Employment Standards TRIBUNAL

An appeal

- by -

Super Save Disposal Inc. and Actton Transport Ltd.
(jointly referred to as 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

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

DATE OF DECISION: April 13, 2005

DECISION

SUBMISSIONS

Michael J. Weiler	for the Appellants
J. Edward Gouge	for the Director of Employment Standards

INTRODUCTION

The four Determinations that are currently under appeal to the Tribunal were issued on May 5th, 2003. These four Determinations were issued after a very lengthy investigation involving at least six delegates of the Director of Employment Standards; the first of the four complaints was filed in April 1998. The appeals were filed on June 19th, 2003. Since this latter date, the Tribunal has issued at least six separate decisions each of which addresses, in one fashion or another, issues relating to the delivery and production of documents. To date, the merits of these appeals have not been adjudicated.

Section 2(d) of the *Employment Standards Act* (the "*Act*") states that one purpose of the *Act* is "to provide fair and efficient procedures for resolving disputes over the application and interpretation if this Act". In my view, this purpose has been waylaid by the seemingly interminable dispute that has arisen between counsel for the Appellants and counsel for the Director concerning production of documents.

I do not consider these appeals to be particularly complex. The issues raised by these appeals (in general terms, the Director's jurisdiction and natural justice) have been raised in many other appeals and the time has come for these appeals to be addressed on their merits. These reasons for decision arise out of directions and orders I issued to the parties by way of letters dated February 3rd and 15th, 2005 and, as will be seen, direct the parties to address, by way of written submissions, the merits of several issues (but not all) that arise in these appeals.

I first wish to summarize the history of these appeals in order to give some context for the directions I am now giving to the parties.

THE DETERMINATIONS

On May 5th, 2003, four separate and essentially identical Determinations totalling $54,185.41 were issued against Super Save Disposal Inc. ("Super Save") and Actton Transport Ltd. ("Actton"). These two companies (the "Appellants") were ordered to pay four individuals, namely: Robert Cardinal ($6,691.96), Stephen Smith ($12,404.31), Todd Norberg ($18,006.89) and Larry Catt ($17,112.25). These amounts represent unpaid wages and section 88 interest. Among other things, the Director's delegate concluded that Super Save and Actton were "associated corporations" pursuant to section 95 of the *Act* and that both companies fell under provincial jurisdiction and were thus subject to the *Act.*

THE APPEALS

On June 19th, 2003 the Appellants filed separate, essentially identical, appeals of the four Determinations on the grounds that the Director erred in law [section 112(1)(a) of the *Act*] and failed to observe the principles of natural justice in making the Determinations [section 112(1)(b) of the *Act*]. The Appellants also sought a section 113(1) order suspending the Determinations. This latter application was addressed by the Tribunal's Vice-Chair in her June 18th, 2003 letter to the parties in which she advised that the Tribunal did not find it necessary to make an order since the Director advised that she would "not engage in any collection action prior to the Tribunal rendering a decision [in the appeals]". The Appellants also purported to reserve their right to request an oral appeal hearing if they felt it appropriate after the Director had made "full disclosure".

The Appellants' grounds of appeal were more fully particularized in a 15-page letter, dated June 12th, 2003, from their legal counsel (appended to the notices of appeal). The Appellants alleged that the Director did not have any jurisdiction to adjudicate the complaints since Actton, a federal jurisdiction firm, was the "true employer" of the four individuals in question and that the Director erred in "associating" Actton, a federal firm, with Super Save.

Further, the Appellants alleged that the Director "refused to decide who is the employer" of the four employees. The Appellants alleged that they were denied a fair hearing and that the Director failed to conduct a proper investigation and otherwise contravened section 77.

Finally, the Appellants alleged that the Determinations should be cancelled because there was "unacceptable", "inexplicable" and "extraordinary" delay involved in issuing the Determinations that, in turn, caused "significant prejudice" to the Appellants.

The Appellants also alleged that the Director failed to disclose all relevant documents and therefore asked the Tribunal to make various disclosure orders under section 109. The Appellants did not challenge the correctness of the delegate's unpaid wage calculations as they related to any of the four complainant employees nor did the Appellants seek to introduce any new evidence under section 112(1)(c) of the *Act.*

PROCEEDINGS BEFORE THE TRIBUNAL TO DATE

B.C.E.S.T. Decision Nos. D263/03 and RD322/03

On August 28th, 2003 counsel for the Appellants, counsel for the Director and two of the employees appeared before me for the purposes of speaking to the Director's disclosure obligation under section 112(5) of the *Act*—the "record that was before the director at the time the determination was made". At this point in time, section 112(5) was a newly introduced provision and the Tribunal had not yet finitely delineated the nature of the Director's disclosure obligation under this subsection.

At the conclusion of the August 28th hearing, I issued an order for production of documents and also ordered the Director to produce a list of documents that the Director claimed were protected by solicitor-client privilege—the Director subsequently delivered this latter list but not until October 2nd, 2003 (the original production deadline was September 5th, 2003). On September 22nd, 2003 the parties again appeared before me at which time counsel for the Director advised that the Director did not intend to comply with my August 28th order to deliver a list of privileged documents. The Director then applied for reconsideration of my August 28th order solely as it related to the requirement to deliver a list of

privileged documents. Member Stevenson dismissed the reconsideration application on November 24th, 2003 (see B.C.E.S.T. Decision No. RD322/03).

B.C.E.S.T. Decision Nos. D329/03 and D100/04 and the Vice-Chair's March 8th, 2004 Letter Decision

On December 8th, 2003 the parties once again appeared before me and it immediately became apparent that the matter of document disclosure was not (and seemingly could not) be resolved between the parties. I therefore directed the parties to file written submissions on three broad issues, namely, whether the Director had complied with my August 29th Order, the Director's role on the appeals, and the contents of, and a dispute resolution process regarding, the section 112(5) record (see B.C.E.S.T. Decision No. D329/03 issued December 15th, 2003).

On January 16th, 2004 counsel for the Director made a separate application to the Tribunal's Vice-Chair regarding documents that were appended to the Appellants' counsel's January 9th, 2004 submission that was filed as directed by my December 15th, 2004 order. On March 8th, 2004, the Vice-Chair ruled that the documents in question had not been "improperly obtained" by counsel for the Appellants. However, the documents in question were nonetheless "severed" from the copy of the submission that was forwarded to me with the proviso that I was "free to decide that those documents should remain severed, or that they should be forwarded to [me]".

With the parties' submissions in hand as directed by my December 15th, 2003 order, I then issued reasons for decision (B.C.E.S.T. Decision No. D100/04, issued May 31st, 2004) setting out my views regarding what documents should be included in the section 112(5) record, how allegedly "privileged" documents should be dealt with, whether the Director had breached my August 29th, 2003 order, and the Director's proper role before the Tribunal with respect to the four appeals. I concluded that the Director would be permitted to appear and make submissions in accordance with the Tribunal's decision in *BWI Business World Inc.* (B.C.E.S.T. Decision No. D050/96). I also ordered the Director to do certain things on or before June 30th, 2004, namely: i) disclose the entire record, as defined by my May 31st, 2004 reasons for decision; ii) deliver a written declaration to that effect; and iii) deliver the actual documents, for which a claim of privilege was asserted, to my attention in a sealed envelope. I advised the parties that upon receipt of the latter documents, I would issue a written ruling regarding the privilege claims and then issue further directions regarding the conduct of the appeals.

Petition for Judicial Review and B.C.E.S.T. Decision No. RD172/04

On June 23rd, 2004 the Director filed a petition seeking judicial review of my May 31st order (S.C.B.C. Vancouver Registry No. L041578), however, that application was never heard on its merits; I understand that the matter was formally discontinued on November 18th, 2004.

The Director also applied, on June 25th, 2004, for reconsideration of my May 31st order. In reasons for decision issued on October 14th, 2004, a 3-person reconsideration panel confirmed my May 31st orders subject to some rather minor revisions and, in addition, the production deadline was extended from June 30th to October 29th, 2004 (B.C.E.S.T. Decision No. RD172/04). The reconsideration panel concluded their Reasons by noting "prehearing management of this matter is returned to Member Thornicroft".

On October 29th, the Director delivered the allegedly privileged documents to the Tribunal in a properly identified sealed envelope. At that point in time, it was my intention to review the documents, if

necessary seek further submissions, and then rule as to whether none, some, or all of the documents were protected by privilege.

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. Counsel for the Director also asked for a clear statement of the Appellants' grounds of appeal; for my part, I would have thought that counsel for the Appellants' June 12th, 2003 letter appended to the notices of appeal adequately set out the Appellants' reasons for appeal, however, as will be seen, counsel subsequently submitted an even more fully particularized statement of the grounds of appeal (see counsel for the Appellants' submission dated February 25th, 2005 esp. at pp. 3-7).

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.

By letter dated February 15th, 2005, I directed the parties to file additional written submissions relating to whether an oral appeal hearing was required in this case with respect to some or all of the issues raised by the Appellants in these appeals. Counsel for the Appellants was directed to file his submission by March 1st, 2005 and counsel for the Director (as well as the individual employees) was (were) given until March 15th, 2005 to file his (their) submission(s). I now have before me a submission from counsel for the Appellants dated February 25th, 2005 and the reply submission of counsel for the Director dated March 14th, 2005. None of the four respondent employees filed a submission. I should add that in addition to the two submissions that were filed as directed by my February 15th letter, the parties filed further submissions dated March 17th and April 8th, 2005 (counsel for the Appellants) and March 22nd, 2005 (counsel for the Director). Since these latter submissions are unsolicited, I am not considering those submissions nor, indeed, have I even read them.

As noted above, in my February 3rd, 2005 letter to the parties, I asked them to make their final submissions regarding the matters of the document disclosure and, in particular, whether the Director has now fully disclosed the section 112(5) record. I have the parties' submissions in hand and I shall now turn to this particular issue.

THE RECORD AND SUPPLEMENTARY DOCUMENT DISCLOSURE

Disclosure of the "Record"

Section 112(5) states that once an appeal has been filed, "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". My May 31st, 2004 reasons for decision (B.C.E.S.T. Decision No. D100/04) defined the nature of the section 112(5) record. This latter decision was confirmed on reconsideration (B.C.E.S.T. Decision No. RD172/04).

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.

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.

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.

IS AN ORAL HEARING ON THE MERITS REQUIRED?

As I noted above, in his originating appeal documents counsel for the Appellants identified several separate instances of alleged errors of law and breaches of natural justice by the Director. The alleged errors of law included:

> i) the Director's finding that she had jurisdiction to adjudicate the complaints since Actton, a federal jurisdiction firm, was the "true employer" of the four individuals in question; and
>
> ii) the Director's section 95 declaration "associating" Actton, a federal firm, with Super Save; and
>
> iii) the Director's refusal to determine the "true employer" of the four complainants.

The alleged breaches of natural justice included allegations that:

> i) the Director denied the Appellants a fair hearing:
>
> ii) the Director failed to conduct a proper investigation and otherwise contravened section 77 of the *Act*; and
>
> iii) the Determinations should be cancelled because of the delay involved in issuing the Determinations.

Counsel for the Appellants more fully particularized his eight separate grounds of appeal at pp. 5-7 of his February 25th, 2005 submission:

> **Ground #1**
> The Director erred in law in finding that the Branch had jurisdiction to adjudicate these complaints.
>
> **Ground #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 ATL was a federally regulated employer.
>
> **Ground #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 for [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 the bad faith and actual bias by the Director, her delegates and agents, in exercising their discretion.
>
> **Ground #4**
> The Director erred in adjudicating the four complainants as the four complaints were determined and the files closed well prior to the Determinations.
>
> **Ground #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 #6**
> - The Appellants were denied natural justice in the investigation and adjudication of these complaints. That included:
> - …the Appellants were not allowed to be heard in this matter…
> - …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 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…

- 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…were not made in good faith…but rather…reflect a predetermined and prejudged result…
- The Director, her delegates and agents and others deliberately undermined the investigation and adjudication of the complaints…
- 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…therefore has further tainted the proceedings and adjudications.

Ground #7
The complaints ought to have been dismissed, in any event, due to the undue delay with respect to 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 #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.

In my view, the above grounds represent a clearer elucidation of the grounds set out in the Appellants' originating appeal documents but do not represent fundamentally changed or new grounds.

Further, I am of the view that several of these grounds can be fairly adjudicated by the Tribunal solely on the basis of written submissions and without conducting an oral hearing. Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act* ("*ATA*") including section 36 of the *ATA*. Section 36 of the *ATA* states that "the tribunal may hold any combination of written, electronic and oral hearings" (see also *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575).

Issues to be addressed by written submissions

In my opinion, the Appellants' grounds of appeal raise a number of legal issues that can be adequately addressed by written submissions. The Appellants' first, second, third, fourth and seventh grounds raise, respectively, issues relating to the Director's jurisdiction; the identity of the "true employer"; the correctness of the section 95 declaration and the related question of whether an allegedly federal employer can be associated with a provincial employer; *res judicata* or issue estoppel; and loss of jurisdiction due to unreasonable delay.

The above issues can, in my view, be adjudicated at this time without any concern whatsoever with respect to the alleged need for further document disclosure. The Appellants' allegation that Actton is a federal-jurisdiction firm, the issues relating to the "true employer", the section 95 declaration and the

possible application of the doctrine of *res judicata* can all be addressed based on information within the existing possession or control of the Appellants and the record as it now stands. Counsel for the Director should be able to support the correctness of the delegate's determination of these issues based on the material that has been disclosed to date. The Appellants' task is to show that the delegate erred in making certain findings or drawing certain legal conclusions in light of the evidence that was before him (as reflected in the record) at the time he was making the Determinations.

I note that, at least with respect to some of these issues, the Director's position is that the Appellants simply refused or neglected to provide information as requested; to the extent that the Director relies on the *Tri-West Tractor/Kaiser Stables* principle (see B.C.E.S.T. Decision Nos. D268/96 and D058/97), that argument can be (and, in other appeals heard by the Tribunal frequently has been) adequately addressed in a written submission.

The Appellants should certainly know what information they submitted to the Director with respect to these four matters (the Appellants' grounds 1, 2, 3 and 4) and should be in a position to argue the correctness of the Determinations as they relate to these various matters in light of the evidentiary record that was before the delegate.

In my February 15th, 2005 letter to the parties, I specifically asked counsel for the Appellants to explain why each individual ground of appeal could not be fairly adjudicated by way of written submissions. I suggested that if he believed an oral hearing was required in order to fairly adjudicate a particular ground of appeal, 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. In my view, counsel for the Appellants' February 25th, 2005 submission is wholly devoid of the sort of particulars I gave notice I expected to receive in support of an application for an oral hearing. In my view, counsel for the Appellants' demand for an oral appeal hearing on all issues has not been adequately supported. In short, counsel claims that he cannot fairly address any of the issues raised in these appeals (with the possible exception of the section 117 issue) by way of written submissions; however, he has not, in my view, provided a proper justification for that claim at least insofar as Grounds of Appeal numbers 1 through 4 are concerned.

As for the matter of delay (Ground No. 7), all of the essential facts are well known and not disputed; we know with certainty the timeline regarding the investigation and adjudication of these complaints. The Appellants, in my view, are certainly able to argue—as the record now stands—why the Determinations should be cancelled due to excessive delay and to show what particular prejudice they have suffered as a result of the delay involved in this case.

The Appellants' Ground No. 5 relates to section 117 of the *Act*; ordinarily, the delegate's authority to investigate a particular complaint is presumed (see e.g., *Thunder Mountain Drilling Ltd.,* B.C.E.S.T. Decision No. D314/96), however, if there is a *bona fide* issue regarding the delegate's authority, that matter can be reviewed by the Tribunal. Therefore, I will direct the Appellants to address this issue by way of a written submission, at least to the extent of raising a *bona fide* concern with respect to the delegate's delegated authority to investigate. The Director may reply as he thinks appropriate. Depending on whether a *bona fide* issue has been raised, the matter may be more fully argued by written submissions or an oral hearing.

The natural justice issues—other than in regard to loss of jurisdiction due to undue delay—do not, in my view, lend themselves as readily to an adjudication format based solely on written submissions. I am further concerned about whether these natural justice issues need to be addressed at this point in time. If

the Appellants are successful on the grounds that are to be adjudicated by written submissions, an oral hearing on the natural justice issues might well be moot. Further, there is a line of authority that natural justice breaches at one level of administrative decision-making may, in some cases, be cured by subsequent administrative proceedings at a higher level—the Tribunal has applied this principle on some occasions. In making these comments, I recognize that the Appellants say that the Determinations must be cancelled outright—without any referral back for rehearing—by reason of the alleged breaches of natural justice. I have not reached any conclusions whatsoever with respect to the natural justice issues. However, I am of the view that the natural justice issues (other than with respect to delay) should be held in abeyance pending a decision on the issues that can be fairly adjudicated by way of written submissions.

Costs, the Appellants' Contempt Application and the Production of a Document Index and/or Catalogue

Counsel for the Appellants, at p. 4 of his February 25th, 2005 submission, asks the Tribunal to make an order in favour of the Appellants for compensation "including all legal fees expended since the filing of this Appeal to the date of the final and full disclosure of documents" (underlining in original). At page 22 of the same submission, counsel for the Appellants submits: "It is imperative that the Tribunal make a decision regarding the Appellants' contempt application for remedial orders". It is not clear whether the Appellants are seeking costs as a usual remedy or as an extraordinary remedy as part of their application to hold the Director in contempt.

Counsel for the Director submits, at paras. 42 and 43 of his submission, that the Tribunal does not have the jurisdiction to award costs. I previously addressed the matter of costs at page 25 of my May 31st, 2004 decision (B.C.E.S.T. Decision No. D100/04) but did not make a ruling at that time.

However, as counsel for the Director points out, the statutory authority to award costs set out in section 47 of the *A.T.A.* has not been granted to the Tribunal via section 103 of the *Act.* Similarly, there is no authority in the *Act* to award costs. In my view, the Tribunal does not have the statutory authority to award costs. Accordingly, that aspect—and only that aspect—of the Appellants' appeal is dismissed pursuant to section 114(1)(a) and (f) of the *Act*. These latter provisions provide that "without a hearing of any kind the tribunal may dismiss all or part of [an] appeal" if the Tribunal lacks jurisdiction or the matter has no reasonable prospect of success.

As for the matter of the Appellants' application for a contempt order, I propose to leave that issue in abeyance pending the final adjudication of these appeals. I think it premature to deal with that question at this point in time.

Finally, counsel for the Appellants has renewed his demand that I "require the Attorney General to provide…a catalogue and listing" of all documents disclosed to date. In my February 3rd, 2005 letter I indicated that I was not prepared to make such an order and I see no reason to change my view in that regard. If counsel for the Director prepares such a list or catalogue, I expect that he will provide a copy to counsel for the Appellants in accordance with my February 3rd direction regarding that particular matter.

SUMMARY AND ORDERS

I am satisfied that the section 112(5) record, as it now stands, is sufficient for purposes of these appeals, at least insofar as the grounds that will be adjudicated by way of written submissions are concerned.

I am not prepared to issue, at this time, a further order for production of documents under section 109 of the *Act* nor am I prepared to order counsel for the Director to prepare a list or catalogue of all documents that have been disclosed to date.

The issues that have been identified by counsel for the Appellants as Grounds of Appeal Numbers 1, 2, 3, 4, 5 and 7 (February 25th, 2005 submission) shall be adjudicated on the basis of written submissions 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 **May 13, 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 **May 30, 2005**; and

- Counsel for the Appellants shall file his final reply submission regarding these issues by no later than 4:00 p.m. on **June 14, 2005**.

Upon receipt of the parties submissions, I will issue written reasons for decision and give further directions and orders with respect to the other matters raised by these appeals that have not yet been adjudicated.

Pursuant to subsections 114(1)(a) and (f) of the *Act*, the Appellants' claim for "costs" of these appeal proceedings is dismissed.

The Appellants' application to hold the Director in contempt shall be held in abeyance for the time being.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal