

**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 -

Sound Contracting Ltd.  
(Sound)

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Niki Buchan

**FILE NO.:** 97/166

**DATE OF HEARING:** September 23, 1997

**DATE OF DECISION:** October 29, 1997

## DECISION

### APPEARANCES

Peter Avis  
Rick Sing  
Heidi Hughes  
Ian MacNeill

Counsel for Appellant  
Observer for Appellant  
Counsel for the Director  
Observer for the Director

### OVERVIEW

This is an appeal brought by Sound Contracting Ltd. (“Sound”) of Determination, dated March 4, 1997, issued by a delegate of the Director of Employment Standards (the “Director”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”). The Ministry of Labour conducted an audit of the payroll records of all employees of Sound who worked on the Pym Street construction site in Parksville between April and August 1996. The Determination arises from that audit and assessment made by the Director under the *Skill and Development and Fair Wage Act* (the “*Fair Wage Act*”). It concludes that Sound had contravened the overtime provisions of Section 40 of the *Act* and Section 5 of the *Fair Wage Act*. The Director ordered Sound to pay \$19,905.46 to employees who worked on the Pym Street Project.

The appellant argues that the Fair Wage Act did not apply to this project and, in the event it did, there was no notice given to Sound by the tendering agency, The City of Parksville (the “City”). Further, it is unfair to assess Sound for these wages long after the contract was completed.

There were no witnesses presented to give sworn evidence at the Oral Hearing. Both parties were represented by Counsel who provided an agreed statement of facts, agreed upon documents and an uncontested, unsworn affidavit plus the arguments for their clients. There is no appeal of the Section 40 contravention of the *Act*.

### ISSUES TO BE DECIDED

1. Does the *Fair Wage Act* apply to this project?
2. Does the *Fair Wage Act* require the contractor/employer be provided with notice that it applies as a condition to the contractor/employer’s liability under this Act?
3. Assuming that the *Fair Wage Act* does require notice to the contractor/employer, did the Contract Documents pertaining to the Project provide adequate notice?
4. Could the City’s failure to comply with its obligations under the *Fair Wage Act* create and estoppel or waiver of the Director’s right to collect wages from Sound?
5. Whether it is unfair to assess Sound for these wages long after this contract was completed?

### FACTS

The original construction contract was tendered on August 29, 1995. Sound was the low bidder but the contract was not awarded. Due to a funding shortfall an entirely new contract was negotiated and signed on March 21, 1996. The work started April 15, 1996 with the first draw date April 30, 1996.

The parties submitted the following:

**“AGREED STATEMENT OF FACTS**

1. Both the Instructions to Tenderers and the Tender Form (Exhibits B-C respectively) were initialed by a representative of Sound, Richard D. MacLeod.
2. The City of Parksville (“City”) awarded Sound the contract for the Pym Street Highway 19 Intersection construction the project (the “Project”).
3. The City did not request from Sound any Statutory Declarations with respect to wages during the course of construction on the Project nor did the City submit to the Director to a Project Report Form.
4. The assessment of wages and overtime owing to employees as set forth in the determination dated March 4, 1997 in the amount of \$19,905.46 is accurate as to the amounts that would be owing if the *Skills Development and Fair Wage Act* applies to the Project.”

The parties submitted an uncontested signed but unsworn affidavit from Frederick Charles Manson, Director of Finance for the City of Parksville (the “City”) that includes these statements:

“...On February 28, 1995, the City and Her Majesty the Queen in Right of the Province of British Columbia (the “Province”) entered into an agreement pertaining to the Pym Street Highway 19 Intersection construction project (the “Project”) in which the City estimated that the costs of the Project would be \$1,300,000.00.

Pursuant to that agreement and a second agreement, referenced therein as the “Infrastructure Program Agreement” between the City and the Government of Canada, the Province and the Federal Government agreed to share the cost for the Project with each of the City, Province, and Federal Government paying one-third of the costs pursuant to the Federal Infrastructure Program.

Based on these two agreements, the City estimated that the Province would contribute more than \$250,000.00 for the construction of the Project.”

The parties submitted the following “AGREED UPON DOCUMENTS” indicating that they were true copies:

Exhibit A Invitation to Tender pertaining to Pym Street-Highway 19 Intersection Construction project (“the Project”). This document contains the following clause:

“The Province of British Columbia ‘Skills Development Fair Wage Act’ will apply to this Contract.”

Exhibit B, Instructions to Tenderers pertaining to the Project. Each page of this document is initialed by Richard L. MacLeod. (See Paragraph 1. in AGREED STATEMENT OF FACTS). Article 2, paragraph 1 of this document states:

“The Tenderer must carefully examine the Contract documents and the site of the proposed works, judging for and satisfying himself as to the probable conditions to be encountered. Should a Tenderer find discrepancies in, or omissions from the drawings or other documents, or should he be in doubt as to their meaning, he should at once notify the City of Parksville. The Tenderer may not claim, after the submission of a tender, that there was any misunderstanding with respect to the conditions imposed by the documents.”

Exhibit B, also contains Article 22, at page 6, that has the following wording:

“ARTICLE 22. FAIR WAGE ACT

The Province of British Columbia ‘Skills Development and Policy Fair Act’ will apply to this contract. The successful Tenderer will be required to provide all necessary documentation and statutory declarations required to ensure compliance with the Act”

Exhibit C, the Tender Form signed by Sound on March 15, 1996, includes an agreement, at Paragraph 1, to be bound by the requirements set forth in the Instructions to Tenderers.

In a written submission from Sound, dated April 24, 1997, Hans Heringa, P.Eng. states that Sound is a very active company and has complied with the Fair Wage Act on other projects.

## ANALYSIS

### The appellant's arguments:

Sound argues that it was unaware that the *Fair Wage Act* applied to this contract. It was not given notice that it applied; therefore, it is unfair for the Director to enforce payment of wages when the City as the tendering agent failed in its obligations to notify Sound that the *Fair Wage Act* applied to the contract. In support of this argument Sound makes the following submissions:

There is no evidence that Sound ever saw Exhibit A, Invitation to Tender which states “The Province of British Columbia ‘Skills Development Fair Wage Act will apply to this Contract.’”

Exhibit B, Instruction to Tenderers Article 22. with the heading “Fair Wage Act” states the Skills Development and Policy Fair Act will apply. This is not an Act of British Columbia. The headings in the contract do not constitute part of the contract itself. The reference to the statute in the body of the contract is clearly wrong. It is a doctrine of contract law that any ambiguity or uncertainty on the face of a contract be construed as against the party who has drawn it. In this case the City had the contract drawn. Sound submits that the City was working as an agent of the Ministry of Skills Training and Labour to ensure that those provisions relating to the *Fair Wage Act* were properly incorporated into the contract. They were not properly incorporated and accordingly the failure to properly refer to the statute should be construed against the Ministry of Skills Training and Labour in their efforts to enforce the contract.

Sound was not privy to the funding deals between the City, Province and Federal Governments. It did not know the costs or who was to pay. It did not know it was a site where more that \$250,000.00 would be expended by the Province.

The City did not comply with Section 4 of the *Regulations* which requires the tendering agency to submit to the Director a “Project Report Form”.

The City did not require the Statutory Declaration from Sound stating that Sound recognized its obligation under the *Fair Wage Act*.

Counsel notes that Section 5 of the *Regulations* requires the tendering agency **must** ensure that every contract for construction to which the *Fair Wage Act* applies include a clause that allows the tendering agency to terminate the contract, suspend payment until compliance occurs or to hold back funds if the contractor fails to comply with the *Fair Wage Act*. He argues there is no requirement on Sound to report. He says the contractors responsibilities are under Section 6 of the *Regulations* to keep records which the Director may access.

The City did not give notice that Sound was not complying with the *Fair Wage Act*. It was not notified it was not in compliance until after the contract was completed. If the contract

documents had properly named the *Fair Wage Act* and the City required the Statutory Declaration from Sound, it would have been informed it must comply with the wages set out in the *Regulations*. Sound then would have realized there was a fundamental error on material facts and would have been able to get out of the contract or retender.

The Director's discretion to enforce the *Fair Wage Act* should be exercised fairly. It is unfair after the fact to come back on the contractor and take his profit when the failure was that of the City as the tendering agent.

The Director's position and arguments:

The *Fair Wage Act* does not require notice. Section 3 provides that it "applies to all construction that is contracted for by a tendering agency." There is no language regarding notice. In the absence of clear statutory language to the contrary, the fundamental common law rule should apply: a person is presumed to know the law. The contract documents provided adequate notice to Sound that the *Fair Wage Act* applied to the project. Counsel for the Director notes that Sound relies on a typographical error in Article 22 of the Instructions to Tenderers for its argument that it did not know that the *Fair Wage Act* applied to the project and that the rule of *contra proferentum* should apply. The error should not be construed against the Director. She argues that the rule should not apply for three reasons. First, the City or its agents drafted the contract documents, not the Province. Second, the City and Sound agreed in the contract that the rule would not apply. (See Exhibit B, Article 2, Paragraph 1 in FACTS) There is no evidence Sound attempted to contact the City to clarify the alleged misunderstanding respecting the application of the *Fair Wage Act*. Third, the typographical error did not create an ambiguity of the sort that the rule usually resolves.

Any inaction by the City cannot act as a bar to the Director's statutory right. It is the *Fair Wage Act* which creates the liability for wages.

Estoppel applies to the Crown only with respect to facts and cannot be applied to defeat a statutory obligation. Counsel cites an example of this principle, *R. v. Taylor*, (1995) 95 D.T.C. 591 (Tax Court of Canada), in which the Court held that Revenue Canada was not estopped from collecting penalties based on its statements that no penalties would be owing if the taxpayer made restitution because the taxpayer's liabilities were statutory, out of which the Minister could not contract.

From these facts and arguments I will now deal with the issues.

Issue 1: Does the *Fair Wage Act* apply to this project? Sound states in its unsworn submissions that it is unaware the *Fair Wage Act* applied to this contract: it thought the City was funding the construction. Counsel for Sound argues that the company was not privy to the funding deals. It did not know the total costs of the project or who paid. The *Fair Wage Act* at Section 2 makes it clear that this construction project comes under the scope of the *Fair Wage Act* since it does not fall under one of the exceptions designated in the *Skills Development and Fair Wage Regulation* (the "*Regulation*"). Also, the

uncontested signed but unsworn affidavit of Frederick Charles Manson states that the City estimated that the Province would contribute more than \$250,000.00 for the construction of the project. This amount of public funding places the project under the *Fair Wage Act*.

Issue 2: Does the Fair Wage Act require the contractor/employer be provided with notice that it applies as a condition to the contractor/employer's liability under this Act? As the Director's argument points out the *Fair Wage Act* does not require that notice be provided to contractors/employers that it applies to their liability under the Act. Section 3 specifically states, subject to certain exceptions, that "...*this Act applies to all construction that is contracted for by a tendering agency*". There is no dispute that the City is a tendering agency under the definition section. There is no language regarding notice. I agree with the Director's position that notice is not required to be provided to a contractor/employer that he has a liability under the *Fair Wage Act*. The statute in itself is notice to contractor/employers.

Issue 3. Assuming that the Fair Wage Act does require notice to the contractor/employer, did the Contract Documents pertaining to the Project provide adequate notice? Even if I had found notice to be required, I am satisfied that Sound had adequate notice that the *Fair Wage Act* was a potential liability on this project. Sound admits it was aware of the *Fair Wage Act*. Hans Heringa stated in his submission that Sound is a very active company and has complied with the *Fair Wage Act* on other occasions. While there was no evidence that anyone from Sound had seen the Invitation to Tender document that clearly states which statute will apply, there is adequate notice at Article 22 of the Instructions to Tenderers that some "FAIR WAGE ACT" of the Province of British Columbia is intended to apply.

Counsel may be correct that headings in the contract do not constitute part of the contract itself but that heading is enough notice to a company that is active in construction in British Columbia and has complied with the *Fair Wage Act* on other projects. If Sound had any doubt as to the meaning of the act named in the contract, it should have notified the City before signing the Tender Form. Once signed it is bound by its agreement that the Tenderer may not claim, after the submission of a tender, that there was any misunderstanding with respect to the conditions imposed by the documents.

Issue 4. Could the City's failure to comply with obligations under the Fair Wage Act create an estoppel or waiver of the Director's right to collect wages from Sound?

The fact that the City did not comply with Section 4 of the Regulations is irrelevant to the dispute before me. That is a matter between the City and the Director as the enforcer of the statute.

Sound cannot take comfort in the fact that the City did not notify it that it was in breach of the legislation. As I read the *Fair Wage Act*, I find the contractor has more responsibilities than to simply keep records as suggested by Counsel. The fact that the City did not require the Statutory Declaration is of no assistance. In fact, the *Fair Wage Act*, Section 6 places the onus on the contractor to provide a statutory declaration to the tendering agency

recognizing their obligations to comply with the *Fair Wage Act* before the first progress payment is made under the contract. Section 6 states:

“6.(1) *A contractor, subcontractor or any other person doing or contracting to do the whole or any part of the construction to which this Act applies must provide a statutory declaration to the tendering agency*

*(a) recognizing their obligations to comply with this Act, and*

*(b) before the first progress payment is made under the contract, specifying the following for each employee:..”*

Also, the *Fair Wage Act*, Section 5 places a strict liability on a contractor to pay fair wages in accordance with the *Regulations*:

“*Requirement to pay fair wages*

5. *All employees of a contractor, subcontractor or any other person doing or contracting to do the whole or any part of the construction to which this Act applies must be paid fair wages in accordance with the regulations.”*

In any event, this appeal by Sound is against the Director who is not party to the contract. Any complaint or rights Sound has as against the City does not affect the Director's statutory right to enforce the *Fair Wage Act*. The City's failure to comply with the *Fair Wage Act* does not create an estoppel and does not bar the Director's responsibility to collect wages from Sound.

Issue 5. Whether it is unfair to assess Sound for these wages long after this contract was completed? The Director has a statutory responsibility under the *Employment Standards Act* to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment. Requirements of the *Act* and *Regulations* are minimum requirements and any agreements made to waive those requirements are of no effect.

The *Fair Wage Act* provides the following enforcement clause:

“*Collection of fair wages*

8. *Fair wages owing under this Act are deemed to be wages for the purpose of the Employment Standards Act, and the collection, complaint and appeal procedures of that Act apply for the purpose of this Act.”*

Since the Determination under appeal here involves wages deemed to be wages under the *Employment Standards Act* and that *Act* places a limit on the amount of wages to be paid, the argument that it is unfair to assess Sound for wages long after the contract was completed is without merit. The *Act* states:



80. “ *The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning*

*(a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment, and*

*(b) in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination, plus interest on those wages.”*

The Determination is dated March 4, 1997 and the assessment for wages owing are for dates between April 1, 1996 and August 31, 1996. All are within the 24 month time frame set out in Section 80(b) of the *Act*. Since the *Act* specifically sets a limit for retroactive collection, I find it is not unfair against Sound that the Director assessed these wages owing to the employees after the contract was completed.

#### **ORDER**

In summary, I order under Section 115 of the *Act*, the Determination dated March 4, 1997 in the amount of \$19,905.46 be confirmed together with whatever interest may have accrued since the date of issuance pursuant to Section 88 of the *Act*.

**Niki Buchan  
Adjudicator  
Employment Standards Tribunal**