BC EST #D463/97
Reconsideration of BC EST #D099/97

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Can-Achieve Consultants Ltd.
("Can-Achieve")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

PANEL: Geoffrey Crampton
Norma Edelman
John Orr

FILE NO.: 398/97

DATE OF DECISION: October 30, 1997

DECISION

OVERVIEW

This is an application by Can-Achieve Consultants Ltd. ("Can-Achieve"), under Section 116 (2) of the *Employment Standards Act* (the "*Act*"), for a reconsideration of Decision #D099/97 (the "Original Decision") which was rendered by the Tribunal on March 10, 1997.

The Original Decision upheld a Determination which was made by a delegate of the Director of Employment Standards on October 22, 1996. The Director's delegate determined that Can-Achieve owed a former employee, Qian Zhai, the sum of $8,017.81 on account of unpaid commissions, vacation pay and interest arising out of a breach of Sections 18 (2) and 58 (1) of the *Act*. There is nothing in the Determination to indicate that the Director's delegate considered there to be any jurisdictional dispute associated with Ms. Zhai's complaint.

The Original Decision sets out, at page 4, the challenge which Can-Achieve made against the jurisdiction of the Director and the Tribunal to deal with Qian Zhai's complaint under the *Act*. Can-Achieve asserted that:

> i) British Columbia laws cannot have extra-territorial application over activities that take place in a foreign country, in this case, China; and
>
> ii) In any event, even if the employment relationship could be said to fall under Canadian law, the employment contract falls under federal law, rather than provincial law, by reason of the federal government's exclusive constitutional jurisdiction over "naturalization and aliens" [see *Constitution Act, 1867*, section 91(25)].

In this reconsideration, Can-Achieve's counsel did not advance a specific submission on the constitutional argument in (ii) above. We have considered it nonetheless and we conclude that it should be dismissed for the reasons given in the Original Decision.

The Original Decision is not the first decision by the Tribunal to deal with the issue of an employment relationship in which work was performed wholly or in part outside of British Columbia. In *Marchant* (BCEST #D233/96), the Tribunal upheld a Determination by the Director that the *Act* did not apply to work performed in Japan despite the fact that the employment contract was entered into in British Columbia and the employer and employee were residents of this province. In *Zedi* (BCEST #D309/96), the Tribunal found that employment contracts which were negotiated in British Columbia were subject to the *Act* despite the fact that performance of the contracts may have occurred outside the province.

A third decision, *G.A. Borstad Associates Ltd.* (BCEST #D339/96), dealt with an appeal in which the employees performed 20% of their work outside of British Columbia and the Tribunal decided that the work performed was protected by the *Act*.

This application for a reconsideration is, then, an opportunity for the Tribunal to set out more fully its views on the proper analytical approach to deciding the jurisdictional issues which are raised by employment relationships such as the one under reconsideration.

At the preliminary stages of this reconsideration, and before considering the merits of the parties' submissions, the Panel noted that the central argument in Can-Achieve's application concerned a constitutional question - whether the employment standards which are created by the *Act* are constitutionally applicable to work performed exclusively outside the province under a contract entered into within British Columbia. We also noted that our decision may entail an analysis of the limits of provincial territorial jurisdiction under Section 92 of the *Constitution Act, 1867*. For these reasons we gave notice to the Attorney General of British Columbia, to the Attorney General of Canada, to Can-Achieve and to Ms. Zhai as required under Section 8 (2) of the *Constitution Question Act* (R.S.B.C., 1996, Ch. 68) and requested them to make submissions.

In giving notice to the Attorneys General, the Panel disclosed a number of court decisions which it considered may be relevant and, in addition, provided a copy of the Original Decision as well as the decisions in *Marchant*, *Zedi* and *Borstad*, supra.

Counsel for the Attorney General of British Columbia made an extensive submission on the constitutional questions. Counsel for the Attorney General of Canada declined to make a submission. Counsel for Can-Achieve was provided a copy of the submission made on behalf of the Attorney General of British Columbia and advised the Tribunal that he would make no submission in reply.

The Panel has reached this decision following its review and analysis of the Original Decision and the parties' written submissions.

ISSUE TO BE DECIDED

The threshold question to be decided in this reconsideration is a constitutional one - whether the employment standards created by the *Act* are constitutionally applicable to work performed exclusively outisde the province under a contract entered into within the British Columbia. If the answer to that question is "no", Ms. Zhai's claims under the *Act* must be dismissed.

FACTS

For the purpose of the constitutional question, the relevant facts on which the Original Decision was based were set out at pages 2 - 3 as follows:

> Can-Achieve is in the business of recruiting and assisting would-be immigrants to Canada. To that end, it established an office in Beijing, China in April 1995 (the company now has three offices in China) and hired Ms. Zhai as a "consultant" for that office. Ms. Zhai is a Chinese national although at the time she was hired she held Canadian landed immigrant status (she has since become a Canadian citizen). Her function was to solicit potential immigrants and then assist them with the immigration process--the nature of the services provided to a Can-Achieve client include preparation of necessary immigration forms, arranging for interviews by Canadian Immigration officials and generally preparing the client's immigration dossier.
>
> There is a dispute as to the precise nature of Zhai's compensation entitlement although both parties agree that her compensation was based on a fixed monthly salary of $1,000 plus additional commission earnings which were calculated as a percentage of the fees paid by the Can-Achieve clients that she procured for the company.
>
> While Zhai's employment contract was negotiated and entered into in the province of British Columbia, the services that she performed for the company were rendered entirely in China. Zhai was paid in cash, in China, by way of United States dollars or Chinese yen. The employer did not make any withholdings on account of Canadian income tax or any other statutory deductions required by Canadian law. The employer did not issue Zhai a statement of earnings for purposes of filing a Canadian tax return although Zhai did, in fact, file a Canadian income tax return, reporting her earnings from China while working for Can-Achieve. So far as I can gather from the evidence before me, China does have some form of income taxation system. Can-Achieve did not report the earnings of its employees in China to the Chinese taxation authorities.
>
> Can-Achieve is a company incorporated pursuant to the laws of British Columbia where it carries on business. The evidence before me is that the funds generated by the Beijing office were, at least in part, patriated back to British Columbia. The affairs of the Beijing office were directed and otherwise supervised by Can-Achieve's head office in Vancouver. Responsibility for the clients procured by the Beijing office was, in due course, turned over to employees working out of the Vancouver head office.

In applying those facts to the jurisdictional issue which Can-Achieve raised, the Original Decision relied exclusively on conflict of laws principles and *forum conveniens* issues to answer the question whether, in the circumstances, does British Columbia law and in particular the *Act* apply? Based on that analytical approach, the Adjudicator decided that, in his view, the *Act* governs the employment contract between Ms. Zhai and Can-Achieve. In making that decision, he acknowledged (page 9) that his decision was "... arguably inconsistent with the decision ... in *Marchant* (BCEST #D233/96) ...".

On May 20, 1997 Can-Achieve applied, under s. 116 of the *Act*, to have the Tribunal reconsider the Original Decision. Its reconsideration request takes issue with the Original Decision on two grounds: (a) the Adjudicator erred in interpreting the legal test for determining the proper law of the contract; and (b) the modified amount that the Adjudicator determined was owing omitted to deduct the $980 U.S. which has already been paid to Ms. Zhai. On May 27, 1997, the employer raised a third issue, regarding the amount of commissions payable for the first client in each month.

On June 8, 1997, Ms. Zhai filed a two page submission focusing on the jurisdiction issue and the commission issue. On the first issue, she described being a "BC resident and taxpayer" and having "worked for a BC company overseas for a short duration and should be protected under BC jurisdiction".

Despite receiving notice and opportunities to reply, the Director of Employment Standards has declined to make any submissions on this reconsideration.

ANALYSIS

The Original Decision dealt with Can-Achieve's jurisdictional challenge primarily with reference to "conflict of laws" principles. That subject can be described generally as a set of primarily common law principles which enable courts to determine what effect must be given to the fact that a private dispute may have significant contact with one or more legal systems. The court before which relief is claimed must decide questions such as whether it is the proper forum for the dispute, and whether the relevant law is provincial law or "foreign" law. As Castel has described it, "[t]he very purpose of the conflict of laws principles and rules is to avoid any conflict of laws by enabling the court to resolve this doubt and to choose the applicable law" [Castel, *Conflict of Laws* (1994), pp. 1-4]. Conflict of laws principles would, of course, be central had Ms. Zhai opted to avoid the *Act* and to take action against Can-Achieve in a British Columbia court for breach of contract.

It is central to our analysis that this Tribunal was created by provincial legislation and that the rights at issue in this case are statutory in nature. As recognized in *Evans v. British Columbia (Employment Standards Board)* [(1983) B.C.J. No. 12 (B.C.C.A.)]:

> "[i]t cannot be said, in my opinion, that the remedy provided to an employee by the Act is in any real sense comparable to the remedy open to an employee at common law, by means of the litigation process".

That statement continues to hold true under the present *Act*, in our opinion.

To put it another way, neither the Director nor this Tribunal would be involved in the dispute between Can-Achieve and Ms. Zhai were it not for the existence of the *Act.* The rights and obligations sought to be enforced here - section 18(2) [payment of wages owing] and section 58(1) [vacation pay] are statutory obligations created by the *Act*. From this it follows that if the *Act* applies to an employer-employee relationship for one purpose, it must apply for all purposes. Thus, for example, any employment relationship subject to the *Act* would be subject to all its provisions, including Part 5, which sets out a series of obligations dealing with statutory holidays - "statutory holiday" being defined as "New Year's Day, Good Friday, Victoria Day, Canada Day, British Columbia Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and any other holiday prescribed by legislation".

As a provincial statute, the *Act* is subject to the **constitutional** limitation that provinces may not legislate "extra-territorially". The *Constitution Act, 1867* makes it clear that provincial legislative jurisdiction is confined to "property and civil rights *in the Province*" [s. 92(13)] and "Generally all Matters of a merely local or private Nature *in the Province*"[s. 92(16)]. (emphasis added)

It is therefore our view that determining the applicability of the *Act* to this situation is not in the first instance a conflict of laws question, rather it is about deciding: (a) how far the legislation does in fact reach as a matter of statutory interpretation; and (b) how far the legislation can reach as a matter of constitutional law. These two inquiries are often closely related, and are inextricably related in this case: see also *British Columbia (British Airways Board) v. British Columbia (Worker's Compensation Board)* [(1985) B.C.J. No. 2533 (B.C.C.A.)]. We must focus our analysis on the construction of the *Act* and the constitutional extent of its application.

Construction of the Employment Standards Act

Unlike statutes such as Ontario's *Employment Standards Act* or British Columbia's *Workers Compensation Act*, there is no provision in this province's *Employment Standards Act* specifically addressing the Legislature's intention regarding the territorial

scope of the *Act*. As the Tribunal has pointed out in *Marchant* (BCEST #D233/96):

> "Neither statute purports to extend its jurisdiction to work done entirely outside the province. Therefore, even if the British Columbia legislation contained similar provisions, this would not assist the appellant in this case"

Section 3 of the *Act* states:

> *This Act applies to all employees, other than those excluded by regulation, regardless of the number of hours worked.*

Section 2 of the *Act* sets out its purposes as follows:

> *(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment.*
> *(b) to promote the fair treatment of employees and employers.*
> *(c) to encourage open communication between employers and employees*
> *(d) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia*
> *(e) to contribute to assisting employees to meet work and family responsibilities.*

Section 2(a) clearly suggests that the *Act* was intended to protect "employees **in** British Columbia". For two reasons, however, we do not see this subsection as conclusive. First, the fact that the *Act* applies to employees "in British Columbia" does not necessarily mean it was intended to exclude any employee for any work done outside the province. Second, the phrase "employees in British Columbia" can be interpreted differently depending on whether the status as an "employee" derives solely from the place where the work is performed or the place where the contract is made. On one reading of s. 2(a), it could be argued that the Legislature intended the employee to be **physically** performing work in British Columbia for the "standards" governing the employee to apply. However, s. 2(a) could be read with s. 2(d) to argue the opposite - namely, that Ms. Zhai contributed directly to the prosperity of the employer and province and is therefore an "employee in British Columbia" who should enjoy the Act's protections.

Section 119 of the *Act*, which deals with extraprovincial certificates, does not provide a conclusive answer to the scope of the *Act*. That section is directed to allowing orders obtained by "foreign" designated statutory authorities to be enforced by the Director in British Columbia. The existence of that power does not answer the question as to who has jurisdiction in the first place over a particular employee who performs work outside the place of contracting.

"Employer" is defined in section 1 of the *Act* as follows:

> *"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****.* ***(emphasis added)***

"Employee" is also defined in section 1 and includes:

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

Section 1 also defines "work" as meaning "the labour or services an employee performs for an employer whether in the employee's residence ***or elsewhere***".

When one reads these sections together, it is clear that Can-Achieve, as a corporate entity within the province, is clearly capable of being an employer in respect of all persons who meet the definition of "employee". The question then becomes: was Ms. Zhai an "employee" within the meaning of the *Act*? Under subsection (c) she certainly did for a time fit squarely within the meaning of employee while she was being trained in B.C. However, what was the situation after she left B.C. and commenced her work in China?

Read expansively, she is clearly a "person" receiving or entitled to receive wages for work performed for another. The "work" done was "elsewhere" than British Columbia and the *Act* imposes no limitation on the word "elsewhere".

There is a presumption that the Legislature intends its enactments to respect its constitutional limitations, including the constitutional limitation prohibiting extra-territorial legislation. As noted by Sullivan in *Driedger on the Construction of Statutes* (1994) at p. 335:

> At the provincial level, the presumption against the extra-territorial application of legislation is reinforced by constitutional limits on the permissible scope of provincial law. Since the provinces do not possess external sovereignty, under Canadian Constitutional law they lack the capacity to exercise limited extra-territorial jurisdiction that is conferred on Canada by international law. Moreover, under s. 92 of the *Constitution*

> *Act, 1867* a province may legislate only in respect of matters that are "in the Province". Under the presumption of compliance with constitutional norms, it is presumed that provincial legislatures intend to observe these limitations on the territorial reach of their law.

What this presumption means in effect is that the "statutory interpretation" question cannot be finally determined without reference to the constitutional limits of provincial legislative power. While it is fair to say from reading the *Act* as a whole that the Legislature wanted to legislate as broadly as it could, it is also fair to say that it did not intend to exceed the limits of its constitutional jurisdiction. To the extent that a literal reading of the *Act* would exceed these constitutional limitations, the legislation must be "read down". As noted again by Sullivan, at p. 336: "By presuming that extra-territorial effects are not intended, the legislation is effectively read down to avoid applications that would violate the constitutional limitations."

Constitutional extent of the Act's application

There appear to be a number of different strands in the caselaw concerning extra-territoriality. The cases often deal with quite disparate subjects and often fail to refer to one another. It is nonetheless possible, we believe, to glean the following principles from the court decisions on this subject.

Where the dominant focus or aim of provincial legislation is to regulate the business ethics of persons who perform activities in British Columbia, the legislation will validly apply to their actions within the province even though their actions may form part of a transaction or contract which originates or ends with a person outside the province*: British Columbia (Director of Trade Practices) v. Ideal Credit* (1997), 31 B.C.L.R. (3d) 37 (C.A.); *Thorpe v. College of Pharmacists* (1992), 72 B.C.L.R. (2d) 1 (C.A.); *It's Adult Video Plus Ltd. v. Director of Film Classification* (1991), 81 D.L.R. (4th) 436 (B.C.S.C.); *Bennett v. Securities Commission* (1991), 82 D.L.R. (4th) 129 (B.C.S.C.); app. dism. (1992), 69 B.C.L.R. (2d) 171 (C.A.); *Alberta v. Thomas Equipment*, [1979] 2 S.C.R. 529.

In *Ideal Credit*, *Thorpe*, *It's Adult Video Plus* and *Bennett*, the actions subject to statutory prohibition were performed within British Columbia by persons physically present and carrying on business here. *Thomas Equipment* makes the point, however, that where legislation is aimed at regulating a business or trade within a province, provincial legislation captures the conduct of their trade within the province even if they are not physically situated there. In *Thomas*, the Court emphasized that "[T]he basis of the prosecution of Thomas (a New Brunswick company) is a statutory obligation entirely independent of contract." Its liability under the Alberta *Farm Implements Act* "a*rose out of its conduct in Alberta*" .... The Court noted that its earlier decision in *Inter-provincial Cooperatives Limited v. Manitoba*, [1976] 1 S.C.R. 477 was quite different in that there provincial legislation was aimed at conduct outside the province of persons outside the province.

The "business ethics" cases concern provincial legislation whose "pith and substance" is directed to regulating actors and/or conduct within the province. Because the activity subject to prohibition takes place within the province, there is no concern about "extra-territoriality". Any impact on civil rights outside the province is merely "incidental" for constitutional purposes: Hogg, *Constitutional Law of Canada* (1997), ch. 13.

Concerns about extra-territoriality are more pronounced where, properly characterized, legislation is aimed "securing a civil right within the province": *C.P.R. v. W.C.B.* [1919] 3 W.W.R. 167 (P.C.) at p. 181. Labour legislation, such as worker's compensation and employment standards legislation, is a good example of such legislation, whose primary purpose is to create a set of statutory civil rights for a vulnerable class of persons such as workers. Where the dominant aim of provincial legislation is the creation of civil rights within the province, a legitimate constitutional question arises as who may enjoy the benefit of those civil rights: *Constitution Act, 1867*, s. 92(13). Broad statutory definitions such as "employee" and "work" must be read in light of these limitations. In these cases, "it is the reach of the legislation that is in question....": *British Columbia (British Airways Board) v. British Columbia (Workers Compensation Board)* (1985), 17 D.L.R. (4th) 36 (B.C.C.A.) (*"British Airways"*).

The relevant caselaw makes clear that merely because a company is resident in British Columbia does not entitle all its employees, wherever situated, to the protection of provincial labour legislation. For example, in *New Brunswick (Labour Relations Board) v. Eastern Bakeries*, [1961] S.C.R. 72, the Supreme Court of Canada held that a labour board could not constitutionally create a bargaining unit that included a company's employees residing and working at its operations outside the province. Moreover, the constitutional power to confer statutory civil rights within the province could not be enlarged merely by the fact that an employee who lives and works outside the province was originally hired within the province (p. 77):

> There is no evidence as to where the hiring of the resident employees in Nova Scotia or Prince Edward Island occurred, *but it does not advance the case for the respondent if it took place at Moncton.* The New Brunswick Labour Relations Board can have no jurisdiction over persons residing and working outside that province so as to declare they are part of the membership of a unit of the company's employees residing and working in New Brunswick. [emphasis added]

This principle was affirmed in *British Airways, supra*. In that case, the BC Court of Appeal held that the *Worker's Compensation Act* did not apply to an employer doing business in British Columbia where its employees did not perform any work "within the province" for constitutional purposes. As articulated by the Court: "In order to give the

province jurisdiction to secure the civil rights of a person related to his employment there must be a sufficient connection between that person's employment and the province".

For *constitutional* purposes, the "sufficient connection" may arise in several ways, but it is not satisfied merely by showing that an employer is resident within the province and that hiring takes place within the province: *Eastern Bakeries*, *supra.* Even less does it involve factors set out in the Original Decision such as the residence of relevant witnesses, the location of documents, or the laws of foreign jurisdictions, which factors are relevant to questions of *forum non conveniens* rather than the Constitution.

In our view, for a "sufficient connection" to exist so as to permit a province to confer statutory civil employment rights upon a person, a real presence performing work within the province must be established. It is clear from *British Airways* that a person need not be present a majority of the time, but there must be a real presence performing employment obligations within the province: *Eastern Bakeries*, supra.

It is significant that the Court of Appeal in *British Airways*, following the judgment in *C.P Rail v. W.C.B.,* specifically pointed to s. 8 of the *Workers' Compensation Act* as illustrating "the limits" of the extra-territorial jurisdiction of the province and the types of factors that lie at the basis of the inquiry. That section, which has not changed in substance since it was considered by the Privy Council in 1919, requires that all of the following factors must be present before a person is entitled to statutory rights under the *Worker's Compensation Act*:

(a) a place of business of the employer is situate in the Province;
(b) the residence and usual place of employment of the worker are in the Province;
(c) the employment is such that the worker is required to work both in and out of the province; and
(d) the employment of the worker out of the province has immediately followed his employment by the same employer within the province and has lasted less than 6 months.

A person meeting the criteria set out in s. 8 of the *Workers' Compensation Act* would enjoy the statutory rights created by the *Act* even though some of their work was performed outside the province. On the facts of this case we find that Ms. Zhai clearly does not meet this test.

In making that finding, we recognize that what governs is the Constitution, not s. 8 of the *WCA*, and that the "sufficient connection" test in constitutional law may well embrace fact situations that do not strictly fall within s. 8 (for example, where a person works within the province but resides outside the province: see examples given by Mr. Justice MacFarlane in *British Airways*).

Recognizing the need for flexibility, however, the "sufficient connection" test must be meaningful and must not be watered down to the point where two or even multiple jurisdictions are able to assert simultaneous or indeed contradictory statutory rights and obligations respecting the same work dispute (in the conflict of laws context, see for example, *Tolofson v. Jensen* [1994] 3 S.C.R. 1022).

On the facts of this case, we conclude that there is an insufficient connection between the employment and the province so as to render the *Employment Standards Act* applicable to this employment relationship. Except for 3 days' training in Vancouver on or about the time the contract was executed, all direct employment services performed by Ms. Zhai were undertaken entirely in China where she resided during the term of her employment by Can-Achieve. Those are the services which have given rise to this dispute. The parties' clear intent, and indeed the only practical means for Ms. Zhai to perform the contract, was for her to reside in China in order to perform the contract. We would add that, to the extent that this is relevant for constitutional purposes, there is no suggestion in the contract itself that the laws of British Columbia would apply to the employment relationship: cf. *Flint Canada v. Bonokoski* [1997] A.J. No. 311 (Alta. Prov. Ct.). Indeed, to the extent that either legal regime is referred to at all, the contract specifically recognizes "Public Holidays for the PRC" (People's Republic of China) rather than the list of Canadian holidays set out in the *Employment Standards Act.* Along with its provision for payment in China, in Chinese or American currency, these provisions reinforce that the real and substantial connection of this employment is with China.

We appreciate that the original decision was underscored by a concern about potentially leaving an employee without a remedy if the provincial statute was held not to apply. We would comment on this concern in two ways. First, it is not at all clear to us that Ms. Zhai is without an action in British Columbia courts for breach of contract. For the reasons given by the Adjudicator, there is little reason to doubt that British Columbia courts would accept jurisdiction, whatever the proper law of the contract. Second, we believe that if constitutional principles are to be credible, they must be applied consistently. Provincial territorial jurisdiction cannot be enlarged whether the "foreign" jurisdiction is the Province of Alberta or the People's Republic of China. To assert provincial jurisdiction in cases such as this would cause unnecessary conflicts with the Employment Standards regimes of other jurisdictions.

As noted, the adjudicator approached this as a conflict of laws problem and asked the question which jurisdiction has the most "real and substantial connection" with the dispute. While we believe he was incorrect in failing to identify the constitutional dimensions of the issue and find that many of the factors he applied in that context are inappropriate to the constitutional context, we recognize the recent acknowledgment by the courts and there are points of similarity and indeed convergence between "conflict of laws" issues and constitutional "territoriality" questions: *Morgaurd Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, *Hunt v. T&N plc* [1993] 4 S.C.R. 289; *Tolofson v. Jensen* [1994] 3 S.C.R. 1022; Hogg, *Constitutional Law of Canada*, (1997) c. 13. Even if we were to have

viewed this matter as turning exclusively on the "proper law of the contract", we would come to the same result: *Hill v. W.P. London & Associates* (1986), 13 C.C.E.L. 194 (Ont. S.C.).

In summary we conclude that the statutory rights and enforcement mechanisms created by the *Employment Standards Act* are not constitutionally applicable to the employment relationship in this case for all of the reasons given above.

As noted earlier, our decision turns on whether the *Act* applies in the circumstances of the employment relationship between Can-Achieve and Ms. Zhai. It is our view, on the principles set out, that the *Act* cannot be said to have the extra-territorial effect which it would require to regulate that employment relationship. Applying the principles set out earlier herein to these significant facts we find that this is not a case where the activities occurred both within and outside the Province but rather occurred entirely outside the Province. Further there is no other "sufficient connection" that would warrant the application of the *Act* to the work performed by Ms. Zhai in China.

ORDER

We order, under Section 116(1) of the *Act*, that the original Decision (BC EST #D099/97) be cancelled and that the Determination dated October 22, 1996 (CDET # 004394) be cancelled.

Geoffrey Crampton
Chair

Norma Edelman
Registrar

John Orr
Adjudicator