Employment Standards TRIBUNAL

An appeal

- by -

Super Save Disposal Inc. (“Super Save”)

-and by -

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 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2003A/172, 173, 174 & 175

DATE OF DECISION: August 24, 2005

DECISION

SUBMISSIONS

Michael J. Weiler	Legal counsel for Super Save Disposal Inc. and Actton Transport Ltd.
Robert Cardinal	on his own behalf
Todd Norberg	on his own behalf
Edward Gouge	Legal counsel for the Director of Employment Standards

INTRODUCTION

The Determinations and Appeals

1. Super Save Disposal Inc. ("Super Save") and Actton Transport Ltd. ("Actton") both appeal four separate, but essentially identical Determinations and accompanying "Reasons for the Determination" ("Reasons). These appeals have been filed pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). I shall refer to Super Save and Actton, jointly, as the "Appellants".

2. A delegate of the Director of Employment Standards (the "Director") issued the four Determinations and accompanying Reasons on May 5th, 2003. By way of the Determinations, the Appellants were found jointly and separately (severally) liable as "associated corporations" under section 95 of the *Act* to pay wages and section 88 interest to four former employees, namely, Robert Cardinal (E.S.T. File No. 2003A/172), Stephen Smith (E.S.T. File No. 2003A/173), Todd Norberg (E.S.T. File No. 2003A/174) and Larry Catt (E.S.T File No. 2003A/175). I shall refer to the four employees collectively as the "complainants".

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

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

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

5. The complainants' unpaid wage claims have not been processed expeditiously. In making this latter statement, I do not wish, at this point, to blame or criticize anyone for that state of affairs; I am merely stating the obvious. The first of the four complaints was filed in April 1998. The ensuing investigation—there never was an oral evidentiary hearing at the Employment Standards Branch level—

continued until the Determinations were issued on May 5th, 2003. At different times during the Director's investigation, no fewer than six delegates apparently had responsibility for the files.

6. The Appellants filed their notices of appeal on June 12th, 2003 and since that time the Tribunal has been called on to issue at least seven separate decisions addressing various interlocutory matters including the scope of the section 112(5) "record" and the disclosure of documents, issues relating to solicitor-client privilege, whether an oral appeal hearing would be held, and the Director's status in these proceedings.

7. These Reasons for Decision arise out of my Reasons for Decision issued on April 13th, 2005 (B.C.E.S.T. Decision No. D050/05). In my April 13th reasons, I held that so far as I could determine, the Director had complied with his obligation to deliver the section 112(5) record and I therefore declined to issue any further document disclosure orders. I dismissed, pursuant to subsections 114(1)(a) and (f) of the *Act*, the Appellants' application to recover legal fees and disbursements by way of a "costs" order on the ground that the Tribunal did not have the statutory authority to make such an order. I adjourned a consideration of the Appellants' application to hold the Director and/or his delegates in contempt until I had finally adjudicated of the merits of the four appeals. I refused the Appellants' application to require the Attorney General to deliver "a catalogue and listing" of all documents disclosed to date. Lastly, I held that certain issues could be fairly adjudicated by way of written submissions and I directed that written submissions be filed with respect to six separate issues. These reasons for decision address those six issues.

8. The submission cycle with respect to these six issues closed on June 14th, 2005 and I now have before me the following submissions (all of which were filed in accordance with the timetable that I set out in my April 13th Reasons:

- Counsel for the Appellants dated May 13th, May 20th (this submission simply corrects certain typographical errors in counsel's May 13th submission), and June 14th, 2005;
- Robert Cardinal dated May 24th, 2005;
- Todd Norberg dated May 24th, 2005; and
- Counsel for the Director of Employment Standards dated May 27th, 2005.

THE ISSUES TO BE ADJUDICATED

9. The grounds for appeal (as framed by counsel for the Appellants in his submission to the Tribunal dated February 25th, 2005) now before me were identified at pages 9 and 10 of my April 13th Reasons as follows:

> Ground No. 1
> The Director erred in law in finding that the Branch had jurisdiction to adjudicate these complaints.
>
> Ground No. 2
> The Director erred in law by not following the directions of Adjudicator Ib Petersen [N.B. see Super Save Disposal Inc., B.C.E.S.T. Decision No. D440/01] and by not determining whether [Super Save] was the employer. The Director erred in law in not finding that [Actton] was the employer and that [Actton] was a federally regulated employer.

> Ground No. 3
> The Director erred n 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 the [the delegate]…to find that the combined operations constituted the employer for the purposes of the *Act*…[Actton] is the true employer of the employees in question [and is]…a federally regulated employer. The Director, we say, had already determined that [Actton] was a federally regulated employer. Therefore, the Director was without jurisdiction to include [Actton] in an order that it, in association with [Super Save] was the employer under the *Act*. Finally, [the section 95 declaration is] void as being fundamentally flawed due to bad faith and actual bias by the Director, her delegates and agents, in exercising their discretion.
>
> Ground No. 4
> The Director erred in adjudicating the four [complaints] as the four complaints were determined and the files closed well prior to the Determinations.
>
> Ground No. 5
> The Director erred in delegating the files contrary to the provisions of section 117 of the *Act* and the principles of natural justice and without jurisdiction to do so.
>
> Ground No. 7
> The complaints ought to have been dismissed, in any event, due to the undue delay with respect the investigation, between the filing of the complaints, the various "determinations" made throughout the course of these investigations and the final disposition of these matters in the May 5, 2003 Determinations of [the delegate].

10. The adjudication of two further grounds of appeal (Nos. 6 and 8) was left in abeyance pending the outcome of the appeal with respect to Ground Nos. 1 to 5 and 7. The two issues that may have to be addressed in a future hearing concern, in general terms, whether the Appellants were denied natural justice because they were not given a full and fair opportunity to be heard by an unbiased decision-maker (Ground No. 6) and whether the Director and/or her delegates wrongly assumed they owed a "fiduciary obligation" to the complainants (Ground No. 8). I shall give further directions with respect to the adjudication of these latter two grounds at the conclusion of my reasons.

11. I shall now address each ground of appeal that is now before me in turn.

FINDINGS AND ANALYSIS

Ground No. 1: The Director erred in law in finding that the Branch had jurisdiction to adjudicate these complaints.

The Delegate's Reasons

12. According to the delegate's Reasons, each of the four complainants drove trucks that used a front-end fork-type loader to pick up and unload garbage bins located at customers' locales throughout the greater Vancouver area. The complainants were dispatched from the Appellants' Langley office each day and drove trucks that were identified with "Super Save" logos. None of the complainants crossed either a provincial or an international boundary during the course of their employment duties. The complainants were issued cheques drawn on an "Actton" account and this latter firm also issued their T-4 Statements of Annual Earnings and their final Records of Employment after their employment ended.

13. The Director's delegate was very much alive to the jurisdictional issue; indeed, it was the principal issue before him. At page 1 of his Reasons, the delegate noted that one of the issues before him was: "Whether the employer is under Provincial or Federal jurisdiction?".

14. The delegate determined that both Super Save and Actton were subject to provincial, rather than federal, employment standards legislation insofar as the claims of the four complainants were concerned. The delegate's Reasons (at page 6-7) regarding the jurisdictional issue are reproduced below:

> **Jurisdiction – Federal or Provincial?**
>
> Again, legal counsel, Kitsul, has provided no evidence to support a finding that the work performed by the complainants, driving garbage trucks, is covered by federal jurisdiction. The only information on file is a copy of the letter dated July 23, 2002 issued by the Canada Industrial Relations Board ("CIRB"). The letter orders a representation vote to be held for "all employees of Actton Transport Ltd. except office and sales staff at and from 19395 Hwy. 10, Surrey, B.C.". In the accompanying letter Kitsul states:
>
> > "The employees listed above who have made complaints to the B.C. Employment Standards branch with respect to overtime claims were employees of Actton Transport Ltd. and, if still employed, would have been part of the bargaining unit…"
>
> and in the same letter:
>
> > As such, any claim for unpaid overtime by the above captioned ex-employees should be made pursuant to the provisions of the Canada Labour Code and not under the B.C. Employment Standards Act."
>
> The first sentence is speculation at best. There is nothing is [*sic*, in?] the documents from CIRB that makes a ruling that the employees are covered by Federal jurisdiction. There is no analysis of competing applications wherein the CIRB weighs the evidence from all parties concerned and comes to an informed decision. Indeed, there is no mention in the order of [Super Save]. "All employees of Actton Transport Ltd." could encompass any group of employees. For instance, those employees driving Gas or Propane trucks that travel across Canada to other Provinces. I see nothing that renders a binding decision on the Delegate of the Director regarding jurisdiction.
>
> In the second sentence Kitsul states the claims for unpaid overtime should be filed pursuant to the "Canada Labour Code". He has obviously forgotten that the claim of Robert Cardinal was originally filed under the Canada Labour Code. Kitsul allowed HRDC to determine that the proper jurisdiction was the Provincial jurisdiction.
>
> In reviewing the Canada Labour Code I find nothing that indicates that truck drivers picking up garbage, only in the Province of British Columbia are covered by Federal jurisdiction. Neither [Actton] nor [Super Save] are federally registered companies. The work of picking up garbage is intraprovincial not extraprovincial. That there may be (this evidence has not been provided by Kitsul) an activity that takes certain employees of [Actton] over a border does not enable the company to evade provincial jurisdiction when the pith and substance of the work is intraprovincial.
>
> I determine that the companies associated pursuant to Section 95 of the Act [i.e., Super Save and Actton] are under the jurisdiction of the Employment Standards branch of the Ministry of Labour

> in the Province of British Columbia and that wages are owed in the amounts indicated in the attached schedules.

The Appellants' Position

15. Counsel for the Appellants submits that Actton, an inter-provincial and international trucking firm, was the "true employer" of the four complainants. Counsel further alleges that since this latter firm falls under federal rather than provincial jurisdiction, the Director should have declined jurisdiction and thus erred in law when he refused to do so.

16. Counsel for the Appellants notes, among things, the following evidence in support of his submission that Actton, rather than Super Save, employed the complainants:

- the complainants were originally hired by Actton to drive garbage trucks for that firm;
- • the complainants were dispatched each day by one of three dispatchers all of whom were Actton employees and were otherwise directed, supervised and disciplined by Actton employees;
- • the complainants were paid by Actton and their various employment benefits were provided through Actton;
- • upon termination, the complainants' were issued Records of Employment identifying Actton as the employer; and
- • the complainants were an integral part of Actton's operations and at least some of them originally identified Actton as their employer in their original unpaid wage complaints.

17. In addition to the foregoing points, counsel for the Appellants asserts: "Federal officials have taken jurisdiction over many, many [Actton] employees including employees that are in the same circumstances as the four complainants" (May 13th submission at page 21). Counsel for the Appellants submits that these prior decisions (by a wage referee appointed under the *Canada Labour Code*, the Ontario Employment Standards Branch, and the Federal Court of Canada) "should be binding on the Director". Counsel for the Appellants also says that a certification application heard by the Canada Industrial Relations Board ("CIRB") in 2002 regarding Actton employees effectively determined the federal employment status of all garbage disposal employees (including those who were employed in positions that were comparable to the complainants' positions) and that this determination is binding on the Director.

18. Finally, counsel for the Appellants submits that in a letter to the complainants dated June 8th, 2001 a previous delegate who had responsibility for these matters "specifically determined that [Actton] was a Federally regulated employer" (Counsel for the Appellants' May 13th, 2005 submission at page 25; underlining in original text).

The Director's Position

19. Counsel for the Director concedes that the delegate did not make a determination regarding the actual identity of the complainants' "true employer":

> [The delegate] decided that Super Save and Actton were "associated employers, within the meaning of section 95 of the [*Act* and thus] it [was] unnecessary for [the delegate] to make a

> decision as to which [company] was the employer…[the delegate] found Actton and Super Save to be "associated employers, but made no finding as which [company] was the "employer". (Counsel for the Director's May 27th, 2005 submission at para. 5; see also para. 29).

20. Counsel for the Director says that the delegate correctly determined, pursuant to section 95 of the *Act*, that Super Save and Actton were "associated corporations" and therefore jointly and separately (severally) liable to pay the complainants' unpaid wages. In any event, counsel submits that on the evidence before the delegate, both Super Save and Actton could be fairly characterized as an employer of all four complainants.

21. With respect to the Appellants' assertion that the Director did not have any jurisdiction to issue a Determination against Actton, counsel for the Director submits that on the basis of the evidence before the delegate, it cannot be concluded that Actton is a federal jurisdiction firm. Further, and in any event, even if the Tribunal were to accept the Appellants' "new evidence" relating to Actton's federal status (and counsel submits such evidence is not admissible before the Tribunal), such evidence "is insufficient to establish a claim to interjurisdictional immunity" [May 27th submissions at para. 7(e)]. Finally, counsel says that even if it could be said that Actton is a federal jurisdiction firm, it does not follow that the four complainants' unpaid wage claims must be adjudicated pursuant to federal employment standards legislation (i.e., the *Canada Labour Code*, Part III) since their work—garbage collection undertaken solely within the province of British Columbia—clearly falls under provincial jurisdiction.

The Submissions of Robert Cardinal and Todd Norberg

22. Mr. Cardinal noted in his submission that he believed he was hired and worked for Super Save and that when he initially questioned why he was being paid on an Actton account, his question was simply "brushed aside" with a comment that the Actton account was the one that was being used to pay him. He says he recorded his hours from the Super Save "trip sheets" that he completed each day.

23. Mr. Norberg, in his submission, noted that he and other garbage truck drivers drove "within the city limits" and never crossed either a provincial or an international boundary during the course of their work.

Findings and Analysis: The Jurisdictional Issue

24. The Director no longer has the statutory authority to adjudicate constitutional questions arising under the *Canadian Charter of Rights and Freedoms:*

> **No jurisdiction to determine constitutional questions**
>
> 86.1 Nothing in this Act is to be construed as giving the director or any person acting for or on behalf of the director under this Act jurisdiction over constitutional questions relating to the Canadian Charter of Rights and Freedoms.

25. However, both the Director and the Tribunal continue to have the statutory authority to deal with constitutional questions concerning "division of powers" issues arising under sections 91 and 92 of the *Constitution Act, 1867* (see *Sagoo*, B.C.E.S.T. Decision No. D096/05).

26. As noted above, counsel for the Director submits that the Appellants' argument regarding "interjurisdictional immunity" must be adjudicated based on the information that was before the delegate [May 27th submission at para. 7(d)] although counsel also concedes: "The Appellants' complaints about

bias and procedure may provide a basis for new evidence" (para. 23). Counsel further submits that even if new evidence is admissible regarding the jurisdictional issue, the evidence proffered by the Appellants "is insufficient to establish a claim to interjurisdictional immunity" [para. 7(e)].

27. In my view, "new evidence" tendered to show that the Director did not have jurisdiction is admissible on an appeal to the Tribunal—see e.g., *J.C. Creations Ltd.*, B.C.E.S.T. Decision No. RD317/03 at para. 57. However, on the basis of the evidence before me, I am satisfied that the *Act* governs the employment of each of the four complainants. The undisputed evidence is that each of the four employees carried out their duties entirely within the province of British Columbia. The nature of their work—garbage collection—is not an inherently federal matter (such as, say, air transportation, banking, telecommunications, or nuclear power generation) nor is it, so far as I can determine, an integral part of Actton's interprovincial or international trucking operations.

28. Although interprovincial and international trucking falls under federal jurisdiction by reason of section 92(10)(a) of the *Constitution Act*, 1867, a garbage collection enterprise operating solely within provincial boundaries—and any wage disputes that arise between such an employer and its employees—falls under provincial jurisdiction under sections 92(13) and (16) of the *Constitution Act, 1867*. The complicating factor in this case is that, at least with respect to Actton, its operations have both federal (interprovincial/international trucking) and provincial (garbage collection) aspects. This latter issue does not seemingly arise with respect to Super Save since its operations appear to be entirely within provincial jurisdiction; in any event, counsel for the Appellants has not argued that Super Save is a federal jurisdiction firm.

29. The following principles were set out by the Supreme Court of Canada in Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754:

- the general rule is that labour and employment relations fall under provincial, not federal, jurisdiction;
- however, the federal government has authority over labour and employment relations if these latter matters are an integral aspect of an enterprise or undertaking that clearly falls under federal jurisdiction (for example, aeronautics or banking); and
- whether an enterprise or undertaking is inherently a federal matter depends on the essential nature of its normal or regular operations.

30. While I am prepared to accept, for the purposes of these appeals, that Actton's work involves both inter-provincial and international trucking—work that in the ordinary course of events would be regulated federally: see *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897—I am also cognizant that different groups of employees within the same firm may separately fall under provincial and federal jurisdiction.

31. In *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, the Supreme Court of Canada noted that while "bifurcating power over labour relations" between the federal and a provincial government with respect to a single enterprise can create practical difficulties, those potential difficulties do not bar both federal and provincial jurisdiction over separate business operations carried on by a single employer. Thus, in *Ontario Hydro* the court held that federal labour laws governed the work of those employees who worked in Ontario Hydro's nuclear power plants whereas Ontario labour laws governed all other Ontario Hydro employees (see also *Sagoo, supra*).

32. Previous decisions of the Privy Council and the Supreme Court of Canada have also held that different business units within a single legal organization could separately fall under federal and provincial jurisdiction. For example, in *Canadian Pacific Railway Company v. A.G. of B.C.,* [1950] A.C. 122 (P.C.) the employees of the Empress Hotel, although owned and operated by a national railway [interprovincial railways fall under federal jurisdiction pursuant to section 92(1)(a) of the *Constitution Act, 1867)*], were subject to provincial law. In *Canadian National Railway Company v. Nor-Min Supplies Limited*, [1977] 1 S.C.R. 322, the Supreme Court of Canada held that a rock quarry owned by the CNR that exclusively supplied rock ballast to the CNR was subject to provincial, rather than federal, regulation since the quarry was not "an essential part of the [CNR's] "transportation operation in its day-to-day functioning" (see pages 332-3)—see also *United Transportation Union v. Central Western Railway Corp.,* [1990] 3 S.C.R. 1112. Similarly, in *Construction Montcalm*, *supra*, the Supreme Court of Canada ruled that provincial employment standards legislation applied to employees who were building airport runways since this latter activity was not considered to be an integral aspect of aeronautics or a core aspect of the airport's operations.

33. Since intraprovincial garbage collection is not an inherently federal matter, the employees of that aspect of Actton's business would only fall under federal jurisdiction if the garbage collection operations were functionally integrated with Actton's interprovincial/international trucking operations. In *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, Justices Iacobucci and Major held (in a 6-1 majority opinion), at paras. 48-49 and 65:

> 48. It is clear that the mere fact that a local work or undertaking is physically connected to an interprovincial undertaking is insufficient to render the former a part of the latter. See *Central Western*, *supra*, at pp. 1128-29. The fact that both operations are owned by the same entity is also insufficient. In *A.G.T.*, *supra*, Dickson C.J. stated at p. 263 that "[t]his Court has made it clear in this area of constitutional law that the reality of the situation is determinative, not the commercial costume worn by the entities involved" and, at p. 265, that "[o]wnership itself is not conclusive". A single entity may own more than one undertaking. See *Canadian Pacific Railway Co. v. Attorney-General for British Columbia*, [1950] A.C. 122 (P.C.) (the *Empress Hotel* case), at p. 143.
>
> 49. In order for several operations to be considered a single federal undertaking for the purposes of s. 92(10)(*a*), they must be functionally integrated and subject to common management, control and direction. Professor Hogg states, at p. 22-10, that "[i]t is the degree to which the [various business] operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not". He adds, at p. 22-11, that the various operations will form a single undertaking if they are "actually operated in common as a single enterprise". In other words, common ownership must be coupled with functional integration and common management. A physical connection must be coupled with an operational connection. A close commercial relationship is insufficient. See *Central Western*, *supra*, at p. 1132…
>
> 65. In our view, the primary factor to consider is whether the various operations are functionally integrated and subject to common management, control and direction. The absence of these factors will, in all likelihood, determine that the operations are not part of the same interprovincial undertaking, although the converse will not necessarily be true. Other relevant questions, though not determinative, will include whether the operations are under common ownership (perhaps as an indicator of common management and control), and whether the goods or services provided by one operation are for the sole benefit of the other operation and/or its customers, or whether they are generally available.

34. Thus, in *Westcoast Energy*, the Supreme Court of Canada held that "raw gas" processing plants that were connected to an interprovincial pipeline fell under federal jurisdiction because (at paras. 70-71):

- "the Westcoast facilities and personnel are subject to common control, direction and management, and are operated in a coordinated and integrated manner";
- "the primary purpose of processing the raw gas at the Westcoast processing plants is to facilitate its transmission through the Westcoast mainline transmission pipeline"; and
- "this processing [must] occur before the gas is delivered into its mainline transmission pipeline because of the design, safety and environmental concerns"

35. Similarly, in *Northern Mountain Helicopters Inc. v. British Columbia (Workers' Compensation Board)* (1998), 61 B.C.L.R. (3d) 361 (affd. on appeal: 2000 BCCA 595; leave to appeal to Supreme Court of Canada refused: [2000] S.C.C.A. No. 428), ground crews who were part of an integrated helicopter logging operation were held to fall under federal jurisdiction. The chambers judge, Saunders, J. (as she then was) observed (at paras. 47-48 and 50):

> 47. Here there is no doubt that were these ground crew employed by a logging company, they would be provincially regulated as part of a forestry concern…Further, they would at least fall within the type of situation described in the *Montcalm Construction* case as being employees of a provincial company merely interfacing with a federal concern. However, these are not the facts before the court.
>
> 48. The evidence here reveals a business whose main group of employees are primarily engaged in pure aeronautics work: pilots and maintenance persons. There is no separate division for helicopter logging, and if there were, it is conceded that the pilots engaged in it still would be federally regulated. In addition to the pilots, the company employs its own ground crew to ensure adequate training in the helicopter aspect of the work, concerned for the proper operation of the helicopters [sic]. Functionally, the work of all Northern Mountain Helicopter's employees relates to the helicopter business. The employees in question interact with the pilots; their supervision on the ground is by the pilots and their supervisor who communicates with the pilots [sic]. The ground crew do not produce separate income or provide a service independent of the entire helicopter transportation service. They are under common management with the pilots and maintenance persons, and their hours of work are dependent on availability of the helicopter…
>
> 50. The facts of each case dictate the result. I find in this case that there is the necessary degree of functional integration and commonality of management between the ground crew component of the helicopter logging and the rest of Northern Mountain Helicopter's operation to conclude that these employees are not within provincial jurisdiction.

36. As Saunders, J. observed in the *Northern Mountain Helicopters* chambers decision ([1998] B.C.J. No. 2525 (B.C.S.C.) at para. 38): "Since the decision of *Canadian Pacific Railway Company v. A.G. of B.C.*, [1950] A.C. 122 (the *Empress Hotel* case), courts have recognized that a company may carry on more than one undertaking or business, and in the event the second business is not properly characterized as federal, it falls to be provincially regulated."

37. In my view, the interprovincial and international truck transport and delivery components of Actton's business stand in marked contrast to the wholly intraprovincial garbage collection business. I do not consider that garbage collection can be fairly characterized as integrated within, or an essential component of, or otherwise reasonably ancillary to, Actton's interprovincial and international truck

transport and delivery business–see *Canadian Air Line Employees' Association v. Wardair Canada (1975) Ltd. et al.*, [1979] 2 F.C. 91 (Fed. C.A.) and the cases cited therein.

38. There is absolutely no evidence before me of functional integration as between Actton's garbage collection business and its interprovincial/international trucking operations. Although there is some evidence of common ownership and control, those factors, standing alone, are insufficient to bring the garbage collection operation (which appears to be an entirely separate business enterprise from Actton's interprovincial/international trucking operations) within the federal sphere.

39. It may be that certain aspects of each, essentially separate, business enterprise—namely, truck transportation/delivery and garbage collection—were (and still are) carried on under the Actton "umbrella". However, the mere fact that some aspects of Actton's entire business operations may be subject to federal jurisdiction does not constitute its garbage collection business as a federal jurisdiction enterprise. Indeed, even if there were some evidence before me that the garbage collection business undertaken by one or both of the Appellant firms involves the crossing of provincial or international boundaries (and there is no such evidence whatsoever), that latter sort of activity would have to be "continuous and regular" before the entire garbage collection business could be said to fall under federal jurisdiction [see *Brinks Canada Ltd. v. Good*, 2005 SKCA 20 (Sask. C.A.) and the cases cited therein].

40. To this point, I have accepted, for the purposes of the foregoing discussion, the Appellants' assertion that the four complainants were employed solely and exclusively by Actton rather than by Super Save. However, as I will detail later on in these reasons, while it might be fairly said that the complainants were Actton employees, in my view, it can equally be fairly stated that they were also Super Save employees [see e.g., *Sinclair v. Dover Engineering Services Ltd. et al.* (1988), 49 D.L.R. (4th) 297 (B.C.C.A.)]

41. As noted above, counsel for the Appellants asserts that previous decisions by the Ontario Employment Standards Branch, the Federal Court of Canada and the CIRB have already determined that all garbage truck drivers employed by one or both of the Appellant firms are governed by federal, rather than provincial, employment standards legislation. In essence, counsel for the Appellants asks the Tribunal to apply the related principles of *res judicata* and issue estoppel with respect to the "federal versus provincial" jurisdictional issue.

42. I am not persuaded that any of the decisions referred to by counsel for the Appellants—by the Ontario Employment Standards Branch or any other adjudicative body—is binding on me. The Tribunal is bound by decisions of the superior courts in this province and by the Supreme Court of Canada, however, none of those bodies has, to my knowledge, determined that the *Act* does not apply to the employment of the complainants or any other persons who were similarly situated. In the absence of a binding decision from a judicial or quasi-judicial authority, I consider myself free to independently decide the jurisdictional issue on its merits. As I have previously stated, in my view (and, for the moment, setting aside the possible application of issue estoppel), the *Act* governs the complainants' employment relationships with one or both of the Appellants.

43. Counsel for the Appellants appears to assert that I am bound to decide the jurisdictional issue in favour of the Appellants by reason of the doctrine of issue estoppel. The principle of issue estoppel may bar the re-litigation of an issue that has already been finally resolved between the parties in another forum. There are three conditions that must be satisfied before a second decision-maker is bound by a decision made by a first decision maker on the basis of issue estoppel:

1. the first decision-maker decided the same question that is now before the second decision-maker;
2. the first decision was a "final" decision; and
3. the parties appearing before the first decision-maker (or their "privies") are the same persons who are appearing before the second decision-maker.

44. Further, even if the above three criteria are established by the party arguing in favour of issue estoppel, the second decision-maker still has a residual discretion not to apply the principles of issue estoppel. Finally, an administrative decision that was made without jurisdiction from the outset cannot provide a proper legal foundation for the application of the doctrine (see *Danyluk v. Ainsworth Technologies Inc.*, [2002] 2 S.C.R. 460 for a fuller discussion of the above criteria).

45. I note that the decision of wage referee Nitikman (appointed under the *Canada Labour Code*, Part III) concerning two Actton employees who drove propane delivery trucks in the B.C. Lower Mainland never addressed a jurisdictional issue; the only issue before the wage referee concerned the interpretation of certain provisions of the federal *Motor Vehicle Operators Hours of Work Regulations*. Since no one ever challenged the wage referee's jurisdictional authority to proceed (and thereby required the referee to rule on her jurisdiction to hear the matter), this decision, in my view, cannot form the basis for an issue estoppel argument.

46. Counsel for the Appellants also relies on a 1-page decision issued by an Ontario Employment Standards Officer dated June 24th, 2002 regarding a former disposal truck driver, Dean Campbell, apparently employed by Actton in Ontario. In this instance, the officer upheld Actton's argument that the employee's claim for compensation for "wrongful dismissal" should be dismissed because Mr. Campbell was obliged to pursue his claim under the *Canada Labour Code:* "Given the nation-wide extra-provincial operations of the employer's business, and evidence of a prior federal ruling, I find the Employment Standards Act, 2000 has no application in this matter, there is no entitlement to termination pay under the Ontario statutes." The officer's decision on the merits is very brief (one sentence) and, in my view, not well reasoned and, in any event, not binding on me. Even if it could be said that the officer's decision addressed the very same issue that is now before me—and I am not convinced that it does since, as is clear from the above analysis regarding the "integration of operations" jurisprudence, each case must be decided on its own unique facts—I would exercise my discretion and not follow this decision.

47. Counsel for the Appellants referred me to various decisions (rendered by Human Resources Development Canada, the Federal Court – Trial Division, and the Federal Court of Appeal) concerning an Alberta garbage truck driver, Russell McIvor. However, counsel also concedes (May 13th submission at page 17): "There was no issue nor any challenge by either HRDC, the complainant, or the Company that [Actton] was the Employer and that [Actton] was Federal…Neither counsel for HRDC, the complainant, nor anyone else has raised any issues regarding jurisdiction or the status of [Actton]". In light of that admission, I fail to see how these decisions have any relevance in terms of the doctrine of issue estoppel.

48. Counsel for the Appellants has also referred to various other truck drivers (including garbage truck drivers)—some employed in British Columbia and some elsewhere—whose various employment-related complaints were addressed under the *Canada Labour Code* in support of his submission that the complainants' unpaid wage claims should also be addressed under the *Canada Labour Code* rather than under the *Act.* However, so far as I can determine, in each case the federal authorities simply assumed jurisdiction and none of the parties in any of the proceedings ever questioned whether the complaint should have been addressed under provincial law. Thus, I am not satisfied that any of these various

decisions or rulings constitute a prior decision that is binding on the Tribunal regarding whether the complainants' claims fall under federal or provincial law.

49. It should be noted that to the extent there was any "decision" on the jurisdictional issue in any of these previously mentioned proceedings, that decision only arises as a matter of implication since the specific jurisdictional question was never formally adjudicated (except for the decision by the Ontario labour standards officer). I cannot accept that a decision by implication can form the basis for the application of the doctrines of *res judicata* or issue estoppel. Alternatively, one might argue that the parties in each of these matters consented to the court or tribunal exercising jurisdiction, however, "A consent judgment has no precedential value": see *Uppal v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 565 (Fed. C.A.).

50. In my view, the first branch of the three-part test for issue estoppel—namely, that the jurisdictional question now before me was previously adjudicated in other proceedings—has not been satisfied in any of the proceedings (save one) referred to by counsel for the Appellants at pages 15 to 20 of his May 13th, 2005 submission. Further, I am not satisfied that any of the employees whose complaints were previously addressed under federal law could be properly characterized as the "privies" of the complainants.

51. I now turn to the certification proceedings that were before the CIRB in 2002. At the outset of my analysis regarding the CIRB proceedings, I should note that decisions of the CIRB are not binding on the Tribunal. Thus, the CIRB proceedings are only relevant if they give rise to the application of issue estoppel. In my view, the CIRB proceedings do trigger the application of that latter doctrine for many of the same reasons I have previously identified in the context of the immediately preceding discussion.

52. In March 2002 a trade union applied to both the B.C. Labour Relations Board and to the CIRB to be certified as the exclusive bargaining agent for a bargaining unit identified in the federal certification application as "all employees except sales and office staff" employed at or from Actton's business office in Langley. It should be noted that on the date of the two certification applications, none of the complainants, other than Mr. Cardinal, was employed by either of the Appellant firms—Mr. Cardinal's employment ended July 10th, 2002; Mr. Smith's employment ended August 10th, 1998; Mr. Norberg's employment ended January 20th, 1998; and Mr. Catt's employment ended March 21st, 2001. I do not think in such circumstances it can be fairly said that the union was the "privy" of three of the four complainants.

53. In any event, the union initially took the position that the provincial board had jurisdiction and requested the federal board to hold the application in abeyance. In proceedings before the provincial Board, legal counsel for Actton took the position that Actton was a federally-regulated firm and that the provincial board should thus dismiss the certification application for want of jurisdiction.

54. I continue the narrative with a quote from counsel for the Appellants' May 13th submission (at page 22):

> The [union] subsequently decided and agreed that [Actton] was a Federally regulated employer. Therefore [the union] proceeded with their Federal application. The Provincial application was held in abeyance subject to the CIRB assuming jurisdiction. At that point, the Union withdrew its Provincial certification application.

55. The B.C. Labour Relations Board never issued a decision regarding its jurisdiction to hear the union's certification application. On April 5th, 2002 the union wrote to the CIRB and simply requested "that you proceed with the adjudication of the above referenced application". In a letter dated April 11th, 2002

from the CIRB to Actton's legal counsel, the CIRB's Regional Director and Registrar stated: "We acknowledge receipt of your letter dated April 9, 2002 filed on behalf of the employer *advising that the applicant and employer agree that this Board has jurisdiction to deal with this application*, and asks that the Board process the application" (my *italics*). Accordingly, as is clear from the foregoing narrative, the CIRB never ruled on the jurisdictional question (the CIRB ultimately dismissed the application for certification because the union failed to obtain majority support in a representation election conducted by the CIRB). Thus, in my view, neither the doctrine of *res judicata*, nor the doctrine of issue estoppel, has any application in the circumstances since both doctrines require a *final decision* (not a mere consent agreement) regarding the dispute or discrete legal issue in question.

56. Finally, counsel for the Appellants says that a series of identical letters dated June 8th, 2001 from a delegate who formerly had responsibility for the files to various employees (including the complainants) "determined that [Actton] was a Federally regulated employer" (May 13th submission at page 25; underlining in original). The delegate's June 8th letters are in the nature of a report and update to the various employees who were included in the Director's investigation.

57. In my view, the delegate's June 8th letters are not "determinations" as that term is defined in section 1 of the *Act*. While it is true that the delegate refers to Super Save as a provincial jurisdiction firm and Actton as a federal jurisdiction firm, I do not consider those comments to constitute a binding *decision* by the Director with respect to the jurisdictional issue. It would appear that those comments were made without the benefit of any submissions from the employees on the point. Counsel for the Appellants' submission that this delegate "would have undoubtedly confirmed [Actton's] Federal status" is pure speculation and, in any event, misses the point that Actton might well be a federal firm for purposes of its interprovincial and international truck drivers but a provincially regulated firm insofar as the complainants (exclusively intraprovincial garbage truck drivers) are concerned [see *Ontario Hydro v. Ontario (Labour Relations Board), supra*].

58. The main thrust of the delegate's June 8th letter was to advise the employees that there was an outstanding issue regarding the identity of their employer and that this latter point would likely be addressed in an appeal by Super Save of a penalty determination issued against that firm. I will address this matter in greater detail, below, as it underlies the Appellants' second ground of appeal.

59. In sum, I am not satisfied that the Director erred when he refused to dismiss the four complaints now before me for want of jurisdiction.

Ground No. 2A: The Director erred in law by not following the directions of Adjudicator Ib Petersen and by not determining whether Super Save was the employer.

Factual Background

60. The record before me discloses that on February 1st, 2001, a delegate wrote to Super Save requesting payroll information regarding three of the four complainants and two other employees. On February 28th, in-house legal counsel for the "Actton Group of Companies" replied stating that Actton, not Super Save, was the actual employer of the employees in question and that Actton "falls under federal jurisdiction under the *Canada Labour Code*". On March 13th, 2001 a delegate issued a formal demand for production of payroll records [see subsections 85(1)(c) and (f) of the *Act*] to "Super Save Disposal"

and, subsequently when records were not produced, the delegate issued a $500 Penalty Determination against Super Save dated April 5th, 2001.

61. On April 20th, 2001 Super Save appealed the Penalty Determination to the Tribunal; the grounds of appeal were particularized, in part, as follows: "The Demand for records was issued against Super Save Disposal Inc. [however] the five ex-employees were employed by… [Actton] and their employment records are with that company. No records for [Super Save] were produced because none exist".

62. Former Adjudicator Petersen heard the appeal on August 15th, 2001 and on August 21st, 2001 issued written reasons for decision (B.C.E.S.T. Decision No. D440/01) allowing the appeal and cancelling the Penalty Determination. Mr. Kitsul, "in-house" counsel for the "Actton Group of Companies", testified that Actton was the employer of the employees in question and that Actton "provides drivers and trucks to a number of companies, including Super Save, under verbal contractual arrangements" (Adjudicator Petersen's Reasons at page 4).

63. Adjudicator Peterson cancelled the Penalty Determination because, in his view, the delegate overstated matters when he found that Super Save did not provide a reasonable explanation for its failure to deliver the payroll records that were demanded. The relevant portions of Adjudicator Petersen's decision (at pages 6-7) are reproduced below:

> I agree with counsel for the Director that the constitutional-jurisdictional argument has not been fully developed. In my view, the reason for this is that what is before me is not really a jurisdictional issue. As I understand it, Super Save is not taking the position that it is a federally regulated company. It is simply an issue of whether the Director properly imposed a penalty in the circumstances where the party (Super Save) to whom the Demand for records was directed states, and there is nothing before me to contradict that, that it does not have the records demanded. Super Save states, as it has consistently in the past, that it is not the employer. In short, in the circumstances, I agree that Super Save, in the circumstances [sic] had a reasonable explanation for the failure to produce the records in question.
>
> Second, the Determination characterizes Super Save as the "employer" of the complainant drivers…While some of the evidence before me at the hearing could support a conclusion that Super Save is the employer, for example, the trucks with the Super Save name; there was also evidence to contradict such a conclusion, for example, the T-4 slips. None of that evidence is apparent on the face of the Determination. In fact, what strikes me about the Determination is the complete lack of reasoned analysis of the basis for characterizing Super Save as the "employer" of the complainant drivers. The failure to give reasons for the "conclusion" with respect to a fundamental aspect strikes at the heart of the Determination.

Findings and Analysis: Adjudicator Petersen's Decision

64. It should be noted at the outset that Adjudicator Petersen did not refer the question regarding who was the "true employer" of the complainants back to the Director for reconsideration [see subsections 114(2) and 115(1)(b) of the *Act* as it now stands; similar provisions were in effect in 2001]. Rather, Adjudicator Petersen simply cancelled the Penalty Determination because it was, in his view, legally deficient. Further, Adjudicator Petersen specifically refrained from deciding whether Super Save or Actton was the true employer (at page 7):

> I emphasize that I do not decide the issue of whether or not Super Save is, in fact, the employer of the complainant employees. I simply say that the characterization of Super Save in the

> Determination as the "employer" does not, on its face, appear to be supported by any reasoned analysis. From the correspondence, which includes the brief conclusions of HRDC that Super Save was the employer, it could well be argued or suggested that the Delegate simply adopted those conclusions as his own. The Delegate, of course, is not bound by the determination—such as it is—of HRDC, he has to conduct his own investigation and reach his own conclusion.

65. I am not persuaded that the Director erred in law by not following the directions of Adjudicator Petersen for the simple reason that Adjudicator Petersen did not give any directions to the Director in the form of a "referral back" order. Of course, Adjudicator Petersen observed that the Director would have to independently determine who was the employer and this comment leads me to the Appellants' next ground of appeal.

Ground No. 2B: The Director erred in law in not finding that Actton was the employer and that Actton was a federally regulated employer.

66. Counsel for the Director concedes that the delegate did not determine whether Super Save or Actton was the complainants' actual employer; rather, the delegate found both firms to be associated corporations under section 95 and thus a single "person" [or, as section 95(a) now reads—as of December 14th, 2003—one "employer"] for purposes of the *Act*.

67. Actton and Super Save are part of a larger business enterprise that holds itself out to the world at large as the "Actton Group of Companies". Clearly there is a considerable degree of integration among the constituent firms as evidenced by the testimony of its "in-house" counsel as recounted in Adjudicator Petersen's Reasons for Decision—e.g., Actton "provides drivers and trucks to a number of companies"; some trucks carry Actton's name whereas others carry the Super Save name; trucks are transferred among "Actton Group" companies and may be re-registered in different provinces.

68. In his May 13th submission, counsel for the Appellants states that some sales persons are employed by Super Save and that Super Save truck drivers are dispatched and directed by persons who are said to be Actton employees. The complainants all drove garbage trucks carrying Super Save logos and complete (on a daily basis) "Super Save" trip sheets and "customer logs" but were paid from an Actton payroll account. Super Save personnel solicited at least some of customers serviced by the complainants who, in turn, issued "Super Save" receipts to those customers. The complainants were issued annual statements of earnings and, upon termination, records of employment that identified Actton as their employer. At least one complainant originally submitted an employment application that was a "Super Save" preprinted form.

69. In light of the definition of "employee" and "employer" contained in section 1 of the *Act*, I am of the view that both Super Save and Actton could be fairly identified as an employer of each of the complainants. The complainants did "work" for Super Save and drove Super Save equipment while, at the same time, were paid and directed by at least some Actton employees.

70. The complainants themselves evidenced confusion regarding the identity of their employer—in their various complaints they identified one or the other, or even both, of Super Save and Actton as their employer. The two appellant firms share common business offices which are also the records and registered offices for both firms. There appears to be some sharing of equipment, services and personnel as between the two firms.

71. In *Sinclair v. Dover Engineering Services Ltd., supra*, our Court of Appeal recognized that a single individual could be employed by several separate corporations that form constituent elements of an integrated business enterprise: "…one may be employed by a number of companies at different times for different purposes, or even at the same time" (page 229). In light of the evidence before me, I share Adjudicator Petersen's observation that the Actton Group of Companies "is a highly complex corporate structure". In my view, it cannot be unequivocally stated that a single firm within that corporate structure was *the* complainants' employer. Both Super Save and Actton satisfy some of the statutory criteria to qualify as an "employer" of the complainants. To paraphrase the Court of Appeal in *Sinclair* (at page 301), the Actton Group "was devised because of the various beneficial aspects to the employer companies [and the constituent firms] "cannot now deny its existence or the responsibility which it imposes upon them respecting their employee[s]" [see also *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (Ont. C.A.); *Vanderpol v. Aspen Trailer Company Ltd. et al.*, 2002 BCSC 518; *Bartholomay v. Sportica Internet Technologies Inc. et al.*, 2004 BCSC 508].

72. In my view, the Director's delegate need not have issued a section 95 declaration since both Super Save and Actton could have been lawfully (and separately) determined to the complainants' employer and, jointly, could have been declared a "common employer" under the common law and, more importantly, in accordance with the statutory definition of "employee" and "employer" contained in section 1 of the *Act.* Notwithstanding that latter comment, however, as will be seen, I am not prepared to find that the delegate erred in making a section 95 declaration with respect to Super Save and Actton.

Ground No. 3: The Section 95 Declaration

73. Section 95 of the *Act* presently states that the Director may treat two or more separate corporations as a "single employer" for purposes of the *Act* in which case both corporations are jointly and separately (severally) liable to pay unpaid wages owed to an employee of either firm. At the time the complainants' wage claims crystallized and, indeed, when the Determinations were issued, section 95 stated that the two firms could be treated as "one person" (rather than "one employer") for the purposes of the *Act.* However, in my view, nothing turns on that change in statutory language.

74. Counsel for the Appellants submits that the delegate erred in associating Actton and Super Save since the Director does not have the legal authority to "associate" a federally regulated firm with a provincially regulated firm. In other words, the Director cannot use section 95 to enforce an unpaid wage claim against a firm whose employees would not otherwise have any rights under the *Act* because their unpaid wage claims would have to be adjudicated under federal employment standards legislation. Counsel for the Appellants cited several authorities in support of this latter argument (e.g., the B.C. Labour Relations Board decision in *Sky Chefs Canada Ltd.,* BCLRB No. B467/2000 and an Ontario Employment Standards Board decision in *Superior Driver Pool*, [1991] O.E.S.A.D. No. 40). I agree with counsel for the Appellants' submission on this score to the extent that section 95 cannot be used as a device to simply extend the Director's jurisdiction to reach into the federally regulated employment arena.

75. However, I have already determined that the complainants' work—garbage collection undertaken entirely within British Columbia—falls under provincial jurisdiction and that each of Actton and Super Save can be lawfully characterized as the complainants' employer *for the purposes of that work.* The B.C. Labour Relations Board acknowledged in *Sky Chefs, supra* (at para. 47) that "it is possible for a federally regulated undertaking to spawn a separate local business or subsidiary operation that would operate within provincial legislation". In my view, Actton's intraprovincial garbage collection activities fall under provincial employment standards legislation. Further, in *Sky Chefs*, the Board specifically

envisioned that a "common employer" declaration might be made regarding a provincial firm and the provincial operations of an otherwise federally-regulated firm (para. 48):

> Fourthly, there is no jurisdiction vested in this Board to bridge the constitutional divided [*sic*] by linking federally and provincially regulated operations in a common employer (or a true employer) declaration. *That does not mean that it may not be possible, in theory, under Section 38 of the Code to link a provincially regulation [sic] off-shoot of a federally regulated employer with another provincial employer*. Thus, for example, if the Empress Hotel, owned and operated by Canadian Pacific, were to enter into arrangements with [a] local business for the joint operation of a laundry or a food preparation operation (to use examples suggested by the Judgment of Jackett, C. J., *supra*), or with a locally-owned hotel chain, those arrangements might attract the possibility of a common employer declaration. Whether separately incorporated or not, the Empress, though owned by a federal company, might be treated as possessing a provincial persona for this purpose. However, that is not the kind of situation with which we are faced in the present case…*It may be possible, in theory, to apply Section 38 to an employer, the core operations of which, are regulated federally, but only in relation to a provincially regulated operation of that employer.* (my *italics*)

76. Thus, in my opinion, the section 95 declaration was a lawful exercise of the Director's authority provided it only binds Actton to the extent that Actton employs persons whose work falls entirely within provincial jurisdiction (as per the B.C. Labour Relations Board's discussion in Sky Chefs, supra).

77. In my view, if one accepts that Actton is a provincially regulated firm at least insofar as the work of the complainants is concerned (as I have so found), the delegate did not err in associating Actton with Super Save under section 95 having regard to the criteria that the Director must take into account prior to making such a declaration—see e.g., *Vencorp Enterprises Corp. v. British Columbia (Director of Employment Standards)*, [1998] B.C.J. No. 2311 (B.C.S.C.) and *Invicta Security Systems Corp*., B.C.E.S.T. Decision No. D249/96. However, I wish to reiterate that I am only upholding the section 95 declaration to the extent that it relates to the claims of the four complainants whose employment relationships were wholly governed by provincial employment standards legislation.

Ground No. 4: The Director erred in adjudicating the four [complaints] as the four complaints were determined and the files closed well prior to the Determinations.

78. Counsel for the Appellants submits that at least some of the complainants' complaints were previously adjudicated and that the Director effectively dismissed the complaints for want of jurisdiction. Counsel for the Appellants submits: "Under section 76(3) or 79, a decision not to proceed with the complaint is, in effect, is [sic] a determination that it is [sic] only subject to review under Section 116".

79. I agree that a decision, made pursuant to section 76(3)(b) of the *Act* [or subsection 76(2) of the *Act* prior to May 2002], not to proceed with a complaint for want of jurisdiction is a determination as defined in section 1 of the *Act*. However, such a decision may be appealed to the Tribunal under section 112. Section 116 of the *Act* (the Tribunal's reconsideration power) only becomes relevant after the Tribunal has issued a decision or order with respect to the appeal.

80. In my view, where the Director dismisses a complaint under section 76(3)(b), or indeed for any of the reasons identified in section 76(3) of the *Act*, that fact must be plainly communicated to the complainant so that he or she may consider the reasons for the dismissal and, where the complainant disagrees with the Director's reasoning, seek to have that decision overturned via a section 112 appeal to the Tribunal. It is

particularly important that a decision to dismiss a complaint be clearly and unequivocally communicated since appeals to the Tribunal are governed by strict time limits [see section 112(3)] and the Tribunal does not readily grant applications to extend the appeal period [see the Tribunal's jurisprudence interpreting and applying section 109(1)(b)].

81. Counsel for the Appellants asserts that Mr. Norberg's complaint was dismissed in the spring of 1998. On May 20th, 1998 a delegate (Ms. Judy Reekie) wrote to Actton advising that, in light of that firm's assertion that Actton was federally regulated, Mr. Norberg's complaint was being forwarded to "Labour Canada". The delegate's letter continues: "Therefore, the Demand for Employer Records issued May 20, 1998 is cancelled, and the file will be closed with out office". The record before me also contains a note—"Clsd May 21/98 Judy Reekie"—apparently attached to Mr. Norberg's original complaint. It may well be that the Director closed Mr. Norberg's file on the assumption that his complaint would be adjudicated under the provisions of the *Canada Labour Code*. However, that internal decision, taken in the context of an ongoing investigation involving several employees, does not, in my opinion, amount to a formal determination by the Director dismissing Mr. Norberg's complaint on jurisdictional grounds. The delegate merely accepted Actton's assertion that Mr. Norberg's complaint should be adjudicated under federal employment standards legislation, however, the delegate did not issue a formal decision on the jurisdictional issue and certainly, so far as I can determine, did not clearly and unequivocally communicate to Mr. Norberg that his complaint was being *dismissed* by the Director for want of jurisdiction.

82. Similarly, the record contains an internal computer printout dated December 1st, 1998 that identifies Messrs. Norberg and Smith as well as some other individuals. This latter printout contains the following handwritten note: "Close – code 45 .5 HR [initials] Jan. 25/99". The record also contains a letter dated January 28th, 1999 from Director's delegate Lynne L. Egan to HRDC (and copied to complainant Steven Smith) relating to Mr. Smith's complaint:

> Enclosed in a complaint which was received in our office. It would appear that the employer is under Federal jurisdiction, therefore, we are forwarding the complaint to you for investigation.

83. It may be that the handwritten note on the December 1st printout confirms that the files of the named complainants were "closed" but, again, that internal record, in my view, falls well short of constituting a determination dismissing the complaints concerning those named individuals on jurisdictional grounds. The January 28th, 1999 letter is somewhat more problematic in that the letter was copied to Mr. Smith. However, I do not read the delegate's January 28th letter as constituting a formal decision on the jurisdictional issue and, in any event, the letter does not suggest that Mr. Smith's complaint is being *dismissed* on jurisdictional grounds. In my view, the more reasonable interpretation of the correspondence is that the delegate was merely forwarding the complaint to HRDC so the jurisdictional issue could be more fully fleshed out prior to the Director making any formal adjudicative decision.

84. I should add that there are other documents in the record to similar effect—notations that the files relating to particular individuals were closed and/or that the matter was forwarded to HRDC for further investigation. In my view, all of these documents suggest that the Director, in effect, either closed or placed certain files in abeyance while federal employment standards officials investigated the jurisdictional issue. I might add that this action was largely predicated on the untested assertions of Actton that the complainants' sole employer was Actton, a wholly federally regulated firm. By letter dated October 21st, 2000 HRDC advised the B.C. Employment Standards Branch that after investigating the jurisdictional question (which included a review of information received from the Actton Group's "in-

house" legal counsel), HRDC concluded that Super Save was the complainants' actual employer and that "the operations of Super Save Disposal Inc. are correctly placed in the provincial jurisdiction". So far as I can determine, however, the *Director* (to be contrasted with HRDC) never formally adjudicated the merits of the jurisdictional issue until the Determinations now on appeal before me were issued. In other words, I am not satisfied that any "determinations" (as defined by the Tribunal in *Insulpro Industries Inc.*, B.C.E.S.T. Decision No. D099/98; reconsideration dismissed: B.C.E.S.T. Decision No. RD498/98) were ever issued with respect to the complainants' unpaid wage claims against the appellants prior to the four Determinations that are now under appeal.

Ground No. 5: 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.

85. The Director's authority to delegate his statutory powers is set out in section 117 of the *Act*. A particular delegate's authority to act is presumed: see e.g., *Thunder Mountain Drilling Ltd.*, B.C.E.S.T. Decision No. D314/96.

86. As noted at the outset of these Reasons, at different times no fewer than six delegates apparently had responsibility for investigating the complainants' unpaid wage claims (as well as the claims of other employees). Counsel for the Appellants asserts (May 13th submission at page 33): "The Director has failed to produce any documents that would explain the proper delegation of these functions". In my view, this comment misconceives the burden of proof on this issue. Since the delegate's authority is presumed, it is incumbent on the Appellants to raise a *bona fide* concern about the delegate's authority. I note that during the course of the Director's lengthy investigation it would appear that the legal counsel for the Appellants (at all times, the Actton Group's "in-house" legal counsel) *never* challenged any particular delegate's authority to act on behalf of the Director.

87. The Appellants raised (and so far as I can tell, for the very first time) the "delegation" issue in their appeal documents. In response to that issue, counsel for the Director produced a letter of authority, signed by the former Director and dated November 26th, 2002, concerning the delegate who issued the Determinations. I am satisfied that the delegate who issued the Determinations had the statutory authority to do so. There is no evidence before me that any of the other delegates who were involved in the investigation of the complaints were not equally lawfully authorized to act. Further, and in any event, I do not consider it be particularly relevant whether other delegates were or were not so authorized since, while the investigation was ongoing, the Appellants never questioned the authority of any of the delegates and, finally, none of these other delegates issued the Determinations that are now before me.

88. Of broader concern is the suggestion that one or more legal counsel for the Director, in effect, investigated and possibly adjudicated the complaints. Statutory decision-makers are entitled to obtain and rely on legal opinions from "staff" or external legal counsel—see *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809. However, there is no evidence before me that the delegate went outside that scope of permissible activity and, in effect, abdicated his legal obligation by simply permitting legal counsel to write his Determination for him. Indeed, the delegate has filed an affidavit (sworn January 30th, 2004) stating such was not the case.

Ground No. 7: The complaints ought to have been dismissed, in any event, due to the undue delay with respect the investigation, between the filing of the complaints, the various "determinations" made throughout the course of these investigations and the final disposition of these matters in the May 5, 2003 Determinations

89. In *Danyluk v. Ainsworth Technologies Inc., supra,* the Supreme Court of Canada made the following comments about employment standards dispute resolution processes (at paras. 50 and 73): "One major legislative objective of the [Ontario Employment Standards Act] scheme is to facilitate a quick resolution of termination benefits so that both employee and employer can get on with other things" and that "…the purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes".

90. No matter how charitably one might view the present dispute, it has not proceeded "quickly" nor, I suspect, has it proceeded "cheaply". The question, of course, is whether the delay from initial complaint to the issuance of the Determinations justifies the cancellation of the Determinations. In my view, and for the reasons I set out below, it does not.

Counsel for the Appellants' Position

91. Counsel for the Appellants submits that by reason of the very lengthy delay in the investigation and ultimate adjudication of these four complaints (recall that the Determinations were issued over five years after the first complaint was filed), the Determinations should be cancelled. Counsel for the Appellants characterizes the delay at the Branch level as "inordinate" and "prejudicial".

92. Counsel for the Appellants' argument with respect to delay is set out at pages 35 to 38 of his May 13th, 2005 submission. Many of the points raised in this latter section of the Appellants' submission strike me as having little, if any, relevance to the "delay" issue (for example: "the Appellants have acted under the jurisdiction of HRDC for a number of years"; the fact that at one point in time there were competing applications for certification brought be a trade union before both the federal and provincial labour relations boards; the assertion that the Director conducted "covert surveillance" at the Appellants' place of business; that each of the Appellants is now "*persona non grata*" before the Director.

93. The following comments contained in counsel for the Appellants' submission more directly relate to the "delay" issue:

- The Appellants have incurred "significant expense throughout these proceedings";
- The Director issued the Penalty Determination (subsequently cancelled by Adjudicator Petersen) "without regard to the merits";
- The Appellants' ability to obtain a "fair hearing now before the Employment Standards Branch is seriously jeopardized due to the bias, etc. that exists [and this] in turn is directly related to the delay";
- "The delay in having this matter adjudicated is extremely prejudicial to the Appellants who were never given an opportunity in a timely fashion to respond to or challenge [evidence from the complainants relating to their hiring];
- "The delay from May 23, 2003 to date, results solely and completely from the actions of the Director in attempting not to produce the record and the relevant documents as required…That delay in and of itself cost the Appellants dearly, including legal costs in

dealing with numerous applications and the damage to its reputation and the reputation of its representatives including legal counsel"; and

– "While the financial consequences are significant, the damages to the Appellants' reputation is unquantifiable and enormous. This prejudice in and of itself justifies cancellation of the Determinations".

Counsel for the Director's Position

94. Counsel for the Director's position on the "delay" issue is set out in a single paragraph (at page 28). Counsel says that the Appellants ought to have paid the wages owing to the complainants "five years ago" and that instead the Appellants launched a "war of attrition". Counsel submits "a party who chooses such a strategy has no valid complaint if the process turns out to be protracted and expensive—that is exactly what the Appellants hoped for when they initiated it".

The Cardinal and Norberg Submissions

95. Neither of Messrs. Cardinal or Norberg directly addressed the merits of the "delay issue" in their respective submissions other than to (quite rightly) express some frustration regarding the length of time it has taken to adjudicate these matters.

The Delay Issue: Findings and Analysis

96. I note that the initial complaints were all filed within the statutory complaint period (as it stood when the complaints were originally filed). This is not a case where the *complainants* failed to pursue their complaints in a timely manner and, accordingly, neither what is now section 76(3)(a), or the equitable doctrine of laches (see *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6), has any application here.

97. Apart from the delay at the Branch level, counsel for the Appellants also appears to complain about the delay in adjudicating the Appellants' appeals. However, that latter question is separate and apart from the matter of delay during the period from initial complaints to issuance of the Determinations. For my part, I believe that I have endeavoured to move these appeals forward in a timely manner but the numerous interlocutory applications made by both parties have certainly hindered my efforts in that regard. At the risk of sounding self-serving, my own view is that the Tribunal has made every reasonable effort to ensure that these appeals are adjudicated both fairly and expeditiously.

98. Further, a significant component of the delay associated with the investigation and adjudication of these complaints by the Director can be attributed to the legal position (i.e., the Director had no jurisdiction in the matter) that was initially taken by the Appellants themselves. I have now ruled that the Director had the jurisdiction to investigate and adjudicate these complaints and thus, as matters now stand, it would appear that much of the delay at the Branch level can be attributed to the ultimately unmeritorious legal position that was aggressively advanced by the Appellants.

99. Finally, and with respect to the matter of financial prejudice, I note that the Appellants' liability to the complainants includes over $9,600 dollars in section 88 interest. Section 88 interest is mandatory and the Tribunal has no authority to "sever" section 88 interest from an unpaid wage determination—see *Insulpro Industries Ltd.*, B.C.E.S.T. Decision No. D405/98; *Piney Creek Logging Ltd.*, B.C.E.S.T. Decision No. D546/98; and *Common Ground Publishing Corp.*, B.C.E.S.T. Decision No. D433/00.

100. As I understand the Appellants' initial position before the Director, the Appellants never suggested that the complainants did not have valid unpaid wage claims; rather, the Appellants' position was that the complainants' entitlements should be adjudicated under the employment standards provisions of the *Canada Labour Code*. The Appellants could have calculated the complainants' respective entitlements (or, at least the Appellants' estimates in that regard) under the *Canada Labour Code* and then paid those monies into the Director's interest-bearing trust account (and thereby avoid a great deal, though perhaps not all, of their liability to pay section 88 interest) on the condition that the funds be held until such time as the jurisdictional issue was resolved.

101. As noted above, counsel for the Appellants submits that these Determinations should be cancelled by reason of inordinate and prejudicial delay. Counsel for the Appellants has not, however, set out the legal foundation that would justify such an order. Counsel appears to be submitting that the delay in this case amounted to an "abuse of process" either under the *Canadian Charter of Rights and Freedoms* or under the common law—see *Blencoe v. British Columbia (Human Rights Commission*), [2000] 2 S.C.R. 307.

102. To the extent that the Appellants rely on the *Charter* (and this is not clear from the Appellants' submissions although counsel did refer to *Blencoe* in his initiating appeal documents), it would appear that the Tribunal no longer has any jurisdiction to adjudicate *Charter* claims—see section 45(1) of the *Administrative Tribunals Act* and section 103 of the *Act;* and *Sagoo, supra.* Even if I had *Charter* jurisdiction, I am not persuaded that the Determinations should be cancelled in light of the Supreme Court of Canada's decision in *Blencoe, supra.*

103. As noted in *Blencoe* (paras. 100 *et seq.*), excessive delay may give rise to a remedy, quite apart from the *Charter*, based on the principles of administrative law:

> In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period…In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay. (*Blencoe*, at para. 101)

104. The governing principles, taken from *Blencoe*, are set out below:

> 121. To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, *supra*, at p. 9-68). There is no abuse of process by delay *per se*. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings…
>
> 122. The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

105. The Tribunal has addressed institutional delay at the Branch level on a few occasions—*see Westhawk Enterprises Inc*., B.C.E.S.T. Decision No. D302/98; *Donetz*, B.C.E.S.T. Decision No. D573/98; *Ecco Il Pane Bakery Inc*., B.C.E.S.T. Decision No. D346/00; *Tung*, B.C.E.S.T. Decision No. D511/01.

106. In *Westhawk*, the Tribunal cancelled a Determination in circumstances where there was a wholly unexplained (the Director did not file any submission in response to the appeal to the Tribunal) 20-month delay from initial complaint to issuance of the Determination. There was evidence of prejudice (relevant witnesses could no longer be located despite the employer's efforts to track them down) and, perhaps more importantly, the adjudicator relied on the British Columbia Court of Appeal's decision in *Blencoe*—a decision that was overturned on further appeal to the Supreme Court of Canada. In *Donetz*, the Tribunal cancelled a section 96 determination (director/officer liability) that was issued "11 years, 7 months, 8 days" after the original complaint was filed; the section 96 determination was issued because the Director was unable to enforce a previously-issued corporate determination. However, the Director had known that Mr. Donetz was a corporate director/officer for some nine years before the section 96 determination was finally issued. The Tribunal found that the delay was wholly unexplained and that Mr. Donetz was "significantly prejudiced" by the delay. On the other hand, the Tribunal refused to cancel determinations where the administrative delay spanned 3 years and 3 months (*Ecco Il Pane Bakery Inc.*), and "over 4 years" (*Tung*), because in each case there was no evidence of serious prejudice.

107. As was noted in *Blencoe*, significant delay *per se* does not constitute an abuse of process. It is not clear to me that the Appellants have suffered any serious prejudice by reason of the delay involved in this case. The delay has not prevented the Appellants from fully arguing their case. Although the Determinations include a significant section 88 interest component, it must be remembered that the Appellants have had the use of the complainants' funds for many years—if the complainants were denied interest, the complainants would be deprived and the Appellants would, in my view, be unjustly enriched. In any event, as I noted earlier, the Appellants could have taken steps to limit their present liability on account of section 88 interest.

108. I do not doubt that the Appellants have incurred substantial legal fees, however, it must be remembered that these fees have been incurred largely in an effort to show that the Director did not have jurisdiction—an argument that I have now rejected as legally untenable.

109. In addition, much of the delay at the Branch level was solely attributable to the Appellants taking the position that the Director lacked jurisdiction. I do not wish to criticize the Appellants for taking that position; they were entirely within their legal rights to do so. However, since much of the delay at the Branch level resulted from the HRDC's seeming inability to issue a timely decision regarding its jurisdiction over the complainants, it strikes me as somewhat unfair for the Appellants to criticize the Director regarding a situation over which the Director had no control (the HRDC's adjudication regarding its own jurisdiction) and which the Appellants themselves triggered in the first instance.

110. Taking into account all of the factors that the Supreme Court of Canada has directed me to consider in an "abuse of process" issue—such as the nature of the case and its complexity, whether the Appellants contributed to the delay, the nature of the various rights at stake in the proceedings, and the community's sense of fairness—I am unable to conclude that this is a case where the Determinations should be cancelled on the basis that the constitute an "abuse of process".

SUMMARY

111. By way of summary, I am satisfied that the Director had jurisdiction to investigate these complaints and to issue the Determinations that are now before me. I am not satisfied that the Appellants' arguments with respect to the decision of my former colleague, Adjudicator Petersen, are meritorious. I am satisfied that both Actton and Super Save can be lawfully characterized as the complainants' employer and that the

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

112. These Reasons for Decision do not dispose of all of the issues that have been raised by the Appellants in these appeals. Accordingly, I now issue further directions and orders so that these remaining issues (broadly speaking, the "natural justice" issues) may be expeditiously adjudicated.

DIRECTIONS AND ORDERS REGARDING FURTHER PROCEEDINGS

113. The remaining two issues to be adjudicated are as follows:

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 #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.

114. In my April 13th, 2005 reasons (B.C.E.S.T. Decision No. D050/05) I observed (at pages 11-12):

> 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.

115. Counsel for the Appellants maintains that an oral appeal hearing is required in order to address the "natural justice" issues. On February 15th, 2005 I wrote to the parties and specifically asked them to address whether some or all of the issues raised by the Appellants required an oral hearing. As I noted in my April 13th reasons, I expected that if counsel for the Appellants believed an oral hearing was necessary he should "identify the nature of the *viva voce* evidence he proposed to call and explain why such evidence could not be presented in written form". When I issued my April 13th reasons, I was not satisfied that a proper justification had been advanced in support of an oral appeal hearing on any of the issues raised in these appeals. I remain of that view.

116. However, if counsel for the Appellants wishes to continue to assert that an oral hearing is required with respect to the remaining issues, he shall be given one final opportunity to do so but all parties should realize that the remaining issues might well be adjudicated based solely on their written submissions. Finally, once all of the issues raised by these appeals have been adjudicated, I will then address the Appellants' contempt application if counsel still wishes, at that time, to have that latter matter adjudicated.

ORDERS

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

- Counsel for Appellants shall file whatever further submissions he may wish to file (the submission may simply incorporate, by reference, submissions that have already been filed with the Tribunal) regarding the above-mentioned issues by no later than 4:30 P.M. on **September 23th, 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 4:30 P.M. on **October, 7th 2005;** and
- Counsel for the Appellants shall file his final reply submission regarding these issues by no later than 4:30 P.M. on **October 21th, 2005.**

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

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal