Employment Standards TRIBUNAL

An appeal

- by -

Super Save Disposal Inc. and Actton Transport Ltd.
(the "Appellants")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE Nos.: 2003A/172, 173, 174 & 175

DATE OF DECISION: January 5, 2006

DECISION

SUBMISSIONS

Michael J. Weiler	Legal counsel for Super Save Disposal Inc. and Actton Transport Ltd.
J. Edward Gouge, Q.C.	Legal counsel for the Director of Employment Standards

INTRODUCTION

1. Super Save Disposal Inc. ("Super Save") and Actton Transport Ltd. ("Actton") both appeal four separate Determinations that were issued by a delegate of the Director of Employment Standards (the "Director") on May 5th, 2003. I shall refer to Super Save and Actton, jointly, as the "Appellants". The Determinations are, in each case, supported by essentially identical "Reasons for the Determination" ("Reasons) also issued on May 5th, 2003. These appeals have been filed pursuant to section 112 of the *Employment Standards Act* (the *"Act"*).

2. To date, the Tribunal has issued several separate decisions dealing with various issues that have arisen in course of these appeal proceedings. These reasons for decision address the two grounds of appeal that have not yet been adjudicated, namely:

    i) Were the Appellants denied natural justice because they were not given a full and fair opportunity to be heard by an unbiased decision-maker?; and

    ii) Did the Director and/or her delegates wrongly assume they owed a "fiduciary obligation" to the complainants?

3. These two issues are being adjudicated based on the written submissions of the parties. I have before me the submissions of counsel for the Appellants dated September 23rd and October 21st, 2005 (which includes an affidavit sworn on October 21st, 2005 by the Appellants' "in-house" legal counsel, James R. Kitsul) and the submissions of counsel for the Director dated September 23rd, 2005 and filed October 7th, 2005 (which includes an affidavit sworn on October 4th, 2005 by Robert Krell, an Industrial Relations Officer employed by the Employment Standards Branch). None of the respondent employees filed a written submission regarding the two outstanding issues.

THE DETERMINATIONS AND APPEALS

4. By way of the Determinations, the Appellants were found jointly and separately (severally) liable as "associated corporations" under section 95 of the *Act* to pay wages and section 88 interest to four former employees, namely, Robert Cardinal (E.S.T. File No. 2003A/172), Stephen Smith (E.S.T. File No. 2003A/173), Todd Norberg (E.S.T. File No. 2003A/174) and Larry Catt (E.S.T File No. 2003A/175). I shall refer to the four employees collectively as the "complainants".

5. The total amount payable under the four Determinations is $54,185.41. The individual amounts payable to each complainant is set out below:

Robert Cardinal	$6,661.96
Stephen Smith	$12,404.31
Todd Norberg	$18,006.89
Larry Catt	$17,112.25
TOTAL	$54,185.41

6. The above amounts include overtime, statutory holiday pay (together with concomitant vacation pay), section 88 interest and, in the case of Messrs. Norberg and Catt, compensation for length of service.

7. As previously noted, these appeals have resulted in several decisions by the Tribunal the most recent of which was issued on August 24th, 2005 (B.C.E.S.T. Decision No. D128/05). In that latter decision I addressed the following issues (as framed by counsel for the Appellants in his submission to the Tribunal dated February 25th, 2005):

> **Ground No. 1**
>
> The Director erred in law in finding that the Branch had jurisdiction to adjudicate these complaints.
>
> **Ground No. 2**
>
> The Director erred in law by not following the directions of Adjudicator Ib Petersen [N.B. see Super Save Disposal Inc., BC EST # D440/01] and by not determining whether [Super Save] was the employer. The Director erred in law in not finding that [Actton] was the employer and that [Actton] was a federally regulated employer.
>
> **Ground No. 3**
>
> The Director erred in law and denied the Appellants natural justice by improperly exercising her discretion under section 95 of the *Act* to answer the central question in this case, namely, who is the employer…it was an error by the [the delegate]…to find that the combined operations constituted the employer for the purposes of the *Act*…[Actton] is the true employer of the employees in question [and is]…a federally regulated employer. The Director, we say, had already determined that [Actton] was a federally regulated employer. Therefore, the Director was without jurisdiction to include [Actton] in an order that it, in association with [Super Save] was the employer under the *Act*. Finally, [the section 95 declaration is] void as being fundamentally flawed due to bad faith and actual bias by the Director, her delegates and agents, in exercising their discretion.
>
> **Ground No. 4**
>
> The Director erred in adjudicating the four [complaints] as the four complaints were determined and the files closed well prior to the Determinations.

Ground No. 5

The Director erred in delegating the files contrary to the provisions of section 117 of the *Act* and the principles of natural justice and without jurisdiction to do so.

Ground No. 7

The complaints ought to have been dismissed, in any event, due to the undue delay with respect the investigation, between the filing of the complaints, the various "determinations" made throughout the course of these investigations and the final disposition of these matters in the May 5, 2003 Determinations of [the delegate].

8. In my August 24th, 2005 reasons for decision I made the following findings:

Ground No. 1: "…on the basis of the evidence before me, I am satisfied that the *Act* governs the employment of each of the four complainants. The undisputed evidence is that each of the four employees carried out their duties entirely within the province of British Columbia. The nature of their work—garbage collection—is not an inherently federal matter (such as, say, air transportation, banking, telecommunications, or nuclear power generation) nor is it, so far as I can determine, an integral part of Actton's interprovincial or international trucking operations." (August 24th reasons at page 8). Further, I was not satisfied that the Director was obliged to refused to investigate and/or determine the complainants' claims on the basis of *res judicata* or issue estoppel (see August 24th reasons at pages 11-14).

Ground No. 2: I was not persuaded that the Director erred in law by not following the directions of Adjudicator Petersen since he did not give any directions to the Director in the form of a "referral back" order. As for the matter of the complainants' "true employer", I held that the Director's delegate could have lawfully determined that both Super Save and Actton were the complainants' employer in light of the definitions of "employee" and "employer" contained in section 1 of the *Act.*

Ground No. 3: Section 95 of the *Act* states that the Director may treat two or more separate corporations as a "single employer" for purposes of the *Act* in which case both corporations are jointly and separately (severally) liable to pay unpaid wages owed to an employee of either firm. At the time the complainants' wage claims crystallized and, indeed, when the Determinations were issued, section 95 stated that the two firms could be treated as "one person" (rather than "one employer") for the purposes of the *Act.* However, I held that nothing turned on that change in statutory language. In my August 24th reasons I ruled "the section 95 declaration was a lawful exercise of the Director's authority *provided it only binds Actton to the extent that Actton employs persons whose work falls entirely within provincial jurisdiction*" (August 24th reasons at page 18). I stressed that I was "only upholding the section 95 declaration to the extent that it relates to the claims of the four complainants whose employment relationships were wholly governed by provincial employment standards legislation" (page 18).

Ground No. 4: In my August 24th reasons I held, at page 20: "So far as I can determine…the *Director* (to be contrasted with HRDC) never formally adjudicated the merits of the jurisdictional issue until the Determinations now on appeal before me were issued. In other words, I am not satisfied that any "determinations" (as defined by the Tribunal in *Insulpro Industries Inc.,* BC EST # D099/98; reconsideration dismissed: BC EST # RD498/98) were ever issued with respect to the complainants' unpaid wage claims against the appellants prior to the four Determinations that are now under appeal".

Ground No. 5: In my August 24th reasons I concluded that the delegate who issued the Determinations had the statutory authority to do so. There was no evidence before me that any of the other delegates who were involved in the investigation of the complaints not lawfully authorized to act. Finally, I also noted that there was no evidence before me that the Director's delegate abdicated his legal obligation to determine the complaints by simply allowing the Director's legal counsel to write the Determinations for him.

Ground No. 7: With respect to the matter of delay, in my August 24th reasons I held, at page 23: "Even if I had *Charter* jurisdiction, I am not persuaded that the Determinations should be cancelled in light of the Supreme Court of Canada's decision in *Blencoe*." Nor was I satisfied that the Determinations should be cancelled as an "abuse of process" within the ambit of administrative law.

9. After having disposed of the six issues that were before me, I issued the following orders:

ORDERS

The issues that have been identified by counsel for the Appellants as Grounds of Appeal Numbers 6 and 8 (February 25th, 2005 submission) shall be adjudicated on the basis of written submissions (if an oral hearing is not ordered) in accordance with the following timetable:

- Counsel for Appellants shall file whatever further submissions he may wish to file (the submission may simply incorporate, by reference, submissions that have already been filed with the Tribunal) regarding the above-mentioned issues by no later than 4:00 P.M. on September 23rd, 2005;

- Counsel for the Director, and the four employees, shall each file whatever further submissions they may wish to file (the submissions may simply incorporate, by reference, submissions that have already been filed with the Tribunal) regarding the above-mentioned issues by no later than 4:00 P.M. on October, 7th 2005; and

- Counsel for the Appellants shall file his final reply submission regarding these issues by no later than 4:00 P.M. on October 21st, 2005.

Upon receipt of the parties submissions, I will determine if an oral appeal hearing is required and, depending on my decision with respect to that matter, may issue final written reasons for decision with respect to the above two issues (i.e., Grounds for Appeal Nos. 6 and 8). The Appellants' application to hold the Director in contempt shall be held in abeyance until such time as I have finally adjudicated these latter issues.

THE REMAINING ISSUES TO BE ADJUDICATED

10. I shall now address the two remaining issues raised by counsel for the Appellants in his submission to the Tribunal dated February 25th, 2005 and identified as Ground Nos. 6 and 8:

Ground No. 6

The Appellants were denied natural justice in the investigation and adjudication of these complaints. That included:

- *audi alteram partem* – Not only were the Appellants not allowed to be heard in this matter, the Director appears to have taken significant steps to hide the investigation and avoid engaging the Appellants in any true discussion of the issues or the evidence.

- *nemo judex in sua causa debet esse* – It now appears, even in the absence of cross-examination on *viva voce* evidence that there is a strong case that there was not only an apprehension of bias on the part of the Director, her delegates, and agents but also actual bias.

- The Director erred in failing to properly investigate the complaint, not only contrary to the principles of natural justice but also contrary to the provisions of section 77 of the *Act* and [Adjudicator] Ib Petersen's directions.

- The Director, her delegates and agents have acted in bad faith with respect to the investigation and adjudication of these complaints and with the intention of harming the Appellants, both in terms of the investigation or the failure to investigate and in terms of rendering the Determinations. The Director, delegates and/or agents knew the Determinations were unfounded and were fundamentally flawed yet the Director, her delegates and agents, continued to ignore these errors and proceeded to issue the Determinations and now argue that the Appeal should be dismissed and the Determinations upheld.

- The Determinations were not made by the delegate acting independently or on his own and accordingly, were not rendered in accordance with the *Act* or the principles of natural justice.

- The Determinations of May 5, 2003 were not Determinations made in good faith following an investigation and adjudication but rather the letter of March 10, 2003 reflects a predetermined and prejudged result which [the delegate who issued the Determinations] had decided before the first contact he made with the Appellants by letter of March 10, 2003. That prejudgment and predetermination was continued and is reflected in the May 5, 2003 Determinations. [underlining in original text]

- The Director, her delegates and agents and others deliberately undermined the investigation and adjudication of the complaints, knowing that such actions would necessarily harm the Appellants financially and would harm the Appellants' reputation.

- The entire investigation, all adjudications and appeal proceedings to date have been tainted by the actual and/or apparent bias of the Director, her delegates and agents against the Appellants.

- The Attorney General's office has so aligned its interests with that of the Director, delegates and agents that is has stepped beyond the proper role of counsel to the Director and has actively participated in the investigation and adjudication of the complaints and therefore, has further tainted the proceedings and adjudications.

Ground No. 8

> The Director, her delegates and/or Agents acted improperly throughout the investigation and adjudication of these complaints by assuming that they owed a fiduciary obligation to the Complainants to the detriment of the Appellants.

11. In addition to the above two remaining grounds of appeal (all other previous grounds were addressed in my August 24th, 2005 reasons), counsel for the Appellants also addressed the matter of the Director's "contempt" of one of my earlier orders. However, as I indicated in my August 24th reasons (at page 26), I do not intend to deal with the Appellants' contempt application until "all of the issues raised by these appeals have been adjudicated". I will give further directions regarding this latter issue at the conclusion of these reasons.

12. I should also note that counsel for the Appellants takes issue with certain findings I made in my earlier August 24th, 2005 reasons. For example, counsel asserts that I should "proceed at this stage with these matters on the basis of the Appellants' view that errors of fact going to jurisdiction have been made" and counsel continues to assert that there was an "improper subdelegation contrary to the common law and the specific authority under section 117 [of the *Act*], which matters were not addressed in the [August 24th] decision" (September 23rd submission, page 6). However, in my view, I have now finally determined those latter matters and I do not propose to revisit them. If the Appellants wish to challenge those findings, the proper course is by way of an application for reconsideration or, perhaps, by way of an application for judicial review.

IS AN ORAL HEARING REQUIRED?

13. In my August 24th, 2005 reasons I made the following comments (at page 26) regarding whether the outstanding two grounds of appeal would be adjudicated following an oral hearing:

> Counsel for the Appellants maintains that an oral appeal hearing is required in order to address the "natural justice" issues. On February 15th, 2005 I wrote to the parties and specifically asked them to address whether some or all of the issues raised by the Appellants required an oral hearing. As I noted in my April 13th reasons, I expected that if counsel for the Appellants believed an oral hearing was necessary he should "identify the nature of the *viva voce* evidence he proposed to call and explain why such evidence could not be presented in written form". When I issued my April 13th reasons, I was not satisfied that a proper justification had been advanced in support of an oral appeal hearing on any of the issues raised in these appeals. I remain of that view.
>
> However, if counsel for the Appellants wishes to continue to assert that an oral hearing is required with respect to the remaining issues, he shall be given one final opportunity to do so but all parties should realize that the remaining issues might well be adjudicated based solely on their written submissions.

The Appellants' Position

14. Counsel for the Appellants, in his September 23rd, 2005 submission (at page 3), stated that Grounds 6 and 8 "**must** be decided **only** following a proper and full oral hearing with the full right of cross-examination of all witnesses having relevant or potentially relevant evidence on all of the issues" (**boldface** in original text). Counsel further submits: "Anything short of a full oral hearing would, in our respectful submission, be tantamount to denying the Appellants fairness". Counsel submits that the

Tribunal earlier ordered that the appeal be adjudicated following an oral hearing and that the Tribunal "should not resile from that order" (page 10).

15. Counsel asserts that the Tribunal should not accept the Director's sworn assertions that all documents have been disclosed and that the Appellants have "substantial concerns that more documents exist and that will only come out in cross-examination" (page 7). For example, Counsel asserts (at page 3) that documents pertaining to a complaint filed by another former employee, David McNeilly (not one of the complainants in the present proceedings), are "clearly part of the record" (underlining in original text) that should have been (but were not) disclosed by the Director.

16. By way of summary, counsel submits (at page 7):

> In this case, the proper adjudication of Grounds No. 6 and 8 (and the contempt proceedings) require the right of the Appellants to cross-examine all of the parties involved in the investigation and the adjudication. This process must now become completely transparent and examinable by the Tribunal. To conduct such an inquiry and make fundamental decisions of this nature in the absence of the benefit of full cross-examination would be a denial of natural justice to the Appellants and indeed would be a denial of justice to the community at large. It would be contrary to the specific purposes of the *Act.*
>
> Accordingly, we respectfully submit that an oral hearing must be conducted to complete the matters before the Tribunal.

Counsel for the Director

17. Counsel for the Director submits (September 23rd submission at para. 5): "The only reason that the Appellants have advanced for an oral hearing is to allow them to cross-examine [the delegate] as to his decision-making process". Counsel submits that the Appellants are not entitled to cross-examine the delegate since his decision-making process is protected by "deliberative privilege"—see *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* (1994), 110 D.L.R. (4th) 731 (Ont. Div. Crt.) leave to appeal to S.C.C. refused: 118 D.L.R. (4th) vi; *Agnew v. Ontario Association of Architects* (1987), 64 O.R. (2d) 8 (Ont. H.C.J.).

18. With respect to the "McNeilly documents", counsel asserts (para. 15) that such documents are "entirely irrelevant to the issues considered by the delegate and equally irrelevant to the issues on this appeal" and, accordingly, "cannot form part of the record".

Conclusion regarding the need for an oral hearing

19. Counsel for the Appellants submits that the recent disclosure of documents concerning a complaint filed by Mr. David McNeilly is further evidence that the entire section 112(5) record has not yet been disclosed. However, I am not persuaded that these latter documents are, as counsel asserts, "clearly part of the record". Mr. McNeilly filed a complaint on April 11th, 2003 (the Determinations were issued on May 5th, 2003) claiming nearly $14,000 in unpaid overtime and statutory holiday pay. This complaint appears to have been initially investigated by a delegate other than the delegate who issued the Determinations now before me. Further, and in any event, I am not satisfied that a complaint relating to an entirely separate person (albeit one that identifies Actton as the employer) is a document that forms part of the section 112(5) record in the present appeals.

20. Counsel for the Appellants submits (October 21st, 2005 submission, page 3):

> The recent disclosure of the McNeilly complaint filed with the Director April 11, 2003 we will argue goes specifically to and contrary to the constitutional findings of fact made by the Tribunal on August 24, 2005. In our view this recently disclosed evidence fundamentally undermines those findings on the important issue of jurisdiction.

21. I have reviewed the so-called "McNeilly documents" (they are appended as exhibits to Mr. Krell's affidavit sworn October 4th, 2005) and I am not persuaded that these documents are relevant to these appeals. I am unable to accept counsel for the Appellants' assertion that these documents "undermine" my earlier decision regarding the jurisdictional issue. It should be recalled that in my August 24th reasons I only concluded that the *four complainants* were governed by provincial, rather than federal, employment standards legislation (I did not make any findings regarding any other current or former Actton and/or Super Save employees) and that "the section 95 declaration was a lawful exercise of the Director's authority provided it only binds Actton to the extent that Actton employs persons whose work falls entirely within provincial jurisdiction" (page 18).

22. As noted above, counsel for the Appellants' states that the Tribunal previously ordered an oral hearing of these appeals—a hearing notice was issued on September 10th, 2003 for a 3-day hearing commencing on December 8th, 2003. The background circumstances relating to that latter hearing notice are set out in my reasons for decision issued May 31st, 2004 (BC EST # D100/04 at pages 3-6). As is detailed in my May 31st reasons, the parties appeared before me on August 28th, September 22nd and December 8th, 2003; each of those hearings dealt with the ongoing issue relating to the disclosure of documents. By way of my order issued August 29th, 2003 (BC EST # D263/03), the parties were advised that the Tribunal reserved the right to make "further orders…with reference to discrete legal questions that can be addressed by way of written submissions rather than by way of an oral hearing".

23. In my April 13th, 2005 reasons (BC EST # D050/05), I indicated I was satisfied that the Director had delivered the section 112(5) record. I then concluded that certain issues could be fairly adjudicated based solely on the record and the parties' written submissions. Accordingly, I ordered the parties to deliver written submissions regarding six separate issues. I subsequently issued my August 24th, 2005 reasons (BC EST # D128/05) setting out my conclusions with respect to each of the six issues (summarized above).

24. Counsel for the Appellants has not identified any witnesses aligned with either Super Save or Actton that he proposes to call on the Appellants' behalf. Rather, counsel for the Appellants, in his October 21st, 2005 submission (at page 5), identified the delegate who issued the Determinations, other delegates and legal counsel for the Director as persons "who must give evidence in order to clarify and explain the documentation to date, confirm if other documentation may exist and if so why it hasn't been disclosed and properly define the process of investigation". Further, counsel submits that these parties must give *viva voce* evidence so that their credibility may be tested. It should be remembered that proceedings before the Tribunal are *appeal* proceedings, not *de novo* hearings, and appeals must be founded on specific statutory grounds.

25. In my view, counsel for the Appellants appears to desire an oral hearing primarily, if not solely, so that he can determine if there might be other documents; it appears to me that counsel would propose to use the oral hearing as a form of "discovery" process akin to that provided for in the B.C. Supreme Court Rules. The matter of document disclosure has been thoroughly addressed in these proceedings and I see no useful purpose in pursuing this matter further. I remain unconvinced that the Director has failed to

disclose the section 112(5) record. As matters now stand, there are two outstanding issues to be adjudicated and I am fully satisfied that these two issues can be fairly adjudicated based on the parties' written submissions.

26. I now turn to the remaining two issues.

GROUND NO. 6: ALLEGED DENIAL OF "NATURAL JUSTICE"

27. Section 77 of the *Act* codifies a particular component of the larger notion of "natural justice", namely, the right to know and respond to allegations made by an adverse party. Section 77 states: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond." Further, sections 112(1)(b) and 115(1) of the *Act* authorize the Tribunal to vary or cancel a determination if "the director failed to observe the principles of natural justice in making the determination".

28. Counsel for the Appellants has identified nine separate instances where the Director and/or his delegates allegedly failed to observe the principles of natural justice. I shall deal with each in turn.

Denial of right to be heard

29. The broad allegation that the Appellants were denied a fair right to respond to the allegations made by the complainants is contained in the first and third of the nine "sub-grounds" contained within Ground No. 6. I am not satisfied that there is any merit to the assertion that the Appellants were denied a reasonable right to be heard.

30. The record before me clearly shows that the Director and his delegates advised the Appellants (and their "in-house" legal counsel) that certain unpaid wage complaints had been filed. The Appellants, by way of response, took the position that the Director did not have jurisdiction since the *Canada Labour Code*, rather than the *Act*, governed the complainants' employment and, in any event, that the complainants' "true employer" was Actton rather than Super Save. The delegate requested further submissions from the Appellants regarding these latter matters and also provided, in advance of issuing the Determinations, calculations setting out the Director's preliminary views regarding the complainants' unpaid wage entitlements. In my view, the Appellants were given a fair and reasonable opportunity to respond to the substance of the complainants' complaints. It would appear that for reasons that are best known only to the Appellants, the Appellants chose to respond in a rather perfunctory fashion.

31. I might also add that the jurisdictional issue and the identity of the complainants' "true employer" have now been fully argued before the Tribunal. Thus, even if there were some sort of procedural failing at the Employment Standards Branch level (and I am not persuaded that is so), that failing has been fully rectified and otherwise "cured" by the instant appeal proceedings.

Bias/Apprehension of Bias

32. The allegation that the Director and his delegates either were, or appeared to be biased, is set out in the second, fourth, sixth, seventh and eighth "sub-grounds" within Ground No. 6.

33. Counsel for the Appellants submits that I should find that the Director and/or one or more of his delegates was biased against the Appellants because, *inter alia*, the Director was not forthcoming in disclosing all relevant documents and because of certain comments that are contained in the record (for example, someone employed by the Employment Standards Branch referred, in a marginal note, to one or both of the Appellants as a "recidivist"). Counsel submits that the Director and his delegates prejudged the matters in dispute.

34. It is clear that after these appeals were filed the Director took a determined position regarding document disclosure. However, it is also clear that the Director's position reflected something of a "legal vacuum" since, when these appeal proceedings were first initiated, the extent of the Director's disclosure obligation under section 112(5) had not yet been adjudicated by the Tribunal although the Tribunal had made some observations in a few decisions. Indeed, the present appeal proceedings presented the first opportunity for the Tribunal to fully delineate the ambit of the section 112(5) record—see BC EST # D100/04; confirmed on reconsideration BC EST # RD172/04.

35. However, as matters now stand, I am satisfied that the Director has fully complied with his section 112(5) disclosure obligation. I also wish to reiterate the comments I made in an earlier decision (BC EST # D100/04 at page 24):

> …I do not believe this to be a case where the Director has willfully flouted an order of the Tribunal. The present dispute regarding document production is attributable to seemingly fundamentally differing views about the nature of the record. The Director is operating under a policy (and made disclosure in this case pursuant to that policy) that, in my view, unduly narrows the scope of the Director's disclosure obligation under section 112(5). I also consider that the Director's position with respect to the disclosure of documents she believes to be privileged does not represent some disguised attempt to avoid full disclosure.

36. As for the "recidivist" handwritten marginal comment contained in one of the documents, I am not satisfied that the delegate who issued the Determinations under appeal was the author of this note. Further, and in any event, I accept that this note, even if it were authored by the delegate who issued the Determinations, merely identifies one or both of the Appellants as "repeat offenders" in the sense of prior meritorious complaints having been made against them. I do not consider such a statement to be *prima facie* evidence of bias or possible bias; indeed, the Director may quite properly inquire if there have been prior complaints in order to determine if a "second- or third-level" administrative penalty (see section 98 of the *Act* and section 29 of the *Employment Standards Regulation*) must be issued.

37. Counsel for the Appellants submits that a March 10th, 2003 letter from the delegate to Super Save "reflects a predetermined and prejudged result" that "is reflected in the May 5, 2003 Determinations" (September 23rd submission at page 5). I am unable to agree that the delegate's 1-page March 10th letter reflects any predetermination. In my view, this letter simply advises Super Save that the Director did not have any payroll records on hand relating to the four complainants—an unremarkable statement since the Appellants had not previously provided any payroll documents relating to the complainants. That being the case, the delegate made some preliminary calculations based on the information provided by the complainants and specifically requested that if there was some disagreement about whether "the amounts contained in the calculation are owed", Super Save should provide written reasons explaining its position within the next two weeks. As noted earlier, the Appellants' "in-house" legal counsel simply responded by stating that Actton was the employer and that this latter firm was subject to federal jurisdiction.

38. The Appellants' seventh "sub-ground" refers to the Director and his delegates having "deliberately undermined the investigation and adjudication of the complaints" in order to cause "financial harm" to the Appellants. I do not accept this assertion. In my view, the financial harm that has been visited on the Appellants by way of the Determinations largely flows from their own failing, namely, the fact that they did not pay the complainants strictly in accordance with the provisions of the *Act.* I would also note that one might well challenge the notion that the Appellants' have suffered any "financial harm" in circumstances where the Determinations simply order the Appellants to pay the complainants the monies to which they are lawfully entitled under the *Act.*

Bad Faith

39. Counsel for the Appellants submits that the Director and/or his delegates "knew the Determinations were unfounded and were fundamentally flawed yet…proceeded to issued the Determinations". I consider this argument wholly without merit. In my reasons for decision issued on August 24th, 2005 (BC EST # D128/05) I held that the Director did have jurisdiction over both Appellants and that the section 95 declaration was properly issued against both Appellant firms. I find it hard to conceive how the Director and/or his delegates can be accused of acting in bad faith because Determinations were issued that were, at least in my view, legally correct. The Appellants chose to defend the complaints filed in this case based on a jurisdictional argument; that latter matter was investigated—at some length—and ultimately was determined to be without merit. Once the Director determined that the complaints fell under provincial jurisdiction and that wages were owed, the Director was obliged to issue determinations.

Independent Decision-Making

40. The Appellants' fifth "sub-ground" relates to the matter of independent decision-making. There is nothing in the record that would lead me to conclude that the delegate who issued the Determinations made anything other than an independent decision; I am not satisfied that some other person essentially "dictated" to the delegate how he should determine these four complaints. The Appellants have not presented any evidence to support this latter assertion.

41. The Appellants' ninth "sub-ground" concerns the conduct of counsel for the Attorney General. Counsel for the Appellants submits, in essence, that lawyers in the Attorney General's office have gone beyond their proper and defensible role as legal advisors and have become, in essence, investigators and decision-makers thereby usurping the statutory role and function of the Director and his delegates.

42. However, having reviewed counsel for the Appellants' September 23rd and October 21st submissions, I note that these allegations regarding the Attorney General's office have not been particularized and, having reviewed the record now before me, I cannot conclude that there is any merit to these allegations. To the extent that these allegations address a matter of impermissible delegation by the Director to one or more lawyers in the Attorney General's office, that point was previously addressed (at page 20) in my August 24th, 2005 reasons for decision (BC EST # D128/05):

> Of broader concern is the suggestion that one or more legal counsel for the Director, in effect, investigated and possibly adjudicated the complaints. Statutory decision-makers are entitled to obtain and rely on legal opinions from "staff" or external legal counsel—see *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809. However, there is no evidence before me that the delegate went outside that scope of permissible activity and, in effect, abdicated his legal

obligation by simply permitting legal counsel to write his Determination for him. Indeed, the delegate has filed an affidavit (sworn January 30th, 2004) stating such was not the case.

GROUND NO. 8: IMPROPER ASSUMPTION OF A FIDUCIARY DUTY

43. Although I previously set out this ground of appeal, for convenience I have reproduced this ground once again, below:

> **Ground No. 8**
>
> The Director, her delegates and/or Agents acted improperly throughout the investigation and adjudication of these complaints by assuming that they owed a fiduciary obligation to the Complainants to the detriment of the Appellants.

44. Counsel for the Appellants did not provide any particulars in support of this ground in his September 23rd, 2005 submission. Counsel for the Director, in his September 23rd, 2005 submission simply stated (para. 30):

> There is no reference to fiduciary duty anywhere in [the delegate's] reasons, nor is there in evidence any document authored by [the delegate] in which he referred in any way to fiduciary duty. There is simply no basis on which anyone could conclude that the fiduciary duty issue affected [the delegate's] decision in any way.

45. By way of reply, counsel for the Appellants asserted his October 21st, 2005 submission (at page 15):

> …the proposition now put forward that nowhere did [the delegate] consider himself a fiduciary is made for the first time. It is simply irrelevant. More importantly, it is inaccurate.
>
> Further, the whole theme of the investigation and adjudication was that the Complainants would otherwise be deprived of their lawful employment standards rights at the hands of a "recidivist employer". It caused the Director to ignore that these 4 complainants and all other drivers of [Actton] did enjoy and do enjoy their extensive rights under the Canadian Labour Code. Mr. McNeilly exercised those rights when he participated in the CIRB certification hearing. The perspective therefore that the Director took in investigating and adjudicating these complaints was clearly tainted by this misconception of the Director's role and her duties to the Appellants. It has been established in these proceedings, that the Director did not investigate these matters in a [sic] unbiased, impartial and neutral fashion. That, in part, emanates from the Director's misunderstanding of her legal obligations as stated in the September 5, 2003 submission. The Director and her delegates not only stated that they believe they are in a fiduciary relationship with the Complainants, all of their actions are consistent with that understanding. Therefore, the interests of the Appellants have never been respected or honoured by the Director or her Delegates throughout this process.

46. There are several points to be noted with respect to the above comments by counsel for the Appellants.

47. First, I determined in my August 24th, 2005 reasons (BC EST # D128/05) that the four complainants' employment was governed by the *Act* rather than the *Canada Labour Code*. Accordingly, the Director and his delegates did not, in my view, display any sort of bias or predisposition toward the Appellants by simply applying the governing legal regime.

48. Second, as for the allegations of predisposition and bias, the record indicates that the Appellants' "in-house" counsel, when first advised about these complaints, took the position that the federal employment standards law applied. The Director then undertook a lengthy investigation of that issue (including a referral to HRDC for an advisory opinion) and ultimately concluded that the *Act,* rather than the *Canada Labour Code*, governed the employment of the four complainants. As previously noted, I entirely agree with that latter conclusion. In such circumstances, I fail to see how it can be fairly asserted that the Director failed to proceed "in an unbiased, impartial and neutral fashion".

49. Third, counsel for the Appellants states that counsel for the Director's September 5th, 2003 submission contains assertions on behalf of the Director to the effect that the Director is in a fiduciary relationship with the complainants. Indeed, that is precisely what (former counsel) stated (at page 4 of the submission):

> When one has regard to the Director's fiduciary duty to the complainant employees and the object of the *Employment Standards Act*, which is the protection of statutory minimums in the workplace, this matter is simply about the wage entitlement of individuals who drive Super Save Disposal trucks and pick up blue garbage bins behind businesses and facilities throughout the Lower Mainland.

50. The Director's September 5th submission followed an August 28th, 2003 oral hearing before me concerning certain procedural issues including document disclosure. On August 29th, 2003 I issued an order (BC EST # D263/03) dealing with various matters and counsel for the Director filed an unsolicited submission dated September 5th, 2003 in response to that latter order. The above-quoted reference to the Director's "fiduciary obligation" is found in the last sentence of the September 5th submission.

51. The Tribunal has consistently held that the Director, when conducting an investigation, does not owe a fiduciary obligation to the complainant—see *B.W.I. Business World Incorporated*, BC EST # D050/96. In a letter dated January 17th, 2005 from counsel for the Appellants to the Director's current counsel, the issue of the Director's asserted "fiduciary obligation" to the complainants was raised and counsel for the Appellants requested a "formal revocation" of that position. Counsel for the Director, in a submission dated January 26th, 2005 responded specifically to that revocation request and conceded (at page 11): "The Director does not owe a private-law duty to employees who make claims under [the *Act*]".

52. The Director's former counsel, in a submission dated January 30th, 2004, explained her reference to the Director's "fiduciary obligation" in her September 5th, 2003 submission. In her January 30th submission, former counsel for the Director contended that the Director stands in a different position *vis-à-vis* a complainant once a complaint has been investigated and determined to be valid. The Director has significant enforcement powers after a determination has been issued (see Part 11 of the *Act*) and counsel explained that she was referring to the Director's "fiduciary duty" in this latter context; counsel specifically referred to a law review article outlining this sort of duty: "Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law", L. Sossin, Saskatchewan Law Review, 2003, Vol. 66 (129-182). Current counsel for the Director, in his January 26th, 2004 submission noted: "In a public law context (such as these appeals), there is much to be said for the views of the learned author [of the law review article].

53. I have reviewed the article in question (it was appended as Tab 12 to counsel for the Director's January 26th, 2005 submission). The article is lengthy and I do not propose to undertake, in these reasons, any detailed review or critique of the article. Professor Sossin argues that administrative decision-makers may have "equitable" or "fiduciary" obligations depending on whether the affected parties are "especially

vulnerable" (such as mentally challenged parties or those who are dealing with a child welfare or income support bureaucracy). In my view, those sorts of obligations, if they arise at all, do not arise here. It may be that the Director does have a quasi- or actual fiduciary obligation to complainants when seeking to recover wages on their behalf. I need not decide that question here. However, I am not satisfied that a statement made by the Director's former legal counsel about the Director's fiduciary obligation—subsequently disavowed in the "private law context" by the Director's current counsel—can be taken as evidence that the Director and/or his delegates investigated these complaints on the basis that they owed the complainants a fiduciary duty. In my view, the record before me shows that the Director and her delegates proceeded to investigate these complaints without any predisposition against the Appellants or in favour of the complainants.

SUMMARY

54. The Appellants raised eight separate grounds of appeal in their appeal documents. These grounds of appeal broadly allege errors of law and a failure to observe the principles of natural justice. In my August 24th, 2005 reasons for decision I concluded that six of these grounds were not meritorious. I deferred a consideration of the two remaining grounds of appeal until I received further submissions. I have now received those submissions and have now concluded that neither of the two outstanding grounds of appeal is meritorious. Accordingly, at this stage, the proper course is to dismiss the appeal and confirm the Determinations.

THE "CONTEMPT" ISSUE

55. However, an order dismissing the appeals and confirming the Determinations does not end my task. As I noted earlier, there is an outstanding issue regarding the Appellants application for sanctions against the Director for contempt. In my May 31st, 2004 reasons for decision (BC EST # D100/04) I addressed, pages 22-24, whether the Director had complied with my order issued August 29th, 2003:

> **Has the Director Complied With My August 29th, 2003 Order?**
>
> As previously detailed in these reasons, I issued an Order on August 29th, 2003, pursuant to section 109(1)(g) of the *Act*, requiring the Director to, *inter alia*, produce all documents forming part of the record (beyond those already produced) to counsel for the Appellants and to the Tribunal on or before September 5th, 2003. Since counsel for the Director took the view that certain documents that had not been produced were protected by solicitor-client privilege, I also ordered that the Director produce a list of such documents (I did *not* order production of the actual disputed documents) by September 5th, 2003 (my August 29th Order is reproduced in its entirety, above).
>
> The Director did not comply with paragraph 2 of my August 29th, 2003 Order (listing of privileged documents). Indeed, when the parties appeared before me on September 22nd, 2003, counsel for the Director took the position that I had no jurisdiction to require the Director to deliver a list of what she conceived to be privileged documents. Counsel for the Director also advised me that the Director intended to seek a reconsideration of my August 29th Order and, in particular, paragraph 2 of that Order. As noted above, the Director's reconsideration request was refused by Adjudicator Stevenson on November 24th, 2003 (BC EST # RD322/03).

> As I understand the situation, the Director did subsequently deliver a list of documents that she claimed were privileged; this list was appended as an exhibit to the Director's request for reconsideration of my August 29th Order…
>
> The Director also produced a further document, namely, a series of e-mails, sent in mid-February 2003, between the delegate who issued the Determinations and Deborah Phippen, an officer with Human Resources Development Canada…
>
> The February 2003 e-mails between Mr. White and Ms. Phippen were not disclosed by the September 5th deadline nor was a "list" of privileged documents delivered by that latter date. Thus, at the very least and to that limited extent, the Director did not comply with my August 29th, 2003 Order. The Director's failure to comply with my August 29th Order may be more far-reaching; I cannot, however, determine that to be so based on the material presently before me.
>
> Counsel for the Director concedes that the Director did not comply with the second paragraph of my August 29th Order but submits that she has now complied with that latter provision. I note, however, that the list of documents contemplated by the second paragraph of my August 29th Order was not delivered until the Director filed its reconsideration application even though, in my Order of September 23rd, 2003 I specifically noted that my August 29th Order was *not* suspended.
>
> In my view, the Director did not comply with the second paragraph of my August 29th Order.

56. Separate from the matter of my August 29th order, counsel for the Appellants seeks an order from the Tribunal for compensation "including all legal fees expended since the filing of this Appeal to the date of the final and full disclosure of documents" (February 4th, 2005 submission at page 4; underlining in original text).

57. In my August 24th, 2005 reasons for decision I indicated (page 26) that "once all of the issues raised by these appeals have been adjudicated, I will then address the Appellants' contempt application if counsel still wishes, at that time, to have that latter matter adjudicated". Notwithstanding that latter direction, counsel for the Appellants addressed the matter of contempt in both his September 23rd and October 21st, 2005 submissions. Counsel for the Director, in his September 23rd, 2005 submission also addressed the "contempt" issue and raised, among other things, certain arguments regarding the Tribunal's powers to deal with contempt of its orders.

58. Although both parties have made submissions regarding the contempt issue, I intend to offer to the parties a final opportunity to address this matter. I would particularly expect further details from counsel for the Appellants regarding the specific nature of the contempt that is alleged, the specific remedy being sought (and any legal precedent for such a remedy), and the Tribunal's jurisdiction to make the proposed order.

ORDERS

59. Pursuant to section 115 of the *Act,* I order that the Determinations be confirmed as issued in the following amounts:

Robert Cardinal	$6,661.96
Stephen Smith	$12,404.31
Todd Norberg	$18,006.89
Larry Catt	$17,112.25

together, in each case, with whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

60. The parties shall file whatever further submissions they may wish to file regarding the Appellants' application to hold the Director in "contempt" in accordance with the following timetable:

- Counsel for Appellants shall file whatever further submissions he may wish to file (the submission may simply incorporate, by reference, submissions that have already been filed with the Tribunal) regarding the contempt issue by no later than 4:00 P.M. on January 27th, 2006;

- Counsel for the Director, and the four employees, shall each file whatever further submissions they may wish to file (the submissions may simply incorporate, by reference, submissions that have already been filed with the Tribunal) by no later than 4:00 P.M. on February, 10th 2006; and

- Counsel for the Appellants shall file his final reply submission regarding this issue by no later than 4:00 P.M. on February 24th, 2006.

61. Upon receipt of the parties' submissions, I will then adjudicate the Appellants' application to hold the Director in contempt.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal