Citation: Beach Place Ventures Ltd. and Black Top Cabs Ltd. (Re)
2019 BCEST 61

An Application for Reconsideration

- by -

Beach Place Ventures Ltd. and Black Top Cabs Ltd.
("the Applicants")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

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

PANEL: Jacquie de Aguayo, Chair
Robert E. Groves
Richard Grounds

FILE No.: 2019/29

DATE OF DECISION: July 5, 2019

DECISION

SUBMISSIONS

Robert W. Grant, Q.C. on behalf of the Applicants

OVERVIEW

1. The Applicants have filed an application under section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration of a decision dated March 15, 2019 (the "Appeal Decision") by Tribunal Member David B. Stevenson (the "Member").

2. In the Appeal Decision, the Member decided the Applicants' appeal under section 112 of the *ESA* of a determination (the "Determination") dated March 29, 2018, by a delegate (the "Delegate") of the Director of Employment Standards. The Appeal Decision varied two aspects of the Determination, but otherwise dismissed the appeal and affirmed the Determination.

3. In the Determination, the Delegate found the three complainants, Ali Abadi-Asbfroushani ("Mr. Abadi"), Fenton Ramesh Paul ("Mr. Paul"), and Arash Karimian Azimi Saraf ("Mr. Saraf") (collectively, the "Complainants"), were employees of the Applicants for purposes of the *ESA* and that the Applicants were therefore liable under the *ESA* to pay wages (and accrued interest) to them. These aspects of the Determination were upheld in the Appeal Decision.

4. In their application for reconsideration of the Appeal Decision, the Applicants submit the Member erred in upholding the Delegate's finding that the Complainants were their employees for purposes of the *ESA* and in finding the Delegate did not breach principles of natural justice in making the Determination. The Applicants also proffer what they describe as "new evidence" as a basis for reconsideration of the Appeal Decision, and make other arguments.

5. As the Applicants note in their reconsideration application (para. 114), the Tribunal's reconsideration power is discretionary and is to be exercised in limited circumstances: *Milan Holdings Inc. (Re)*, BC EST D313/98 ("*Milan Holdings*"). *Milan Holdings*, the Tribunal's leading decision on the Tribunal's exercise of its reconsideration powers under section 116, states at page 7:

> The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. As noted in previous decisions, "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society* (BCEST # D199/96, reconsideration of BCEST # D114/96).

6. Accordingly, we must review this application for reconsideration to determine whether it warrants an exercise of our discretion to reconsider the Appeal Decision and, if so, whether the Appeal Decision should be confirmed, varied, or cancelled under section 116 of the *ESA*.

THE APPLICATION FOR RECONSIDERATION

7. The Applicants' reconsideration submission is 37 single-spaced pages in length (the "Reconsideration Submission"). They have attached their 78-page appeal submission to it, as well as an excerpt from a transcript, and numbered this material consecutively as totalling 223 pages. While we have reviewed this material, our focus is on the Reconsideration Submission. We will not be re-addressing the Applicants' appeal submission, which was considered and addressed by the Member in the Appeal Decision. Reconsideration is not an opportunity for a party to present their appeal of a determination to a different panel of the Tribunal in hopes of receiving a different answer. Rather, it provides an opportunity for an applicant to argue that reconsideration of an appeal decision is warranted.

8. In this case, the Applicants submit the Member erred in the Appeal Decision by upholding the Delegate's conclusion in the Determination that the Complainants were their employees within the meaning of the *ESA*. The Applicants submit their relationship with the Complainants "was not an employment relationship", but rather "a relationship between a business and its suppliers of goods and services" (para. 12). They say the Complainants "each operated a taxi business", and to carry on that business they "entered into contracts with the owners of taxis whereby they would lease the owners' taxis for an agreed-upon amount and period of time", thereby obtaining "the benefit of the brand name and the dispatch and accounting services that the owner had purchased from the Applicants for the benefit of every operator of the taxi vehicle" (para 13). The Applicants assert that the Delegate and the Member "mischaracterized this legal relationship by failing to identify, articulate or apply an intelligible, coherent, and transparent conception of employment to the facts"'; instead, the Delegate and the Member "simply deemed the Complainants to be employees, and the Applicants to be their employer, on the basis of a misconceived predisposition to find every worker to be an employee so that the worker may receive the 'benefits' of the ESA" (para. 15).

9. The Applicants then go on to make assertions of facts, without reference to the factual findings made by the Delegate in the Determination. Some of their assertions of fact are not consistent with the Delegate's findings of fact. For example, they assert the Complainants "solely determined how they would like to use their leased taxis" (para. 18), and "were free to determine the hours they operated the taxi in the rental period" and "could take a break whenever they wanted and start the shift late or end it early if they wished" (para. 19). They assert the Complainants "had complete control over their work, including if and when they worked and how much they paid to rent a taxi from third parties" (para. 25), and that they "had the complete freedom to hire someone else to drive the taxi or to sublease the taxi to another driver, without any approval from the owner or the Applicants" (para. 26).

10. In the Determination, the Delegate noted the Applicants made similar arguments that the Complainants had complete freedom to control and direct their taxi-driving work and to determine how the taxi they leased would be used during the lease period (pp. R21 – R22). However, the Delegate found that, while the Complainants had "*some* freedom and discretion in the day-to-day performance of their duties by virtue of operating alone in their vehicles" (Determination, p. R40, emphasis in the original), the Applicants exercised considerable control and direction over the Complainants' work and their use of the leased

vehicle, particularly through the Complainants' dependence on the Applicants' dispatch system. He found the Applicants used the dispatch system to "instruct taxi drivers including the Complainants to pick up mandatory fares, to update drivers including the Complainants about Black Top's and Beach Place's policies, and to discipline drivers like the Complainants in real-time for breaching those policies" (*ibid.*). The Delegate rejected the Applicants' argument that the Complainants were free to ignore the dispatch system, finding that being denied access to it "could ruin the economic prospects for any given shift", and that the Applicants, through the dispatch system, "substantially controlled the earning potential of the Complainants" (*ibid*).

11. The Delegate further found the evidence before him "suggests that when a Complainant was unable to drive as scheduled, he was required to notify Beach Place, and Beach Place would assign a replacement driver from Black Top's list of 'pre-approved' drivers" (p. R41). He also found the "freedom the Complainants had in setting their own schedules was not unlike the freedom an employee enjoys when he or she informs an employer that he or she wishes to work particular days or hours, and the employer accedes to the request if the possibility to do so is there" (p. R41) and that "[m]ost of the time, their days and hours of work were regular" (p. R45).

12. Thus, the factual assertions made by the Applicants in their Reconsideration Submission differ in some respects from the factual findings in the Determination. As noted in the Appeal Decision (para. 83), the *ESA* does not permit the Tribunal to ignore or overrule a delegate's findings of fact, unless the Tribunal concludes on appeal or reconsideration that the delegate's findings of fact amount to an error of law. As further noted in the Appeal Decision (para. 84), the test for establishing an error of law on this basis is "stringent": a delegate's findings of fact in a determination are only reviewable as errors of law if they are based on no evidence or on a view of the facts which could not reasonably be entertained. Here, the Applicants do not assert this stringent test is met and, in any event, we find it is not met. Accordingly, to the extent the factual assertions of the Applicants differ from the factual findings by the Delegate in the Determination, the latter must prevail.

13. The Appeal Decision, at paragraphs 20 – 25, summarizes the factual findings the Delegate made in relation to factors he found were relevant to the central question of whether there was an employment relationship for purposes of the *ESA* between the Complainants and the Applicants. As noted in the Appeal Decision (para. 20), those factors included: control and direction; equipment, tools and supplies; financial investment and risk; opportunity for profit; and permanency of the relationship. All of these are factors commonly considered in relation to this question, both at common law and under the *ESA*. The Delegate also considered factors specific to this case and arguments made by the Applicants: the personal tax filings of the Complainants; and the absence of GST and WorkSafeBC filings (see the headings in the Determination at pp. R40 – R45, noted in the Appeal Decision at para. 20).

14. The Delegate analysed the facts before him in relationship to these factors (Determination pp. R40 – R45), and held they led to the conclusion that there was an employment relationship between the Complainants and the Appellants for purposes of the *ESA* (p. R46). As noted in the Appeal Decision (para. 24), the Delegate also addressed the Applicant's arguments against this conclusion in the Determination (pp. R46 – R48). The Delegate was not persuaded by the Applicants that they "merely provide support services to taxi owners and drivers running their own businesses", finding instead that they and their shareholders "are really a syndicate operating a single taxi business (i.e. Black Top and Checker Cabs)" (Determination, p. R47, quoted in the Appeal Decision at para. 24).

15. The Applicants argued on appeal that the Delegate erred in law in rejecting their characterization of the relationship between them and the Complainants and finding instead that it was an employment relationship for purposes of the *ESA*. The Applicants' arguments in that regard are addressed in the Appeal Decision (paras. 82 – 106). Ultimately, the Member was not persuaded the Delegate erred in law as alleged by the Applicants. Nor was he persuaded the Determination was reached in a manner that was procedurally unfair to the Applicants, as they had alleged. His reasons with respect to those arguments are set out in the Appeal Decision (paras. 50 – 81).

16. In seeking reconsideration of the Appeal Decision, the Applicants make a number of arguments in their Reconsideration Submission as to how they submit the Member erred in reaching these conclusions in the Appeal Decision. Their arguments can be summarized as follows:

a. The Member erred in law and denied natural justice by failing to enunciate and apply a "conception" of what constitutes an employment relationship when deciding whether the Delegate erred in finding one existed between the Applicants and the Complainants.

b. The Member erred in upholding the Determination that the Complainants are the employees of the Applicants even though the Applicants received only indirect, and not direct, economic benefit from the taxi driving work performed by the Complainants.

c. The Member misinterpreted the *ESA* and misconceived its purposes by believing it should be interpreted to protect as many people as possible instead of as many employees as possible.

d. The Member erred in finding the Delegate was not required to consider and give weight to the common law factor of the subjective intention of the parties with respect to whether their relationship was one of employment.

e. The Member erred in distinguishing federal case authorities relied on by the Applicants, particularly a decision of the Tax Court of Canada, *Beach Place Ventures Ltd. v. Canada (Minister of National Revenue)*, 2019 TCC 24 ("*Beach Place TCC*"), and erred in not considering whether, in light of *Beach Place TCC*, the doctrines of *res judicata* or issue estoppel applied, at least in respect to the complaint filed by Mr. Abadi.

f. The Member erred in dismissing the Applicants' arguments that the Delegate breached natural justice and denied the Applicants a fair hearing in making the Determination, and the Member also erred and breached natural justice himself by not seeking reply submissions to the Applicants' appeal submission before issuing the Appeal Decision.

g. The Applicants also submit that *Beach Place TTC* "constitutes new evidence" for purposes of reconsideration, and they ask the Tribunal to also consider a transcript of Mr. Abadi's testimony before the Tax Court on December 6, 2018, as "new evidence" for purposes of reconsideration.

17. We will consider and address each of these arguments in turn.

ANALYSIS

A. Failure to articulate a clear conception of what constitutes an employment relationship

18. The Applicants assert that it is "crucial" for the Tribunal to "provide a clear and coherent conception of employment to guide future decisions" (para. 44). They say that at "every stage" of the proceedings in this matter, they themselves "have provided a clear and concise conception of an employment relationship, grounded in law and economics", which they set out (para. 46). Despite this, they submit, their "careful submissions on this central issue have never been addressed by the Tribunal or Delegate, and no alternative characterization of an employment relationship has ever been proposed" (para. 47). They submit this means "not only that a central component of the Applicant's submissions [has] been implicitly rejected, without explanation, but also that the crucial finding of employment has been made without an intelligible or transparent justification" (*ibid.*).

19. We do not agree that either the Delegate in the Determination or the Member in the Appeal Decision failed to address a central component of the Applicant's submissions. It is clear from a reading of both the Determination and the Appeal Decision that the Applicants' central argument – that their relationship with the Applicants did not constitute an employment relationship for purposes of the *ESA* – was addressed in both decisions. Accordingly, there was no denial of a fair hearing in that regard. We further find that, in deciding whether there was an employment relationship for purposes of the *ESA* between the Applicants and the Complainants, neither the Delegate nor the Member was required to provide a "clear and concise conception of an employment relationship" in the abstract. This is because it has long been recognized that the existence of an employment relationship is best determined by considering relevant factors, not by articulating and applying a precise legal test or definition. As explained by Major J. for the Supreme Court of Canada in the leading common-law authority on this issue, *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 ("*Sagaz*") at para. 46:

> In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan, supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations ..." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing *Atiyah*, supra, at p. 38, that what must always occur is a search for the total relationship of the parties:
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> > [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones. (emphasis added)

20. The Supreme Court went on in *Sagaz* (paras. 47 – 48) to describe the appropriate approach at common law to distinguishing an employment relationship from other kinds of relationships:

> Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is

> that taken by Cooke J. in *Market Investigations, supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
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> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case. (emphasis added)

21. In the Appeal Decision, the Member noted that the Tribunal has considered *Sagaz* and the various common law tests it reviewed and found that "while common law tests may remain useful in focusing attention on relevant factors, they must be applied bearing in mind the broad statutory definitions which in turn are interpreted in light of the policy objectives of the *ESA*" (para. 90). The Member also noted in the Appeal Decision (para. 85) that the Delegate had stated in the Determination that the common law tests are "helpful and useful tools when addressing employment status", but they are "subordinate to the provisions of the Act" (p. R38). The Member stated that the Delegate "engaged in an appropriate analysis of relevant legal factors, and the Appellants arguments to the contrary are not persuasive" (para. 86).

22. In their Reconsideration Submission, the Applicants complain that "[i]nstead of articulating a clear conception of employment, the Delegate and the Member selectively applied some of the common law indicia of employment in a completely decontextualized fashion, devoid of any consideration of the purpose of the factors or any larger conception of employment" (para. 48, emphasis in original). They further assert this approach "constitutes a failure or refusal to reason in a legal or logical way" (para. 50). We do not find these submissions persuasive. As already noted, it is well-established, both at common law and under the *ESA*, that the existence of an employment relationship is not determined by way of the application of a test or "conception" of employment, but rather by the application of a number of relevant factors, such as control, ownership of tools and equipment, financial risk, opportunity for profit, etc. As stated in *Sagaz*, there is not an exhaustive list of factors which may be relevant, "there is no set formula as to their application", and the relative weight of each "will depend on the particular facts and circumstances of the case" (para. 48).

23. Most of the factors considered by the Delegate in this case are ones that have been expressly identified as potentially relevant factors in *Sagaz* or other common law authorities. Consistent with the approach outlined in *Sagaz*, the Delegate selected the factors he found to be relevant based on the facts and circumstances before him. He also then considered the totality of the evidence before him concerning the relationship between the Complainants and the Applicants, as suggested in *Sagaz* (para. 46). In doing so, he concluded that the Applicants did not "merely provide support services to taxi owners and drivers running their own businesses", but rather that they were "really a syndicate operating a single taxi business (i.e. Black Top and Checker Cabs)" (Determination, p. R47).

24. We find no basis for the Applicant's assertion that the Delegate selected or applied the factors "in a completely decontextualized fashion, devoid of any consideration of the purpose of the factors or any larger conception of employment" (para. 48) or for the assertion that the analysis in the Determination

or the Appeal Decision "constitutes a failure or refusal to reason in a legal or logical way" (para. 50). To the contrary, we find the Member correctly concluded in the Appeal Decision that the Delegate applied the proper legal approach for determining whether there was an employment relationship between the Applicants and the Complainants for purposes of the *ESA*.

B. No direct economic benefit from the Complainants' taxi work

25. In their Reconsideration Submission (paras. 54 – 61), the Applicants take issue with paragraphs 101 – 103 of the Appeal Decision, in which the Member addressed the Applicants' argument that the Complainants cannot be their employees because, they said, the Complainants' taxi driving work did not provide them with any direct benefit. The Member rejected this argument, first because "it is not necessary for the purpose of establishing an employment relationship to show that the [Applicants] received a direct economic benefit from the Complainants' taxi driving work", and second because "as the [Applicants] concede, they did receive an indirect economic benefit" (para. 102). In addition, the Member noted it was apparent the driving work performed by Lease and Spare Drivers like the Complainants is an "essential element" of the taxi enterprise (*ibid.*). The Member further stated (paras. 103 – 104):

> Accordingly, it cannot be said, and the Appellants do not claim, that they receive no benefit whatsoever from the Complainants' driving work. Rather, they argue that the benefit they receive should not be considered, or should count for nought, in deciding whether an employment relationship exists between them and the Complainants for the purpose of the *ESA*. They say to do otherwise would result in the untenable conclusion that either "everyone" involved (that is, presumably, all Black Top taxi drivers) is part of a single business with no employees, or conversely that they are all employees.
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> However, the Determination does not decide that all Black Top drivers are employees of the Appellants; it merely decides that the Complainants are. The Complainants are distinguishable from other Black Top taxi drivers in that they are not taxi vehicle Owners and therefore shareholders of the Appellants. Rather, they are Spare or Lease Drivers. As such, their circumstances are clearly different from any other Black Top drivers who are Owners/shareholders. A finding that the Complainants are employees of the Appellants therefore does not necessarily equate to a finding that all Black Top taxi drivers are employees of the Appellants. The Delegate did not need to decide the employment status of other Black Top drivers, such as those who are shareholders of the Appellants. He only needed to decide the employment status of the Complainants, who were not shareholders. I find there is nothing untenable in the Delegate's conclusion that they were employees of the Appellants within the meaning of the *ESA*.

26. In their Reconsideration Submission, the Applicants submit that "[i]f economic benefit is extended to this type of indirect benefit, the concept loses any ability to distinguish one legal relationship from another" (para. 55). They say that "[o]n this reasoning the Law Society receives an economic benefit from a lawyer's clients and therefore is the employer of all clients" or "if Telus provides telecommunications services to Hudson's Bay, it receives an economic benefit from the store['s customers and therefore must employ all customers" (*ibid.*). They say that "on the conception of economic benefit adopted by the Member, everyone derives a benefit from everyone else's labours and therefore everyone must employ everyone else" (para. 56). They submit that it is "precisely this type of decontextualized and arid reasoning that makes the justification offered by the Member unintelligible" (para. 57).

27. We do not find these submissions persuasive. The Member did not uphold the Delegate's conclusion that an employment relationship existed between the Applicants and Complainants merely because the Complainant's lease payments to the Applicant's shareholders provided an indirect economic benefit to the Applicants. Rather, he rejected the Applicant's argument that the Complainants cannot be their employees because the Applicants received no direct economic benefit from the Complainants' taxi driving. He rejected it first because it is not necessary for the purpose of establishing an employment relationship to show such a direct economic benefit; second because the Applicants did receive an indirect economic benefit from the Complainants' taxi driving; and further because the driving work of lease and spare drivers like the Complainants is an essential element of the taxi enterprise.

28. The Member went on to address the Applicants' argument that finding the Complainants to be employees of the Applicants would mean "everyone must employ everyone else" in paragraph 104 of the Appeal Decision, set out above. We do not agree that the reasoning or analysis is "decontextualized", "arid", or "unintelligible", and we find these submissions do not provide a basis for reconsidering the Appeal Decision's upholding of the Determination that the Complainants were employees of the Applicants for purposes of the *ESA*.

C. Misinterpretation of the *ESA* and misconception of its purposes

29. In their Reconsideration Submission, the Applicants go on to submit that "[t]his kind of incoherent analysis, devoid of any actual engagement with a conception of employment, is the only analysis that the Applicants have received from the Delegate and the Member" (para. 61). They submit the "analytical approach [is] unsound" and has been "guided by a profound misconception regarding the interpretation and application of the ESA, and the ESA's purposes" (para. 62). They say these "misconceptions are most clearly and concisely captured by the proposition that 'the ESA is intended to apply to as many people as possible'" (para. 63) and that the "unavoidable corollary is that 'as many people as possible should be treated as employees for the purposes of the ESA'" (para. 64). They assert that "these misconceptions motivate virtually every aspect [of] the Delegate's and Member's 'reasoning'" (para. 65) and that the "procedures chosen, the acceptance / rejection / weighing of evidence, and the legal reasoning, are all distorted to the point of error by the decision-makers' belief that the ESA is intended to apply to as many people as possible" (para. 66).

30. We are not persuaded the Determination or the Appeal Decision reflects a "profound misconception regarding the interpretation and application" of the *ESA* and its purposes. The phrase identified by the Applicants as erroneous – "the *ESA* is intended to apply to as many people as possible" – is found in one passage in the Determination (p. R39), in which the Delegate states:

> As the [*ESA*] is remedial, benefits-conferring legislation designed and intended to protect as many people as possible (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 ["*Rizzo*"]), an interpretation of the [*ESA*] which encourages employers to comply with the minimum requirements of the [*ESA*], and so extends its protection to as many employees as possible, is to be favoured over one that does not (see *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 at 507 ["*Machtinger*"]).

31. In their Reconsideration Submission, the Applicants submit that the Delegate's statement in the above passage that the *ESA* is "intended to protect as many people as possible" is "an example of a systemic bias

at the Branch level" (para. 68). They say a further example is a July 2016 Branch Factsheet entitled "Employee or Independent Contractor" which states that the *ESA* "is intended to protect as many workers as possible" (*ibid.*). They add that in their submissions to the Member on appeal, they cited two instances where the Tribunal had repeated this proposition. They say they "urged the [Member] to address this important point" (para. 69) but that "[d]espite these submissions, the [Appeal] Decision is silent about whether or not the ESA is intended to apply to as many people as possible" (para. 70).

32. The Applicants submit that, because the Appeal Decision did not accede to their urging to address this point, "it is apparent that the Member accepts or even endorses the proposition that the [*ESA*] should be applied to as many people as possible" (para. 71). They say there is "no legal basis for this proposition in the language or purpose of the ESA or the jurisprudence of the courts" (para. 73). They ask this panel to "consider whether the ESA is intended to apply to as many people as possible, because if so, that would amount to a presumption of employment status, strongly and systematically biasing the outcome in every complaint towards a finding that the complainant is an employee" (para. 75).

33. We are not persuaded the impugned phrase in p. R39 of the Determination reveals bias, pervasive legal error, or otherwise establishes a proper basis to reconsider the Appeal Decision's upholding of the Determination. In the sentence containing the impugned phrase, the Delegate accurately paraphrased the passage from *Machtinger*, in which the Supreme Court of Canada stated that an interpretation of employment standards legislation "which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not". In *Rizzo*, the Supreme Court of Canada's stated that the object of employment standards legislation is "to protect the interests of as many employees as possible". The Delegate, in paraphrasing this passage, said "people" instead of "employees". We are not persuaded this choice of words reveals reviewable error. We find it is clear when the Determination is read as a whole that the Delegate applied the proper legal approach to the facts before him in deciding whether an employment relationship existed between the Applicants and the Complainants under the *ESA*.

34. The Applicants complain that, although on appeal they urged the Member to clarify that the *ESA* is not intended to apply to as many "people" as possible, the Appeal Decision is silent on this point. We find this silence does not reveal a reviewable error. It was not necessary for purposes of deciding the appeal to address the Applicant's question about the Tribunal's general interpretation of the *ESA*. Furthermore, we too find it unnecessary to address this question, beyond stating that we agree with the Applicants that the passages in *Rizzo* and *Machtinger* do not mean there is a "presumption" of an employment relationship, where that characterization of a relationship is disputed.

35. Where a respondent to a complaint disputes that the complainant is their employee within the meaning of the *ESA,* that issue falls to be determined on the basis already described in this decision. The delegate must consider the facts and circumstances before her or him in light of relevant factors such as control, ownership of tools and equipment, opportunity for profit, financial risk, permanency of the relationship, etc. This is precisely the approach taken by the Delegate in the Determination and approved by the Member in the Appeal Decision. In these circumstances, we find the Delegate's use of the word "people" in the quoted passage from p. R39 of the Determination, and the Member's choice not to specifically address the Applicants' complaint about the use of that word, do not establish either bias or misconception regarding the interpretation or purposes of the *ESA*, as the Applicants have alleged.

D. The subjective intention of the parties as a factor

36. The Applicants take issue with paragraph 105 of the Appeal Decision, in which the Member dismissed their argument on appeal that the Delegate erred by not considering the subjective intention of the Applicants and the Complainants with respect to their relationship. They say that at common law, the subjective intention of the parties is a factor to be considered in deciding whether an employment relationship exists, and they submit that the Tribunal is obliged to interpret the *ESA* harmoniously with the common law. They take issue with the Tribunal's ability to interpret defined terms in the *ESA* such as "employee" differently from what those terms mean at common law, and they submit that, "[u]nlike the *Labour Relations Code*, the ESA does not confer upon the Tribunal any exclusive jurisdiction to decide questions about whether a person is an employer or employee" (para. 95).

37. In fact, however, the *ESA* does confer exclusive jurisdiction on the Tribunal to interpret and apply the *ESA*, and this includes deciding whether a person is an employer or an employee for purposes of the *ESA.* As explained by Harris J. (as he then was) in *Canwood International Inc. v. Bork*, 2012 BCSC 578 ("*Canwood*") at paras. 102 – 104:

> The *ESA* provides statutory protection for entitlements such as wages owing to employees. What and who is entitled to protection under the *ESA* is a matter of statutory interpretation. The question whether someone is an employee for the purposes of the *ESA* and whether they are entitled to wages for the purposes of the *ESA* are also matters of statutory interpretation. Those questions cannot be reduced to the application of common law principles, although those principles may inform the analysis of whether the statute applies to a given relationship or issue.
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> It will be seen that the definitions of "employee" and "wages" in the *ESA* are both broad and not equivalent to the definitions of those terms in the common law:
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> [quotation of *ESA* definitions omitted]
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> Whether an individual is an employee for the purposes of the *ESA*, whether they are entitled to wages, and whether the nature of any obligation for financial remuneration falls within the obligation to pay wages are not just matters of the application of the statute; they are matters at the heart of the jurisdiction of the Director and the Tribunal. The specialised expertise of the Director and the Tribunal in relation to these matters is recognised by the privative clause conferring on the Tribunal exclusive jurisdiction over those matters and ousting the jurisdiction of the Court.
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> (emphasis added)

38. In its interpretation of the terms "employer" and "employee" in the *ESA*, the Tribunal has not rejected the intention of the parties as one potentially relevant factor in deciding whether an employment relationship exists between them. However, the Tribunal has made it clear that the intention of the parties is only one factor that may be considered, and that it does not trump the reality of the nature of the relationship as revealed by other relevant factors. For example, in *LoveAgain Network Inc.*, BC EST # RD120/12 ("*LoveAgain*"), the Tribunal stated at para. 25:

> There is no doubt that LoveAgain deliberately structured the relationship between Ms. Goss and itself as a "contractor" relationship but the law is crystal clear that form never triumphs over substance when dealing with this sort of dispute. Parties cannot, by the simple rubric of a contractual declaration, exclude the application of the *Act* to their relationship. In my view, the

> delegate did not consider the "wrong" legal test but rather correctly directed his mind to the statutory definition of "employee" and applied the criteria set out in that definition to the evidence at hand. Clearly, and standing alone, some of the evidence submitted by LoveAgain supported a finding that Ms. Goss was an independent contractor; however, the delegate was bound to consider the totality of the evidence in light of the statutory considerations and, in that regard, I am in complete agreement with Tribunal Member Stevenson that the delegate's ultimate conclusion that Ms. Goss was an employee was reasonable especially in light of the Supreme Court of Canada's dictate that employment standards legislation be given a large, liberal and remedial interpretation (see *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 and *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27). …

39. In the present case, the Delegate similarly noted that the Applicants argued they merely provided support services to taxi owners and drivers running their own businesses, and stated he recognized that "most of the documents the [Applicants] submitted suggested that they attempted to organize their affairs to reflect this on paper" (Determination, p. R47). However, the Delegate added, "the form of the [Applicants'] intended relationship with the Complainants does not align with its substance" (*ibid.*). We find no error in this analysis. As stated in *LoveAgain*, the contractual "form" of the relationship "never triumphs over substance" when deciding whether or not it is one of employment for purposes of the *ESA*.

40. In addition to considering the Applicants' own documents, the Delegate also considered the Complainants' personal tax filings and the Applicants' argument that they "confirm that [the Complainants] always saw themselves as self-employed, and that this should deal a near fatal, if not fatal blow, to the complaints" (Determination, p. R44). The Delegate rejected this argument, holding that even if he accepted that the Complainants intended to be treated as self-employed in their relationship with the Applicants, "that does not (by itself or in combination with other factors militating toward self-employment) have the effect of changing the fundamental objective reality of the relationship between them and both [Applicants]" (*ibid.*).

41. We are therefore satisfied the Delegate considered the Applicants' evidence and argument with respect to the subjective intention of the parties. We further find he did not err in looking at the totality of the evidence before him, not just the evidence of the subjective intention of the parties. We find it was open to him to conclude that, even taking the evidence of subjective intention at its highest and assuming the parties subjectively intended that their relationship not be one of employment, the totality of the evidence before him established the Complainants were employees of the Applicants for purposes of the *ESA*.

42. As the Member noted in the Appeal Decision, the subjective intention of the parties, as a factor in determining whether an employment relationship exists, "may have greater relevance in other legislative contexts, but it generally has little relevance in the employment standards context" (para. 105). As he further noted, this is because of the generally unequal bargaining power between employees and employers noted by the Supreme Court of Canada in *Machtinger* at para. 31 (quoted in the Appeal Decision at para. 99), and because one cannot contract out of the minimum protections provided by the *ESA*. Bearing this context in mind, we agree with the Appeal Member that the Delegate's assessment of the subjective intention of the parties as one factor in determining whether theirs was an employment relationship for purposes of the *ESA* does not reveal reviewable error.

E. Distinguishing federal case authorities, particularly *Beach Place TCC*, and issue estoppel

43. The Applicants submit the Member erred in finding that, because certain case authorities on which they relied arose "either under the common law or under statutory regimes other than the *ESA*, such as federal legislation governing taxation, employment insurance, and pension benefits", those case authorities were "distinguishable on this basis and not directly relevant to the issue of employment status under the *ESA*" (Appeal Decision, para. 94). The Applicants submit that, because the *Employment Insurance Act* and the *Canada Pension Plan* are benefits-conferring legislation, it "cannot plausibly be argued that there is any appreciable difference regarding the interpretive approach under the EI Act from that under the ESA on the basis of different legislation" (Reconsideration Submission, para. 99).

44. We are not persuaded by this argument that the Member erred when he observed that the federal case authorities relied on by the Applicants were distinguishable on the basis that they decided the issue of employment status under the common law or under statutory regimes other than the *ESA*. While we accept that the *Employment Insurance Act* and the *Canada Pension Plan* are also benefits-conferring legislation, we do not agree that this alone establishes there is no appreciable difference regarding the interpretative approach under those pieces of legislation and the *ESA*. We are not persuaded this argument establishes a reviewable error of law warranting reconsideration of the Appeal Decision.

45. The Applicants further submit that the question before the Tax Court in *Beach Place TCC* was the same question that was before the Delegate "and is now before the Tribunal: was Abadi in business for himself or was he a worker working as an employee of the Applicants?" (para. 101). They submit that *Beach Place TCC* is "binding under the principle of issue estoppel" (para. 103). They also submit the Member "did not consider whether, in light of *Beach Place TCC*, the doctrines of *res judicata* or issue estoppel applied (at least to the Abadi complaint)" (para. 116b). The Applicants elaborate on this argument in the final paragraphs of their Reconsideration Submission, under the heading "*Res Judicata* (Abadi Complaint)". They begin by submitting that, as a result of *Beach Place TCC*, "Abadi's complaint has become *res judicata*" (para. 126).

46. The Applicants in their Reconsideration Submission (para. 127) then quote paragraphs 18, 20, and 21 of the Supreme Court of Canada's decision in *Danyluk v. Ainsworth* Technologies Inc., 2001 SCC 44 ("*Danyluk*"). In those paragraphs, the Court states that the law "rightly seeks a finality to litigation" and that therefore it "requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so" (para. 18). The Court further states that the law has developed a number of "techniques" to prevent "abuse of the decision-making process", which include the doctrines of cause of action estoppel, issue estoppel, and collateral attack (para. 20). Finally, the Court notes that these rules were initially developed in the context of prior court proceedings, but have since been extended to decisions of a judicial or quasi-judicial nature by administrative tribunals (para. 21).

47. In *Danyluk*, the Court sets out that the question of issue estoppel arose because the individual appellant had been dismissed from her employment with the respondent company, and had initially sought to recover some $300,000 in unpaid commissions through an employment standards complaint. When that route proved unsuccessful, the appellant then tried to recover that amount through a civil claim; however, the lower court dismissed her claim on the basis of issue estoppel. In overturning that dismissal, the Supreme Court of Canada stated that "in general issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been unsuccessfully litigated before an administrative tribunal" (para. 1). However,

the Court went on to note that the doctrine of issue estoppel was "developed to serve the ends of justice" and therefore "should not be applied mechanically to work an injustice" (*ibid.*).

48. The Court in *Danyluk* noted that there were three "preconditions" to the operation of issue estoppel: (1) that the same question has been decided; (2) that the "judicial decision" which is said to create the estoppel is "final"; and (3) that the parties to that decision "or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies" (para. 25). In *Danyluk*, the decision which gave rise to the question of issue estoppel was made by an officer of the Ontario Director of Employment Standards after an investigation. The Court agreed with the lower courts that this was a final "judicial" decision on the same issue between the same parties, and therefore "the preconditions to issue estoppel are met in this case" (para. 61). The Court in *Danyluk* held, however, that because the employment standards officer was found to have breached procedural fairness in reaching her decision, the lower court should have declined to apply the doctrine. The Court held it was unjust to bar the appellant's subsequent civil claim on the basis of issue estoppel when the earlier decision had been found by a court to be flawed by procedural unfairness.

49. In the present case, the Applicants submit the preconditions for applying the doctrine of issue estoppel are met. While the parties before the Tax Court were only Beach Place Ventures Ltd. as the appellant, Her Majesty the Queen (the Minister of National Revenue) as the respondent, and only one of the complainants, Mr. Abadi, as the "intervenor", the Applicants nonetheless say the "parties are the same" (para. 132). They submit this is the case because "Beach Place and Black Top are sister companies", because Mr. Abadi as an intervener was "not merely a witness in the case", and because they say his "interests were aligned with the Minister whose case was argued by a barrister employed by the Department of Justice of Canada" (*ibid.*). The Applicants submit that therefore the preconditions for issue estoppel are met, and they submit "there is no valid reason for the Tribunal to exercise its discretion to decline to apply issue estoppel in Abadi's case" (para. 133). They submit the Determination should be cancelled as it relates to Mr. Abadi, and his complaint "dismissed on the basis of issue estoppel" (para. 134).

50. We are not persuaded by these submissions for a number of reasons.

51. First, in our view, the preconditions for an application of issue estoppel are not made out, because the parties to the Tax Court decision are not the same as the parties to this appeal. The parties to *Beach Place TCC* were Beach Place as the appellant and the Minister of National Revenue as the respondent, and only Mr. Abadi had intervener status. By contrast, the parties to the present matter are Beach Place Ventures and Black Top Cabs Ltd. as the appellants, and the three Complainants as well as the Director of Employment Standards as respondents.

52. Second, even if it could be said the parties to the Tax Court proceeding are the same for issue estoppel purposes as the parties to the present employment standards proceeding, in our view this would merely mean that the question of issue estoppel should have been raised for the Tax Court's consideration, given the Delegate issued the Determination, which found an employment relationship between the Applicants and the Complainants, on March 29, 2018. This was well before the December 5 – 6, 2018 Tax Court hearing which led to the issuance of *Beach Place TCC* on January 29, 2019.

53. In *Danyluk*, the Court expressly found that a decision on an employment standards complaint by an employment standards officer after an investigation was sufficiently final and judicial in nature to give rise to a question of issue estoppel, if a party attempted to pursue the same issue in court. The Court further held that issue estoppel should not be applied in that case to bar the subsequent civil claim because the employment standards officer's decision had been found to be procedurally flawed. In this case, by contrast, the Delegate's Determination has not been found to be procedurally unfair or otherwise fatally flawed. Accordingly, to the extent the Applicants argue issue estoppel arises in this case, it would appear to arise as between the Determination and the Tax Court decision.

54. Third, even if we assume a question of issue estoppel can properly be raised before the Tribunal as a result of *Beach Place TCC*, we do not agree the doctrine means that the Tax Court decision is "binding" upon the Tribunal, as the Applicants claim. As explained in *Danyluk*, issue estoppel is an equitable doctrine and therefore its application is discretionary. Even if its preconditions are met, there is no requirement to apply it. As stated in *Danyluk*, the doctrine should not be applied where it would work an injustice. Here, we find it would work an injustice to apply the conclusion reached in *Beach Place TCC* and on that basis overturn the conclusion reached by the Delegate.

55. As the Member explained in the Appeal Decision at paragraph 98 – 100, *Beach Place TCC* decided the issue of whether an employment relationship existed between Beach Place Venture and Mr. Abadi in a different legislative context from the one in which the Delegate decided whether an employment relationship existed between the Applicants and the Complainants. As he further stated in the Appeal Decision, the "context of employment standards legislation is distinguishable from other legislative contexts" with respect to this issue (para. 99). Terms such as "employee" and "employer" must be interpreted in their statutory context, which means that, while some of the same common law factors may be considered, they may be given different weights in different statutory contexts. The result may be different conclusions as to the nature of the relationship for the purpose of different legislative regimes.

56. For example, the Tax Court judge in *Beach Place TCC* found it significant that for seven years Mr. Abadi reported for tax purposes that he was self-employed before he "changed his mind" and decided he was an employee (pp. 8 – 9). The judge found this was evidence of a common intention between Mr. Abadi and Beach Place Ventures that the relationship was not one of employment for tax purposes, and he placed weight on this common intention. By contrast, the Delegate noted that "all three Complainants independently stated that either (or both) Respondent(s) instructed (i.e. forced or required) them to file taxes as self-employed in order to work for them", and he declined to put significant weight on alleged evidence of a common intent (p. R44). He further stated that, even if he were to accept that the Complainants "all saw themselves as self-employed at all material times, and that they all intended to be treated as self-employed in their relations with the Respondents, and that they all filed taxes as self-employed persons at all material times, that does not (by itself or in combination with other factors militating towards self-employment) have the effect of changing the fundamental objective reality of the relationship between them and both Respondents" (*ibid.*).

57. Thus, in our view, it is clear that the Tax Court judge and the Delegate each looked at the evidence before them through the lens of the particular statutory regime in which the issue of employment relationship arose before each of them. They then each came to a conclusion with respect to whether there was an employment relationship for the purpose of the particular legislative context in which each was deciding that issue. The fact that a different conclusion was reached does not mean that either was wrong as far

as each decision goes (that is, in its particular statutory context). As the Supreme Court of Canada noted in *McCormick v. Fasken Martineau Dumoulin LLP*, 2014 SCC 39 ("*McCormick*"), an individual may be an "employee" in one statutory context but not in another.

58. In *McCormick*, the Court was considering whether a law firm partner was an "employee" of his law firm for purposes of human rights legislation. In the course of considering this issue, the Court noted that as a result of the "expansive approach to the definition of 'employment'" under human rights legislation, independent contractors "have been found to be employees for purposes of human rights legislation, even though they would not be considered employees in other legal contexts" (para. 22). The Court further noted that the Ontario Labour Relations Board "uses a seven-factor test for determining if an employment relationship exists" and stated that "<u>while significant underlying similarities may exist across different statutory schemes dealing with employment, it must always be assessed in the context of the particular scheme being scrutinized</u>" (para. 25, emphasis added).

59. Here, assessed in the context of the statutory regime established by the *ESA*, we find the Member did not err in upholding the Delegate's decision that the relationship between the Complainants and the Applicants was one of employment for purposes of the *ESA*. The decision in *Beach Ventures TCC* does not persuade us otherwise. To the extent that the Tax Court judgment gives rise to a question of issue estoppel (as opposed to arguably being subject to a question of issue estoppel itself in light of the earlier Determination), we decline to apply the doctrine because in our view to do so would work an injustice. The Delegate reached the Determination on the basis of an investigation during which he heard submissions from all three Complainants, not just one of them, and from both Applicants. In the Appeal Decision, the Member was not persuaded the Determination was reached in a manner that was procedurally unfair to the Applicants. Unless we reach a different conclusion on that issue, we find it would not be just and equitable to apply the doctrine of issue estoppel as a basis for overturning the Determination as it relates to Mr. Abadi.

F. Natural justice/procedural fairness/bias issues

60. The Member addressed the Applicants natural justice/procedural fairness grounds of appeal at paragraphs 50 – 81 of the Appeal Decision. He began by setting out the general principles which apply (paras. 50 – 55). Among other things, the Member noted in those paragraphs that, while the Delegate was under a general duty of fairness in making the Determination, the content and scope of the right to natural justice/procedural fairness is "highly contextual" (para. 50). In the context of decision-making by administrative decision-makers, the duty of fairness must be applied flexibly so as not to place them in a "procedural straight-jacket" by requiring them to hold "judicial type hearings" (para. 51, quoting a passage from the decision of the Ontario Court of Appeal in *Downing v. Graydon*, (1978) 21 O.R. (2d) 292). In addition to recognizing that judicial fair hearing requirements should not automatically be imposed on administrative decision-making, courts have also recognized that fairness requirements can be legislatively modified (para. 52). Section 77 of the *ESA* "addresses the scope of procedural protection to be applied in the context of an investigation under the *ESA"*, and it provides that if an investigation is conducted, "the director must make reasonable efforts to give a person under investigation an opportunity to respond" (para. 53, quoting section 77 of the *ESA*). We find no errors in the Appeal Decision's summary of general principles at paragraphs 50 – 55.

61. The Member further correctly stated in the Appeal Decision (paras. 54 – 55):

> Under section 77, it is not required that the person under investigation be provided with the evidence of the claim; it is sufficient that they be provided with enough particulars of the claim to make the opportunity to respond meaningfully: see *Cyberbc.Com AD & Host Services Inc.,* BC EST # RD344/02 (Reconsideration of BC EST # D693/01).
>
> The Appellants submit (p. 16), and I agree, that they were entitled to an adequate opportunity to be heard (*audi alteram partem*) and an impartial and unbiased decision-maker (*nemo judex in sua causa*). They quote a passage from *Vanform Canada Inc*., BC EST # D048/08, which confirms that the first of these principles means that "the parties to a dispute are entitled to know the case against them and to be heard by, and make submissions to, the decision-maker" (para. 22), but that it does not necessarily include a right to an oral hearing or to cross-examine witnesses (para. 23). As stated in the excerpt from *Baker, supra*, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case".

62. The Member then went on to consider the Applicants' natural justice/procedural fairness grounds for appealing the Determination. Among other things, the Member found the Applicants' complaints about the way the Delegate reached the Determination "appear to misconceive the nature of the investigative process carried out by delegates of the Director under the *ESA* (para. 57). The Member then addressed some of the Applicants' specific complaints about the process (paras. 58 – 66). He concluded (para. 67):

> Viewed as a whole, I find the process before the Delegate was procedurally fair. The Determination and the Record reveal that the Appellants were provided with the opportunity required by section 77 of the *ESA*, and the applicable principles of natural justice, to know the case they had to meet, present their position, including providing evidence to support that position, and to respond to the positions presented by the Complainants and the evidence provided by them to support that position.

63. The Member further noted that the Delegate in the Determination "summarizes the Appellants' position and arguments at length and addresses them in some detail", and that the Determination "evidences that the Delegate heard and considered those positions and arguments" (para. 69). The Member rejected the Appellants' allegations of bias at paragraphs 70 – 79, finding that the allegation was unsubstantiated. Among other things, the Member noted that many of the Applicants' bias allegations flow from the Delegate's decision to proceed by way of investigation rather than adjudication, but the Member found the Delegate had the authority to choose to investigate, and "the choice to investigate in this case did not impede the Appellants' ability to know the case to be met and to answer it" (para. 74). Accordingly, he found the decision to investigate "was not a breach of procedural fairness" and "does [not] provide a basis for a reasonable apprehension of bias" (*ibid.*).

64. In their Reconsideration Submission, the Applicants take issue with the Member's dismissal of their bias allegation and with his finding that the Delegate did not breach natural justice in proceeding by way of investigation rather than an oral hearing. We are not persuaded these submissions raise a serious question as to the correctness of the Member's conclusion that the allegation of bias was not substantiated and that the Delegate's decision to proceed by way of investigation rather than an oral hearing did not breach procedural fairness/natural justice requirements. We adopt the reasons given in paragraphs 50 – 81 of the Appeal Decision in that regard.

65. In paragraphs 116d – 116n of the Reconsideration Submission, the Applicants take issue with statements made within those paragraphs of the Appeal Decision. For the reasons which follow, we do find these submissions do not establish that reconsideration of the Appeal Decision is warranted.

66. In paragraph 116d, the Applicants take issue with the Member's statement at paragraph 72 of the Appeal Decision that the only evidence they cited in alleging "systemic bias" against the Employment Standards Branch was the Determination. The Applicants submit "[t]here is also the Branch's published policy document, and the Tribunal's past misstatements of the law (that the ESA applies to as many people as possible)". We are not persuaded this submission establishes the Member erred in dismissing their complaint of "systemic bias" against the Branch. We find the evidence the Appellants cite is insufficient to establish a reasonable apprehension of bias as a basis for setting aside the Determination. We further agree with the observation in paragraph 72 of the Appeal Decision that, in any event, the Delegate, not the Branch, was the decision-maker.

67. At paragraphs 116e – 116g, the Applicants take issue with paragraph 65 of the Appeal Decision, where the Member finds that it was unnecessary to consider whether the Delegate made a finding that section 21 was breached in a procedurally fair manner, because the Delegate's section 21 finding was quashed on its merits in any event. The Applicants submit that "[t]he manner in which the issue was decided, and the practical outcome, is further evidence of bias". We have considered the Applicants' submissions and are not persuaded the Member made a reviewable error in paragraph 65 of the Appeal Decision. We are also not persuaded by their submissions that the Delegate's section 21 finding gives rise to a reasonable apprehension of bias.

68. In paragraph 116h, the Applicants argue the Delegate erred or breached natural justice in choosing to investigate rather than hold an oral hearing, citing previous decisions of the Tribunal in support of this position. We find these submissions do not raise a serious question as to the correctness of the Appeal Decision on this issue. We rely on paragraphs 50 – 58 and 74 – 76 of the Appeal Decision, which explain why the Applicant's complaint about the Delegate's decision to proceed by way of investigation rather than an oral hearing did not establish a breach of natural justice/procedural fairness.

69. In paragraph 116i, the Applicants submit that the Member's statement, at paragraph 68 of the Appeal Decision, that the "central, material" facts were not in dispute, and that it was the correct legal characterization of those facts which was disputed, is "inaccurate". They say the following facts, which they submit were "central and material", were in dispute: "the existence of a single taxi business, who 'provided the taxi', who paid for fuel, profit and loss, financial investment, negotiation of lease prices, hours of work and control of work days and hours, and subcontracting". They then state that because the Delegate made "findings of facts that are contradictory and irreconcilable, it is also impossible to know which of the contradictory findings was relied on". They say this is "a mistake in stating the facts, regarding underlying errors of law".

70. We find these submissions do not persuade us that reconsideration of the Appeal Decision is warranted. While there were some areas of difference between the evidence of the Applicants and Complainants, there was no real dispute as to the central, material facts that Beach Place Ventures and Black Top Cabs were two closely associated companies who each carried on certain activities in relation to Black Top taxi drivers, including the Complainants. The fundamental dispute between the parties was the legal characterization of the relationship between them, for purposes of the *ESA*. While the Delegate made

many findings of fact in the Determination, we find it is clear that it was this issue of legal characterization of the largely undisputed facts about the relationship between the Applicants and the Complainants which determined the finding of an employment relationship for purposes of the *ESA*. We find the Applicants' submissions regarding paragraph 68 of the Appeal Decision do not provide a basis for reconsideration of the Appeal Decision.

71. We have reviewed paragraphs 116j, 116k, 116l, and 116m of the Applicant's Reconsideration Submission, which take issue with statements in paragraphs 63, 66, 59, and 80 of the Appeal Decision. We are not persuaded these submissions raise a serious question with respect to the correctness of the Member's finding in the Appeal Decision that the Delegate did not deny the Applicants natural justice/procedural fairness in making the Determination. We agree with the Member when he stated at paragraph 67 of the Appeal Decision (set out above at paragraph 62) that viewed as a whole the process before the Delegate was procedurally fair.

72. In paragraph 116n, the Applicants complain that the Member dismissed their appeal without "a hearing of any kind" and without inviting or receiving any submissions in response to their appeal. They submit the Member instead "decided to make the case against" their appeal within the Appeal Decision, which they submit was "a breach of natural justice principles" and "a mistake in applying the appeal provisions of the ESA". We find no merit in these submissions. As the Applicants note, there is no mention in the Appeal Decision of section 114 of the *ESA*, which allows the Tribunal to summarily dismiss appeals under enumerated circumstances. The fact that the Member did not summarily dismiss the appeal on one of the section 114 grounds does not mean he was required to seek response submissions from the Complainants and the Director before deciding and dismissing the appeal on its merits. The Applicants do not point to anything in the *ESA* which required the Member to do so. To the extent the Applicants point to Rule 23 of the Tribunal's *Rules of Practice and Procedure*, it is clear that the rule cannot be read in a manner inconsistent with the *ESA*. We find the fact the Member did not summarily dismiss the appeal under section 114, but rather dismissed it on its merits without seeking submissions from opposing parties, did not deny the Appellants natural justice or constitute a mistake in applying the appeal provisions of the *ESA*.

73. With respect to the submission that the Member "[made] the case against" the appeal in the Appeal Decision, we do not agree with this characterization of the Appeal Decision. The Member was obliged to give reasons for dismissing the appeal, and he did so. This was not in any way improper or unfair. With respect to the Applicants' complaint that, because the Member did not seek submissions from the other parties before rendering the Appeal Decision, they had no opportunity to reply to his reasons, we note first that a right of reply to other parties' submissions only arises if other parties' submissions are sought. Second, there is no right for a party to "reply" to the reasons of a decision-maker. Rather, there is a right, under the *ESA*, to seek reconsideration of the Appeal Decision, which the Applicants have exercised. We find the Applicants have not established any unfairness or error of law in the manner in which the Appeal Decision was rendered which would warrant reconsideration.

G. New evidence application

74. The Applicants note that "new evidence" is a basis for reconsideration and submit that the decision in *Beach Place TCC* "constitutes new evidence of a judicial decision on the same employment status question". The

Applicants also proffer as "new evidence" a partial transcript of the proceedings before the Tax Court judge – specifically, Mr. Abadi's testimony before the Tax Court on December 6, 2018 (the "Partial Transcript").

75. The Tribunal's long-established test, for the admission of "new evidence" as a basis for appeal or reconsideration under the *ESA* is set out in *Merilus Technologies Inc.* ("*Merilus*"):

> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with the other evidence, have led the Director to a different conclusion on the material issue.

76. All four elements of the test must be met. In our view, neither *Beach Place TCC* nor the Partial Transcript meets all elements of the test, for the reasons which follow.

77. With respect to *Beach Place TCC*, while the decision did not exist before the Determination was made, it did exist before the Appeal Decision was made. The Applicants provided *Beach Place TCC* to the Tribunal shortly after it was issued, and the Member considered it in the Appeal Decision. It is therefore not "new evidence" in the sense of not having been put before the decision-maker whose decision is now under review. In addition, for reasons already given, we are not persuaded the Member erred in his consideration of *Beach Place TCC* and the arguments the Applicants made to him with respect to it. In any event, we also do not accept that *Beach Place TCC* is "evidence" for purposes of reconsideration. The Tax Court judge was not a witness, and his decision was not evidence; he was a decision-maker, and *Beach Place TCC* was his decision. We thus find *Beach Place TCC* is neither "new" nor "evidence" for purposes of reconsideration.

78. With respect to the Partial Transcript, we note *Beach Place Ventures* states that four taxi drivers, including Mr. Abadi, testified, and "the fifth witness was the general manager of Beach Place and Black Top Cabs" (para. 3). The Partial Transcript on which the Applicants rely only provides a transcript of Mr. Abadi's evidence. Thus, it does not present a complete picture of the evidence that was presented to the Tax Court judge. In these circumstances, we are not persuaded by the Applicants' assertion that the Partial Transcript, being the evidence of only one of five witnesses, "establishes … facts that differ from the facts on which the Determination is based" (p. 25). The Delegate did not base his findings of fact in the Determination on the evidence of Mr. Abadi alone. He investigated and considered the evidence of the three Complainants and the extensive evidence of the Applicants. In these circumstances, we find the Partial Transcript does not meet the fourth *Merilus* requirement. The probative value of the Partial Transcript in terms of establishing facts which differ from the facts on which the Determination is based is low, because it provides only a transcript of the evidence of Mr. Abadi to the Tax Court, not that of the other witnesses.

79. We would add that, even if the Applicants had submitted the entire transcript of the evidence before the Tax Court, we would not find it an appropriate basis for interfering with the Delegate's factual findings. We have concluded that the Determination was made in a procedurally fair manner, consistent with the requirements of section 77 of the *ESA.* In these circumstances, we find it would not be consistent with the purposes of

the *ESA* to permit the Applicants to rely on the written transcript of evidence subsequently given orally in another forum, held for a different purpose, as a basis for challenging the factual and credibility findings made by the Delegate in the Determination. As the Supreme Court of Canada observed in *Danyluk*, the law "rightly seeks a finality to litigation" and "requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so" (para. 18). Doctrines such as issue estoppel and collateral attack protect the finality of the decision-making process (para. 19). The Applicants also rely on the Partial Transcript to challenge the Delegate's decision not to hold an oral hearing so that they could cross-examine the Complainants. In particular, they submit the Partial Transcript "raises serious doubt about the reliability of Abadi's evidence before the Delegate and highlights the necessity of conducting a hearing at which the Applicants are permitted to cross-examine the Complainants on their allegation of having worked as employees rather than in their own businesses" (pp. 34 – 35). We are not persuaded by the Applicants' submissions in that regard. There is no transcript of Mr. Abadi's evidence before the Delegate; it therefore cannot be known whether what he said then is inconsistent in material ways with what he said in Tax Court. In any event, we find the Applicants have not established that the Determination turned on the nuances of the evidence of Mr. Abadi. Rather, we find, it turned on the Delegate's consideration of the evidence before him as a whole, and especially on his rejection of the Applicants' characterization of their operations as being merely service providers to the Complainants as one-person taxi businesses. Instead, the Delegate concluded the Applicants and their shareholders ran a taxi business which employed the Complainants as spare or lease drivers. We are not persuaded the Delegate denied the Applicants natural justice when he did not hold an oral hearing so that the Applicants could cross-examine the Complainants "on their allegation of having worked as employees rather than in their own businesses", as the Applicants submit.

CONCLUSION

80. Under section 116 of the *ESA*, the Tribunal has a discretion to reconsider appeal decisions. The Tribunal exercises this discretion with restraint, in keeping with the purposes of the *ESA*, which include providing "fair and efficient procedures for resolving disputes over the application and interpretation" of the *ESA*. In this case, the dispute to be resolved was whether the Complainants were employees of the Applicants for purposes of the *ESA*. The Delegate investigated that issue, including by considering the evidence and submissions of the Applicants, and his Determination reflects that evidence and those submissions, as well as the evidence and submissions of the Complainants. He concluded the Complainants were employees of the Applicants for the reasons he gave in the Determination. The Applicants appealed the Determination to the Tribunal under section 112 of the *ESA*. Their 78-page appeal submission was considered and addressed by the Member in the Appeal Decision. For the reasons given in the Appeal Decision, the Member concluded the Delegate did not err in concluding the Complainants were employees of the Applicants for purposes of the *ESA*.

81. The Applicants have sought reconsideration of the Appeal Decision. We have carefully considered and addressed the submissions made in their Reconsideration Submission and have also considered the material attached to that submission. Having considered that material, we are not persuaded the Appeal Decision should be varied or cancelled on reconsideration (or that any matter should be remitted to the Member for further consideration). Accordingly, the Appeal Decision is confirmed.

82. As we are dismissing the application for reconsideration, we find it is unnecessary to address the Appellants' request for a suspension of the Determination pending reconsideration under section 113 of the *ESA*. Specifically, the Applicants on reconsideration confirm that the financial aspect of its suspension request was resolved on the basis of payments made to the Director to be held in trust pending proceedings before the Tribunal (Application for Reconsideration, page 14 of 15, Letter dated July 11, 2018). With respect to the Director's order to reinstate one of the complainants, we understand that matter is settled and, in any event, is effectively moot given our reasons for decision.

ORDER

83. For the reasons given, the application for reconsideration is dismissed and the Appeal Decision is affirmed.

Jacquie de Aguayo **Chair** **Employment Standards Tribunal**	**Robert E. Groves** **Member** **Employment Standards Tribunal**	**Richard Grounds** **Member** **Employment Standards Tribunal**