Applications for Reconsideration

- by -

Director of Employment Standards
(the "Director")

- of Decisions 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)
Robert E. Groves (Member)

FILE Nos.: 2014A/58 & 2014A/60

DATE OF DECISION: November 17, 2014

DECISION

SUBMISSIONS

Adele J. Adamic	counsel for the Director of Employment Standards
Paul A. Bourassa	on behalf of 0862284 B.C. Ltd. and on his own behalf as a Director and Officer of 0862284 B.C. Ltd.
Sarah Craveiro	on her own behalf
Tim Chisholm	on his own behalf
Jonty Davies	on his own behalf
Ronald Janzen	on his own behalf

REASONS FOR DECISION OF MEMBERS KENNETH WM. THORNICROFT AND ROBERT E. GROVES (MAJORITY DECISION)

INTRODUCTION

1. We have before us two applications for reconsideration filed on May 8, 2014, by the Director of Employment Standards (the "Director") under section 116 of the *Employment Standards Act* (the "*Act*"). The Director's applications concern two separate, but related, appeal decisions issued by Tribunal Member Stevenson on April 8, 2014 (BC EST # D022/14 and BC EST # D023/14). The appellant in the first decision was 0862284 B.C. Ltd. (the "numbered company") and the appellant in the second decision was Paul A. Bourassa (a director and officer of 0862284 B.C. Ltd.; "Bourassa").

2. The first appeal decision (BC EST # D022/14) concerned a June 28, 2013, determination issued by a delegate of the Director of Employment Standards (the "delegate") against the numbered company and Fun City Sightseeing Inc. ("Fun City"; jointly, the two firms will be denoted as the "employer companies"). By way of the determination, these two business corporations were declared to be one employer under section 95 of the *Act* (the "associated" or "common" employer provision) and thus jointly and separately (severally) liable for $50,466.16 in unpaid wages (regular wages, statutory holiday and vacation pay) and section 88 interest owed to 42 former employees. In addition, and also by way of the June 28, 2013, determination, the two firms were assessed eight separate $500 monetary penalties under section 98 of the *Act*. Accordingly, the total amount payable under the June 28, 2013, determination was $54,466.16. We shall refer to this determination as the "Corporate Determination".

3. The second appeal, filed by Mr. Bourassa, related to the delegate's July 31, 2013, determination issued against Mr. Bourassa under section 96 of the *Act* (this provision creates a personal director/officer liability for unpaid wages owed by the corporate employer). We shall refer to this determination as the "Section 96 Determination". Mr. Bourassa was ordered to pay $50,466.16 by way of the Section 96 Determination and this determination was the subject of appeal decision BC EST # D023/14.

4. On April 25, 2014, Mr. Bourassa filed an application for reconsideration of BC EST # D023/14. Tribunal Member Thornicroft addressed this latter application in separate reasons for decision (Mr. Bourassa's

reconsideration application was refused). These reasons for decision address the Director's applications for reconsideration of the two appeal decisions.

5. The two determinations were issued following an investigation, rather than an oral hearing, by a Director's delegate (see *Act*, section 117) – the "delegate". In each case, the delegate issued concurrent "Reasons for the Determination" and we shall refer to these reasons as, respectively, the "Corporate Determination Reasons" and the "Section 96 Reasons".

6. On appeal, and in both instances, Tribunal Member Stevenson issued an order varying the determinations and directing that the Director recalculate the employees' unpaid wage entitlements. We will review the substance of, and the basis for, the two determinations and Tribunal Member Stevenson's appeal decisions in greater detail, below.

7. The Director of Employment Standards says that Tribunal Member Stevenson "erred in law in interpreting section 76(2), section 77, and section 80(1)(b) in a manner that excludes from the right to recovery of wages a significant number of former employees of Fun City". These latter provisions of the *Act* concern, respectively, the Director's statutory authority to conduct unpaid wage investigations whether or not a formal complaint has been filed, the Director's obligation to "make reasonable efforts to give a person under investigation an opportunity to respond" and the statutory limit on an unpaid wage award. The Director says that, if allowed to stand, the appeal decisions "will have considerable impact on the administration of the *ESA* by the Director, and the ability of the Director to recover wages for employees who are the victims of contraventions of the *ESA*".

8. We are adjudicating these applications based on the submissions filed by Counsel for the Director of Employment Standards, Mr. Bourassa (a common submission filed on behalf of the numbered company and himself), and by some of the former employees. In addition, we have also reviewed the complete appeal record that was before Tribunal Member Stevenson. The submissions filed by the former employees, almost entirely, reflect their view that the wage awards should stand and in some cases they challenge factual assertions made by Mr. Bourassa in his submission. Mr. Bourassa's submissions are almost exclusively focussed on challenging the delegate's factual findings and his credibility (and now, in addition, the credibility of the Director's legal counsel) but do not, in any fashion, address the legal issues raised by the reconsideration applications.

9. Although we acknowledge that the delegate could have been clearer in his communications with the numbered company and its principal, Mr. Bourassa, we are of the view that, in the somewhat unique circumstances of this case, the delegate provided adequate notice regarding his investigation into the unpaid wage claims of all former employees, not merely those who filed formal complaints. Accordingly, we do not share our colleague Tribunal Chair Mullin's view that the delegate failed to provide notice as required by subsection 80(1)(b) of the *Act*. We would grant the reconsideration.

PRIOR PROCEEDINGS

10. As noted above, the Director's applications concern both the Corporate Determination and the Section 96 Determination. We summarize the delegate's findings, below.

The Corporate Determination

11. The employer companies operated "hop-on/hop-off" tour buses in Vancouver under the business name "Fun City Sightseeing" and the complainants and other former employees were variously employed in the business as drivers, tour guides or sales representatives.

12. The Corporate Determination was issued following an investigation by the delegate into 22 separate complaints filed by former employees of one or both of the employer companies. During the course of his investigation, the delegate determined that there were a further 20 former employees "who had not been paid all wages owing" (Corporate Determination Reasons, page R2).

13. The delegate investigated and determined two broad questions: first, whether the two employer companies should be treated "as one employer for the purposes of the *Act*" under section 95; and second, whether the employer companies had failed to pay all of the wages the 42 former employees earned, or that otherwise became payable, during the period from April 1 to October 31, 2012. As we understand the situation, the business was apparently shut down on, or shortly after, October 5, 2012, and the employees who were still on the payroll as of this latter date were not paid any wages for their final pay period.

14. With respect to the first question, the delegate determined that the two employer companies should be "associated" and deemed to be a single employer under section 95 of the *Act*. In coming to that conclusion, the delegate relied on, *inter alia*, evidence of common control and direction of the two firms and their functional integration, banking records, evidence from the former employees, evidence from a former payroll administrator, B.C. Corporate Registry records, City of Vancouver licencing records, and evidence showing the integration of the financial resources of the two corporations (see Corporate Determination Reasons, pages R9 – R13).

15. The employer companies did not maintain proper payroll records although the delegate eventually did obtain some employer payroll records from a third party source; the delegate also had before him some records that were prepared by individual former employees relating to their work days and hours of work. The employers' records indicated that the employer companies failed to pay overtime pay, statutory holiday pay, and vacation pay in accordance with the provisions of the *Act*. In some instances, the former employees' unpaid wages also included amounts reflecting "NSF" payroll cheques and unauthorized payroll deductions. The delegate prepared individual wage entitlement schedules (appended to both determinations) for each of the 42 former employees and these entitlements varied widely ranging from amounts less than $30 to an amount exceeding, in one case, $6,000.

The Section 96 Determination

16. On July 31, 2013, approximately one month after the Corporate Determination was issued, the delegate issued the Section 96 Determination. In his accompanying reasons, the delegate noted that "to date" the employer companies had not appealed the Corporate Determination (in fact, the numbered company filed an appeal on August 6, 2013, the last day of the appeal period) nor had they paid any of the monies owed under the Corporate Determination. Further, the delegate determined, based on B.C. Corporate Registry Records, "that Paul Bourassa also known as Paul A. (Alexander) Bourassa was a director and officer [of the numbered company] between April 1, 2012, and October 31, 2012, when the Complainants' wages were earned or should have been paid". Section 96(4) of the *Act* essentially states that if a person is a director or officer of any firm within a group of "associated" entities under section 95, that person is personally liable for up to 2 months' unpaid wages owed to an employee of any one of the associated entities. Since all of the 42 former employees' unpaid wage claims fell below the 2-month threshold, the delegate determined that Mr. Bourassa

was liable for $50,466.16 in unpaid wages (the same amount of unpaid wages determined to be owed under the Corporate Determination).

The Appeal Decisions

17. In August 2013, Mr. Bourassa filed appeals on behalf of the numbered company (relating to the Corporate Determination) and on his own behalf (relating to the Section 96 Determination). Both appeals were based on the grounds that the delegate erred in law (subsection 112(1)(a)) and failed to observe the principles of natural justice in making the determinations (subsection 112(1)(b)).

18. On April 8, 2014, Tribunal Member Stevenson issued his reasons for decision in both appeals. Tribunal Member Stevenson's decision relating to the Corporate Determination is BC EST # D022/14 and his decision relating to the Section 96 Determination is BC EST # D023/14.

19. The numbered company's fundamental legal challenge to the Corporate Determination concerned the correctness of the section 95 declaration. Shortly put, the numbered company's position on appeal was that there was no proper legal and/or factual foundation for the declaration. Tribunal Member Stevenson rejected this assertion and in the course of doing so noted that many of the assertions advanced by the numbered company were flatly contradicted by other credible documentary evidence (for example, banking and licencing records). In sum, Tribunal Member Stevenson found there was "ample evidence" to support the section 95 declaration and that, in essence, the numbered company's appeal was not much more than a simple unsubstantiated statement of disagreement with the delegate's determination on the section 95 issue.

20. The numbered company's natural justice argument was based on the assertion that the delegate was, or appeared to be, biased against it. Tribunal Member Stevenson rejected this assertion finding that "there is no clear objective evidence from which it can reasonably be found the [delegate] was disposed to hold an adverse view of Mr. Bourassa and [the numbered company] such that the [delegate's] ability to analyze the evidence neutrally and render an impartial decision was compromised" (para. 62).

21. Finally, Tribunal Member Stevenson addressed an issue that he identified during his review of the material before him. As previously noted, the two determinations include unpaid wage awards in favour of 22 former employees who filed complaints as well as 20 other individuals who did not file complaints. On February 14, 2014, Tribunal Member Stevenson, by way of a letter from the Tribunal's Appeals Manager to the parties, requested submissions regarding the following point (we are quoting from the Tribunal Manager's February 14 letter):

> The Member charged with this appeal has raised a concern about the inclusion of twenty persons in the Determination who did not file a complaint with the Director.
>
> …
>
> The concern which arises in the circumstances of this case flows from section 80(1), which states:
>
> **80** (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning
>
> (a) in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of the employment, and
>
> (b) in any other case, 6 months before the director first told the employer of the investigation that resulted in the determination,
>
> plus interest on those wages.

> The section 112(5) "record" does not, on first blush, indicate any section 76(2) investigation was being conducted, or if there was, when the employer was first told of it. In the absence of a timely investigation, the validity of the findings concerning those twenty persons is in question.
>
> The Member is seeking submissions from the parties that address this concern…

22. The parties were directed to file their submissions by February 28, 2014. The delegate filed a submission (dated February 28, 2014) but no other party did so. Tribunal Member Stevenson's decision regarding this issue is the matter that the Director now seeks to have reconsidered. We have reproduced, below, the salient portions of Tribunal Member Stevenson's decision on this point (at paras. 69 – 75):

> When I raised my concern with the parties about the inclusion of twenty persons in the Determination who did not file a complaint with the Director, I understood the Director had conducted an investigation of Fun City under section 76(2) of the *Act*…
>
> The Director's confirmation that no section 76(2) investigation was undertaken assists the analysis of my concern, but doesn't affect the outcome because, in any event, I can find nothing in the "record" indicating the Director told 0862284 there would be such an investigation. I am left in the same situation in respect of the requirements of the *Act* whether there was or was not a section 76(2) investigation.
>
> The *Act* requires a complaint to be in writing and delivered to the Branch. The *Act* does not require the written complaint to take a particular form or contain any particular information, although for reasons of procedural fairness there must be sufficient information in a complaint to inform an employer of the case against them to allow a reasonable opportunity to present evidence and argument in response: see *Inshalla Contracting Ltd.*, BC EST # RD054/06, at paras. 23-28 and cases cited therein. However, the *Act*, as I read it, provides no other way for finding wages are owing under the *Act* than through a complaint or a section 76(2) investigation.
>
> A complaint delivered outside of the statutory time limits provided in section 74 of the *Act* may be rejected by the Director. In respect of a wage claim that is before the Director, an employer's liability for wages is limited: "in the case of a complaint", from the earlier of the date of the complaint or termination of employment; or, "in any other case", from the Director first telling the employer of the section 76(2) investigation (section 80(1)).
>
> In this case, there are up to twenty former employees who have received the benefit of the Determination without either having directly filed a complaint or having the wage liability of 0862284 assessed against the requirements of subsection 80(1). I say "directly" because there is evidence, to which I will refer later, that some of the twenty former employees are the beneficiaries of a written complaint filed on their behalf by Jeff Weiss and acknowledged by Mr. Bourassa. The "record" and the Determination indicate evidence of the amounts owing to these former employees were not before the Director until the payroll records provided by the former bookkeeper were reviewed by him in June 2014. [*sic*, 2013]
>
> In my view, the *Act* does not allow the Director to avoid the statutory requirements for filing a complaint and award wages on what would be an untimely complaint if one were made and would, in any event, reach back past the wage liability period in subsection 80(1), since there were no complaints filed by the twenty former employees and section 76(2) was not used by the Director. While it may be of benefit to the former employees who have been awarded wages without having participated in the process, it is quite unfair to the employer who has had no opportunity to respond to the validity of the claims or to seek to invoke the statutory limitations for filing a complaint and limiting its wage liability: see section 2(b).
>
> Accordingly, the Determination must be varied to exclude those former employees for whom no complaint was made. In reaching this conclusion, I would not exclude those three employees whose names appear on the list prepared by Mr. Weiss and was provided to the Director by Mr. Bourassa on March 14, 2013. Mr. Weiss' document satisfies the requirement of a written complaint and it was delivered to the Branch. In his communication to the Director, Mr. Bourassa acknowledges the list is of "employees that are owed money from Fun City Sightseeing Inc." Even if the amounts found owing to those former employees in the Determination might now differ from what Mr. Bourassa accepted was

> owing in his communication, determining wages owing in respect of a complaint is a function of the role of the Director and, if the amounts do differ, there is nothing in this appeal that provides any basis for finding the Director erred in law in calculating wages owing for those former employees entitled to wages under the *Act*.

23. Tribunal Member Stevenson issued an order varying the Corporate Determination by cancelling the wage payment orders made in favour of the employees who did not file formal complaints (or were not otherwise named in Mr. Weiss' March 2013 memorandum). The Corporate Determination was referred back to the Director for purposes of recalculating the total unpaid wage award.

24. Tribunal Member Stevenson's decision with respect to the Section 96 Determination (BC EST # D023/14) was issued concurrently with his decision regarding the Corporate Determination. Since all of the issues raised by Mr. Bourassa in his appeal of the Section 96 Determination had already been dismissed (and were, in any event, not proper grounds of appeal of a director/officer determination), and in light of the fact that Mr. Bourassa did not contest his status as a director and officer of the numbered company, Tribunal Member Stevenson concluded that the stated grounds of appeal lacked merit. However, Tribunal Member Stevenson also held that the Section 96 Determination should be varied to reflect the correct amount of the unpaid wages he found to be due and payable by way of his decision regarding the Corporate Determination (at paras. 20 and 21):

> While Bourassa has not specifically raised an issue concerning the amount of his personal liability in this appeal, the corporate determination reached a final decision on the inclusion by the Director in the Determination of persons who had not delivered a complaint to the Branch. Specifically, in the appeal of the corporate determination, it was decided the Director had been over-inclusive in extending the wage awards in the corporate determination to persons who had not delivered a complaint to the Branch. That decision has the potential to directly impact his personal liability under section 96. This appeal must give effect to that decision, as to do otherwise would be unfair and open the door to all those concerns the doctrine of issue estoppel operates to prevent. Also, this result is so obvious that to require further expenditure of resources to hear other parties on it would be inefficient and impose a delay not justified by the circumstances.
>
> In sum, this Determination must be varied for the same reasons and on the same terms as the corporate determination.

THE DIRECTOR'S APPLICATIONS FOR RECONSIDERATION

25. Although the Director has filed separate section 116 applications, the two applications raise the identical issue, namely, whether Tribunal Member Stevenson erred in cancelling the unpaid wage awards made in favour of the former employees who never filed unpaid wage complaints (or were not otherwise named in the Weiss March 2013 memorandum).

Should the Applications be Considered on the Merits?

26. The Tribunal has a long-standing practice of reviewing reconsideration applications based on the two-stage approach set out in the *Milan Holdings* decision (*Director of Employment Standards*, BC EST # D313/98). Applications that are untimely, or simply ask the Tribunal to "reweigh" evidence in favour of the applicant, or that do not raise significant legal or procedural fairness questions will be summarily dismissed. On the other hand, if the application passes this first step, the Tribunal will proceed to an in-depth analysis of the issues raised by the application.

27. In the instant case, the application is timely and the Director does not ask the Tribunal to revisit any factual findings. The Director says that if Tribunal Member Stevenson's decision stands, it will have significant import for employees' (especially seasonal employees') access to the wage recovery provisions of the *Act*. Further, and quite apart from the public policy concerns, the Director says that the decision reflects an incorrect interpretation of the statutory framework and, in particular, the interplay of sections 76, 77 and 80 of the *Act*. We also note that this application raises a matter of statutory interpretation that the Tribunal has not yet squarely addressed.

28. In assessing whether these applications should be more fully examined on their merits, we are concerned that this entire proceeding may prove to have little practical consequence. The numbered company is no longer operating and does not appear to have any readily exigible assets. Counsel for the Director advises that Mr. Bourassa has made a consumer proposal under the federal *Bankruptcy and Insolvency Act* listing net assets of less than $890. He apparently incorrectly listed his liability under the Section 96 Determination as a debt in favour of the "Employment Standards Branch Winnipeg". However, even if ultimately no funds are recovered to satisfy the former employees' unpaid wage claims, we nonetheless think it appropriate for these applications to proceed given that they raise an important issue of statutory interpretation that has larger public policy implications.

29. Mr. Bourassa, for the numbered company, has not provided any specific objection to the Director's applications being reconsidered based on the *Milan Holdings* criteria and neither has any other respondent. In our view, these applications pass the first stage of the *Milan Holdings* test and, accordingly, should not be summarily dismissed.

Consideration of the Applications on the Merits

30. The *Act* seemingly provides for two separate dispute resolution procedures: i) the Director may hold a complaint hearing where the parties attend and present their evidence following which a decision is rendered based on the evidence and arguments submitted at the hearing; alternatively, ii) the Director may conduct an investigation. There was no complaint hearing in this instance; the two determinations were issued following an investigation. Section 76 of the *Act* creates two investigative options. First, an investigation may be conducted following the filing of a section 74 complaint (indeed, subject to subsection 76(3), the Director, at the very least, "*must* accept and review a complaint"; see subsection 76(1) and *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553). Second, "The director may conduct an investigation to ensure compliance with this Act and the regulations, *whether or not the director has received a complaint*" (subsection 76(2)). (our *italics*)

31. The Director's investigation was initially triggered by a series of complaints (ultimately 22 in total) filed during the fall of 2012 following the October 5, 2012, closure of the business. In many of the complaints, the employer was simply identified as some version of "Fun City Sightseeing" (i.e., with different configurations such as "Funcity" and "Sight Seeing") although in other complaints, the numbered company was also, or separately, identified as the employer. It would appear that the first complaint was filed on September 13, 2012, (seeking about $890) and this, in turn, produced a series of e-mails and at least one letter from the Employment Standards Branch to Fun City Sightseeing Inc. and Mr. Bourassa seeking to explore resolution of the complaint. These communications spanned the period from the middle to the end of October 2012 and during this period (and also in November 2012), several other former employees filed similar complaints against Fun City Sightseeing and/or the numbered company.

32. On November 15, 2012, the delegate issued a "Demand for Employer Records" to the numbered company seeking "any and all payroll records" for "All employees" of the company during the period from April 1,

2012, to September 30, 2012. In addition, and also on November 15, 2012, the delegate wrote to the numbered company (to Mr. Bourassa's attention) advising "that this office of the Employment Standards Branch has received a number of complaints under the *Act* alleging that as your former employees, they have not been paid their final pay for work performed". The letter noted that the delegate was not the complainants' "advocate" and requested that Mr. Bourassa provide "your response to these allegations". The delegate sent a follow-up e-mail to Mr. Bourassa on November 22, 2012, asking him to call the delegate on a direct line. On November 26, 2012, the delegate sent another e-mail to Mr. Bourassa reiterating that "there have been a number of complaints alleging non-payment of wages from your former employees" and noting the Branch had not yet received any records in response to the "Demand for Employer Records" – another copy of the Demand was attached to the e-mail. The delegate said he would appreciate Mr. Bourassa "contacting me as soon as possible in regard to these complaints". Mr. Bourassa finally responded by e-mail on November 26, 2012, stating that he would not be in a position to deal with the matter before December 8, 2012, but, in any event, the numbered company "is not responsible for employees of Fun City Sightseeing Inc.".

33. Unpaid wage complaints filed under subsection 74 of the *Act* are governed by a 6-month limitation period running from either "the last day of employment" (subsection 74(3)) or, for alleged section 8, 10 or 11 contraventions, "within 6 months after the date of the contravention" (subsection 76(4)). Each of the section 74 complaints was timely inasmuch as it was filed within 6 months following the employee's last day of employment. Of course, ultimately the delegate expanded his mandate to include a review of the numbered company's (and Fun City's) entire payroll and this resulted in a payment order in favour of both complainants and other former employees who did not personally file formal section 74 complaints. With respect to this latter group of former employees, subsection 76(2) empowers the Director to conduct an investigation "whether or not the director has received a complaint".

34. Tribunal Member Stevenson's concern – and this triggered his request for further submissions contained in the Tribunal's February 14, 2014, letter to the parties – was that the Corporate Determination did not give full effect to the wage recovery limitations set out in section 80 of the *Act*. Subsection 80(1)(a) states that an employer can only be held liable for wages "that became payable in the period beginning (a) in the case of a complaint, 6 months before the earlier of the date of the complaint of the termination of the employment". As previously noted, there is no issue with respect to the timeliness of the formal complaints filed by former employees on their own behalf and, similarly, there is no issue regarding the wage recovery period as it relates to this class of former employees. However, subsection 80(1)(b) states that "in any other case" (presumably covering the situation where no formal complaint is filed and the Director conducts an investigation under subsection 76(2)), the employer can only be required to pay wages "that became payable in the period beginning…(b)…6 months before the director first told the employer of the investigation that resulted in the determination". In this latter circumstance, the key date is when the delegate "first told the employer of the investigation that resulted in the determination" – an employer can only be held liable for unpaid wages that became payable during the period dating from 6 months back in time from the "notification date".

35. Member Stevenson sought submissions regarding the impact of the subsection 80(1)(b) wage recovery limitation period because (quoting from the Tribunal's February 14, 2014, letter):

> The section 112(5) "record" does not, on first blush, indicate any section 76(2) investigation was being conducted, or if there was, when the employer was first told of it. In the absence of a timely investigation, the validity of the findings concerning those twenty persons [i.e., the "non-complainants"] is in question.

36. The delegate, and only the delegate, provided a response to Tribunal Member Stevenson's request for further submissions. The delegate's February 28, 2014, submission asserted that "[the numbered company] and Mr. Bourassa knew and were advised with respect to the fact that there were likely more complaints than actual complaints filed". The delegate noted, among other things, that the November 15, 2012, "Demand for Employer Records" sought the payroll records for "All employees" and that Mr. Bourassa, in an e-mail to the delegate dated March 14, 2013, provided "a list of employees that are owed money from Fun City Sightseeing Inc." that included the names of eight persons who never filed complaints. Both of these facts, so asserted the delegate, clearly showed that Mr. Bourassa and the numbered company "were aware from the outset of the investigation that I was seeking information for all employees" and that during various telephone conversations Mr. Bourassa was made fully aware of the nature and scope of the former employees' unpaid wage claims.

37. For his part, Mr. Bourassa, either on behalf of the numbered company, or in his own personal capacity, never suggested that he did not know that the delegate was reviewing both the unpaid wage complaints of the complainants and, at least potentially, whether any other former employee might also have a valid unpaid wage claim under the *Act*. Mr. Bourassa's position throughout this matter has been simply that neither he, nor the numbered company, is liable for any unpaid wages owed to Fun City employees because the numbered company never "employed" any of the 42 former employees. On appeal, Mr. Bourassa suggested that the delegate "solicited" additional complaints and that his finding in favour of former employees who did not personally file complaints was "a clear manifestation of his bias toward [Mr. Bourassa]".

38. Tribunal Member Stevenson rejected all the reasons for appeal advanced by Mr. Bourassa both on behalf of the numbered company and in his personal appeal of the Section 96 Determination. However, Tribunal Member Stevenson also concluded that the delegate awarded wages outside the section 80(1)(b) wage recovery period, at least with respect to some of the former employees named in the Corporate Determination (para. 74) and, accordingly, referred the two determinations back to the delegate for purposes of recalculating the numbered company's and Mr. Bourassa's unpaid wage liabilities. In making the referral back order, Tribunal Member Stevenson proceeded on the basis that, firstly, the delegate never conducted a subsection 76(2) investigation and, secondly, even if one had been conducted, Mr. Bourassa and the numbered company were never formally advised that such an investigation would be conducted (BC EST # D022/14, para. 70). Tribunal Member Stevenson concluded (at para. 74):

> In my view, the *Act* does not allow the Director to avoid the statutory requirements for filing a complaint and award wages on what would be an untimely complaint if one were made and would, in any event, reach back past the wage liability period in subsection 80(1), since there were no complaints filed by the twenty former employees and section 76(2) was not used by the Director. While it may be of benefit to the former employees who have been awarded wages without having participated in the process, it is quite unfair to the employer who has had no opportunity to respond to the validity of the claims or to seek to invoke the statutory limitations for filing a complaint and limiting its wage liability: see section 2(b).

39. The Director's legal counsel notes, correctly in our view, that several of the complaints clearly identify a systemic problem regarding the payment of wages and that while many of the individual complainants were seeking only a personal remedy, several complainants also put the Director on notice that there were other employees who had not been paid for their work. For example (and this is by no means an exhaustive list), one complainant refers to "most other ticket agents [who] have yet to receive their pay as well" while another refers to "most of the other former employees…are currently experiencing the same problem" and a third says "I (as all my co-workers) have not been paid my final pay check". Of the 22 individual complaints that were filed, nine of them specifically referred to the fact that there was a general failure to pay wages to all employees and that most, if not all, were owed unpaid wages.

40. The Director's counsel submits that "there are two requirements for the application of section 76(2)" [the director's statutory authority to investigate in the absence of a formal complaint], namely, "the Director receive[s] information that the employer…may have contravened the Act" and "the Director advise the employer of this information within 6 months of the last date on which wages were earned but not paid". Counsel further says that the Director "had knowledge of global failure to pay wages by the employer in October and November of 2012" and, in our view, this assertion cannot be seriously questioned. While not every former employee filed an individual section 74 complaint, the complaints that were filed undeniably raised a broader problem regarding non-payment of wages perhaps encompassing every former employee of the employer companies.

41. Subsection 74(1) states that "an employee, former employee or other person may complain to the director that a person has contravened" the *Act*. There is nothing in subsection 74(1) stating that a person can only file a complaint on their own behalf. This provision simply states that *any* person can file a complaint in which it is alleged that another person has contravened the *Act* or the accompanying regulations. There are some procedural requirements – the complaint must be in writing and delivered to an Employment Standards Branch office within a defined time period. Subject to subsection 76(3), the Director "must accept and review" the complaint. Following this review, and subject to section 77 (which obliges the Director to afford a person under investigation an opportunity to respond), the Director may issue a determination under section 79.

42. The *Act*, consistent with its status as benefits-conferring legislation, must be "interpreted in a broad and generous manner [and] any doubt arising from difficulties of language should be resolved in favour of the claimant" (*Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27). Read literally (and not even necessarily broadly and generously), nine of the complaints can be fairly interpreted as complaints filed both on behalf of the individual complainant as well as notice to the Director (and to the employer) that other former employees might also have unpaid wage claims. In essence, and in each case, a "person" alleged that one or both of the employer companies contravened the *Act* thereby triggering the Director's obligation to "accept and review" these complaints.

43. The present case is somewhat similar to that in *Meadow Creek Cedar Ltd.* (BC EST # D061/12) where the delegate's investigation was triggered by a single complaint but the ultimate determination – made after a review of payroll records submitted with respect to all employees – included unpaid wage awards in favour of 64 former employees. On appeal, the employer argued that the delegate's "expansion" of the investigation to include 63 employees who never complained amounted to an error of law. The Tribunal rejected this position (para. 11):

> …insofar as the "expansion" of the complaint to include a total of 64 employees is concerned, it must be noted that the Director is not obliged to proceed to investigate possible breaches of the *Act* only when a specific complaint has been filed. Subsection 76(2) of the *Act* authorizes the delegate to conduct a compliance audit/investigation whether or not a complaint has been filed. I might add that when a complaint raises the spectre of a more widespread contravention (for example, where an employer appears to have systematically failed to pay overtime in accordance with the provisions of the *Act*), the Director *should* expand the scope of his investigation in order to ensure compliance with the *Act* – this latter approach is entirely consistent with the scheme of the *Act* and the Director's role under this legislation.

44. Of course, in this case, unlike in *Meadow Creek*, at least some of the complaints, on their face, suggested that there were widespread contraventions of the *Act* affecting virtually every former employee. The delegate was properly entitled, and arguably had a statutory duty, to inquire into the extent of the alleged contraventions of

the *Act*. In *660 Management Services Ltd. et al.* (BC EST # D147/05; reconsideration refused: BC EST # RD044/06), the Tribunal observed (at paras. 26 and 27):

> … There is nothing in Section 74, or in any other provision of the *Act*, that either requires a complainant to specifically identify the particular contraventions which have taken place or to indicate what is owed. Providing this information at an early stage undoubtedly assists the Director in administering the complaint process, but to suggest it delineates the scope of the Director's jurisdiction is unsupported by any provision and, as the Director has argued, is inconsistent with the general authority of the Director to ensure compliance with the *Act*.
>
> Subsection 76(1) of the *Act* requires that the Director, subject to subsection 76(3), accept and review a complaint made under Section 74. Reading subsection 76(1) together with subsection 76(2) and Section 2, which sets out the purposes of the *Act*, the Director is entitled, and quite probably required, to take a liberal view of the scope of the complaint. …

45. Of course, and as noted in the *660 Management Services* appeal decision (at para. 28): "…concerns about the procedural fairness of the complaint process can arise if the Director does not allow the party under investigation a reasonable opportunity to respond to the Director's appreciation of the complaint following the required review…". Section 77 of the *Act* states: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond". Further, subsection 76(2) states: "The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint".

46. In this case, the Director received a number of complaints and, by way of response, immediately attempted to engage the numbered company (and Mr. Bourassa) in a factfinding and, if necessary, a dispute resolution, exercise. Although advised at the outset of the investigation that it extended to one specifically named employee as well as several other former unidentified employees (and potentially, by reason of the Demand for Employer Records"), to *all* former employees, Mr. Bourassa's position was that the numbered company was not the employer and, as such, had no legal responsibility for any of the employees' unpaid wage claims. I might add that Mr. Bourassa took this position notwithstanding the fact that the employees were paid by cheques identifying the payor as, and drawn on the account of, the numbered company "DBA Fun City Sightseeing". Further, Mr. Bourassa was the signatory on all the payroll cheques issued to the former employees and, in fact, was the only authorized signatory on the account.

47. We do not read the record in the same way as our colleague Tribunal Member Stevenson does and, with respect, disagree with his conclusion that the numbered company and/or Mr. Bourassa (in his personal capacity) were not given adequate notice about the scope of the delegate's investigation. From a very early stage (and by no later than mid-November 2012, about one month after Fun City ceased operations on October 5, 2012), the numbered company and Mr. Bourassa were advised that the delegate was reviewing a number of complaints and that, based on those complaints, there could be a finding of widespread contraventions of the *Act* affecting, potentially, the entire former workforce. As was noted in the delegate's February 28, 2014 submission, "the Employer and Mr. Bourassa knew and were advised with respect to the fact that there were likely more complainants than actual complaints filed" and that Mr. Bourassa and the employer companies "were aware from the outset of the investigation that I was seeking information for all employees as noted on the Demand for Employer Records…sent to both the Appellants and Fun City Sightseeing Inc.". The delegate also noted that "the substance of the complaints received, names, allegations and amounts were communicated to Mr. Bourassa during various telephone conversations [but] Mr. Bourassa did not want to hear about them as he stated that neither he nor his companies had any employees, records or involvement with the business of Fun City Sightseeing Inc.".

48. The record shows that the Employment Standards Branch first contacted Mr. Bourassa in mid-October and that Mr. Bourassa simply did not respond to the Branch's several communications sent in October and November 2012. By letter dated November 15, 2012, the delegate advised Mr. Bourassa and the numbered company that the Employment Standards Branch "has received a number of complaints…alleging as your former employees, they have not been paid their final pay for work performed" and he invited "your response to these allegations". Not receiving a response, the delegate sent a follow-up e-mail on November 22 inviting Mr. Bourassa to contact the delegate "to discuss a number of complaints received"; another follow-up e-mail was sent of November 26 stating "there have been a number of complaints alleging non-payment of wages from your former employees" and asking Mr. Bourassa to contact the delegate "as soon as possible in regard to these complaints". Mr. Bourassa finally responded on November 26, by e-mail, simply stating that the numbered company "is not responsible for employees of Fun City…". Mr. Bourassa's final communication to the delegate appears to be letter dated February 22, 2013, in which he, once again, maintains that he had nothing to do with Fun City and that he had no records whatsoever; he suggested the delegate deal directly with his former business associate and that person's mother (who apparently was the business' bookkeeper).

49. As we review the record, it appears that during the period from mid-October through November 2012, the delegate made repeated efforts to engage Mr. Bourassa in an investigation relating to the unpaid wage claims of, quite possibly, *all* of the former employees of the employer companies. In our view, the delegate made a reasonable effort to communicate to Mr. Bourassa that there was an ongoing investigation and that it concerned not only individual complainants but also, potentially, all former employees of Fun City and/or the numbered company. Mr. Bourassa's steadfast response was "I have no records"; "I am not involved and neither is the numbered company"; "Fun City is the only employer"; "deal with my former business associate". In October and November 2012, the delegate communicated to Mr. Bourassa and to the numbered company that there was an ongoing investigation relating to certain former employees who had filed unpaid wage complaints and, in addition, the investigation would also be expanded to at least consider whether other former employees also had unpaid wage claims. Thus, by no later than November 2012, Mr. Bourassa and the numbered company were "told…of the investigation that resulted in the [Corporate and Section 96] determination[s]" (see subsection 80(1(b)).

50. The complaints actually filed are governed by subsection 80(1)(a) and, accordingly, the unpaid wage awards for these former employees all fall within the statutory wage recovery period. Subsection 80(1)(b) governs the wage recovery period for the former employees who did not individually file complaints. The numbered company and Mr. Bourassa were informed by no later than late November 2012 (and perhaps as early as October 2012) that the investigation would extend to include a review of all former employees' unpaid wage entitlements under the *Act*. Thus, taking late November 2012 as the latest date of notification, the wage recovery period would run as and from late May 2012. The former employees who did not file complaints had unpaid wage claims spanning the period from August through October 2012 and thus all of these claims fell within the applicable wage recovery period.

51. Our review of the record leads us to conclude that the delegate was conducting *one* investigation that combined elements of a subsection 76(1) investigation ("the director must accept and review a complaint made under section 74") and a subsection 76(2) investigation regarding the former employees who did not file formal section 74 complaints. Counsel for the Director refers to the process used by the delegate as a "hybrid process" and, as such, was not strictly an investigation conducted under either of subsection 76(1) or 76(2) (or two separate investigations conducted pursuant to each subsection) but, rather, was a single integrated investigation that combined elements of both. As we conceive the documents in the record before us, while the Director's investigation (initially conducted by a different delegate) may have commenced, in early October 2012, as a 76(1) investigation (and only with respect to a single complaint – the very first to be

filed), it very quickly expanded into a broader "audit" of the employer companies' payroll and all former employees' possible unpaid wage entitlements under the *Act* as the number of complaints continued to increase, ultimately, to 22 separate complaints.

52. Tribunal Member Stevenson proceeded on the basis that there was no section 76(2) investigation (see paras. 68 – 70) and he based this conclusion on a statement contained in the delegate's February 28, 2014, submission (filed in response to Tribunal Member Stevenson's request for submissions on the question of whether a subsection 76(2) investigation was ever conducted). Counsel for the Director submits that the delegate and Tribunal Member may have been "talking at cross purposes" and that a careful review of the record indicates that the delegate *did* conduct a subsection 76(2) investigation and advised the numbered company and Mr. Bourassa that he was doing so. We agree with this submission. The steps taken by the delegate clearly demonstrated that he conducted an investigation that combined elements of both subsections 76(1) and (2) and that Mr. Bourassa and the numbered company were made aware of this investigation by no later than mid-November 2012.

53. The record before us indicates that there were several separate occasions during October and November 2012 when the Director notified the numbered company and Mr. Bourassa that an investigation was being conducted to determine if the employer companies' former employees had been paid all of the wages to which they were entitled. If it is necessary to identify a specific date within that period when the Director "told the employer of the investigation that resulted in the determination", so as to establish a fixed end date for the purposes of determining the six month wage recovery period stipulated by subsection 80(1)(b), it is clear that November 15, 2012, the date the Demand for Employer Records relating to "All employees" was issued, is one such date. However, given that the failure to pay wages relates to a period dating from August 2012, it matters little which notification date is chosen, because any of the several notifications given in October or November 2012 is sufficient for all of the former employees' wages to be recoverable.

54. The numbered company and Mr. Bourassa appended an identical 20-page submission to their respective Appeal Forms. In paras. 38 - 40 of that document, the appellants asserted that several of the former employees never filed formal complaints and, on this basis, their unpaid wage claims should not have been included in the two determinations. At para. 38, the appellants asserted that when the delegate first contacted Mr. Bourassa to discuss the matter, "the number of the complainants of which he advised [Mr. Bourassa] was significantly smaller than the number ultimately addressed in his Reasons for the Determination" and, at para. 40, asserted that these additional complainants "were solicited by [the delegate] and are…a clear manifestation of his bias toward [Mr. Bourassa] and [the numbered company".

55. By way of response to these specific allegations, the delegate stated in his January 13, 2014, submission to the Tribunal (at pages 7 – 8): "Mr. Bourassa had been verbally advised that there were some twenty complaints filed but that more might be added depending on what records I was able to obtain" and his submissions continued:

> The complainants added to the Determination were found as a result of my review of the payroll records, finally obtained [from the employer companies' former bookkeeper]…in a format I was able to open in early June 2013. These complainants were not solicited in any fashion by me; they came about as a result of my review of the payroll records provided. Mr. Bourassa had previously been told in telephone conversation [*sic*] that the number of complaints received might be amended dependent upon reviewing the payroll records".

56. The delegate then quoted subsection 76(2) and stated: "Proceeding pursuant to section 76(2) of the Act does not constitute bias on my part."

57. The delegate, in his February 28, 2014, submission to the Tribunal (in response to Tribunal Member Stevenson's request for further submissions) stated: "[the numbered company] and Mr. Bourassa knew and were advised with respect to the fact that there were likely more complainants than actual complaints filed". He identified material in the record that led him to conclude there might be more employees named in a determination than the present number of actual complainants. The delegate then stated (and this is the basis for Tribunal Member Stevenson's ultimate conclusion that no subsection 76(2) investigation was ever undertaken): "The comment in the delegate's response with respect to section 76 (2) was not intended to infer that a 76 (2) investigation had taken place, rather, it was made in the context that not all investigations need a formal complaint before being initiated". The delegate's reference, in his February 28 submission, to a subsection 76(2) investigation was triggered by the appellants' assertion the delegate was biased because he ultimately embarked on a wider investigation that considered the employer companies' entire payroll, not just the individual claims of those former employees who filed formal complaints. The delegate was merely saying that his expansion of the investigation did not constitute bias on his part because he was entitled to investigate whether there might be other valid claims (beyond those of the individually named complainants) under subsection 76(2) of the *Act*. The delegate did not indicate to Mr. Bourassa that a subsection 76(2) investigation "had taken place" (in other words, a concluded investigation) but was only advising Mr. Bourassa of his right (and intention) to conduct such an investigation.

58. While the delegate should perhaps have expressed himself more clearly, a careful reading of the foregoing excerpts from the record suggests that the delegate did not confirm, as Tribunal Member Stevenson concluded (at para. 70), "that no section 76(2) investigation was undertaken". Rather, the delegate was simply stating that *when he first contacted Mr. Bourassa* he indicated to the latter that the investigation would comprise more individuals than the present number of complainants. When the delegate made this statement, he did not have the employer companies' payroll records in hand (and would not have them until several months later) and thus could not affirmatively say that there would be other employees' unpaid wage claims encompassed in the investigation (and, depending on the results of that investigation, in a resulting determination). However, the information the delegate then had in hand suggested that this was a distinct possibility. The delegate never suggested to Mr. Bourassa that he would not conduct such an investigation, nor did he indicate to Tribunal Member Stevenson that he, in fact, did not do so. The numbered company and Mr. Bourassa were notified, at least by November 2012, that the delegate intended to conduct an investigation that would include a consideration of the potential unpaid wage claims of all former employees, not merely the 22 former employees who actually filed complaints.

59. It appears that the delegate was not in a position to determine the unpaid wage entitlements of the former employees who did not file complaints until June 2013 when certain payroll records were obtained from the employer companies' former bookkeeper. However, almost from the outset of the investigation, the delegate was aware that there were allegations that all (or most) employees, not simply the former employees who filed complaints, had not been paid all of the wages that were owed to them. Mr. Bourassa, as the sole person controlling the employer companies' bank account either knew, or should have known, that when the business ceased operations in early October 2012 none of the employees was paid for work performed during the final pay period. Further, the delegate indicated to the numbered company and to Mr. Bourassa, within a few weeks after the business shut down, that he was conducting a wide-ranging investigation into any and all possible violations of the *Act*. It is this earlier point in time, a date no later than November 2012, that is relevant for purposes of the subsection 80(1)(b) wage recovery period.

60. As noted in *Emergency Health Services Commission* (BC EST # D132/09), the delegate's obligation under section 77 is to provide a general, and not a specific, overview of the nature of the possible contraventions of the *Act* (at para. 74):

> …a party is not necessarily entitled to the entirety of the evidence that may have been presented to the Director. The crux of the statutory obligation is that a person under investigation has enough information to permit an informed response, not that every scintilla of information is disclosed. The question in each case is whether the party has been provided with sufficient particulars of a claim to make the opportunity to respond effective.

61. The numbered company and Mr. Bourassa did not receive detailed information about each and every employee's unpaid wage claim in November 2012 – indeed, that would have been impossible since, at that point, the delegate did not have all the requisite information he needed (especially the payroll records that were eventually provided by a third party, the former bookkeeper, not Mr. Bourassa or someone else on behalf of the numbered company). The delegate might have been able to provide further particulars at an earlier point in time if the employer companies had properly responded to the delegate's Demand for employment records and provided all of the relevant payroll records. On the other hand, the delegate did indicate to Mr. Bourassa and the numbered company by no later than November 15, 2012, when the Demand for Employer Records for "All employees" was issued, that the investigation would be a searching one touching on the wage entitlements of *all* former employees since the complaints clearly suggested that there was a system-wide failure to comply with the *Act*. We also observe that Mr. Bourassa's determined approach not to engage with the delegate during the course of his investigation (particularly in the early stages of it), and his steadfast position that the numbered company was not in any way involved in this dispute, may have resulted in his not obtaining as much information as he might otherwise have obtained at the outset of the delegate's investigation. That said, Mr. Bourassa and the numbered company were certainly told in October and November 2012 that the investigation would address the potential unpaid wage claims of *all* former employees.

62. Counsel for the Director submits:

> The reality of complaints before the Director, is that a complaint may provide the essential information for the Director to exercise his powers under 76(2). To fail to exercise those powers would allow many employers to fail to pay wages…

63. In our view, the Director is entitled, and may even have a statutory duty (see *Meadow Creek*, *supra*), to expand an existing investigation, or launch an initial investigation, where the Director has reasonable grounds for concluding that there has been a failure to comply with the provisions of the *Act* or the accompanying regulations. In this situation, the Director must comply with section 77 and provide the person under investigation with notice of the investigation and provide them a reasonable opportunity to respond. In the instant case, we are satisfied that the delegate had reasonable grounds to expand the investigation to include a consideration of the potential unpaid wage claims of all former employees, not merely the claims of the 22 individually-named complainants. Further, we are satisfied, based on the record before us, that the numbered company and Mr. Bourassa were advised, in a timely manner, that the investigation would be a wide-ranging one that could result in unpaid wage awards in favour of former employees who had not filed formal section 74 complaints.

64. To summarize:

i) at least some of the 22 complaints can be fairly interpreted as constituting unpaid wage complaints on behalf of the named complainant and notice to the Director that other former employees might not have been paid for all of their work.

ii) the section 74 complaints were timely and, in addition, there is no issue with respect to the subsection 80(1)(a) wage recovery period since, in each case, the wage payment orders fall within the applicable 6-month limitation.

iii) we are satisfied that the delegate conducted a subsection 76(2) investigation that ran parallel to, or concurrently with, his subsection 76(1) investigation relating to the 22 former employees who actually filed complaints. The delegate told the numbered company and Mr. Bourassa by no later than the latter part of November 2012, and in any event on November 15, 2012, when the Demand for Employer Records for "All Employees" was issued, that his investigation would consider the potential unpaid wage claims of *all* former employees.

iv) in light of iii) above, the unpaid wage orders issued in favour of the former employees who did not file section 74 complaints all fell within the applicable subsection 80(1)(b) 6-month wage recovery period.

65. The Section 96 Determination was issued based on the uncontested fact that Mr. Bourassa was a director and officer of the numbered company when the former employees' unpaid wage claims crystallized. By way of the Corporate Determination, the numbered company was associated with Fun City and thus constituted "one employer for the purposes of [the *Act*]". Mr. Bourassa's personal liability under the Section 96 Determination flows from the combined effect of subsection 96(1) which states that directors and officers are personally liable for up to 2 months' unpaid wages for each employee and subsection 96(4) which states that a director and officer of any associated firm is included within the ambit of subsection 96(1).

66. Mr. Bourassa appealed the Section 96 Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. This appeal was wholly unsuccessful as it related to the stated grounds of appeal. However, Tribunal Member Stevenson nonetheless varied the Section 96 Determination in light of his decision regarding the Corporate Determination (paras. 20 – 21).

67. Given our finding that the Corporate Determination should have been confirmed rather than varied, it follows that the same form of order must be issued with respect to Tribunal Member Stevenson's decision regarding the Section 96 Determination.

ORDER

68. Pursuant to subsection 116(1)(b) of the *Act*, BC EST # D022/14 is varied as follows:

- Paragraph Nos. 64 to 75 are deleted;
- Paragraph No. 76 is renumbered 64 and is varied to read as follows:

  "64. Pursuant to section 115 of the *Act*, I order that the Determination dated June 28, 2013, be confirmed as issued in the amount of $54,466.16 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance."

69. In all other respects, BC EST # D022/14 is confirmed.

70. Pursuant to subsection 116(1)(b) of the *Act*, BC EST # D023/14 is varied as follows:

- Paragraph Nos. 20 and 21 are deleted;
- Paragraph No. 22 is renumbered 20 and is varied to read as follows:

"20. Pursuant to section 115 of the *Act*, I order that the Determination dated July 31, 2013, be confirmed as issued in the amount of $50,466.16 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance."

71. In all other respects, BC EST # D023/14 is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal

Robert E. Groves
Member
Employment Standards Tribunal

REASONS FOR DECISION OF TRIBUNAL CHAIR BRENT MULLIN (DISSENTING):

1. I have had the benefit of reading the decision of my colleagues on the panel. Unfortunately, I find that neither the record in this matter nor the legislation supports their decision. Accordingly, I disagree with their decision and must dissent. I would uphold the original decisions in BC EST # D022/14 and BC EST # D023/14 (the "Original Decisions").

2. In short, I find there is no explanation in the record as to why the Delegate did not tell Bourassa that he was conducting an investigation into all of the employees, as the Delegate did in his communications to BMO Bank of Montreal and the City of Vancouver, Licencing Department. On receiving the Delegate's Determination, Bourassa then consistently complains regarding how the original claim from claimants went from the $20,000-$25,000 range to the $54,000 plus mark in the Determination. I find the Delegate provides no answer to that challenge and further, when questioned by the original panel in that regard, denies in fact conducting an investigation, which is what was rightly found in the Original Decisions in my view.

3. I further find that the requirement in section 80(1)(b) is clear, simple, and easy to comply with. It requires nothing more than telling a respondent employer that an investigation of all the employees in respect to potential breaches of the *Employment Standards Act* (the "*Act*") is being conducted, as in fact the Delegate did tell the BMO Bank of Montreal and City of Vancouver, Licencing Department.

4. In my view, there is as a result no basis upon which to interfere with the determinations in the Original Decisions.

5. I will explain my view in more detail in what follows. My concerns can be divided into those arising from certain matters in the record, the submissions, and the legislation, with the final section addressing the present reconsideration application. I will set out what follows under those headings.

A. The Record

6. I find the following aspects of the record to be relevant to the present matter:

- October 15, 2012 – a Delegate of the Director sends notice to Jordan Prince and Paul Bourassa of the Section 74 complaint filed by an employee, Margita Bosanac, against Fun City Sightseeing Inc. Among other information on file, there is a Notice of Mediation Session sent October 22, 2012, regarding Margita Bosanac's complaint.
- November 15, 2012 – A different Delegate, Hans Suhr, issues a Demand for Employer Records for "All employees" (emphasis added) of 0862284 B.C. Ltd. carrying on business as Fun City Sightseeing
- November 15, 2012 – Hans Suhr (herein simply referred to as the "Delegate") sends a registered mail notice to Paul Bourassa, Director and Officer of 0862284 B.C. Ltd. carrying on business as Fun City Sightseeing, stating that the Employment Standards Branch "has received a number of complaints" (emphasis added) under the *Act*.
- November 22, 2012 – The Delegate sends an e-mail to Bourassa regarding "a number of complaints received" (emphasis added).
- November 26, 2012 – Letter from the Delegate to BMO Bank of Montreal advising "that Certain Employees of the above-captioned company [0862284 B.C. Ltd.] have filed complaints with this Ministry alleging that wages have not been paid" (emphasis added). The next paragraph states, "the Director is conducting an investigation of these complaints to determine whether wages are, in fact, owing and in what amounts" (emphasis added). Section 87 of the *Act* is cited, followed by a request that the Bank "hold all monies up to the amount of $25,000 … in trust …".
- January 15, 2013 – Delegate e-mail to Bourassa regarding "the complaints" (emphasis added).
- January 16, 2013 – Letter from the Delegate to BMO Bank of Montreal stating that the Delegate is "conducting an investigation into matters pertaining to the employment of all employees of the above noted employers" (emphasis added) and then requesting that records relevant to that investigation be provided.
- January 17, 2013 – Letter from the Delegate to the City of Vancouver, Licencing Department, advising that the Delegate is "conducting an investigation into matters pertaining to the employment of all employees of Fun City Sightseeing Inc." (emphasis added) followed by a request for copies of records relevant to that investigation.
- June 28, 2013 – Determination of the Delegate/Director. The introduction notes complaints from 22 employees. It then adds that the Delegate's "review of the partial payroll records provided by the former bookkeeper of the employer revealed another 20 former employees who had not been paid all wages owing". Those employees are named and added to the list. The Delegate then says that he has "completed my investigation into the Complainants' allegations" (emphasis added). He further adds that in respect to the summary sheets regarding the amounts owing, "The Employer will receive all of the summary sheets".
- July 31, 2013 – Determination of the Delegate/Director. The introduction to this Determination lists 42 named employees and says that they "filed complaints under Section 74 of the Employment Standards Act" (emphasis added). The Determination goes on to say that

"An investigation was conducted into the Complainants' allegations", then noting the previous Determination.

7. August 29, 2013 – The Record is provided to Bourassa. I do not find anywhere in this Record that the Delegate told Bourassa, as he did tell the bank and the City of Vancouver, that he was conducting an investigation under the *Act* in respect to all the employees of the employer.

B. The Submissions

- September 23, 2013 – Bourassa sends an e-mail to the Employment Standards Tribunal. He complains about the record which was provided asserting that it was "incomplete. Mr. Suhr did not send all the 20-25 extra claims he added on, with all there [sic] paper work, time of the claims, and why he went forward with there [sic] claims, …." Later in the note after some further assertions, he concludes "with twice the judgment coming forward …".
- September 24, 2013 – the Tribunal says that it disclosed the Director's Record to Bourassa on September 5, 2013. The Tribunal provides an opportunity for the Director to respond.
- September 26, 2013 – the Delegate responds by e-mail. Among other matters he notes Bourassa's assertions in respect to "the 20-25 extra claims … added on". The Delegate responds as follows:

> With respect to the September 16 and September 23, 2013, submissions of the Appellant, I submit that for the issuance of the Director Determination which was issued to the Appellant on July 31, 2013, the only information necessary was the Corporate Determination issued June 28, 2013, which indicated that the Appellant was a Director and Officer of the Corporation, and confirmation that the Appellant was a Director and Officer of the Corporation at all time material to the findings in the Corporate Determination. I further submit that the Record provided is complete in all respects.
>
> For the foregoing reasons, I submit that the Appellant has not presented any evidence to support his contention that the Record for the Director Determination issued July 31, 2013, is not complete. I finally submit that the objections to the Record for the Director Determination raised by the Appellant are without merit.

8. I struggle to find here in the Delegate's submission a meaningful response to the Appellant's inquiry and assertions regarding the claim doubling.

- October 28, 2013 – E-mail from Bourassa to the Employment Standards Tribunal. Bourassa's e-mail starts with the following:

> I wish to ascertain that Mr. Hans Suhr did not respond completely to the following questions we put forward in response to his letter to the Employment Standards Tribunal dated September 23/13 in reference to the company 0862284 B.C. Ltd. and Paul A. Bourassa:
>
> 1. The original claim from the claimants was in the $25,000 range and afterwards doubled to $54,000 plus mark. Is it true to say there were no claims from approximately half of the claimants named and in place after the six month period? (Yes or No)
> 2. Can Mr. Suhr please answer the question as to how the number of claimants doubled after the six month period? ….

- December 29, 2013 – E-mail from Bourassa to the Employment Standards Tribunal. Bourassa submits:

> It is a fact that the claims made by Employees of Mr. Jordan Prince and his Company Fun City Sightseeing Inc. were around the $20,000 to $25,000 dollar mark. It ended up at twice that number with Employees who had not made a claim at all, and when they did, it was outside of the six month period the Employment Standards Division works under, in order to except [sic] claims.

9. I pause to note that there is a significant amount of correspondence which I am not referencing here, as I am trying to focus on what I believe to be the material points in respect to the main issue before us, one expression of which is, as put forward by the Director in her reconsideration application, whether simply requesting payroll records is in fact sufficient notice to the employer that there is a section 76(2) investigation which may cover ESA violations regarding all of the employees and that notice satisfies section 80(1)(b).

- February 14, 2014 – Letter from the Employment Standards Tribunal to the parties regarding the Member's request in respect to section 76(2) and 80(1) of the *Act*. The letter states, "The Member charged with this appeal has raised a concern about the inclusion of 20 persons in the Determination who did not file a complaint with the Director". After referencing the just noted sections of the *Act*, the letter goes on to state:

> The section 112(5) "record" does not, on first blush, indicate any section 76(2) investigation was being conducted, or if there was, when the employer was first told of it. In the absence of a timely investigation, the validity of the findings concerning those 20 persons is in question.

The letter goes on to request submissions.

10. I find the query by Member Stevenson was warranted on the basis of both the portions of the record noted above and the submissions which had been made by Bourassa.

- February 28, 2014 – Response of the Delegate. I will set out the response in full. It contains what the Director later refers to as "the comment", which was interpreted in the Original Decisions as being a direct response to a direct question, with the response being that the Delegate said that he had not conducted a section 76(2) investigation. The full response of the Delegate is as follows:

> Further to the Member Request for Submissions dated February 14, 2014, the following is the response of the Delegate of the Director of Employment Standards with respect to the request.
>
> The delegate submits that the Employer and Mr. Bourassa knew and were advised with respect to the fact that there were likely more complaints than actual complaints filed. The evidence that indicates this is as follows:
>
> 1. The Record, Section G, page 1/17 is a Demand for Employer Records dated November 15, 2012, requesting records for "all employees";
> 2. The Record, Section G, page 14/17 is an e-mail from Mr. Bourassa dated March 14, 2013, as well as copies of the list of employees referred to in the e-mail, pages 15/17 and 16/17. The copies provided were of poor quality however, I have been able to distinguish the names of 23 employees, 8 of whom did not file

complaints but at least 3 of whom were picked up from the review of the payroll records;

3. The Record, Section K, pages 19/26, 20/26, 21/26, 22/26, and 23/26 which are e-mails dated November 9, 2012, sent on behalf of Mr. Bourassa to Mr. Prince and containing bank statements.

4. The Record, Section Q, 197 pages clearly show that the bank statements include copies of the cancelled cheques;

In addition to the above, I would draw the Member's attention to the submission of the delegate dated January 13, 2014, where in paragraphs 37 thru 40, the issue of the discovery of the additional complainants as a result of the review of the payroll records provided as a result of the Demand for Employer Records, issued to Fun City Sightseeing Inc. on January 21, 2013, the Record, Section K, page 1/26 was dealt with.

The comment in the delegate's response with respect to section 76 (2) was not intended to infer that a 76 (2) investigation had taken place, rather it was made in the context that not all investigations need a formal complaint before being initiated.

In summary, I submit that the Appellants, 0862284 B.C. Ltd. and Mr. Bourassa were aware from the outset of the investigation that I was seeking information for all employees as noted on the Demand for Employer Records (Demand) sent to both the Appellants and Fun City Sightseeing Inc.

I further submit that the substance of the complaints received, names, allegations and amounts were communicated to Mr. Bourassa during various telephone conversations. Mr. Bourassa did not want to hear about them as he stated that neither he nor his companies had any employees, records or involvement with the business of Fun City Sightseeing Inc.

I further submit that as all parties were made aware that I was investigating all employees from the outset as noted on the Demands, they should not be permitted to benefit from the fact that they did not provide the records as and when required. When I was finally able to obtain records from the former bookkeeper those records disclosed other employees who had not been paid appropriately during their employment. The Appellants knew full well who all the employees were as Mr. Bourassa was the sole signatory on the bank accounts and signed all payroll cheques.

I finally submit that the appeal should be dismissed and the Determination confirmed.

- May 8, 2014 - The Director's reconsideration application. The application of course deserves full consideration from front to back and my summary of it here will not do it justice from that perspective. However, I think key points are that the Director is asserting that in the circumstances of the case the Demand for Payroll Records is sufficient to meet the requirements of Sections 76(2), 77 and 80(1)(b). In respect to "the comment", the Director submits that the Original Decisions are in error their interpretation of it as, "This comment is confusing and simply illustrates that the Delegate and the Member seem to be talking at cross purposes. In other comments in this responsive submission [of February 28, 2014] the Delegate clearly indicates that in fact he was conducting an investigation under 76(2)".

11. As well, the Director submits that if her approach is not followed a rogue employer may "lie in the weeds" by not providing the relevant documents and thereby escape responsibility and liability via the six month wage claim periods in the *Act*. Jumping ahead a bit to my view of the legislation set out below, I think this is a red herring. In my reading of the *Act*, once a section 76(2) investigation is properly commenced by telling the employer that an investigation under the *Act* is being commenced in respect to the employees (section 80(1)(b)), however long that investigation then takes is essentially irrelevant. The time periods in respect to wage claims is met and completed by the proper commencing of the investigation.

- July 4, 2014 - Bourassa's reply submission in the reconsideration process. Among his submissions is the following:

> Page 3-7) They do raise questions with respect to real Justice here. I am not a lawyer but there are errors that have been made here with the Employment Standards Division, as myself and Company had no idea that the amount being claimed by them would go from $20,000-$25,000 to over $54,000 dollars. The fact I should have known this with the way this had been done, is impossible; I was in shock when I received that notice by special mail.

C. The Legislation

12. I believe the requirements of the *Act* in respect to the notice of an investigation, the issue in this matter, are clear and simple. I have reviewed *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 and believe that this simple and clear interpretation of the *Act* is consistent with the required method of interpreting legislation, including benefits-conferring legislation such as the *Act*. In particular, I believe that this simple and clear interpretation of the *Act* is consistent with both the benefits-conferring nature of the *Act* and the ability to have it interpreted and applied as "a relatively quick and cheap means of resolving employment disputes" through the regulatory context of the Employment Standards Branch: *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, para. 73.

13. The *Act* provides two means or avenues to justice for employees: section 74(1) written complaints and section 76(2) investigations by the Director.

14. As befits the nature and purpose of the *Act*, there is no requirement in it in my view, explicit or implicit, that the Director provide a reason or probable cause or, in any event, anything in order to initiate an investigation under the *Act*. The *Act* leaves that entirely to the discretion and expertise of the Director, subject potentially only to such restrictions as the common law may impose in respect to the exercise of a statutory discretion in respect to remedial, benefits-conferring legislation such as the *Act*. We need not go into that latter possibility here, as there was in any event an obvious basis for the Director to conduct an investigation into Fun City Sightseeing's non-payment of its employees, as noted in a number of the written complaints by individual employees.

15. There are two requirements in respect to a section 76(2) investigation, however, under the *Act*. The first is the section 80(1)(b) requirement that the employer be "told" of the investigation. This is an express requirement in the *Act*. In my view it is not in any way inconsistent with the nature, purposes and object of the *Act*, which include promoting "the fair treatment of employees and employers" and providing "fair and efficient procedures for resolving disputes over the application and interpretation of this Act" (section 2(b) and (d)).

16. The second requirement in respect to a section 76(2) investigation is the requirement in section 77 of the *Act* that "[i]f an investigation is conducted, the director must make reasonable efforts to give a person under

investigation an opportunity to respond". Again, this is an express requirement in the *Act* and for the same reasons, in my view, is not in any way inconsistent with the nature, purposes and object of the *Act*.

17. The *Act* thus places these two, express requirements on the Director in respect to a section 76(2) investigation. Particularly in respect to the section 80(1)(b) requirement, I do not believe that responsibility of the Director can be diluted or deflected on the basis of rogue behaviour by a respondent such as occurred here. An exception to that would be if the respondent was evasive to the point of not being able to be contacted and thus not being able to be "told" of the investigation. In that circumstance, in my view the investigation should be allowed to continue and thus justice to the employees would not be prevented if the Director could not contact the respondent employer. That does not arise here and, as just stated, otherwise the section 80(1)(b) responsibility falls upon the Director and in general is not something that can be negated or defeated by the inappropriate actions of a responding employer.

18. In my interpretation of the *Act*, the section 80(1)(b) requirement is easily met. It simply requires that the Delegate tell the employer that he or she is entering into a section 76(2) investigation regarding the employees of the employer in respect to potential violations of the *Act* - such as, for instance, the Delegate did here in respect to the express notifications to the bank (BMO Bank of Montreal) and the Licencing Department of the City of Vancouver.

19. In sum, I find the avenues in the *Act* in respect to protecting employee rights are two-fold, section 74 complaints and section 76(2) investigations and, in the case of the latter, can be launched by simply telling the employer of the investigation.

20. I find all of this simple and clear and does not in any way present egregious or difficult circumstances for the Director or the Delegate or raise any of the uncertainties or difficulties argued by the Director in the reconsideration application.

D. The Present Reconsideration Applications

21. I will be fairly summary at this point as what I have set out above highlights my concerns in this matter.

22. One of the concerns is that we accurately reflect what occurred in relation to the specific nature of the issue on reconsideration. In reality I found that not so easy to do. A lot has occurred in this matter in terms of the usual sort of submissions and determinations, but that is also mixed in with a lot of extraneous material, most of which is not of assistance. However, I think it is our obligation to sort through that in respect to the particular issue before us, which is in my view the section 80(1)(b) issue.

23. As noted above in respect to the legislation, the obligation on the Director in the *Act* to tell an employer of a section 76(2) investigation is clear. I also find it is a simple requirement and one that is not egregious or difficult in any sense to comply with. As noted, the exception may be if an employer cannot be found. However, that is not the circumstance here.

24. I also believe that in fact to not give effect to this clear and simple requirement may undermine the *Act*. As noted in the section 2 purposes, the *Act* is to promote the fair treatment of employers as well as employees and to provide fair as well as efficient procedures for resolving disputes. While the *Act* is benefits-conferring legislation and thus in particular to be given fair, large, and liberal interpretation and application, in my view that does not require or provide for ignoring the simple and clear, express requirement in section 80(1)(b). To do so may in fact lead to an undermining of the credibility and acceptance of the *Act* and its enforcement.

25. I also do not think that we can or should confuse the behaviour of Bourassa, which is obviously unacceptable, with the basic requirements on the Director in the application and enforcement of the *Act*. Along with all the rest of his submissions, the bulk of which were properly not accepted in the Original Decisions, Bourassa made it clear from his receipt of the Determinations and the record that in his view he was not notified of how the matters at issue went from claims in the range of $20,000-$25,000 to $54,000. He requested a response in that regard, which was forwarded by the Employment Standards Tribunal. Member Stevenson also requested a response, "raising a concern about the inclusion of 20 persons in the Determination who did not file a complaint with the Director, adding "the section 112(5) record" does not, on first blush, indicate that any section 76(2) investigation was being conducted, or if there was, when the employer was first told of it". In my view, those questions were warranted in respect to the history of this matter, including Bourassa's complaints about the inclusion of those 20 further persons and the Delegate's responses to date. The Delegate then provided "the comment" within his response. In "the comment" he denies that there was a section 76(2) investigation. That is what Member Stevenson found.

26. The issue before us is whether the Member was in error in reaching that conclusion. In respect to our task in making a determination in that regard, I do not believe that the enforcement of the *Act* will be made difficult if we were to find that Member Stevenson did not err in that regard. All that would be determined is that in the facts of this case in respect to the section 76(2) investigation which was actually conducted (as reflected in the Delegate's letters to the bank and the City of Vancouver regarding his investigation of all of the employees of the employer), there was a failure to tell the employer, as per section 80(1)(b), that such an investigation was being conducted.

27. In the future then if a Delegate is going to conduct a section 76(2) investigation, the Delegate should simply tell the employer that. Nothing more need be said. It is not difficult. It is not egregious. It does not provide a means by which the employer can "lie in the weeds" and avoid the wage claim time periods by not responding. The section 80(1)(b) requirement is in fact only common sense and fair in any event, and consistent with the section 2(b) and (d) purposes of the *Act*.

Brent Mullin
Chair
Employment Standards Tribunal