An Application for Reconsideration

- by -

Writers Guild of Canada
(the "Guild")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2010A/132

DATE OF DECISION: February 18, 2011

DECISION

SUBMISSIONS

Donald W. Bobert	Counsel for the Writers Guild of Canada
David G. Wong	Counsel for Kirk Edward Shaw, a Director or Officer of Guardian Films Inc. and En Garde Films Inc.
Michelle J. Alman	Counsel for the Director of Employment Standards

OVERVIEW

1. This is an application brought pursuant to section 116 of the *Employment Standards Act* (the "*Act*") by the Writers Guild of Canada (the "Guild"). The Guild seeks a reconsideration of a decision of a Member of the Tribunal (the "Member") dated August 27, 2010, under BC EST # D089/10 (the "Original Decision").

2. In a determination dated April 21, 2010, (the "Determination") a delegate of the Director of Employment Standards (the "Director") sought to exercise the authority provided under section 3(8) of the *Act* and ordered one Kirk Edward Shaw ("Shaw") to pay $147,579.30 in wages owed to various employees (the "Writers") of Guardian Films Inc. and En Garde Films Inc. (the "Producers"). The liability imposed on Shaw flowed from the application of section 96 of the *Act*, as the Director determined that Shaw was an officer and director of the Producers at all relevant times.

3. Shaw appealed the Determination. In its Original Decision, the Tribunal cancelled the Determination.

4. The Guild seeks a reconsideration, alleging that the Original Decision is flawed because it contains errors of law and results in a denial of natural justice.

5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 26 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. The Guild, Shaw, and the Director have delivered comprehensive submissions in support of their respective positions on this application. I have concluded that this application shall be decided having regard to the written materials filed, without an oral or electronic hearing.

FACTS

6. On October 9, 2008, David McPhillips, a consensual arbitrator appointed to resolve a dispute arising under an agreement entered into by the Guild and the Producers (the "Arbitrator"), issued a consent order (the "Order") requiring the Producers to pay to the Guild the sum of $147,579.30 for the benefit of the Writers named in an appendix attached to the Order.

7. When the Producers failed to make the designated payment, counsel for the Guild sought to have the Director exercise his authority under the *Act* to enforce the terms of the Order.

8. On April 14, 2009, the Arbitrator forwarded a copy of the Order to the Director. The correspondence from the Arbitrator accompanying the Order stated that he had been advised to provide the Director with a copy

of the order issued by him as Arbitrator in the dispute, and that he was forwarding the Order "pursuant to section 3(8)" of the *Act*.

9. Following an investigation, the Director issued the Determination, which concluded, *inter alia*, that Shaw was an officer and director of the Producers for the purposes of section 96 of the *Act*. Since the appendix to the Order set out the sum the Producers were to pay to each of the Writers named therein, and those sums, in each case, represented less than two months' wages for each of the Writers named, the Director concluded that Shaw was personally liable to pay the full $147,579.30 amount.

10. Shaw appealed the Determination, on several grounds. The Member who issued the Original Decision was of the view that the key issue to be decided was whether section 3(8) of the *Act* gave the Director the jurisdiction to enforce the Order, in the circumstances. In the end, the Member decided that it did not, and so he cancelled the Determination.

11. The relevant provisions of section 3 of the *Act* are these:

> (4) If a collective agreement contains any provision respecting a matter set out in one of the following specified provisions of this Act, that specified provision of this Act does not apply in respect of employees covered by the collective agreement:
>
> section 17 [paydays];
>
> section 18(1) [payment of wages when employer terminates];
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> section 18(2) [payment of wages when employee terminates];
>
> section 20 [how wages are paid];
>
> section 22 [assignment of wages];
>
> section 23 [employer's duty to make assigned payments];
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> section 24 [how an assignment is cancelled];
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> section 25(1) of (2) [special clothing];
>
> section 26 [payments by employer to funds, insurers or others];
>
> section 27 [wage statements];
>
> section 28(1) [content of payroll records];
>
> section 28(2) [payroll record requirements].
>
> (5) If a collective agreement contains no provision respecting a matter set out in a provision specified in subsection (4), the specified provision of this Act is deemed to be incorporated in the collective agreement as part of its terms.
>
> (6) Parts 10, 11 and 13 of this Act do not apply in relation to the enforcement of the following provisions of this Act in respect of an employee covered by a collective agreement:
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> section 9 [hiring children];
>
> section 10 [no charge for hiring or providing information];
>
> section 16 [employers required to pay minimum wage];
>
> section 21 *[deductions]*;
>
> Part 6 [leaves and jury duty];
>
> section 64 [group terminations];

section 65 [exceptions to section 64];

section 67 [rules about notice of termination];section 68 [rules about payments on termination].

(7) If a dispute arises respecting the application, interpretation or operation of

(a) a Part or provision of this Act deemed by subsection (3) or (5) to be incorporated in a collective agreement, or

(b) a provision specified in subsection (6),

the grievance procedure contained in the collective agreement or, if applicable, deemed to be contained in the collective agreement under section 84(3) of the *Labour Relations Code*, applies for the purposes of resolving the dispute.

(8) Despite subsection (6), if an arbitration board makes a decision on the merits of a matter in dispute referred to in subsection (7) and the decision is in respect of wages, the arbitration board may refer the decision to the director for the purpose of collecting the wages and, for that purpose, the director may collect the wages under sections 87 to 97 and 99 as if the decision of the arbitration board were an order of the tribunal.

(9) In subsection (8), "arbitration board" has the same meaning as in Part 8 of the *Labour Relations Code*.

12. The Member decided that there were two preconditions to the Director's assuming authority under section 3(8): (a) a decision on the merits of a matter in dispute referred to in section 3(7), and (b) that the decision referred is in respect of wages.

13. The Member took issue with the Director's treatment of the issue whether the Arbitrator's decision was a decision on the merits of the matter in dispute referred to in section 3(7). Specifically, the Member noted that the Determination contained no reasons supporting its conclusion that the Arbitrator's decision satisfied this test. For the Member, this constituted an error of law.

14. The Member then went on to examine the Record to determine if it contained evidence indicating that section 3(8) could be engaged. In deciding that it did not, the Member said this:

> Nowhere in any of the correspondence or material relating to the grievance is there an indication that a matter in dispute before Arbitrator McPhillips was one referred to in section 3(7) of the *Act* or that the arbitrator was ever referred to section 3(7) in the context of the matters in dispute that were before him and made the subject of the Consent Order. In sum, there is no basis, factual or otherwise, for concluding the dispute before Arbitrator McPhillips was in respect of the application, interpretation or operation of a matter referred to in paragraphs (a) or (b) of section 3(7). In particular, the dispute was not about the application, interpretation or operation of a paydays or assignment of wages provision in the Agreement. That kind of dispute was never before Arbitrator McPhillips. The grievance was about the obligation of the Producers to pay production fees and make remittances on those fees based on specific and existing provisions in the Agreement.

15. The Member also considered a further argument made by the Guild and the Director that if the collective agreement did not include provisions in respect of paydays or assignments of wages, section 3(7)(a) stipulated that sections 17 and 22 of the *Act*, which dealt with those matters, must be deemed to be included within the agreement. If so, those provisions might "co-exist" with the requirement to pay production fees, and establish a foundation for the assertion that the sums found to be owed constituted wages, thus satisfying this precondition for the application of section 3(8).

16. The Member declined to accept this argument stating, again, that the Arbitrator was not asked to make, nor did he make, any decision on whether sections 17 or 22 of the *Act* were deemed to be incorporated into the parties' collective agreement. The Member then went on to say that it was not open to the Director, on his own initiative, to examine the collective agreement and determine whether it contained any provisions respecting those matters referred to in subsections (2) through (5) of section 3 of the *Act*. In support of this conclusion the Member cited *Rand Reinforcing Ltd.*, BC EST # D123/01 (reconsideration refused, BC EST # RD612/01). In any event, the Member noted, the Director made no express finding in the Determination that sections 17 and 22 were deemed to be included in the agreement.

17. But even if the Director did have the jurisdiction to determine whether the collective agreement should be deemed to include sections 17 and 22 of the *Act*, and had decided that they should be, the Member was of the view that there would have been no rational basis for his doing so. The reason, the Member said, was that the collective agreement contained comprehensive provisions for the determination, calculation and payment of production fees, and the contributions and deductions the Producers were required to withhold from the Writers' fees before remitting them to the Guild, which were the very matters in issue in the grievance which led to the Arbitrator's issuing the Order.

18. Regarding the production fees, the Member pointed out that even in the event they could be construed to be "wages" for the purposes of the *Act*, Article C10 of the collective agreement contained specific language relating to the time they were to be paid, and so it could not help but be construed to be a provision respecting a payday. Article A13 must be interpreted to constitute an assignment of wages, because it dealt directly with the obligation of the Producers to withhold and remit portions of the production fees to the Guild.

19. Further, the Member considered that sections 17 and 22 could have no logical utility even if they were deemed to be included in the collective agreement. This was so in respect of section 17 because the agreement contemplated single payments at prescribed times for discrete types of work, or on the occasion of a specified event, rather than a regime marked by ongoing, repeated, and time-determined paydays.

20. Finally, the Member made the following observation:

> As well, it makes no sense, and is not consistent with the objective of the deeming provisions, to be replacing provisions in a collective agreement with sections of the *Act*. That is not a statutory objective of section 3.... [S]ubsections (3) and (5) exist to fill a void in a collective agreement, not to replace collective agreement provisions. Section 3 contains a legislative expression of deference to the product of the collective bargaining process.

21. The Member then concluded:

> In sum: there was no finding by the Director, and no basis for finding, that either section 17 or 22 of the *Act* were "in dispute" in the matter before Arbitrator McPhillips; there was no decision by Arbitrator McPhillips to deem either section 17 or 22 into the Agreement; on any reasoned analysis of the Agreement, there was no basis on which the Director could independently make a finding that either section 17 or 22 could be deemed into the collective agreement; and there was no rational basis for concluding there was a dispute respecting the "interpretation, application or operation" of either section 17 or 22.

22. Having conducted this analysis, the Member concluded that the Director had erred in deciding that the Order was a decision on the merits of a matter in dispute referred to in subsection 3(7). He therefore decided that the preconditions for engaging section 3(8) were not established, and so the Determination must be cancelled.

23. The Guild's application for reconsideration alleges three principal flaws in the Original Decision.

24. First, the Guild submits that since the Member decided that the Director had provided no analysis or reasons supporting a conclusion that the Order constituted a decision on the merits of a matter in dispute referred to in section 3(7), the Member should have exercised his discretion under section 115 to refer the matter back to the Director. Instead, the Member cancelled the Determination. The Guild says that section 115 provides the Tribunal with the authority to cancel a determination and refer a matter back in appropriate circumstances. The Guild argues that if the Member had referred the matter back the Director could then have provided an explanation why section 3(7) was applicable, or re-investigated the matter in aid of that purpose.

25. The Guild asserts that the Member's discussion in the Original Decision regarding the application of section 3(7) usurps the role of the Director because it was delivered without the benefit of any reasons having been provided by him emanating from the Determination issued at first instance. The Guild says that the decision in *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)* 2010 BCCA 97 prohibits the Member from "curing" a denial of natural justice in this way, and that the Member's decision to do so itself constitutes a denial of natural justice.

26. Second, the Guild argues that the Member deciding that sections 17 and 22 of the *Act* did not exist in the collective agreement is inconsistent with the liberal and purposive approach which the authorities have said must be employed when applying the provisions of a remedial statute such as the *Act*. The Guild submits that when the Member decided there were provisions in the collective agreement in respect of paydays, and the assignment of wages, it had the effect of denying the Writers access to the enforcement mechanisms contained in the *Act*, through the vehicle supplied by section 3(8). The Guild asserts that this result is undesirable, because it impedes the vindication of the remedial objectives the *Act* is meant to facilitate. Instead of interpreting the provisions of the collective agreement in a way that precluded the application of the *Act*, the Guild says that the Member should have construed them narrowly, so as to permit a conclusion that sections 17 and 22 of the *Act* were deemed to be included in the agreement, which would in turn have entitled the Guild to pursue the special enforcement remedies against Shaw personally that section 3(8) is designed to make available.

27. Third, the Guild submits that it was an error of law for the Member to decide that it is for an arbitrator, not the Director, to determine whether a provision of the *Act* should be deemed to be included in a collective agreement. The Guild states that such a requirement will impose an onerous additional requirement on trade unions participating in arbitration proceedings. It will compel them to consider whether the grievance involves a dispute over wages, and if it does, whether submissions should be made in aid of the arbitrator's deciding that there is a provision of the *Act* which should be deemed to be included in the relevant collective agreement. If so, trade unions will need to ensure that arbitrators render a decision on the merits regarding alleged breaches of the provision in question, so as to permit them to pursue the enforcement remedies made available under the *Act* through the application of section 3(8). The Guild argues that the imposition of such a requirement is inappropriate because it will increase cost, produce delay, and add to the complexity of the arbitration process. Such a requirement is also, it says, inconsistent with the exercise of the broad jurisdiction section 76(3) bestows on the Director to conduct investigations on his own motion, and without receiving a complaint, in order to ensure compliance with the *Act*.

28. The Director supports the Guild's application for reconsideration. He says that when the Tribunal has, in several of its other decisions, identified a failure to observe the principles of natural justice it has stated that the appropriate response is to refer the matter back to the Director to cure the error. Since the Member found that it was an error of law for the Director to fail to give reasons why section 3(7) was applicable to the

Order, the Director submits that the Member should have referred that question back so that reasons, or an explanation why they were unnecessary, could then be provided.

29. The Director argues that the *Rand Reinforcing* decisions on which the Member relied involved an examination of the "meets or exceeds" provisions appearing in the *Act* prior to its amendment in 2002, and are therefore distinguishable. He observes that there is nothing in the language of section 3(8) which makes it a condition precedent to the Director's enforcing an arbitrator's order that the arbitrator specify in the referred decision that it involves one of the parts of the *Act* referenced in section 3(7). He also submits that since section 3(8) nowhere expressly precludes the Director from deciding whether section 3(7) applies to a decision of an arbitrator that is referred for enforcement, the Tribunal should assume that the Director does possess this jurisdiction. He asserts that such an interpretation is consistent with the general principle, applicable to all statutory officers, which deems them to possess all the authority they may require as a matter of reasonable and practical necessity in order for them to carry out their functions.

30. For the Director, an interpretation of section 3(8) which exempts from him a power to determine if section 3(7) is applicable will render nugatory his ability to manage referrals from arbitrators in an effective and efficient manner. Since there is no provision in the *Labour Relations Code* RSBC 1996 c.244, for example, which compels arbitrators to specify whether an award involves elements of the *Act* referred to in section 3(7), few arbitrators will do so, and so the value of section 3(8) as a method of enforcing those provisions in awards will be further diminished. The Director says this is not what the legislature intended when it enacted section 3 of the *Act*.

31. The Director takes issue with the Member deciding that even if the Director had the authority to determine if sections 17 and 22 should be deemed to be included in the collective agreement, there could be no rational basis for his concluding that they should be, in the circumstances. The Director says that the Member's discussion on this point was inappropriate because it usurped the role of the Director.

32. Conversely, the Director argues that if the Member was correct in deciding that it was the Arbitrator's task to determine if sections 17 and 22 were engaged, the Member should not have deigned to analyze the question himself.

33. Shaw wishes that the Original Decision be confirmed. He submits that the language setting out the Tribunal's jurisdiction to make orders disposing of appeals under section 115 makes it clear that if the Tribunal decides it is inappropriate to confirm a determination, it is not required to refer the matter back to the Director, even if a basis for its decision rests on a finding that there has been a failure to observe the principles of natural justice. Instead, the Tribunal should only be disposed to refer a matter back where a determination cannot otherwise be confirmed, varied, or cancelled, and where reinvestigation or reconsideration is required.

34. Shaw says that in the circumstances of this case the Member was correct to cancel the Determination, and that no reinvestigation or reconsideration by the Director was necessary. While the Member might have exercised his discretion to refer the matter back if the Original Decision had rested entirely on his conclusion that the Director erred when no reasons were provided, the Member went on to analyze the principal issue in the case on its merits, and must be taken to have decided that since the preconditions for engaging section 3(8) were not met, no referral back was warranted. It was the Director's decision that section 3(8) was applicable in the circumstances, which the Member found to be in error, which formed the basis for the Member's decision to cancel the Determination without referring the matter back, and not the finding that the Director had failed to observe the principles of natural justice when he failed to provide adequate reasons.

35. Shaw denies that the Member's declining to refer the matter back was itself a denial of natural justice, because it deprived the Director of a further opportunity to obtain relevant information regarding the provisions of the collective agreement, arbitral interpretation of its clauses, and bargaining history. Both the Guild and Shaw were given full opportunity to provide material and make submissions to the Director at first instance. There was no evidence that the Director's failure to provide reasons was the result of an inadequate Record, or a denial of any party's right to be heard. Indeed, the fact that the Member was able to decide the issue raised in the dispute on the merits, despite the failure of the Director to give reasons, is proof that the Record was entirely sufficient to dispose of the matter. Alternatively, if the Record was inadequate, and the Guild is of the view that other materials should have been provided to the Director so that proper reasons could have been given, Shaw says that the Guild should have ensured that those materials were delivered prior to the issuance of the Determination. If they were not, then it is no denial of natural justice to fail to grant the Guild a second opportunity to present them.

36. As the Director issued the Determination without an oral hearing, his decision was made on the Record before him. That Record was also before the Member. For Shaw, this means that the Director was in no better position than the Member to decide the issue on its merits. Indeed, Shaw argues that the Member was in a better position to resolve the matter because he had the benefit of the Determination and the further submissions of the parties on which he could rely. In these circumstances, there was no necessity to refer the matter back, and in Shaw's submission it would have offended the prescription in section 2 of the *Act* that the processes made available under the legislation provide fair and efficient procedures for resolving disputes over its application and interpretation if the Member had done so.

37. Shaw asserts that it is not inconsistent with the remedial nature of the *Act*, and the purposive approach which should be employed in its interpretation, for the Member to have concluded that the relevant parts of section 3 do not exist to replace collective agreement provisions, but only to fill a void if they are absent. Such a reading of section 3 does not deny unionized employees access to the enforcement provisions in the *Act*, in appropriate circumstances, but it does represent a legislative expression of deference to the collective bargaining process. This means that section 3 creates no general right to enforce an arbitration award making use of the machinery afforded by the *Act*. There are preconditions to the application of section 3(8). The award must be a decision on the merits regarding a matter deemed by section 3 to be incorporated into the collective agreement, and it must be in respect of wages. Given these limitations, Shaw notes, the Member was correct to decide that section 3(8) was inapplicable.

38. Regarding the Member's conclusion that the collective agreement contained provisions relating to paydays and an assignment of wages, Shaw observes that the Guild has delivered no explanation why this conclusion was incorrect; it merely states that the Member erred in interpreting those provisions expansively, rather than narrowly. Shaw submits that there is no compelling reason why the relevant provisions of the collective agreement should be construed narrowly and, in any event, such an interpretation would operate in a way that defies common sense.

39. Shaw asserts that the Member was also right to decide that section 3(8) was inapplicable because the grievance in question was specifically related to provisions already existing in the collective agreement requiring the Producers to pay production fees and make remittances on those fees, rather than any provisions that might otherwise be deemed by the *Act* to be included. Thus, even if it could be said that sections 17 and 22 should be deemed to be included in the collective agreement, they would have had no bearing on the outcome of the matter the Arbitrator resolved when he issued the Order.

40. Since the Member determined that the issues before the Arbitrator in no way related to the application, interpretation, or operation of a matter referred to in paragraphs (a) and (b) of section 3(7), Shaw says that the

Member's statement that the Director had no independent jurisdiction to examine the terms of the collective agreement and decide if it contained a provision respecting the relevant matters set out in section 3 is really of no significance to the disposition of the appeal because it was *obiter*. But even if the Director did have that power, Shaw says it was employed incorrectly in the circumstances. If it had been employed properly the Director would have had to conclude that the preconditions for the application of section 3(8) were not met.

41. Shaw makes two responses to the Guild's assertion that the Original Decision will place onerous requirements on trade unions. He first says that the Member did not decide it was necessary for an arbitrator to specifically consider a grievance with the provisions of the *Act* in mind in order for section 3(8) to be engaged. Second, he says that even if such a requirement is read into section 3(8), it is by no means an unreasonable one. That section permits the Director to enforce a decision of an arbitrator if it is in respect of a provision in the *Act* that is deemed to be part of the collective agreement by, *inter alia*, section 3(5). Shaw argues that it would not be unreasonable to expect that a union pressing a grievance will refer the arbitrator to the provisions of the collective agreement that it alleges the employer has violated. Those provisions will either exist, expressly, within the agreement, or they will be deemed to be included by the *Act*. Since it is only in respect of a decision by an arbitrator on the merits relating to provisions that are deemed by section 3 to be contained within a collective agreement which may be enforced pursuant to section 3(8), Shaw submits that any burden on trade unions to address the applicability of the *Act* in the arbitration proceedings cannot be said to be onerous.

42. The parties have delivered further submissions in reply on this application, some of which were unsolicited by the Tribunal. Regarding the final reply submission delivered by Shaw, the Guild and the Director argue that it should be rejected as there are portions of it which address issues they say that Shaw should have dealt with in his initial submission in reply. Since, they say, Shaw did not do that, they submit that he has effectively split his case, and so they are placed at a procedural disadvantage. Alternatively, they request a further opportunity to respond to Shaw's final reply submission.

43. The practice of the Tribunal relating to the delivery of submissions on applications for reconsideration is set out in Parts 10-12 of the Tribunal's *Rules of Practice and Procedure*. The practice is that when an application is received in proper form notice of it is delivered to the other parties, including the Director, along with an invitation to provide a reply to the application. It is to be inferred, then, that the initial replies provided by the other parties will incorporate their responses to the application only. Once all such replies to the application are received, they are circulated to all the parties, including the applicant, and final replies to the initial replies are requested. Once those final replies are received, the file is assigned to a panel of the Tribunal for disposition.

44. If the panel is of the view that it should receive further submissions, or other material, prior to its rendering a decision, the Tribunal's *Rules* clearly permit it to do so. *Rule* 27(2) says this:

> The panel hearing the application will decide how the hearing is to be conducted and may receive and accept evidence and information that it considers necessary and appropriate, whether or not that evidence or information would be admissible in a court of law.

45. Here, the Guild asserts that Shaw was in possession of the Director's initial reply when he submitted his initial reply, and so his responses to the Director's initial reply that appear in his final reply should be ignored, because they should have been included in his initial reply. Shaw says, and I have no reason to doubt, that he did not have the Director's initial reply in hand at the time he prepared his initial reply to the application. In any event, Shaw's initial reply was directed to the application, as the Tribunal requested it should be. It was entirely permissible for Shaw's final reply to be directed to the matters raised in the initial reply submitted by

the Director. Having said that, I agree with the Guild that to the extent Shaw's final reply can be said to repeat arguments previously made in his initial reply, it is redundant, and therefore unhelpful.

46. The Director takes a somewhat different approach to this issue. He argues that since Shaw's final reply raises new issues relating to the role of the Director in these proceedings, the Director should be permitted to file further material in response to that specific aspect of Shaw's submission. I believe there is merit in the Director's position. However, I do not think it is necessary for me to request further submissions concerning the role of the Director because I cannot conclude that he has overstepped the bounds of propriety in the manner in which he has participated in these proceedings.

47. Shaw argues that the Director's role in appeals, and therefore on applications for reconsideration, is limited to his explaining the underlying basis for a determination, and that it does not incorporate his becoming an advocate for the party seeking to uphold the result at first instance. In this case, Shaw submits that the Director has transgressed because he supports the Guild's position that fairness required the Member to refer the matter back when it was decided that the Director's failure to give reasons was a denial of natural justice. Shaw says that the Director's advocating this position amounts to an admission that the Determination was flawed. As the Director seeks a referral back, Shaw asserts that he is abandoning a mere defence of the Determination and acting instead as an advocate for the Guild.

48. In my view, Shaw's position delineates too narrow a scope within which the Director may properly operate in the circumstances of this case. In *B.C. Securities Commission v. Burke* 2008 BCSC 1244 the court noted that the Director is not precluded from acting as a protagonist in appeals, where circumstances warrant. Indeed, on some occasions it may be necessary for the Director to do so, to ensure that all the relevant issues are considered during the appeal process. This is important, because the Tribunal's orders are protected by a strong privative clause.

49. In *Old Dutch Foods Ltd.*, BC EST # RD115/09, the Tribunal commented on the propriety of the Director's acting as an advocate in appeals. It said this:

> It follows, in our view, that there is nothing *per se* improper in the Director's making submissions on appeal....
>
> Having said this, there is clearly a line beyond which the Director should not step when participating in appeals. The Director's submissions should not take on the character of advocacy, because it creates a perception that the Director has a personal investment in the outcome of the appeal which may, as here, raise the concern that if a matter is referred back, it will not be re-visited with an open mind. Instead, the Director should limit himself to explaining the determination, and the path of reasoning employed in reaching the conclusions contained within it.

50. If the matter were to be referred back, I discern no risk that the Director will approach his task in a manner that compromises his neutrality. As I see it, the Director's support for a referral back simply reflects his desire for an opportunity to remedy the failure to give reasons that was identified in the Original Decision, in order that the conclusions reached in the Determination may be properly explained. As it is entirely appropriate for the Director to provide an explanation for the Determination within the appeal process, I see nothing objectionable in his seeking a means through which that role may be performed. The fact that his doing so happens to result in his adopting a posture that coincides with the position taken by the Guild is, I think, of no moment.

ISSUE

51. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be cancelled or varied or sent back to the original panel, or another panel of the Tribunal?

ANALYSIS

52. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

> *116. (1) On application under subsection (2) or on its own motion, the tribunal may*
>
> *(a) reconsider any order or decision of the tribunal, and*
>
> *(b) confirm, cancel or vary the order or decision or refer the matter back to the original panel or another panel.*

53. The reconsideration power is discretionary, and must be exercised with restraint. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a legitimate desire to preserve the integrity of the appeal process described in section 112 of the *Act*. A party should not easily have available to it an avenue for avoiding the consequences of a Tribunal decision with which it is unhappy. Nor should it be entitled to an opportunity to re-argue a case that failed to persuade the Tribunal at first instance. Having regard to these principles the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's original decision overturned.

54. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal asks whether the matters raised in the application warrant a reconsideration of the Tribunal's original decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the original decision which are so important that they demand intervention. If the applicant satisfies this requirement the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the original decision. When considering the original decision at this second stage, the standard applied is one of correctness.

55. In my opinion, the Guild has met the threshold test for reconsideration. Its application raises questions regarding the proper interpretation of section 3 of the *Act*. The answers to those questions will inform the decisions that are made by parties to collective agreements, especially when a grievance relating to unpaid wages is filed, and a party wishes to enforce an arbitrator's order in respect of it. To this extent, at least, the resolution of this dispute may provide guidance to the labour relations community generally when similar cases arise in future.

56. Having said this, I have also decided that the application for reconsideration cannot succeed on its merits. It follows that I have concluded that the Original Decision is correct.

57. The Guild argues, citing *Taiga Works*, *supra*, that the Member's failure to refer the matter back to the Director after finding that the Determination was flawed for want of reasons itself constitutes an error of law because the Tribunal does not have the power to cure a breach of natural justice of this sort in that way. The Director adopts much the same position, arguing that the Member deciding to provide reasons why section 3(8) was inapplicable improperly usurps the role the Director plays in proceedings commenced under the *Act*.

58. None of the authorities cited by the parties suggest that the Tribunal must refer a matter back where it detects that the Director has failed to observe the principles of natural justice when issuing a determination. Indeed, in *Old Dutch Foods*, *supra*, the Tribunal took pains to explain that the powers set out in section 115 of the *Act* may be employed in a variety of ways in order to do justice to the parties in the circumstances of the particular case. At paragraph 66 of that decision, the Tribunal said this:

> In our view, section 115 permits the Tribunal to employ its remedial powers cumulatively as well as exclusively, so as to enable it to fashion a remedy which best suits the circumstances presented in the particular case. The legislation nowhere expressly prohibits such an approach and such an interpretation is more apt to permit a result that is fair and efficient.

59. In my view, the *Taiga Works* decision does not stand for the proposition that the Tribunal has no jurisdiction to cure a failure to observe the principles of natural justice. Instead, it is an authority which supports the Tribunal's power to cure such failures provided the proceedings as a whole are thereby rendered fair. In that case, the procedural errors in question related to the failure of the Director to disclose to the employer certain documents received from the complainants, or to consider a submission from the employer before the determination was issued. Given the nature of the errors alleged, the court was of the view that they could only be cured after a full rehearing once complete disclosure of all the relevant documents had occurred.

60. In the case before me, the procedural error that has been identified in no way impugns the manner in which the Director conducted his investigation, or the opportunity afforded to the parties to deliver comprehensive submissions in support of their respective positions, and in answer to the material presented by the parties opposite. Instead, the error relates to the failure of the Director to provide reasons for his conclusion that the Arbitrator's decision was a decision on the merits of a matter in dispute referred to in section 3(7) of the *Act*, so as to justify the Director's conclusion that he could issue the Determination pursuant to section 3(8).

61. The principal question the Member needed to answer in the appeal, then, was whether it was correct for the Director to have issued the Determination based on the authority of section 3(8). The relevant facts that were before the Director, and on which he relied in making the Determination, do not appear to have been disputed. The parties were represented by counsel during the Director's investigation. They provided comprehensive submissions to him before the Determination was issued. The Director issued the Determination without conducting a hearing, as he was entitled to do. In my view, given the issue to be decided, the Member was in at least as advantageous a position to resolve it as the Director had been. I cannot conclude, therefore, that the Member deciding not to refer the matter back to the Director once he determined that section 3(8) was inapplicable in the circumstances can be said to have rendered the proceedings unfair. The Director's reasons for deciding that section 3(8) was applicable might have been of assistance, but they were not necessary for the proceedings as a whole to be viewed as fair, in the circumstances.

62. When an appeal of a determination is commenced section 112(5) of the *Act* requires the Director to provide to the Tribunal the Record that was before the Director at the time the determination was made. It cannot be said, then, that it was inappropriate for the Member to review that Record to attempt to discern whether the preconditions to the application of section 3(8) were met. The Member's review of the Record revealed nothing to him on the basis of which it could have been decided that the dispute before the Arbitrator

involved the application, interpretation or operation of a matter referred to in paragraphs (a) and (b) of section 3(7). Instead, the Record demonstrated to the Member that the parties' dispute was about the obligation of the Producers to pay production fees and make remittances on those fees based on specific and existing provisions in their collective agreement. The Director employing section 3(8) to issue the Determination against Shaw was, therefore, based on a misapplication of the relevant statutory provisions appearing in section 3. This is precisely the type of error of law the Tribunal is meant to remedy under section 112(1)(a) of the *Act*.

63. I agree with Shaw that this is the true *ratio* of the Original Decision. The Member made it clear that his statement to the effect that the Director had no independent jurisdiction to examine the terms of a collective agreement and decide if it contained a provision respecting those matters referred to in subsections (2) through (5) of section 3 was unnecessary in order to decide the issues in the appeal, and so it must be construed to be *obiter*.

64. Like the Member, I am not required to comment on the matter. Having said that, I believe the Member was correct. Section 3(8) is an enforcement provision. It permits the Director to collect wages that are found to be owed as if the decision of the arbitration board were an order of the Tribunal, nothing more.

65. In my view, the strongest inference to be discerned from the language of section 3(8) is that since it is the arbitration board which makes the decision on the merits of a matter in dispute referred to section 3(7), and refers the decision to the Director for the purpose of collecting the "wages" it has found are owed, it is the arbitration board which must decide if section 3(7) is engaged, not the Director. Such an approach preserves the integrity of the arbitration process, and the broad remedial authority of arbitrators appointed pursuant to it, to which the parties have bound themselves when they negotiate a collective agreement.

66. While the *Rand Reinforcing* decisions to which the parties have referred are distinguishable to the extent that they dealt with the "meets or exceeds" provisions that appeared in a previous version of the *Act*, the principles underlying those decisions remain apt. In this province, disputes arising under collective agreements are meant to be resolved through the grievance arbitration process. That means it is for arbitrators to decide what is contained within collective agreements. One consequence of an interpretation of the language of section 3(8) which would contemplate arbitrators and the Director having concurrent powers to determine whether an arbitration award contains a decision on the merits of a matter in dispute referred to in section 3(7), and that the decision is in respect of wages, is that there will be more than one forum for determining how the rights and obligations arising under collective agreements are to be vindicated. As stated in *Rand Reinforcing*, such a result is inconsistent with the preferred approach, expressed in the jurisprudence, that it is for arbitrators to resolve all disputes that arise relating to the interpretation, application, operation or alleged violation of collective agreements.

67. Within this institutional environment, I believe that clearer language than that which currently appears in section 3(8) would be required before I would be inclined to support an interpretation of it that would permit the Director to exercise the jurisdiction he argues for on this application. As was stated by the reconsideration panel in *Rand Reinforcing* regarding the provisions in question there, the legislature could have easily inserted language into section 3 which would have made it clear that the Director has the independent authority he seeks. I do not see that section 3 contains that type of language.

68. This reasoning is also sufficient to dispose of the argument that sections 17 and 22 of the *Act* should be deemed to be included in the collective agreement at issue. Even if the Member was incorrect in concluding that the dispute before the Arbitrator, from which the Order emanated, related to matters distinct from those referred to in paragraphs (a) and (b) of section 3(7), the fact is that the Arbitrator made no determination that

sections 17 or 22 of the *Act* were deemed to be included in the collective agreement, nor was he ever asked to do so.

69. With respect, it appears to have been assumed by the parties that the Order incorporated a decision of the Arbitrator on the merits of a matter in dispute referred to in section 3(7), and that the decision was in respect of wages. I agree with the Member that something more than what appears to have occurred in this instance, that is, a mere order to pay money, and a referral from the Arbitrator, were necessary before the preconditions underlying section 3(8) could be said to have been satisfied so as to permit the Director to issue the Determination.

70. I accept, as a general proposition, that the *Act* is remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. I also accept, for the purposes of our discussion here, that the Member's approach to the interpretation of section 3 may deprive the Writers of the opportunity to employ the enforcement provisions of the *Act* in order to collect the sums the Order stipulates that the Producers should pay. However, I do not accept that it must follow, of necessity, that the provisions of section 3(2) to (9) must be interpreted so as to ensure that the Writers obtain access to a remedy under the *Act*. These parts of section 3 appear in the *Act* at least in part because the legislature wished disputes arising under collective agreements to be resolved by means of the arbitration process, and not through the intervention of the Director. If this were not so, there would appear to be little reason why those sections were included at all. Section 3(8) provides a limited role for the Director in disputes arising under collective agreements, but it is subject to preconditions, and is therefore exceptional. All of this points towards a legislative intention that deference be shown to the collective bargaining process, and the work that arbitrators perform to resolve disputes arising within that milieu.

71. Nor can I conclude that the result of these proceedings will impose an onerous burden on members of the labour relations community when they seek a remedy from an arbitrator arising from an alleged violation of the terms of a collective agreement. It will simply mean that parties in arbitration proceedings will need to address whether the provisions of the collective agreement that they say are engaged are expressly included in the agreement, or are deemed to be so because of the operation of the relevant provisions of section 3 of the *Act*. It is not apparent to me that requiring the parties to consider that issue will impose undue hardship. If a party believes that the enforcement of an arbitration award may prove difficult, it will be an issue that should, and likely will, be dealt with in a timely way within the arbitration proceedings, along with the myriad other issues which may arise in the circumstances of the particular case at hand.

ORDER

72. Pursuant to section 116(b) of the *Act*, I order that the Original Decision of the Tribunal issued under BC EST # D089/10 be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal