BC EST #D313/98
Reconsideration of BC EST #D559/97

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 -

The Director of Employment Standards

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

PANEL: Frank A. V. Falzon

John McConchie

Geoffrey Crampton

FILE NO.: 98/093

DATE OF DECISION: July 9, 1998

DECISION

OVERVIEW

This is an application by the Director for reconsideration under s. 116 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 ("the *Act*"). The Director asks us to reconsider an Adjudicator's decision (BC EST #D559/97) remitting this matter back to the Director based on a "reasonable apprehension of bias" on the part of the Director's delegate who issued the determination. An overview of the procedural history of this matter will assist in understanding the nature of the reconsideration request.

The Determination

On April 24, 1997, the Director of Employment issued a Determination against I Rock Concrete (1995) Ltd. ("I Rock") and Milan Holdings Inc. ("Milan"). Both companies were engaged in the concrete placing and finishing industry. The primary focus of the Determination was to address the complaint of Mr. Frank Woodley regarding his entitlement to unpaid wages under the *Act* for the period between April 23, 1996 and January 29, 1997. The Director's delegate concluded that the complaint was valid. He determined that as a result of various breaches of the legislation, Mr. Woodley was entitled to the sum of $9893.76 in unpaid wages and interest. He further determined that I Rock and Milan were associated companies under s. 95 and employers falling within 97 of the *Act*, and that as a consequence both companies should be liable to Mr. Woodley for the sum in question.

The Determination makes clear that Mr. Woodley's complaint was not an isolated complaint. His was one of three complaints touching on these issues, all of which arose in the context of an ongoing "general Audit of compliance with the Employment Standards Act Regulation in the concrete placing and finishing industry": Determination, p. 1. The Determination confirms that the audit involves in excess of 70 companies. The Determination forthrightly states that the Director's delegate has since June, 1996 been investigating alleged contraventions of the legislation by I Rock dating back to July, 1994. The central issue before this Panel is whether the Director's delegate's statements regarding these other matters give rise to a "reasonable apprehension of bias" which taints his decision and justified the Adjudicator in remitting the matter back to the Director for further investigation.

Milan's appeal to the Tribunal

On May 21, 1997, Milan, through counsel, appealed the Determination to this Tribunal. I Rock did not appeal. In my view, the focus of Milan's appeal is very important. Milan did not dispute the fact that wages may be owing to Mr. Woodley. It did not dispute that Mr. Woodley's statutory rights were infringed. Its dispute in substance was with the finding that it is a person liable to pay those wages as either an associated company under

s. 95 or an employer falling within 97 of the *Act*. In challenging the finding that it is an employer that falls within ss. 95 or 97 of the *Act*, Milan put forward three grounds of appeal:

(a) The Director's delegate based his decision on information and evidence unrelated to circumstances of I Rock and Milan, and which had not been disclosed to Milan;

(b) The decision of the Director's delegate is tainted by reasonable apprehension of bias against Milan; and

(c) On the merits, Milan's business relationship with I Rock and its employment relationships with certain of I Rock's employees were not such as to render it an associated or successor company.

With the concurrence of legal counsel for Milan and the Director, the Adjudicator dealt with the question of "bias" as a preliminary issue. His decision states that "if necessary, the hearing would be reconvened to deal with the other matters raised by Milan's appeal": p. 2. The Adjudicator received written and oral submissions on this preliminary question. He rendered his decision on December 9, 1997.

The Adjudicator's decision

The Adjudicator decided that several comments contained within the Determination showed that it was tainted by a reasonable apprehension of bias. After stating that "the Director and her delegates are acting in a quasi-judicial capacity when conducting investigations into complaints filed under the Act" (pp. 3, 4) the Adjudicator wrote as follows at pp. 4-5 of his decision:

> The Determination runs some 10 pages, not including various additional attachments. The Director's delegate, in the course of setting out his reasons for finding Milan liable for $9893.76 in unpaid wages and interest, made several comments which are germane to the "reasonable apprehension of bias" issue. These comments are reproduced below:
>
> - "my investigation .... began in June of 1993 [sic - should read 1996] as part of a general audit of compliance with the [*Act*] and [*Employment Standards Regulation*] in the concrete placing and finishing industry".
>
> - "The audit is ongoing and ... involves in excess of seventy companies."
>
> - I am satisfied that there are at least the equivalent of 500 full-time non-union workers that at the time the audit began were

> not receiving overtime or other minimum's [sic] set out in the [*Act*]."
>
> - "...as many as 1200 workers may be affected... It is estimated that as much as 6.9 million dollars is owing to workers affected by the industry audit."
>
> - "At the time the audit began, there was almost complete non-compliance with the overtime provisions of the [*Act*] in the non-union side of the industry".
>
> - "The workers who were subject to these violations are reluctant to give evidence publicly as even the most experienced fear retaliation. These fears are well-grounded."

It should be recalled that the only issues relevant to the instant determination were:

> i) Was Frank Woodley owed unpaid wages?;
> ii) If so, were Milan and I Rock Concrete (1995) Ltd. associated corporations within section 95 of the *Act*, or, alternatively, was Milan a successor to I Rock Concrete (1995) Ltd. within section 97 of the *Act*, so that Milan could be said to be legally responsible for Woodley's unpaid wages?

In my view, a reasonable person, having read the above statements, all reproduced from the Determination, might well conclude that the Director's delegate had determined, on the basis of other information disclosed during the course of a much wider investigation, that nonunion firms (such as Milan) were regularly avoiding their obligations under the *Act* and were able to do so because their employees would not complain for fear of retaliation. Inasmuch as these conclusions were drawn from an audit that was well underway, if not substantially completed, prior to the filing of Woodley's complaint, would a "reasonably informed bystander" say, to paraphrase Madame [sic] Justice Southin in *Bennett*: "It does not seem quite right for this delegate to have made this Determination".

In my opinion, a reasonable person might well conclude that the Director's delegate approached the complaint with something less than a fully open mind. Woodley's claim was for, *inter alia*, unpaid overtime wages. Woodley's alleged employer, Milan, was a nonunion contractor in the concrete placing and finishing industry. The Director's delegate had, apparently, already concluded that such contractors virtually never complied with the overtime provisions of the Act and that would-be complainants had "well-grounded" fears of retaliation. In these circumstances, I am satisfied that Milan had a reasonable apprehension as to the neutrality of the Director's delegate.

> I wish to reiterate that I am not satisfied that there was actual bias on the part of the Director's delegate; his failing, if one chooses to characterize it as a failing, was in the use of intemperate language - language that could give rise to a reasonable concern as to his neutrality. However, again to paraphrase Madam [sic] Justice Southin in *Bennett*, "this is a case about appearances and not about reality". According [sic], I do not believe that the Determination ought to be cancelled; rather, I believe the more appropriate remedy is to refer the matter back to the Director for a new investigation. A new investigation should also have the salutary effect of remedying Milan's present concern with respect to section 77 of the *Act*.
>
> It may well be that following a fresh investigation, Milan will still be held liable to Woodley; then again; Milan may be found to have no liability. As I have not heard any evidence and argument on the substantive liability question, I pass no opinion on the underlying merits of the Determination. [underlining added]

The application for reconsideration

On February 3, 1998, the Director applied to have the Tribunal reconsider the Adjudicator's decision under section 116 of the *Act*.

Milan's submission in response was filed on March 9, 1998. In addition to supporting the Adjudicator's decision as being correct, Milan submits that we should not entertain the Director's application because it was not brought in a timely fashion, because the decision in question was "of a preliminary nature" and because the Director has failed to show why this is an exceptional case in which the reconsideration power should be employed.

ISSUES TO BE DECIDED

The submissions of the Director and Milan give rise to the following issues arising on this application for reconsideration:

I. Should we decline to reconsider the adjudicator's decision?; and

II. If we should reconsider the adjudicator's decision, should it be reversed?

ANALYSIS

Principles regarding reconsideration

Section 116 of the *Act* is the statutory foundation for the Director's application for reconsideration. That section provides 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) cancel or vary the order or decision or refer the matter back to the original panel.
>
> (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
>
> (3) An application may only be made once with respect to the same order or decision.

While the Director or a person named in a tribunal decision has the right to make application for reconsideration (s. 116(2)), the decision whether to exercise the reconsideration power is specifically left to the discretion of the Tribunal: s. 116(1). The Tribunal has sought to exercise that discretion in a principled fashion, consistent with the fundamental purposes of the *Act*. One such purpose is to "provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act": s. 2(d). Another is to "promote fair treatment of employees and employers": s. 2(b).

To realize these purposes in the context of its reconsideration power, the Tribunal has attempted to strike a balance between two extremes. On the one hand, failing to exercise the reconsideration power where important questions of fact, law, principle or fairness are at stake, would defeat the purpose of allowing such questions to be fully and correctly decided within the specialized regime created by the *Act* and Regulations for the final and conclusive resolution of employment standards disputes: *Act*, s. 110. On the other hand, to accept all applications for reconsideration, regardless of the nature of the issue or the arguments made, would undermine the integrity of the appeal process which is intended to be the primary forum for the final resolution of disputes regarding Determinations. An "automatic reconsideration" approach would be contrary to the objectives of finality and efficiency for a Tribunal designed to provide fair and efficient outcomes for large volumes of appeals. It would delay justice for parties waiting to have their disputes heard, and would likely advantage parties with the resources to "litigate": see *Re Zoltan T. Kiss* (BC EST #D122/96).

Consistent with the need for a principled and responsible approach to the reconsideration power, the Tribunal has adopted an approach which resolves into a two stage analysis. At

the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In deciding this question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:

> (a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.* BC EST #D522/97 (Reconsideration of BCEST #D007/97).
>
> (b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BCEST #D075/98 (Reconsideration of BCEST #D418/97); *Alexander (c.o.b. Pereguine Consulting)* BCEST #D095/98 (Reconsideration of BCEST #D574/97); *323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BCEST #D186/97);
>
> (c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BCEST #D134/97 (Reconsideration of BCEST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. As noted in previous decisions, "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society* (BCEST #D199/96, reconsideration of BCEST #D114/96).

After weighing these and other factors relevant to the matter before it, the Panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the Panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the Panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the decision being reconsidered.

The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such review, we consider it sensible to conclude that questions deemed worthy of reconsideration - particularly questions of law - should be reviewed for correctness. Such an approach is consistent with the Legislature's confidence that questions of law should be fully and properly resolved within the specialized statutory regime governing employment standards: s. 110. It is consistent with the reasonable expectation of parties that if we exercise our discretion to reconsider, we will bring our best judgment to bear upon the issues. This approach is also consistent with the expectation of the courts on judicial review which will be reviewing decisions of reconsideration panels on questions of law within jurisdiction based on the "patently unreasonable" test: *Canada (Attorney General) v. Public Service Alliance of Canada* (1993), 101 D.L.R. (4th) 673 (S.C.C.). The "patently unreasonable" test applies on judicial review precisely because of the relative advantages and expertise possessed by specialized administrative tribunals in relation to courts. The presence of the full privative clause in s. 110 of the *Act* means that such deference by the courts is mandatory: *Bell Canada v. C.R.T.C.* (1989), 60 D.L.R. (4th) 682 (S.C.C.). The *Act* includes nothing resembling a privative clause to shield the substance of adjudicators' decisions from reconsideration panels where those panels consider reconsideration to be warranted.

The Panel wishes to make clear that parties ought not to confuse the two stage *analytical* approach reflected in these reasons with the practical reality that the reconsideration application be based on one set of submissions. Parties will be able to use their own judgment regarding how best to structure their submissions given the Tribunal's approach to reconsideration. The Panel also wish to make clear that nothing in these reasons should be taken to signal a departure from the perspective that reconsideration is a matter of discretion, not of right.

Application of these principles to the present application for reconsideration

The Director has applied for reconsideration based on a point of principle. Her concern is that the Adjudicator's decision "stands for the proposition that a delegate cannot bring to the investigation, and therefore to the finding of facts, and to the conclusions drawn,

information acquired from other investigations". The Director's concern is that the Adjudicator's decision means that:

> "[a] delegate who participates in a sectoral compliance initiative, as did the delegate who had conduct of Woodley's complaint, would be unable to conduct an investigation into a complaint made against an employer in that sector because that employer would have "a reasonable apprehension as to the neutrality of the Director's delegate"
>
> Such a preposition [sic] wreaks havoc on the ability of the Director to assign investigations".

The Director submits that there is a distinction between a delegate who prejudges a party's position, and a delegate who applies to the investigation information acquired through experience in previous investigations either with the employer or generally:

> The first situation is contrary to natural justice. The second is the application of experience in the finding of fact. The delegate, to paraphrase another adjudicator, is not required to check her or his experience and common sense at the door, and start each file afresh. It is one thing to "proceed in an entirely unbiased and neutral fashion", it is another to be uninformed as to the dynamics of the workplace and the norms of an industry or sector.

Counsel for Milan submits firstly that we should not reconsider the decision because the Director waited for nearly two months to file her application, during which time she continued to hold in trust the $9893.76 paid pursuant to the Registrar's July 31, 1997 decision. Milan says that despite the absence of a time limit for reconsideration in the *Act*, we should guided by principles of timeliness and finality which should be considered in light of time limits specified in other parts of the Act and other statutes, which range between 15 and 30 days. Secondly, Milan says that because the Adjudicator made a "preliminary decision", allowing reconsideration will only further complicate this matter procedurally because the parties will be forced to return to the Adjudicator, who may possibly decide to remit the matter to the investigator again on other grounds. Thirdly, Milan says that the bias issue was fully canvassed before the Adjudicator. It would be contrary to the purpose of the reconsideration power to allow the Director to "re-hash" those arguments before a reconsideration panel. Fourth, Milan says that, in any event, the Adjudicator's decision was fully supportable. It argues that:

> The Original Panel's decision does not, contrary to the Director's reconsideration submission, stand for the proposition that a delegate "could not do repeat business" with a given employer, nor that a delegate could not participate in a "sectoral compliance initiative". Rather, it stands for the wholly unremarkable proposition that a delegate who does so cannot prejudge, or appear to prejudge, the actions of a particular employer in regards to a particular act or set of

> circumstances on the basis of the delegate's preconceived notions about that employer, employers in the sector, or employers in general....

In the Panel's view, reconsideration is warranted on the particular facts of this case. The Adjudicator's decision raises important questions of principle regarding the standards and the fashion in which delegates are to carry out their duties in the context of issuing Determinations. The issues in this case potentially carry systemic implications. The Director's submissions have persuaded us that these issues are sufficiently serious that reconsideration is warranted. In the Panel's view, the importance of these issues outweighs Milan's arguments against reconsideration based on delay.

The Panel does not accept Milan's argument that reconsideration should be refused on the basis that the Adjudicator made a "preliminary" decision. The Adjudicator finally disposed of the appeal based on the bias argument and accordingly concluded that it was unnecessary to consider the remaining arguments. This is entirely different from an application for reconsideration filed from an adjudicator's ruling where proceedings before the adjudicator were still ongoing. The very point of the application for reconsideration is that the Adjudicator should not have disposed of the appeal and remitted the matter for investigation based on the bias argument. As noted, the Panel regards that as an important question that warrants reconsideration.

Did the Adjudicator err in finding that there was a reasonable apprehension of bias on the part of the Director's delegate?

I respectfully conclude that the Adjudicator erred in referring the matter back to the Director for further investigation based on a "reasonable apprehension of bias" on the part of the Director's delegate against Milan. In my view, the Determination does not give rise to a "reasonable apprehension of bias" against Milan as that term is understood and applied in administrative law. Out of deference to the reasons of the Adjudicator, and those of my colleagues which I have now had the privilege of reading in draft and from which I respectfully dissent, I wish to explain the reasons for my view that the adjudicator erred in law in making a finding of bias and in remitting the matter to the Director.

The law is clear that the standards for reasonable apprehension of bias depend very much on the specific statutory context, role and function assigned to the decision-maker in question. A proper analysis cannot rest on the mere assignment of labels such as "quasi-judicial". In defining the appropriate standard of fairness, including bias, what matters most is the nature of the function being performed in light of the purposes of the legislation. As noted in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* (1992), 89 D.L.R. (4th) 289 (S.C.C.) at p. 299 - 300:

> It can be seen that there is a great variety of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standards applicable to courts. That is to say, the conduct of the members of the Board should be such that there is no reasonable apprehension of bias with regard

> to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard is much more lenient. In order to disqualify the members the challenging party must establish that there is prejudgment of the matter to such an extent that that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. In those boards, a strict application of the reasonable apprehension of bias test might undermine the very role which has been entrusted to them by the legislature....
>
> This does not of course, mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered. [emphasis added]

I would observe that the law demonstrates some flexibility in the application of the test for reasonable apprehension of bias even in the criminal context: *R. v. R.D.S.*, [1997] 3 S.C.R. 141. Even though the courts apply the highest standards of impartiality in criminal cases, McLachlin J. in *R.D.S., supra*, observed as follows [para. 36]:

> The presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail (*Committee for Justice and Liberty*, *supra*.) The person postulated is not a "very sensitive or scrupulous" person, but rather a right-minded person familiar with the circumstances of the case.

As noted by Cory J. in the same case [para. 112]: "... the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough." For reasons that will be expressed below, I am unable to agree that the facts of this case pass the threshold from suspicion to an apprehension sufficiently serious to give rise to a *real likelihood* of bias.

The compelling need for administrative law "bias" principles to reflect the purposes and intent of the legislation is apparent from the Supreme Court of Canada's decision in *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301. In that case, the Court reinforced the proposition that common bias standards may be modified by legislation. It held that a legislature's creation of an officer who has both investigative and adjudicative functions justified a modification of the standard for "bias" applicable in that context:

> Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its

> operation. In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activity of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislature. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" *per se*.

The office of Director is unique, significant and central to the effectiveness of the *Employment Standards Act*. Under Part 10 of the *Act*, the Director is given a series of quintessential investigative powers. The Director may enter and inspect premises: s. 85. She may, with or without complaint, investigate a person to ensure compliance with the *Act*: s. 76. She may receive confidential information: s. 75. The Director's *Inquiry Act* powers extend to this investigative role: s. 84.

An investigation is, by its nature, different from a proceeding conducted in the cool detachment of a quasi-judicial hearing where all the parties are present and procedural niceties are attended to. Investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77 which requires only that "If an investigation is conducted, the director must make *reasonable efforts* to a give a person under investigation an opportunity to respond". This modification of the common law standard is legislative recognition that the Director's role is more subtle and more complicated than can be expressed by the label "quasi-judicial". On completing an investigation, the director may make a determination: s. 79(1). At the time such a determination is made, it is an unavoidable practical reality that other investigations on related subjects may still be underway and that tentative conclusions may have been reached in respect them, pending a decision as to what, if any enforcement action is appropriate on an individual or more general basis: *Re Takarabe* (BCEST #D160/98). This is precisely the situation which presents itself here.

The foregoing leads me to conclude that the standards of "bias" which apply to determinations issued under s. 79(1) must take into account the practical reality of the antecedent investigative function and the overlap of investigative and decision-making functions over the course of many related matters, all of which is specifically authorized by the legislation. It is significant, moreover, that this overlap applies not only to the Director personally, but to her delegates. Sections 117(1) and (2) provide:

> 117(1) Subject to subsection (2), the director may delegate to any person any of the director's functions, duties or powers under this Act, except the power to delegate under this section.

> (2) The director may not delegate to the same person both the function of conducting investigations into a matter under section 76 and the power to impose penalties in relation to the matter.

Sections 117(1) and (2) make clear that, with the exception of having the same delegate investigate a matter and impose penalties under s. 98, the *Act* specifically envisions the same delegate investigating and determining one or more related matters. Recognition of that specific overlap must be accompanied by recognition of the human reality that persons exercising these dual functions cannot be expected to function like courts or quasi-judicial tribunals. The standards for reasonable apprehension of bias must reflect that reality. Except where the case for bias is clear and strong, it is my opinion that candour and transparency on the part of a delegate should not taint his decision.

In making this point, it is equally clear that the Director's delegates must conduct themselves professionally and must exercise objective good judgment by proceeding where the evidence takes them in the course of an investigation. In that sense, the investigation must of course be "unbiased". A delegate cannot enter upon an investigation with a personal agenda, with a financial stake in the outcome or with a mind closed to the outcome. On the other hand, the Director's delegate cannot be expected to check his or experience at the door. Based on experience, patterns will inevitably arise within various firms or sectors that give rise to an expectation that an investigation will probably conclude a certain way. That is experience, not bias. In such circumstances, however, the overriding obligation of the Director or her delegate keep their mind open in good faith to the particular facts and evidence before them in individual cases.

At the conclusion of the investigation, the Director may issue a determination. If she does so, she is obliged to make an independent Determination which reflects her best judgment about the outcome of the investigation in light of her experience and expertise. It is in this sense that she is neutral from either the employer or employee, and it is this neturality that gives rise to her unique position before this Tribunal: *BWI Business World*, BCEST #D050/96. All this is, however, quite a different matter from suggesting, as might be taken from some of the language in the decision under reconsideration (p. 3), that the investigation is itself a "quasi-judicial" act which imports corresponding standards for bias.

In my respectful view, the standard for bias applied by the Court in *Bennett v. Securities Commission*, [1993] B.C.J. No. 2519 (C.A.) is not apt for a case such as this. In *Bennett*, the Court applied to the Securities Commission the same standard for appearance of bias as applied to courts. There were two reasons for this. First, the Securities Commission panel in that case was sitting in a purely adjudicative capacity. Second, the case dealt with a potential pecuniary bias resulting from the fact that one of the panel members was a director of company in competition with one of the parties. There is no analogy here on either ground.

Even if the "quasi-judicial standard" for bias did apply to the Director, I would observe a party cannot complain of bias against him or her where prejudgment is alleged on issues that are not part of its case before the decision-maker. For example, in *Large v. Stratford (City)* (1992), 9 O.R. (3d) 104 (Div. Ct.), the Court held that a professor who had taken a public position against mandatory retirement was not disqualified from adjudicating a human rights complaint where the issue was whether mandatory retirement was, in the particular case before him, a "*bona* fide occupational requirement". As noted by the Court:

> The professor took a public position on a public issue - the general desirability of mandatory retirement. That question was never in issue before him in this case and he was not called upon to decide it. The parties avoided that question by agreeing that mandatory retirement at age 60 was prima facie discriminatory. Professor Kerr was called upon to decide a quite different issue, whether the evidence established that retirement at age 60 was a *bona fide* occupational requirement of the Stratford Police force.

I appreciate that it is unusual for a director's delegate to commence a Determination, as he did here, with a discussion stating that he had been investigating I Rock for 8 months, that his investigation was ongoing in the context of a general compliance audit involving over 70 companies, and that even at the point the Determination was issued, he was "satisfied" that at least 500 workers were not receiving overtime or other minimums at the time the audit began. While I agree that it will in most cases be ideal for a delegate to confine himself or herself to the particular facts of the individual complaint alone, and while I agree that some of the delegate's language here was strong, the question before the Tribunal is whether, in law and within this statutory context, these statements give rise to a reasonable apprehension of bias by the Director's delegate against Milan.

The Delegate's opening comments may or may not have been relevant to the narrow question of Mr. Woodley's entitlement to wages. That would be a question for the adjudicator on the merits. For all we know, those facts may all be true. However, even if they are irrelevant, irrelevancy is not the same thing as bias. Applying all of the foregoing principles to the Determination before us, I am unable to conclude that the Determination was tainted by a reasonable apprehension of bias by the Director's delegate against Milan.

The Director's delegate candidly noted that he was deciding Mr. Woodley's complaint, as he was entitled to do, in the context of other complaints and the comprehensive audit that was still taking place regarding the concrete placing and cement finishing industry. He stated that the investigation had involved I Rock and over 70 other companies. He noted that based on his experience to date, he was satisfied that there were systemic problems in the industry and that at the time the audit began, there was "*almost* complete non-compliance with overtime provisions of the Act". He further stated that numerous workers had provided him with information which caused "well grounded fears of retaliation". This is strong language, but the determination of an individual complaint in

an ongoing and dynamic context such as this is in my view precisely what the legislation envisions and allows. Given the statutory context in which the language was used, I do not regard the delegate's language as proving a reasonable likelihood that he was biased in the Woodley complaint against Milan.

I might well have viewed this matter differently if the Determination had suggested that Mr. Woodley's entitlement to benefits was disposed based on assumptions about how other employers acted. But that is not this case. Even the strong statement that experience has demonstrated "*almost*" complete non-compliance with overtime provisions" shows a mind open to considering each case on its merits. Moreover, as I have pointed out, Milan has not contested the truth of these statements.

To my mind, it is vitally important to observe that after discussing the industry context in the first two pages of his submission, the Director's delegate immediately turned to a specific, detailed and focused review of the Woodley complaint in the remaining eight pages and lengthy attachments. The reasons satisfy me that, viewed in their totality and in light of the statutory function being exercised, the Woodley complaint was decided objectively and on the facts of that complaint. Whether the Determination's conclusions were correct in substance has yet to be determined. However, viewed in their totality, I find no reasonable apprehension that he approached the matter with a mind not open to the particular facts of the complaint before him.

The decision under reconsideration notes that the only issues relevant to the instant Determination were "was Frank Woodley owed unpaid wages" and "were Milan and I Rock associated or successor corporations"? In my view, this is a somewhat narrow characterization of the Determination. The Determination makes clear that while the primary focus of the Determination was the Woodley complaint, the additional remedies which required I Rock and Milan to serve their employees with the Determination, to provide payroll records and to undertake self-audit were connected to and integrated with the ongoing systemic investigation. The delegate's discussion of the overall investigative context is relevant to those remedies. Moreover, the request for records is itself evidence that the Delegate had not prejudged the claims of other employees. The directions to provide records were given precisely to allow those issues to be investigated because the delegate was not prepared to rush to conclusions regarding how Milan has acted in other cases.

I also wish to emphasize again that the issue before the Adjudicator was whether the Director's delegate was biased *against Milan*. The question "was Frank Woodley owed unpaid wages" was not contested by Milan before the Adjudicator. Milan's appeal never challenged the conclusion that there were numerous violations of the *Act* in relation to Mr. Woodley and that Mr. Woodley is owed money as a result of those violations. Milan's argument is that it should not be responsible for paying that money because it is not an employer falling within ss. 95 and 97 of the *Act*. In determining whether there was a reasonable apprehension of bias against Milan, it must be noted that nothing in the first

two pages of the Determination in any way touch on issues relative to ss. 95 and 97 of the *Act*: *Large v. Stratford*, *supra.*

I would observe, finally, that had the Adjudicator, despite the objection about reasonable apprehension of bias, proceeded to hear the appeal, the defect caused by a reasonable apprehension of bias would have been "cured" by the appeal: Mullan, *Administrative Law* (3d ed, 1996), pp, 307-08, 315. This is not intended as a criticism of the Adjudictor, who dealt with this issue as a preliminary matter by consent of the parties. I do nonetheless consider that in situations such as this adjudicators ought to be reluctant to remit a matter to the Director based solely on a concern for "reasonable apprehension of bias". Where the record is otherwise complete, the parties are prepared to proceed and the matter is about perceptions rather than reality that has tainted the ability to proceed with the appeal, it is my view preferable for adjudicators to proceed to hear the appeal in the appropriate fashion, in the interests of the fair and efficient resolution of appeals.

While the Panel finds itself in agreement regarding the legal principles applicable to the question of bias, I regret that I have been unable to take the same view regarding the application of that law to these facts as have my colleagues. However, for the reasons I have given, I would, pursuant to s. 116(1)(b) of the *Act*, cancel the Adjudicator's order in appeal #D559/97 and refer the matter back to the original panel.

Frank Falzon
Adjudicator
Employment Standards Tribunal

Reasons of John L. McConchie and Geoffrey Crampton

It became apparent while the panel was deliberating this request for reconsideration that there was some divergence of opinion about the application of certain legal principles to the facts of this particular case. Our colleague has set out a complete review of the facts, the issues to be decided and the legal principles involved in the issues that are before us. We concur fully with his analysis and reasons pertaining to the proper exercise of the Tribunal's reconsideration powers under Section 116 of the *Act*. Similarly, we concur with his analysis of the law and legal principles which apply when an appellate body must decide whether a "reasonable apprehension of bias" is present in a decision under appeal (in this case, the Determination dated April 24, 1997).

Our disagreement with our colleague is confined to the result which, we say, flows from the application of those legal principles to the facts which were before the Adjudicator and are now before us. In short, we agree with the essence of the Adjudicator's decision as it is set out at page 4 of the Decision:

> "... a reasonable person might well conclude that the Director's delegate approached the Woodley complaint with something less than a fully open mind ..."

and

> "... The Director's delegate had, apparently, already concluded that such contractors virtually never complied with the overtime provisions of the Act and that would-be complainants had "well-grounded-fears of retaliation."

We agree with the Adjudicator's decision to refer the matter back to the Director because of his concerns about the Delegate's "... use of intemperate language-language that could give rise to a reasonable concern as to his neutrality." In short, our view is that this is a case in which it is essential that justice must be seen to be done.

We wish to make it clear (and on this point both our colleague and the Adjudicator also agree) we are satisfied that there was not actual bias on the part of the Director's delegate. We note also that Counsel for Milan shares that view.

The central argument in the Director's request for reconsideration was put in the following terms:

> "Th(e) decision, in the Director's view, stands for the proposition that a delegate cannot bring to the investigation, and therefore to the finding of facts, and to the conclusion drawn, information acquired from the other investigations. A delegate, therefore, could not do repeat business ..."

We disagree with that submission and agree with counsel for Milan when she describes the significance of the Decision in the following terms:

> "... it stands for the wholly unremarkable proposition that a delegate ...cannot prejudge, or appear to prejudge, the actions of a particular employer in regards to a particular act or set of circumstances on the basis of the delegate's preconceived notions about that employer, employers in that sector, or employers in general. Delegates are not expected to check their experience and common sense at the door of an investigation, along of course with an appreciation for the principles of procedural fairness and due process ...."

In our view, the respect and integrity ascribed to the Director (and the Director's delegates) by employers and employees arise in no small part from the neutrality, impartiality and lack of bias with which complaints are investigated and determinations are made. Those qualities are crucially important to the effective implementation of the Director's statutory mandate.

The Adjudicator's decision to refer the matter back to the Director supports at least two of the purposes of the Act, as set out in Section 2: promoting fair treatment of employees and employers as well as providing fair and efficient procedures for resolving disputes. We also note that the Adjudicator's decision does not deprive Mr. Woodley of any statutory rights, does not result in a multiplicity of procedures, and does not prejudice either party's rights under the *Act*. Mr. Woodley's entitlement to wages under the *Act* arises from the number of hours he worked for his employer and not from the employment practices of other employers in the concrete placing industry.

For all these reasons, while we agree with the major tenets of our colleague's analysis, we disagree in the result and would confirm the Decision dated December 9,1997.

ORDER

We order, under Section 116 of the *Act*, that the Decision dated December 9,1997 be confirmed.

John McConchie
Adjudicator
Employment Standards Tribunal

Geoffrey Crampton
Chair
Employment Standards Tribunal