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 -

TNL Paving Ltd. and TNL Management Ltd.
("TNL")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: John McConchie

FILE NO.: 97/314

DATE OF DECISION: July 22, 1997

DECISION

OVERVIEW

This is an application by TNL Paving Ltd. and TNL Management Ltd. pursuant to Section 116 of the *Employment Standards Act* (also referred to as the *"Act"*) for reconsideration of Decision BC EST No. D283/96 issued October 2, 1996. The two companies have been collectively referred to by all parties in the proceedings as "TNL" and we will use that term except where it may be necessary to refer to one or both of the companies individually. Decision No. D283/96 dealt with an appeal by TNL from Determination No. CDET 002337, dated May 24, 1996 which concluded that TNL had contravened the *Skills Development and Fair Wage Act* (the *"Fair Wage Act"*) in respect of the employment of Douglas Thompson ("Thompson") on a highway reconstruction project in the Pine Pass.

In Decision BC EST No. D283/96 (the "Appeal Decision"), Adjudicator Stevenson denied TNL's appeal which alleged that the *Fair Wage Act* did not apply to the Pine Pass project and that the wage calculations for Thompson were incorrect. In the Appeal Decision, Adjudicator Stevenson noted that there was substantial agreement on the following facts:

1. TNL was involved in the reconstruction of Highway 97 between Bijoux Falls and Azouetta Lake from August, 1994 to August,1996.

2. The project was tendered for bid by the Ministry of Transportation and Highways and TNL, the successful bidder, entered into a contract with the Ministry on or about July 21, 1994.

3. In the contract between the Ministry and TNL, TNL agreed to comply with the Fair Wage and Skills Development Policy, which was in place at the time the contract was made. The Policy was declared to be invalid by the Supreme Court of British Columbia on April 11, 1995 in *Independent Contractors and Business Association of British Columbia v. British Columbia*.

4. On September 1, 1994 the *Fair Wage Act* was enacted and, like the Policy, required employers contracting on certain publicly funded projects to pay specified minimum wages and benefits. The required wages and benefits are identified in the *Regulations* to the *Fair Wage Act*.

5. Thompson was employed by TNL from June 6, 1995 to November 6, 1995 as a "rod-man", a surveyor's helper. He filed a complaint October 9, 1995 alleging TNL was not paying him the wages and benefits required by the *Fair Wage Act*.

In its reconsideration application TNL argued that the *Fair Wage Act* and its *Regulations* did not properly have retroactive or retrospective application. Additionally, TNL argued that the Director's calculation of wages owed to Thompson was incorrect in that it ignored three factors: (1) benefits which Thompson had received from TNL; (2) a sum of $5750 paid to Thompson; and (3) the fact that Thompson spent 30% of his employment "off-site" and was not entitled to the fair wage for that "off-site" work.

Adjudicator Stevenson rejected TNL's appeal. He found that the *Fair Wage Act* operated prospectively and applied to Thompson's employment on the project in question. He also found that TNL had not shown that the Director had miscalculated the monies owed to Thompson and that there was no basis to conclude that Thompson was not performing "construction" work.

Subsequent to this Decision, a Demand Notice (the "Demand Notice") was issued by the Employment Standards Branch on October 23, 1996 to the Ministry of Transportation with respect to funds payable to TNL Paving Ltd. It was in the amount of $19,991.32. In its reconsideration application, TNL also takes issue with the Demand Notice.

POSITIONS OF THE PARTIES

In the course of its argument on reconsideration, TNL has raised six issues. Four of the issues amount to grounds for appeal of Decision BC EST No. D283/96. The remaining two issues relate to TNL's allegation that the Demand Notice is invalid. TNL acknowledges that these latter issues do not relate to the merits of the Decision nor whether the Tribunal ought to reconsider it. TNL seeks to have the reconsideration panel comment on these latter issues in the course of rendering a decision on the reconsideration application.

The following are the six issues and a summary of TNL's position on each:

1. The Tribunal erred in holding that the *Fair Wage Act* applied to Thompson's employment on the Pine Pass Project. TNL alleges that the Adjudicator erred in finding that the *Fair Wage Act* applied to Thompson because he was a "rod man (surveyor's helper)". It argues that the Ministry of Transportation and Highways ("MOTH"), as advised by the Employment Standards Branch, takes the position that surveyor's helpers are not covered by the *Fair Wage Act* and that this is confirmed in the *Contract Administration Policy and Procedures Manual* prepared for MOTH employees.

2. TNL claims that the Adjudicator fundamentally misconstrued TNL's written submissions and did not address the central issue before the Tribunal. In TNL's view the "central issue" which the Adjudicator failed to address is whether the Legislature passed legislation which has a retrospective effect and whether the *Fair Wage Act* applies to construction which takes place pursuant to a construction contract which was entered into before the *Fair Wage Act* was enacted. TNL submits that the application of the *Fair Wage Act* is set out in Section 3 and the language in that

section does not clearly state that the *Fair Wage Act* applies to contracts which were tendered prior to the enactment of the *Fair Wage Act*. TNL acknowledges that the Legislature may enact a statute that has retrospective application and interferes with vested rights (which TNL says is the effect of the *Fair Wage Act*). However, it says, there is a presumption that legislation does not do so unless there are clear words which indicate such an application or such an application is to be necessarily implied. The factors to be examined in deciding if retrospective application ought to be necessarily implied include the purpose and subject matter of the legislation, the nature of the harm the legislation was meant to remedy, the circumstances of the legislation's passage, and the nature of the rights potentially affected by the legislation.

In TNL's view the purpose of the *Fair Wage Act*, to mandate certain skill and wage requirements for certain publicly funded construction projects, is not nullified if the *Fair Wage Act* is held to only apply to projects contracted for after the *Fair Wage Act* was enacted. TNL argues that, contrary to the Adjudicator's finding, there was no mischief that needed to be remedied through a retrospective statute because, at the time the *Fair Wage Act* was enacted, all major publicly funded projects tendered prior to September 1, 1994 had the fair wage standards of the Fair Wage and Skills Development Policy (the "Policy") included in the construction contracts. When the Legislature passed the *Fair Wage Act* on third reading on June 1, 1994, the Policy was still in force and the "fair wages" the Policy had mandated had become incorporated into the terms of all major publicly funded construction projects up to the date the *Fair Wage Act* came into force. The subsequent declaration that the Policy was invalid cannot have any bearing on the intention of the Legislature at the time the *Fair Wage Act* was passed.

TNL also argues that the circumstances of the legislation's passage provide support to its position. Finally, TNL argues that the retrospective application of the *Fair Wage Act* will cause significant financial hardship to some contractors and it cannot be presumed that the legislature intended such a prejudicial effect in the absence of a clear expression of such intent.

3. TNL submits that new evidence has come to light indicating the Employment Standards Branch made representations to TNL to the effect that the *Fair Wage Act* did not apply to the Pine Pass Project. These representations were made after the *Fair Wage Act* was proclaimed and TNL relied on these representations to their detriment.

4. TNL submits that the Adjudicator erred in holding that the *Fair Wage Act* applies to work conducted outside the geographic limits of the construction site. TNL concedes that the *Fair Wage Act* does not specifically refer to an "off-site/on-site" distinction. However, TNL argues that the Policy, which it is submitted served the same purpose and function as the *Fair Wage Act*, did not apply to work done off-site, and the Tribunal should not have found the *Fair Wage Act* applicable to off-site work. In support of this assertion TNL quotes from a Ministry of Transportation and Highways Policy and a letter from a representative of the Ministry of Transportation and Highways with respect to the application of the Policy to off-site work. TNL submits that the application of mandated wages must be limited to ensure a "realistic application" of this type of program. In

further support, TNL points to differences between clarifications issued under the Policy and Section 2 of the Regulation promulgated under the *Fair Wage Act* that deals with deliveries of specific materials to construction sites. In TNL's view the provisions address a situation which is only relevant where there is a "site distinction". TNL also argues that the Ministry of Transportation and Highways believes the site distinction applies and that this distinction is clear from the wording of the preamble to the post-September 1994 contracts, from the Statutory Declarations which contractors and subcontractors are required to submit to the Ministry of Transportation and Highways; and from the policy manual prepared by Ministry of Transportation and Highways through consultation with the Employment Standards Branch. It argues that the latter document will, when published, specifically state that the *Fair Wage Act* does not apply to off-site work (at the time of submissions the policy manual was not yet available). Finally, TNL submits that if off-site workers who are somehow connected to major publicly funded construction projects are entitled to the mandated wages then the cost of publicly funded construction projects will increase astronomically.

5. TNL claims that the Demand Notice dated October 23, 1996 was for an amount which was subsequently discovered by the Director to be incorrect and the difference was refunded to TNL. TNL argues that the *Employment Standards Act* cannot authorize the effective garnishment of funds that are not owed to the Director. It takes the position that the Demand Order dated October 23, 1996 was of no force and effect and, upon becoming aware of the error, the Director should have refunded the full amount to the Ministry of Transportation and Highways along with a new demand for the correct amount. TNL acknowledges that this issue relates to the collection procedures undertaken by the Employment Standards Branch and does not relate to the merits of the Decision nor whether the Decision should be reconsidered. Nevertheless TNL notes that the Branch has not yet paid out the funds which are the subject of the impugned determination and asks that the Tribunal consider commenting on the correct collection procedure as authorized by law.

6. Lastly, TNL notes that the Determination named two companies (TNL Paving Ltd. and TNL Management Ltd.) as being in contravention of the *Fair Wage Act*. TNL further notes that Thompson was employed by these two "separate" companies at different times. Pursuant to the Demand Notice, the Director has garnished funds owing to TNL Paving Ltd. equal to the entire amount of the Determination plus interest. The effect of this is to hold TNL Paving Ltd. jointly and separately liable with TNL Management Ltd. TNL maintains that the Director cannot do this without specific statutory authority and without giving the affected corporations an opportunity to respond. As with Ground 5, TNL acknowledges that this issue does not relate to the merits of the Decision nor whether the Tribunal ought to reconsider the Decision. However TNL is of the view that the Branch has breached a basic tenet of procedural fairness in the purported application of Section 95 of the *Employment Standards Act* and asks that the Tribunal comment on this "procedural question".

The Director submits that the Tribunal should exercise its statutory power to reconsider with caution and not, as in this case, when the applicant is merely attempting to re-argue its case. The Director submits that TNL has failed to demonstrate that any of the grounds for reconsideration have been met and asks that the Tribunal uphold Decision BC EST No. D283/96.

With respect to the specific grounds raised by TNL the Director responds as follows:

1. The Director takes that position that the information received by TNL from the Ministry of Transportation and Highways is irrelevant to the Decision before the Tribunal. In any event, the Director questions the relevancy of any statement in an unpublished policy manual to the decision made by the Director in the Determination issued on May 24, 1996.

2. With respect to the issues of retroactivity and retrospectivity of the *Fair Wage Act*, the Director submits that even if the Adjudicator failed to characterize TNL's argument in a manner acceptable to TNL, the issue was clearly canvassed and decided upon by the Adjudicator. The Director supports the findings of the Adjudicator that the *Fair Wage Act* and accompanying regulations are not retroactive or retrospective. The effect of the *Fair Wage Act* is as stated by the Adjudicator, that is, it applies to all work performed on construction projects as of the date of its enactment on September 1, 1994 and the wage rates apply to all workers from the date of the statute's enactment. The Director argues that the interpretation of the legislation must reflect the legislative purpose and the Tribunal's application of the *Fair Wage Act* meets this requirement. Furthermore, the Director submits that section 3(1) of the *Regulations* (which provide for different schedules to apply to projects which were tendered during three periods between March 1992 through those tendered after September 1994) further support the Tribunal's determination that the *Fair Wage Act* applies to the Pine Pass Project. The Director sees no ambiguity in the statute which could lead to any other interpretation but that the *Fair Wage Act* clearly applies to projects where contracts were entered into prior to the enactment of the legislation. The Director acknowledges that the application of the Policy provisions clearly state the time frame for which it applies. However, the Director fails to see the basis in law for applying the Policy's application to the circumstances of the application of the *Fair Wage Act.*

3. With respect to the alleged "new evidence" the Director questions the evidentiary value of the assertion made by TNL, given that it was not made under oath and is subject to a myriad of interpretations which make it far from compelling. Second, even if there were clear guidelines set out by the Employment Standards Branch stating that the *Fair Wage Act* did not apply to the TNL project the Director maintains that as with policy manuals and interpretation guidelines in all areas of law, such guideline does not provide the authority upon which an action is done in light of statutory powers to the contrary. While not admitting to the commentary allegedly made, the Director submits that TNL has interpreted the comments to suit its view of the case and, even if accurate, are not determinative of the application of the *Fair Wage Act*. Likewise, TNL's submission with respect to lack of enforcement or compliance by other Ministries is, in the Director's opinion, not determinative of the application of the *Fair Wage Act.*

4. The Director submits that there is no merit in TNL's submission regarding alleged off-site work. The Director notes that the documents relied on by TNL were drafted prior to the enactment of the legislation and speak to the Policy only. Further, the commentary comes from a Ministry not mandated to administer the *Fair Wage Act*. As it did before the Adjudicator TNL merely repeats its assertion that approximately 30% of the complainant's time was off-site. Even if the Tribunal had accepted that the *Fair Wage Act* does not apply to off-site work, TNL has not provided the Employment Standards Branch or the Tribunal with any evidence in this regard.

5. With respect to the excessive interest calculation and collection procedures undertaken by the Branch the Director takes the position that the collection procedures are unrelated to the reconsideration and, therefore, it is inappropriate that they be reviewed under the guise of reconsideration. In any event, the Director takes the position that the Demand was and is legally effective despite the interest calculation error which, the Director notes, it has acknowledged, paid back and amended the Demand accordingly.

6. With respect to the final ground on the joint and several liability of the TNL companies the Director again submits that this issue is not related to the request for reconsideration and should not be considered by this Tribunal. If the Tribunal chooses to address the issue the Director takes the position that Section 95 gives the Employment Standards Branch the power to associate corporations. The "safeguard" in the process is to appeal the Determination to the Tribunal on the basis of no association and that was not done in this case. Furthermore, the Director takes issue with TNL's assertion that Section 95 provides no basis upon which the Director is to make a determination that corporations are associated. The wording of the statues itself, i.e. "common control or direction" and the wealth of case law on that phrase provide guidance to the Director.

Although invited to do so, Thompson made no submissions on the reconsideration application.

ANALYSIS

In *Harrison (Re*), BC EST No. D344/96, this Tribunal considered the permissible scope of review under section 116 of the *Employment Standards Act*:

> The Tribunal has issued several decisions regarding the permissible scope of review under section 116 of the Act: see *Zoltan T. Kiss* (BCEST # D122/96). The Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error in law. The reconsideration provision of the Act should not be a second opportunity to challenge findings of fact made by the adjudicator, especially when such findings follow an oral hearing, unless such findings can be shown to be as lacking in evidentiary foundation.

Each of the issues raised by TNL on review will be considered in its turn.

Issue 1. - Does the *Fair Wage Act* apply to Thompson's employment on the Pine Pass Project?

TNL says that the *Fair Wage Act* does not apply to Thompson's employment because he was a "rod man (surveyor's helper)". It supports this argument by referring to an unpublished policy of the Ministry of Transportation and Highways ("MOTH") prepared for its own employees.

TNL did not raise the issue of Thompson's status before the Adjudicator. To do so now would require it to provide a compelling reason. It has not done so as an interpretation of the *Fair Wage Act* by the Ministry of Transportation and Highways for its own employees is not determinative of the issues which were before the Adjudicator.

This ground for review fails.

Issue 2. - Did the Adjudicator fundamentally misconstrue TNL's written submissions and fail to address the central issue before the Tribunal?

TNL's submissions on this point are comprehensive and well argued. However, TNL has not established a basis for reconsidering the Decision on this ground. Whether or not the Adjudicator framed the issue in the same way as TNL would frame it, a review of the Decision discloses that he clearly addressed the central issue in dispute. He found that the *Fair Wage Act* was prospective legislation. This resolved the issue before him. In making this finding, the Adjudicator made no error in interpretation of the statute, and this ground for appeal must fail.

Issue 3. - Will the reconsideration panel admit new evidence of representations allegedly made by an Employment Standards officer to TNL, upon which TNL relied?

TNL submits that an officer of the Employment Standards Branch made representations about the applicability of the *Fair Wage Act* prior to its entry into the Pine Pass contract. It says that TNL relied on those representations to its detriment.

In order to assess this aspect of the application on its merits, it would be necessary to call an evidentiary hearing. This could have been done at the time of the original appeal if the parties had identified material issues of fact which were in dispute. TNL did not raise this evidence in its appeal and has not explained in its reconsideration submissions why it has done so only now. In the absence of compelling reasons for entertaining this new allegation on reconsideration, this ground must fail.

The ground would fail even if it had been raised in a timely manner and considered on its merits. The evidence which TNL seeks to adduce is, on its face, of little apparent relevance to the issue of the

interpretation of the *Fair Wage Act*. It involves what appears to be an allegation of a *failure to warn* on the part of an Employment Standards Branch officer prior to TNL's entry into the Pine Pass contract. The evidence itself is equivocal. At best, the evidence might establish that an officer of the Employment Standards Branch passed along a Branch interpretation of relevant legislation to an interested person who, at the time, was not a party to proceedings under the *Employment Standards Act*.

The Employment Standards Branch administers many important aspects of the *Act*, and in the course of doing so interprets and explains its provisions to persons with whom it comes into contact. As a guide to employers and employees in British Columbia, it publishes *Interpretation Guidelines*, which are now available to the public on the Internet. However, its guidelines are simply that – guidelines and not binding interpretations of law or policy.

Clearly, as a matter of public confidence, the Branch will wish to ensure that its policies and guidelines are carefully considered and clearly expressed. However, if a dispute or question arises about the proper interpretation of the *Act*, this is a matter which stands to be resolved on the language and policy of that *Act* itself and within the framework for adjudication set out in the legislation.

This ground fails.

Issue 4. - Did the Adjudicator err in holding that the *Fair Wage Act* applies to work conducted outside the geographic limits of the construction site?

Again, TNL relies on new evidence to support its argument that the Adjudicator has erred. The evidence which it alleges is not new evidence at all, and it has provided no explanation, compelling or otherwise, why the evidence should be considered at this stage of the proceedings. As the Director has argued, the documents relied on by TNL were drafted prior to the enactment of the legislation and speak to the Fair Wages Policy only. Further, the commentary comes from a Ministry not mandated to administer the *Fair Wage Act*. There is no basis for considering this new evidence in the course of reconsideration.

The argument on the merits was fully argued before the Adjudicator and decided by him. The Adjudicator made no fundamental error of law in his interpretation decision on this matter. This ground fails.

Issue 5. - This issue involves TNL's request for the reconsideration panel to comment on the correct collection procedure as authorized by law.

TNL's comments about the error in the Branch's Demand Notice in terms of quantum are not part of its appeal. It is clear that in the exercise of its authority under s. 89, the Employment Standards Branch would be expected to act with proper care and attention. It appears that the demand for an incorrect amount resulted from a genuine error and that speedy rectification of the error was made. There is no

basis on reconsideration to provide any further comments on this matter.

Issue 6. - TNL's request for the reconsideration panel to comment on the allegation that the Branch has committed a breach of fundamental justice in treating the two TNL companies as the same company for the purposes of the Demand Notice.

Section 95 of the *Employment Standards Act* provides that the Director may treat two or more entities as one person for the purposes of this *Act*:

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

TNL alleges that the Director has applied this section without providing it with an opportunity to address the matter. A partial review of the lengthy file documentation on this matter discloses that the two entities were treated as the same entity for the purposes of the Thompson complaint from the outset. However, it was not only the Branch which treated the two companies in this way. TNL's own submissions made no distinction between the two companies in the critical area of liability. TNL referred to the individual companies from time to time during its submissions, and even itemized the amounts paid and owing by each, but always dealt with the issue of quantum as a global amount owing. The following history is illustrative:

1. Thompson's Complaint was registered against TNL Management Ltd. Nevertheless, the Complaint made allegations of fact which embraced addressed Thompson's employment with both TNL companies.

2. In its letter of December 14, 1995, TNL's lawyers referred to the proceeding as "Doug Thompson and TNL Paving Ltd." Despite the absence of TNL Management Ltd. from the style of proceeding, TNL's letter went on to address the case in the context of Thompson's entire employment, which embraced periods of employment with both companies. The submission did not suggest that the companies had potentially separate liabilities. It described its arguments by speaking of "TNL's" position when referring to the position of the two companies.

3. On February 26, 1996, the Employment Standards Officer wrote to TNL's lawyers. The reference was now "Complaint by Doug Thompson against TNL Paving Ltd.". The letter advised of the officer's calculations indicating a balance owing of $15.385.95 for work performed during a period

which embraced Thompson's employment with both companies.

4. By the time of the letter of March 29, 1996 from TNL's lawyers, the style of proceeding now read: "Employment Standards Act Complaint by Doug Thompson". The letter went on to set out "TNL's position" without distinguishing between the two companies in terms of liability. In the body of the letter, TNL's lawyers identify the start dates of Thompson's employment with TNL Paving Ltd. and then TNL Management Ltd.. However this is done simply to persuade the Branch to revise its overall damages calculations. At no time does the submission suggest that separate awards are required for the two companies. No distinction in that sense is made between them.

5. The Determination was issued May 24, 1996 against "TNL Paving Ltd. and TNL Management Ltd." The determination included a finding that "the above-named person" had contravened the statutes in question (emphasis added). The Reason Schedule attached to the Determination again identified the name of the employer as "TNL Paving Ltd. and TNL Management Ltd." There was a single employer number assigned (15112). In the course of the reasons, the term "TNL" was used to describe the two companies collectively without distinction. The Reasons went on to state as undisputed facts that "Thompson was employed from June 6, 1995 to October 15, 1995 and paid under TNL Management. From October 16, 1995 to November 6, 1995 he was paid under TNL Paving."

   The balance of the reasons again used the term "TNL" to describe the combined operations without distinguishing between them. When calculating the amounts owing, once again no distinction was made between the two companies, although each had paid Thompson at slightly different rates and had employed him at different (although contiguous) times. It is clear from a review of the Determination that the Branch was treating the two companies as being a single entity for the purposes of the *Act*.

6. When TNL appealed on June 14, 1996, it described its *full name* on the applicable form as "TNL Paving Ltd. and TNL Management Ltd." There was no mention in the appeal of any issue concerning the identification of the employer, or, more specifically, that the two companies were being incorrectly treated as one. The two companies used the same lawyers throughout and were treated in the correspondence as one entity.

7. In its letter of July 18, 1996, the lawyers for TNL provided full reasons for the appeal. By now, they had as well adopted a style of proceeding that included both "TNL Paving Ltd. and TNL Management Ltd." Their correspondence stated that they were counsel to both companies and that the two would be "hereafter collectively referred to as "TNL". The letter went on to set out a clear statement of payments and entitlements in respect of the individual companies but returned at the end of the submission to a global figure of $8,010.16 owed to Thompson (assuming anything was owed at all).

8. A subsequent letter from TNL's representatives dated August 16, 1996 addressed two specific issues: (1) off-site work and (2) benefits received by Thompson while employed with TNL Management Ltd.. Although the submission dealt extensively with Thompson's work only with TNL Management Ltd., it made no request to the Tribunal to address each company as a separate entity in the decision-making process.

9. The submissions of the Director in the course of the appeal followed TNL's lead and did not distinguish between the two companies insofar as liability was concerned. They also referred to the companies collectively as "TNL".

10. The Director then issued a Demand Notice in the names of both companies. It was at this point that TNL's lawyers wrote on November 6, 1996 to voice concerns about the separate character of the companies, arguing that each should be responsible for its own contravention of the *Act* (if any). This is the first time this had ever been raised in the proceedings.

Having recited this history, it is apparent that from an early stage in the proceedings the Officer treated the two companies as being one entity for the purposes of the *Act*. TNL did not raise any issue at the material times respecting this characterization. In fact, its own correspondence may appear to have encouraged such a characterization, dealing as it did with both companies under the rubric of "TNL". Although the Determination was issued against both companies without distinguishing individual liabilities, TNL did not raise this as an issue on the appeal. In short, there is nothing in the proceedings prior to TNL's letter of November, 1996 which suggests any issue regarding the corporate connections between the two companies.

As this issue is not part of the formal grounds for reconsideration, the following observations represent commentary only and do not represent an adjudication on the issue of the proper process in cases involving more than one potential employer. This panel was not asked to render an adjudication on this issue and does not purport to do so here. However, the following comments may provide some guidance to the parties.

On a review of the history, it is this panel's view that TNL was not denied due process on this issue. It was or should have been apparent from the earliest stages of the proceeding that the Branch was treating the two companies as the same entity. It is conceivable that TNL did not advert to the consequences which flow from such a determination until those consequences were made apparent by the Demand Notice. By virtue of s. 95 (b), the entities treated as a single entity are jointly and separately liable for payment of the amount stated in a determination. Having said that, the file history reviewed earlier discloses that the relatedness of the companies was never in doubt until after the issuance of the Demand Notice. At that point in the proceeding, after the Determination and after Adjudicator Stevenson's Decision, the issue was no longer open for review.

Although it is this panel's view that TNL was not misled on this issue, it will be prudent for Branch officers who intend to treat two or more entities as one entity for the purposes of the *Employment Standards Act* to advise parties specifically of this intention and provide them with an opportunity for reply. At the time of issuance of the Determination, the officer should make a specific finding in the Determination that the two or more entities are being treated as one entity under s. 95 of the *Act*. This will serve to alert all parties in an express way and safeguard against the possibility that parties will be denied due process on this issue.

ORDER

283/96.

John McConchie
Adjudicator
Employment Standards Tribunal

JLM:jel