Employment Standards TRIBUNAL

An appeal

- by -

Super Save Disposal Inc. ("Super Save")

-and-

Actton Transport Ltd. ("Actton")
(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 No.: 2003A/172, 173, 174 & 175

DATE OF DECISION: May 31, 2004

DECISION

SUBMISSIONS

Michael J. Weiler	Counsel for Super Save Disposal Inc. and Actton Transport Ltd.
Robert Cardinal	on his own behalf
Todd Norberg	on his own behalf
Adele J. Adamic and Michelle Alman	Counsel for the Director of Employment Standards

INTRODUCTION

The Determinations and Appeals

These reasons for decision arise out of my earlier decision issued on December 15th, 2003 (BC EST # D329/03). Super Save Disposal Inc. ("Super Save") and Actton Transport ("Actton") have jointly appealed four separate Determinations that were issued by a delegate of the Director of Employment Standards (the "Director") on May 5th, 2003. I shall refer to Super Save and Actton, jointly, as the "Appellants". The appeals have been filed pursuant to section 112 of the *Employment Standards Act* (the *"Act"*).

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 (Tribunal File No. 2003A/172), Stephen Smith (Tribunal File No. 2003A/173), Todd Norberg (Tribunal File No. 2003A/174) and Larry Catt (Tribunal File No. 2003A/175). The total amount payable under the four Determinations is $54,185.41.

The Appellants appeal the Determinations on the grounds that the Director's delegate erred in law [section 112(1)(a)] and failed to observe the principles of natural justice in making the Determinations [section 112(1)(b)]. More particularly, the Appellants say that the Determinations should be cancelled because the actual employer of the particular individuals (Actton Transport Ltd.) falls under federal jurisdiction. The Appellants also say that the Director erred in associating a federal jurisdiction firm (Actton) with a provincial jurisdiction firm (Super Save Disposal Inc.). Finally, the Appellants say that the Determinations should be cancelled due to the significant delay involved in determining the individual complainants' unpaid wage claims and because the Director's investigation was conducted in a manner that was unfair to the Appellants and was tainted by bias.

These reasons for decision deal with three issues that I requested the parties to address by way of my December 15th, 2003 reasons for decision. However, before turning to those latter issues, I shall detail the background circumstances that have brought these proceedings to the present juncture.

SUMMARY OF PREVIOUS PROCEEDINGS

Production of the "Record"

Upon being served with a copy of an appellant's appeal documents, the Director *must*, pursuant to section 112(5) of the *Act*, "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". On August 28th, 2003 the parties appeared before me and made arguments with respect to nature and scope of the Director's obligation to produce the "record".

The "record", as it was initially disclosed by the Director, consisted of approximately 700 pages. However, the Appellants filed a separate application to compel disclosure of documents held by the Employment Standards Branch pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act.* The Appellants were subsequently advised by the Information and Privacy Branch that the Employment Standards Branch files consisted of "a large number of records (approximately 3000 pages)". Counsel for the Director took the position that any documents other than those initially disclosed did not form part of the "record" or were protected by solicitor-client privilege.

The August 28th, 2003 Hearing

The parties appeared before me on August 28th, 2003 in order to address, among other things, outstanding issues with respect to the production of documents. The August 28th hearing resulted in the following Order (see BC EST # D263/03 issued August 29th, 2003):

> ORDER
>
> (1) The Director of Employment Standards (the "Director") is ordered, pursuant to section 109(1)(g) of the [*Act*] to produce and deliver all documents that form part of the record referred to in section 112(5) of the Act, except those documents already produced, to [counsel for the Appellants] and to the Tribunal, on or before September 5, 2003.
>
> (2) Documents in the custody or control of the Director with respect to the four complainants' claims but which, in the Director's view, 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.
>
> (3) Any issues with respect to whether documents should be produced will be addressed at an oral hearing to be held on September 22, 2003.
>
> (4) The deadline for final submissions by Super Save is extended from September 2, 2003 to September 5, 2003.
>
> (5) The appeal on the merits will be the subject of an oral hearing of three days to be set by the Tribunal. The Tribunal will contact the parties concerning availability for such a hearing.
>
> (6) Further orders may be made with reference to discrete legal questions that can be addressed by way of written submissions rather than by way of an oral hearing.

The September 22nd Hearing

On September 22nd counsel for the Director advised that the Director would not provide the "document list" as described in paragraph 2 of my August 29th Order. Further, counsel for the Director was not prepared to give the Tribunal an undertaking that the entire record had been disclosed and also advised that she intended to file an application for reconsideration of my August 29th Order. In light of those circumstances, the September 22nd hearing was adjourned so that the Director could apply for reconsideration of paragraph (2) of my August 29th order. On September 23rd, 2003, I issued the following order:

> ORDER
>
> The hearing set for September 22nd, 2003 is adjourned generally. My Order of August 29th contained in Tribunal Decision BC EST #D263/03 is not suspended. The Director of Employment Standards (the "Director") will request a reconsideration of my August 29th Order by October 6th, 2003. If the Director does not request the reconsideration within the time limit above, the Tribunal will issue further Orders regarding the continuance of these appeals.

The Director's reconsideration application was heard by Adjudicator Stevenson (in a hearing by way of written submissions) and was refused (see BC EST # RD322/03, issued November 24th, 2003). The relevant portions of Adjudicator Stevenson's reasons for decision (at pp. 4-5) are reproduced below:

> Under Section 109(1)(c), the Tribunal has made rules about how appeals should proceed. Those rules authorize pre-hearing conferences and allow an adjudicator presiding at a pre-hearing conference to "require one party to disclose to the other, or to the Tribunal, originals or copies of information, documents, records or submissions" [Rule 18(e)]. The applicable statutory provisions clearly and specifically provide the Tribunal with the authority to compel a party to disclose or produce documents that may be relevant to an appeal. Disclosure may be done orally or in writing, the Tribunal may require it be done on oath or affirmation. The authority in the Tribunal to inspect any documents that *"may be relevant"* necessarily includes both an obligation on the party under compulsion to produce any document that has potential relevance and a power in the Tribunal to inspect those documents even if they may ultimately have no relevance to any matter raised in the appeal or reconsideration. Relevance is not decided by the party under compulsion to produce or disclose, but by the Tribunal upon inspection of the records and documents produced. The Director argues that an order for production must be governed by relevance. Even if it were possible to determine with certainty the relevance of all documents at the pre-hearing stage, the Adjudicator has not required the production of any document not included in the record. He has only ordered documents in the custody and control of the Director and not included in the record be *listed* and the list produced. In my view, point 2 of the order is a reasonable and balanced approach to ensuring production remains limited to only those documents which are relevant while ensuring that any issue of relevance can be properly adjudicated.
>
> The other arguments made by the Director are premature. The Director has produced the list apparently contemplated by point 2 of the order. The adjudicator has not decided any of the substantive issues addressed in this application. Specifically, the Adjudicator has not decided that no solicitor-client privilege attaches to communications between the Director and counsel from the Legal Services Branch of the Attorney General's Ministry; he has not decided if any of the other listed documents should remain inaccessible to any other party; he has not decided that any document in the list requires his inspection; and he has not decided any of the documents not included in the record are relevant. If necessary, the Director may raise these issues before the Adjudicator.

(*italics* in original)

The December 8th, 2003 Hearing and December 15th, 2003 Order

In accordance with the provisions of paragraph (5) of my August 29th order, the parties once again appeared before me on December 8th, 2003 so that the substantive issues raised by this appeal could be addressed. Although the Director produced (as part of the reconsideration proceedings) a list itemizing various documents (and, in some cases, categories of documents) in her custody or control with respect to the four complainants' claims, her legal counsel maintained that none of those documents should be included in the section 112(5) record and, in any event, that all were privileged. This list was appended to a letter to the Tribunal's Vice-Chair dated December 3rd, 2003; the documents (totalling 62 pages) and categories of documents were itemized as (a) through (h) on the list.

Counsel for the Director further indicated that the Director did not intend to abide by any consequent orders for inspection and/or production that I might make pursuant to paragraph (3) of my August 29th order. The Director's position seemingly was that she alone has the exclusive and unilateral authority to determine what documents constitute the "record" that must be disclosed under section 112(5). Counsel for the Director also submitted that the Tribunal had no authority to inspect a document in the Director's files if a claim of privilege was asserted with respect to that document. Finally, counsel for the Director submitted that the entire record had been disclosed and the adjudication of the appeal should proceed.

Counsel for the Appellants maintained that there must be other documents in the Director's files that form part of the record but that have not been produced. He submitted that some documents that appear in the record disclosed to date refer to other documents that have not been disclosed and that other deficiencies (in terms of complete disclosure) were apparent on the face of the record. Counsel for the Appellants submitted that since the record had not been fully disclosed, he could not be fairly asked to proceed until a determination was made that the complete record had been delivered. In light of the Director's position, counsel for the Appellants made several motions including one that I find that the Director and her delegates in contempt of the Tribunal for failure to comply with my August 29th Order.

I concluded that the appeal could not go forward on its merits unless and until the issues surrounding the compilation and disclosure of the record were resolved. Accordingly, the appeal hearing was adjourned so that the parties could file written submissions with respect to the following three issues, namely:

> 1. Has the Director complied with my August 29th, 2003 Order and, if not, what remedy, if any, ought to granted?
>
> 2. The Director's role in this appeal - What restrictions, if any, should be imposed on the Director's right of audience (by counsel or otherwise) before the Tribunal in these appeal proceedings?
>
> 3. The "record" - What documents, in general terms, constitute the "record" for purposes of section 112(5) of the *Act*? What dispute resolution procedure, if any, ought to be put in place to resolve conflicts about whether the complete "record" has been produced? What form of order, if any, should I issue regarding the production of the "record" for purposes of this appeal?

I subsequently issued a formal order (BC EST # D329/03) directing the parties to file submissions on the above-noted matters within certain time parameters and by way of my decision also advised the parties

that I would be issuing written reasons for decision with respect to the three issues and further directions regarding the final adjudication of this appeal.

The Separate Proceedings Before the Vice-Chair

I now have before me submissions from counsel for the Appellants (January 9th and 13th, 2004 and reply dated February 12th, 2004), counsel for the Director (January 30th, 2004), Robert Cardinal (January 19th and March 10th, 2004) and Todd Norberg (January 21st, 2004).

As a result of a motion made by the Director's counsel, the Tribunal's Vice-Chair adjudicated certain matters with respect to the content of counsel for the Appellants' submissions. These matters are discussed in some detail in a letter to the parties (in essence, reasons for decision regarding the Director's counsel's motion) from the Tribunal's Vice-Chair dated March 8th, 2004. I have not been privy to any of the submissions made by the parties with respect to this latter motion. However, I have been provided with the Vice-Chair's March 8th letter that summarizes the nature of the issues before her and sets out her ruling on the Director's motion. I shall now briefly summarize the nature of the proceedings before the Vice-Chair and her ruling.

Counsel for the Appellants attached four separate appendices ("A" to "D") to his January 9th, 2004 submission. On January 16th, counsel for the Director applied to the Vice-Chair to have Appendices "A" and "D" severed from the Appellants' submission on the ground that "the noted appendices are privileged documents which the Director alleges were improperly obtained and used by counsel for the appellants". The relevant portions of the Vice-Chair's ruling (at pp. 6-9 of her March 8th letter) are set out below:

> The submission cycle ordered by Adjudicator Thornicroft in his December 15, 2003 Decision has now been completed...Accordingly, subject to a determination of the severance issue, the Tribunal's usual procedures require that these submissions be forwarded to the Adjudicator to be dealt with on their merits.
>
> The Director asks that I as Vice-Chair deal with the severance issue. The Appellants submit that the Adjudicator should decide the issue. I find it appropriate in the circumstances that I deal with the issue, in order to expedite the forwarding of the parties' submissions to the Adjudicator and to foreclose any suggestion that the Adjudicator might be prejudiced by seeing documents he ought not to have seen...
>
> I find that the allegation that Appendices "A" and "D" were improperly obtained by the appellants is not established by the material the Director has put before me...
>
> In these circumstances, I find no basis for concluding that the Appellants improperly obtained Appendices "A" and "D"...
>
> Accordingly, I reject the claim of improper conduct as a basis for ordering severance. This leaves the Director's assertion that Appendices "A" and "D" are covered by solicitor-client privilege that has never "knowingly" been waived.
>
> The Appellants dispute that solicitor-client privilege attaches to Appendices "A" and "D", and argue that, in any case, any solicitor-client privilege that might attach to these two documents under s. 14 of FOIPPA [*Freedom of Information and Protection of Privacy Act*] was effectively waived by [Information and Privacy Branch manager] Carlson on December 23, 2003 (if not before then). I find there is considerable merit to the latter argument...

> ...I find in these circumstances that, to the extent that Appendices "A" and "D" might be covered by solicitor-client privilege (an issue I find I need not decide), that privilege under s. 14 of FOIPPA has been waived.
>
> Does the fact that Carlson waived privilege over these two documents for purposes of s. 14 of FOIPPA mean that the Director can no longer assert solicitor-client privilege with respect to these documents for purposes of determining what constitutes the "record" in this case, under s. 112(5) of the *Act*? I find this a difficult question to answer.
>
> As noted in the Adjudicator's December 15, 2003 decision (at p. 7), the Director's position appears to be that she alone has the exclusive and unilateral authority to determine what documents constitute "the record" that must be disclosed under section 112(5) of the *Act*, and that the Tribunal has no authority to inspect a document in the Director's file once a claim of privilege has been asserted with respect to that document. It is presumably in furtherance of that position that the Director asserts that Appendices "A" and "D" should be severed.
>
> The correctness of the Director's position in this regard is a matter for the Adjudicator to decide. It goes to the heart of the issues identified by the Adjudicator in his December 15, 2003 order seeking submissions from the parties...
>
> In my view, it is essential in light of the purposes of the *Act* that this matter proceeds in as expeditious [a] manner as possible. In this case, that means the completed submission cycle should be forwarded to the Adjudicator without further delay. In order to facilitate that goal, I propose, without deciding the issue, to sever for the time being Appendices "A" and "D" and the one passage which the Director has consistently blacked out from the Appellants' January 9, 2004 submission.
>
> The Adjudicator will be provided with a copy of this letter so that he understands why portions of the submissions have been blacked out, and the attachments severed. The Adjudicator is free to decide that those documents should remain severed, or that they should be forwarded to him, or that he wishes further submissions on the issue. It is possible that the Adjudicator may find that he can deal with the matters before him without needing to resolve this issue. I leave this to the complete discretion of the Adjudicator.
>
> Accordingly, for the reasons given and in the manner indicated, the submissions will be forwarded, with the severance issue outstanding but the disputed documents and passages for the time being severed from the Appellants' January 9, 2004 submission.

I shall address the matters of severance and privilege later on in these reasons. I now turn to the three issues that I requested the parties to address by way of my August 29th Order.

ANALYSIS

The Director's Statutory Obligation to Deliver the "Record" to the Tribunal

An appellant may appeal a determination by filing a written request with the Tribunal. The appellant's written request must specify one or more of the three statutory grounds set out in section 112(1) of the *Act* and must also be delivered to the Director [section 112(2)(b)]. Upon receipt of the appellant's written request: "...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" [section 112(5)].

The Director's obligation to provide a "record" was incorporated into the *Act* pursuant to the *Employment Standards Amendment Act, 2002* and took effect as of November 30th, 2002 (B.C. Reg. 307/02). At this juncture there is only limited Tribunal jurisprudence regarding the ambit of section 112(5). Unfortunately, this latter subsection does not provide much guidance regarding what documents (other than "witness statements") constitute the record nor does it set out any process for determining whether the complete record has been disclosed should that become (as it has here) an issue in dispute between the parties.

An appeal to the Tribunal is not a *de novo* appeal (see *World Project Management Inc. at al.*, BC EST # D325/96; affd. on reconsideration: D134/97). If it were, any deficiencies in the "record" produced by the Director would not necessarily prove to be particularly problematic. On the other hand, while an appeal to the Tribunal under section 112(1) in not a strict "appeal on the record"--this is most obviously apparent in light of the Tribunal's authority to cancel a determination based on "new evidence"--the completeness of the record is now much more important than was formerly the case when the *Act* did not provide for specified grounds of appeal.

The Director undeniably has the initial obligation under section 112(5) to determine what constitutes the record for purposes of a particular appeal and to provide those documents to the Tribunal. However, where an appellant raises a *bona fide* and seemingly meritorious challenge regarding the completeness of the record provided by the Director under s. 112(5), that issue must be resolved before the Tribunal can proceed to adjudicate the appeal on its merits. The Tribunal, not the Director, has the statutory jurisdiction to make a "final and conclusive" decision or order regarding the record (see section 110).

What Documents Constitute the Record?

Before one can determine whether the complete record has been produced a fundamental threshold question must be addressed, namely: What documents constitute the section 112(5) record? This latter question may, in turn, depend on the nature of the adjudicative proceedings that preceded the issuance of the determination.

A determination may be issued following an investigation by a Director's delegate or--reflecting a relatively recent change in adjudicative procedures utilized by the Employment Standards Branch--after an oral hearing before a delegate. In the former procedure, the delegate acts as both a factfinder and a decision-maker. In *BWI Business World Inc.* (BC EST # D050/96) I made the following observations regarding the delegate's dual investigative and adjudicative function:

> Under the current *Act,* the adjudicative process is triggered by the filing of a complaint with the Director of Employment Standards under section 74. The Director also has the authority to conduct an investigation in the absence of a complaint [section 76(3)]. Once a complaint has been filed, the Director has both an investigative and an adjudicative role. When investigating a complaint, the Director is specifically directed to give the "person under investigation" (in virtually every case, the employer) "an opportunity to respond" (section 77). At the investigative stage, the Director must, subject to section 76(2), enquire into the complaint, receive submissions from the parties, and ultimately make a decision that affects the rights and interests of both the employer and the employee. In my view, the Director is acting in a quasi-judicial capacity when

> conducting investigations and making determinations under the *Act* [*cf. Re Downing and Graydon,* 21 O.R. (2d) 292 (Ont.C.A.)]...
>
> When conducting an investigation, the Director will typically gather evidence from each of the parties but will rarely, if ever, convene a hearing at which both parties are present. Accordingly, neither the employer nor the employee will necessarily know precisely what the other has alleged or what particular documentation has been provided to the Director.

As noted above, some determinations are now being issued following an oral hearing before a delegate. In this latter procedure, the delegate does not conduct an independent factfinding investigation. Rather, the delegate hears the parties (and any witnesses they might call), finds facts based on the evidence presented (which may involve resolving conflicts in the evidence), determines the governing legal principles and then issues a decision applying those principles to the relevant facts. In this latter procedure, the onus lies on the parties to gather evidence, prepare their positions and then present their case in a formal evidentiary hearing before a Director's delegate. Where there is an oral hearing, the delegate's role is limited to hearing the parties' evidence (in a manner that is consistent with the principles of natural justice) and then issuing a decision in accordance with the provisions of the *Act.*

Despite the Director's announced change in adjudicative procedures, the Tribunal's recent experience indicates that many section 79 determinations appealed to the Tribunal are still being issued after an investigation. In my view, the contents of the "record" will be affected by the nature of the adjudicative process that preceded the issuance of the determination. If the determination is issued after an oral hearing, the record might well be limited to the evidence presented by the parties at the oral hearing together with other relevant documents such as the original complaint. However, if the determination is issued after a delegate has conducted an independent factfinding investigation, there may be documents that neither party submitted to the Director's delegate but that nevertheless form part of the record since they were obtained by delegate during the investigation and considered prior to issuing the determination (for example, a third party witness statement).

Although the term "record" is not defined in either the *Act* or the *Employment Standards Regulation*, the *Interpretation Act* (section 29) provides the following definition:

> **Expressions defined**
>
> 29. In an enactment:..."record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise;

In light of the above provision, it would appear that the section 112(5) record may consist of a wide variety of physical or other electronic evidence. However, section 112(5) refers, not simply to a "record" but, rather, to "the record that was before the director at the time the determination...was made".

Section 1 of the *Judicial Review Procedure Act* defines a "record of the proceeding"; arguably, a concept analogous to the "record" envisioned by section 112(5) of the *Act:*

> **Definitions**
>
> 1. In this Act: ...
>
> "record of the proceeding" includes the following:

> (a) a document by which the proceeding is commenced;
>
> (b) a notice of a hearing in the proceeding;
>
> (c) an intermediate order made by the tribunal;
>
> (d) a document produced in evidence at a hearing before the tribunal, subject to any limitation expressly imposed by any other enactment on the extent to which or the purpose for which a document may be used in evidence in a proceeding;
>
> (e) a transcript, if any, of the oral evidence given at a hearing;
>
> (f) the decision of the tribunal and any reasons given by it;...

Although, this latter definition does not apply to an appeal to the Tribunal under section 112(1) of the *Act*, it does indicate a general legislative intent in favour of placing all relevant information before a judge who is reviewing an administrative tribunal's decision (see *e.g., Re Shepp and Board of Variance for Saanich et al.*, B.C.S.C. Victoria Registry Docket No. 98-2332, July 23rd, 1998). The grounds of appeal set out in section 112(1) of the *Act* are not markedly dissimilar from the administrative law principles governing applications for judicial review and thus, in my view, the above definition provides some useful guidance regarding what constitutes the "record" for purposes of a section 112 appeal under the *Act.*

In my view, when defining the ambit of the section 112(5) record, the governing principle should not be *reliance* or *materiality*--that is, did the delegate rely on the document or was it material to the delegate's decision? Rather, the governing principle should be *availability*--that is, was the document etc. in the hands of the delegate when he or she was making the determination? ("*...the record that was before the director* at the time the determination...was made"). It should be noted that a document may have been available notwithstanding that the delegate did not rely on that document when making his or her determination (say, because the delegate considered it to be irrelevant or not probative).

Counsel for the Director submits that only documents actually considered to be relevant and relied on by the delegate constitute the record; I reject that submission as being overly narrow. In my opinion, a document is "considered by the delegate" even though the delegate may conclude that it is not relevant. One must "consider" a document before one can conclude whether it is relevant. The *Oxford Dictionary* defines "consider", among other things, as "a mental contemplation in order to reach a conclusion", "an examination of the merits", "to view attentively" and "to take into account after careful thought". If a delegate were to reject a document as irrelevant without having first "considered" it, that decision might well offend the principles of natural justice.

In some cases, a ground of appeal may be that the delegate erred in law or breached the rules of natural justice by refusing to receive and consider certain documentary evidence; in my view, such documents should be placed before the Tribunal as part of the record transmitted under section 112(5) of the *Act.* Further, there may be documents in the delegate's file that were obtained by the delegate (say, during the course of an independent factfinding investigation) and not disclosed to either the complainant or the respondent. Such documents, in my view, form part of the record irrespective of whether the delegate actually relied on the documents in making the determination. I might add that I consider an "inclusionary", rather than an "exclusionary", approach to defining the record to be more consistent with the purposes of the *Act* set out in subsections 2(b), (c) and (d).

In the case of an oral hearing, the record would consist of all documents that were submitted to the delegate at the hearing including any documents that were ruled inadmissible since this latter issue might be relevant to an appeal--for example, the appellant might argue that the exclusion of certain evidence constituted an error in law. As I noted earlier, the record is not restricted to only those documents the delegate considered to be relevant; any document tendered at the hearing ought to be included in the record forwarded to the Tribunal.

The record must also include "any witness statement". Individual parties and their witnesses will likely give *viva voce* evidence although, I suppose, their evidence might be contained in a sworn or unsworn written statement. Written statements undoubtedly form part of the record. In *Balint* (BC EST # D103/03) the Tribunal made the following observations (at p. 4) about witness statements in the context of an investigation but I would conceive the following comments to be equally applicable where there is an oral hearing:

> I find it curious that the Director, in responding to the appeal, says the investigating delegate "based his findings on the credibility of the parties based on his numerous conversations with them". If that were so, and if the alleged conversations were considered when the Determination was made, those conversations should have been included in the record provided to the Tribunal. I can find no such documents in the material filed by the Director. If the Director seeks to rely on verbal communications when making the Determination, those communications must be transcribed in some way and included with the record.

If the determination was issued following an investigation, the matter of the record is somewhat more problematic. Where the determination was issued following an oral hearing, one or more of the parties would, in most cases, be able to provide the Tribunal with first-hand information with respect to what evidence was actually tendered at the hearing. However, in the case of an investigation, unlike an oral hearing, one or more of the parties (perhaps all parties) will not necessarily know what particular documents etc. were obtained by, given to, or relied on, by the delegate.

Section 77 of the *Act* states: *If an investigation is conducted*, the director must make reasonable efforts to give a person under investigation an opportunity to respond" (my *italics*). If the complaint is to be determined following an oral evidentiary hearing, arguably, the "respondent" party's opportunity to respond is at the oral hearing itself. The rules of natural justice would, of course, oblige one or both of the complainant and the Director to inform the respondent about the nature of the complaint and the matters that will be addressed at the oral hearing. On the other hand, where the complaint was investigated and no oral hearing was held, the record, where there is an allegation by the appellant that section 77 was contravened, should include "information regarding the process followed in the investigation and what efforts were made to give the [person] under investigation an opportunity to respond" (*J.C. Creations Ltd. operating as "Heavenly Bodies Sport"*, BC EST # RD317/03 at para. 54).

If a determination is issued following an independent factfinding investigation by a Director's delegate, the record consists of all documents submitted by (or on behalf of) the parties to the delegate and, in addition, any other documents obtained by, or on behalf of, the delegate during the course of the investigation. Where, as in the present case, more than one delegate had conduct of the matter, the record consists of all documents submitted to, or obtained by, any delegate who had conduct of the file.

Counsel for the Director says (January 30th, 2004 submission, para. 26) that if an appellant alleges bias (real or apprehended) on the part of the Branch or one of its officers, a 2-stage truncated approach ought to be followed with respect to the record:

> The Director submits that, where a party alleging bias on the part of the Branch provides the Tribunal with **sufficient strong evidence of real or reasonably apprehended bias, and** the Tribunal makes a decision that there was bias, then and only then would the Tribunal have any reason to require greater disclosure of Branch file information as part of "the record"...If the Tribunal were to make a preliminary finding of bias on the part of the Director after considering the offered evidence of alleged bias, the Director submits that the individual circumstances of any such case would determine what sort of additional materials from the Branch's file would be required to be disclosed as "the record".
>
> (**emphasis** in original text)

In my view, a two-step process, such as that suggested by the Director, is neither fair nor efficient and thus would be contrary to one of the express purposes of the *Act* [section 2(d)]. Further, it may be that an appellant requires certain documents from the Branch's file in order to corroborate an assertion of bias or, indeed, any other allegation with respect to natural justice. I adopt the following comments of Lambert, J.A. (a dissenting opinion, but not on this point) in *Hammami v. College of Physicians and Surgeons of British Columbia* (B.C.C.A. Registry No. CA018057, March 25th, 1996):

> It would be a very unsatisfactory state of the law if disclosure could only be obtained if there were allegations of bias, or some similar breach of natural justice, which could only be revealed or substantiated by the very documents for which disclosure was sought. And it would be a disservice to the interests of justice if there were any encouragement given to the concoction of allegations of bias in order to meet a threshold test for disclosure.

In my view, the composition of the record does not depend on the particular grounds of appeal advanced by an appellant. I do not accept the notion, implicit in counsel for the Director's submission, that there is one record if the ground of appeal is error of law and, possibly, a different record if the appeal is based on natural justice grounds. Finally, and as I indicated earlier, the entire Branch file is the presumptive "record"; documents should only be excluded if there is a proper legal basis for exclusion (an issue I turn to shortly).

I do not, however, conceive that the section 112(5) record includes documents or other evidence--even though they may be relevant to the issues in dispute between the parties--that were not in the Director's delegate's hands ("the record that was *before* the director...") when the determination was being made. Documents in the hands of other administrative agencies (for example, a complainant might have filed a separate complaint with the Human Rights Tribunal, the Workers' Compensation Board or there may have been parallel proceedings before a federal Employment Insurance Board of Referees) would not form part of the record unless those documents were placed before the delegate for his or her consideration [say, by reason of an issue estoppel argument; *e.g., Polycryl Manufacturing (1988) Inc.*, BC EST # D360/01].

Although documents may form part of the record, for administrative convenience and efficiency, it may be appropriate in certain instances if a description of the document is disclosed rather than the actual document itself. Thus, the Director could include, as part of the record, a separate appendix itemizing those documents that form part of the record but have not been transmitted to the Tribunal.

For example, the delegate may have relied on payroll records--in the form of a voluminous computer printout--in order to calculate the complainant's unpaid wages. In the latter example, if the appeal did not concern the accuracy of the payroll information or the delegate's calculations (say, because the only issue on appeal was whether the employer had just cause for dismissal), I would not think it necessary for the

payroll records to be copied and delivered to the Tribunal even though those payroll records would constitute, in my view, part of the section 112(5) record. As I have previously observed, in my opinion, the content of the section 112(5) record does not depend on the nature of the issues raised by the appeal. Having said that, however, those documents that are not relevant to the issues raised on appeal, but which nonetheless form part of the record, need not be delivered so long as they are identified by the Director as constituting part of the record (say, by way of a list). If some or all of the listed documents need to be disclosed in order to adjudicate the appeal, the Tribunal can subsequently request that any such documents be delivered to the Tribunal.

In her January 30th, 2004 submission, counsel for the Director suggested that some sort of understanding was reached between senior administrators of the Employment Standards Branch and the Tribunal regarding what documents would be delivered as part of the section 112(5) record. Counsel states (at para. 84 of her submission):

> ...The affidavit of Ken White ("White") [the Director's delegate who issued the Determinations] sworn January 30, 2004 is filed with these submissions. That affidavit appends as Exhibits "A" and "B" a May 2003 version and an August 2003 version of a Branch internal policy directive containing guidelines for the Director's delegates as to what constitutes "the record" that must be submitted to the Tribunal under section 112(5)...the Branch issued the May 2003 internal policy directive only after the administration of the Tribunal and the Branch had met to attempt to create a mutually agreed policy on what should be provided to the Tribunal by the Branch as "the record".

In paragraph 13 of his affidavit Mr. White avers:

> 13. I am informed and believe it to be true that as there is no definition of the "record" in either the ESA or the *Employment Standards Regulation*, the May 2003 Branch internal policy directive on what constitutes the "record" for ESA section 112(5) purposes was developed after consultation between the administration of both the Tribunal and the Branch.

Exhibit "B" to Mr. White's affidavit is a 1 1/2 page "Policy Directive" issued August 2003 regarding "What constitutes the record"? I quote from the directive:

> For the purposes of Section 112(5) "The Record" will include copies of the following and apply to appeals of determinations resulting from an adjudication hearing or investigation:
>
> 1. The complaint (complainant's personal information deleted)
> 2. Self-Help Kit, if applicable
> 3. Documents received pursuant to the Demand for Records and before the officer at an adjudication hearing or during an investigation
> 4. Documents entered as an exhibit at a Hearing or considered by an officer during an investigation, including written witness statements
> 5. Determination with reasons which will include those situations where credibility is the issue and reasons one party's evidence was preferred
> 6. The Docket, and
> 7. List of exhibits...
>
> "The Record" does not include:
>
> • Investigation notes;
> • Adjudication notes;
> • Any documents submitted to ESB, but never entered as an exhibit at an adjudication hearing or considered in an investigation decision...

I have several comments with respect to counsel for the Director's submission. Mr. White's statement regarding consultations between "the administration of both the Tribunal and the Branch" concerning the scope of the record to be delivered to the Tribunal is a hearsay statement. Further, Mr. White does not indicate who "informed" him about the consultations. I have never been formally advised that the Tribunal and the Branch reached an accord concerning the contents of the "record". Even if I were satisfied that there was such an agreement (and I am not), I would not consider myself bound by that agreement; I would characterize any such agreement to be an unlawful attempt to fetter my adjudicative duties and responsibilities as a member of the Tribunal [including my statutory authority under sections 107, 108 and 109(1)(e) and (h) of the *Act*].

As for the "policy" itself, I believe it unduly restricts the ambit of the "record". Documents that were submitted to the Branch but not entered as an exhibit might equally be considered to be part of the record--as noted above, an appeal might turn on whether the delegate improperly refused to receive evidence that was tendered by one of the parties. The "Docket" referred to in the policy is not more fully described. As a guideline, and nothing more, the policy appears to be a reasonable attempt to assist delegates in their compilation of the record. If the policy document was intended--as it apparently was--to be a definitive statement regarding the content of the record in all cases, I think it falls well short of what section 112(5) mandates.

Having set out my views as to what should be *included* in the record, I now turn to the question of what documents might be *excluded* from the record even though they may have been before the delegate when the determination was being made.

Documents Excluded Based on Complainant Confidentiality

First, any documents that would fall under section 75 (complainant confidentiality) could be lawfully excluded from the record in an appropriate case. In such cases, rather than excluding the documents in question, I would think that the preferable approach would be to disclose those documents identifying the complainant but only after having first excised the complainant's name. I recognize that this approach may not be feasible if the contents of the document would identify the complainant even though he or she is not specifically named. In the latter case, the entire document may have to be withheld.

Privileged Documents

Second, and this is an issue that is raised directly in these proceedings, documents or other communications that are protected by some sort of legal privilege (particularly solicitor-client privilege) might also be excluded from the record.

Section 78 of the *Act* give the Director a specific statutory mandate to assist in settling complaints. It is generally understood that settlement negotiations are presumed to be conducted on a "without prejudice" basis (even though that term may not be specifically invoked by an offeror) and therefore protected from compelled disclosure (see *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50). Thus, any documents concerning the settlement of a complaint (or, more usually, only some aspect of a complaint) would be presumptively privileged and thus properly excluded from the record. If the appeal concerned whether or not a lawful settlement agreement was actually concluded, or the scope of a settlement agreement (see *e.g.*, *Fraese*, BC EST # D131/03 and *Domtar Inc.*, BC EST # RD611/01),

however, it may be that the documents reflecting the settlement negotiations would no longer be privileged and, accordingly, would be included in the record.

Counsel for the Director submits that legal opinions or advice given to the Director or her delegates by Ministry of the Attorney General legal staff during the course of an investigation, or prior to an oral hearing, are protected by solicitor-client privilege and, accordingly, need not be produced as part of the section 112(5) record. It will be recalled that Appendices "A" and "D" to counsel for the Appellants' January 9th, 2004 submission were severed from the copy of that submission provided to me by reason of counsel for the Director's claim of solicitor-client privilege. Counsel for the Appellants concedes that documents protected by solicitor-client privilege need not be disclosed but also submits: "The fact that Legal Services personnel may have been involved in the investigation and adjudication of the Complainants [sic] does not necessarily make documents connected or linked to them privileged" (January 9th, 2004 submission at p. 16).

The scope of, and rationale for, solicitor-client privilege is set out in the Supreme Court of Canada's decision in *Solosky v. Canada*, [1980] 1 S.C.R. 821 and is also discussed in other Supreme Court of Canada judgments including *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. Campbell*, [1999] 1 S.C.R. 565; *R. v. McClure*, [2001] 1 S.C.R. 445; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209; *Maranda v. Richer*, 2003 SCC 67; and, most recently, in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 (the court's reasons for decision were issued on May 14th, 2004).

As the law now stands, solicitor-client privilege is no longer merely an evidentiary or procedural rule but, rather, "a general principle of substantive law" although "not everything that happens in the solicitor-client relationship falls within the ambit of privileged communication" (*Maranda, supra* at paras. 12 and 30).

This appeal raises an issue regarding the scope of solicitor-client privilege where an "in-house" legal opinion is provided to a statutory decision-maker. This latter issue was addressed by the New Brunswick Court of Appeal in *Melanson v. New Brunswick Workers' Compensation Board* (1994), 114 D.L.R. (4th) 75; leave to appeal to Supreme Court of Canada refused: [1994] SCCA No. 26. Mrs. Melanson's husband suffered a fatal heart attack while working and her subsequent claim for benefits under the New Brunswick *Workers' Compensation Act* was refused. Throughout the protracted proceedings, the W.C.B. steadfastly refused to produce to Mrs. Melanson various legal opinions that had been prepared regarding the Board's liability in "heart attack at work" cases, as well as a legal opinion given to a W.C.B. review committee. With respect to solicitor-client privilege, Ryan, J.A. (for the court) stated:

> Legal opinions given in relation to the interpretation of legislation which is germane to a claim before one of the board's tribunals is not privileged. Such professional opinions are, in my view, for the benefit of employers, employees and dependents in the processing of claims by the Workers' Compensation Board, not simply something for the exclusive use of the board. When the W.C.B. is in an adversarial position or has caused the legal opinion to be generated for matters unrelated to claims, a solicitor-client privilege relationship arises vis-à-vis other parties. However, when the legal opinions relate to the interpretation of W.C.B. legislation or the duty or obligation to pay claims, they must not be withheld from the employers, employees or their dependents. Privilege does not attach. When the opinions were requested litigation was not contemplated nor in hand as between the administrator of the fund and the employer, employee or a dependent: see *R. v. Solosky* [citation omitted].

However, the New Brunswick Court of Appeal's views (and the above comments represent only *obiter dicta* by that court) have now been affirmatively rejected by the Supreme Court of Canada in *Pritchard, supra,* at para. 26. Ms. Pritchard filed a complaint with the Ontario Human Rights Commission alleging gender discrimination and sexual harassment by her former employer. Her complaint was dismissed as "trivial, frivolous, vexatious or made in bad faith" particularly, it seems, because she had entered into a settlement agreement with her employer that included a release of any and all human rights claims. During the course of judicial review proceedings, Ms. Pritchard obtained an order directing the Commission to disclose all information that was before the Commission when it was considering her complaint including a legal opinion obtained by the Commission regarding the merits of her case.

The Supreme Court of Canada affirmed the Ontario Court of Appeal's opinion that the disclosure order was properly quashed as an unwarranted infringement of solicitor-client privilege. In the course of his judgment, Mr. Justice Major (for the 7-justice panel) made the following observations (at paras. 14 et seq.):

> Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer...
>
> Dickson, J. outlined the required criteria to establish solicitor-client privilege...as "(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice, and (iii) which is intended to be confidential by the parties". Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not...
>
> Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing...The scope of the privilege does not extend to communications: (1) where legal advice is not sought or offered; (2) where is is not intended to be confidential; or (3) that have the purpose of furthering unlawful conduct...
>
> Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency. [In *R. v. Campbell*, Binnie, J. explained that] where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply. However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.
>
> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.
>
> Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is "in-house" does not remove the privilege, or change its nature...
>
> Procedural fairness does not require the disclosure of a privileged legal opinion. Procedural fairness is required both in the trial process and in the administrative law context. In neither area

> does it affect solicitor-client privilege; both may coexist without being at the expense of the other...
>
> Legislation purporting to limit or deny solicitor-client privilege will be interpreted restrictively. Solicitor-client privilege cannot be abrogated by inference. While administrative boards have the delegated authority to determine their own procedure, the exercise of that authority must be in accordance with natural justice and the common law.
>
> Where the legislature has mandated that the record must be provided in whole to the parties in respect of a proceeding within its legislative competence and it specifies that the "whole of the record" includes opinions provided to the administrative board, then privilege will not arise as there is no expectation of confidentiality. Beyond that, whether solicitor-client privilege can be violated by the express intention of the legislature is a controversial matter that does not arise in this appeal.
>
> Section 10 of the *Judicial Review Procedure Act*, in any event, does not clearly or unequivocally express an intention to abrogate solicitor-client privilege, nor does it stipulate that the "record" includes legal opinions. As such, "record of the proceedings" should not be read to include privileged communications from Commission counsel to the Commission.

Thus, to summarize, communications from legal counsel to statutory decision-makers may not be privileged if counsel goes beyond merely providing legal advice and procedural guidance and becomes a "factfinder" of sorts. If counsel, rather than merely advising the decision-maker with respect to the governing legal principles, in effect becomes the decision-maker (a violation of the natural justice principle that the person who hears the case should decide the case), the privilege may be lost. I draw the foregoing conclusions from, among others, the following authorities: *Carlin v. Registered Psychiatric Nurses' Association (Alberta)*, [1996] 8 W.W.R. 584 (Alta. Q.B.); *Omenica Enterprises Ltd. v. British Columbia (Minister of Forests)* (1993), 37 B.C.A.C. 123 (B.C.C.A.); *Hammami v. College of Physicians and Surgeons,* 2000 BCSC 1555; *Ahluwalia v. College of Physicians and Surgeons* (1999), 134 Man. R. (2d) 152 (Man. C.A.), leave to appeal to Supreme Court of Canada refused: [1999] SCCA No. 328; *Snider v. Manitoba Association of Registered Nurses*, [2000] 4 W.W.R. 130 (Man. C.A.), leave to appeal to Supreme Court of Canada refused: [2000] SCCA No. 102; and *Pritchard, supra.*

Lawyers employed by the Ministry of the Attorney General are sometimes called upon to give advice or guidance in areas that are well outside the traditional boundaries of what constitutes "legal practice". Such guidance or advice (and documents reflecting such advice) is not privileged:

> It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected.
>
> [R. v. Campbell, [1999] 1 S.C.R. 565 at para. 50; see also Foster Wheeler Power Company Ltd. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc., 2004 SCC 18 at paras. 36-37]

Policy advice (to be contrasted with legal advice) given by a government lawyer to a delegate in the course of adjudicating a particular complaint may not be privileged and would, presumptively, form part of the section 112(5) record.

Resolving Disputes Concerning the Production of the Record

Having defined the various categories of documents that, in my view, constitute the section 112(5) "record", I now turn to the form of dispute resolution procedure that should be invoked if there is a *bona fide* concern about the completeness of the record produced by the Director.

Counsel for the Director submits (January 30th, 2004 submission, para. 90) "that there is no necessity for the creation of a separate 'dispute resolution' process concerning the contents of 'the record'" and that the Branch's August 2003 policy directive [see above] "should well and sufficiently address most concerns abut natural justice in the context of the Tribunal's ESA mandate". I reject this submission. First, I have already held that the limited disclosure contemplated by the Branch's August 2003 policy directive does not necessarily satisfy the Director's disclosure obligation under section 112(5). Second, counsel's submission seemingly implies that the contents of the "record" are conclusively determined by the Director. If that is the underpinning of the Director's submission, I cannot accept it. It is only the Tribunal's decisions and orders under the *Act*, and not those of the Director and her delegates, that are "final and conclusive" [section 110]. Further, the Director's obligation to deliver records pursuant to a Tribunal order is specifically contemplated in section 121 of the *Act.*

I am, however, prepared to accept that, in the ordinary course of events, there is a rebuttable presumption that the documents delivered to the Tribunal by the Director pursuant to section 112(5) constitute the complete record. The Tribunal should embark on an inquiry into the completeness of the record only if a party has raised a *bona fide* and presumptively meritorious argument that the record produced is deficient. In other words, the party challenging the record bears the burden of proving a *prima facie* case that the record is incomplete. Once this latter burden has been discharged, the Tribunal could deal with the issue in one of several ways.

First, if both parties agree that one or more documents were submitted to the delegate for his or her consideration, the Tribunal might simply include such documents in the record by consent. Second, the delegate might agree that one or more documents were omitted through inadvertence in which case, again, the Tribunal could simply order that such documents be included in the record.

However, and this is a third scenario, there may be a case where a party has raised a *prima facie* concern that the record is not complete and, accordingly, asks the Tribunal to make a production order. If there is a legitimate concern that documents constituting part of the record have not been delivered to the Tribunal, the Tribunal could invoke one or more of its statutory powers under section 109(1), particularly those set out in *italics* below:

> **Other powers of tribunal**
>
> 109. (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:
>
> (a) [repealed]

> (b) extend the time period for requesting an appeal even though the period has expired;
>
> (c) make, with the approval of the minister, rules about how appeals and reconsiderations are to be conducted;
>
> *(d) enter during regular working hours any place, including any means of conveyance or transport, where*
>
> > (i) work is or has been done or started by employees,
> >
> > (ii) an employer carries on business or stores assets,
> >
> > *(iii) a record required for the purposes of this Act is kept, or*
> >
> > (iv) anything to which this Act applies is taking place or has taken place;
>
> *(e) inspect any records that may be relevant to an appeal or a reconsideration;*
>
> *(f) on giving a receipt for a record examined under paragraph (e), remove the record to make copies or extracts;*
>
> *(g) require a person to disclose, either orally or in writing, a matter required under this Act and require the disclosure to be made under oath or affirmation;*
>
> *(h) order a person to produce, or to deliver to a place specified by the tribunal, any records for inspection under paragraph (e).*

As a first step, it might be appropriate for the Tribunal to issue an order under subsection 109(1)(g) directing the Director's delegate to provide a written statement under oath or affirmation attesting to the completeness of the record produced--this would also be a final opportunity for the delegate to rectify the record if documents were inadvertently excluded (the Tribunal's direction would typically also require production of any documents that were inadvertently not disclosed). In this latter regard, I note that section 121 of the *Act* expressly contemplates the Tribunal making such an order in a proper case:

> **Director cannot be required to give evidence in other proceedings**
>
> 121. Except for a prosecution under this Act or an appeal to the Employment Standards Tribunal, the director or a delegate of the director must not be required by a court, board, tribunal or person to give evidence or produce records relating to information obtained for the purposes of this Act.

Section 108 of the *Act* states that the Tribunal (and each of its members) has the authority of a commissioner under sections 12, 15 and 16 of the *Inquiry Act.* These latter provisions authorize a commissioner to issue a summons and to require the person summoned to produce documents and, *inter alia*, give commissioners "the same powers, to be exercised in the same way, as judges of the Supreme Court, if [a person who has been summoned]...refuses...to produce and show to the commissioners any documents, writings, books, deeds and papers in the person's possession custody or power touching or in any way relating to the subject matter of the inquiry" [see subsection 16(1)(a)(ii)]. If, despite the delivery of a sworn statement with respect to the record, the Tribunal was still concerned about whether the entire

record had been produced, these latter provisions, as well as subsections 109(1)(e), (f) and (h) of the *Act*, might be invoked against the delegate or some other appropriate person.

In addition to ordering production of documents, a commissioner has the power to punish for contempt [section 16(1)(b)]. I would think that the Tribunal would only exercise this latter power in the most exceptional and egregious of circumstances.

Counsel for the Director has steadfastly maintained that the Director will not produce any documents that are, in her view, privileged. Counsel goes further and says that she will not even produce those documents to the Tribunal so that an independent decision can be made as to whether the documents in question should be produced as part of the record. In my view, counsel's position is contrary to established legal protocols governing the disclosure of documents that are subject to a claim of confidentiality or privilege.

In *Re Greater Vancouver Transit Authority*, [2001] B.C.L.R.B.D. No. 341, the B.C. Labour Relations Board ordered an employer to produce to counsel for the union (on strictly confidential terms) certain documents included in its "bargaining brief" despite the employer's claim that the documents were protected from compelled disclosure. The production order was made in a case where two unions were alleging that a third party, rather than the employer of record, was the "true employer" of employees who were involved in a labour dispute. A 3-person reconsideration panel of the Board modified the original order as follows (at paras. 22-23):

> We have concluded that a neutral body should review the Documents, consider their potential relevance and determine which portions, if any, should be produced to the Unions. This will permit exclusion of those portions of the documents containing confidential bargaining information that is not potentially relevant to the issues in the True Employer Application.
>
> The Chair of the original panel is the appropriate person to perform this function. This will permit review of the Documents by a person with knowledge of the issues and theories in the True Employer Application while ensuring the documents are viewed by as few people as possible.

In *Greater Vancouver Transit Authority, supra,* the concern was confidentiality not solicitor-client privilege. However, in my view, and consistent with the Supreme Court of Canada's recent decision (issued March 25th, 2004) in *Foster Wheeler Power, supra,* a similar procedure ought to be followed where a claim of solicitor-client privilege is advanced.

In *Foster Wheeler Power*, the plaintiff sued two intermunicipal agencies following the latter agencies' cancellation of construction contracts relating to a proposed recycling facility. As part of the pre-trial discovery process, the plaintiff sought production of certain documents. The defendants refused production on various grounds including confidentiality and solicitor-client privilege. The relevant portions of LeBel, J.'s opinion (for the 7-justice panel) are reproduced below (paras. 44-47):

> ...These questions seek the production of various documents. The City maintains its objection to these questions, claiming that the documents sought are confidential. Many of these documents are alleged to be covered by an immunity from disclosure, which in Quebec civil law is roughly equivalent to the common law's litigation privilege. This privilege protects documents prepared by a lawyer for the purposes of contemplated or ongoing litigation. Although originating in the common law, litigation privilege is now being absorbed into the Quebec civil law concept of professional secrecy. In Quebec's law of evidence in civil matters, these documents are

> effectively treated as being confidential and protected by an immunity from disclosure [citations omitted].
>
> The trial judge rejected the objection. The Court of Appeal allowed the appeal in part on this point and ordered the Superior Court to examine the documents before ruling on whether immunity from judicial disclosure should be accorded.
>
> The City was unhappy with this part of the Court of Appeal's decision, as the City still wished to prohibit the production of documents it claimed to be covered by professional secrecy. The City opposed even allowing the trial court to examine these documents.
>
> The City's attitude is without doubt motivated by a cautious tactical strategy which seeks to avoid allowing the trial judge to be influenced by the content of documents the City alleges are inadmissible. These concerns, while common, are unjustified. We must remember that every day judges must rule on the admissibility of evidence that they must inspect or hear before excluding, and that this duty is an indispensable part of their role in the conduct of civil or criminal trials. Judges understand that they must disregard any evidence that they deem inadmissible and base their judgments solely on the evidence entered into the court record. Seen in this light, the appellant's argument would have us ask judges not to carry out one of their core functions in the consideration of evidence, based on the unverified and unverifiable statement of the appellant's counsel. I would very much like to take the appellant's counsel at their word and trust in their oath of office, but the courts do not even have at their disposal a sworn statement identifying the documents in dispute and giving a summary of the nature of their content and of the reasons for objecting to their production. In these circumstances, the City is asking the courts to abdicate their traditional role of ruling on the admissibility and relevance of evidence that is always accorded them, with certain exceptions, under the applicable law of evidence in Canada. The fate of these objections cannot be decided on the mere basis of one party's unilateral declaration. The judge must carry out the function of verifying these documents, as the Court of Appeal rightly decided [citations omitted]. After examining the documents, the judge may rule on the admissibility of the request for access...

While I recognize that the above comments were made in the context of the pre-trial discovery process in a civil dispute, I am of the view that the same principles should govern in the case of disputes about the content of the section 112(5) record under the *Act.* Accordingly, in those cases where it is not clear whether a particular document should be included in the record, the Tribunal should inspect the document and then determine whether the document will be included or excluded from the record. As an initial step in this process, the Director should prepare a list of disputed documents that sufficiently identifies the documents without disclosing their content. At a minimum, I would think disputed documents ought to be identified by date, sender/recipient, a general summary statement about the nature of the document and the reasons for objecting to its production (see *Foster Wheeler Power, supra*, at para. 47).

Depending on the nature of the case and the document in question, it may be appropriate for this latter determination to be made by a Tribunal member other than the member who has been delegated to adjudicate the appeal although I would think that to be the exception, not the rule.

I now turn to the issues surrounding the production of the "record" in this appeal.

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. This list, which identifies 8 categories of documents totalling 62 pages, is reproduced below:

> **List produced as per Order of Tribunal dated August 29, 2003,**
>
> a) Ministry of Attorney General B.C. On-Line searches, 4 pages;
>
> b) counsel's hand-written notes, 15 pages;
>
> c) emails headed "Adamic, Adele AG:EX", 17 pages;
>
> d) Attorney General daily fax activity report and fax cover sheets of "Adele J. Adamic, Barrister & Solicitor", 6 pages;
>
> e) two counsel general memoranda, one in duplicate, one in triplicate, 8 page;
>
> f) letter from Kitsul to the Employment Standards Branch marked with counsel's handwritten notes, 2 pages;
>
> g) draft determination marked with counsel's handwritten notes, 9 pages;
>
> h) email setting out details of meeting with counsel, 1 page.

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.

With respect to the production of the record, counsel for the Director says:

> The Director submits that the Director had met the first requirement of the Tribunal's August 29, 2003 order [production of the "record"] before the date of its making. The Director had by August 29, 2003 already produced to the Tribunal "all documents that form part of the record" in accordance with both the Director's analysis of the meaning of that term in section 112(5), and in accordance with the policy guidelines developed by the Branch after consultation with the administration of the Tribunal.
>
> (Counsel for the Director's January 30th, 2004 submission at para. 97)

I am troubled by this submission in at least two respects.

First, as I have already indicated, I am of the view that the Branch's policy guidelines regarding the contents of the record are overly restrictive and, in any event, are not binding on the Tribunal. Thus, if the record in this case was compiled--as it apparently was--on the basis of the Branch's policy guideline, there may well be further documents that form part of the record that have not been disclosed.

Second, counsel for the Director produced a series of e-mails between the delegate who issued the Determinations and Deborah Phippen *after* August 29th, 2003 (I understand they were appended to a submission to the Tribunal's Vice-Chair dated December 3rd, 2003). These e-mails span the period from February 11th to 14th, 2003 and thus pre-date the issuance of the Determinations (May 5th, 2003). These e-mails refer, in part, to an investigation that was being undertaken by the provincial delegate's federal counterpart (Ms. Phippen) with respect to whether "drivers of the Super Save trucks are truly Actton Transport Inc. employees (and thus federal) or if they are employees of Super Save Disposal Inc. (and thus provincial)" [February 14th, 2003 e-mail from Ms. Phippen to Mr. White]. Clearly, the question of federal versus provincial jurisdiction was a key issue during the delegate's investigation (and is now an issue in these appeals). These e-mails were "before" the Director when the determination was made and thus should have been included in the record that was initially delivered. It is not clear to me why these e-mails were not included in the original record although counsel for the Director has indicated that they were not in the Branch's file; if that is so, one wonders why these documents would have been deleted or discarded by the Director's delegate.

At paragraphs 16 through 20 of his affidavit, Mr. White acknowledges that he had a number of e-mail communications with officers at the federal HRDC (including Ms. Phippen) and that he did not consider these communications to be part of the record. I disagree. All e-mail communications between any delegate and the federal HRDC with respect to the matter of jurisdiction, or any other issue related to the investigation of the subject complaints, should have been included in the record. Further, Mr. White also acknowledged that the record delivered to the Tribunal did not include his "investigative notes". In my view, and particularly since these Determinations were issued after an investigation rather than following an oral evidentiary hearing, I am of the view that the record in this case should presumptively include the notes of any and all delegates (including Mr. White) who were involved in the investigation of the subject complaints. One or more of the delegates involved in this investigation (and certainly the last delegate involved) may have had telephone or other person-to-person communications with their federal counterparts regarding the "federal versus provincial" jurisdictional issue. As noted above, there has been limited disclosure of some e-mail communications regarding this latter issue. However, a complete record would include notes relating to all such communications and, preferably, copies of the actual communications (for example, e-mails or letters)

Counsel for the Director, at paragraph 99 of her January 30th, 2004 submission, states: "Not all of the 'non-record' documents in the Branch's file pertain to the four complainants' claims [and that] the

breadth of disclosure required under the [*Freedom of Information and Protection of Privacy Act*] revealed to counsel for the appellant/employer documents in the Branch's file that related to other than the four complainants' claims against the appellant/employer". These latter documents have not been disclosed. At the very least, counsel for the Director's submission indicates that there are other documents that relate to the Appellants, but not necessarily to the four complainants, that have not been disclosed. To the extent that these documents relate to the issues in dispute, and were before the delegate when he was making the Determinations at issue in these proceedings, they may form part of the record.

Thus, *on the face of the Director's own submissions*, it appears that the entire record has not been disclosed (at least not a complete "record" as I have defined its contents). Counsel for the Appellants maintains that "there must be other documents pertaining to these matters" and refers, specifically and by way of example, to the missing notes and reports (these have not been disclosed) of other delegates (there were several) who were apparently responsible for investigating the complaints prior to the file being given to Mr. White.

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.

Further Orders Regarding the Production of the Record

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

Accordingly, I propose to make three orders with respect to the production of the record.

First, I intend to allow the Director to make whatever further disclosure is necessary given the directions with respect to the content of the record that I have set out in these reasons.

Second, after having made further disclosure, I will require the Director or her delegate to deliver a statement under oath attesting to the fact that the entire section 112(5) record has been disclosed.

Third, and in accordance with the procedure suggested by the Supreme Court of Canada in *Foster Wheeler Power, supra*, I will direct counsel for the Director to deliver to the Tribunal copies of *all* of the documents for which a claim of privilege is advanced. These latter documents 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 must be accompanied by a list identifying each document 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, 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 counsel's submissions regarding the claim of privilege, and will then rule on the privilege claim for each document.

I propose to make these latter three orders pursuant to the provisions of subsections 109(1)(e), (g) and (h) of the *Act.*

If, during the further course of these appeal proceedings, it appears that the entire record has not been disclosed, I will entertain an application to invoke my powers under section 15 (summons to appear and produce documents) and, if necessary, section 16 (contempt), of the *Inquiry Act* [see section 108 of the *Act*].

Counsel for the Appellants seeks an order for costs on a solicitor and own client basis. It would not appear that the Tribunal has the jurisdiction to make such an order (see *Van Unen v. W.C.B.*, [2001] BCCA 0262), however, I do not intend to address this particular matter at this juncture. If, at the conclusion of these appeal proceedings, counsel for the Appellants still wishes to seek costs, I will entertain an appropriate application at that time.

The Director's Role in the Appeal Proceedings

Counsel for the Appellants submits that "the Director and her Delegates and representatives should not be allowed to directly or indirectly participate in these proceedings other than to be subject to cross-examination, especially in the area of documentation" (January 9th, 2004 submission at page 11).

Counsel for the Director submits that any "restrictions on the Director's right of audience are unwarranted and would amount to a breach of natural justice against the Director as a party to Tribunal proceedings" (January 30th, 2004 submission at para. 106).

I note that these Determinations were issued following an investigation rather than following an oral evidentiary hearing. In these circumstances, I see no need to depart from the *BWI Business World Inc.* guidelines with respect to the Director's role in an appeal to the Tribunal. Further, the substantive issues

raised by the Appellants in this appeal are of vital concern to the Director, namely, her jurisdiction over one of the appellant firms, the conduct of her delegates in this investigation, the timeliness of that investigation, and whether the *Act* governs the employment relationships at issue in this case. Accordingly, I am not prepared, at this juncture, to limit the Director's role in these appeals other than to reiterate that the Director's role will be governed by the principles set out in *BWI Business World Inc., supra.*

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.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal