Employment Standards TRIBUNAL

An appeal

- by -

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

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

ADJUDICATOR: Kenneth Wm. Thornicroft

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

DATE OF HEARING: December 8, 2003

DATE OF DECISION: December 15, 2003

DECISION

APPEARANCES

M. Weiler, Barrister & Solicitor & C. Hauer, Barrister & Solicitor	for the Appellants
Todd Norberg	on his own behalf
Adele Adamic, Barrister & Solicitor & D. Roberts, Barrister & Solicitor	for the Director of Employment Standards

OVERVIEW

This is an appeal filed by Super Save Disposal Inc. and Actton Transport (the "Appellants") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). The Appellants appeal four separate Determinations that were issued by a delegate of the Director of Employment Standards (the "Director") on May 5th, 2003 in favour of four individuals, namely, Robert Cardinal (EST File No. 2003A/172), Stephen Smith (EST File No. 2003A/173), Todd Norberg (EST File No. 2003A/174) and Larry Catt (EST File No. 2003A/175).

The Director's delegate determined that the two Appellants were "associated corporations" under section 95 of the *Act* and, accordingly, were jointly and severally liable for unpaid wages owed to each of the above-named individuals. The total amount payable under the four Determinations is $54,185.41 and the individual entitlements are as follows:

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

REASONS FOR APPEAL

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.).

With respect to the "natural justice" ground of appeal, the Appellants say that the Determinations should be cancelled due to the significant delay involved in determining the individual's unpaid wage claims and because the Director's investigation was conducted in a manner that was unfair to the Appellants. The Appellants say, among other things, that they were denied a proper right of response and that one or more of the delegates involved in this matter was biased, or appeared to be biased, against the Appellants.

These reasons for decision concern various orders that I issued on December 8th, 2003 in order to expedite the adjudication of this appeal. However, before formally setting out those orders in these reasons, I wish to first detail some background information.

PRODUCTION OF THE "RECORD"

This matter originally came on for hearing before me on August 28th, 2003. The purpose of that hearing was to address what has turned out to be a continuing issue between the parties, namely, the Director's obligation to produce the record.

Upon being served with a copy of the 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".

Todd Norberg filed the first complaint in this matter; that complaint was filed on February 13th, 1998. Mr. Cardinal filed a complaint on August 16th, 2000 but that complaint was filed with the federal employment standards agency (Human Resources Development Canada). Mr. Cardinal's complaint was apparently redirected by the federal agency to the B.C. Employment Standards Branch on or about October 25th, 2000. It appears that the investigation of these four former employees' unpaid wage claims has generated a very significant volume of documents, and therein lies a major stumbling block to the expeditious adjudication of this appeal.

Counsel for the Director says that the entire record has been delivered to the Tribunal; counsel for the Appellants says that the Director has not disclosed the entire record. Counsel for the Appellants says that he cannot properly prepare and argue his appeal--especially on the natural justice issues--since key documents have not been disclosed. The "record", as it was initially disclosed by the Director, consists of approximately 700 pages. However, the Appellants made a separate document request of the Employment Standards Branch under the provisions of the *Freedom of Information and Protection of Privacy Act*. Counsel for the Appellants was advised, in a letter to him dated July 28th, 2003 from the Information and Privacy Branch, that the Employment Standards Branch files concerning the four employees in question consisted of "a large number of records (approximately 3000 pages)".

Counsel for the Director concedes that certain documents in the possession, custody or control of the Director have not been disclosed, but she says that such documents either do not form part of the "record" or are protected by solicitor-client privilege. She adds that, in any event, the total "file" does not consist of anywhere near 3000 pages.

THE AUGUST 28th HEARING

As noted, a one-day hearing was scheduled for August 28th, 2003. As detailed in the hearing notice: "The purpose of this hearing is to deal with the procedural matters outlined in the Tribunal's letter of August 20th, 2003". The August 20th letter was from the Tribunal's Administrator and identified various issues, including document production, that he had gleaned from a review of the parties' submissions. Counsel for both the Appellants and the Director attended the August 28th hearing as did two of the employees, Messrs. Catt and Norberg.

Following the conclusion of that hearing, I issued an Order (B.C.E.S.T. Decision No. D263/03 issued August 29th, 2003) the relevant provisions of which are set out below::

> **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...

My expectation, which I communicated to the parties on August 28th, was that the parties would appear before me, if necessary, on September 22nd, 2003 so that any particular objections regarding document production could be addressed.

THE SEPTEMBER 22nd HEARING

On September 22nd the parties again appeared before me. Counsel for the Director advised that the Director would not provide the "document list" as described in paragraph 2 of the order. I enquired of counsel for the Director if she was prepared to give the Tribunal an undertaking that the entire record had been disclosed; she was not prepared to give such an undertaking. Further, I was advised by counsel for the Director that she intended to file an application for reconsideration of my August 29th Order.

In light of the above circumstances, I issued the following further Order (a written copy of which was provided to the parties by way of memorandum dated September 23rd, 2003):

> **ORDER**
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> The hearing set for September 22, 2003 is adjourned generally. My Order of August 29th contained in Tribunal Decision BC EST #D263/03 is not suspended. The [Director] will request a reconsideration of my August 29th Order by October 6, 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 RECONSIDERATION DECISION

The Director sought reconsideration of paragraph 2 of my August 29th order and asked that it be deleted from the latter order. Adjudicator Stevenson, after considering the submissions of both counsel for the Director and the Appellants, refused the application (B.C.E.S.T. Decision No. RD322/03, issued November 24th, 2003). The relevant portions of Adjudicator Stevenson's reasons for decision (at pp. 4-5) are set out 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.
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> (*italics* in original)

I am advised by counsel for the Director that the Attorney General's office is now considering whether it will seek judicial review of Adjudicator Stevenson's decision, however, no decision in that regard has yet been made.

THE DECEMBER 8th HEARING

In accordance with the provisions of paragraph 5 of my August 29th order, the substantive issues raised by this appeal were subsequently scheduled to be heard in a three-day hearing commencing December 8th, 2003; hearing notices were sent to the parties on September 10th, 2003.

The parties appeared before me on December 8th. Although the Director had 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, counsel maintains that none of those documents should be included in the section 112(5) record and, in any event, all are privileged. This list was appended to a letter to the Tribunal's vice-chair dated December 3rd, 2003; the documents and categories of documents are itemized (a) through (h) on this list and apparently comprise 62 pages.

At the December 8th hearing, 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.

Counsel for the Director had also appended to her December 3rd letter a series of e-mails between the delegate who issued the Determination and another person who apparently has a similar role with the federal employment standards agency (HRDC). These e-mails span a period from February 11th to 14th, 2003. Counsel for the Director says that these e-mails were "not in the Director's files, but has [sic] been requested and received based on the comments of the counsel for the Appellants".

It is not clear from whom these e-mails were obtained, nor is it clear why these e-mails were not contained in the Director's files. I note that the dates of the e-mails all predate the issuance of the Determinations (May 5th, 2003). They refer, in part, to an investigation that was being undertaken by the provincial delegate's federal counterpart 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)."

I would have thought that these e-mails were documents that were "before" the Director when the determination was made and thus would be, presumptively, part of the record that ought to have been produced under section 112(5). The Director's jurisdiction to determine the four employees' unpaid wage claims was a central issue in the investigation and was one that was specifically addressed in the Determinations. A document that was before the delegate and which addressed the jurisdictional issue would *prima facie*, it seems to me, form part of the section 112(5) record.

It is not clear whether the Director takes the position that these e-mails are part of the record but were not initially produced by mistake or oversight, or whether the Director takes the position that they are not part of the record.

Counsel for the Appellants maintains that there must be other documents in the Director's files that form part of the record but that have not yet been produced. He says that some documents that appear in the record disclosed to date refer to other documents that have not been disclosed. He says that other deficiencies (in terms of complete disclosure) are apparent on the face of the record.

Counsel for the Director says that the entire record has been disclosed and the appeal should now go forward on the merits. Counsel for the Appellants says that the record has not yet been fully disclosed and that he cannot be fairly asked to proceed until some determination is made that the complete record has been disclosed.

Accordingly, I must determine whether the Director has complied with the requirement to produce the record so that the hearing on the merits may proceed. This determination is made more difficult by the

fact that the Director has taken the position that she will not allow anyone at the Tribunal to inspect the documents listed as items (a) through (h) in the list attached to her December 3rd letter, in order to determine whether they should be included in the record or excluded because of privilege or for some other reason.

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). Further, the Director also takes the view that the Tribunal has no authority to inspect a document in the Director's files if a claim of privilege has been asserted with respect to that document.

The Director undoubtedly has the obligation at first instance under section 112(5) to determine what constitutes the record with respect to a given proceeding, and to provide those documents to the Tribunal. However, where (as here) an Appellant appears to have some basis for questioning the completeness of the record provided by the Director under s. 112(5), and raises that as an issue before the Tribunal, that issue must be decided in order for the appeal to proceed in accordance with statutory requirements. The Tribunal's powers of inspection would normally be available and of assistance in deciding an issue of this nature. The question arising in the present case is whether the fact that the Director has declared certain documents to be privileged exempts those documents from any possibility of inspection by the Tribunal. If so, would the Appellants then be obliged simply to accept the Director's assertion that the complete record has been produced despite circumstances, outlined above, which appear to give rise to some basis for concern in that regard?

In light of the Director's position, counsel for the Appellants made several motions before me on December 8th, 2003, including a motion that I find that the Director and her delegates in contempt of the Tribunal. Counsel for the Appellants asserts that the Director has not complied with my August 29th, 2003 Order.

Counsel for the Appellants also requested that the appeal hearing be adjourned, that a number of summonses be issued by the Tribunal (including summonses for various delegates and the Director), that counsel for the Director be denied an audience before the Tribunal or that limitations be imposed regarding her role in this appeal proceeding, and that I make an order for costs in favour of the Appellants.

FINDINGS

I do not intend to address the requests for summonses or the matter of costs at this juncture.

I am, however, of the view that the question of the record is a fundamental question that must be resolved before this appeal can go forward on its merits. The Director's obligation to provide a record is an obligation that has only relatively recently been incorporated into the *Act.* To my knowledge, there is no Tribunal jurisprudence regarding the ambit of section 112(5). Unfortunately, this subsection defines the "record" in only general terms (except for "witness statements") and does not set out the process for determining whether the complete record has been disclosed, where that becomes a disputed issue before the Tribunal.

Accordingly, after hearing from the parties on December 8th I adjourned the appeal hearing. I also directed that the parties file written submissions with respect to the following three issues:

1. The August 29th Order - 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?

ORDER

Pursuant to section 107 of the *Act* and Rules 14(d) and 14(h) of the Tribunal's Rules of Procedure (Appeals), I am issuing the following Orders:

1. The Appellants shall file with the Tribunal a written submission with respect to the three issues noted above on or before Friday, January 9th, 2004;

2. The Director shall file a written response on or before Friday, January 23rd, 2004;

3. If any of the Respondent employees wishes to file a submission responding to that filed by counsel for the Appellants, that submission must also be filed with the Tribunal on or before Friday, January 23rd, 2004;

4. If the Appellants wish to file a final written reply to that filed by the Director or any Respondent employees, that submission must be filed on or before Wednesday, February 4th, 2004.

5. The Tribunal will arrange for all submissions received pursuant to this Order to be disclosed to all other parties.

6. After receiving all submissions filed in accordance with this Order, I shall issue written reasons for decision and further directions regarding the adjudication of this appeal.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal