IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

Action CV 06421

IN THE MATTER OF the *Labour Standards Act*, R.S.N.W.T. 1988, c. L-1, as amended;

AND IN THE MATTER OF a decision of the Labour Standards Board issued on April 19, 1996 allowing an Appeal by Mark Marren against the decision of Labour Standards Officer Eric Smith issued on September 27, 1995 dismissing a complaint by Mark Marren against Echo Bay Mines Ltd. under the *Labour Standards Act*;

BETWEEN:

ECHO BAY MINES LTD.

Appellant

- and -

MARK MARREN AND LABOUR STANDARDS BOARD

Respondents

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

Action CV 06422

IN THE MATTER OF the *Labour Standards Act*, R.S.N.W.T. 1988, c. L-1, as amended;

AND IN THE MATTER OF a decision of the Labour Standards Board issued on April 19, 1996 allowing an Appeal by Norm Smith against the decision of Labour Standards Officer Eric Smith issued on September 27, 1995 dismissing a complaint by Norm Smith against Echo Bay Mines Ltd. under the *Labour Standards Act*;

BETWEEN:

ECHO BAY MINES LTD.

Appellant

- and -

NORM SMITH AND LABOUR STANDARDS BOARD

Respondents

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

Action CV 06795

IN THE MATTER OF the *Labour Standards Act*, R.S.N.W.T. 1988, c. L-1, as amended;

AND IN THE MATTER OF a decision of the Labour Standards Board issued on October 31, 1996 stating that the Board had no jurisdiction to hear an appeal filed by Echo Bay Mines Ltd. on May 13, 1996 against a decision of Labour Standards Officer Eric Smith issued on April 26, 1996

BETWEEN:

ECHO BAY MINES LTD.

Appellant

- and -

LABOUR STANDARDS BOARD

Respondent

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

Action CV 06419

IN THE MATTER OF the *Labour Standards Act*, R.S.N.W.T. 1988, c. L-1, as amended;

AND IN THE MATTER OF a decision of the Labour Standards Board issued on April 19, 1996 allowing an Appeal by Mark Marren against the decision of Labour Standards Officer Eric Smith issued on September 27, 1995 dismissing a complaint by Mark Marren against Echo Bay Mines Ltd. under the *Labour Standards Act*;

BETWEEN:

ECHO BAY MINES LTD.

Applicant

- and -

MARK MARREN AND LABOUR STANDARDS BOARD

Respondents

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

Action CV 06420

IN THE MATTER OF the *Labour Standards Act*, R.S.N.W.T. 1988, c. L-1, as amended;

AND IN THE MATTER OF a decision of the Labour Standards Board issued on April 19, 1996 allowing an Appeal by Norm Smith against the decision of Labour Standards Officer Eric Smith issued on September 27, 1995 dismissing a complaint by Norm Smith against Echo Bay Mines Ltd. under the *Labour Standards Act*;

BETWEEN:

ECHO BAY MINES LTD.

Applicant

- and -

NORM SMITH AND LABOUR STANDARDS BOARD

Respondents

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

Action CV 06796

IN THE MATTER OF the *Labour Standards Act*, R.S.N.W.T. 1988, c. L-1, as amended;

AND IN THE MATTER OF a decision of the Labour Standards Board issued on October 31, 1996 stating that the Board had no jurisdiction to hear an appeal filed by Echo Bay Mines Ltd. on May 13, 1996 against a decision of Labour Standards Officer Eric Smith issued on April 26, 1996;

BETWEEN:

ECHO BAY MINES LTD.

Applicant

- and -

LABOUR STANDARDS BOARD

Respondent

COUNSEL:

Mr. Thomas W. Wakeling for the applicant, Echo Bay Mines Ltd.
Mr. Austin F. Marshall for the respondent, Mark Marren
Ms. Karan M. Shaner for the respondent, Labour Standards Board

DISPOSITION:

Application Heard:	May 26, 1997
Appeal Dismissed:	August 14, 1997
Appeal File:	CV06421, CV06422, CV06795, CV06419, CV06420, CV06796
Reasons By:	The Honourable Mr. Justice Vancise, Deputy Judge of the Northwest Territories

Preliminary Observations

The three appeals and the three applications for judicial review described in the style of cause originate with a claim for overtime made by Mark Marren and Norm Smith for hours of work each worked in excess of standard hours during a period when an overtime averaging permit issued to their employer Echo Bay Mines Ltd. under the *Labour Standards Act*[1] was not in force. By an order dated the 15th of May 1997, Vertes J. directed that all the appeals in Supreme Court proceedings numbered CV06421, CV06422 and CV06795 and all the applications for judicial review numbered CV06419, CV06420, and CV06796 be heard at the same time.

The appellant/applicant, Echo Bay Mines Ltd., filed concurrent notices of appeal and applications for judicial review in each of the three above noted procedures. It appeals the decisions of the Labour Standards Board pursuant to s. 53(4) of the *Act* allowing the appeals of Mark Marren and Norm Smith set out in files CV06421 and CV06422. The respondents, Marren and Smith challenge the jurisdiction of the Supreme Court to hear the appeals. If the Court decides that it has jurisdiction under the *Act* to hear the appeals on a point of law pursuant to s. 53(4), it will not be necessary to hear the applications for judicial review because all the issues on the appeals and the applications for judicial review are identical. It will also not be necessary to decide certain questions of law arising out of the filing of concurrent notices of appeal and applications for judicial review.

The appeal and application for judicial review set out in file nos. CV06795 and CV07696 deal with an alleged denial of natural justice and

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[1]R.S.N.W.T. 1988 c.L-1.

whether it will be necessary to decide the issues raised in those proceedings is also dependant on the result of the decisions of the two appeals and applications for judicial review.

I propose to deal with the Marren appeal first. The issues raised on the Marren appeal are identical to those raised in the Smith appeal and the result will apply equally to both appeals.

Introduction

The respondent, Mark Marren, requested that the Labour Standards Board investigate the circumstances surrounding the issuance of an overtime averaging permit to Echo Bay Mines. He also claimed he was entitled to be paid overtime during the period the overtime averaging permit issued to Echo Bay Mines had expired and a new permit was issued (the gap period). The Labour Standards Officer refused to issue a certificate ordering Echo Bay Mines to pay overtime for the hours worked in excess of the standard hours of work during the gap period. He decided that the conditions of employment, including the two week on, two week off rotational scheme and overtime averaging arrangement, were more favourable to the employees of echo Bay Mines than the standard overtime provisions in the *Act*.

The Labour Standards Board overturned that decision on the basis that the standard overtime provisions were more favourable to employees. It ordered the Labour Standards Officer to issue a certificate in the requisite amount for all overtime worked by the employee during the gap period.

Echo Bay Mines appeals that decision pursuant to s. 53(4) of the *Act* and out of an abundance of caution, also applied for judicial review to set aside the decision of the Board on essentially the same grounds as those set out in the notice of appeal. It did so in order to keep the matter open should the Court find that there was no right of appeal from the decision of the Board under the provisions of the *Act* in the circumstances of this case.

Facts

Echo Bay Mines operates the Lupin Mine in the Northwest Territories. Mark Marren, an employee of Echo Bay Mines, wrote to the Labour Standards Board on September 2, 1995 claiming to be entitled to overtime during the gap period when the overtime averaging permit granted to Echo Bay Mines was not in force. The *Act* authorizes a Labour Standards Officer to issue a permit to average hours of work when the nature of the work necessitates irregular distribution of employees' hours of work. That situation exists at the Lupin Mine. The permit issued to Echo Bay Mines expired August 21, 1995 and a new permit was not issued until October 16, 1995 which was effective as and from September 11, 1995. During the gap period (August 21 to September 11) there was no permit in place authorizing the employer to average overtime.

Mr. Marren wrote to the Board claiming that all employees of Echo Bay Mines who worked overtime during that gap period were entitled to be paid overtime for all hours worked in excess of standard hours because the employer, Echo Bay Mines, had not received an overtime averaging permit under s. 7 of the *Act*. This complaint to the Labour Standards Board was made pursuant to s. 53 of the *Act*.

A Labour Standards Officer, Eric Smith, investigated the claim for wages filed by Marren. By letter dated September 27, 1995 the Labour Standards Officer refused to certify that there were wages owed to Marren and as a result refused to issue a certificate. In his letter of September 27, 1995 the Labour Standards Officer stated:

> The Labour Standards Act establishes minimum conditions of employment. Employers are entitled to provide superior conditions of employment but are not allowed to provide inferior ones.
>
> The question in this instance is whether the rotation scheme, including the overtime averaging arrangement, represented a condition of employment which was superior to the normal terms established in the Labour Standards Act. The fact that the overwhelming majority of the employees favoured the rotation scheme, including the overtime averaging, indicated to us that the employees considered it to be a superior arrangement.
>
> As a result, we felt that the employer could legitimately pay overtime during the period when no permit was in effect, in the same manner as when it was in effect.
>
> If the outcome of the employee vote had rejected the permit, then the normal arrangements set out in the Labour Standards Act would have been made to apply effective when the permit expired.

On October 11, 1995 Marren wrote to the Labour Standards Board stating that he wished to appeal the Labour Standards Officer's decision. That appeal was filed pursuant to s. 53(2) of the *Act*. He claimed that he was entitled to overtime pay for hours worked in excess of standard hours for the gap period when no overtime averaging permit was in place. He disputed the Labour Standards Officer's finding that the rotation scheme in place during the gap period was more favourable to the employees than the standard conditions contained in the *Labour Standards Act* and he requested that the Board set aside

the decision of the Labour Standards Officer and order payment of overtime.

On April 19, 1996, the Board overturned the finding of the Labour Standards Officer and ordered the payment of overtime in these terms:

> The Board concludes that while the two week on and two week off shift worked at Echo Bay's Lupin mine is considered by the employees to be more favourable than the standard hours of work set by the Act, the way in which overtime is paid to Lupin employees for those shifts is below the minimum requirement set out in the Act. The permit's provisions allow the company to ignore the overtime payment requirements set out in sections 4 and 11(1) of the Act, and to pay the employees in terms of overtime as if they were standard hour employees under the Act.
>
> The Board accepts Mr. Marren's appeal, and finds that employees who were required to work overtime in excess of the standard hours of work at the Lupin mine between August 22, 1995 and September 10, 1995, are entitled to overtime pay at a rate of pay of not less than 1.5 times their regular rate of pay for all hours worked above the standard hours of work as set by the Act.

The Board went on to direct the Board Officer to issue a certificate under s. 53(1) in the requisite amount.

Issues

This appeal raises three principal issues:

1. Does the appellant, Echo Bay Mines, have a right of appeal from the decision of the Board?

2. If a right of appeal exists, did the Board err in law by overturning the decision of the Labour Standards Officer ?

3. Does the appellant, Echo Bay Mines, have a right to apply for judicial review concurrently with a statutory notice of appeal?

Right of Appeal

The first issue is whether the *Act* provides a statutory right of appeal of the decision of the Board to the Supreme Court. To decide that question, it is necessary to refer to the statutory scheme of the *Act*. Two sections, located in Part VI of the *Act* entitled "Administration and General", are relevant to that issue. The first, s. 45, is found in that portion of Part VI entitled "Labour Standards Board" and deals with appeals from decisions rendered by the Labour Standards Officer. The relevant portion of s. 45 provides as follows:

> 45.(1) An employer or employee aggrieved by a decision or order of the Labour Standards Officer may appeal to the Board, and the decision of the Board on the matter is final.

The second, s. 53, is located in that portion of Part VI entitled "Payment of Wages". This section deals specifically with the issue of unpaid wages. The relevant portions of the section reads as follows:

> 53.(1) Where the Labour Standards Officer
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> (a) receives information that indicates that an employer has failed to pay to an employee all wages earned, and
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> (b) is satisfied that the employee is not proceeding with any other action for the recovery of the unpaid wages,
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> the Labour Standards Officer may, at any time,
>
> (c) make a certificate in which shall be set out the wages owing, and,
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> (d) send a copy of the certificate to the employer by registered mail, giving the employer 30 days after the date of the mailing of the certificate within which to present evidence and make representation.
>
> (2) The Board, after the investigation that it considers adequate, including the holding of hearings that it considers advisable, and consideration of representation, if any, from the persons concerned, may
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> (a) confirm the wages owing as set out in the certificate;
>
> or
>
> (b) cancel the certificate and

> (i) make another certificate, in which shall be set out the wages owing, or
> (ii) take no further action.
>
> (4) An appeal lies to a judge of the Supreme Court from the Board on any point of law raised before the Board under this section and the appeal must be lodged within 30 days after the date of the decision appealed from.

The Board has jurisdiction to review decisions of the Labour Standards Officer on matters set out in s. 53(2). The decision of the Board may be appealed to the Supreme Court on a question of law raised within the context of s. 53(2).

The primary issue is whether the jurisdiction of the Board was exercised pursuant to s. 45(1) which provides no right of appeal or pursuant to s. 53(4) which provides a limited right of appeal on a question of law. There are essentially two types of decisions of the Labour Standards Board. The first is a decision made pursuant to s. 45 of the *Act* dealing with all issues or questions except wages and the second is a decision made pursuant s. 53 of the *Act* dealing with claims for wages.

Section 45 provides for a general right of appeal from decisions of a Labour Standards Officer to the Board. It is not restricted to subject matter or to questions of law. The decision of the Board is final and is not subject to appeal.

Section 53, on the other hand, provides for a limited right of appeal restricted to a point of law relating to the issue of unpaid wages. The defining

characteristic or underlying purpose of s. 53 is the recovery of unpaid wages. The purpose of s. 53 is made clear in the heading — Payment of Wages — which introduces this portion of Part VI of the *Act*. The statutory heading provides meaningful insight into the legislative intent of the subsequent provisions. This principle was recognized by Mitchell J.A. in *Phillips v. Robinson*:[2]

> My opinion is that a heading forms a part of the statute and that the sections under a heading must be interpreted with reference to the heading, except where such an interpretation would lead to a manifest absurdity, or would clearly run counter to the object of the statute when considered as a whole.

This principle was reiterated by Justice Estey in *Law Society of Upper Canada v. Skapinker*:[3]

> It is clear that these headings were systematically and deliberately included as an integral part of the *Charter* for whatever purpose. At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the *Charter*. The extent of the influence of a heading in this process will depend upon many factors including (but the list is not intended to be all-embracing) the degree of difficulty by reason of ambiguity or obscurity in construing the section; the length and complexity of the provision; the apparent homogeneity of the provision appearing under the heading: the use of generic terminology in the heading; the presence or absence of a system of headings which appear to segregate the component elements of the *Charter*; and the relationship of the terminology employed in the heading to the substance of the headlined provision. Heterogeneous rights will be less likely shepherded by a heading than a homogeneous group of rights.

The Supreme Court of Canada also approved the use of the marginal notes as

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[2](1982), 133 D.L.R. (3d) 189 at p. 194.

[3][1984] 1 S.C.R. 357 at 376-7.

an aid to statutory interpretation in *R. v. Wigglesworth*[4], while noting that they were not an integral part of the statute, unlike statutory headings. The Saskatchewan Court of Appeal in *R. v. Morris*[5] approved the use of statutory headings as an aid to the interpretation to the section then under consideration. In this case, the legislature clearly intended to segregate issues involving the "Payment of Wages" and provide a separate route of appeal to parties engaged in such disputes.

The *Act* expressly provides a mechanism for employees to recover unpaid wages an employer has failed to pay. The Legislature has segregated issues involving the "payment of wages" from other issues pertaining to Labour Standards and has provided a separate appeal procedure to the parties. The defining characteristic is the recovery and payment of wages. The questions are: (1) are there unpaid wages owing — yes or no? and (2) did the Labour Standard Officer or Labour Standard Board make and error in law in so finding?

The respondent contends that there is no right of appeal under s. 53(4) because the Labour Standard Officer did not issue a certificate. He contends the right of appeal under s. 53(4) is available only when the Labour Standards Officer issues a certificate certifying that there are wages owing to an employee. Then and only then, he contends, can resort be had to the provisions of s. 53(4). In essence, he contends, "no certificate — no appeal".

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[4][1987] 2 S.C.R. 541 at pp. 556-558.

[5](1988), 64 Sask. R. 98 (Sask. C.A.) at para 39, p. 117.

Echo Bay Mines on the other hand, argues that s. 53 is a separate remedy restricted to the recovery of wages which should be broadly interpreted in light of the remedial powers of the Board and the provisions of s. 10 of the *Interpretation Act*[6] which reads as follows:

> 10. Every enactment shall be construed as being remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Echo Bay Mines contends that an interpretation which limits jurisdiction runs counter to the philosophy of both *Acts*. I agree with that submission.

What then was the effect of the decision of the Labour Standards Officer? Did he issue a certificate setting out what wages were owed? He received a request from Marren dated September 2, 1995 wherein Marren claimed to be entitled to overtime during the gap period and conducted an investigation into that claim. After conducting the investigation he was empowered to undertake, the Labour Standards Officer rendered a decision in which he "certified" that there was no overtime owing to Marren. Neither the *Act* nor the regulations under the *Act* define certificate and nowhere in s. 53(1) is the term "certificate" defined. Section 53(1) simply provides that the Labour Standards Officer may "make a certificate in which shall be set out the wages owing". Is it possible that a document certifying that there are no wages owed is a "certificate"? In my opinion the answer is yes.

A certificate is simply a statement of some fact by the party certifying the

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[6]R.S.N.W.T. 1988, c.I-8.

fact. *Black's Law Dictionary*, Sixth Edition[7] defines certificate as:

> **Certificate.** A written assurance, or official representation, that some act has or has not been done, or some event occurred, or some legal formality has been complied with. A written assurance made or issuing from some court, and designed as a notice of things done therein, or as a warrant or authority, to some other court, judge or officer. A statement of some fact in a writing signed by the part certifying. A declaration in writing. A "certificate" by a public officer is a statement written and signed, but not necessarily sworn to, which is by law made evidence of the truth of the facts stated for all or for certain purposes. A document certifying that one has fulfilled the requirements of and may practice in a field.

In the Shorter Oxford English Dictionary (1973) "certificate" is defined as follows:

> 1. Certification. 2. A document wherein a fact is formally certified.

Webster's New World Dictionary[8] defines certificate as:

> 1. a written or printed statement by which a fact is formally or officially certified or attested...

The Random House Dictionary of the English Language [9] defines certificate as:

> 3. *Law*, a statement, written and signed, which is by law made evidence for the truth of fact stated, for all or certain purposes.

The Oxford English Reference Dictionary [10]defines it as:

> A formal document attesting a fact...

Thus, the term certificate has a broad meaning. The ordinary meaning of

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[7](St. Paul: West Publishing Co., 1990).

[8]Second College Edition (1978)

[9]Random House, (1966), The Unabridged Edition.

[10]Oxford University Press, 1995,1996.

certificate is simply a document attesting to a fact signed by the attesting official. In this case, the Labour Standards Office attested to the fact there was no overtime owing. There is no particular form required. All that is required is that the attesting officer set out the fact or facts, and attest to the fact that some event has or has not occurred.

The term certificate has been judicially defined in a number of contexts. The Supreme Court of British Columbia interpreted "certificate of costs" in *Re Swinton and Co. and Richez; Re Mortimer and Kirkpatrick*[11]. The Chambers judge, in deciding the issue adopted the opinion of the District Registrar wherein he stated:

> In my view, a taxing officer's certificate is nothing more than a paper on which the officer certifies what has been allowed.[12]

Similarly, in *Zylstra v. Canada Permanent Mortgage Corporation*[13] Fanjoy, Co. Ct. J. when dealing with the requirements of a "certificate" under *The Vendors and Purchasers Act*[14] stated:

> [para12] Furthermore, Section 42 does not require a "certificate" to be in any particular form. I have not overlooked the fact that Section 15 of Ontario Regulations 732/78 does, when in combination with form 3 of the Regulation, indicate a form of certificate. A regulation however, cannot affect the interpretation of a statute. The word "certificate" has a broad meaning. The Concise Oxford dictionary defines it as, "a document formally attesting a fact", Webster's New American dictionary (1965) defines it as, "written testimony on the truth of any facts". Black's Law Dictionary, 4th ed. defines it as follows - "a written assurance or official

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[11](1981) 33 B.C.L.R. 36.

[12]*Ibid*. p. 40.

[13]Unreported decision of the County Court of Ontario, dated March 12, 1980.

[14]R.S.O., 1970 c.478.

> representation that some act has, or has not been done, or some event occurred or some legal formality complied with".
>
> [para13] In my opinion, the affidavit of Mr. Fairlie, the Secretary-Treasurer of the Committee of Adjustment, settling out the detailed facts, complies with all these definitions of the word "certificate".

In this case the Labour Standards Officer investigated the claim under s. 53(1) and found that no overtime was owed. He stated:

> The question in this instance is whether the rotation scheme, including the overtime averaging arrangement, represented a condition of employment which was superior to the normal terms established in the *Labour Standards Act*. The fact that the overwhelming majority of the employees favoured the rotation scheme, including the overtime averaging, indicated to us that the employees considered it to be a superior arrangement.
>
> As a result, we felt that the employer could legitimately pay overtime during the period when no permit was in effect, in the same manner as when it was in effect.
>
> If the outcome of the employee vote had rejected the permit, then the normal arrangements [set out in the *Labour Standards Act*] would have been made to apply effective when the permit expired.[15]

The response of the Labour Standards Officer certifies that for the purpose of the application made by Marren, no overtime is payable during the gap period. It is a document which, while not stating on its face that it is a certificate, contains all the elements of one. It attests to certain facts: the period of the operation of the permit; the effective date of the permit; the fact that the overtime averaging permit was a condition of employment superior to the normal terms established under the *Act*; and finally, that no overtime was owing. In my opinion, the Court must look to the substance of the document

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[15]Letter dated September 27, 1995 from Eric D. Smith, Labour Standards Officer to Mr. Norman Smith.

rather than the form and in so doing it is clear that the letter of September 27, 1995 is a certificate in the broadest sense of the word “certifying” that no overtime is owed.

It may be argued that to so find is inconsistent with the scheme under s. 53(1)(d) which requires the Labour Standards Officer to send a copy of the certificate to the employer and give the employer time to present evidence and make representation. That section, in my opinion, can be read as permitting the employer to respond when it is required. In my opinion, a finding that the letter of the Labour Standards Board is a certificate does not render the appeal or review provisions of the Board under s. 53(2) redundant. Indeed, it does just the opposite — it renders coherence to the legislative scheme under the *Act*. The Board has the authority to: 1) confirm the amount of wages owing, in this case — none; 2) cancel the certificate and issue a new one; or, 3) take no further action.

In my opinion, this reasoning avoids a serious structural problem which provides for disparate remedies under the *Act*. The *Act,* as previously noted, provides for two rights of appeal under Part VI: 1) appeals pursuant to s.40(2) or s. 45 (which are protected by a privative clause); and, 2) appeals pursuant to s. 53. which grants a right of appeal to the Supreme Court on a point of law. If one were to find that the Labour Standard Officer’s decision was not a certificate a statutory anomaly would be created. If there is a finding by the Labour Standards Officer that wages are owing, the parties affected have a statutory right of appeal to the Supreme Court, but if the Labour Standard Officer finds that no wages are owing the parties have no right of appeal to the

Court. It makes no structural sense to provide an appeal in circumstances where a claim is allowed but to preclude an appeal where a claim is denied. The Legislature clearly intended to provide a separate route of appeal for claims involving wages, one which grants a limited right of appeal to the Supreme Court. To accept the Marren's arguments would clearly undermine that intent.

In this case, Marren filed a wage claim under s. 53 of the *Act*. The Labour Standards Officer examined the claim and issued a certificate certifying there was no overtime owed by Echo Bay Mines. Marren appealed that decision under s. 53(2) to the Board and the Board, acting under the power conferred on it pursuant to s. 53(2) cancelled the certificate. It is from that decision that the appellant, Echo Bay Mines, appeals pursuant to s. 53(4).

The result is that this Court has jurisdiction to hear the appeal on a point of law from any decision made under s. 53 of the Act. That interpretation is, in my opinion, consistent with the decision of this Court in *Dowdall v. Nerco Con Mine (Ltd.)*[16] which holds that jurisdiction to appeal a decision of the Board to the Supreme Court is dependant on the granting of a certificate. In my opinion, that is precisely what happened in this case.

Did the Board Err in Law by Setting Aside Or Cancelling the Certificate of the Labour Standards Officer?

The fundamental issue is whether the Labour Standards Board erred in

[16](1995), 131 D.L.R. (4th) 380 N.W.S.C.

law by finding that the overtime averaging rotation scheme in force during the gap period was a more favourable right or benefit than those provided for under the *Act*. What is specifically at issue is whether the Board should have examined the benefits as a whole payable by the employer to the employee as opposed to simply comparing the averaging provisions in the *Act* with the overtime averaging arrangement.

Analysis

The determination of this appeal turns on the interpretation of s. 3(1) of the *Act* and its effect on ss. 4, 7 & 11 of the *Act*. The material portions of those sections are set out for ease of reference:

> 3.(1) This Act applies notwithstanding any other law or any custom, contract or arrangement, whether made before, on or after July 1, 1968, but nothing in this Act shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his or her rights or benefits under this Act.
>
> . . .
>
> 4. Subject to this Part, the standard hours of work for an employee are eight hours in a day and 40 hours in a week.
>
> . . .
>
> 7.(1) Where the nature of the work in an industrial establishment necessitates irregular distribution of an employee's hours of work, the Labour Standards Officer may, by permit in writing, authorize the standard and maximum hours of work in a day and in a week to be calculated as an average for a period of one or more weeks.
>
> (2) The Labour Standards Officer may, by permit in writing, on application by an employer and his or her employees,
>
> (a) reduce the days of work in a week by permitting hours of work in a day in excess of the standard hours of work, in respect of those employees; and

(b) specify the conditions under which the permit applies.

. . .

11.(1) When an employee is required or permitted to work in excess of the standard hours of work, the employee shall be paid for the overtime at a rate of wages not less than 1.5 times his or her regular rate.
(2) Subsections (1) and (3) are subject to the provision for overtime contained in a permit issued under section 7.[17]

Section 3(1) is intended to protect employee benefits that exceed the statutory minimum. Section 4 establishes a standard eight hour day, 40 hour week regime. Section 11 requires an employer to pay overtime for all hours of work worked in excess of the standard hours of work at a rate of 1½ times the regular rate of pay. That overtime requirement is subject to the provision for overtime contained in s. 7. In the absence of a permit contemplated by s. 7, an employer is required to pay overtime for all hours of work worked in excess of the standard hours of work. The *Act* clearly provides that an employer can, in the circumstances described in s. 7, require an employee to work more than the standard hours without being required to pay overtime if an overtime averaging permit is obtained.

Echo Bay Mines contends, however, that there is a second way in which the requirement to pay overtime can be overridden — that is by the operation of s. 3(1) of the Act. That section provides that nothing in the *Act* affects "any rights or benefits of an employee under any . . . contract or arrangement that are more favourable to the employee than his rights or benefits under this *Act*". Echo Bay Mines contends s. 3(1) is an overriding section which can affect how

[17] *Supra*, Note 2.

benefits are paid. It contends the work arrangement with its employees — a two week on, two week off rotation which contains an overtime averaging provision — is more favourable to the employees than their standard rights under the *Act*, and that s. 3(1) overrides the obligation to pay overtime. The result is no overtime is payable for hours of work worked in excess of the standard hours of work during the gap period.

Thus the effect of s. 3(1) of the *Act* is the fundamental issue on this branch of the appeal? How is it to be interpreted to determine whether the arrangement is superior to the standard benefits under the *Act*? There are two broadly stated and conflicting points of view. The first is that the benefits in the *Act,* which appear on their face to be more advantageous such as the overtime requirements, must be evaluated in light of all the other provisions of the agreement. In other words, one must consider all of the terms and conditions of employment between the employer and its employees and weigh them against the benefits provided for in the *Act* to determine whether or not overtime is payable. The second is that the benefits should be compared only to those benefits falling within the compass or subject matter under consideration, i.e, overtime. One does not consider all the provisions or terms of employment to determine whether the benefit is more favourable to the employee, simply those directly related to the benefit in question.

The first position was articulated by Bayda J.A., as he then was, in *R. v. Caxton Press*[18]. He interpreted s. 62(1) of the *Labour Standards Act*, 1967[19] a

[18]*Supra*, Note 14.

[19]S.S. 1969, c.24.

provision similar, but not identical to s. 3(1). The statutory provision contained a second branch which provided that if any wage clause in an agreement provided for less than time and one half for overtime, such arrangement would be deemed to be less favourable than the benefits contained in the *Act.* It was that second portion which led Bayda J.A. to conclude that the rate of pay provisions should be read in light of the other provisions in the agreement. He said:

> The appellants' submission has properly identified one problem that arises in the construction of s. 62(1). There is another problem: In determining whether any provision in an agreement prescribing a rate of pay is more favourable than its counterpart contained in the Act, should that provision be isolated from the rest of the agreement and be treated as unaffected by the other provisions of the agreement — dealt with in vacuo so to speak — and the comparison between it and its counterpart in the Act then made, or should that provision and its effect be first evaluated in the light of the other provisions of the agreement then, only after such evaluation has taken place, should the comparison be made?
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> ****
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> [M]y conclusion is that the legislature intended the rate-of-pay provision in any agreement to be read and evaluated in the light of the other provisions of the agreement before a comparison is made with its counterpart in the Act. That the legislature contemplated that it should be left open to demonstrate that a provision (in an agreement) on its face less favourable than its counterpart in the Act is, in fact, more favourable than the latter is evident not only from the wording of the section but from the decision itself to include the second branch of s. 62(1) in the section.[20]

The Court held that the working hours and conditions of the shortened work-week voluntarily adopted by the employees were more favourable than the scheme provided for by the statute. As a result, the employees were not entitled to overtime pay, notwithstanding the fact that no authorization had been issued. [see also: *Regina (City) v. Saskatchewan (Minister of Human*

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[20] *Supra*, Note 14 at p. 421.

Resources)[21]]

Section 62(1) has since been amended and the second branch removed. The current section, section 72(1) is virtually identical to s. 3(1). That section reads:

> 72(1) Nothing in this Act or in any order or regulation made under this Act affects any provision in any Act, agreement or contract of service or any custom insofar as it ensures to any employee more favourable conditions, more favourable hours of work or a more favourable rate of wages than the conditions, the hours of work or the rate of wages provided for by this Act or by any such order or regulation.[22]

The interpretation of s. 72(1) of *The Labour Standards Act* was revisited by the Saskatchewan Court of Appeal in *Meyer v. Thyssen Mining Construction of Canada Ltd.*[23] in the context of the amount of notice an employer was required to give regarding the termination of an employee. There, the employer gave the plaintiff manager twelve months termination notice, advised him that his services would not be needed for the remaining ten months of the contract and told him to use up his remaining vacation entitlement during that ten month period. The plaintiff sued seeking to recover vacation pay. The employer defended, contending the terms of the contract were more favourable than those provided by the statute.

Vancise J.A., speaking for the Court, interpreted s. 72(1) of *The Labour Standards Act*, R.S.S. 1978, c. L-1 in the following way:

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[21](1991), 89 Sask. R. 211 (Q.B.).

[22]R.S.S. 1978, c.L-1.

[23](1984), 37 Sask. R. 280 (Sask. C.A.).

> [6] The appellant contends that s. 72 of the **Labour Standards Act** makes the **Act** inapplicable to the contract of service between the appellant and the respondent. It contends that the inclusion of more favourable conditions in the agreement takes the agreement out of the operation of the **Act** and that the **Act** was never intended to apply to persons such as the respondent. The trial judge, in our opinion, correctly decided that, to the extent that contractual obligations under the agreement ensure more favourable conditions, more favourable hours of work, and remuneration higher than that provided in the **Act**, the **Act** does not apply. *That does not however, mean that all of the provisions of the **Act** do not apply to the parties, but rather that only those provisions less favourable do not apply*. The only provisions of the **Act** that could have benefited the respondent in these circumstances are ss. 33, 35 and 36(1). (emphasis added)[24]

The first position as outlined in *Caxton* was also re-examined in *White Pass Transportation Ltd. v. Attorney General of Canada*.[25] There, the trial judge found that, because the terms of the collective agreement maintained seniority and recall rights for laid-off employees in terms more favourable than the statute, the statutory requirement of two weeks severance was not binding on the employer. The trial judge held that s. 28(1) [now s. 168(1)] of the *Canada Labour Code*, R.S.C. 1985, c. L-2 relieved the employer of its obligation to pay two weeks severance to the employees because, as a whole, the terms regarding the issue of lay-off were more favourable than those provided by the statute.

The British Columbia Court of Appeal overturned the decision of the trial judge. Hinkson J.A. stated, on behalf of the court, that the application of the statutory provision was limited to the extent that specific benefits exceeded

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[24] *Ibid* at p.282.

[25] (1986), 33 D.L.R. (4th) 371 (B.C.C.A.).

the base level prescribed by the *Code*.

> Section 28(1) of the Code does not provide that the provisions under that part of the Code and the *Canada Labour Standards Regulations*, C.R.C. 1978, c. 986, cease to have application when rights or benefits provided to an employee under a collective agreement are more favourable to the employee than his rights or benefits under that part of the Code. That subsection does not provide that in such circumstances that part of the Code and the regulations cease to have application to the employee. Rather, the Code continues to have application but to the extent that any particular rights or benefits provided to an employee under the terms of a collective agreement are more favourable to him, those rights or benefits are to continue to apply.
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> . . .
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> I have reached that conclusion despite the submission made on behalf of the plaintiff that it is not appropriate in interpreting s. 28(1) of the Code to look only at what provisions, if any, are contained in the collective agreement with respect to termination. The plaintiff contends that it is necessary to look at the collective agreement in its entirety and, if the package of benefits in the collective agreement, either generally or with respect to the wide subject-matter of ending the employment relationship, is more favourable than the package of benefits contained in the Code in the same broad areas, then the Code is inapplicable. In support of this proposition, reference was made to the decisions in *R. v. Caxton Printing Ltd. et al.*, [1977] 3 W.W.R. 410 (Sask. C.A.), and *Canmore Mines Ltd. et al. v. Board of Industrial Relations et al.* (1967), 67 C.L.L.C. ¶14,040. Consideration of the reasoning in those decisions does not lead me to conclude that in construing s. 28(1) of the Code it is appropriate to compare all the benefits provided in the collective agreement with the benefits contained in the Code, or to compare the benefits in a wide area in each case, in order to determine whether the benefits of the collective agreement are to continue to have effect. The benefits to be compared should be benefits falling within the precise compass under consideration; in this case, termination pay[26].

The fact that the employees had superior benefits to retain seniority upon recall from a lay-off was irrelevant to the application of s. 28(1) [now s. 168(1)] *vis-a-vis* severance pay. A general characterization of the collective agreement as more or less favourable would have deprived the employees of specific benefits imposed by the *Act* for their protection in the event of termination. See also *M.C. Graphics Inc. v. Director of Labour Standards (Sask.) et al.*[27]

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[26] *Ibid* at pp. 375 &376.

[27] (1992), 106 Sask. R. 17 (Q.B.)

In my opinion, *Meyer*[28] and *White Pass* represent the correct approach to the interpretation of overriding provisions such as ss. 3(1) and 72(1). Where the impugned deficiency (the overtime requirement) has an immediate and inextricable benefit, the Court should consider the specific issue as a whole rather than isolating the constituent element. The provisions relating to overtime, for example, are unrelated and are not affected by the benefit of the more favourable termination provisions in the agreement. Those more favourable provisions would not be considered in determining whether the specific overtime provision was more favourable because they are outside the "precise compass" of the sections affecting overtime. If one concluded that the correct approach is to consider or examine the agreement, contract or arrangement in its entirety to determine whether it is generally more favourable, the underlying fundamental purpose of the *Act* of establishing minimum standards will be adversely affected. The comparison must be made with respect to those elements which are inextricably linked to the impugned provision.

Application of Principles

What then is the result of this analysis? What is the "precise compass" and what provisions are relevant to determine whether the two week on, two week off rotation provision and the overtime averaging provisions in effect during the gap period are more favourable to the employee than the rights under the *Act*?

Section 4 of the *Act* establishes the standard hours of work. Section 11(1) provides that an employer must pay overtime for hours of work worked by an

[28] *Supra*, Note 21.

employee in excess of the standard hours of work. The arrangement that Echo Bay Mines had with its employees provided for a two week rotational work schedule and an overtime averaging provision. That arrangement deals with hours of work, and overtime and is inextricably tied to the statutory benefits — the obligation to pay overtime. It is not necessary to examine matters in the agreement which are not inextricably tied to the statutory provisions such as termination benefits, notice requirements etc., to decide whether the arrangement in this case is superior to the standard benefits payable under the *Act*.

Thus, one cannot look at the overtime provisions in s. 11 in isolation. It is necessary to consider them in light of the rotation scheme including the overtime averaging provisions. The Labour Standards Officer found that the rotational scheme including the overtime averaging provisions was a superior arrangement to the standard benefits payable under the *Act*. That finding was clearly made taking into account the specific provisions of the *Act* (the obligation to pay overtime) and those matters within the "precise compass" or subject matter as contemplated by *White Pass* and the interpretation set out in *Meyer* (the rotational arrangement and overtime averaging arrangement). I note in passing that although the Labour Standards Officer referred to *Caxton Printing* as support for his position that overtime was not payable, the result in this case would have been the same because the matters referred to in that case are within the affected compass — hours of work and overtime. The decision of Bayda J.A. must be read in light of the second branch of the section as it existed at the time *Caxton* was decided.

In my opinion, the Board erred in law in its interpretation of s. 3(1) of the

Act by failing to consider those matters inextricably linked to the payment of overtime in s. 11 of the *Act* and in particular the rotational scheme, the overtime averaging provisions and its effect on the employees. Section 3(1) overrides the obligation to pay overtime in accordance with the provisions of the *Act* in the circumstances of this case. As the Labour Standards Officer noted, the employees clearly considered that scheme to be superior to those benefits under the *Act*. Three hundred and fourteen out of 317 of them voted in favour of the retention of the scheme.

The decision of the Board is hereby set aside and the decision of the Labour Standards Officer restored. The same result also applies in connection with the appeal of Smith in proceeding CV06422.

Having concluded that this Court has jurisdiction to hear the appeals in the proceedings number CV06421 and CV06422, and the result being the same in each case, it is not necessary to hear the applications for judicial review or to decide whether it was appropriate in the circumstances to file applications for judicial review.

Having determined that the Labour Standards Officer was correct in his finding that no overtime was payable during the gap period, the issues raised on appeal CV07695 and application for judicial review CV07796 are moot and do not require to be dealt with at this time.

Accordingly, the appeal and application for judicial review are dismissed without prejudice to the appellant/applicant to reinstitute the proceedings before

the Labour Standards Officer to modify the dates of the permit if necessary.

The appellant shall have one set of costs against the respondent, Marren. There will be no order as to costs in the remaining five matters heard at the same time as the Marren appeal pursuant to the order of Vertes J.

DATED at the City of Regina, in the Province of Saskatchewan, this 14th day of AUGUST, A.D. 1997.

VANCISE J.

Deputy Judge of the Northwest Territories

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Labour Standards Act*, R.S.N.W.T. 1988, c. L-1, as amended;

AND IN THE MATTER OF a decision of the Labour Standards Board issued on April 19, 1996 allowing an Appeal by Mark Marren against the decision of Labour Standards Officer Eric Smith issued on September 27, 1995 dismissing a complaint by Mark Marren against Echo Bay Mines Ltd. under the *Labour Standards Act*; CV 06421

BETWEEN: **ECHO BAY MINES LTD.**

Appellant

- and -

MARK MARREN AND LABOUR STANDARDS BOARD

Respondents

AND IN THE MATTER OF a decision of the Labour Standards Board issued on April 19, 1996 allowing an Appeal by Norm Smith against the decision of Labour Standards Officer Eric Smith issued on September 27, 1995 dismissing a complaint by Norm Smith against Echo Bay Mines Ltd. under the *Labour Standards Act*; CV 06422

BETWEEN: **ECHO BAY MINES LTD.**

Appellant

- and -

NORM SMITH AND LABOUR STANDARDS BOARD Respondents

AND IN THE MATTER OF a decision of the Labour Standards Board issued on October 31, 1996 stating that the Board had no jurisdiction to hear an appeal filed by Echo Bay Mines Ltd. on May 13, 1996 against a decision of Labour Standards Officer Eric Smith issued on April 26, 1996 CV 06795

BETWEEN: **ECHO BAY MINES LTD.**

Appellant

- and -

LABOUR STANDARDS BOARD Respondent

AND IN THE MATTER OF a decision of the Labour Standards Board issued on April 19, 1996 allowing an Appeal by Mark Marren against the decision of Labour Standards Officer Eric Smith issued on September 27, 1995 dismissing a complaint by Mark Marren against Echo Bay Mines Ltd. under the *Labour Standards Act*; CV 06419

BETWEEN: **ECHO BAY MINES LTD.**

Applicant

- and -

MARK MARREN AND LABOUR STANDARDS BOARD

Respondents

AND IN THE MATTER OF a decision of the Labour Standards Board issued on April 19, 1996 allowing an Appeal by Norm Smith against the decision of Labour Standards Officer Eric Smith issued on September 27, 1995 dismissing a complaint by Norm Smith against Echo Bay Mines Ltd. under the *Labour Standards Act*; CV 06420

BETWEEN: **ECHO BAY MINES LTD.**

Applicant

- and -

NORM SMITH AND LABOUR STANDARDS BOARD

Respondents

AND IN THE MATTER OF a decision of the Labour Standards Board issued on October 31, 1996 stating that the Board had no jurisdiction to hear an appeal filed by Echo Bay Mines Ltd. on May 13, 1996 against a decision of Labour Standards Officer Eric Smith issued on April 26, 1996; CV 06796

BETWEEN: **ECHO BAY MINES LTD.**

Applicant

- and -

LABOUR STANDARDS BOARD

Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE W. J. VANCISE