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

TRIBUNAL MEMBERS:	Frank Falzon, Panel Chair Norma Edelman, Vice-Chair Dave Stevenson, Member
FILE No.:	2004A/113
DATE OF DECISION:	October 14, 2004

DECISION

SUBMISSIONS

E.W. (Heidi) Hughes	counsel for the Director of Employment Standards
Michael J. Weiler	counsel for Super Save Disposal Inc. and Actton Transport Ltd.
Todd Norberg	on his own behalf

INTRODUCTION

The Director of Employment Standards (the "Director") has applied under section 116 of the *Employment Standards Act* (the "*Act*") to have this Tribunal reconsider and set aside a May 31, 2004 interlocutory order requiring the Director to disclose certain records, and to provide others to the Tribunal for inspection. Questions as to the Director's compliance with the requirements of s. 112(5) are at the root of the order:

> 112(5) On receiving a copy of [an 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.

We have carefully considered all the submissions and information tendered on this application, with the exception of the August 18, 2004 sur-reply of Super Save Disposal Inc. and Actton Transport Ltd. (the "Appellants"), which we have excluded.

The background to this application is complex. The file is voluminous, and growing. We frankly do not wish to add any more to this history than is necessary for the purpose of explaining this decision. As we cannot improve upon the description of the procedural history set out in Member Thornicroft's December 15, 2003 and May 31, 2004 decisions (BC EST # D329/03 and # D100/04, pp. 2-7 of each decision), we adopt those descriptions by way of opening.

The appeal was filed in June 2003. The Appellants appeal four Determinations issued in May 2003 by the Director's delegate, Ken White, finding the Appellants jointly and separately liable under s. 95 of the *Act* to pay four complainants for outstanding wages, totalling approximately $54,000. The Appellants say that only one of the Appellants (Actton Transport Ltd.) was the complainants' real employer, and that this employer is not subject to the *Act* because it falls under federal legislative jurisdiction. The Appellants also say that the Determinations should be set aside for delay, and for breaches of procedural fairness.

Despite the passage of nearly 16 months, the appeal has not been heard on the merits.

This unfortunate situation has arisen because a serious dispute has emerged about the nature and scope of the Director's obligation to produce documents on this appeal, as required by s. 112(5) of the *Act*, quoted above.

Between August 2003 and May 2004, Member Thornicroft made no less than four interlocutory orders relative to the issue of production of documents by the Director:

- August 29, 2003
- September 23, 2003
- December 15, 2003
- May 31, 2004

In addition to these orders, the Tribunal has made other interlocutory decisions.

- On November 24, 2003, the Tribunal (Member Stevenson) dismissed the Director's application to reconsider and set aside various terms of the August 29, 2003 order.
- On March 8, 2004, the Tribunal (Vice-Chair Edelman) ruled on a motion by the Director to excise portions of the Appellants' submission before they were forwarded to Member Thornicroft pursuant to his December 15, 2003 order directing submissions on the disclosure issue.

In late June 2004, the Director filed a Petition seeking judicial review of Member Thornicroft's May 31, 2004 interlocutory order (SCBC Action No. L041578). The Director subsequently adjourned that application while she exercises her right to make this reconsideration application.

THE DISPUTED ORDER

The May 31, 2004 order reads as follows:

> In accordance with the provisions of subsection 2(d), section 107 and subsections 109(1)(e), (g) and (h) of the Act, I make the following Orders:
>
> 1. The Director shall make whatever further disclosure as may be necessary, in light of the directions set out in these reasons, to ensure that the entire record, as defined by section 112(5) of the Act, is delivered to the Tribunal. Such further disclosure shall be completed by no later than June 30, 2004.
> 2. By June 30, 2004, the Director or her delegate shall deliver to the Tribunal a written declaration, under oath or affirmation, attesting that he or she has delivered the entire section 112(5) record to the Tribunal. Alternatively, legal counsel for the Director may deliver a written undertaking to the Tribunal to like effect.
> 3. By June 30, 2004, legal counsel for the Director shall deliver to the Tribunal copies of all documents or other records for which a claim of privilege is asserted. These latter documents or records include, but are not necessarily limited to, those listed as (a) to (h) in the attachment to counsel for the Director's December 3rd, 2004 submission as well as Appendices "A" and "D" and the document mentioned in the "blacked out" sentence at page 17 of counsel for the Appellants' January 9th, 2004 submission to the Tribunal. The documents and records must be accompanied by a list identifying each document or record by date, sender/recipient, and counsel for the Director must include a general written summary regarding the nature of the document and her reasons for objecting to its production. The above documents and records, list and counsel's grounds for objection shall be delivered in a sealed envelope marked to my attention and also marked "Confidential: To Be Opened Only

> By Kenneth Thornicroft". I shall review the documents and records, and counsel's submissions regarding the claim of privilege, and will then rule on the privilege claim for each document or record.
>
> 4. After I have ruled on the various privilege claims, I will issue further directions and orders with respect to the adjudication of these appeals.

The Tribunal has adjourned the June 30th deadlines pending the outcome of this reconsideration application.

THE MAY 31, 2004 REASONS

Member Thornicroft's May 31, 2004 reasons are lengthy. They are carefully crafted and should be read in full.

THE DIRECTOR'S RECONSIDERATION APPLICATION

The Director filed her reconsideration application on June 25, 2004. She submits that each of the first three paragraphs of the disputed order is wrong in law for the following reasons:

- Paragraph #3 directs that legal counsel produce for inspection to the Tribunal documents in her files over which privilege has been asserted. As a matter of statutory interpretation, paragraph #3 exceeds the Tribunal's authority to order production under section 112(5), as well as sections 107-109, because there is no evidence the documents in counsel's file were before the Director. Moreover, the order disregards solicitor-client privilege.
- In Paragraph #2, the Tribunal ordered the Director, or her delegate, or legal counsel to deliver a written declaration to the Tribunal under oath or affirmation attesting that he or she has delivered the entire section 112(5) record to the Tribunal. This provision is overly broad and impossible to make under oath or undertaking.
- Paragraph #1 requires the Director to produce whatever additional documents constitute the record in accordance with the Members definition of "record". This definition is overly broad and does not reflect the common law definition of "record".

Despite our reticence to entertain reconsideration applications in respect of interlocutory orders, the subject matter of this application is sufficiently important that we should hear and address the reconsideration application: *Re Milan Holdings* (BC EST #D313/98). We intend to address each ground in turn.

1. Paragraph #3

For convenient reference, we reproduce again paragraph #3 of the May 31, 2004 order:

> By June 30, 2004, legal counsel for the Director shall deliver to the Tribunal copies of all documents or other records for which a claim of privilege is asserted. These latter documents or records include, but are not necessarily limited to, those listed as (a) to (h) in the attachment to counsel for the Director's December 3rd, 2004 submission as well as Appendices "A" and "D" and the document mentioned in the "blacked out" sentence at page 17 of counsel for the Appellants' January 9th, 2004 submission to the Tribunal. The documents and records must be accompanied by a list identifying each document or record by date, sender/recipient, and counsel

> for the Director must include a general written summary regarding the nature of the document and her reasons for objecting to its production. The above documents and records, list and counsel's grounds for objection shall be delivered in a sealed envelope marked to my attention and also marked "Confidential: To Be Opened Only By Kenneth Thornicroft". I shall review the documents and records, and counsel's submissions regarding the claim of privilege, and will then rule on the privilege claim for each document or record.

The Director says there is no evidence that any document in her legal counsel's file was before the Director, and therefore paragraph #3 must be quashed. The Director argues: "…the Tribunal lacks the statutory authority to order inspection of Legal Counsel's documents without some evidence that Legal Counsel's documents were before the Director, which is absent in this case."

Paragraph #3 is directed to the Director's legal counsel. However, we do not read paragraph #3 as an order directing legal counsel to disclose those documents in her file, which the Director or her delegate has never seen. Read fairly and in light of the Member's definition of the record, paragraph #3 is limited to documents which were before the Director or her delegate, but over which solicitor-client privilege is claimed. Paragraph #3 clearly assumes that the specific documents identified therein, and possibly others, were before the Director or her delegate when the Determinations were made. We find there was an evidentiary basis for this assumption.

The January 30, 2004 Affidavit of Mr. White, included in the Director's reconsideration materials, states in part at paragraph 20:

> …nor did I request or consider opinions from any other body, including legal counsel, when making the appealed determinations against the Employer.

This might be taken by some to imply that Mr. White made his decision in the absence of any contact with counsel.

But the Director's reconsideration materials also include two Affidavits sworn by the Director's legal counsel, Adele Adamic. One Affidavit, sworn in October 2003, states as follows:

> In my role as counsel to the Director, I have been contacted for general advice concerning complaints from former employees of Super Save Disposal Inc. and Actton Transport Ltd. ("the Employers").
>
> In the course of providing general advice to the Delegates of the Director, I compiled a file on this matter….
>
> At no time have I been requested to provide, nor have I provided, any legal opinion relating to matters in the appealed Determinations.

These paragraphs suggest that Ms. Adamic provided "general advice" to delegates who had previously worked on this file, but no opinion related to these Determinations.

However, counsel's other Affidavit, sworn on June 2, 2004, states as follows:

> In my role as counsel to the Director, I have been contacted for legal advice and representation concerning complaints from former employees of Super Save Disposal Inc. and Actton Transport

> Ltd. ("the Employers"). In the course of providing that advice, I compiled a legal file on this matter.
>
> *In particular, the Director's delegate to whom I mainly provided legal advice in connection with the complaints from the Employers' former employees ... was Ken White ("White").* [emphasis added]

The latter paragraph states that counsel did provide legal advice to Mr. White on these complaints, and carries a reasonable implication that the advice was given prior to the making of the Determinations, even if it was not in the form of an opinion. It is reasonable to conclude that communication between Mr. White and Ms. Adamic may have been other than purely verbal communication prior to the time the Determinations were made. Based on Member Thornicroft's interpretation of the scope of s. 112(5), with which we agree, these documents would fall within the scope of s. 112(5), subject to a proper claim of privilege.

This leaves the question of the specific documents referred to in paragraph #3. In this context, we turn to the evidence regarding the rather bizarre turn of events that caused the Ministry to inadvertently show, and later send, 62 pages of Ms. Adamic's solicitor's file to the Appellants as part of the process of responding to the Appellants' "FOI" request, which was made parallel to these appeal proceedings. The Director has not disclosed these documents; however she has provided a list of the 62 pages. The list includes many items suggesting written communication between counsel and the Director.

In an Affidavit filed on behalf of the Director dated October 2, 2003, the 62 pages [(a) – (h)] were listed for the Tribunal in late compliance with clause #2 of the August 29, 2003 order. It will be remembered that clause #2 of that order required, *inter alia*, production of a list of the privileged documents "*in the custody or control*" of the Director. The Director submits today that the documents in Ms. Adamic's files were clearly not included in the clause #2 of August 29, 2003. Yet the Director listed the same documents in late compliance with the August 29th order. The Director thus conceded before the Member that she did not comply with the second clause of his August 29th order until that list was produced (May 31, 2004 reasons, p. 24). This fact alone would be a basis on which Member Thornicroft would have reasonably concluded that this material was part of the Director's file, and thus reasonably made reference to them in paragraph #3 of the May 31, 2004 order.

From the tenor of the Director's submission on this reconsideration application, it is unclear whether her position now is that some of those documents were never shared with her client, or whether her position is that paragraph #3 of the May 31, 2004 order should have referred to the copies of documents that exist in the Director's file, rather than the copies that physically reside in the solicitor's file. Regardless of her position on this point, we find the Director's acknowledgement that these documents exist to be sufficient evidence that there are documents over which solicitor-client privilege is claimed that were before the Director or her delegate. Accordingly, we reject the Director's challenge to paragraph #3 on the basis that there is no such evidence.

To alleviate all doubt regarding the purpose and intent of paragraph #3 of order, we have revised its language so as to (a) impose the obligation on the Director rather than legal counsel, and (b) frame it slightly more generally, by stating that the documents required to be produced for inspection are those that were "before the Director", as that term was interpreted (correctly in our view) in the Member's reasons. This more general language does not exclude the production of the specific items referred to by the Member, but makes clear, as we believe is the obvious intention of that term, that those documents are

to be produced for inspection only if and to the extent that they were before the Director or her delegate. Paragraph #3 of the May 31, 2004 order will therefore be revised as follows:

> By October 29, 2004, the Director shall deliver to the Tribunal copies of all documents or other records relating to the claims of the four complainants, Robert Cardinal, Stephen Smith, Todd Norberg and Larry Catt, that were before the Director at the time the delegate made his Determinations, and for which a claim of privilege is asserted. The documents and records must be accompanied by a list identifying each document or record by date, sender/recipient, and counsel for the Director must include a general written summary regarding the nature of the document and her reasons for objecting to its production. The above documents and records, list and counsel's grounds for objection shall be delivered in a sealed envelope marked to my attention and also marked "Confidential: To Be Opened Only By Kenneth Thornicroft". I shall review the documents and records, and counsel's submissions regarding the claim of privilege, and will then rule on the privilege claim for each document or record.

Subject to the revisions we have made, we uphold paragraph #3.

We should perhaps just observe that paragraph #3 does not require the Director to produce documents *to the parties* over which the Director claims solicitor-client privilege. The documents are to be delivered to the Tribunal for inspection - they are to be delivered "in a sealed envelope marked to my attention and also marked "Confidential: To Be Opened Only by Kenneth Thornicroft". Member Thornicroft was obviously aware of the exceptional nature of the order he was making, and sensitive to the confidentiality concerns the Director would have in releasing documents over which she claimed solicitor-client privilege.

If there were no finding of a legitimate dispute over the Director's claim of privilege, there would be no need for the Tribunal to inspect the documents over which privilege is claimed. But the Member found that there was a legitimate dispute concerning the Director's claim of privilege over documents in this case, and thus found it necessary to make the inspection order. For their part, the Appellants have conceded that the Director is not required to disclose documents protected by solicitor-client privilege when disclosing "the record" under s. 112(5). However, the Appellants submitted that "[t]he fact that Legal Services personnel may have been involved in the investigation and adjudication of the Complainants [sic] does not necessarily make documents connected or linked to them privileged" (May 31, 2004 reasons, p. 15). The Appellants asserted that the Director was making too broad a claim of privilege, asserting it over any document connected or "linked" in some way to legal counsel for the Director. The Member obviously found there was merit to this concern in all the circumstances of this case. Even on this application, the Director has submitted:

> The Appellants claim that there is no basis for concluding privilege exists based on their description [in the Director's list]. The description, however, clearly identifies that the documents have Legal Counsel's hand-written notes or are otherwise clearly marked to "Adele Adamic" [counsel for the Director]. *This is sufficient for concluding that the documents are subject to solicitor-client privilege.* [emphasis added]

So it does appear to be the position of the Director that it is "sufficient" for concluding that documents are subject to solicitor-client privilege that they are "clearly marked to" counsel for the Director (see, for example, items (c) and (d) of the list produced by the Director, reproduced at p. 22 of the May 31, 2004 reasons). As articulated by the Director, this position does not appear to be entirely consistent with the law as set out in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31. The Member obviously concluded that it would be necessary for him to consider more detailed submissions from the

Director as to why the documents in question were subject to solicitor-client privilege, and then making a ruling on the issue. We find no fault in this approach. Member Thornicroft did not "disregard" solicitor client privilege. To the contrary, he set up a process that would ensure that it was properly determined.[1]

Member Thornicroft fashioned this order so that these issues could be resolved once and for all, and the appeal could proceed on the merits. We uphold the Member's decision to proceed according to the process described by the Supreme Court of Canada in *Foster Wheeler Power Co. v. SIGED Inc*., 2004 SCC 18 (i.e. to order production of the disputed documents for inspection by the Tribunal). The *Foster Wheeler* process proposed by the Member at p. 21 of his May 31, 2004 reasons, should be highly exceptional. However, having reviewed the voluminous materials before us, we find that the Member made the just and appropriate order in the unique and exceptional circumstances of this case. We note the Director has not argued that, if the disputed documents are to be disclosed to the Tribunal, a Member other than Member Thornicroft should review those documents to determine solicitor-client privilege.

Having found the Member's order to be just and appropriate in the circumstances of this case, we also affirm the Member's observations (at p. 18) that the record provided by the Director is presumptively complete, but if it is apparently deficient then the Tribunal will deal with any issue of the completeness of the record. This can be done by ordering further production of documents and an affirmation that the entire record has been produced. If a claim of privilege is raised, that claim will be accepted unless there is a reason to question it. If the latter, then the Tribunal will deal with that issue by, for example, ordering the Director to produce a descriptive list of the documents over which privilege is claimed, and her reasons for claiming privilege. If necessary, the Tribunal may order the disputed documents themselves be produced for a determination of the privilege issue as per the *Foster Wheeler* process. Depending on the circumstances, the documents could go to the Tribunal's Registrar or a Member.

It is clear to us that the reasons the Member ordered production of the disputed documents in this case included: the Director's lack of clarity and detail concerning the list that was eventually produced; the delay in resolving the issue around the production of documents; and a legitimate concern that the Director's claim of solicitor-client privilege is overbroad. The order is clearly not motivated by a desire to impinge on or lift solicitor-client privilege in order to allow the Appellants to pursue their bias claim. No document over which solicitor-client privilege can properly be claimed will be ordered to be produced to the parties. Rather, the order is intended to ensure that only those documents over which solicitor-client privilege can properly be claimed are withheld as not being part of the record.

With benefit of the clarification we have given in these reasons, the Director will be able to advance her claims for solicitor-client privilege in a specific fashion in accordance with the law protecting such

[1] Paragraph #3 must also be understood in light of the various positions the Director has taken before the Tribunal in relation to production of the record throughout the proceedings before Member Thornicroft. The Director first took the position that she would not comply with the August 29, 2003 order to produce a list of documents over which privilege was claimed; later, after the order deadline had passed, the Director produced a list which the Director then said was responsive to that order but now says was not required by it. Further, the Director continued to maintain that the entire record had been produced before the August 29, 2003 order, despite the fact that in December 2003 she produced a series of e-mails between the delegate and a Deborah Phippen which, as noted in the May 31, 2004 decision, "were 'before' the Director when the Determinations were made and thus should have been included in the record that was initially delivered" (p. 23). These circumstances, which triggered various allegations by the Appellants concerning document production, would also have reasonably played a part in the Member's decision to make an inspection order so that this issue could be resolved and the appeal proceed.

privilege, and also be in a position to advance any other privilege claim, such as the claim that emerged only recently in the reconsideration submission, regarding deliberative secrecy privilege: *York v. Northside-Victoria School District Board*, [1992] N.S.J. No. 167 (C.A.). If the Director wishes to make her representations to the Member on that point in person, she may of course apply to the Member for leave to do so.

Finally on this ground of the reconsideration application, we turn to the Director's submission that the Member had no authority in any event to issue an order requiring the Director to disclose anything. The Director argues that the Tribunal cannot make an order under s. 109 to ensure that she performs her legal duty under s. 112. The Director says the only remedy for her failure to perform her duty is an order in the nature of *mandamus*. We note that this argument was not advanced before Member Thornicroft.

This argument, presented in two brief paragraphs, is not persuasive. Section 121 of the *Act* makes clear that for the purpose of an appeal, the Tribunal may order the Director or a delegate to produce records relating to information obtained for purposes of this *Act*. Section 109(1) confers a series of powers on the Tribunal to compel persons to provide information, including disclosure of a matter required under this *Act*. The obligation under s. 112(5) is a duty to produce under the *Act*. The Director is a "person":

> "director" means the Director of Employment Standards appointed under the *Public Service Act* and, in relation to a function, duty or power that the director has under section 117 of this Act delegated to another person, "director" includes that other person [emphasis added]

These conclusions find support in the express language of the legislation and the purpose of the *Act*. Further, fairness and efficiency (the *Act*, s. 2(d)) are obviously advanced if appellants are able to address s. 112(5) issues before the Tribunal rather than having to go to Court.

2. Paragraph #2

Paragraph #2 is reproduced below:

> By June 30, 2004, the Director or her delegate shall deliver to the Tribunal a written declaration, under oath or affirmation, attesting that he or she has delivered the entire section 112(5) record to the Tribunal. Alternatively, legal counsel for the Director may deliver a written undertaking to the Tribunal to like effect.

The Director objects to this paragraph because it requires an attestation that is absolute, rather than "to the best of her knowledge and ability".

We agree that the attestation required by paragraph #2 would be more appropriately framed as an attestation that the Director has taken steps to the best of her knowledge and ability, to produce the record in accordance with Member Thornicroft's May 31, 2004 reasons:

> By October 29, 2004, the Director, her delegate or her legal counsel shall deliver to the Tribunal a written declaration, under oath or affirmation, attesting as to what steps she taken, to the best of her knowledge and ability, to deliver the entire section 112(5) record to the Tribunal in accordance with the meaning of s. 112(5) of the *Act* as set out in the Tribunal's May 31, 2004 decision.

3. Paragraph #1

Paragraph #1 states as follows:

> The Director shall make whatever further disclosure as may be necessary, in light of the directions set out in these reasons, to ensure that the entire record, as defined by section 112(5) of the Act, is delivered to the Tribunal. Such further disclosure shall be completed by no later than June 30, 2004.

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. We would hope that in light of the file review undertaken by Ms. Reimer as outlined in her June 23, 2004 Affidavit, and the documents attached to her June 30, 2004 Affidavit, confirmation of full disclosure in accordance with the Member's reasons will be straightforward.

We note that in challenging paragraph #1 of the order, the Director has not attempted to meet Member Thornicroft's reasons. Rather, the reconsideration submission proceeds on the premise that the Member's interpretation of s. 112(5) is founded on a concern that bias has been shown. The Director refers to the well known proposition that bias allegations should not be made out in the absence of evidence (*Adams v. W.C.B.* (1989), 42 B.C.L.R. (2d) 228 (C.A.) at 231) and argues further that even if bias were shown, this Tribunal's appeal hearing would cure any bias.

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 not based on a finding that bias has been shown in this case. 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. The bias question is an issue for the merits.

CONCLUSION

For the reasons given in this decision, the May 31, 2004 order is varied to read as follows:

1. The Director shall make whatever further disclosure as may be necessary, in light of the directions set out in the May 31, 2004 reasons, to ensure that the entire record, as defined by section 112(5) of the *Act*, is delivered to the Tribunal. Such further disclosure shall be completed by no later than October 29, 2004.
2. By October 29, 2004, the Director, her delegate or her legal counsel shall deliver to the Tribunal a written declaration, under oath or affirmation, attesting as to what steps she taken, to the best of her knowledge and ability, to deliver the entire section 112(5) record to the Tribunal in accordance with the meaning of s. 112(5) of the *Act* as set out in the Tribunal's May 31, 2004 decision.
3. By October 29, 2004, the Director shall deliver to the Tribunal copies of all documents or other records relating to the claims of the four complainants, Robert Cardinal, Stephen Smith, Todd Norberg, and Larry Catt, that were before the Director at the time the delegate made his Determinations, and for which a claim of privilege is asserted. The documents and records must be accompanied by a list identifying each document or record by date, sender/recipient, and counsel for the Director must include a general written summary regarding the nature of the document and her reasons for objecting to its production. The above documents and

> records, list and counsel's grounds for objection shall be delivered in a sealed envelope marked "Confidential: To Be Opened Only By Kenneth Thornicroft". The Member shall review the documents and records, and counsel's submissions regarding the claim of privilege, and will then rule on the privilege claim for each document or record.

This decision having been made, pre-hearing management of this matter is returned to Member Thornicroft.

Frank Falzon	**Norma Edelman**	**Dave Stevenson**
Panel Chair	**Tribunal Vice-Chair**	**Member**
Employment Standards Tribunal	**Employment Standards Tribunal**	**Employment Standards Tribunal**