Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

The Director of Employment Standards
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBERS: Kenneth Wm. Thornicroft (Member & Panel Chair)
Brent Mullin (Tribunal Chair)
Shafik Bhalloo (Member)

FILE No.: 2015A/113

DATE OF DECISION: October 5, 2015

DECISION

SUBMISSIONS

Justin Mason — counsel for the Director of Employment Standards

OVERVIEW

1. This is a timely application filed by legal counsel for the Director of Employment Standards (the "Director") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of BC EST # D075/15 issued by Tribunal Member Roberts on July 23, 2015. The application concerns the scope of the Director's obligation to provide the record under subsection 112(5) of the *Act*:

> On receiving a [notice of appeal], the director must provide the tribunal with the record that was before the director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director.

2. The impugned order is as follows (para. 10):

> In accordance with subsections 109(1)(e), (g) and (h) of the *Act*, I make the following Order:
>
> The Director shall disclose any documents in written and/or electronic format that record evidence provided by individuals giving evidence in relation to the complaint. Such disclosure shall be completed **no later than August 7, 2015.**
>
> (**boldface** in original text)

3. Subsections 109(1)(e), (g) and (h) of the *Act* empower the Tribunal to, respectively, "inspect any records that may be relevant to an appeal", "require a person to disclose, either orally or in writing, a matter required under this Act and require the disclosure to be made under oath or affirmation" and "order a person to produce, or to deliver to a place specified by the tribunal, any records for inspection under paragraph (e)".

4. The present application concerns an interim order issued by Tribunal Member Roberts. Ordinarily, the Tribunal will not entertain a reconsideration application relating to an interim decision or order (see, for example, *World Project Management Inc.*, BC EST # D134/97; *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98 [*Milan Holdings*]; *Director of Employment Standards (Super Save Disposal Inc.)*, BC EST # RD172/04). However, given the nature of the document production order at issue here, we are of the view that it would not be appropriate to hold the Director's application in abeyance until the appeal proceedings are finally determined. If the production order were allowed to stand without being reconsidered at this juncture, and if the Director's position ultimately prevailed in a reconsideration of the final appeal decision, it is conceivable that the Director could suffer irreparable harm. Further, by dealing with this matter at the present time, the appeal can proceed in a timely manner (see subsection 2(d) of the *Act*) with a proper evidentiary record.

5. In accordance with what is now known as the *Milan Holdings* test (*supra*), reconsideration applications are evaluated using a two-stage test. The Tribunal will first consider whether the application presumptively raises a serious and arguable issue. If the application passes the first stage, the Tribunal will then consider the application on its merits. In our view, while this application passes the first stage of the *Milan Holdings* test, we are not persuaded that the application is meritorious. Accordingly, we do not find it necessary to seek submissions from the respondent parties.

6. In assessing the present application we have reviewed the record before Member Roberts as well as the material filed in support of the application by the Director's legal counsel.

BACKGROUND FACTS

7. On March 3, 2015, and following an investigation into an unpaid wage complaint filed by Steven Martin Thomas ("Mr. Thomas"), a delegate of the Director (the "delegate") issued a Determination against ProTruck Collision & Frame Repair Inc. ("ProTruck") ordering it to pay Mr. Thomas compensation for length of service (section 63 of the *Act*) and concomitant vacation pay (section 58 of the *Act*). In addition, and also by way of the Determination, the delegate levied two separate $500 monetary penalties against ProTruck (section 98 of the *Act*). The total amount of the Determination, including section 88 interest, is $4,766.20.

8. The delegate's "Reasons for the Determination" (the "delegate's reasons") indicate that Mr. Thomas filed his complaint against another company the assets of which were subsequently sold to ProTruck, a heavy-duty truck repair firm. Mr. Thomas' last working day with the original employer was March 21, 2014, shortly before the extended closing date of the asset sale. Mr. Thomas maintains he stopped working due to a work-related injury and when he later attempted to return to work he was told the company had been sold and that no work was available for him. ProTruck's position on appeal is that Mr. Thomas was not fit to return to work. The delegate determined that ProTruck was liable to Mr. Thomas as a "successor employer" under section 97 of the *Act* and that Mr. Thomas was entitled to compensation for length of service under section 63 of the *Act*.

9. ProTruck appealed the Determination on each of the three statutory grounds of appeal: i) the delegate erred in law; ii) the delegate failed to observe the principles of natural justice in making the Determination; and iii) that it had new and relevant evidence that was not available when the Determination was being made (subsections 112(1)(a), (b) and (c) of the *Act*).

10. A person wishing to appeal a determination must, among other things, file a notice of appeal with the Tribunal and deliver a copy of this notice to the Director (see section 112 of the *Act*). The Director, after having been served with the appeal notice "must provide the tribunal with the record that was before the director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director" (subsection 112(5) of the *Act*). The record is essential to adjudicating appeals since the Tribunal generally adjudicates appeals without holding an oral hearing (see section 103 of the *Act* that incorporates, by reference, section 36 of the *Administrative Tribunals Act*) and therefore it is critically important that the Tribunal know what information and documentation was, or was not, before the delegate when the Determination was being made.

11. On April 9, 2015, the Tribunal's Appeals Manager wrote to the delegate requesting that the record be produced by April 23, 2015. On April 17, 2015, the delegate delivered the record to the Tribunal and on April 20, 2015, the Tribunal's Appeals Manager wrote to ProTruck regarding whether it had any objections to the "completeness of the Record". On May 1, 2015, ProTruck raised several objections regarding the record and asked, among other things, that the delegate (and another Employment Standards Branch employee who, we understand, was also involved with the file) disclose "[r]ecords of all telephone conversations and/or e-mails and/or any other form of correspondence or communication that [the delegate and another Employment Standards Branch employee] had with [certain named individuals including Mr. Thomas]" as well as communications that either had with "[a]ny other individuals that [the delegate and the other named employee] communicated with regarding this complaint". On May 19, 2015, the delegate replied indicating that she was not prepared to disclose this latter documentation:

> [ProTruck] has requested all records of telephone conversations, emails, and any other form of correspondence or communication on file. Notes made during the conduct of an investigation are not customarily provided as part of the Record, as the verbal statements of the parties that contained relevant information are recorded in the decision.

12. On May 29, 2015, and by way of reply to the delegate's position, ProTruck asserted that the requested information must be provided so that it could assess whether the delegate "treated the employer fairly" and to provide it with an opportunity to review and respond to all of the evidence that was before the delegate when she made the Determination. The parties subsequently filed their written submissions with respect to the merits of the appeal.

THE INTERIM DECISION REGARDING DOCUMENT PRODUCTION

13. On July 23, 2015, Member Roberts issued the interim decision that is the subject of this reconsideration application. The relevant portions of this decision are reproduced, below (at paras. 4 – 5 and 7 – 9):

> ProTruck contends that the record ought to contain any records in written and/or electronic format, including any records of telephone conversations, emails, and any other form of correspondence or communication that Melony Forster, the delegate, and Ken Proulx, an employee of the Employment Standards Branch, had with individuals concerning the complaint. (I note parenthetically that ProTruck also argued it has been prejudiced because certain documents that were disclosed in the record were not disclosed to ProTruck during the investigation process. However, that is an issue to be dealt with in the appeal, and not an issue relating to the completeness of the record.)
>
> ProTruck submits it is essential for the Tribunal to have the missing records so the Tribunal can determine whether the delegate adhered to the principles of administrative fairness and natural justice during the investigation and in making the Determination.
>
> …
>
> When defining the ambit of the section 112(5) record, the governing principle is not materiality or reliance, *Super Save Disposal Inc. - and - Actton Transport Ltd.* (BC EST # D100/04) [*Super Save*]. In that decision, the Member stated:
>
> > The record must also include "any witness statement". Individual parties and their witnesses will likely give *viva voce* evidence although, I suppose, their evidence might be contained in a sworn or unsworn written statement. Written statements undoubtedly form part of the record. In *Balint* (BC EST # D103/03) the Tribunal made the following observations (at p. 4) about witness statements in the context of an investigation but I would conceive the following comments to be equally applicable where there is an oral hearing:
> >
> > > I find it curious that the Director, in responding to the appeal, says the investigating delegate "based his findings on the credibility of the parties based on his numerous conversations with them". If that were so, and if the alleged conversations were considered when the Determination was made, those conversations should have been included in the record provided to the Tribunal. I can find no such documents in the material filed by the Director. If the Director seeks to rely on verbal communications when making the Determination, those communications must be transcribed in some way and included with the record.
> >
> > …
> >
> > If a determination is issued following an independent factfinding investigation by a Director's delegate, the record consists of all documents submitted by (or on behalf of) the

> parties to the delegate and, in addition, any other documents obtained by, or on behalf of, the delegate during the course of the investigation. Where, as in the present case, more than one delegate had conduct of the matter, the record consists of all documents submitted to, or obtained by, any delegate who had conduct of the file.
>
> In this case, ProTruck seeks records of telephone conversations, emails, or other form of correspondence or communication that the delegate or another employee of the Employment Standards Branch had with individuals concerning this complaint.
>
> The issue at this stage of the proceeding is not whether the delegate complied with the requirements in section 77 to "make reasonable efforts to give a person under investigation an opportunity to respond". Rather, the issue is whether the delegate has complied with the section 112(5) requirement to provide the record. I find that any records of conversations with witnesses or other individuals who provided evidence to the delegate (or another employee of the Employment Standards Branch) are documents that should be included as part of the record in this case, whether or not the delegate relied on this evidence.

14. Tribunal Member Roberts then issued the production order that is now in question (see above, para. 2).

THE RECONSIDERATION APPLICATION

15. The Director's legal counsel makes three points. First, he submits that this application raises an important legal issue that has implications beyond this particular case – namely, the scope of the subsection 112(5) record and whether a delegate's investigative notes must be disclosed as part of the record. Counsel says that the Tribunal's two principal decisions regarding the scope of the record (particularly as it relates to delegates' investigative notes) are inconsistent and that this issue requires clarification. Second, he says that Tribunal Member Roberts should not have made a production order, relying on *Super Save*, without giving the parties an opportunity to make submissions with respect to the principles set out in that decision. Third, counsel submits that *Super Save* should not be followed and that the governing decision is *Cariboo Gur Sikh Temple Society (1979)*, BC EST # D091/14, confirmed on reconsideration: BC EST # RD030/15. Counsel says, following *Cariboo Gur Sikh Temple*, that production of a delegate's investigative notes should only be ordered in "rare and unique circumstances" and that Member Roberts should not have made the production order in this case without first determining that such "rare and unique circumstances" were present.

ANALYSIS AND FINDINGS

16. As noted above, we are satisfied that this application passes the first stage of the *Milan Holdings* test. The scope of the record is an important issue that concerns not just this appeal, but all appeals to the Tribunal. The Director, the appellant and all other respondent parties should have a clear understanding regarding the sort of information that should be included in the record. Further, as the Director's counsel states in his submissions, the issue of whether a delegate's investigative notes (or certain portions of them) should presumptively be included in the record is a matter that the Tribunal should unequivocally determine especially since there may be an inconsistency in the Tribunal's approach to this issue. In our view, the present application raises a significant legal issue that has implications for both the present appeal and for future cases.

17. Although this application arises out of an interim order, we believe that it is appropriate to address it now so that this appeal can be adjudicated in a timely manner and to prevent any possible prejudice arising from an order that could, ultimately, be set aside as having been improperly issued.

18. We now turn to the merits of the application.

19. It is important to stress that the Determination under appeal was issued following an *investigation* rather than an *oral complaint hearing*. These two adjudicative processes are very different (see *Super Save Disposal Inc.*, BC EST # D100/04; *Freney*, BC EST # D130/04; *Whitaker Consulting Ltd.*, BC EST # D033/06). An unpaid wage complaint may be adjudicated via either process and the Director has a broad (but not wholly unfettered) discretion to determine which adjudicative path a given complaint will follow. At a complaint hearing, the parties attend (usually in person but in some cases by teleconference) and present *viva voce* evidence and submit relevant documentary evidence. In this adjudicative process, the delegate is a neutral decision-maker who does not gather evidence; rather, the delegate adjudicates the complaint based on the evidence and submissions presented by the parties. "The delegate then makes a decision on the basis of the evidence presented at the hearing rather than on the basis of whatever evidence or information he or she might have been able to gather through an investigation process" (*Healey*, BC EST # D207/04 at page 5; see also *Freney*, *supra*).

20. Where the unpaid wage complaint is *investigated*, the delegate has a dual role as both investigator and decision-maker. The delegate, as investigator, is acting in a quasi-judicial capacity (*BWI Business World Incorporated*, BC EST # D050/96; see also *Mitchell v. British Columbia (Director of Employment Standards)*, 1998 CanLII 3983 (B.C.S.C.)) and "must make reasonable efforts to give a person under investigation an opportunity to respond" (section 77 of the *Act*).

21. In our view, the contents of the record will vary depending on whether the complaint was the subject of an investigation or an oral complaint hearing. In the latter case, the record would ordinarily include the complaint, the parties' written submissions (if any) and all documents filed at the complaint hearing (see *Super Save Disposal Inc.*, BC EST # D100/04 at page 9). The record would also include relevant documents that the delegate obtained prior to the hearing such as corporate registry searches, demands for production of records, payroll records, etc. where these documents were before the delegate "at the time the determination, or variation of it, was made" (subsection 112(5) of the *Act*). However, where a complaint is investigated, the parties will not know what documents or witness statements the complainant or respondent provided to the delegate, or were independently obtained by the delegate during the investigation, unless the delegate discloses this information and documentation to the parties. If an appeal is filed, the record provided to the Tribunal should include these documents and witness statements; indeed, subsection 112(5) mandates that the record include all "witness statements" and any other "document considered by the Director".

22. The central thrust of the Director's submission is that the arguably wider scope of the record as defined in *Super Save* has been narrowed by the more recent *Cariboo Gur Sikh Temple* decision and that production of delegates' notes will lead to delegates simply not making a written record of interviews with complainants or other witnesses. The Director's legal counsel submits:

> …the *Cariboo* Decision appears to indicate a change in direction with respect to the s. 112(5) "record" since the *Super Save* Decision was issued in 2004. In the Director's respectful submission, under the proper approach adopted in *Cariboo*, a delegate's investigative interview notes do not need to, and should not, be disclosed unless there is a finding of rare and unique circumstances, provided the parties have the relevant information contained in those notes and an opportunity to respond…
>
> The Director submits that the *Cariboo Decision* is directly on point with respect to the scope of the Disclosure Order and that the position and principles enunciated in that decision represents the proper approach to take when an objection involving the Director's notes is made as to the completeness of the "record". Accordingly, the Director submits that investigative notes should not be subject to disclosure as part of the record based upon the rationale and legal principles enunciated in *Cariboo* and *United Specialty* [*United Specialty Products Ltd.*, BC EST # D057/12]. Specifically, routine disclosure of such notes may compromise the deliberative process of an investigation, and may result in a delegate not keeping any notes of interviews. This would in turn be detrimental to the quality of the investigative and adjudicative

> process. To the extent that the Tribunal is of the view that there may be an exception to this rule, then the Director would agree that the exception would only be in the rarest of cases, namely if there were rare and very unique circumstances. The burden to establish the rare and unique occasion would be on the moving party.
>
> …the Director also accepts that if the Tribunal on reconsideration agrees that the legal principles in *Cariboo* should have been applied in a consistent and principled manner by the Tribunal in the Interim Decision, then it may be necessary for such submissions to be made to a panel on a referral back.

23. We wish to first note that the Director's legal counsel frames the impugned production order as concerning "investigative notes". However, the actual order issued by Member Roberts is more narrowly framed: "…documents in written and/or electronic format that *record evidence provided by individuals giving evidence in relation to the complaint*" (our *italics*) consistent with subsection 112(5) that refers to the record as including "any witness statement".

24. As noted above, the record must include "any witness statement". We are not persuaded that the record would include, for example, a written statement tendered by a complainant or other witness, but would not include the very same evidence given orally to, and contemporaneously recorded by, a delegate. Far from being a "rare and unique circumstance", this latter sort of evidence gathering technique is routinely utilized by all kinds of investigators – including the Director's delegates – and, in our view, falls within the ambit of the subsection 112(5) record.

25. Further, we are deeply troubled by the suggestion that delegates will stop keeping notes of interviews with complainants and other witnesses if such notes are subject to disclosure. Delegates are acting in a quasi-judicial capacity when conducting investigations and caseloads are such that delegates typically undertake many separate investigations concurrently. One wonders how delegates would be able to prepare legally sufficient reasons for decision if critical evidence were only available (and perhaps not even recoverable) in the recesses of their memories. In our view, delegates who conduct investigations – as well as delegates presiding at oral complaint hearings that are not otherwise independently recorded or transcribed – must keep an accurate written record of the evidence given by the complainant, respondent and other witnesses.

26. Since the Director's position is predicated on its submission that *Super Save* has been overtaken by *Cariboo Gur Sikh Temple*, we now turn to a brief review of those decisions. *Super Save*, a case where determinations were issued after an investigation, was the first comprehensive Tribunal decision addressing the scope of the subsection 112(5) record. The Director argued that certain documents were not part of the record and that others were protected from disclosure by solicitor-client privilege. We note that the issue of solicitor-client privilege does not arise in this case. The scope of the subsection 112(5) record was discussed at pages 9 – 13 of the *Super Save* appeal decision. In *Super Save*, the Director purported to rely on a "policy directive" that excluded "investigative notes" from the record (see page 13), however, this directive was affirmatively rejected as defining the scope of the record. The matter of "investigative notes" was addressed (at page 23) as follows:

> Further, Mr. White also acknowledged that the record delivered to the Tribunal did not include his "investigative notes". In my view, and particularly since these Determinations were issued after an investigation rather than following an oral evidentiary hearing, I am of the view that the record in this case should presumptively include the notes of any and all delegates (including Mr. White) who were involved in the investigation of the subject complaints.

27. The Director was ordered to produce the record "in light of the directions set out in these reasons". The Director subsequently applied for reconsideration challenging various aspects of the production order issued.

The reconsideration panel (see *Director of Employment Standards (Super Save Disposal Inc.)*, BC EST # RD172/04) held (at page 10):

> The reconsideration panel agrees with Member Thornicroft regarding his interpretation of the scope of the record in s. 112(5), for the reasons given by him. We do not accept the submission that this interpretation gives rise to the unworkable result that delegates must deliver each and every document in their custody as a matter of course. The decision itself addresses both the scope of the obligation, its limits, and its practical operation…
>
> The reasons for the Member's construction of s. 112(5) are set out in detail at pp. 7-14 of his May 31, 2004 reasons…They are based on a legal reasoning process, informed by an understanding of the operation of the legislative scheme, pertaining to the language and purpose of the section.

28. The scope of the record, as defined in *Super Save*, has consistently been applied in later Tribunal decisions – see, for example, *Quigg Development Corporation*, BC EST # D014/08 (reconsideration refused: BC EST # RD047/08) and *Dingman*, BC EST # D061/09.

29. As noted above, the Director's counsel relies on *Cariboo Gur Sikh Temple* and also correctly observes that this latter decision was based on an earlier Tribunal decision, *United Specialty Products Ltd.*, BC EST # D057/12. We now turn to these two decisions.

30. In *United Specialty Products*, the complainant claimed she was wrongfully dismissed (the employer asserted it had just cause) and her complaint was the subject of a 2-day complaint hearing. The delegate subsequently issued a determination in the complainant's favour. On appeal, and in an interim application, the employer sought an oral appeal hearing and an order for the production of the delegate's notes taken at the hearing. Both applications were refused. With respect to the latter matter, Member Bhalloo noted that the delegate's notes were intended to be a personal *aide-mémoire* rather than a verbatim transcript of the proceedings. Member Bhalloo compared the delegate's hearing notes to a judge's notes taken in a civil trial and ruled that such notes would not ordinarily form part of the record absent "a rare and very unique occasion" (which exception did not apply in the case at hand). We note that the delegate, in her submissions, accepted that the scope of the record in an "oral hearing" case was precisely as defined in *Super Save* (see para. 12). While we unreservedly accept that *United Specialty Products* was correctly decided, that decision simply does not address the issue presently before us, namely, the scope of the record where the determination was issued following an *investigation*.

31. In *Cariboo Gur Sikh Temple*, the Tribunal summarily dismissed an appeal under subsection 114(1)(f) of the *Act* as having no reasonable prospect of succeeding. The determination was issued following an investigation. After receiving the record delivered by the delegate the appellant employer objected "to the completeness" of the record (BC EST # D091/14 at para. 5). The relevant excerpts of the appeal decision relating to this latter matter are reproduced, below (at paras. 53 – 54 and 57 – 59):

> As a final matter, I will comment on the objection by counsel for the Society to the completeness of the section 112(5) "record". For clarification, counsel objects to the absence of notes of interviews between the Director and the Society concerning allegations of fraud; notes of interviews between the Director and Mr. Sodhi [the complainant] in response to allegations that he had provided fraudulent documentation; and notes between the Director and Varinder Gill concerning his evidence, including his response to allegations that he admitted to creating fraudulent documentation relating to Mr. Sodhi's conditions of employment.
>
> The Director has responded to the objection, noting, in relation to the first two matters, that the Society and Mr. Sodhi were advised that their respective arguments and evidence was expected to be put in written form, written submissions were received from both parties and it was those submissions which

> were relied on. In relation to the third matter, Varinder Gill's evidence was not accepted and, while he verbally denied falsifying, or admitting to falsifying, documents, that information was passed on to the Society and, in the final analysis, little turned on his evidence…
>
> … In respect of the demand for the Director's notes, I adopt the position expressed by the Tribunal in *United Specialty Products Ltd.*, BC EST # D057/12, in which the Tribunal stated, in reference to notes taken at a complaint hearing, that such notes are not customarily ordered to be produced. The rationale for such position is expressed in that decision at para. 18 of the decision, with the Tribunal noting that ordering production of the Director's notes would be "a rare and unique occasion". Although this decision specifically addresses notes taken during a complaint hearing, I do not find notes taken during an investigation that has their purpose of providing the factual basis for adjudicating the complaint to be significantly different in nature to compel a lesser view of when they might be ordered to be produced, provided the relevant information contained in those notes, and an opportunity to respond, is provided.
>
> I do not find anything in the circumstances of this matter would qualify as "a rare and unique occasion". All of the information that might be found in the notes of the Director was committed to writing by each party. Notes relating to discussions with Varinder Gill are not relevant to this appeal.
>
> The objection is not accepted. The notes need not have been provided.

32. Thus, the delegate's notes concerning interviews with the employer and the complainant were not disclosed because the parties were specifically advised to file written submissions (which they did) and these submissions were included in the record. In effect, the delegate indicated to the parties that the only evidence (on this score) to be included in the record before him would be that contained in their formal written submissions. Thus, each party had information about the other party's position with respect to the "fraud" allegation. With respect to the delegate's witness interview, those notes were not produced because the delegate did not rely on this evidence and, in any event, the thrust of this witness's evidence "was passed on to the [employer]". The Member noted, without referring to *Super Save*, that the Tribunal would not ordinarily order a delegate's investigative notes to be produced "provided the relevant information contained in those notes, and an opportunity to respond, is provided". The Member concluded "[a]ll of the information that might be found in the notes of the Director was committed to writing by each party" and that this information was disclosed and that the notes relating to the witness were not relevant.

33. In our view, the Member's comments more appropriately speak to the delegate's obligation under section 77 of the *Act* to ensure that a respondent is given a reasonable opportunity to respond to the substance of the complaint rather than to the scope of the section 112(5) record.

34. Similarly, on reconsideration of *Cariboo Gur Sikh Temple* (BC EST # RD030/15), the delegate's notes were addressed principally in the context of section 77, rather than subsection 112(5):

> …the Member determined that the Society had not shown how the failure to produce the notes, or the other documents, *had prevented it from knowing the substance of the case being made against it, or deprived it of an opportunity to respond.* (para. 18)
>
> The Member declined to accede to the Society's objection to the contents of the record on the basis that the Society had failed to identify the documents which might have been relevant to the issues on the appeal and *how the failure to receive those documents had affected the ability of the Society to know and respond to the claims made by the Complainant*. The Member's comments reflect the position expressed by the Delegate in his explanation of the record, where he stated that natural justice does not require that a party be provided with every document submitted. Instead, he stated, *it is sufficient under the Act that a party be provided with a reasonable opportunity to respond to any claims made. In essence, the Delegate stated that there were no allegations of any substance in documents received by him which were not shared with the Society.* (para. 51)

> …The Member said that the Delegate had advised that some of the documents were irrelevant, and that the allegations in the ones that were relevant had been shared with the Society. In this case, *I do not see that the Delegate's choosing not to produce irrelevant documents, or relevant documents the substance of which was communicated to the Society can amount to a failure of natural justice.* (para. 55)
>
> *…What section 77 requires is that a person who is the subject of a complaint has a reasonable opportunity to respond. Nowhere is it stated that in all cases all relevant documents must be disclosed.* (para. 56)
>
> There will, of course, be many cases where natural justice requires that a relevant document be disclosed. The Member decided that this was not one of them, insofar as the undisclosed documents were concerned. A reason given by the Member was that the Society had not identified in its submissions any undisclosed documents that might have been relevant to an issue in the appeal; *nor had it established that the receipt of any such documents was essential in order for it to have a reasonable opportunity to respond to the complaint.* (para. 57)
>
> The same conclusions can be drawn regarding the Society's submissions on this application. (para. 58)
>
> For these reasons, I see no basis for disturbing the Member's decision regarding the contents of the record. (para. 59)
>
> (our *italics*)

35. The two disclosure obligations contained in section 77 and subsection 112(5) of the *Act* are both legislatively and conceptually separate. They are also temporally separate – section 77 is triggered once an investigation is undertaken; subsection 112(5) does not come into play unless and until there is an appeal of a determination. Insofar as section 77 is concerned, we accept the notion that the delegate's section 77 obligation can be satisfied by disclosing the nature and substance of a document rather than the document itself and that there is no obligation to disclose wholly irrelevant documents. However, the governing test regarding disclosure under section 112(5) is not necessarily "relevance" or even "reliance" but, rather, whether the documents, including witness statements and any other documents considered by the delegate, were "before the director at the time the determination, or variation of it, was made".

36. If *Cariboo Gur Sikh Temple* stands for the proposition that the subsection 112(5) record does not include those portions of the delegate's notes, prepared during the course of an investigation, that record or otherwise summarize the evidence of the complainant, or any other party or witness, we do not accept that proposition to be correct. While the delegate's notes pertaining to interviews with the complainant or other witnesses are not required to be disclosed under section 77 provided the substance of the complainant's or other witnesses' evidence is disclosed for purposes of allowing an adequate opportunity to respond, such notes nonetheless form part of the subsection 112(5) record and, accordingly, must be disclosed.

37. The leading authority regarding the contents of the record, namely, *Super Save*, was not cited in either the *Cariboo Gur Sikh Temple* appeal decision or the reconsideration decision. The appeal decision purports to rely on, and extend, *United Specialty Products*, but this reliance and extension was, in our view, misplaced. As previously noted, we consider *United Speciality Products* to have been correctly decided. However, this latter decision concerns the content of the record where the determination was issued following an *oral complaint hearing*. There are sound reasons why the scope of the record will vary depending on whether the complaint was investigated or adjudicated following an oral hearing.

38. When a determination is issued following an oral hearing, all parties know (or at least are given the opportunity to know) what evidence and argument is before the delegate. If a complaint is investigated, neither party will necessarily know what evidence and arguments the other party has provided to the delegate unless the delegate acts as a conduit of this sort of information – this is the foundation for the delegate's disclosure obligation under section 77. If the determination issued following an investigation is appealed, it is

a matter of fundamental fairness that the appellant know what evidence was before the delegate. The Tribunal requires a complete record so that it can properly assess the parties' arguments. For example, the Tribunal has stressed, in literally hundreds of decisions, that the delegate's findings of fact are entitled to deference. However, a factual finding made without evidence, or that is clearly inconsistent with the evidence that was before the delegate, can only be effectively challenged if the party challenging the finding has a record of the evidence that *was* before the delegate. Thus, subsection 112(5) requires the delegate to produce the complete evidentiary record and this includes the delegate's notes recording the evidence of the complainant and other witnesses when the delegate has gathered this evidence, say, for example, via a telephone interview. Of course, when the complainant or other witnesses have submitted their evidence in the form of a written statement, these statements must be produced under subsection 112(5).

39. In this particular case, the delegate's reasons indicate that during the course of her investigation she interviewed the complainant and five other individuals. However, our review of the record, as disclosed, only includes statements from the complainant and one of the other five individuals. While the delegate did summarize the nature of these individuals' evidence in her reasons, the source documents (for example, a written statement or an excerpt from the delegate's notes taken contemporaneously with, say, a telephone interview (such an interview was conducted with at least two of these individuals, as noted in the delegate's reasons) is missing from the record. While we do not pass any judgment on the merits of the appellant's assertions in its appeal documents, we do note that, at least in part, the appeal is predicated on the delegate having misinterpreted or even completely ignored evidence that was submitted to her – without the source documents it is not possible to assess the veracity or merits of such assertions.

40. In our view, Member Roberts properly relied on *Super Save* in making the production order at issue in this application. It is important to stress that Member Roberts' order only requires the delegate to disclose investigative notes to the extent that they "record evidence provided by individuals giving evidence in relation to the complaint". Thus, the order is carefully tailored in full compliance with the disclosure strictures set out in *Super Save*.

41. The Director's legal counsel notes, and this appears to be factually accurate, that "neither the Employer nor the Director made use of the *Super Save* decision in their submissions, and the Tribunal did not notify the parties or provide an opportunity for the parties to make submissions with respect to the Tribunal's anticipated reliance upon the *Super Save* Decision." Although counsel did not expressly make this point, the thrust of his submission appears to be that the Member Roberts was obliged to first ask the parties to make submissions with respect to *Super Save* before making the impugned disclosure order. If that is, indeed, counsel's position, we reject it.

42. First, it is not the Tribunal's function to advise parties about how to frame their arguments or what particular decisions they should include in their written submissions. Second, the *Super Save* decision is, and has been for quite some time, posted on the Tribunal's "Noteworthy Decisions" webpage specifically in regard to the "appeal record". This decision is thus readily available to any party who chooses to review the Tribunal's leading decisions in the course of preparing a submission. Third, and perhaps most importantly, the Director and delegates should be well aware of the *Super Save* decision. This case was perhaps the most vigorously litigated appeal ever brought to the Tribunal with no fewer than nine separate appeal and reconsideration decisions, two British Columbia Supreme Court decisions and one British Columbia Court of Appeal decision. In each and every proceeding, the Director was represented by legal counsel. While only a few of these decisions addressed the "record", we find it untenable to suggest that the Director's legal counsel, and her delegates, are unaware of the *Super Save* decision as it relates to the scope of the subsection 112(5) record.

43. Our findings may be summarized as follows:

- The delegate's disclosure obligations under sections 77 and subsection 112(5) of the *Act* are separate and distinct obligations and different considerations apply in each case;
- The scope of the disclosure obligation under subsection 112(5) of the *Act* varies depending on whether the determination was issued following an oral complaint hearing or an investigation;
- Absent extraordinary circumstances, the delegate's notes taken during the course of an oral complaint hearing do not constitute a formal transcript of the hearing and are not required to be disclosed under subsection 112(5);
- Where a complainant's, or other witness's evidence is submitted in the form of a written statement, that statement forms part of the subsection 112(5) record and, where evidence is taken from such individuals directly by the delegate during the course of an investigation, the delegate's notes setting out the individual's evidence forms part of the record;
- *Super Save* is the governing Tribunal decision relating to the contents of the record.

44. In light of the foregoing considerations, we are of the view that the Director's application must be dismissed and Member Roberts' order confirmed.

45. Finally, we note that Member Roberts' order directed that the documents be disclosed by no later than August 7, 2015. An application for reconsideration does not operate as a stay of the order that is the subject of the application. Accordingly, if the documents ordered to be produced have not already been delivered to the Tribunal, they must be delivered forthwith.

ORDER

46. Pursuant to subsection 116(1)(b) of the *Act*, the Director's application for reconsideration of BC EST # D075/15 is refused and this matter is referred back to Member Roberts to be heard and adjudicated.

Kenneth Wm. Thornicroft Member Employment Standards Tribunal	Brent Mullin Chair Employment Standards Tribunal	Shafik Bhalloo Member Employment Standards Tribunal