EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SUSPENDING A DETERMINATION (BUT WERE TOO AFRAID TO ASK)

By Shafik Bhalloo and Devin Lucas

INTRODUCTION

The steps to receiving a suspension when appealing a determination of the Director of Employment Standards (the "Director") to the Employment Standards Tribunal (the "Tribunal") can be confusing and full of potholes, so it is best to plan ahead and know the terrain. For applicants wanting to map out their route, this article will provide a brief primer of the law governing a suspension request when appealing a determination by the Director. It will also serve as a practical guide for adjudicators who are reviewing these applications. Part I examines the statutory scheme behind this remedy. Part II documents a number of previous decisions where suspensions have been ordered and where they have been refused, as well as decisions regarding reconsideration of appeals and suspension orders rendered moot. Part III sets out five common errors made by applicants and seven instructive principles for consideration by both applicants and adjudicators.

PART I. LEGISLATIVE FRAMEWORK

Section 113 of the Employment Standards Act (the "*Act*") and Rule 31 of the Tribunal's *Rules of Practice and Procedure* (the "*Rules*") govern requests to suspend a Director's determination. The two provisions are complementary and should be viewed collectively by an applicant seeking a suspension of a determination:

> **Director's determination may be suspended**
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> **113** (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination.
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> (2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either
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> (a) the total amount, if any, required to be paid under the determination, or

(b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.

Rule 31 Request to Suspend a Determination

Requirements for application to suspend a determination

(1) In order to request a suspension under s. 113 of the *Act* an appellant or applicant must, in writing, at the same time as filing the appeal or application for reconsideration:

(a) state the reasons for the request to suspend the determination;

(b) state the amount to be deposited with the Director; and

(c) if that amount is less than the amount required to be paid by the Director, state the reasons why depositing a lesser amount would be adequate in the circumstances.

Notice of suspension request

(2) The Tribunal may notify the other parties of the request to suspend the determination and set a time limit for responding to the request.

Suspension decision

(3) If the request is not otherwise resolved, the Tribunal will advise the parties in writing of its decision on the request.

Section 113(1) of the *Act* grants an applicant appealing a determination the ability to seek a suspension of a determination pending an appeal; subsection (2) gives the Tribunal the authority to consider such an application. The language of subsection (2) is permissive and vests in the Tribunal the sole discretion to grant a suspension. As such, a suspension is not granted by the Tribunal as a matter of course. Further, respondents are given the opportunity to file submissions in response to an applicant's suspension request.

Subsection (2) holds that the Tribunal is to exercise its discretion to suspend a determination subject to terms and conditions considered sufficient by the Tribunal. The Tribunal has the option of ordering either the total amount, if any, required to be paid under the determination to be deposited with the Director, or a smaller amount that the Tribunal considers appropriate in the circumstances of the appeal. The amount is held in trust by the Director pending a further order by the Tribunal on the merits of the appeal.

Rule 31(1) goes further and explains the procedural requirements governing a suspension request. It requires the applicant to submit in writing, "at the same time as filing the appeal or

application for reconsideration", the reasons for the request to suspend the determination, the amount the applicant is willing to deposit with the Director, and if that amount is less than the full amount ordered by the Director in the determination then the reasons why the lesser amount would be adequate in the circumstances.

It is important to note that an applicant is only permitted to request the Tribunal to suspend a determination that was issued pursuant to section 79 of the *Act.* Section 113 does not apply in respect of a determination issued under section 119. Section 119 deals with reciprocating jurisdictions under the *Act* and allows an employee in a reciprocating jurisdiction to have an order from that jurisdiction enforced in British Columbia. Pursuant to section 119, a determination can be appealed, but only to the Supreme Court of British Columbia and not to the Tribunal. Accordingly, only the Supreme Court of British Columbia has the authority to suspend a section 119 determination.

PART II. HELPFUL DECISIONS DEALING WITH SECTION 113 AND RULE 31

Numerous Tribunal decisions have considered section 113 applications. The practice that has emerged recently with respect to these decisions is for the Tribunal to issue its reasons on an application to suspend the effect of a determination separately from the reasons regarding the actual merits of an applicant's appeal.

A. Suspensions Ordered

The 1997 Tribunal ruling in *Tricom Services Inc.*[1] is a leading decision on the factors that a Tribunal must evaluate when considering a suspension of a determination request. In that decision, a security business appealed a determination by the Director, whereby the employer was ordered to pay the total sum of $34,076.82 representing unpaid wages and interest. The employer, Tricom Services Inc. ("Tricom"), also sought a suspension of the determination pending the outcome of the appeal.

The Tribunal released an initial decision regarding the employer's request to suspend the determination. The Director strenuously objected to the suspension request because the company was in a financially precarious position. The Director raised the concern that if the

[1] *Tricom Services Inc.,* BC EST #D420/97

determination was suspended without any monetary deposit the employees would be severely financially prejudiced. In response, the employer stated that although it was able to pay the full amount of the determination, such payment would have a significant negative effect on its cash flow and, on the basis of its strong meritorious appeal, the suspension ought to be ordered with no, or very little, money being deposited.

In its preliminary decision on the suspension request, the Tribunal made reference to two earlier Tribunal decisions. First, the Tribunal distinguished *Motion Works Group Ltd.*[2], where the Tribunal ordered the suspension of a determination (in the amount of $16,039.58) upon deposit of the sum of $5,000. In *Motion Works Group Ltd.,* the Tribunal issued an order suspending the determination primarily for the reason that the determination appeared to overstate the unpaid wage entitlement of the employees. The Tribunal, in *Tricom,* noted that, unlike the case at bar, the allegation had been particularized in *Motion Works Group Ltd*. In that regard, the Tribunal stated:

> ... Tricom simply makes a general assertion that the Determination may be in error as to the calculation of the amounts due to the various employees. However, given that the Determination was based on Tricom's own payroll records, I would have thought it not a Herculean task for the appellant to more fully particularize its claim that the Determination contains calculation errors.

Despite the lack of particularity regarding the Director's apparent overstatement of wages, the Tribunal was satisfied that the employer's appeal may be meritorious. The Tribunal went on to consider the Tribunal decision in *TNL Paving Ltd. et al.*[3] In *TNL Paving Ltd. et al*., the Director had opposed a suspension request on the basis that if the determination was suspended, an ongoing investigation would be prejudiced. The Director had issued a determination that the records pursuant to an earlier Demand by the Director could be utilized in an investigation into whether the employers had complied with its statutory obligations. This was a unique case as the determination did not involve a monetary order. The Director, in response to the applicant's request, had opposed it as it submitted only determinations for a specific monetary sum could be suspended. The Tribunal noted that section 113(2)(a) referred to depositing with the Director the "total amount, *if any...*". In the Tribunal's opinion, the words "*if any*" specifically contemplated an applicant seeking a suspension of a determination that did not involve the payment of money.

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[2] *Motion Works,* BC EST #D345/946
[3] *TNL Paving Ltd. et al*., BC EST # D002/97

Further, the Tribunal found that the Director's submission that it would be prejudiced if a suspension was granted failed for lack of particularity. The Director had not established how it would be prejudiced if the determination were to be suspended.

Similarly, the Tribunal in *Tricom Services Inc.*[4] found that the general claim of prejudice on the part of the employer regarding its cash flow was insufficient to justify an order to suspend the determination upon deposit of little or no monetary security. According to the Tribunal, the adequacy of any proposed deposit must be viewed not only from the perspective of the employer, but from the point of view of the employees as well, as their rights could be affected by a suspension order. The Tribunal took into account the fact that Tricom appeared to be having financial difficulties and there was a risk that the employees would not be able to recover their unpaid wages. The Tribunal ordered that the determination be suspended until the appeal had been heard or decided, or until further order of the Tribunal, on the condition that Tricom deposited with the Director the full amount of $34,076.82 required to be paid under the determination.

The Tribunal in *Miller*[5] provided a useful summary of the governing principles in a section 113 application. In this decision, the Tribunal Member approved of a two-stage analysis for adjudicators considering section 113 suspension applications. First, the Tribunal should determine whether it should suspend the determination. If the Tribunal decides that a suspension is warranted, it should then contemplate what terms and conditions are appropriate in the circumstances. In considering whether it should suspend the determination, the Tribunal should consider whether the grounds of appeal appear to raise a "justifiable issue" based on any of the three statutory grounds of appeal. Moreover, at this stage, the Tribunal ought to consider whether the applicant will likely endure unreasonable financial hardship if a suspension order is not granted and whether one or more of the respondent parties will be unjustly prejudiced if a suspension order is granted. If the Tribunal is satisfied that a suspension order is justified, the "default" order is that the full amount of the determination be paid into trust with the Director pending the outcome of the appeal. If, however, the applicant seeks an order that a lesser sum be deposited, the applicant must establish why that would be appropriate taking into account all the relevant circumstances.

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[4] *Tricom Services Inc.*, *supra*
[5] *Miller,* BC EST # D090/10

The Tribunal Member recognized that an appeal from a decision of the Director does not grant a right to the applicant for a fresh trial. On this basis, he advised that the Tribunal should not suspend a determination if the applicant's appeal documents fail to raise, on their face, an arguable case that the appeal might succeed on one or more of the enumerated grounds of appeal pursuant to section 112 of the *Act*. As such, the Tribunal Member warned that a general claim that the Director failed to observe the principles of natural justice in making the determination will not be adequate. The Tribunal Member identified that the applicant is the party that bears the burden of satisfying the Tribunal, on a balance of probabilities, that a suspension order is warranted.

In light of these principles, the Tribunal found in *Miller*[6] that the applicant raised an arguable case, but had failed to provide any support for its contention that the award would raise undue financial hardship. Therefore, the Tribunal Member ordered that the suspension order should be granted provided the appellant deposit the full sum required to be paid under the determination.

The Tribunal in *Kootenai Community Centre Society*[7] was asked to consider a request for suspension of a determination requiring a non-profit society to pay $18,171.74, representing wages and accrued interest owed to a former employee and an administrative penalty in the amount of $500.00. The society deposited the amount of $7,359.75 with the Director in its appeal. This amount reflected what the society submitted was the employee's entitlement less statutory deductions. The society also gave an undertaking to pay out the outstanding balance of the award, if necessary, following the Tribunal's decision on the merits. The Tribunal found that the society's submissions regarding the substantive aspects of the appeal had merit. Further, the Tribunal considered the fact that neither of the respondents had taken a position with respect to the suspension application and found that the granting of the suspension would not be prejudicial towards these parties. In the end, the Tribunal concluded that a suspension order was warranted and that the lesser amount was sufficient to act as security pending the outcome of the appeal.

In many section 113 suspension application decisions, the Tribunal takes a middle of the road stance that seeks to balance the competing interests of the applicant and the respondent. This

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[6] *Miller, supra*
[7] *Kootenai Community Centre Society,* BC EST # D001/12

was illustrated in the Tribunal decision of *Wen-DI*[8], in which the Tribunal fashioned a creative remedy that sought to satisfy the interests of both the applicant and the respondent. In that case, the applicant employer requested that the determination ordering the applicant to pay $10,451.36 be suspended upon the deposit of $1,200 with the Director pending the appeal. The applicant raised the issue of potential cash flow problems. In response, the Director submitted that the full amount ought to be deposited. The Tribunal felt neither proposal was appropriate. The Tribunal framed an order that secured the employee's claim while, at the same, did not unduly constrain the employer's cash flow. The Tribunal accomplished this by ordering the applicant to provide to the Director an irrevocable letter of credit in favour of the Director for the full amount ordered to be paid under the determination.

In *Chatzispiros*[9], the Director issued a determination against a number of related companies, including 553334 B.C. Ltd., for $435,905.05 on account of unpaid regular wages, statutory holiday pay, vacation pay, individual compensation for length of service and group termination pay owed to 64 former employees of an intermediate care facility. A subsequent determination was issued against Kosta Chatzispiros, in the amount of $121,253.56, in his capacity as a director and officer of 553334 B.C. Ltd. In his suspension request, Mr. Chatzispiros claimed that if he was required to pay the full amount of the determination, he would be forced to file for bankruptcy. According to Mr. Chatzispiros, a deposit of $1,000 would be suitable in the circumstances of the appeal. The Director took the position that 10 percent of the determination would be an adequate, being $12,125. The Tribunal agreed with the Director's proposal given the fact that $1,000 was inadequate security for the 64 complainant employees, the lack of merit of Mr. Chatzispiros's appeal, and that it appeared the applicant had no intention of paying the determination amount should it be upheld on appeal. As such, the Director ordered that the determination be suspended provided the applicant deposited $12,125 with the Director.

In *Holt*[10], William Holt was found personally liable for two months of unpaid wages, in the total amount of $11,786.67. The Director had found that Mr. Holt, as a director or officer of a software company, had breached the *Act* by failing to pay regular wages to a former employee. Mr. Holt appealed the determination and requested a suspension of the determination. Counsel

[8] *Wen-Di,* BC EST # D307/99
[9] *Chatzispiros*, EST #D520/98
[10] *Holt,* BC EST #D123/06

for Mr. Holt submitted that Mr. Holt was retired and requiring a deposit of any amount would cause a considerable hardship to the applicant. The Tribunal found that Mr. Holt had made out an arguable case, and that his appeal had some merit. On this basis, the Tribunal suspended the effect of the determination. Because of the fact that Mr. Holt was retired, the Tribunal considered it appropriate that the entire amount be suspended pending the result of the appeal.

B. Suspensions Refused

In the Tribunal decision in *RTS*[11], an employer requested a suspension of the effect of a determination, in the amount of $4,346.78, pending the outcome of a hearing and a final decision made by the Tribunal. The Tribunal quoted with approval a passage from the leading decision of *Tricom Services Inc.*[12], where the Tribunal stated:

> ... it is important to note that the legislature has provided, as a first proposition, that a suspension should only be ordered if the 'total amount' of the determination is posted; a 'smaller amount' should only be ordered if such lesser amount would be 'adequate in the circumstances of the appeal'.

The Tribunal Member noted that there was not any indication in the appeal that the employer deposited any amount with the Director that was required to be paid pursuant to the determination. Without some indication that that this condition has been fulfilled, or that the Tribunal approved of a lesser amount being deposited, the Tribunal was not prepared to exercise its discretion under section 113 and issue a suspension of determination.

In *Strauss*[13], an employee filed a complaint pursuant to section 74 of the *Act* based on the allegation that her employer, Strauss Herb Company, had failed to pay her annual vacation pay, statutory holiday pay and compensation for length of service. The employee was ultimately successful and was awarded vacation pay, statutory holiday pay, and compensation for length of service. Further, the employer was ordered to pay interest and three administrative penalties. The company subsequently appealed on the basis that the Director failed to observe the principles of natural justice in making the determination and also requested that the Tribunal suspend the determination. Contrary to the principles espoused in *Miller*[14], the applicant failed

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[11] *RTS,* BC EST #D070/03
[12] *Tricom Services Inc., supra*
[13] *Strauss,* BC EST # D095/10
[14] *Miller, supra*

to provide an arguable case for the appeal on its merits, and instead relied on a bare allegation that the Director had failed to comply with the principles of natural justice in making its determination. Moreover, the applicant did not provide any written submissions in support of its suspension request, nor deposit any amount with the Director. Given that the applicant had the onus of establishing the basis for suspension, the Tribunal quite rightly refused suspension. The Tribunal Member stated that "it is not for the Tribunal to divine the basis of an applicant's suspension application. The onus is clearly on the applicant to persuade the Tribunal on a balance of probabilities, the merits of its suspension request."

The decision in *Golden Crown*[15], underscores the confusion that applicants, and their counsel, encounter when requesting a suspension of a Determination. The applicant in this case had been ordered to pay a former employee $4,158.74, representing wages, annual vacation pay and interest. Prior to submitting a suspension request, the applicant's counsel had requested an explanation of the process governing the suspension of a determination. An officer of the Tribunal responded to the applicant's request and clarified the process. The officer clearly laid out what was required if the applicant intended to proceed with the suspension request. The applicant's counsel was told the applicant was required to provide written submissions as to why the suspension should be granted. As well, counsel for the applicant was informed that the applicant would be required to explain if any deposit would be offered to the Director in respect of the determination and if not, the reason why. Despite receiving these instructions, the applicant failed to make any written submissions whatsoever. The Tribunal Member found, in the circumstances, the applicant had abandoned the suspension request. In any event, the Tribunal Member would have denied the applicant's request for suspension as the applicant failed to discharge its burden that a suspension order was warranted in the circumstances.

In *0708964 B.C. Ltd.* [16], the Tribunal considered a request to suspend a determination by an applicant that owned property on which a school was situated. The applicant requested a suspension on the basis that the Director made an error in law and further that it would be required to sell the property in order the raise the necessary funds to post security. While the Tribunal was not prepared to characterize the appeal as destined to fail, it did not accept the

[15] *Golden Crown,* BC EST # D010/09
[16] *0708964 B.C. Ltd.,* BC EST # D126/10

applicant's argument that selling the land was the only practical option open to the applicant. In addition, the Tribunal noted that the applicant was the only likely source of recovery of the complainants' unpaid wages. On this basis, the application to suspend the effect of the determination was refused.

Another Tribunal decision where suspension was refused occurred in *Wren.*[17] The applicant applied for an order pursuant to section 113 of the *Act* suspending the effect of the determination pending the result of the appeal. The applicant asserted a strong case on the merits and, accordingly, submitted that the determination should be suspended without him having to pay any funds, or alternatively, only a nominal sum. The Tribunal briefly reviewed the merits of the appeal, as well as the financial circumstances of the applicant. The Tribunal noted that the applicant had failed to provide any corroborating information about his financial circumstances. The Tribunal also emphasized the fact that the applicant did not appear to have any close personal connections to the province of British Columbia apart from keeping a business office, that he "rarely visits", in New Westminster. The Tribunal thus concluded that a suspension order was not appropriate.

In the decision of *Judy Harvey and Melvin Martin operating as The Sportsman Country Inn*[18], the Tribunal refused the applicant's suspension request. At the time the Tribunal heard the suspension request, the Director had already taken steps to collect on the amount ordered to be paid under the determination. In particular, the Director had issued a garnishment order on the applicant employer's bank account. The appeal hearing had been originally scheduled at an earlier date but was subsequently adjourned at the request of the employer. At that time, no collection action had been commenced by the Director. However, the Director stated that subsequently it had learned that the applicant was diverting funds into another company and that the applicant was actively trying to sell the operation. In these circumstances, the Director felt justified in taking action on collecting on the determination. The Tribunal noted that the employer did not respond to the submissions of the Director, nor did it offer any particulars to support the application apart from its claim that the garnishment created a financial hardship. The Tribunal held that the applicant had not met its burden that the determination should be suspended.

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[17] *Wren*, BC EST #D099/10
[18] *Judy Harvey and Melvin Martin operating as The Sportsman Country Inn,* BC EST #D411/00

In *Pacific Western Costal Constructors Ltd.*[19], the Tribunal considered a suspension request by the applicant employer who appealed a determination of the Director ordering it to pay $51,056.60, representing wages and accrued interest to 30 former employees. The applicant was a subcontractor that had commenced proceedings in the British Columbia Supreme Court against the developer as the applicant alleged it was due unpaid amounts. The applicant did not dispute that the employees were entitled to wages. However, the applicant took the position that the disputed funds in respect of the Supreme Court action included the outstanding wages and that it was not in a position to deposit any funds with the Director. The applicant had filed a lien against the property and the funds in dispute had been paid into the Supreme Court by the developer pending a trial. The applicant submitted that the Director should attach the funds in Court to recover the outstanding wages instead of pursuing the applicant company. The Director had already commenced collection procedures against the applicant, and submitted that an order to suspend the collection would unduly prejudice the collection of the unpaid wages. The employees argued that the dispute between the applicant and the developer should not preclude them from seeking payment of their wages.

In denying the application to suspend the determination, the Tribunal was convinced that the appeal had no merit. The Tribunal found that a dispute with a third party could not result in depriving the employees of their wages. Further, the Tribunal emphasized the risk that the employees would never completely recover their wages given the fact that the employer had stated it had no funds to deposit pending the appeal of the determination.

In *Lowan*[20], the applicants appealed a determination issued by the Director ordering the applicants to pay their former employee the sum of $15,664.01 on account of unpaid wages and interest. The applicants' counsel requested that the determination be suspended without any deposit with the Director. In response, the Director submitted that the determination should be suspended only if the applicants deposit the full amount required to be paid under the determination. The applicants' submission that a suspension order was warranted in the circumstances rested primarily on the fact that the applicants' business was no longer operating and both applicants had limited liquid financial assets. The Tribunal came to the conclusion that

[19] *Pacific Western Coastal Constructors Ltd.*, BC EST D#074/08
[20] *Lowan,* BC EST D#254/00

a suspension was not appropriate given the legitimate concern of whether the applicants would be able to pay the determination should it be confirmed on appeal.

C. Reconsideration of Appeals

In *The City of Surrey*[21], the Tribunal Panel considered a suspension request from a determination, whereby the applicant municipality applied for a reconsideration of a decision issued by the Tribunal. In this case, the City of Surrey (the "City") had applied for a reconsideration of a determination that was confirmed on appeal requiring it to pay approximately $205,000 to the Director, to cover wages and other statutory entitlements to 32 persons receiving firefighting instruction. In connection with its reconsideration application, the City applied under section 113 of the *Act* to have the Tribunal suspend the effect of the determination pending the outcome of the reconsideration proceedings. The Director and the Surrey Firefighter's Association both objected to the City's section 113 application.

The City submitted in support of its suspension request that it did not wish to be in the position of having to recoup significant amounts of money from a number of individuals in the event that the reconsideration application was successful. Moreover, the City confirmed that there was no issue in respect of its ability to pay. In response, the Director submitted that a suspension request was not available pending a reconsideration application and, further, the Director maintained that the City had not followed through with an earlier promise to have funds paid to the Director. The City responded that it was prepared to deposit the full amount with the Director in trust pending the outcome of the reconsideration provided the Director would not disburse the funds until after a decision was made. The Tribunal first addressed the threshold question of whether it had the legal authority to suspend the effect of a determination pending a reconsideration decision. The Tribunal held that the language, context and legislative intent of section 113 was that the power exercised by the Tribunal ought to be only exercised in the context of appellate proceedings over which it has exclusive jurisdiction. The Tribunal then cited two earlier Tribunal decisions for the following proposition:

> The language should not be read so as to permit the Tribunal to encroach on the role of the courts or other adjudicative bodies merely because a person has

[21] *The City of Surrey,* BC EST #D049/99

> appealed sometime in the past: see *Re New Pacific Limousine Service Inc.*[22] and *Re Paradon Computer Systems.*[23]

The Tribunal rejected the Director's narrow interpretation of the legislation whereby section 113 would only apply in the period between the determination and the original Tribunal appeal decision. Instead, the Tribunal took a middle ground approach and interpreted the provision to read that a "person who appeals" a determination may make a section 113 request at any point while the statutory appeal process, including the reconsideration process, is ongoing. The Tribunal felt the broad authority given to the Tribunal to suspend a determination under section 113 to ensure justice is done during an appeal supported this view. According to the Tribunal, to exclude section 113 from the reconsideration process would prevent the Tribunal from ensuring that justice is done with respect to reconsiderations.

The Tribunal found the Director's submissions to be more convincing with respect to discretion than that of jurisdiction. The Tribunal identified two factors that become particularly important when a suspension request is made in the context of a reconsideration application. First, the suspension request will generally occur prior to the Panel even making a decision on the preliminary issue of whether to even engage in the reconsideration process. Second, the application will arise from a considered appeal decision by an Adjudicator. In consideration of those factors, the Tribunal took the position that for the Tribunal to allow a suspension request in the context of a reconsideration application, an applicant must make a "clear and compelling" case to the Tribunal that it will suffer prejudice if a suspension order is denied. As such, the party requesting a suspension should demonstrate to the Tribunal that it has contacted the Director in good faith, was not able to reach an agreement with respect to payment and disbursement pending the reconsideration, and that the Director's stance pending the outcome of the reconsideration will cause them serious hardship.

Applying those principles to the case at bar, the Tribunal found that a mutually agreeable situation was available whereby the City would forward the funds to the Director on the condition they would not be paid until after the reconsideration decision was made. It was not clear on the evidence, however, whether the City had actually forwarded the funds to the Director. On this basis, the Tribunal encouraged the parties to resolve the disbursement issue. In

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[22] *Re New Pacific Limousine Service Inc.*, BC EST D#054/96
[23] *Re Paradon Computer Systems,* BC EST D#221/98

any event, the Tribunal was not prepared to suspend the determination pending the reconsideration process. The Tribunal noted that it did not have sufficient evidence regarding the prejudice that the City would suffer if the money were paid out to the employees, nor did it have clear evidence that the Director was insisting on ordering the funds disbursed prior to the reconsideration decision.

In *The City of New Westminster*[24], the Tribunal considered a suspension request, in conjunction with an application for reconsideration brought by the City of New Westminster (the "City"). The City applied for reconsideration of an Adjudicator's decision confirming a determination finding that the City had breached the *Act* when it charged job applicants a $50 non-refundable fee as part of the application process. In support of its suspension application, the City submitted that it had a meritorious appeal, that its conduct throughout the investigation process had been excellent, and that it was financially solvent. Further, the City submitted that it would suffer prejudice because of the difficulty the City would face in recovering the amount ordered in the determination from the individuals in the event the Tribunal cancels or varies the determination. In response, the Director raised a preliminary objection that a suspension pending a reconsideration decision was not contemplated by section 113 of the *Act*. The Director also submitted that the matter was at a point at which the full amount of the determination should be deposited with the Director. Finally, the Director submitted that at the reconsideration stage, the employer should interact directly with the Director, as a statutory fiduciary, responsible for enforcement under the *Act*, with respect to disbursement of funds collected.

The Tribunal dispensed with the preliminary objection that a suspension order was not available on a reconsideration application by following the identical analysis that the Tribunal undertook in *The City of Surrey.*[25] The Tribunal then considered the facts in the present case. In dismissing the suspension application, the Tribunal found that the City had failed to raise any compelling reason as to why it had failed to offer to deposit the full amount with the Director. Moreover, the Tribunal found that the City had failed to provide any basis for its submission that the Director had taken a position to the City's prejudice with respect to the issue of disbursement during the reconsideration process.

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[24] *The City of New Westminster,* BC EST D#518/98
[25] *The City of Surrey, supra*

D. Suspension Orders Rendered Moot

In circumstances where the Tribunal releases a decision regarding a suspension request at the same time as issuing its decision on the merits of the appeal, the suspension order will be rendered moot. This situation was illustrated by the Tribunal decision in *More Group.*[26] In that case, three related companies, More Marine Ltd., More Management Ltd., and Morecorp Holdings Ltd. (collectively, the "More Group"), appealed a determination of the Director in the amount of $4,710.37. The Tribunal's decision specifically related to the unpaid wages of one of its former employees. The More Group sought a suspension of the determination pending the appeal and advised the Tribunal that it was prepared to place the amounts ordered in the determination in the trust accounts of its legal counsel. The Tribunal was convinced that the appeal had merit with respect to More Marine Ltd. and More Management Ltd.; however, because the Tribunal ordered that the determination be cancelled as against these two companies in the same decision, the suspension issue was rendered moot. With respect to Morecorp Holdings Ltd., the Tribunal denied the application to suspend the determination as it was not persuaded that its appeal had any merit.

PART III. INSTRUCTIVE PRINCIPLES ARISING FROM TRIBUNAL DECISIONS

Upon reviewing a number of decisions on the suspension of a determination, it became apparent to the Author that applicants are often times confused by the process and do not adequately prepare for this application. One plausible explanation is that applicants are primarily focus on the substantive aspects of the appeal to the detriment of the suspension application. This may be exacerbated by the requirement set out in the *Rules,* whereby an applicant must file written submissions in respect of the application for suspension at the same time as filing the appeal or request for reconsideration. No matter the reason, applicants are cautioned against taking a casual approach to these applications given that it is the applicant who bears the onus of satisfying the Tribunal that a suspension is warranted.

In many cases, applicants have relied on the strength of their appeal on its merits in support of their submission to post little or no money with the Director. In the Author's view, this reliance is misplaced. In considering what terms and conditions should be placed on the suspension

[26] *More Group,* BC EST #D078/08

order, Tribunal Members place more weight on whether depositing money with the Director will have a prejudicial effect on the applicant. Although the strength of an appeal on its merits is helpful in seeking a lesser amount to be deposited, especially if the lesser amount is supported by an applicant's own calculations, the overriding factor that a Tribunal will consider in determining whether a lesser amount is justified is whether the applicant will be prejudiced.

Based on the decision in *Tricom Services Inc*.[27], applicants should be cautioned against claiming that they are able to pay the full amount under the determination, while also making a general assertion that they will be unduly financially prejudiced. The Tribunal in that case highlighted this inconsistency and noted that without some "unique prejudice flowing from having to post the full amount of the Determination" it was of the view that a determination should only be suspended if the full amount of the determination is deposited with Director.

A number of common mistakes made by applicants have emerged in a number of Tribunal decisions. Five common errors are set out below:

- Failing to deposit the full amount that is required to be paid under the determination with the Director, or some lesser amount with the Director which the Tribunal would think adequate in the circumstances; [28]
- Neglecting to provide written reasons for why a suspension of the determination should be ordered;[29]
- Failing to provide corroborating documents in support of a contention of undue financial hardship;[30]
- A bare and unspecified claim that the Director failed to observe the principles of natural justice in reaching its determination; [31] and
- Failing to set out the nature of the prejudice in requesting a suspension on the ground of prejudice.[32]

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[27] *Tricom Services Inc., supra*
[28] *RTS, supra*
[29] *Strauss, supra*
[30] *0708964 B.C. Ltd., supra*
[31] *Strauss, supra*
[32] *TNL Paving Ltd. et al,, supra*

The following seven instructive principles for both applicants and adjudicators are set out as follows:

- Adjudicators should review section 113 applications through a two-stage analysis[33]:
    (1) The Tribunal should determine whether it should suspend the determination.
    (2) If a suspension is warranted, the Tribunal should then consider what terms and conditions are suitable.
- It is the applicant's burden to show why a determination order should be suspended;[34]
- If there is a risk that employees will not be able to fully recover what is owed to them, the Tribunal is unlikely to grant a suspension request made by an employer;[35]
- A suspension of a non-monetary determination is permitted;[36]
- A suspension will not be granted where it appears the company is trying to actively avoid collection actions;[37]
- A Tribunal will view the adequacy of a proposed deposit not just from the perspective of the applicant employer, but also from the perspective of any employees whose rights may be affected by the granting of a suspension order;[38] and
- For a Tribunal to award a suspension in conjunction with a reconsideration application, an applicant must demonstrate a "clear and compelling" case that it will suffer serious prejudice if a suspension order is not granted.[39]

CONCLUSION

The issuance or denial of a suspension may have serious financial consequences for both the applicant and respondent in a dispute. The granting of a suspension is a discretionary remedy and applicants should not assume their request will be approved as a matter of course. With careful planning, however, chances for a successful outcome are significantly increased. Prior to

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[33] *Miller, supra*
[34] *Strauss, supra*
[35] *Pacific Western Coastal Constructors Ltd., supra*
[36] *TNL Paving Ltd. et al., supra*
[37] *Judy Harvey and Melvin Martin operating as The Sportsman Country Inn, supra*
[38] *Tricom Services Inc., supra*
[39] *The City of Surrey, supra*

initiating a request, an applicant must ensure compliance with the legislative framework and provide a detailed evidentiary record for all submissions.