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 -

Insulpro Industries Inc. and Insulpro (Hub City) Ltd.
("Insulpro")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 98/264

DATE OF DECISION: September 14, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Insulpro Industries Ltd. and Insulpro (Hub City) Ltd. ("Insulpro") of a Determination which was issued on April 2, 1998 by a delegate of the Director of Employment Standards (the "Director"). In the Determination, the Director found that Insulpro had contravened Sections 16, 18, 21, 25, 28, 34, 36, 40, 44, 46 and 58 of the *Act* in respect of the employment of four individuals: Handrick P Christofferson ("Christofferson"); Alain Berube ("Berube"); Greg J. Matthews ("Matthews"); and Craig A. Norton ("Norton") and ordered Insulpro to cease contravening the *Act* and to pay an amount of $46, 626.53. The Determination also concluded that Insulpro Industries Ltd. and Insulpro (Hub City) Ltd. were associated companies and should be deemed one person, pursuant to Section 95 of the *Act*.

There are two distinct aspects to the appeal by Insulpro.

The first aspect of the appeal raises arguments relating to the process of the Director in investigating the complaints. These arguments are the foundation of a preliminary objection seeking to have the Determination declared void and unenforceable for abuse of process, for failure by the Director to meet the requirements of Sections 2, 76, 77 and 79 of the *Act* and for failure by the Director, generally, to comply with the principles of natural justice.

The second aspect of the appeal, raised in the alternative by Counsel for Insulpro, challenges several substantive conclusions made by the Director in the Determination. These can be arranged under the following issues:

1. Whether the Director should have declared Insulpro Industries Ltd. and Insulpro (Hub City) Ltd. to be associated corporations under Section 95 of the *Act*;

2. Whether the Director erred in concluding the four individuals were "employees" under the *Act*, rather than independent contractors;

3. Whether the Director erred, both as a matter of process and as a matter of quantum, in determining the hours and days worked by the individuals;

4. Whether the Director erred in concluding Insulpro had made unauthorized deductions from the wages of the four individuals; and

5. Whether the Director erred when it imposed an interest payment on Insulpro from June , 1997.

The issues raise in points 3, 4, and 5 do not need to be addressed if Insulpro is successful on either of the issues raised in points 1 and 2. There was also a collateral issue raised by Insulpro in its appeal, which was whether Insulpro failed to maintain payroll records as required by Section 28 of the *Act*. That issue is also dependent on whether the individuals are employees under the *Act* or independent contractors.

In the appeal, Counsel for Insulpro requested a pre-hearing conference to establish a procedure for hearing the preliminary objection, exchanging relevant documents and narrowing the issues on appeal. On June 26, 1998, the parties were notified that the Tribunal had decided to convene a Case Management Conference to address two matters:

1. The request by counsel for Insulpro for an order that the Director produce and deliver all documents and other material on file pertaining the matters in issue in the appeals; and

2. The request by counsel for Insulpro to narrow the issues on appeal.

It was noted that the second matter would attempt to narrow factual, as well as substantive, issues. A Case Management Conference was held on July 20, 1998. A summary of the essential elements of that process were communicated to the parties on July 24, 1998. It contained the following statement:

> As I indicated at the Case Management Meeting, the Tribunal is not required to hold a hearing on the appeals. After August 7, 1998 [later changed to August 14, 1998] the material on file will be reviewed and I will decide whether all or any part of the appeal requires a hearing. Accordingly, when responding to matters raised in this correspondence, the parties should not presume there will be another opportunity to state their case.

The file on this appeal is extensive.

ISSUES TO BE DECIDED

The issues on this appeal have been outlined above.

FACTS

In August, 1995, the Director received a communication from the Victoria Labour Council, over the signature of Steve Orcherton, Secretary-Treasurer of the Council complaining of possible violations of the former *Employment Standards Act* by four

insulation companies, including Insulpro, and requesting an investigation of the companies by the Director. In September, 1995, the Director considered commencing such an investigation as part of a general audit of the construction industry, but concluded that the resources of the Employment Standards Branch (the "Branch") did not allow for such a project to occur at that time. The Director opted to defer any consideration of a general investigation, to deal with complaints as they arose and to revisit a strategy to address continuing problems on an industry wide basis after the *Act* came into effect.

The complaints which are relevant to this appeal were filed by the individuals with the Director in early January, 1997. As the Director is required to do under subsection 76(1) the complaints were investigated. As a result of the investigation, a Determination, dated June 23, 1997, was issued. On July 7, 1997, Counsel for Insulpro wrote the Director asking her to cancel the Determination under Section 86 of the *Act*. The Director declined to do so and Insulpro filed an appeal of the Determination with the Tribunal. The appeal was scheduled to be heard by the Tribunal on October 20, 1997. On October 16, 1997 the Director and Insulpro agreed the Determination would be cancelled and the complaints would be investigated further by the Director.

Shortly after, the complaints were delegated to a senior officer of the Branch for further investigation. On October 27, 1997, Mark Tatchell, another delegate of the Director, wrote to Counsel for Insulpro and formally advised Insulpro of the allegations raised by the complainants. The communication also contained ten questions for response by Insulpro relating to the complainants' status, that is, whether they were employees under the *Act* or independent contractors. He requested a reply by November 5. Counsel for Insulpro responded on November 3, 1997 stating , in part, that the request evoked the obligation of the Director under Section 77 of the *Act* to allow the "*person under investigation an opportunity to respond*" and that obligation could, in the opinion of Counsel for Insulpro, only be met by attending a meeting scheduled for November 5, 1997 and listening to and receiving information from Insulpro "with an open mind". On November 5, 1997 a meeting took place which lasted approximately 4 to 5 hours during which Insulpro provided information and made submissions on the complaints. On November 17, 1997, Mr Tatchell and the investigating delegate met again with representatives of Insulpro for approximately four to five hours. Insulpro reviewed the material the Branch had on file, made further submission and argument on the employee status issue. In addition, the investigating delegate interviewed Mr. Doug Brown, the Operations Manager for Insulpro in Nanaimo. Insulpro was given copies of any documents it requested. This included documents which Insulpro indicated they had not previously received or which they could not recall receiving. In the appeal, Counsel for Insulpro describes the meeting in the following terms:

> The Director's delegates finally met with Insulpro and, to some extent, explained the issues about which they were concerned and the allegations of the complainants.

Counsel for Insulpro goes on to state:

> However, the investigation was inadequate and flawed because:
>
> > Insulpro was forced to use its own resources to identify information and documents relevant to the complaint;
> >
> > Insulpro's requests for a copy of the Director's complete file, dating back to June, 1997, have never been met despite repeated promises and assurances from the Director;
> >
> > instead of having the Director's complete file, which was necessary in order to respond as required by law, Insulpro was left to rely on material included with submissions to the Tribunal from the complainants;
> >
> > the Director simply accepted the hours of work information from the complainants and refused to investigate the veracity of that information;
> >
> > the Director has not pursued other sources of relevant information suggested by Insulpro. For example, Insulpro provided the names of approximately 60 other independent contractors doing batt insulation for Insulpro and specifically requested the Director to speak with these people as part of her investigation;
> >
> > instead, the Director purports to rely on "Further Evidence" at pages 6 and 7 of the Determination but does nothing to identify the individuals talked to such that there is insufficient information to allow Insulpro to make any meaningful response to the allegations;
> >
> > further, the Director refers to and seems to rely on evidence of "**One** contractor [who] was no longer in the insulation business" (p. 7, emphasis added) with no indication of the source or even if it was an insulation contractor or a general insulation contractor like Insulpro;
> >
> > in addition, we submit that the information provided by this contractor is not indicative of an employment relationship; and
> >
> > the whole process has been tainted by the Director and her delegates' cursory attempts to meet the minimum investigation requirements of the *Act* in order to justify a pre-determined course of action.

Following the last meeting, Insulpro was invited to respond. In mid-January, Insulpro submitted a typed "batt installer report" and a summary of payments made to the batt installers.

In its appeal, Insulpro supplemented its assertions about the failure of the Director to disclose relevant documents by seeking from the Tribunal an order for complete disclosure by the Director of all material on their file. Counsel for the Director assured the Tribunal that Insulpro had received complete access to the file and was provided with copies of any documents requested. Counsel for Insulpro was unwilling to accept this assurance, but was vague about what documents had not been produced. This matter was addressed at the Case Management Conference, but the need for the Tribunal to consider such an order was obviated by the agreement of Counsel for the Director to allow Counsel for Insulpro complete access to the file. In addition, Counsel for Insulpro was allowed to supplement his appeal submission in respect of any documents that had not been seen by him before July 31, 1998. The submission received by Insulpro enclosed a number of documents, but did not identify which, if any, of those documents were documents Insulpro had not seen before July 31, 1998. Many of the documents included with the submission had been referred to or included in submissions to the Tribunal made before July 31, 1998. In any event, all of the documents submitted go to the preliminary issue and have been taken into account in addressing that issue.

The Determination concluded the four complainants were employees under the *Act.* In determining that the individuals were employees for the purposes of the *Act* the Director noted that the issue had two aspects: the first relating to the relevant sections of the *Act*, including the definitions of *"regular wage"*, *"employee"*, *"employer"* and *"work"*; and the second relating to certain tests that have been utilized by the Courts in considering a question of employment status. In the Determination, it states:

> In addition to the ESA definitions, accepted common-law tests concerning an employee vs. independent contractor have been applied to the evidence collected. . . .
>
> In determining whether there is an employment relationship, one must consider the whole of the relationship between the parties. I have attempted to do this in coming to my determination.

ANALYSIS

I will deal first with the preliminary objection, as agreement with the position of Counsel for Insulpro would make it unnecessary to consider the remaining grounds of appeal.

An analysis of this issue requires some understanding that the functions of the Director under the *Act* are neither exclusively adjudicative nor purely investigative. I agree substantially with the following statement of the Tribunal in *Cineplex Odeon Corp.*, BC EST #D577/97:

> Once a complaint has been filed, the Director has both an investigative and adjudicative role. When investigating a complaint, the Director is specifically directed to give the "person under investigation" in this case Cineplex Odeon, "an opportunity to respond" (Section 77). At the investigative end, the Director must, subject to Section 76(2), enquire into the complaint, receive submissions from the partes and ultimately make a decision that affects the rights and interests of both the employer and employees.

The only comment I would add to that statement is that the function of the Director also contains what is described as a "legislative" or "ministerial" aspect. The Director is not only charged with investigative and adjudicative authority, but also with the obligation to administer broadly based legislative policy objectives that are expressed, like those in Section 2, or implied, in the *Act*. Insulpro asks the Tribunal to exercise a superintending role over the Director:

> In our submission, it is critical that the Tribunal carefully supervise the work of the Director and her delegates in accordance with the purpose and express provisions of then *Act*. The scope of the *Act* is such that the Director has tremendous power to make determinations of great importance to employees, employers and the economy of British Columbia.

While the invitation is intriguing, the Tribunal graciously declines. The Tribunal has not the authority, the resources nor the inclination to supervise the work of the Director. The Tribunal has been established under the *Act* as a body independent of the Branch with authority under the *Act* relating to the administration of appeals from determinations made under the *Act*. Its role under the *Act* is predominantly adjudicative. It is important to that role and to the continuing independence of the Tribunal that it not be seen or perceived as involved in the functions of the Director.

That does not, of course, mean that the Tribunal is precluded from deciding the Director or her delegates have erred in respect of a Determination, but such a decision is related to its appellate function and its authority under Part 13 of the *Act*, not to supervising the work of the Director. In particular, the Tribunal has expressed its view on a number of occasions about the circumstances under which it would interfere with the exercise of discretion by the Director. In *Jody L. Goudreau*, BC EST #D066/98, the Tribunal said, at page 4:

> The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:

> . . . a general description of things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably".
> *Associated Provincial Picture Houses v. Wednesbury Corp.,* [1948] 1 K.B. 223 at 229

This view was adopted by another panel of the Tribunal in *Takarabe and others*, BC EST #D160/98, who also added:

> In *Boulis v. Minister of Manpower and Immigration* [(1972) 26 D.L.R. (3d) 216 (S.C.C.)] the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant factors.
> (page 15)

I agree with Counsel for Insulpro that the terms abuse of process, which is used in the appeal, and abuse of power, which is used in *Goudreau*, are equivalent. As already indicated, Insulpro says the Determination at issue is fatally flawed because, among other things, it is the product of an abuse of process.

The burden falls squarely on Insulpro to show an abuse of process. The evidence must point clearly to the conclusion that the process was tainted to such a degree that to allow the Determination to stand would be an affront to fundamental principles of justice that underlie a reasonable person's sense of decency and fair play (see *R. v. Conway*, [1989] 1 S.C.R. 1659 at 1667). The evidentiary burden is significant. The following comment from *R. v. Power*, [1994] 1 S.C.R. 601 is instructive:

> Where there is *conspicuous* evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, *and only then*, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute.
> (at page 616; emphasis added)

That is also an appropriate test for the Tribunal when asked to set aside a Determination of the Director for alleged abuse of process. Insulpro has not shown an abuse of process

by the Director or her delegates. While a number of assertions have been made by Insulpro that certain facts justify such a conclusion, real evidence demonstrating the necessary motivation or conduct consistent with the allegations is neither clear nor conspicuous from the facts alleged or the material relied upon by Insulpro.

Insulpro also says the Director and her delegates failed to meet the requirements of sections 2, 76, 77 and 79 of the *Act* and failed to satisfy the obligation to comply with other requirements of natural justice.

The focus of this argument is on the factual assertion that the Director accepted the allegations of the individuals without making full disclosure or providing Insulpro with an opportunity to respond. There is also a similar vagueness to the factual underpinnings for these allegations as in the allegation of abuse of process and that allegation is not close to being proven.

The record indicates Mr. Tatchell and the investigating delegate on the Determination under appeal detailed the specifics of the complaints, met with Insulpro on two occasions in November to listen and receive information from Insulpro, gave Insulpro full access to the file and provided Insulpro with at least two months following those meetings to respond to the information provided and to the complaints. There is absolutely no evidence that the investigating delegate was predisposed to a specific conclusion or that his investigation ought to be considered "tainted" by the results of the June 1997 Determination.

Insulpro argues that the Director failed to meet the requirements of Section 2 of the *Act*. However, Section 2 does not contain any "requirements" nor does it create substantive rights or obligations. It is a purposes and objects section. It guides the interpretation and application of the *Act*. One can fail to give consideration to the stated purposes, but the section contains no specific duty or obligation to do so. There is no basis for this argument.

Second, in response to the balance of the argument relating what Insulpro says are requirements of the *Act*, I can find no basis for concluding the Director failed to give effect to the requirements of the *Act*. I repeat, the arguments are based on the assertions that the Director accepted the allegations of the individuals without giving Insulpro full disclosure or an opportunity to respond and the investigation following the October 16, 1998 agreement was tainted by the events preceding it. Those assertions are not supported by the facts and the argument is not accepted.

Insulpro relies on the majority decision in the Ontario Court of Appeal case of *Downing v. Graydon*, (1978) 21 O.R. (2d) 292 (C.A.) to support its natural justice argument. It is correctly noted in their argument that the case was decided before the Courts evolved to a more flexible application of a general duty of procedural fairness that does not depend on proof of a judicial or quasi-judicial function. In fact, the minority judgement in the case

is more consistent with the current approach to issues of denial of procedural fairness by administrative bodies.

The Branch is not unique among administrative bodies. As noted above, the Director exercises functions which, if being characterized, would include legislative, investigative and judicial decision making processes. In that context there is no specific or set level of procedural protection that must accompany a function of the Director. The decision of *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602 stresses that the attributes of natural justice that apply in a given context will vary according to the character of the decision made:

> A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision. On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards. Between the judicial decisions and those which are discretionary and policy oriented will be found a myriad of decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum.

While the function of the Director conducting an investigation under the *Act* does contain a judicial element, the function is predominantly investigative or administrative and would not compel the Director be placed in a "procedural strait-jacket". The conduct of the Director and her delegates was fair and provided ample opportunity to Insulpro to respond to the complaints and to the information acquired in the investigation.

Also, the procedural safeguards demanded of the Director in the context of an investigation and Determination cannot be viewed in isolation from the legislative requirement found in Section 77 of the *Act*. In *Downing v. Graydon*, *supra*, Blair, J.A. acknowledged the following:

> Although under the common law *audi alterum partem* applies to the exercise of all judicial powers, it is, as Rand, J., pointed out in the *Alliance des Professeurs* case, *supra*, possible for the principle to be excluded or qualified by statute.
> (page 308)

A statutory provision that specifically addresses the scope of procedural fairness to be accorded in a given circumstance should be viewed as a legislative function, based broadly on grounds of public policy. Such a provision would not normally be "amenable to judicial supervision". For reference, the statutory provision in the *Act* reads:

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

That legislative requirement is the manifestation of one of the statutory objectives of the *Act*, found in Section 2, to "*provide fair and efficient procedures for resolving disputes over the application and operation of this Act"*.

I also note that the majority of the Court in *Downing v. Graydon*, *supra*, did qualify their conclusion in that case with the following comment:

> There are no rigid rules of procedure which must be followed to satisfy the requirements of natural justice. Courts have been careful not to place the decision-making officials and tribunals in a procedural strait-jacket, and, in particular, not to require them to hold judicial type hearings in every case. The purpose of beneficent legislation must not be stultified by unnecessary judicialization of procedure. The presentation of this case suffered from the initial misconception that the right to know and to reply required a full scale hearing. This is not so. *The appropriate procedure depends on the provisions of the statute and the circumstances in which it has to be applied*.
> (page 310; emphasis added)

Based on the provisions of the *Act* and the above comments, I conclude the Director did not fail to meet the requirements of the *Act* or the applicable principles of natural justice. The *Act* says the Director need only make reasonable efforts to give a person under investigation an opportunity to respond. The Director met that requirement and Insulpro was given that opportunity.

The preliminary objection is dismissed.

I will now address the substantive issues raised in the appeal. The nature of an appeal under Section 112 of the *Act* has been described in the following way by the Tribunal in *World Project Management Inc. et al*, BC EST #D134/97:

> The *Act* does not define the nature of the proceeding under s. 112, although s. 107 says the Tribunal "may conduct an appeal . . . in the manner it considers necessary and is not required to hold an oral hearing". The Tribunal has clearly been given wide latitude to determine how to conduct the appeal. It is master of its own procedure. But the *Act* does refer to this process as an "appeal", it is not a hearing in first instance.
>
> It is helpful to refer to the statement of purpose set out in the *Act* itself. Section 2 of the *Act* sets out the purposes of the *Act*:
>
> *2. The purposes of this Act are to*

> *(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,*
>
> Clearly the Tribunal is not limited to a "true appeal" focusing only on the original decision, nor, on the other hand, would it be fair and efficient to ignore the initial work and determination of the Director. In my opinion the Tribunal should be flexible in its procedure on appeal to ensure the intent of the *Act* to create a fair and efficient dispute resolution process is fulfilled.
> (page 4)

The substantive issues on the appeal will be considered in the context of the above statement.

Associated Companies

This issue raises a question of the interpretation and application of Section 95 of the *Act*. That provision, among other things, allows the Director to treat one or more corporations as one person for the purposes of the *Act*. It reads:

> *95. If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,*
>
> *(a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and*
>
> *(b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any and all of them.*

Insulpro says the Determination is insufficient to justify a finding of association between Insulpro Industries Ltd. and Insulpro (Hub city) Ltd. as it contains no reasons for the conclusion reached by the Director.

I agree with Insulpro that the Determination shows no reason to invoke Section 95 of the *Act* at this time. In *Invicta Security Systems Corp.*, BC EST #D349/96, the Tribunal concluded

there were four preconditions to the application of Section 95 to the circumstances of any matter before the Director:

1. There must be more than one corporation, individual, firm, syndicate or association, or any combination of them;

2. Each of the entities must be carrying on a business, trade or undertaking;

3. There must be common control or direction; and

4. There must be some statutory purpose to treating the entities as one employer.

At the present time, no statutory purpose is apparent on the record and no such purpose is indicated in the Determination. It is unlikely that any statutory purpose could be shown as the Director has not yet sought to enforce the Determination. Accordingly, one of the preconditions to the application of Section 95 has not been established and that part of the Determination must be cancelled. It is always open to the Director to revisit Section 95 and make such a declaration if a statutory purpose becomes evident and the other pre-conditions are also shown to be present.

Employee Status

As indicated above, the analysis of the employee status issue developed from two perspectives: relevant provisions of the *Act* and accepted common law tests. The Determination proceeds from the conclusion that there was sufficient evidence to satisfy essential elements of each of four common law tests considered by the Director. The Determination identified the tests as the control test, the integration test, the economic reality test and the specific result test. It briefly summarized the essential elements of each test and applied the tests to the evidence acquired.

Insulpro challenges factual assertions attributed to the individuals in the Determination and the factual conclusions made in the Determination in the context of applying the common law tests to the evidence. Insulpro contends the test for determining whether a person is an independent contractor or an employee is that found in the following statement from *Hemming*, BC EST #D103/97:

> The common law offers three tests to determine the existence of an employment relationship: the control test, the four fold test and the organizational test. The control test sets out four factors to be examined: the employer's power of selection of the servant; payment of wages and other remuneration; the employer's right to control the method of doing the work; and the employer's right to suspend or dismiss the employee.

> This test focuses on the control exerted by the employer, not just over what work must be done by the employee, but also how the work is to be performed. But the control test is inadequate where the employee is highly skilled or a professional. The four-fold test was first enunciated in *Montreal v. Montreal Locomotive Works Ltd.* [1947] 1 D.L.R. 161 (P.C.) and considers: control; ownership of tools; chance of profit; and risk of loss. While the four-fold test is more useful in complex cases, the courts have also looked to the integration or economic dependency test. Here, a worker who is economically dependent on one company or whose activities are integral to the business of the employer will be an employee rather than an independent contractor. Frequently, this test is combined with factors from the other tests. Thus, to determine whether an employment relationship exists, the following factors may be examined: 1) control; 2) ownership of tools; 3) chance of profit; 4) risk of loss; and 5) integration into the employer's business.

Insulpro then proceeds to examine those last factors, adding two additional factors from another decision of the Tribunal: whether the individual does work for more than one person and whether the individual hires his own helpers.

The problem with both the Determination and the appeal is that neither have addressed the issue of the individuals' status in the context of the *Act*. While common law tests may be helpful, in the final analysis, it is the *Act* that must be interpretted and applied. The *Act* defines employee as follows:

> ***"employee"*** *includes*
>
> > *(a) a person, including a deceased person, receiving or entitled to wages for work performed for another,*
> >
> > *(b) a person the employer allows, directly or indirectly, to perform work normally performed by an employee,*
> >
> > *(c) a person being trained by an employer for the employer's business,*
> >
> > *(d) a person on leave from an employer, and*
> >
> > *(e) a person who has a right of recall;*
>
> ***"employer"*** *includes a person*

> *(a) who has or had control or direction of an employee, or*
>
> *(b) who is or was responsible, directly or indirectly, for the employment of an employee;*

Both of those definitions are inclusive, not exclusive. The *Act* is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). I agree with the following comment from *Machtinger v. HOJ Industries Ltd., supra*, that:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

It may be that common law tests, while a helpful guide, are not determinative of this issue when it is considered in the context of the definitions and objectives of the *Act* (see also: *Project Headstart Marketing Ltd.*, BC EST #D164/98). Having said that, a lingering concern remains that Insulpro, the individuals and the Director have not had an opportunity to address the status of the individuals in view of the above comments and I have decided to schedule a hearing for that purpose. I will provide instructions on this aspect of the appeal later in this decision.

The remaining grounds of appeal are dependent on whether the individuals are employees, and entitled to claim "the basic standards of compensation and conditions of employment" provided by the *Act*, or are independent contractors, and not entitled to claim that any provision of the *Act* applies to their relationship with Insulpro. Each of these grounds of appeal will be addressed as though the *Act* applies, accepting that the conclusions will become irrelevant if the individuals are found to be independent contractors.

Hours and Days of Work

Insulpro challenges the Determination in respect of both the process used by the Director to determine the amount owed to the individuals and the amount itself. The Determination on this issue states:

> The records of hours worked each day by Matthews, Norton and Berube I find reflect the hours worked each day by these complainants. While Insulpro maintains these records are not credible, no information was produced to contradict the hours described in these records.

In challenging the process by which the Director calculated the individuals' hours of work, Insulpro asserts the Director accepted the individuals' recollection of the hours worked "with an unquestioning acceptance". Such an attack is not really an attack on the process, but an argument that there was no factual basis upon which the Director could reach the conclusions that are contained in the Determination. In making this statement, I accept that all the factual assertions made by Insulpro about why the individuals' records were inherently unreliable were made to the Director during the investigation. If they were not, I would dismiss this ground of appeal on the basis that it represents no more than an attempt to introduce new facts on appeal which could have and should have been placed before the Director during the investigation.

The Director was entitled to receive and to rely on any information available. In the circumstances of this investigation, the Director was also entitled to require Insulpro to provide information supporting its assertion that the individuals' records were not credible. The Director was entitled to make conclusions of fact based on such information. It is highly improbable, given the likelihood that an adversarial relationship existed between the complainants and Insulpro, a circumstance that is typical in matters arising under the *Act*, that there would be complete agreement between them about the factual conclusions reached by the Director. The experience of the Tribunal indicates a large number of appeals are based on nothing more than a disagreement with a conclusion of fact made by the Director in the Determination under appeal. The burden in those cases is on the appellant to show there was no rational basis upon which that conclusion of fact could be made.

There is no support for the suggestion that the Director accepted the individuals' recollection of the hours worked "with an unquestioning acceptance". That suggestion is completely at odds with the conclusion of the Director in the Determination that the record produced by Christofferson was unreliable for the purpose of determining his hours of work. At a minimum, Insulpro would have to show there were facts given to the Director that strongly indicated a reason to not accept the individuals' records and, as indicated below, they have not done that.

In support of its contention that the records accepted by the Director as representing the individuals' hours of work are not credible, Insulpro says:

> To properly asses the hours alleged by the complainants requires a detailed analysis of InsulPro's records for the jobs done by the complainants. Such an analysis *will require* an exhaustive review of hundreds of pages of documents and comparison with the complainants' records. The Director did not even attempt a sample review, . . .
> (emphasis added)

I have three comments. First, notwithstanding it was given particulars of the claims made by the individuals and had full access to all the material from which the Director made the calculations of amounts owing, the only response by Insulpro prior to the Determination was to challenge the reliability of the individuals' records and deliver to the Director a typed "batt installer report" and a summary of payments made to the batt installers. Second, there is no indication that Insulpro itself has attempted to develop the analysis which they assert is necessary, even though they continue to assert the records are not credible. Third, if they have developed such analysis, it has still not been presented to the Director. After all, the Director has a discretion, under Section 86 of the *Act*, *"to vary or cancel a determination"* which it might be appropriate to exercise in the face of clear evidence showing the factual foundation of a Determination to be wrong.

Section 112 of the *Act* does not contemplate a re-examination of the facts underlying the Determination. To address the appeal of Insulpro as it is framed would require, in the words of Insulpro, "an exhaustive review of hundreds of pages of documents and comparison with the complainants' records". Under the *Act*, the Director has the jurisdiction to perform that function, not the Tribunal. If Insulpro says that the information revealed by an exhaustive review of company documents is relevant to the calculation of the individuals' hours worked, it was their responsibility to supply that information during the investigation. The Tribunal has consistently taken the approach that it will not allow appellants to "sit in the weeds", failing or refusing to participate or cooperate in the investigation by the Director and later filing appeals against the conclusions of the Director (see *Tri-West Tractor Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97).

The Tribunal must decide whether the Determination is wrong in light of the available facts and the statutory requirements. Insulpro's burden on this ground of appeal is to demonstrate, from the available facts, that the Director erred in accepting the records of the individuals as a reliable source of their hours of work. That burden is not met by contesting the accepted facts or by suggesting an expansive audit might reveal an error. This aspect of the appeal is dismissed.

Unauthorized Deductions

The conclusion that Insulpro contravened Section 21 of the *Act* is based on a conclusion by the Director that the individuals were employees, deductions were made by Insulpro from wages payable to them as employees and there was no evidence the deductions were authorized by the individuals. Insulpro argues the deductions were for clothing, tools and advances and were permitted by the *Act*. There is no issue on the question of the advances, as the Determination indicates those deductions were considered allowable:

> Cash advances were listed in the pay summaries as an "advance" or "loan". The complainants agree that from time to time they did receive a cash advance. These deductions were considered to be allowable by the officer.

All other deductions were found to be unauthorized. The *Act* prohibits any unauthorized deduction from an employee's wages, with limited exceptions which do not apply here. That prohibition is contained in subsection 21(1) of the *Act*, which reads:

> *21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct, or require payment of all or part of an employee's wages for any purpose.*

Insulpro has not shown the deductions were permitted under the *Act* or under any other provincial or federal enactment. They do not say the deductions were authorized, only that they ought to be considered proper in the context of the work arrangements between the individuals and Insulpro. The context of work arrangements is not an exception to the general prohibition against unauthorized deductions and this ground of appeal fails.

Interest

Insulpro says if any part of the determination is upheld, there should be no interest charged, since any delays were the fault of the Director, not Insulpro. Section 88 of the *Act* contains the provisions relating to payment of interest. Subsection 88(1) of the *Act* is the relevant part of that provision and it states:

> *88. (1) If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of*
>
> *(a) the date the employment terminates, and*
>
> *(b) the date a complaint about the wages or other amount is delivered to the director*
>
> *to the date of payment.*

The requirement to pay interest on wages or other amounts payable to an employee is mandatory. There is no discretion in the Director or in the Tribunal to alter the requirement nor is there any statutory provision that would allow this requirement to be waived or adjusted for reasons of delay. This ground of appeal is dismissed.

Section 28

Counsel for Insulpro concedes the appeal relating to the conclusion that Insulpro contravened Section 28 of the *Act* is entirely dependent on the answer to the issue of the status of the individuals:

> The Determination that InsulPro has breached s. 28 stands or falls on whether or not the complainants were employees.

On that basis, and in light of my remarks at the outset of my analysis on the last four grounds of appeal, it is dismissed.

ORDER

No final Order will be made at this time. My conclusions on all grounds of appeal except the issue of the status of the individuals should be apparent, but any final Order in regard to those matters would be premature as the continuing jurisdiction of either the Director or the Tribunal over the relationship between the individuals and Insulpro is unsettled.

There remains only the matter of the hearing on the remaining issue on appeal. Under Section 107 of the *Act*, the Tribunal has the authority to determine its own procedures. In my opinion, the hearing should consume no more than two days. Its focus will be, of course, the status of the individuals as employees or independent contractors.

The Tribunal will set an early hearing date on the issue. We will attempt to accommodate the calendars of the parties but the primary consideration will be to have this issue addressed quickly and the Tribunal may peremptorily fix a date in order to achieve that objective. In addition, the following procedural matters and obligations are ordered:

1. All parties who intend to call evidence are required to prepare a Statement for each witness they intend to call, which must set out, in numbered paragraphs, the evidence that it is anticipated will be given orally by that witness in examination-in-chief. All Statements must be delivered to all other parties no later than 14 days prior to the date set for the hearing.

2. A party who disputes any part of a Statement delivered to them is required to prepare a Reply, which must identify the relevant Statement, which paragraph and evidence in the Statement that is disputed and set out the evidence that will be called to contradict such paragraph and evidence A Reply will be delivered to all other parties no later than 7 days prior to the date set for the hearing.

3. Failure to deliver a Statement of a witness within the time limited will deny a party the right to call that witness. The evidence elicited from a witness in examination-in-chief will be confined to what is contained in the Statement.

4. Failure to deliver a Reply within the time limited will deny a party the right to challenge the evidence of other parties' witnesses.

5. All the Statements and Replies will be submitted to the Panel of the Tribunal at the hearing.

6. Evidence not disputed by any party in its Reply shall be deemed agreed by all parties and shall become evidence in the hearing.

7. All documents intended to be filed as exhibits in the hearing will be delivered to all parties no later than 14 days prior to the date set for the hearing. Unless a party indicates that a document delivered is required to be proved, documents delivered in accordance with this paragraph shall be deemed agreed and shall become evidence in the hearing.

There is one further matter. In any appeal, the Director is entitled to attend, give evidence, cross-examine witnesses and make submissions at the hearing with a view to explaining the basis for the Determination, provided her attendance is not viewed as "advocating" in favour of one party (see *BWI Business World Incorporated*, BC EST #D050/96). That is a sound policy in the context of most of the matters at issue between the complainants and Insulpro, recognizing it is important for effective administration of the *Act* for the Director to maintain her neutrality in disputes between the parties. That rationale evaporates, however, when the "matter at issue" between the parties is the jurisdiction of the Director over the complaints. In such a case the Director has a vital interest in advocating for a result that is perceived by her as being consistent with her jurisdiction and with the objectives of the *Act*, even if her position could also be characterized as advocating in favour of a party.

On the issue of the status of the individuals under the *Act*, the difference between advocating in favour of a party and explaining the basis for the Determination is a difference without a distinction. The issue is fundamentally jurisdictional, involving the interpretation and application of the *Act* to determine whether the relationship between the individuals and Insulpro is one covered by the *Act*. The interests of the Director and the individuals on that issue are identical. Both are advocating for a conclusion that the individuals are employees under the *Act*, not independent contractors. On that basis, the Director should represent the interests of the individuals coincidentally with her own. This is intended to accomplish a more efficient hearing. The Director should also assume the primary, if not the exclusive, role in respect of presenting the "jurisdictional facts" supporting the position that the individuals are employees under the *Act*. For that purpose, the Director is encouraged to call the individuals as part of her case and may communicate with them in preparation for the hearing. If she does call the individuals as part of her case, the obligation of preparing and delivering the Statements and Reply for the individuals will apply.

There is some suggestion in the Determination and in the appeal submission that information from other persons (contracts, sub-contractors, independent contractors and other companies in the insulation installing business) is important and relevant to the question of whether the individuals are employees or independent contractors. I confess to some doubt about the relevance of such information. If any party anticipates calling evidence from such persons,

I require that they inform the Tribunal no later than 14 days before the date set for hearing of the purpose for such evidence. On the basis of that information, I will decide whether it is necessary to the issue I have to decide and will inform the party accordingly.

David Stevenson
Adjudicator
Employment Standards Tribunal