Employment Standards TRIBUNAL

An appeal

- by -

Super Save Disposal Inc. and Actton Transport Ltd.

- 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: April 24, 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
Todd Norberg	On his own behalf

INTRODUCTION

1. Super Save Disposal Inc. ("Super Save") and Actton Transport Ltd. ("Actton") both appealed, pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), four separate Determinations that were issued by a delegate of the Director of Employment Standards (the "Director") on May 5th, 2003. The Determinations, in each case, were supported by essentially identical "Reasons for the Determination" ("Reasons) also issued on May 5th, 2003. The appeals were dismissed by way of my reasons issued on August 24th, 2005 (B.C.E.S.T. Decision No. D128/05) and January 5th, 2006 (B.C.E.S.T. Decision No. D001/06).

2. I shall refer to Super Save and Actton, jointly, as the "Appellants".

3. These Reasons for Decision address the final matter that arises from these appeal proceedings, namely, the Appellants' application for sanctions against the Director; the Appellants seek sanctions on the ground that the Director was in contempt of an order issued by the Tribunal.

4. Before addressing this latter matter, I shall very briefly summarize the proceedings to date. The following summary does not address each and every decision that has been issued in these proceedings; there have been several "procedural" decisions—relating to document disclosure and ancillary matters—that are not discussed, below.

ADJUDICATIVE HISTORY

The Director's Determinations

5. 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". The total amount payable under the four Determinations (now confirmed by the Tribunal) 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

The Tribunal's Decisions to Date

6. The Appellants framed their grounds of appeal as follows:

> **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., B.C.E.S.T. Decision No. 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. 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. 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].

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.

7. In Reasons for Decision issued on August 24th, 2005 (B.C.E.S.T. Decision No. D128/05), I held that none of Ground Nos. 1 to 5 or 7 raised a meritorious reason for cancelling or otherwise varying the Determinations (see pages 24 – 25):

> By way of summary, I am satisfied that the Director had jurisdiction to investigate these complaints and to issue the Determinations that are now before me. I am not satisfied that the Appellants' arguments with respect to the decision of my former colleague, Adjudicator Petersen,

> are meritorious. I am satisfied that both Actton and Super Save can be lawfully characterized as the complainants' employer and that the Director did not err in issuing a section 95 declaration with respect to those two firms. In my view, none of the complaints at issue in these appeals was "determined" (and dismissed) prior the issuance of the Determinations. I am not satisfied that the Appellants' argument with respect to section 117 of the Act (unlawful delegation) is meritorious. Finally, I am unable to accept that these Determinations should be cancelled, either under the Charter or as constituting an "abuse of process", by reason of the delay associated with the investigation and adjudication of these complaints.

8. I then ordered that the Appellants' "natural justice" grounds, namely, Ground Nos. 6 and 8, be adjudicated separately and I fixed a timetable for the delivery and exchange of the parties' submissions. Subsequently, the parties filed further written submissions regarding Grounds 6 and 8. On January 5th, 2006, I issued further Reasons for Decision (B.C.E.S.T. Decision No. D001/06) dismissing those latter two grounds. I was not satisfied the Appellants were denied a reasonable right to be heard, that there was actual or apprehended bias by the Director and/or her delegates toward the Appellants, or that the Director and/or her delegates otherwise acted in bad faith toward the Appellants. I was not satisfied that the Director, or anyone else, improperly usurped the delegate's decision-making responsibility or that the Director and/or her delegates improperly assumed that they owed a fiduciary relationship to one or more of the complainants. By way of summary I stated, at page 15 of my January 5th, 2006 Reasons for Decision:

> 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.

9. By way of my January 5th, 2006 decision, I confirmed the Determinations although I did not finally dismiss the appeals in order to preserve my jurisdiction. I outlined the remaining "Contempt Issue" as follows (at pages 15 – 16):

> **THE "CONTEMPT" ISSUE**
>
> 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 (B.C.E.S.T. Decision No. 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.

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).

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.

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.

10. As indicated above, on January 5th, 2006 I confirmed the Determinations as issued (together with any additional interest accrued pursuant to section 88 of the *Act*). In that same decision I fixed the

following timetable for the delivery and exchange of final submissions with respect to the "contempt" issue:

- 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.

11. I now have before me the following submissions:

- Counsel for the Appellants dated January 27th, 2006 and reply submission dated February 24th, 2006;

- Counsel for the Director dated February 8th, 2006 (incorporating certain portions of his October 8th, 2005 submission); and

- Todd Norberg dated February 9th, 2006.

12. I propose to summarize the parties' positions and then set out my analysis of the matter.

THE PARTIES' SUBMISSIONS

Counsel for the Director

13. Counsel for the Director's position is that the Appellants' application to hold the Director in contempt is misconceived inasmuch as the Tribunal has no such independent statutory power. Further, and in any event, counsel submits that the Director was never in contempt of a Tribunal order because there was no "willful and deliberate disobedience". Counsel submits that the "contempt" provisions of the *Administrative Tribunals Act* (the "*ATA*") govern the matter and that pursuant to those provisions, the Tribunal should not apply to the B.C. Supreme Court to have the Director held in, and punished for, contempt. Finally, counsel submits that even if the Director were, at one time, in contempt of a Tribunal order, that contempt has now been purged.

Todd Norberg

14. Mr. Norberg's February 9th submission does not address the contempt issue; rather he simply asks that he be awarded additional interest as and from the date of the Determinations until such time as he is actually paid. It should be noted that my January 5th, 2006 order provided for additional interest to be paid pursuant to section 88 of the *Act*.

Counsel for the Appellants

15. In his January 27th, 2006 submission, counsel for the Appellants challenges or otherwise takes issue with certain findings I made in the course of adjudicating the eight enumerated grounds of appeal. I do not propose to reconsider any of my earlier findings. In due course, my earlier findings may be reviewed by way of a section 116 reconsideration application—the proper avenue to have my previous findings formally reconsidered.

16. With respect to the matter of contempt, counsel for the Appellants asserts, at page 2 of his January 27th submission:

> The essence of the contempt proceedings relates to the Director's failure to properly and fully disclose documents and the Director's failure to properly and fully comply with the August 23 (*sic*, 29), 2003 orders of this Tribunal. That includes the undertaking by Mr. Gouge that any and all documents would be disclosed in order to avoid an adjudication on the alleged privilege that the Director claimed…However, the McNeilly documents were not included.
>
> The McNeilly documents clearly existed before May 5, 2003 [Note: this is the date the Determinations were issued], were clearly before the Director and likely were before Mr. White [Note: the delegate who issued the Determinations], given the affidavit of Mr. Krell that was filed by the Director on October 7, 2005…although the Tribunal may now conclude that McNeilly's Complaint was irrelevant, at least they were relevant from the Director's perspective throughout and therefore should have been disclosed. (underlining in original text)

17. Counsel for the Appellants submits that the Director "deliberately and intentionally flaunted" my August 29th, 2003 order. Counsel for the Appellants also apparently asserts that counsel for the Director breached an undertaking to "disclose any and all documents…in order to avoid an adjudication of the alleged privilege that the Director claimed". If counsel for the Appellants is actually asserting that there has been a breach of an undertaking, that is a very serious matter. In my view, such an allegation is more properly advanced before the Law Society of B.C. My concern, however, is solely with respect to those documents the Tribunal ordered to be produced. As I understand the position that was finally adopted by counsel for the Director, he ultimately stated that he would produce all documents whether privileged or not. I should note that the Tribunal's prior production orders did not have nearly as wide an ambit.

18. With respect to the Tribunal's jurisdiction, counsel submits that "the Tribunal has the power to find the Director in contempt" and that the introduction of the *ATA* "do[es] not alter that fact".

19. In his February 24th reply submission, counsel submits, with respect to the Tribunal's jurisdiction in contempt matters, "the power of the Tribunal to remedy the contempt cannot be removed retroactively by the provisions of the [*ATA*]".

FINDINGS AND ANALYSIS

The Document Production Order and Subsequent Events

20. The order in question was formally issued on August 29th, 2003 (B.C.E.S.T. Decision No. D263/03). This order directed the Director to produce the section 112(5) "record" and a list of documents over

which the Director claimed solicitor-client privilege. Subsection 112(5) reads as follows: "On receiving a copy of [the appellant's appeal notice], the director must provide the tribunal with the record that was before the director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director".

21. My August 29th, 2003 order was subsequently confirmed on reconsideration (B.C.E.S.T. Decision No. RD322/03 issued on November 24th, 2003)

22. The relevant portions of my August 29th order are reproduced below:

> **ORDER**
>
> (1) The Director of Employment Standards (the "Director") is ordered, pursuant to section 109(1)(g) of the Employment Standards Act (the "Act") to produce all documents that form part of the record referred to in section 112(5) of the Act, except those documents already produced, to be delivered to Michael J. Weiler, Counsel for Super Save, with a copy of said documents to be delivered to the Tribunal, on or before September 5, 2003.
>
> (2) Documents in the custody or control of the Director with respect to the four complainant's claims but which do not form part of the record or are otherwise privileged are to be listed and the list is to be produced on the same terms as above and by the same deadline…

23. In August 2003, subsection 112(5) was a comparatively new provision in the *Act* and the Tribunal had not yet adjudicated the scope of the Director's production obligation under that provision. On December 15th, 2003, I issued Reasons for Decision (B.C.E.S.T. Decision No. D329/03) directing the parties to file submissions regarding, *inter alia*, the scope of the section 112(5) record.

24. In my Reasons for Decision issued on May 31st, 2004 (B.C.E.S.T. Decision No. D100/04) I specifically addressed the scope of the Director's section 112(5) production obligation as well as the question: "Has the Director complied with my August 29th, 2003 Order?" (at pages 22 – 24). I answered this latter question, at page 24, as follows:

> I have not reviewed the entire Branch file to determine if the entire record has been disclosed. At the September 22nd, 2003 hearing, and in response to my specific enquiry, counsel for the Director was not prepared to give the Tribunal an undertaking that the entire record had been disclosed. While I cannot conclusively state that the entire record has not been disclosed, I have a genuine concern that, in fact, the complete record has not yet been delivered to the Tribunal.
>
> 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.

25. I then issued the following orders:

> **ORDERS**
>
> In accordance with the provisions of subsection 2(d), section 107 and subsections 109(1)(e), (g) and (h) of the Act, I make the following Orders:
>
> 1. The Director shall make whatever further disclosure as may be necessary, in light of the directions set out in these reasons, to ensure that the entire record, as defined by section 112(5) of the Act, is delivered to the Tribunal. Such further disclosure shall be completed by no later than June 30, 2004.
>
> 2. By June 30, 2004, the Director or her delegate shall deliver to the Tribunal a written declaration, under oath or affirmation, attesting that he or she has delivered the entire section 112(5) record to the Tribunal. Alternatively, legal counsel for the Director may deliver a written undertaking to the Tribunal to like effect.
>
> 3. By June 30, 2004, legal counsel for the Director shall deliver to the Tribunal copies of all documents or other records for which a claim of privilege is asserted. These latter documents or records include, but are not necessarily limited to, those listed as (a) to (h) in the attachment to counsel for the Director's December 3rd, 2003 submission as well as Appendices "A" and "D" and the document mentioned in the "blacked out" sentence at page 17 of counsel for the Appellants' January 9th, 2004 submission to the Tribunal. The documents and records must be accompanied by a list identifying each document or record by date, sender/recipient, and counsel for the Director must include a written general summary regarding the nature of the document and her reasons for objecting to its production. The above documents and records, list and counsel's grounds for objection shall be delivered in a sealed envelope marked to my attention and also marked "Confidential: To Be Opened Only by Kenneth Thornicroft". I shall review the documents and records, and counsel's submissions regarding the claim of privilege, and will then rule on the privilege claim for each document or record.
>
> 4. After I have ruled on the various privilege claims, I will issue further directions and orders with respect to the adjudication of these appeals

26. The Director subsequently applied, pursuant to section 116 of the *Act*, for reconsideration of my May 31st, 2004 decision and orders. The Reconsideration Panel essentially confirmed my decision and orders subject to some very minor changes—the deadline for production in the first paragraph of my order was extended to October 29th, 2004; the second paragraph was amended so that the Director, her delegate, or legal counsel could provide a sworn statement "attesting as to what steps she [has] taken, to the best of her knowledge and ability, to deliver the [record]…; the third paragraph was amended by extending the production deadline to October 29th, 2004 and by clarifying that the documents and "privileged document list" to be produced by the Director concerned only the four complainants' unpaid wage claims and only with respect to documents that were before the Director when the Determinations were being made.

27. On October 29th, 2004, at 3: 49 P.M., the Director complied with the third paragraph of my amended order by delivering the sealed envelope with enclosed list and documents to the Tribunal (marked "confidential" and addressed to my attention as directed). Parenthetically, I might add that I have now "resealed" the documents in their original envelope and have returned the envelope to the Tribunal.

28. The following events transpired with respect to the balance of my production orders (reproduced from my Reasons for Decision issued April 13th, 2005, B.C.E.S.T. Decision No. D050/05, at pages 5 - 6):

> **FURTHER DISCLOSURE BY THE DIRECTOR AND THE CONTINUING DISPUTE REGARDING DOCUMENT DISCLOSURE**
>
> On July 8th, 2004, the Director disclosed over 1100 pages of documents; these documents were said to constitute the entire section 112(5) record. On October 29th, 2004, the Director produced 6 further documents and an affidavit (sworn October 28th, 2004) from the delegate who issued the Determinations attesting that, to the best of his knowledge, the entire record had now been produced. The Director also provided, as noted above, a sealed envelope containing other documents that the Director claimed were privileged.
>
> On December 6th, 2004, and prior to my issuing a ruling on the privilege claims, new counsel for the Director wrote the Tribunal and advised that he had arranged for all documents in both the Employment Standards Branch's files and those of the Attorney General relating to this matter be provided to counsel for the Appellants; he expected that full disclosure would be completed by early January 2005. Counsel for the Director further indicated: "We will give him every document we have, and waive privilege over all of them". However, counsel also indicated that he believed "that the documents are governed by the implied undertaking described in *Hunt vs T&N plc*". In light of his position, counsel suggested that I did not need to rule on the privilege issue.
>
> On December 18th, 2004 counsel for the Appellants rejected the notion that the documents were subject to an implied undertaking but did agree that the privilege issue could be held in abeyance. On December 22nd, 2004 counsel for the Director advised that the Tribunal should not concern itself with the matter of the existence of an implied undertaking and that if the Director thought it appropriate to do so, she would seek an injunction in the B.C. Supreme Court. Accordingly, that particular issue has been set aside, at least insofar as the Tribunal is concerned…
>
> By letter dated January 5th, 2005 I directed the Director to deliver the additional documents to the Tribunal by January 17th, 2005; I also established a timetable for the delivery of any further submissions relating to the disclosure of documents. On January 7th, 2005, counsel for the Director advised that the documents in question were contained in "7 boxes…comprising several thousand pages"; he asked me to reconsider my order directing delivery of the documents. On January 10th, 2005, a paralegal in counsel for the Director's office advised the Tribunal that only 1 1/2 of the 7 boxes represented new material and that the other documents had already been produced; accordingly, she stated that all of the new documents would be produced as I originally ordered.
>
> By letter dated January 13th, 2005, counsel for the Director delivered to the Tribunal (and to counsel for the Appellants) a compact disk ("CD") "containing images of all documents in the possession of the Employment Standards Branch and/or the Ministry of the Attorney General which: ...relate in any way to these complaints (whether or not privilege had previously been, or might be claimed); and…are dated, or were created, on or before May 5, 2003 (the date of the decisions which are the subject of the present appeals)".
>
> On January 14th, 2005, co-counsel for the Director advised that she had discovered some further documents that were not included on the previously submitted CD and that, accordingly, she would arrange for those documents to be copied to a second CD that would be delivered on or before January 17th, 2005. In various letters all dated in mid to late January 2005, counsel for the Appellants submitted that there must be further documents that had yet to be disclosed; he also submitted that the Director should index or otherwise catalogue the documents contained in the two CDs. I note that counsel for the Director also provided to counsel for the Appellants hard copies of all documents contained on the two CDs.

> On February 3rd, 2005 I wrote to the parties and addressed several procedural issues relating to the matter of documents and set out a further timetable for final submissions regarding delivery of the section 112(5) record. I indicated to the parties: "Subject to any further rulings or orders that I might make in respect to those submissions, this matter will then move to written submissions on the merits of the appeal…". More specifically, I directed the parties to file submissions as to whether the section 112(5) record had now been delivered and, more generally, whether there had been full disclosure of the Director's and Attorney General's relevant files.

29. I also concluded in my April 13th, 2005 Reasons (at pages 7 – 8) that, so far as I could determine, the section 112(5) record had been produced and that it was time to finally move on to address the eight grounds of appeal raised by the Appellants in their appeal documents:

> I have before me the affidavits of the Director's delegate sworn October 28th, 2004 in which he avers that the entire record, as defined by the Tribunal's above-mentioned decisions "has now been produced". Further, and apart from the disclosure obligation embodied in section 112(5), counsel for the Director has advised the Tribunal that all of the relevant documents contained in both the Employment Standards Branch's and Attorney General's files have also been disclosed. The affidavit of Cathy Riley (who I understand to be the legal assistant to counsel for the Director), sworn February 18th, 2005 details the various enquires that have been made to ensure that the complete files have been disclosed.
>
> Certainly, the Director has disclosed a very large number of documents. While I have not undertaken a precise document count, it would appear that the documents that have been disclosed number several thousand pages (counsel for the Appellants says the documents disclosed to date exceed 5,000 pages). Counsel for the Appellants states, at pp. 2-3 of his February 25th, 2005 submission:
>
> > The Tribunal has now asked if the Appellants are prepared to accept the document disclosure to date as complete so that the Appeal may proceed. We say no—it is simply not possible nor proper to accept that there has been full disclosure. Neither we nor the Tribunal have any way of knowing for sure, although it would seem that there are a great deal of documents yet to be disclosed.
>
> Counsel for the Appellants says that the Tribunal should conduct an oral hearing so that the various delegates who over the course of some five years had responsibility for the investigation of the four complainants' unpaid wage claims, could be cross-examined to determine, with some certainty, whether all of the relevant documents have been disclosed.
>
> I agree with counsel for the Director that the Director's obligation to deliver the section 112(5) record does not create a form of discovery entitlement such as is available under the B.C. Supreme Court Rules. It may be that there are some documents that have been lost or misplaced during the five years that the Director's investigation continued. Thus, any order that I might make regarding additional disclosure would seemingly prove futile. **I do wish to make it clear, however, that I am now fully satisfied the Director has made every reasonable effort to ensure that all relevant documents have been located and, in turn, produced to counsel for the Appellants.** (my **emphasis**)
>
> Both counsel for the Director and Employment Standards Branch officials have assured the Tribunal (the latter by statements under oath) that, after searching the Employment Standards Branch's and Attorney General's files, the entire record (and more) has been disclosed. There has been very substantial disclosure to date. Counsel for the Appellants has not precisely identified

any document that forms part of the record but has not yet been disclosed; indeed, he says he cannot identify any such documents.

I have made an order that the record be produced. Counsel for the Director maintains that the Director has fully complied with that order. I have no reason to believe otherwise. However, **if in the fullness of time it becomes apparent that the entire record has not been disclosed, the Director may well face serious sanctions. As will be seen, counsel for the Appellants has an outstanding application to hold the Director in contempt but I am not prepared to deal with that application at this particular juncture.** It is time to move forward. Accordingly, **I am satisfied that the section 112(5) record, as it now stands, is sufficient for purposes of these appeals.** (my **emphasis**)

Further Disclosure Under Subsections 109(1)(e), (g) or (h)

Counsel for the Appellants has not requested that I order the production of specific documents; rather, he seeks an oral hearing so that he might question the various delegates (and possibly other persons as well) with a view to discovering what other documents might be available. I consider such a proposed endeavour to be akin to asking the Tribunal to allow counsel for the Appellants to conduct a "fishing expedition".

In my view, the matter of documents must also be considered in light of the issues that are properly before the Tribunal. As I indicated at the outset of these reasons, I do not consider this case to be particularly complex. Indeed, in my mind, while these appeals raise issues that are somewhat outside what might be termed a "typical" appeal (e.g., the jurisdictional issue), the appeal hardly raises novel legal questions. Further, it must be remembered that the Tribunal is an appellate body; at its core, the question before the Tribunal—at least in terms of the questions of law that are raised by the Appellants (to be contrasted with the natural justice issues)—is whether the Director correctly took jurisdiction, correctly interpreted and applied section 95, correctly determined the identity of the actual employer, etc. In my view, these legal issues can be fairly adjudicated by this Tribunal based on the record as it now stands.

If it turns out there are specific documents that, as this matter proceeds, should be disclosed, I will consider a proper application in that regard. For now, I see no reason to make an order for disclosure nor do I think it appropriate to conduct an oral hearing simply for the purpose of possibly identifying documents that have not been disclosed to date. (my **emphasis)**

30. Thus, I was satisfied that the Director had complied with her section 112(5) document production obligation, however, I also indicated that further production might be ordered if a proper case for production was made out. I adjourned, but did not dismiss, the Appellants' application to have the Director held in contempt. This latter issue, of course, is now before me for adjudication.

The Tribunal's Power to Punish for Contempt

31. The *ATA* was given Royal Assent on May 20th, 2004 and was proclaimed in force on June 30th, 2004. On October 15th, 2004, the *Employment Standards Act* was amended so that certain provisions of the *ATA* were, by amendment to section 103 of the *Act*, made applicable to the Tribunal.

32. Prior to the enactment of the *ATA* and the subsequent conferral of certain *ATA* powers on the Tribunal, the Tribunal's power to punish for contempt was contained in section 108 of the *Act.*

Section 108 granted the Tribunal, and its members, the powers of a commissioner contained in sections 12, 15 and 16 of the *Inquiry Act*. Section 15 of the *Inquiry Act* authorizes the summoning of both witnesses and documents; section 16 states that commissioners have B.C. Supreme Court judicial authority, "to be exercised in the same way as judges of the Supreme Court" to address a failure to appear and/or produce documents or to punish "a person [who] is guilty of contempt of the commissioners or their office". Section 108 of the *Act* was repealed concurrent with the Tribunal being given certain *ATA* powers (see B.C. Reg. 425/04).

33. Presently, the Tribunal's power to punish for contempt is contained in section 103 of the *Act*, a provision that, in turn, incorporates, *inter alia*, section 49 of the *ATA*:

> **Contempt proceeding for uncooperative witness or other person**
>
> 49. (1) The failure or refusal of a person summoned as a witness to do any of the following makes the person, *on application to the court by the tribunal*, liable to be committed for contempt as if in breach of an order or judgment of the court:
> (a) attend a hearing;
> (b) take an oath or affirmation;
> (c) answer questions;
> (d) produce the records or things in their custody or possession.
>
> (2) The failure or refusal of a person to comply with an order or direction under section 48 makes the person, *on application to the court by the tribunal*, liable to be committed for contempt as if in breach of an order or judgment of the court.
>
> (3) Subsections (1) and (2) do not limit the conduct for which a finding of contempt may be made by the court in respect of conduct by a person in a proceeding before the tribunal.
>
> (my *italics*)

34. Thus, the Tribunal no longer has the independent authority of a B.C. Supreme Court judge to punish for contempt. Rather, the Tribunal must now apply to the B.C. Supreme Court to have a person held in contempt.

35. I should note, however, that the right to apply to court for a contempt order is not the only mechanism open to the Tribunal to address, for example, a person's failure or refusal to produce documents. Under section 18 of the *ATA*, the Tribunal can dismiss the application (where, for example, the applicant refused to produce documents) or can simply proceed without the documents. Under subsection 34(3)(b) of the *ATA*, the Tribunal can order the production of relevant and otherwise admissible documents and if the documents are not produced, the Tribunal may apply to the B.C. Supreme Court for a compliance, rather than a contempt, order [see subsection 34(4)(a)].

Which Contempt Provisions Govern?

36. Counsel for the Director submits that the "*ATA*" regime governs whereas counsel for the Appellants apparently argues that the "*Inquiry Act*" regime governs.

37. My August 29th, 2003 Reasons for Decision (B.C.E.S.T. Decision No. D263/03; confirmed on reconsideration, B.C.E.S.T. Decision No. RD322/03 issued on November 24th, 2003) were issued well before the *ATA* amendments to the *Act* were proclaimed in force (on October 15th, 2004). That being the case, one might presume that the "*Inquiry Act*" regime governs. However, counsel for the

Director submits that the *ATA* regime governs "because section 49 [of the *ATA*] is procedural [and thus] it is presumed to operate retrospectively, and to apply to allegations of contempt arising from acts or omissions before Section 49 came into force" (October 8th, 2005 submission at para. 37).

38. In *Angus v. Sun Alliance Insurance Company*, [1988] 2 S.C.R. 256, La Forest, J. writing for a 5-justice panel of the Supreme Court of Canada observed, at page 262:

> There is a presumption that statutes do not operate with retrospective effect. "Procedural" provisions, however, are not subject to the presumption. To the contrary, they are presumed to operate retrospectively.

39. At page 265, La Forest, J. provided some further guidance:

> A provision is substantive or procedural for the purposes of retrospective application not according to whether or not it is based upon a legal fiction, but according to whether or not it affects substantive rights…
>
> …Normally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use. (underlining in original text)

40. In light of the Supreme Court of Canada's decision in *Angus*, I am unable to accept counsel for the Appellants' assertion that the Tribunal's power to remedy contempt "cannot be removed retroactively by the provisions of the [*ATA*]".

41. Under the "*Inquiry Act*" regime, the Tribunal, and its members, had the statutory authority to determine if a person was in contempt of a Tribunal order. Since the Tribunal did not—and still does not—have the staff or resources to actually punish someone for contempt, it would have required the assistance of others to ensure that its orders were respected. To my knowledge, the Tribunal never utilized its *Inquiry Act* contempt powers.

42. Section 16(2) of the *Inquiry Act* states: "All jailers, sheriffs, constables, bailiffs and all other police officers must assist the commissioners in the execution of their office". However, as was noted by the B.C. Administrative Justice Office in a recent report[1]: "…as the *Inquiry Act* was first enacted in the 1890s, it substantially predates the *Canadian Charter of Rights and Freedoms* [and accordingly] the ability of a commissioner to now rely on the contempt power to imprison a person, without an application to the court, may now be questionable". I agree with those observations.

43. Thus, under the *Inquiry Act* regime, the Tribunal could determine that someone was in contempt but it did not have the independent authority or resources to enforce a contempt order—likely, the Tribunal would have had to apply to the courts for enforcement assistance in which case the correctness of the Tribunal's initial finding of contempt would likely also be reviewed.

44. As matters stand under the current *ATA* regime, the Tribunal cannot make an independent determination that a person is in contempt but, rather, must apply to the B.C. Supreme Court for a

[1] *The Power to Take Action for Contempt: A Discussion Paper*, Administrative Justice Office, Ministry of Attorney General (www.gov.bc.ca/ajo), at page 6.

contempt order against the alleged contemnor. However, under either statutory regime, a person may be held in contempt if the person has, for example, failed to produce documents as ordered by the Tribunal. In my view, the *ATA* has not taken away any substantive rights insofar as the law of contempt is concerned nor has it changed any of the substantive legal principles governing civil contempt.

45. The *ATA* amendments simply substitute one procedure for another where it is alleged that a person is in contempt of a Tribunal order. In my opinion, the *ATA* amendments are merely procedural as they relate to the matter of contempt of a Tribunal order. The *ATA* amendments do not affect whether one can or cannot be held in contempt; rather, the amendments concern only the "manner of enforcement" where there is a contempt allegation (see *Angus, supra*). Accordingly, it follows that I consider the *ATA* amendments to be purely procedural and, therefore, operate retrospectively.

46. Thus, it must now must be determined if it is appropriate for the Tribunal to make an application to the B.C. Supreme Court to have the Director held in contempt.

Should the Tribunal Make Application to Hold the Director in Contempt?

47. It should be borne in mind that the Director has now produced the documents referred to in my August 29th, 2003 order—the section 112(5) "record" and the list of allegedly privileged documents (and, subsequently, these latter documents as well)—albeit not within the time frames originally contemplated by my order; the documents and list were produced either before, or shortly after, the deadline specified in the reconsideration panel's decision issued October 14th, 2004.

48. The *ATA* regime arguably establishes a two-step process to address a failure to produce documents as ordered by the Tribunal. First, if documents are not produced as ordered by the Tribunal, an application can be made to the B.C. Supreme Court pursuant to section 34(4) of the *ATA*. Second, if person continues to refuse to produce the documents in question, the Tribunal can apply to the B.C. Supreme Court pursuant to section 49(1)(d) of the *ATA* to have the person held in contempt. Presumably, one could by-pass section 34(4) and immediately proceed to apply for a contempt order. However, in most (if not all) cases, a section 34(4) order would likely precede a section 49 contempt application.

49. The Appellants maintain that the Director has yet to fully comply with my August 29th, 2003 and May 31st, 2004 orders (as amended by the reconsideration panel on October 14th, 2004) since the entire section 112(5) record has not been produced. Further, some documents were produced after the October 29th, 2004 deadline fixed by the reconsideration panel. Nevertheless, as matters now stand, and as I indicated in my April 13th, 2005 Reasons for Decision (B.C.E.S.T. Decision No. D050/05, at page 7), the entire section 112(5) record has been disclosed. I reiterated that latter view in my January 6th, 2006 Reasons for Decision (B.C.E.S.T. Decision No. D001/06, at pages 9 – 10).

50. As noted above, in my view, the *ATA* regime should be applied retrospectively. That being the case, the critical question is whether the Tribunal should make a section 49 application. In my view, a section 34(4) application is not warranted since the Director has now produced the documents it was ordered to produce by way of my August 29th, 2003 and May 31st, 2004 (as amended by the reconsideration panel) orders. While it is true that some documents were disclosed after the October 29th, 2004 production deadline, some of those documents were not, in my opinion, required to be disclosed since they were not part of the section 112(5) record (for example, the so-called "McNeilly

documents" or the documents relating to a union certification application before the Canada Industrial Relations Board—see my January 5th, 2006 Reasons for Decision at pages 8 – 9).

51. I now turn to section 49(1)(d) of the *ATA*. While some documents that form part of the section 112(5) record were not produced by the original September 5th, 2003 (or by the final October 29th, 2004) deadline, this is not a case where, in my view, it would be appropriate for the Tribunal to make application to the B.C. Supreme Court to have the Director committed for contempt. Although the Tribunal could apply to the B.C. Supreme Court to have the Director committed for civil contempt, I have grave doubts whether such an application would be successful.

52. This is not a case of alleged criminal contempt since the alleged contempt—failure to comply with a Tribunal order—was not accompanied by the requisite "public defiance" that is the defining characteristic of criminal contempt (see *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901). In any event, the Tribunal clearly does not have any criminal contempt power either under the "*Inquiry Act*" or the "*ATA*" regimes.

53. The underlying purpose of the civil contempt process is to ensure that the Tribunal's orders are respected. Although contempt may be characterized as "civil" contempt, the contempt must nonetheless be proved on the criminal standard of proof, namely, beyond a reasonable doubt [*Re Sheppard* (1976), 67 D.L.R. (3d) 592 (Ont. C.A.); *Bhatnager v. Canada (Minister of Employment & Immigration)*, [1990] 2 S.C.R. 217; *Ebrahim v. Ebrahim* (2000), 77 B.C.L.R. (3d) 70 (B.C.C.A.)].

54. In *North Vancouver (District) v. Sorrenti* (2004), 29 B.C.L.R. (4th) 214, 2004 BCCA 316, Newbury, J.A., for the court, discussed the essential elements of civil contempt flowing from disobedience of an order: the conduct must be proved beyond a reasonable doubt; the disobedience must be intentional rather than accidental or unintentional; and intention may be inferred from the circumstances of a given case. In *Sorrenti*, the civil contempt was proven (breach of a court order) and a $500 fine was imposed.

55. In my May 31st, 2004 Reasons for Decision (B.C.E.S.T. Decision No. D100/04) I noted that although the Director did not fully comply with the second paragraph of my August 29th, 2003 order, I did not consider that failure to be a willful flouting of my order. Rather, I determined (page 24):

> 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.

56. Further, as is apparent from the portions of my April 13th, 2005 Reasons for Decision (B.C.E.S.T. Decision No. D050/05), reproduced above, once the Director's obligation regarding document disclosure was sorted out following a decision-making process that, for the very first time, defined the scope of the section 112(5) record, the Director made all reasonable efforts to comply with the Tribunal's document production orders. Accordingly, even if it could be said that the Director was in contempt of a Tribunal order, that contempt has been purged since all required documents (and a good number of irrelevant documents) have now been produced.

57. The question of whether the Director was, or was not, in contempt of the Tribunal's orders is, by reason of the *ATA*, a matter for the courts, not this Tribunal, to determine. At this stage, the Tribunal can only decide if it will make application to the court under section 49 of the *ATA*. I am not clear what authority, if any, I (as an individual Tribunal member) have to compel the Tribunal to make a section 49 application—section 106(6) does not appear to provide the enabling statutory authority. However, even assuming I have such authority, I would not make application for the following reasons:

1. I do not consider that the Director intentionally breached my orders. Rather, this appears to be a situation where the legality of the orders was contested and thus had to be finally determined through a reconsideration process.

2. Even if there were a deliberate flouting of my orders, the probable sanction (likely a small fine) would not serve any useful purpose in these proceedings since the document production orders have now been honoured.

3. In addition, a fine would not likely serve any deterrent public purpose since future disagreements about what documents should be disclosed by the Director under section 112(5) are much less likely to arise since—as a result of these proceedings—the Director's obligation under section 112(5) has now been clarified.

4. The Tribunal has limited resources and it would not be a prudent expenditure of the Tribunal's scarce resources to pursue contempt proceedings (likely, at some considerable cost) against the Director particularly where a meaningful outcome is uncertain.

58. Finally, I should also note that even if I have erred and the "*Inquiry Act*" regime governs this matter and, accordingly, the Tribunal has an independent authority to determine if the Director was in contempt, I would nevertheless decline to hold the Director in contempt (largely for the same reasons why I do not think it appropriate for the Tribunal to file a section 49 contempt application).

ORDER

59. These Reasons for Decision dispose of the last matter that was before me in these appeal proceedings. I have previously confirmed the Determinations. The Appellants' application to hold the Director in contempt is dismissed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal