Citation: 561748 B.C. Ltd. and Margaret Churchill
2025 BCEST 31

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

- by -

561748 B.C. Ltd. and Margaret Churchill

- of a Determination issued by -

The Director of Employment Standards

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|---|---|
| PANEL: | Kenneth Wm. Thornicroft |
| SUBMISSIONS: | Brett G. McClelland, counsel for 561748 B.C. Ltd. and Margaret Churchill |
| | CB, on his own behalf and on behalf of VB |
| | Tara MacCarron, on behalf of the Director of Employment Standards |
| FILE NUMBER: | 2024/133 |
| DATE OF DECISION: | March 17, 2025 |

# DECISION

## OVERVIEW

1. On September 13, 2024, Tara MacCarron, a delegate of the Director of Employment Standards (the "delegate"), issued a Determination under section 79 of the *Employment Standards Act* (the "*ESA*") ordering the appellants, 561748 B.C. Ltd. and Margaret Churchill ("Ms. Churchill"; jointly, the "appellants"), to pay the total sum of $17,840.80 to three former employees on account of unpaid wages. Further, and also by way of the Determination, the delegate levied seven separate $500 monetary penalties against the appellants (see section 98 of the *ESA*). Accordingly, the appellants' total liability under the Determination is $21,340,80.

2. The appellants now appeal one component of the unpaid wage award made to two of the three former employees on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see sections 112(1)(a) and (b) of the *ESA*).

3. The appellants deposited the entire amount of the Determination with the Director of Employment Standards and requested a section 113 suspension order. The Director of Employment Standards has agreed to hold the funds pending the outcome of this appeal. On November 3, 2024, the Tribunal's Registrar advised the appellants that given the Director's undertaking to hold the funds, "the Tribunal does not find it necessary to make an Order on the suspension issue at this time."

4. As will be seen, I find there is merit to at least some of the appellants' arguments and, accordingly, this matter is being referred back to the Director of Employment Standards in relation to the one component of the Determination that is the subject of this appeal. Otherwise, the Determination is confirmed as issued.

## FACTUAL BACKGROUND

5. As set out in the delegate's "Reasons for the Determination" (the "delegate's reasons") issued concurrently with the Determination, the appellants operate a recreational vehicle park, known as "Tuscany Orchard," in Lake Country. The business is seasonal, being open from April 1 to October 31 each year.

6. The delegate accepted the evidence of two former employees, "CB" and "VB," a married couple (I shall refer to them jointly as the "complainants"), that they worked 124 and 211 hours, respectively, tending to what was described in the delegate's reasons as a "vegetable garden" on the property. The delegate's reasons addressed several issues. However, the correctness of the two unpaid wage awards made in favour of the complainants in relation to their work in the vegetable garden is the sole matter before me in this appeal.

7. The complainants' wage claims spanned the period from April 18 to November 12, 2021. During this period the parties had an arrangement whereby the complainants would provide maintenance and landscaping services in exchange for housing (I understand the complainants were accommodated in a cabin on the property). This arrangement appears to have been only haphazardly documented, both at the outset and during the currency of this "labour for housing" barter arrangement. For

example, as noted in an "Investigation Report" prepared by an Employment Standards Branch officer (discussed in greater detail, below):

> No money exchanged hands between the [appellants] and the Complainants for work done by the Complainants. Neither party could clarify when monthly rent was deducted from the bank of hours. Further, the Complainants did not receive wage statements from the [appellants] or receipts when the [appellants] credited banked hours toward their rent.

8. "Barter" arrangements are not enforceable under the *ESA* (see *Lombnes*, BC EST # D665/01). Thus, the delegate was obliged to determine whether there was an employment relationship, as defined in the *ESA*, as between the parties. The delegate determined that the parties were in an employment relationship, and the appellants do not appeal that finding.

9. Initially, the complainants submitted timesheets setting out their hours, but after May 2021, the complainants only submitted their hours on "an irregular monthly basis" (delegate's reasons, page R4). There is no evidence that the complainants ever received statutory holiday pay or vacation pay. The appellants evicted the complainants, issuing an eviction notice on March 30, 2022, but the complainants did not actually vacate their residential premises until August 31, 2022.

10. The delegate did not conduct an evidentiary hearing, nor did she seek any submissions from the parties prior to issuing the Determination and her reasons (delegate's reasons, page R2). Rather, the delegate issued the Determination based on the evidence and argument submitted to, and otherwise obtained by, an Employment Standards Branch officer who was assigned to conduct the investigation into this dispute (the "ESB officer").

11. On February 15, 2024, the ESB officer issued an "Investigation Report" (the "Report") in which he summarized the parties' evidence and argument. Although the parties' evidence was clearly inconsistent with respect to several matters, the ESB officer did not make any findings of fact, nor did he assess the parties' relative credibility.

12. As noted above, this appeal concerns only the unpaid wage awards made in relation to the complainants' alleged work in the vegetable garden, which work was never documented in the complainants' submitted timesheets. The complainants' evidence on this matter, as set out in the ESB officer's Report, was as follows:

> In addition to the work noted in the timesheets, the Complainants worked in [Ms. Churchill's] vegetable gardens. The gardens are 15.24 x 6.1 metre (50 x 20 ft.) and 21.3 x 3.0 metre (70 x 10 ft.) areas of the Property adjacent to [Ms. Churchill's] residence. When the Complainants started, the gardens were overgrown and [Ms. Churchill] often pulled [CB and VB] off their regular duties on the Property in May and June of 2021 to weed and landscape them. However, [Ms. Churchill] would not allow the Complainants to add hours spent working there to their timesheets. The weeding duties noted in the timesheets only included the weeding done outside of the garden areas. [CB] did not submit any timesheets to the [appellants] with garden hours included in the sums of hours worked.

The Complainants denied the [appellants'] statement that the gardens were internally divided into separate plots and that the [appellants] granted the Complainants an allotment to grow vegetables for themselves. Rather, the whole garden was for [Ms. Churchill's] personal use, and the Complainants' work was for her benefit. [Ms. Churchill] only permitted the Complainants to take certain things grown in her gardens, such as tomatoes, at her discretion…

The Complainants submitted a summary of landscaping and yard work that [Ms. Churchill] sent them to support their work in the gardens was an employment responsibility (Item #6) [*sic*]. The [appellants' summary of landscaping and yard work included the following duties related to [Ms. Churchill's] gardens:

- Rototill
- Remove weeds,
- Build trellis in gardens
- Pull weeds as they come up in park and house area.

The Complainants submitted a summary of the hours they worked in the gardens per week (Item #8). The summary was non-contemporaneous and created from an original calendar of hours that [CB] has since destroyed. The Complainants did not record additional hours worked in the gardens after the week of August 15, 2021.

…On days in the spring and summer months when the Complainants worked fewer than 2.0 hours according to the timesheets, the Complainants continued to work the rest of their day in the gardens at [Ms. Churchill's] request without recording the work in timesheets. There was no overlap between the hours on the timesheet and the hours worked in the gardens, as [Ms. Churchill] would not allow any garden hours to be added to the timesheets. The Complainants did not request to end their work early on days shorter than 2.0 hours. The [appellants'] practice of transferring the Complainants to the gardens continued up to July 7, 2021.

…

Between the week of April 18, 2021, and August 15, 2021, [CB] worked a total of 124 hours in the gardens according to the summary submitted by the Complainants. Garden work made up roughly 10-15 hours of his work per week. His garden hours do not appear on his timesheets.

…

Between the week of April 18, 2021, and the week of August 15, 2021, [VB] worked a total of 211 hours in [Ms. Churchill's] gardens.

In support of the time spent in the garden being work rather than recreation, the Complainants submitted text messages between [VB] and [CB] from June 25, 2021, in which [VB] wrote that she was "[d]reading going to the garden" and messages from October 14, 2021, in which [VB] asked [CB] to pick her up from the garden at a time when she finished there (Item #13). Despite the messages sent on October 14, 2021, the summary of garden hours does not record any hours worked by [VB] in October of 2021.

The [appellants] would not allow [VB] to include time she spent working in the gardens on timesheets. The Complainants drew attention to the "(N/C)", short for "no charge",

noted beside the task "weed garden" on May 6, 2021, to support that [VB] worked in the gardens but did not receive wages.

13. The ESB officer's Report summarized the appellants' evidence with respect to the complainant's claim for "vegetable garden" work as follows:

> The time the Complainants alleged to have worked in [Ms. Churchill's] garden was not work for the [appellants]. Near the beginning of [the complainants'] employment, [Ms. Churchill] told them that they were welcome to share use of her personal garden, but it would require some work such as using the roto-tiller to turn the soil, for which the Complainants earned wages toward their rent as noted in the timesheets. After the garden was ready to plant, [Ms. Churchill] and the Complainants shared the use of the garden. [Ms. Churchill] provided the Complainants water for the garden and some of the seeds without charge. Anything the Complainants grew inside their garden allotment was theirs to keep. However, unlike weeding and landscaping work around the edge of the garden and elsewhere on the Property, the time the Complainants spent tending the garden itself was not work for the [appellants]. At the time the [appellants] employed [CB and VB], the Complainants agreed with this special arrangement for the garden.
>
> [Ms. Churchill] remembered one instance when she told [CB and VB] that weeds were coming up in the shared garden sometime in July or August of 2021. [VB] did one day of work weeding a shared area of the garden, for which [Ms. Churchill] credited toward the rent at the agreed wage rate. [Ms. Churchill] believed [CB] may have worked a second day that lasted 2.0 hours on an unknown date around this period. [VB] came back to harvest in the garden four to six weeks after the weeding, sometime in September of 2021, for 2.0 or 3.0 hours of work.
>
> The [appellants] argued that the Complainants blended the time they spent tending their own small garden plot with work they did for the [appellants] around the Property generally, and only the latter work counted toward the work-rent agreement.

14. The ESB officer's Report also summarized the evidence of two witnesses, "LK" and "RK," who provided evidence on behalf of the complainants:

> [LK and RK] were guests of Tuscany Orchard from on or around May 24, 2021, to the end of October 2021. They returned to stay in May 2022 until the end of October 2022. Neither witness has ever been employed by the [appellants] or had a business relationship with them. [LK] had an arrangement to help [Ms. Churchill] in her vegetable garden in 2022, and [Ms. Churchill] allowed [LK] to keep vegetables in return. [Ms. Churchill's] vegetable garden was not visibly divided into different plots.
>
> In 2021, [LK and RK] witnessed the Complainants removing bushes, weeding, planting, and mowing. [LK and RK] primarily saw VB and [CB and VB's son] working on the Property. They did not see [CB] do much work during the spring and early summer and did not see [CB] do any work after his injury in August of 2021. When [LK and RK] saw [CB and VB] at work, it was during the middle of the day in the middle of the week.
>
> [LK and RK] could not recall specific dates or times when they observed the Complainants at work.

...

[LK] occasionally saw the Complainants work in the vegetable garden in [Ms. Churchill's] backyard. However, [LK and RK] were not able to see into the garden itself from where they parked their trailer and could not have seen the Complainants at work unless [LK and RK] walked away from their trailer to another vantage point on the Property.

## THE DELEGATE'S REASONS

15. The delegate's reasons summarize — essentially verbatim — the parties' conflicting evidence regarding the "vegetable garden" arrangements as set out in the ESB officer's Report. As previously noted, the ESB officer never made any finding regarding which version of the arrangement was to be believed. At page R17 of her reasons, the delegate, after accepting the complainants' timesheets as being an "accurate record" and the "best evidence available," then addressed the complainants' claim for working in the vegetable garden, noting that these alleged working hours were "not captured by [the complainants'] timesheets."

16. As noted in the ESB officer's Report, the complainants' unpaid wage claim regarding work in the vegetable garden was set out in the summary sheet the complainants' submitted to the Employment Standards Branch. "This summary was non-contemporaneous and created from an original calendar of hours that [CB] has since destroyed" (Report, page IR12; section 112(5) record, page 18). With respect to the "garden hours" summary sheet, CB informed an ESB officer: "We had a calendar, scribbled hours we worked in the garden. I took that and burned the calendar" (see section 112(5) record, page 404). The appellants' one-page summary appears at page 62 of the section 112(5) record and records "garden work" for both complainants, in separate columns, spanning the period for the weeks commending from April 18 to August 15, 2021. CB recorded having worked 124 hours and VB recorded having worked 211 hours in the vegetable garden. The total weekly hours recorded were as follows:

| Week | CB | VB |
|---|---|---|
| 2021-04-18 | 12 | 14 |
| 2021-04-24 | 10 | 20 |
| 2021-05-02 | 8 | 16 |
| 2021-05-09 | 14 | 24 |
| 2021-05-16 | 13 | 24 |
| 2021-05-23 | 14 | 22 |
| 2021-05-30 | 8 | 14 |
| 2021-06-06 | 2 | 4 |
| 2021-06-13 | 10 | 11 |
| 2021-06-20 | 14 | 16 |
| 2021-06-27 | 3 | 18 |
| 2021-07-04 | 2 | 3 |
| 2021-07-11 | 4 | 6 |
| 2021-07-18 | 4 | 8 |
| 2021-07-25 | 5 | 4 |
| 2021-08-01 | 0 | 5 |

| | | |
|---|---|---|
| 2021-08-15 | 1 | 2 |
| Totals | 124 | 211 |

17. The delegate noted that because the complainants only provided a summary record of hours worked in each week, "one is unable to determine whether any overtime hours were worked" (page R17). The delegate noted that the appellants contested the total number of hours claimed "given the actual size of the Garden" (the complainants' evidence, as set out in the Report, was that the two gardens were 1,000 and 700 square feet, respectively). The delegate also noted that the appellants maintained that the complainants work in the vegetable gardens "was done so in their own personal time." I note that the appellants' evidence — which the complainants do not appear to have contradicted — was that only the larger of the two gardens was ever used.

18. The delegate made two findings regarding the complainants' claim for hours worked in the vegetable gardens. First, she held that the complainants' work tending to the vegetable gardens was compensable working time. Second, she held that the complainants' summary of their working hours was accurate. The delegate's reasons for these two findings are set out at pages R17-R18 of her reasons. The delegate held that the complainants had been ordered to work in the vegetable garden on at least two occasions and from this evidence concluded "it is more likely than not that it happened more regularly than the [appellants have] portrayed."

19. With respect to the hours the complainants claimed to have worked in the vegetable garden, the delegate noted that the appellants "confirmed it accepted the hours submitted by the Complainants on the timesheets" and thus "I question why the summary of the Complainants' record of the hours they worked in the Garden (which were based on original records which were claimed to have been kept contemporaneously) would not be equally reliable". The delegate stated that "I accept the Complainants' summary of their hours worked in the Garden and, alongside their other timesheets, I find them to be an accurate record of the Complainants' hours of work throughout their employment." The delegate also held:

> It should also be noted that Ms. Churchill knew the Complainants were working in the Garden and she continually allowed them to do so. It was Ms. Churchill who forbade the Complainants from recording their time spent in the Garden on their timesheets. Seeing as the [appellants] knowingly allowed the Complainants to work in the Garden and intentionally instructed the Complainants to omit these hours from their timesheets, the argument cannot be made that the time worked in the Garden by the Complainants was without authorization of the [appellants] and, therefore, is not entitled to wages.

20. The delegate did not question the fact that CB destroyed the original source records from which the "vegetable garden" hours summary was apparently prepared (i.e., spoliation). The delegate did not directly address whether there was an agreement between the parties whereby the complainants could use the vegetable garden for their own purposes and could take produce from the garden, and from other areas of the property (for example, apricots, cherries, peaches, grapes, walnut, hazelnut and chestnuts), for their own personal use as a *quid pro quo*. The delegate did not question whether the hours the complainants claimed to have worked in the garden were reasonable in light of the small scale of the garden and the fact that little or no work in the garden would have been necessary prior to the end of May 2021.

21. As for the complainants' credibility, their own witness, LK, confirmed that she "had an arrangement to help [Ms. Churchill] in her vegetable garden in 2022, and [Ms. Churchill] allowed [LK] to keep vegetables in return" — the very same sort of arrangement that was alleged to have in place with the complainants. The delegate never addressed this evidence in terms of Ms. Churchill's credibility. Finally, the delegate did not address the appellants' concern that the complainants' claim for hours relating to the garden was not advanced until long after they stopped paying rent and were, in consequence, evicted. These issues, and others, were specifically identified in the appellants' response to the ESB officer's Report.

## THE PARTIES' POSITIONS

*The appellants' submissions*

22. The appellants say that the delegate erred in law and failed to observe the principles of natural justice in making the Determination regarding the unpaid wage award relating to the complainants' "vegetable garden" claim.

23. The appellants say that the delegate made several errors — amounting to errors of law — in making certain findings of fact. In particular:

- the delegate referred to the complainants' "hours summary" as having been "created from original individual records privately maintained by the Complainants throughout their employment" (page R17) when, in fact, "the summary was non-contemporaneous and created from an original calendar of hours that [CB] has since destroyed" (ESB officer's Report, page IR 12);
- this previously identified destruction of the source document was a "blatant spoliation" and the delegate never addressed how this action should have affected the weight to the given the complainants' "summary";
- the delegate improperly used Ms. Churchill's admission that she had, on two occasions, directed one or both complainants to work in the garden (with the work to be credited to the hours submitted in their timesheets), to then conclude that all the work undertaken in the garden was for the appellants' benefit;
- further, in making this immediately noted finding, the delegate ignored the complainants' own evidence that they "agreed to a small garden to learn how to grow vegetables" (section 112(5) record, pages 147-148);
- the delegate ignored a May 27, 2021 text message from Ms. Churchill to CB "*asking* if he *wanted* to plant more rows in the garden" and "then relied on the May 29, 2021, text message where [Ms. Churchill] *followed up* with [CB] and pointed out that the water was going to be turned on as evidence that the [Ms. Churchill] was directing the Complainants to work" (*italics* in original text);
- the delegate "found that the [appellants] forbade the Complainants from submitting hours worked in the garden, despite the [appellants] openly accepting hours worked in the garden at the [appellants'] request on two occasions";

- the delegate "seemingly ignored that the Complainants claimed hours spent making tenant improvements *to their own residence* as hours worked for the [appellants]" (*italics* in original text);
- the delegate "accepted at face value the Complainants [*sic*] summary of their time worked in the garden as evidence of the actual hours [CB and VB] worked in the garden, in spite of the fact that Complainant [*sic*] admitted the source of that summary that was allegedly contemporaneously created was destroyed by [CB]";
- the delegate accepted the complainants' evidence that the appellants had forbidden them from submitting hours on their timesheets for "garden work" – as set out in various e-mails to them – but never produced the e-mails that would have corroborated those directions, and thus erred in taking the complainants' evidence "at face value without any analysis of the weight or reliability of entirely self-serving claims"; and
- the delegate did not properly weigh the claim as to the number of hours allegedly worked given the size of the garden and the relevant vegetable growing season.

24. Given these errors, the appellants say that the delegate's decision is entirely unreasonable, tainted as it is by many palpable and overriding errors.

25. With respect to the natural justice ground of appeal, the appellants, citing the Tribunal's decision in *Groulx*, 2021 BCEST 55 at para. 30 (and the other decisions referred to therein) say that, overall, the delegate's reasons are impermissibly inadequate, reflect bias in terms of the inferences drawn by the delegate, and do not show that the conflicting evidence before the delegate was adequately weighed.

*The complainants' and delegate's submissions*

26. The complainants' submission speaks to several matters that are not germane to this appeal. Their submission also includes new evidence that was not before the delegate when she made the Determination and thus is not admissible in this appeal. The complainants also appear to be advancing some new claims in their submission (including, for example, a claim under section 8 of the *ESA* and claims for work that was not reflected in their timesheets).

27. While admitting that it was a "mistake" to destroy the source documents from which the "garden hours" summary was prepared, the complainants maintain that the summary is nonetheless accurate. The complainants acknowledge that while they "showed interest in planting a couple of rows in the garden," they never agreed to undertake to work in the vegetable garden without compensation.

28. The delegate, in her submission on behalf of the Director of Employment Standards, responded to several of the points advanced by the appellants. I will address each response in turn.

29. With respect to the destruction of the source material from which the "vegetable garden" hours summary was prepared, the delegate says that the use of the term "destruction" is "exaggerated" as it implies "negative intent" underlying the destruction "for which there is no evidence." The delegate did not directly address the matter of spoliation, an issue specifically raised by the appellants in their appeal.

30. Insofar as the validity of the "vegetable hours" claim is concerned, the delegate says:

> While the Complainants may not have been able to produce a specific email from the Appellants directing the Complainants to omit their hours in the Garden from their record of hours, the Director submits this does not inevitably demonstrate the Appellants did not make such a demand. As the Determination found, several of the Appellants' claims were not true. This includes [the complainants' son's] status as not an employee, [the complainants'] status as farm labourers, and whether the parties had a valid assignment of wages in place. Bringing these falsities together, it is not unreasonable for the Delegate to call into question the validity of the Appellants' evidence that they never instructed the Complainants to not record their hours of work in the Garden.

31. Turning to the matter of the two instances of "directed" or "authorized" work in the vegetable garden, which the appellants concede is compensable working time, the delegate maintains that this evidence supports, rather than undermines, the complainants' entire claim:

> ...the Appellants admitted there was one instance in which [the complainants] both worked in the Garden at the Appellants' request, and one instance in which [VB] worked in the Garden at the Appellants' request. Seeing as both parties agree these two instances of time spent in the Garden was work entitling the Complainants to wages, the Director questions what differentiates these instances from all the other instances the Complainants performed similar work also in the Garden...
>
> ...The Appellants confirm the work the Complainants did in the Garden on these two specific instances was work, thereby entitling them to wages. It then follows that presumably all other work done by the Complainants in the Garden, whether it be directly or indirectly ordered by the Appellants, could reasonably be work entitling the Complainants to wages. A few instances of directed work does not mean the Complainants were not performing work at other times.

32. Finally, the delegate says that there are credible explanations regarding why the bulk of the claimed garden hours was apparently undertaken outside the usual growing season.

33. The delegate asks the Tribunal to dismiss the appeal and confirm the Determination as issued.

## FINDINGS AND ANALYSIS

34. The threshold issue before the delegate was whether there was an agreement between the parties whereby the complainants would be given unfettered access to the vegetable garden and could use the garden for their own purposes (and to harvest other tree fruits elsewhere on the property), in exchange for undertaking work in the garden which would also benefit Ms. Churchill. The ESB officer did not make any findings in this regard.

35. Although the complainants submitted timesheets in relation to their general landscaping and yard maintenance work, they never submitted timesheets in relation to their work in the vegetable garden. The complainants' position is that the appellants specifically directed them not to record these latter

hours. While maintaining that these directions were contained in various emails from the appellants, no such communications, save in relation to two separate occasions, were ever produced. The delegate found that the appellants' evidence regarding the "vegetable garden" agreement was "not entirely true." Relying on the two occasions when the complainants were directed to work in the garden, delegate reasoned as follows (at page R18):

> While these are just a few examples of [Ms. Churchill] instructing the Complainants to work in the Garden, I find they undermine [Ms. Churchill's] claim that she never ordered the Complainants to work in the Garden. Instead, I infer it is more likely than not that it happened more regularly than [Ms. Churchill] has portrayed.

36. The delegate reiterated this position in her submission, stating that "all other work done by the Complainants in the Garden, whether it be directly or indirectly ordered by the Appellants, could reasonably be work entitling the Complainants to wages [because a] few instances of directed work does not mean the Complainants were not performing work at other times."

37. The delegate never made a finding that Ms. Churchill's evidence was not credible, or that the appellants were credible witnesses — and given the fact that no evidentiary hearing was ever held, I query how the delegate might have been able to make a credibility finding. The clear and obvious conflict in the positions of the two parties called for a relative credibility assessment to be undertaken.

38. The delegate appears to have accepted the complainants' assertion that there was no agreement because there were two instances where there was a direction given to work in the garden. However, the appellants conceded that the work done on these two occasions was compensable. The appellants' position regarding the agreement between the parties with respect to the use of vegetable garden is consistent with the documentary evidence available, as well as with the fact that the complainants never submitted a claim for having worked in the vegetable garden during the currency of their employment. The only evidence favouring the complainants' position that their labour in the vegetable garden was compensable work is their own uncorroborated assertion. Similarly, there is no documentary evidence confirming the complainants' position that the appellants specifically directed them not to record their "vegetable garden" hours in their timesheets.

39. Further, the complainants conceded, in their written response to the ESB officer's Report, that they "agreed to a small garden to learn how to grow vegetables" (section 112(5) record, pages 147-148), a concession that seemingly supports the appellants' position. The complainants also conceded in their submission on appeal that they "showed interest in planting a couple rows in the garden" and that they only wished to have "a small garden and plant a few rows", statements that also could be taken as corroborative of the appellants' position.

40. Insofar as the appellants' position is concerned, there was evidence of a similar agreement in place with LK and RK in 2022. This evidence supports, rather than undermines, the appellants' position but the delegate never addressed this evidence in her reasons. Further, the complainants never submitted this claim until after the parties' relationship ended. There is no independent evidence corroborating the complainants' position that they were specifically told not to submit their

"vegetable garden" hours. The complainants apparently maintained that there was evidence in the form of emails that corroborated their position, but these documents have never been produced.

41. In my view, especially given the other contrary evidence discussed above (which the delegate did not properly address), the delegate erred in law in finding that two instances of authorized or directed work could then be leveraged to demonstrate that *all* hours claimed for allegedly undertaking various (but never particularized) tasks in the vegetable garden constituted "work" under the *ESA*.

42. Apart from the matter of spoliation (discussed below), the onus on proof rested with the complainants to show, on a balance of probabilities, first, that there was no agreement regarding the vegetable garden as was alleged by the appellants; second, and assuming the complainants prevail on the first question, the complainants must demonstrate that their work in the vegetable garden constituted compensable "work" under the *ESA*; and, third, prove that they worked the number of hours which they claimed to have worked.

43. Perhaps the more problematic issue concerns CB's destruction of the source records which were used to prepare the "garden hours" summary. I note that CB is a former lawyer (see section 112(5) record, page 403) and thus should have been particularly sensitive to the legal issues arising from a deliberate destruction of evidence. Indeed, he concedes that the destruction of the source records was an "error". The complainants' hours summary only reports the total hours allegedly worked in a week. Thus, the appellants were denied access to important information about how many hours were allegedly worked on individual days which, in turn, would have allowed them to more effectively challenge the complainants' claim. The appellants were also denied an opportunity to examine the source records in order to challenge whether these records were valid and reliable.

44. Where there is spoliation, a rebuttable presumption arises that the destroyed evidence was unfavourable to the party destroying the evidence (see *Axion Ventures Inc. v Bonner*, 2025 BCSC 167). This is an issue that the delegate should have addressed (particularly since the appellants specifically challenged the veracity of the summary and the absence of source records) but did not. The delegate's position, as set out in her submission on appeal, is that the destruction of the source records was akin to the inconsequential destruction "of a transitory draft after the final copy is prepared." However, this argument wholly misses the point that we are here dealing with the destruction of *evidence* — indeed, the destruction of the *most critical* evidence as it relates to the complainants' "vegetable garden" claim.

45. In a case of proven spoliation, a decision-maker has various options open to them which could include, in a case such as this, the exclusion of the derivative evidence that was allegedly prepared from the primary evidence that was destroyed.

46. In my view, and for the reasons given above, the unpaid wage award made in relation to the complainants' claim for working in the vegetable garden cannot stand. Accordingly, that aspect of the Determination is cancelled.

47. Given the lack of critical findings of fact, I am in no better position than was the delegate to assess whether the "vegetable garden" claim is meritorious. Accordingly, this issue will be referred back to the Director of Employment Standards so that, at a minimum, the following issues can be fully investigated (including a proper assessment of the parties' relative credibility) and adjudicated: 1) Was there an

agreement between the parties in relation to the vegetable garden and, if so, what was the nature of the agreement?; 2) Did the complainants undertake any compensable work, and if so, how many hours did each complainant work, in relation to the vegetable garden; and 3) What is the appropriate order, if any, to be issued in relation to CB's destruction of the source documents from which the complainants' hours summary was prepared (i.e., was there a spoliation and, if so, how should that be remedied?).

## ORDER

48. Pursuant to section 115(1)(a) of the *ESA*, the unpaid wage awards made to each complainant (including any vacation pay, consequential statutory holiday pay, and interest) in relation to their alleged work in the "vegetable garden" are both cancelled. In all other respects, the Determination is confirmed.

49. Pursuant to section 115(1)(b) of the *ESA*, the matters identified in paragraph 47 of these reasons are referred back to the Director of Employment Standards.

*/S/ Kenneth Wm. Thornicroft*

**Kenneth Wm. Thornicroft**
**Member**
**Employment Standards Tribunal**