BC EST #D522/97
Reconsideration of #D007/97

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 -

Rescan Environmental Services Ltd.

("Rescan")

of a Decision issued by

The Employment Standards Tribunal
(the "Tribunal")

PANEL:	Geoffrey Crampton Norma Edelman Lorna Pawluk
FILE NO.:	97/491
DATE OF DECISION:	November 7, 1997

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DECISION

OVERVIEW

This is a reconsideration under Section 116 of the *Employment Standards Act* of Decision #D007/97 (the "Original Decision") which was issued by the Employment Standards Tribunal on January 6, 1997. That Decision confirmed Determination #CDET 3562 issued by the Director of Employment Standards ("Director") on August 7, 1996. The Adjudicator concluded that Section 80 of the *Employment Standards Act* R.S.B.C. 1996, c.113 ("new *Act*") and not the *Employment Standards Act*, S.B.C. 1980, c. 10 ("old *Act*") applied to permit Janet Freeth ("Freeth") to recover unpaid overtime .

Rescan seeks a reconsideration of the Original Decision on the grounds that the Adjudicator erred in law in interpreting section 80 of the new *Act.*

ISSUE TO BE DECIDED

The issue is whether this panel should allow a reconsideration from the Original Decision under section 116 of the new *Act*.

FACTS

Freeth was employed by Rescan as a geologist from June 9, 1992 until her resignation on July 14, 1995. During that period she worked overtime for which she was not paid. Upon leaving Rescan, she sought payment; Rescan offered to pay for 6 months which was the maximum period under section 80 of the former *Employment Standards Act*. Freeth would not accept this sum as final payment for Rescan's obligations. Further negotiations between the parties did not resolve the dispute.

The new *Act* came into effect on November 1, 1995 and on November 14, 1995 Freeth filed a complaint with the Director of Employment Standards, alleging non-payment of overtime, for 24 months under section 80 of the new *Act*:

> *80. The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning*
>
> *(a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment, and*

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

On investigating the complaint, the Director's delegate concluded that the new *Act* applied to the dispute, so that Freeth was owed for 24 months overtime. Determination #CDET 3562, dated August 7, 1996, ordered Rescan to pay Freeth $16,547.65, representing $14,643.50 unpaid wages and $821.64 interest from November 1, 1995 to the date of Determination. It is common ground between the parties that Freeth is owed $1,082.51 if the old *Act* applies and an additional $14,643.50 plus interest if the new *Act* applies. (The former sum has been paid by Rescan and held in trust by the Director.)

Rescan appealed the Determination to this Tribunal and in the Original Decision the Adjudicator concluded that the new *Act* applied to the dispute and thus confirmed Determination #CDET 3562. Rescan now seeks reconsideration of the Original Decision.

ANALYSIS

Rescan brings its application on the grounds that the Adjudicator erred in law by finding that:

1. Rescan's statutory obligations to Freeth regarding overtime work would have been no different under the new *Act* than under the old *Act*;

2. the language of the new *Act* expressly or by necessary implication rebuts the presumptions in favour of protection of Rescan's vested rights under the old *Act*; and

3. the Director has the power under section 80 of the new *Act* to collect overtime wages owing to Freeth during the last 24 months of her employment with Rescan.

On behalf of Rescan, Mr. Thorne argues that the correct standard for review is "correctness" and that the Adjudicator made a serious mistake in applying the law. Mr. Thorne further submits that neither Section 128(2) nor Sections 128(3) apply to the Freeth complaint as it was not filed before the repeal of the old *Act* and there is no provision in the new *Act* to deal with a complaint arising out of events which occurred before it came into force. He also argues that "fairness of the outcome in the specific circumstances" is a primary consideration in determining Legislative intent that the new *Act* applies retroactively. He submits that since Rescan had offered to pay Freeth for 6

months in keeping with its obligations under the former *Act*, it is arbitrary or unfair to interfere with Rescan's reliance on vested rights under the old *Act*. Rescan cites several provisions which changed in 1995 as examples showing that section 80 does not apply retroactively:

> Under the Old *Act*, employees covered by collective agreements were not entitled to statutory holiday pay. Under the New *Act* they are. If an employee filed a complaint under the new *Act* on November 1, 1995, then the Adjudicator's decision would mean that the employer must be found liable for the statutory holidays during the two preceding years. This clearly could not have been the "necessary intendment" of the Legislature.

We are urged to consider the effect of a "retroactive" application of s. 80 on the obligation of the directors who discharged their liability under the old *Act.* Finally it is argued that since the new *Act* does not apply retroactively, the Director lacks the jurisdiction to compel payment of 24 months of wages under s. 80 of the new *Act.*

On behalf of the Director of Employment Standards, Ms Hunt objects to this application for reconsideration on the basis of delay, saying no explanation has been offered for a five and a half month delay in filing. On the substantive arguments, she argues that the new *Act* has not changed the obligation to pay overtime, only the period for which the Director has the power to recover unpaid wages; thus, it is not retroactive. Further she argues that there is no need for a transitional provision such as s. 128(2) and (3) as the new *Act* applies to both the complaint and the remedies. In response to Rescan's arguments about fairness, the Director argues that it must favour the complainant who did not receive the overtime wages mandated by the statute. She notes that the Thompson report identified a number of inequities which arise because of the expansion of the recovery period and suggested a phasing in period to deal with some of these problems; nevertheless, the Legislature did not adopt this suggestion. Finally, she urges this panel to uphold the Original Decision.

On behalf of Freeth, Mr. Gibson also objects to the timeliness of this application and urges this Tribunal to exercise its discretion to dismiss the application. He notes that one of the purposes of the *Act* is to provide a fair and efficient procedure of resolving disputes over interpretation and application of the *Act*, so that the Tribunal's reconsideration power should be exercised with great caution. Finally, he argues that the reconsideration grounds provided by the employer here are "nothing more than a rehashing of the arguments" that were rejected by the Adjudicator in the Original Decision. Mr. Gibson submits that the reasoning in the Decision dealt correctly with the employer's appeal. He argues that the overtime requirements in both statutes are identical and that the employer violated the old *Act* throughout Freeth's employment by failing to pay overtime wages. Mr. Gibson asserts that the employer cannot now seek protection of section 80 of the repealed statute. He points to the British Columbia Court of Appeal decision in

MacKenzie v. B.C. Commissioner of Teachers' Pensions (1992), 69 B.C.L.R. (2d) 231 which endorses the following principles on retroactivity:

> 1. A retroactive statute is one that changes the law as of a time prior to its enactment.
>
> 2(1). A retrospective statute is one that attaches new consequences to an event that occurred prior to its enactment.
>
> 2(2). A statute is not retrospective by reason only that it adversely affects an antecedently acquired right.
>
> 3. The presumption does not apply unless the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability or duty.
>
> 4. The presumption does not apply if the new prejudicial consequences are intended as protection for the public rather than as punishment for a prior event.

He points out that in *Gustavson (1964) Drilling Ltd. v. M.N.R.*, [1977] 1 S.C.R. 732, the Supreme Court of Canada decided that the presumption against retroactivity does not apply if the amending statute expressly, or by necessary implication, applies to transactions which occurred prior to its enactment; here ss.128(2) and (3) make this "crystal clear". He notes that the Tribunal has previously decided that the new *Act* is to be interpreted retrospectively. (*Burnaby Taxi* BCEST #D091/96; aff'd BCEST #D122/96 and *Harrison and Lander* BCEST #D224/96.) Alternatively, Mr. Gibson argued that the "presumption against retrospectivity" does not apply since the substantive provisions of both acts are the same and because the new *Act* imposes no new penalties on the employer for failing to pay overtime. Further he argues that the presumption does not apply because the period for which unpaid wages can be collected (and which was increased from 6 to 24 months) was clearly intended for public protection and not as punishment for employers. Further, he submits that the presumption applies only to the substantive and not procedural aspects of a statute. He also argues that section 36(1) of the *Interpretation Act* applies.

Mr. Gibson says that section 128(3) shows that the Legislature intended the new *Act* to apply retrospectively: under s. 128(3), the new *Act* would apply if Freeth had filed her complaint prior to November 1, 1995; thus it is "nonsensical" to argue that the new *Act* cannot apply because Freeth filed her complaint after November 1, 1995. Moreover, the complaint was filed within 6 months after the last day of her employment as provided in both statutes. The employer argued that it had structured its affairs in accordance with the old *Act* and thus should not now have to pay Freeth for 24 months of overtime.

Mr. Gibson responds by saying that "the Employer chose to structure its affairs throughout Ms Freeth's employment by failing to pay overtime" owed under the former *Act*. It thus "assumed the risk throughout that it would be found liable to pay those wages". Under both statutes, the employer was required to pay Freeth overtime; the new *Act* simply extends the recovery period from 6 to 24 months.

Mr. Gibson also argues that Freeth is not barred from filing a complaint under the new *Act* because of her actions between July 24 and November 1, 1995. He points out that during that period, the parties continued to disagree about the amounts owed and Freeth could have filed a complaint at any time prior to November 1, 1995. Mr. Gibson calls the argument about the liability of corporate officers "a red herring" since there has been no change in the substantive obligation to pay overtime and since the new *Act* "clearly provides for retrospective application". Finally, he describes Rescan as a "solvent company" that can meet its obligations so that officer liability is not at issue.

In final reply, Mr. Thorne submits that the events preceding the filing of a reconsideration application shows that all of the parties were aware that Rescan wished to seek review of the Adjudicator's decision and there has been "absolutely no prejudice" to any of the parties to this reconsideration application. Moreover, factual matters have not been disputed, only matters of statutory interpretation.

Before proceeding on the merits of this application, this panel will deal with two preliminary issues. The first is the objection to the timeliness of the application. Both Ms Hunt and Mr. Gibson ask this panel to dismiss the application on the ground that it was not brought in a timely way. We agree with Mr. Thorne that all of the parties were aware of their inability to settle this matter to their mutual satisfaction and that discussions were ongoing. Freeth knew that Rescan was unhappy with the Original Decision as Rescan had filed the initial documentation necessary for judicial review but later withdrew it and applied for this reconsideration. We see no prejudice to Freeth in the length of proceedings, beyond her failure to receive additional sums owing and find that this is not grounds to dismiss this application.

The second preliminary matter concerns the standard of review that will be employed by this panel. Section 116 of the *Act* gives this Tribunal the power to reconsider its decisions:

> *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 be made only once with respect to the same order or decision.*

The reconsideration power under section 116 of the *Act* is not unlimited; it will be exercised in certain circumstances. This power was considered at length by this Tribunal in *Zoltan Kiss* (BCEST #D122/96) which set out typical instances where the Tribunal will allow a reconsideration application:

- failure by the Adjudicator to comply with the principles of natural justice;
- there is some mistake in stating the facts;
- failure to be consistent with other decisions which are not distinguishable on the facts;
- some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- a serious mistake in applying the law;
- some misunderstandings of or a failure to deal with a significant issue in the appeal;
- some clerical error exists in the decision;

Mr. Thorne argues that this decision sets out an incorrect standard for review under section 116 and that "correctness" is the standard of review on reconsideration. We reject this argument and reiterate the principles in *Zoltan Kiss*. To allow this application, we must be satisfied that the Adjudicator made a "serious mistake in applying the law" in deciding that Freeth was entitled to collect unpaid overtime under the provisions of the new *Act* when the overtime was earned during the currency of the old *Act*.

The Original Decision relied heavily on Driedger, "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar Rev. 264. Using this article as the point of departure for the analysis, the Adjudicator reasoned that this case did not involve "any question of retroactivity" as the new *Act* did not change the law respecting overtime payments. Rather, it involved an issue of retrospectivity:

> On its face, s. 80 of the new *Act* permits a claimant to use the provisions of the *Act* to recover unpaid wages which became payable in the (sic) in the

> period beginning 24 months before termination. Section 80 does not deal expressly with the issue of retrospectivity – it does not distinguish between wages which became payable before or after the introduction of the new *Act.* The critical issue in this case is whether the new *Act* provides that claims filed under s. 80 may reach back 24 months even if part or all of this period is prior to November 1, 1995.

The Adjudicator characterized Rescan's status under the former *Act* as vested which in turn triggers the presumption against retroactivity. He also concluded that the right would be vested, within the meaning of section 35 of the *Interpretation Act* but that section 128(3) of the new *Act* rebutted the presumption against interference with vested rights:

> 128(3) If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act.

The Adjudicator identified an anomaly in the legislation which would have placed an employee who files a claim under the new *Act* in a worse position than someone with an identical claim who filed a complaint under the old *Act.* He noted:

> The very purpose of s. 128(3) is to put both classes of claimant in precisely the same situation. It is true, as Rescan argues, that Freeth cannot bring herself within the transitional language of s. 128(3). However, she need not do so. It is only the claimant whose complaint is already before the Employment Standards Branch under the old *Act* who needs the assistance of the transitional provisions. A claimant filing under s. 80 of the new *Act* is on the face of the provision, entitled to claim 24 months unpaid wages. There is no need for transitional language, although the language of s. 128(3) makes the legislative intention as a whole entirely clear. The objective of the Legislature was to make the liberal provisions of s. 80 available to complainants who were owed wages and whose claim had not been the subject of a decision under the old *Act.*

It is from this analysis that Rescan seeks reconsideration.

Retroactive changes in the law are thought to be unfair and arbitrary because they tamper with future plans and anticipated results; at common law, legislation is presumed not to apply retroactively unless such an intention is necessarily required express provisions or is necessarily implied. It is a strong presumption that may be displaced by only the

clearest expression of legislative intention. Retroactive application of legislation can result from express provisions which provide for operation on a date prior to the coming into force; for example, a statue passed in 1997 expressly states that it is operative as of 1995. "Retroactive" legislation can also arise from application of the legislation; this is type of retroactivity at issue here.

The Adjudicator distinguished between "retroactive" and "retrospective" legislation, like many courts and academic commentators: whereas "retroactive" referred to legislation which altered the past law, "retrospective" described legislation whose effect was prospective but which impaired existing rights. *Cote on The Interpretation of Legislation in Canada (2d)* (*"Cote"*) does not make this distinction, using retroactive to describe both situations. Professor Ruth Sullivan in *Driedger on the Construction of Statutes* (1994) (*"Driedger")* noted that the distinction between the two concepts was inconsistently applied by the courts and academic commentators and that this lead to confusion. Thus, the most recent edition of *Driedger* uses "retroactive" to refer to both retroactive and retrospective provisions; we will do the same.

The test for "retroactivity" was set out by Dickson, J. in *Gustavson*, *supra*, at 279-280:

> An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively [retroactively]. Superficially the present case may seem akin to the second instance but I think the true view to be that the repealing enactment in the present case, **although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time**. The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; **it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date**. The effect, so far as the appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of the amending statute. **(emphasis added)**

The Supreme Court of Canada considered whether a 1962 statute could affect the tax consequences of a sale which had taken place in 1960. The sale agreement had given one of the parties the right to make certain deductions but this right was taken away by the subsequent legislation. A majority of the Court found that the latter provision was not retroactive as it did not purport to alter the right to take these deductions prior to 1962, only subsequent to it. Although it affected the past in the sense that the consequences of a past transaction were altered as of the date of the legislation, it was not retroactive because it did not alter the status of deductions that were made in the past.

In order to determine if section 80 of the new *Act* reaches into the past and changes the law as it was, it is first necessary to determine when the relevant facts occurred. Both *Cote* and *Driedger* suggest a three stage analysis: identifying the relevant facts, situating the facts in time and applying the test. (*Cote* at 118). The first stage identifies the facts "that trigger the operation of the statute" (*Driedger* at 514) The second stage classifies facts as they occur in time. Fact patterns may be ephemeral, continuing or successive. A fact situation is ephemeral if the facts begin and end in a short period of time, as in the case of a single action or event. Continuing facts exist over a period of time and include such conditions as residency or ownership. Successive facts consist of facts, whether ephemeral or continuing, that occur at separate times and do not end until the final act in the series is complete. As noted in *Driedger*:

> An application is not retroactive unless *all* of the relevant facts were past when the provision came into force. . . . In the case of a provision that attaches legal consequences to successive facts, the provision is not retroactive unless the final fact in the series has ended before commencement. (at p. 514)

In this case, the pattern emerges as one of successive facts, beginning with the overtime worked between June 9, 1992 and July 14, 1995 and ending with the filing of the complaint on November 14, 1995 under section 80 of the new *Act*:

> *80. The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning*
>
> *(a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment, and*
> *(b) in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination*
> *(c) plus interest on those wages.*

When Freeth filed the complaint, the last event in the sequence, the successive fact pattern was complete. This conclusion is reinforced by the legislative context, in particular sections 128(2) and (3), the transitional provisions:

> *128(2) If, before the repeal of the former Act, a decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the remedy, review, appeal, enforcement and other provisions of that Act continue, despite the repeal of that Act, to apply to the complaint to all subsequent proceedings in respect of the decision.*

> *128(3) If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act.*

Complaints filed before the change in the law, but unresolved or undetermined by the Director, fall under subsection (3) and by its provisions are subject to the new *Act.* Complaints filed before the change in the law and completed by the Director, remain under the old *Act*, as called for by subsection (2). (This means, for example, that an appeal of an order or a certificate under the old *Act* would be governed by the substantive provisions of the old *Act*.) If the filing of the complaint does not trigger rights under section 80 of the new *Act*, section 128(2) is redundant. Thus, the filing of the complaint is the critical point in this analysis.

By the reasoning in *Gustavson, supra*, there is no retroactive aspect to this case unless the provision reaches into the past and alters the law as it was. By this test, the provision would be retroactive if it reached back to section 80 applications filed prior to November 1, 1995 and permitted those applications to be brought for 24 rather than 6 months of unpaid wages. (As we can see, for this to happen, the Legislature enacted section 128(3) which specifically deals with unresolved applications prior to November 1 1995; this provision would not have been necessary if section 80 was intended to operate retroactively.) This does not occur here; thus it is not retroactive.

Characterizing the new *Act* as having immediate rather than retroactive application is reinforced by the reasoning of the Supreme Court of Canada in *A.G. of Quebec v. Expropriation Tribunal* [1986] 1 S.C.R. 732. There the court considered a 1973 provision in the *Expropriation Act* and whether it applied retroactively to an expropriation initiated by the government in 1970 and which the government attempted to discontinue in 1979. According to the 1973 provision, the expropriation could be discontinued only with the authorization of the Expropriation Tribunal; prior to this, such authorization was not necessary. The court found that since all of the relevant facts were not in the past when the amendment came into force, the provision was not retroactive but rather was one of immediate effect. As Chouinard, J. noted: "[a] distinction must be made between the retroactivity of legislation and its immediate effect". Like that case, the facts here spanned the currency of the old and new acts, and here, as there, the provision is not retroactive.

Counsel for Rescan cited *MacInnis v. Saskatchewan (Department of Labour Standards) (1993) 44 C.P.C. 381* (Q.B.) as an example of a decision which limits the period of wage recovery under employment standards legislation and which characterizes the provision as substantive and therefore not to be applied retroactively. We do not find that this decision assists the employer's argument. *MacInnis* arose from a claim filed on

November 17, 1994 by certain employees for unpaid wages earned prior to February 23, 1993. On August 1, 1995, the province passed legislation limiting a claim for unpaid wages to one year from the last day the payment was to be made. The question was whether the recovery period was limited by this amendment, and the court found that it did not. After reciting the law as outlined in *Gustavson* relating to the presumption against retroactivity and the presumption against interference with vested rights, the Court summarily dismissed the suggestion that the provision was retroactive: "There is nothing in *The Labour Standards Amendment Act, 1994*, which expressly states that s. 68.4 shall have retroactive effect". (at 389) As far as the Court was concerned, the critical question was whether the employee's rights to collect the wages had vested:

> The courts must in each case, decide whether the individuals' claim was, at the time of repeal, sufficiently defined and developed, and sufficiently in his or her possession to count as a vested right . . .
>
> The two criteria enunciated by Vancise J.A. in *Scott v. College of Physicians & Surgeons (Saskatchewan)* (1992), [1993] 1 W.W.R. 533 (Sask. C.A.) to determine whether the respondent possessed a "vested" right clearly exist: they have to place themselves in a distinctive legal position, and the right (to recover unpaid wages) was acted upon. As is pointed out in *Driedger* at p. 532, the courts have established a right will not be defeated simply because all procedural steps required to enforce the right have not been taken prior to repeal. (at 389)

The issue of whether the right to collect wages was substantive was not canvassed by the Court. Rather, the judgment concentrated on whether the employees had a vested right after their claims had been assessed by the Director of Employment Standards, and the Court found that they did.

The court in *Gustavson* concluded that even though a statute is not retroactive it may, nevertheless, affect vested rights:

Second, interference with vested rights. The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: *Spooner Oils Ltd. V. Turner Valley Gas Conservation Board* [1933] S.C.R. 629 at p. 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions. It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights . . . No one has a vested right to continuance of the law as it stood in the past . . . . (at 282)

Section 35 of the *Interpretation Act* embodies this presumption against interference with vested rights:

> *35 (1) If all or part of an enactment is repealed, the repeal does not*
>
> *(a) affect a right or obligation acquired, accrued or accruing or incurred under the enactment so repealed.*

Cote distinguishes between the presumption against retroactivity and the presumption against interference with vested rights:

> The two presumptions can also be distinguished by their weight. The presumption against retroactive operation of statutes is an extremely strong one, and the courts expect Parliament to express any contrary intent very clearly. By its very nature, retroactivity is and must be exceptional. Impairment of "existing" rights on the other hand, is rather common. . . . Thus, the rule against retroactive operation of statutes is far stronger than the presumption of non-interference with vested rights . . . (at 106)

To determine whether vested rights exist, *Cote* suggests that the rights:

> not only . . be concrete and tangible but that they attain a sufficiently individualized and materialized degree to justify judicial protection.
>
> At what moment does this take place? This is a delicate question, and often little more than a guess can suggest where the judge will draw the line between vested rights and simple expectations. . . . A tort or delict instantaneously gives birth to the right to compensation. Proceedings may ensure, but they will only help realize the debt, they do not create rights, nor do they give them "vested" or "acquired" status. . . .
>
> Often a statute requires that the individual apply to an administrative agency in order to create or exercise his rights. Three steps are involved: application, study by the agency, and decision. Although generalizations are hazardous, it seems that problems will arise only if the statute is amended during the process of study by the agency. As long as the application has not been made, the individual has no more than an expectation, and this can be swept away by legislative amendment. On the other hand, if the administrative body has rendered its final decision, the courts will generally hold that the right in question has been fully constituted and is not affected by a new statute. (at 146-147)

The Adjudicator characterized Rescan's rights as vested and thus subject to the protection of both the presumption against interference and section 35 of the *Interpretation Act*. On this point, we note the employee and not the employer had the "right" to file a complaint and to be paid for overtime worked under both *Act*s. The Adjudicator also concluded that the presumption against interference with vested rights was rebutted by section 128(3). Regardless of whether we agree that Rescan had a vested right to pay Freeth for 6 rather than 24 months of unpaid overtime, we agree with the Adjudicator that section 128(3) rebuts the presumption.

Mr. Thorne argued that it is unfair to alter the employer's obligations to pay overtime by recognizing Freeth's right to collect 24 rather than 6 months of unpaid overtime. He maintains that Rescan arranged its affairs in reliance on the 6 month payment period so that it would be unfair and inequitable to find that the new provision applies. With respect, we must reject this argument; the equities in this situation clearly rest with Freeth. Rescan has been obliged to pay Freeth overtime throughout, under the new and old *Act*s. The only change is in the period of time available to Freeth to collect unpaid wages: rather than being limited to 6 months under the old *Act* she can exercise her rights under the new *Act* and receive payment for overtime over 24 months.

Mr. Gibson argued that this matter is governed by section 36(1) of *Interpretation Act*:

> 36(1) If an enactment (the "former enactment") is repealed and another enactment (the "new enactment") is substituted for it, ...
>
> (c) the procedure established by the new enactment must be followed as far as it can be adapted in the recovery or enforcement of penalties and forfeitures incurred under the former enactment, in the enforcement of rights existing or accruing under the former enactment, and in a proceeding related to matters that happened before the repeal

We note that this provision was not considered by the Adjudicator in the first instance who considered section 35 and its impact on Rescan's vested rights; thus we will not comment on this point further, except to say that section 36 does not alter the interpretation of rights set out here.

Finally, there has been comment on the impact of this decision on the liability of corporate directors, with Mr. Thorne arguing that it should be a consideration in these deliberations and Mr. Gibson saying it is not relevant since Rescan is a solvent company. Like the Adjudicator, we decline to comment on this hypothetical question.

ORDER

Under section 116 of the *Act,* we confirm the Original Decision (BCEST #D007/97).

Geoffrey Crampton
Chair

Norma Edelman
Registrar

Lorna Pawluk
Adjudicator