Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Director of Employment Standards
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

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

ADJUDICATOR: Kenneth Wm. Thornicroft, Panel Chair
Norma Edelman
Frank A.V. Falzon

FILE No.: 2001/509

DATE OF DECISION: November 14, 2001

DECISION

OVERVIEW

The Director of Employment Standards (the "Director") applies, pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), for reconsideration of an adjudicator's decision issued on March 13th, 2001 (B.C.E.S.T. Decision No. D123/01). The adjudicator cancelled a determination issued by a delegate of the Director on October 17th, 2000 (the "Determination").

By way of the Determination, a Director's delegate concluded that certain provisions of a collective bargaining agreement between Rand Reinforcing Ltd. ("Rand") and the Canadian Iron, Steel and Industrial Workers' Union, Local No. 1 (the "Union") did not "meet or exceed" certain specified provisions of the *Act.*

THE "MEET OR EXCEED" PROVISIONS OF THE *ACT*

Section 4 of the *Act* states that agreements that purport to waive the minimum provisions of the *Act* are "of no effect" subject to sections 43, 49, 61 and 69; these latter sections allow for some flexibility in the case of a unionized workforce. In each case, if certain provisions of a collective bargaining agreement "when considered together, meet or exceed" the comparable provisions of the *Act*, the former provisions will apply. On the other hand, if the collective agreement provisions, considered collectively, do not "meet or exceed" the specified provisions of the *Act*, the latter provisions will apply.

The four "meet or exceed" provisions are reproduced below:

> **Standards for those covered by collective agreement**
>
> 43. (1) If the hours of work, overtime and special clothing provisions of a collective agreement, when considered together, meet or exceed the requirements of this Part and section 25 when considered together, those provisions replace the requirements of this Part and section 25 for the employees covered by the collective agreement.
>
> (2) If the hours of work, overtime and special clothing provisions of a collective agreement, when considered together, do not meet or exceed the requirements of this Part and section 25 when considered together,
>
> (a) the requirements of this Part and section 25 are deemed to form part of the collective agreement and to replace those provisions, and
>
> (b) the grievance provisions of the collective agreement apply for resolving any dispute about the application or interpretation of those requirements.

Standards for those covered by collective agreement

49. (1) If the statutory holiday provisions of a collective agreement, when considered together, meet or exceed the requirements of this Part when considered together, those provisions replace the requirements of this Part for the employees covered by the collective agreement.

(2) If the statutory holiday provisions of a collective agreement, when considered together, do not meet or exceed the requirements of this Part when considered together,

(a) the requirements of this Part are deemed to form part of the collective agreement and to replace those provisions, and

(b) the grievance provisions of the collective agreement apply for resolving any dispute about the application or interpretation of those requirements.

Standards for those covered by collective agreement

61. (1) If the annual vacation and vacation pay provisions of a collective agreement, when considered together, meet or exceed the requirements of this Part when considered together, those provisions replace the requirements of this Part for the employees covered by the collective agreement.

(2) If the annual vacation and vacation pay provisions of a collective agreement, when considered together, do not meet or exceed the requirements of this Part when considered together,

(a) the requirements of this Part are deemed to form part of the collective agreement and to replace those provisions, and

(b) the grievance provisions of the collective agreement apply for resolving any dispute about the application or interpretation of those requirements.

Standards for those covered by collective agreement

69. (1) If the provisions of a collective agreement relating to an individual termination of employment, including the layoff and right of recall provisions, when considered together, meet or exceed an employee's entitlement under section 63, those provisions replace section 63 for the employees covered by the collective agreement.

(2) If the provisions of a collective agreement relating to an individual termination of employment, including the layoff and right of recall provisions, when considered together, do not meet or exceed an employee's entitlement under section 63, that section is deemed to form part of the collective agreement and to replace those provisions.

> (3) An employee's entitlement, under a collective agreement or under this section, on group termination of employment is in addition to the employee's entitlement on an individual termination of employment.
> (4) The grievance provisions of a collective agreement apply for resolving any dispute about the application or interpretation of a provision deemed by this section to form part of the collective agreement.
> (5) Subsections (1) and (2) do not operate to provide any remedies that would not be otherwise available under the grievance provisions of a collective agreement.
> (6) If an employer is in receivership or is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act, subsections (1) to (5) do not apply and the employee is entitled to the greater, as determined by the director, of
> (a) the amount payable for an individual termination under the collective agreement, and
> (b) the amount payable to the employee under section 63.

The Labour Relations Board has held that the "meet or exceed" provisions must be considered in relation to the entire bargaining unit and not just a single employee or a smaller group of employees [*Community Social Services Employers' Association (Vancouver Island Haven Society*), B.C.L.R.B. Reconsideration Decision No. B551/98]. In reference to the legislative policy underlying the "meet or exceed" provisions, the Board observed:

> ...the Legislature intended in these limited circumstances that the protection of individual rights in the Act would potentially be subject to negotiated terms which provide greater benefits for the majority of employees covered by the collective agreement. "Flexibility" with one Part of the statute is permitted through the give and take of collective bargaining, recognizing as well that the Legislature has extended a degree of protection to individual employees and minority groups in the collective bargaining context (*viz.* Section 12 of the Code).

THE DETERMINATION

The relevant background facts giving rise to the issuance of the Determination are reproduced below (Determination at pages 1-4):

> I have completed an investigation pursuant to section 76(3) [*i.e.*, an investigation conducted in the absence of a complaint in order to ensure compliance with the *Act*]...with regard to [Rand] and the collective agreement they have with the [Union]. The purpose of the investigation was to determine if the collective agreement between Rand and the Union met or

exceeded the corresponding requirements contained in Part 4 including section 25, Parts 5, 7 & 8 pursuant to Sections 43, 49, 61 and 69 of the Act.

Late last year the Branch was advised that there were several collective agreements that did not meet or exceed the Act with regard to Part 4 including section 25, Parts 5, 7 and 8 pursuant to sections 43, 49, 61 & 69. This was having a direct impact on union and non-union employers [sic] ability to compete with these companies...

The Director received information that certain collective agreements fell below the minimum standards of the Act. This has adverse affects [sic] on employers who are complying with the minimum standards of the Act by creating competitive problems whether they are union or non-union. The Director, as the gatekeeper to the legislation covering these matters, was compelled to investigate.

Normally, employees who are members of a trade union would have access to a grievance procedure for a remedy. However where a trade union has bargained terms and conditions of work on their behalf that are sub standard [sic] they have no real remedy for resolving the dispute. An employee could file a grievance with their trade union. However, the grievance would be based on a violation of the terms and conditions contained within the collective agreement. Since those terms and conditions fail to meet the standards outlined in the Act the employee has no real remedy by pursuing a meet or exceed based grievance under the collective agreement.

The Director is not an agent for the employee, the employer or the union. However, she does have a fiduciary duty to ensure the minimum standards of the Act are met.

The Director is statutorily obligated to enforce the Act where there are violations of the Act. Where a collective agreement is substantially deficient, she is bound to remedy the situation.

If the Director did not remedy a substandard collective agreement then it would force an employee to pursue a section 12 complaint under the Labour Relations Code [*i.e.*, a complaint that the union breached its "duty of fair representation"]. This puts the employee in the position of being the gatekeeper for the actions of the employer and union. An employee represented by a trade union has put their trust in them to negotiate terms and conditions of employment that are the best possible. They would naturally assume that those terms and conditions would at least meet the minimum standards and should not be forced to pursue a section 12 complaint to obtain these entitlements.

The Director's delegate met with the Union's officials and its legal counsel but Rand did not participate, in any fashion, in the investigation--Rand did not respond to the delegate's various letters, telephone calls and e-mails. The Union, for its part, took the position, *inter alia*, that the delegate did not have the legal authority to determine whether or not the collective agreement provisions in question did, in fact, "meet or exceed" the comparable provisions of the *Act*.

The delegate concluded that he had jurisdiction to determine whether or not the agreement did "meet or exceed" the relevant provisions of the *Act* (Determination at page 9):

> If the legislators did not intend the Director to be involved in enforcing minimum standards for those covered by a collective agreement they would not have included sections 43, 49, 61 or 69. Indeed, there would not have been a provision for which an employer and union could negotiate terms and conditions around hours of work and overtime, statutory holidays, annual vacation and termination of employment as long as they met or exceeded the corresponding relevant provisions of the Act. By actually including these sections in the Act, the legislators granted the Director jurisdiction in these matters. If the Director were not to have jurisdiction in issues involving employees represented by trade unions they would have simply excluded them. The lack of such exclusion explicitly implies that the Director does have jurisdiction.

The delegate, after concluding that he had jurisdiction, then determined that certain provisions of the collective bargaining agreement between Rand and the Union did not "meet or exceed" the comparable provisions of the *Act*. Accordingly, the following orders were issued (Determination at page 14):

> **Remedy**
>
> Pursuant to sections 43, 49 & 61 of the Act, the provisions of Part 4 (including section 25), Parts 5 & 7 are deemed to form part of the collective agreement between Rand and the Union and to replace those sections of the collective agreement.
>
> In addition, Rand is required to send, by registered mail, a copy of this Determination to each of their employees. Rand must provide evidence to the Director they they have sent this Determination to all of their employees.
>
> Copies of the Determination and the Employment Standards Act Part 4 (including section 25), Parts 5 & 7 must be posted at all work locations of the employer. The posting shall be in locations to allow all employees easy access to read and review the Determination and the Parts of the Act that have been deemed to form part of the collective agreement.

> Pursuant to s. 79(3) of the Act, Rand Reinforcing Ltd. is ordered to comply with requirements of this Determination and the Remedies contained in it.
>
> The employer must comply with the requirements of this Determination and the Remedies within 30 days from the date of the Determination.
>
> A copy of this Determination will be sent to the Labour Relations Board.

APPEAL TO THE TRIBUNAL

Rand appealed the Determination on four grounds, namely:

- The Director did not have the statutory authority to conduct the investigation in question;
- The Director did not have the statutory authority to order the remedies set out in the Determination;
- The investigation was not conducted in accordance with the principles of natural justice; and
- The delegate failed to accord Rand a fair hearing.

The appeal was adjudicated based on the parties' written submissions. The adjudicator issued reasons for decision on March 13th, 2001 (B.C.E.S.T. Decision No. D123/01) in which he concluded:

> I find that the Director had no jurisdiction to exercise any authority within Sections 43, 49, 61 and 69 of the *Act*, including deciding whether the provisions of a collective agreement meet or exceed the statutory minimums in the relevant corresponding Part of the *Act*. In light of my conclusion on this point, I do not find it necessary to consider any other argument raised by Rand, except to say I agree with the submission of the Director that an evidentiary foundation for the arguments alleging bad faith, bias and failure to provide a fair hearing is absent.

The adjudicator noted that the Director's delegate's investigation was not triggered by any individual complaints but, rather, "to address what the Director perceived to be collective agreement provisions that did not meet or exceed the minimum requirements of the *Act*" (adjudicator's reasons for decision at page 5). The adjudicator was not troubled by the circumstances giving rise to the investigation [indeed, section 76(3) of the *Act* clearly states that the Director's investigative authority is not predicated on the filing of a complaint], however, he noted that the Director's investigative authority does not extend to questions outside her statutory authority.

In this latter regard, the Director maintained that she had the authority to both determine if the relevant provisions did "meet or exceed" the comparable provisions of the *Act* and to remedy an apparent failure in that respect. The adjudicator held, at page 17 of his reasons, that that Director did not have either exclusive or concurrent jurisdiction to determine a "meet of exceed" question arising under any of sections 43, 49, 61 or 69 of the *Act:*

> ...the legislature intended Sections 43, 49, 61 and 69 of the *Act* to be administered within the statutory scheme created for administering any other provision of a collective agreement; that all aspects of the enforcement of statutory minimums be addressed within the grievance arbitration machinery of the collective agreement, just as with all other parts of the collective agreement; and that any disagreement with the comparative analysis of the relevant provisions of the collective agreement with the corresponding parts of the *Act* be reviewed through section 99 or Section 100 of the *Code*, the statutory mechanism designed for reviewing arbitration awards.

In light of the foregoing conclusion, and as noted earlier, the adjudicator cancelled the Determination.

THE APPLICATION FOR RECONSIDERATION

The Director's request for reconsideration is contained in a lengthy submission to the Tribunal, dated and filed July 10th, 2001, prepared by the Director's legal counsel. The basis for the Director's application is set out below:

> The Director now seeks to have the Appeal Panel decision reconsidered, specifically, and only with regard to its decision that the Director had no jurisdiction to determine that a collective agreement did not meet or exceed the minimum provisions of the [*Act*], thereby triggering the deeming provisions of Sections 43, 49, 61 and 69 of the *Act.*
>
> The Director does not seek reconsideration of the Appeal Panel decision concerning Section 76(3) of the Act, the decision concerning the Director's inability to provide a remedy once it is found a collective agreement does not meet or exceed statutory conditions, or the Director's inability to interpret and apply statutory provisions <u>once</u> they have been deemed to be part of a collective agreement.
>
> (<u>underlining</u> in original submission)
>
> The Director now seeks to have the Appeal Panel decision reconsidered on the basis that the Appeal Panel erred in law and committed jurisdictional error, the particulars of which are as follows:

- The Appeal Panel erred in law when it decided that there was no legislative intention to have the Director decide whether a collective agreement met or exceeded the statutory minimums, so that the deeming provisions of the Act take effect, and the matter go to an interest [sic, rights] arbitrator for interpretation and application of the statutory provisions deemed to be part of the collective agreement.
- The Appeal Panel erred in law in that its decision is inconsistent with recent decisions under the British Columbia Labour Relations Code R.S.B.C. 1996 c. 244 (the "Code"), which looks to the Director to determine if a collective agreement meets or exceeds sections of the Act.
- The Appeal Panel erred in law and committed a jurisdictional error when it found the Tribunal has supervisory authority over the Director.

The Director says that the adjudicator's decision "that the Director has no jurisdiction to exercise any authority within Sections 43, 49, 61 and 69 of the *Act* [should] be cancelled". Further, the Director says that the Determination should be confirmed, at least with respect to the finding that the collective agreement was substandard, so that the "members of the bargaining unit may grieve to an arbitrator".

ANALYSIS

The Director's application is not untimely (see *Unisource Canada Inc.,* B.C.E.S.T. Decision No. D122/98). Further, the instant application, at least with respect to the first and second grounds, raises a significant issue of statutory interpretation worthy of closer examination (see *Director of Milan Holdings Inc.*, B.C.E.S.T. Decision No. 313/98), namely, whether the Director has the initial and exclusive jurisdiction to determine if certain provisions of a collective bargaining agreement "meet or exceed" the parallel provisions of the *Act*. We do note, however, that the instant application appears to represent a change in the Director's view with respect to her jurisdiction under the "meet or exceed" provisions of the *Act* (see *e.g.*, *Wardrope*, B.C.E.S.T. Decision No. D130/97).

The Tribunal's Supervisory Authority

We do not find that the Director's third ground raises a significant issue of law or policy and, accordingly, we shall only briefly address this latter matter.

The Director objects to the adjudicator's comments (particularly the two italicized sentences) found at page 17 of his reasons for decision:

> Even if I were to accept that the Director had jurisdiction to decide whether a collective agreement met or exceeded the corresponding statutory minimums, there is nothing in the *Act*, or in any other legislation, that would bind an

> arbitrator to that conclusion. In the context of an actual grievance arbitration requiring an arbitrator to do a comparative analysis of the requirements of the *Act* and the provisions of the collective agreement, it is open to an arbitrator to reach a different conclusion than the Director. Further, the [Labour Relations] Board has supervisory authority over arbitrators in this province and has told the arbitral community how it expects the "meet or exceed" test to be applied. *The Board does not have supervisory authority over the Director. That role falls to the Tribunal.*
>
> (our *italics*)

Counsel for the Director submits, at page 15 of her submission, that "only the Supreme Court and the courts above it have an inherent jurisdiction to direct the exercise of discretion by an administrative body" and that the Tribunal "has no inherent authority to 'supervise' the Director" and "no power to 'supervise' the Director's general administration of the *Act*".

We do not conceive the adjudicator's reasons to suggest that the Director and her delegates are obliged to report their daily activities under the *Act* to the Tribunal or that the Tribunal directs and controls the Director's administrative duties under the *Act.* We understand the adjudicator, in the above-quoted extract from his reasons, to be simply noting the wholly uncontroversial facts that grievance arbitrators' decisions may be appealed to the Labour Relations Board pursuant to section 99 of the *Labour Relations Code* ("*Code*") and that decisions made by the Director and her delegates may be appealed to the Tribunal pursuant to section 112 of the *Act.*

Determinations issued by the Director and her delegates under section 79 of the *Act* are not protected by a privative clause of any sort. When a party appeals a determination to the Tribunal, the latter's task is to decide whether the determination being appealed is legally and factually correct. In that sense--and that sense only--the Tribunal exercises a supervisory authority with respect to the decisions made by the Director and her delegates regarding the proper interpretation and application of the provisions of the *Act.* If an appeal challenges the exercise of the Director's statutory discretion, however, the Tribunal has indicated that a greater measure of deference will be accorded to such decisions. The Tribunal has repeatedly indicated that it will not interfere with an exercise of the Director's discretionary authority unless there is a compelling reason to do so (for example, the discretion was exercised in bad faith--see *e.g.*, *Ludhiana Contractors Ltd.*, B.C.E.S.T. Decision No. D361/98).

We now examine the question of whether the Director has the jurisdiction to determine if collective bargaining agreements "meet or exceed" the provisions of the *Act.*

Does the Director have the jurisdiction to determine "meet or exceed" questions?

Counsel for the Director submits that the Director's jurisdiction under the "meet or exceed" provisions of the *Act* is limited to the initial determination of whether or not the relevant collective bargaining agreement provisions satisfy the "meet or exceed" threshold (Director's July 10th, 2001 submission at page 9):

> The Director recognizes that once the provisions of a part or parts of the *Act* are deemed to form part of a collective agreement, the role of the *Act* and the Director is at an end. This issue which remains is, what is the proper role of the Director in the meet or exceed sections of the *Act?* If the Director has no role, as noted in the Appeal submissions, there is a vacuum. How does a truly substandard collective agreement have parts of the *Act* deemed into it, and move to the jurisdiction of the Code, if there is nothing to grieve until the deeming has taken place?

At the outset, it should be recognized that this case ultimately turns on a question of statutory interpretation rather than public policy. The Director, and quite rightly, is concerned about an adjudicative regime that leaves open the possibility for individuals, whose employment is governed by a collective agreement, to be denied the benefit of the minimum standards set out in the *Act.* However, as we view the matter, that possibility is slight (and can be rectified) and, in any event, both the Director and this Tribunal are obliged to respect the clear instructions of the legislature as expressed in the *Act.*

The *Act* governs the employment of all employees subject to it, whether or not their employment is also governed by a collective bargaining agreement. Section 4 of the *Act* prohibits any "contracting out" of statutory rights but--and this is an important qualification--this latter provision is expressly subject to sections 43, 49, 61 and 69 of the *Act*. These latter four provisions permit an employer and a union to negotiate a collective agreement that may not, in a strict literal sense, comply with certain specified minimum requirements of the *Act.*

The four "meet or exceed" provisions (*i.e.*, sections 43, 49, 61 and 69) are structured in essentially identical terms and demand a three-stage analysis. First, the terms of the collective agreement governing certain specified matters [for example, statutory holidays (section 49), or annual vacation and vacation pay (section 61)] must be compared to the parallel provisions of the *Act.* Second, it must be determined if the terms in the collective agreement "when considered together do not meet or exceed" the requirements of the parallel provisions of the *Act.* Third, if the "meet or exceed" threshold is satisfied, then the collective agreement provisions govern, however, if the threshold is not satisfied, the parallel provisions of the *Act* "are deemed to form part of the collective agreement and to replace" the relevant terms set out in the collective agreement.

As previously noted, the Director does not assert that she has any jurisdiction to interpret a collective agreement or to order remedies where there is a "substandard" collective

agreement. The Director asserts, however, that she has the exclusive jurisdiction to undertake the initial comparison and the subsequent determination as to whether the collective agreement provisions "meet or exceed" the parallel provisions of the *Act* (Director's submission at page 10):

> It is most likely that the Director would be called upon in the most egregious cases of a collective agreement failing to meet or exceed the statutory minimums. As the only finding that the Director would make is whether a part of a collective agreement met or exceeded a part of the *Act,* before the deeming provision takes effect, it is difficult to see how the role of the Director of [sic] the arbitrator would clash or create a multitude of forums. The Director would not be interpreting or applying the provisions of the *Act* deemed into the collective agreement, merely activating the deeming provision...
>
> The Director's finding does not bind an arbitrator, it is simply a mechanism for putting the issue of substandard collective agreements before an arbitrator, so that the employees covered by those agreements do not fail to receive the minimum standards of the *Act.*

Grievance (or rights) arbitration, in British Columbia as in other Canadian jurisdictions, is not a matter of voluntary agreement between an employer and a union; it is a statutory requirement [see *Code*, section 84(2)]. Further, grievance arbitrators are given extensive powers (see *e.g.*, *Code*, sections 89, 92 and 93) and their decisions--unlike those of the Director--are protected by a broad privative clause (*Code*, section 101).

The Supreme Court of Canada has held that arbitrators have *exclusive jurisdiction* to adjudicate disputes that arise from the collective agreement: "Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it"--see *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583 at page 599; see also *New Brunswick v. O'Leary* (1995), 125 D.L.R. (4th) 609; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners,* [2000] 1 S.C.R. 360.

The arbitrator's exclusive jurisdiction may, however, be overridden by express statutory language: "...in determining whether an adjudicative body has jurisdiction to hear a dispute, a decision-maker must adhere to the intention of the legislature as set out in the legislative scheme, or schemes, governing the parties" (see *Regina Police Association, supra.,* para. 23). What was the legislature's intent in enacting the "meet or exceed" provisions of the *Act*? Has the legislature given the Director the exclusive jurisdiction to determine, as is asserted by the Director, "whether a part of a collective agreement met or exceeded a part of the *Act*"? We are of the view that the legislature clearly intended that grievance arbitrators, rather than the Director, would make the initial "meet or exceed" determination.

As previously noted, the *Act* applies to unionized as well as nonunionized workplaces. In general, where a provision in a collective agreement falls short of a statutory minimum standard, the collective agreement provision is void and the statutory minimum will apply (see section 4 of the *Act*). Arbitrators are obliged, consistent with their statutory authority [*Code*, section 89(g)], to ensure that collective agreements are interpreted and applied in a manner consistent with all relevant employment legislation including, for example, the *Act* and the *Human Rights Code*--see, in regard to human rights legislation, *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1993] 3 S.C.R. 3. Thus, arbitrators, while carrying out their statutory mandate to interpret and apply collective agreements, must give primacy to employment-related legislation that conflicts or is otherwise inconsistent with the terms of the collective agreement [see *McLeod v. Egan* (1974), 46 D.L.R. (3d) 150].

An arbitrator's exclusive jurisdiction to interpret and apply a collective agreement is in no way fettered by the "meet or exceed" provisions of the *Act.* If the legislature had intended to give the Director the initial (and exclusive) jurisdiction to issue a "declaratory order" that the relevant provisions of the collective agreement did not "meet or exceed" the comparable provisions of the *Act*, that objective could have been easily accomplished. In that latter event, section 43, for example, might have been drafted as follows:

> 43.(2) If, *in the opinion of the Director*, the hours of work, overtime and special clothing provisions of a collective agreement, when considered together, do not meet or exceed...

The legislature, however, chose not to give the Director such a declaratory power. The operation of the "meet or exceed" provisions does not depend on a prior "determination" by the Director, or anyone else. The "meet or exceed" provisions exist by operation of law. The assumption that the Director must make some decision to "trigger" them is not tenable.

The practical question then arises regarding the appropriate forum in which those rights may be asserted. In our view, the appropriate forum is grievance arbitration. All of the "meet or exceed" provisions state that "the grievance provisions of the collective agreement apply for resolving any dispute about the *application* or *interpretation* of those requirements" (*italics* added). In other words, it is the arbitrator who must decide if the minimum standards of the *Act apply* (because the comparable provisions of the collective agreement do not satisfy the "meet or exceed" threshold) and then *interpret* the collective agreement in light of those deemed provisions. If the arbitrator concludes that the particular provisions of the collective agreement do "meet or exceed" the comparable provisions of the *Act*, the arbitrator simply carries out his or her usual statutory obligation, *i.e.*, to interpret and apply the terms and conditions of the collective agreement. In either case, the arbitrator's decision is subject to review in accordance with the provisions of sections 99 and 100 of the *Labour Relations Code.*

Accordingly, if certain terms of the collective agreement constitute an attempt to "contract out" of the *Act*--either because the agreement purports to undermine a specific minimum statutory standard or because certain provisions, considered collectively, do not satisfy the "meet or exceed" threshold--the arbitrator's task is the same, namely, to interpret and apply the collective agreement in light of the *Act* (see *McLeod v. Egan*, *supra.*). In our view, the Director does not have any jurisdiction to issue a "declaratory order" with respect to the "meet or exceed" provisions of the *Act.* Such a declaratory power is unnecessary and would be superfluous to the legal and practical operation of the "meet or exceed" provisions.

Counsel for the Director concedes that if the Director declared that certain collective agreement provisions did not satisfy the "meet or exceed" standard, "that finding [would] not bind an arbitrator" since "it is simply a mechanism for putting the issue of substandard collective agreements before an arbitrator". We do not accept that assertion. Surely such a declaration *would* bind an arbitrator at least to the extent that those provisions of the collective agreement would be void and, therefore, the arbitrator would be obliged to interpret and apply the collective agreement in light of the statutory, rather than the contractual, terms and conditions. If the arbitrator was *not* bound by the Director's declaration--in other words, if the arbitrator was free to independently determine if the "meet or exceed" threshold was satisfied--we have to question the utility of the Director's asserted declaratory power [see section 2(d) of the *Act*].

We do not accept the proposition that the Director must be given a "declaratory power" with respect to the "meet or exceed" questions because, without such a power, there is a "vacuum". The relevant provisions of the collective agreement either satisfy the "meet or exceed" threshold--in which case, no issue arises under the *Act* with respect to the validity of the collective agreement--or the relevant provisions are deficient--in which case, and by operation of law, the comparable provisions of the *Act* are deemed to be in effect.

The Director's counsel poses the question (see above): "How does a truly substandard collective agreement have parts of the *Act* deemed into it, and move to the jurisdiction of the Code, if there is nothing to grieve until the deeming has taken place?". First, it must be noted that, in fact, no decision-maker ever "deems" that the provisions of the *Act* replace those of the collective agreement. The "deeming" occurs automatically following a finding that the collective agreement provisions do not satisfy the "meet or exceed" threshold. Second, we agree with the adjudicator that there is no requirement for some sort of declaratory order to be issued before a grievance can be filed. We reject the Director's submission that in the absence of the declaratory power she asserts, there would be no "mechanism for putting the issue of a substandard collective agreement before an arbitrator".

As noted by the adjudicator at page 19 of his reasons:

> ...it is an unnecessarily narrow view of the term "dispute" [*Code*, section 1] to confine it to "live" issues between an employee and an employer. In the

> context of labour relations matters arising under the *Code*, which includes matters involving the interpretation and application of the collective agreement, the term is framed in terms sufficiently broad to capture an *"apprehended difference"* between an employer and its employees *"relating to terms and conditions of employment"*. Clearly, a question about whether existing provisions of a collective agreement ought to be replaced by the relevant statutory minimums and thereafter govern the employment of person[s] working under that collective agreement is captured by the definition.

Under the *Code*, arbitrators adjudicate "disputes" about the "interpretation, application, operation or alleged violation" of a collective agreement; arbitrators must also determine if a particular dispute is arbitrable [*Code*, section 84(2)]. An arbitrator's jurisdiction to interpret and apply those provisions of a collective agreement that allegedly fail to satisfy the "meet or exceed" threshold is not predicated on a Director's declaratory order to that effect. In the event of such a dispute, the arbitrator will have to determine (if the point is not conceded) whether the "meet or exceed" threshold has been satisfied. If the collective agreement is determined to be substandard in this latter respect, the arbitrator will simply interpret the agreement in light of the minimum statutory requirements. If the agreement is not substandard, and assuming the agreement--as it stands--has not been contravened, the grievance will be dismissed. In this respect, grievance arbitration is no different than any other adjudicative process. The assertion of a statutory right does not depend upon a prior "approval" by a statutory decision-maker. Statutory rights exist as a matter of law.

Counsel for the Director, in her submission, suggests that in a unionized workplace the Director fulfills a "watchdog" role ensuring that unionized employees receive at least the minimum statutory standards. On this account, it should be remembered that not a single bargaining unit employee apparently complained about a "substandard" collective agreement; the Director's investigation was instigated as a result of "third party" complaints. The comments of the Labour Relations Board in *James and P.E.A.*, *infra.* at page 14, are apposite:

> Employees have a say in the substantive provisions of a collective agreement, typically at the start of collective bargaining, when the union seeks input with respect to its bargaining proposals, and at the finish, when employees are given an opportunity to vote on ratification of the collective agreement.

Despite the absence of any manifest concern on the part of the bargaining unit employees in this case, it must be remembered that collective bargaining, by design, addresses collective (and, more correctly, majority), rather than individual, interests. Thus, an individual bargaining unit employee may well feel aggrieved when other employees do not. This aggrieved employee may demand that his or her union challenge an allegedly "substandard" agreement by way of a grievance. In such circumstances, it is possible that a union might not

file a grievance, despite the employee's request, because, for instance, the union does not accept that the agreement falls short of the "meet or exceed" threshold. In general, individual bargaining unit employees do not have the right to file grievances or to remit unresolved grievances to arbitration--those decisions rest with the union. This scenario does raise a potential concern. Indeed, this was the very scenario in the *James* case, *infra.*

Nevertheless, even in the latter circumstances, the individual employee is not without a remedy. Indeed, there are several avenues by which the matter might be remedied. As noted by the adjudicator (at page 19): "One might wonder what rationale exists for continuing to recognize an organization that is unwilling or unable to negotiate even minimum standards for its members as a trade union for purposes of the *Code*..." [see *Code*, section 1 definition of "trade union"]. If the union is not meeting its members' needs, any employee could encourage his or her fellow employees to apply for decertification of the union (*Code*, section 33) in which case the Director's jurisdiction to enquire into the employees' terms and conditions of employment, and to remedy situations where statutory minimum standards are not being met, would be fully revived. Alternatively, the employees could seek to be represented by a more conscientious union (*Code*, section 19). Even in the absence of any change in union representation, an individual employee could bring the union's failure to pursue a grievance with respect to an allegedly substandard agreement before the Labour Relations Board by way of a complaint that the union failed to meet its "duty of fair representation" (*Code*, section 12).

In the latter event, although the issue before the Board would not be whether the "meet or exceed" threshold was satisfied, obviously, one would have to seriously question a union that was unwilling to challenge collective agreement provisions that did not meet even minimum statutory standards. The Board itself recognized as much in the previously-mentioned *James and P.E.A.* decision (Reconsideration Decision No. B.C.L.R.B. B330/2001, at page 10):

> ...where a union, having considered the member's argument, decides not to proceed to arbitration, the member may complain to the Board that the union's decision violates its duty of fair representation under Section 12 of the Code. An allegation that the union has breached Section 12 in negotiating a substandard collective agreement and contracting out of the statutory minimums would be a "serious matter" and therefore subject to "closer scrutiny" under the Board's jurisprudence. To meet its duty of fair representation, the union must show that it made a reasoned assessment of the merits of the grievance, and properly considered "the options, ramifications and legal implications". The Board does not, on a Section 12 complaint, have the jurisdiction to decide the merits of the grievance, although "merit or lack of merit may be a relevant factor in determining whether there is a reasonable basis for the Union's decision".

Finally, we wish to briefly comment on counsel for the Director's submission that the Labour Relations Board has recognized the Director's jurisdiction to initially determine whether certain provisions of an agreement "meet or exceed" the parallel provisions of the *Act.* While there are some comments in at least one Board decision (*James and P.E.A.*, B.C.L.R.B. Decision No. B59/2001, note this decision was reconsidered, *supra.*) which suggest that such a jurisdiction resides in the Director, we also note that the specific question raised in this reconsideration application was not addressed by the Board in that case.

In *Robson et al.*, B.C.L.R.B. Decision No. B67/99, 51, C.L.R.B.R. (2d) 53, a Board panel observed that all matters regarding "meet or exceed" questions "are within the *exclusive jurisdiction of an arbitrator* appointed to interpret and apply the collective agreement in light of the statute" (our *italics*). In the *James* reconsideration decision, *supra.*, the Board, at page 14, expressly accepted the notion--and in doing so referred to the Tribunal's decisions in *Wardrope*, B.C.E.S.T. Decision No. D130/97 and the within appeal decision--that all aspects of the "meet or exceed" provisions are within the exclusive jurisdiction of a grievance arbitrator.

In short, we conceive the current Board jurisprudence to be entirely consistent with--and supportive of--the view expressed by the adjudicator in this case and by the Tribunal in other decisions such as *Wardrope*, *supra.* and *Tricom Services Inc.*, B.C.E.S.T. Decision No. D569/97.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is **refused**.

Kenneth Wm. Thornicroft **Adjudicator** **Employment Standards Tribunal**	**Norma Edelman** **Vice-Chair** **Employment Standards Tribunal**	**Frank A.V. Falzon** **Adjudicator** **Employment Standards Tribunal**