Citation: Joseph James Hirak (Re)
2021 BCEST 67

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Joseph James Hirak
("Mr. Hirak")

- of a Determination issued by -

The Director of Employment Standards

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

**PANEL:** Shafik Bhalloo

**FILE NO.:** 2021/051

**DATE OF DECISION:** August 13, 2021

# DECISION

## SUBMISSIONS

Lawrence Smith — counsel for Joseph James Hirak

## OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the "*ESA*") by Joseph James Hirak ("Mr. Hirak") of a determination issued by Carrie H. Manarin, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), on October 25, 2019 (the "Determination").

2. The Determination found Mr. Hirak, Michael Walter Hirak ("Mr. M. Hirak") and Keith Richard Williamson ("Mr. Williamson"), carrying on business as Twin Mining General Partnership ("TMGP"), contravened Part 3, sections 16, 17, 18, 27, and 28; Part 4, section 40; Part 5, sections 45 and 46; and Part 7, section 58 of the *ESA* in respect of the employment of Trevor Illsey ("Mr. Illsey") and ordered TMGP to pay Mr. Illsey wages in the amount of $14,820.44, an amount that included regular wages, overtime, statutory holiday pay, annual vacation pay, and interest under section 88 of the *ESA*. The Director imposed administrative penalties for five contraventions of the *ESA* – sections 16, 17, 18, 27 and 28 – in the amount of $2,500.00. The total amount of the Determination is $17,320.44.

3. Mr. Hirak has appealed the Determination on the grounds that the Director erred in law and failed to comply with principles of natural justice in making the Determination.

4. The appeal was perfected by counsel for Mr. Hirak and sent to the Tribunal on June 5, 2021, and received by the Tribunal on June 7, 2021, about eighteen months after the expiry of the statutory time limit set out in section 112(3) of the *ESA*. There is a history of e-mail communications between TMGP or their representatives and the Tribunal, starting some five (5) months after the expiry of the appeal deadline until the perfected appeal was filed by counsel in June 2021 which I will more appropriately summarize under "THE FACTS AND THE DETERMINATION" section below.

5. Mr. Hirak has applied under section 109(1)(b) of the *ESA* for an extension of the appeal period to June 15, 2021, to appeal the Determination.

6. In correspondence dated June 14, 2021, the Tribunal acknowledged receiving the appeal and the request to extend the appeal period, requested the section 112(5) record (the "record") from the Director, and notified the other parties (including the interested parties, namely, Mr. M. Hirak and Mr. Williamson) that submissions on the merits of the appeal were not being sought from them at that time.

7. The record was provided to the Tribunal by the Director. A copy was delivered to Mr. Hirak, Mr. Illsey, and to Mr. Williamson, but not to Mr. M. Hirak because the Tribunal did not have the latter's current contact information at that time. The parties served with the record were provided with the opportunity to object to its completeness. No objection to the completeness of the record was received from Mr.

Illsey and Mr. Williamson, and counsel for Mr. Hirak advised that according to his client, the record is complete. Accordingly, the Tribunal accepts the record as being complete.

8. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based on the Determination, the Reasons for the Determination (the "Reasons"), the appeal, the written submissions filed by counsel for Mr. Hirak with the appeal, the section 112(5) Record, as well as the additional documents I requested be included in the appeal. Under subsection 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under subsection 114(1), the Director and Mr. Illsey will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in subsection 114(1), it is liable to be dismissed. In this case, I will consider whether Mr. Hirak should be granted an extension of the statutory time period for filing an appeal and whether there is any reasonable prospect the appeal can succeed.

## ISSUE

9. The issue is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA.*

## THE FACTS AND THE DETERMINATION

10. TMGP operates a gold mining venture in Manson, near McKenzie, British Columbia (a finding of the Delegate in the Reasons that counsel disputes in their appeal submissions).

11. A BC Registry Search (the "Registry Search") conducted online on February 11, 2019, with a currency date of January 22, 2019, indicates that TMGP is a general partnership registered in British Columbia on April 25, 2017, with Mr. Hirak, Mr. M. Hirak and Mr. Williamson as partners.

12. On February 11, 2019, Mr. Illsey filed a complaint under section 74 of the *ESA* against TMGP alleging that he was employed as a heavy equipment operator and labourer by TMGP between June 7, 2018 to October 12, 2018, and the latter failed to pay him regular wages, overtime wages, annual vacation pay and statutory holiday pay (the "Complaint").

13. On May 14, 2019, an Employment Standards Assistant (the "Branch Assistant") at the Employment Standards Branch (the "Branch") communicated with Mr. Hirak by telephone and advised him about the Complaint. During that call, Mr. Hirak informed the Branch Assistant that Mr. Illsey was not an employee; he was collecting welfare during the material time he was prospecting for gold; there was an agreement between TMGP and Mr. Illsey to "split the gold" and TMGP did not earn any monies during the relevant period. He also informed the Branch Assistant that he was travelling the next day to a remote mine site but he could receive mail at the Omenica General Store (the "Store") in Manson Creek, British Columbia. On the same day, the Branch Assistant emailed Mr. Hirak, at the email address Mr. Hirak provided, a copy of the Complaint, fact sheet on Mediation and a Notice of Mediation. The Notice of Mediation set out the mediation date of May 27, 2019, and the start time of 1:00 p.m. as well as the dial in numbers for mediation and the participant ID. Mr. Hirak attended the mediation by teleconference on May 27, 2019.

The fact sheet on mediation indicated that "[i]f the parties can't reach an agreement, the issue will proceed to a hearing or investigation with a different officer of the Employment Standards Branch."

14. The mediation, apparently, did not result in a settlement agreement. As a result, on June 6, 2019, the Branch Assistant sent Mr. Hirak by email and by registered mail at the Store and to TMGP's registered address (which is also Mr. Hirak's residential address according to the Registry Search), a Notice of Complaint Hearing and Demand for Employer Records. The Notice of Complaint Hearing stated that the hearing would be conducted by teleconference call on July 18, 2019. While the registered mail sent to TMGP's registered address was returned unclaimed, the registered mail sent to the Store was successfully delivered on June 12, 2019, according to the Canada Post tracking history in the record. The Branch Assistant also emailed Mr. Illsey's documents to Mr. Hirak on June 6, 2019, and followed up on June 7, 2019, by mailing to Mr. Hirak at the Store, hardcopies of the documents for the hearing.

15. On June 25, 2019, the Branch Assistant received, by mail, copies of TMGP's records for the hearing. On the same date, the Branch Assistant emailed Mr. Hirak confirming receipt of the documents.

16. On July 2 and 3, 2019, the Branch Assistant sent emails to Mr. Hirak, at the same email address, attaching additional documents and an updated witness list of Mr. Illsey for the hearing.

17. On July 17, 2019, the Branch Assistant emailed Mr. Hirak and Mr. Illsey separately to advise that the Complaint hearing scheduled for July 18, 2019, was adjourned and would be rescheduled.

18. On August 14, 2019, the Branch Assistant sent Mr. Hirak the Amended Hearing Notice (the "Amended Notice") of same date by email and by registered mail to the Store, and a copy was also sent by registered mail to TMGP's registered address. The Amended Notice provided that the hearing would be conducted by teleconference call on September 6, 2019 at 9:00 a.m. and included a dial-in number and conference ID for the call. While the Amended Notice sent to TMGP's registered address was returned unclaimed, the Amended Notice sent by email to Mr. Hirak was successfully delivered (that is, the email did go through to the recipient's email address) and the Amended Notice sent to the Store was delivered on August 21, 2019, according to the Canada Post tracking history in the record.

19. On September 6, 2019, when the hearing proceeded as scheduled, no one attended on the call on behalf of TMGP. The Delegate attempted to contact Mr. Hirak at both telephone numbers he had provided to the Branch Assistant but to no avail. The Delegate only managed to leave voicemail messages advising Mr. Hirak to dial into the call or the hearing would proceed in his absence. Mr. Hirak did not call, and the hearing proceeded in his absence.

20. At the hearing, the Delegate considered whether Mr. Illsey was an employee of TMGP and if so, was he owed any wages and how much. With respect to the first question, whether or not Mr. Illsey was an employee of TMGP, the Delegate considered the inclusive definitions of "employee" and "employer" in the *ESA* and common law tests, as set out at pages R6 and R7 of the Reasons:

> The definition of an "employer" under the [*ESA*] includes a person "who has or had control or direction of an employee or who is or was responsible, directly or indirectly, for the employment of an employee". The definition of an "employee" includes "a person an employer allows directly or indirectly to perform work normally performed by an employee". As a result, when determining if a worker is an employee or an independent contractor, the central question is

> whether the worker is doing work normally performed by an employee or is performing it as a person in business on his own account. Case law has made it clear that the definition of "employee" is to be broadly interpreted and that an interpretation of the [*ESA*] that extends its protection to as many employees as possible is favoured over one that does not. The onus for proving a worker is an independent contractor excluded from the [*ESA*] is on the party who alleges it.

21. The Delegate then went on to consider the uncontested evidence of Mr. Illsey at the hearing as well as Mr. Hirak's contention or assertions in his telephone conversation with the Branch Assistant on May 14, 2019, that Mr. Illsey was not an employee because: (i) "he was on welfare" at the time; (ii) he was "up there to live cheap and pass the time doing prospecting"; and (iii) there was an agreement between Mr. Illsey and TMGP that the "gold would be split". In concluding that Mr. Illsey was an employee of TMGP, the Delegate preferred the evidence of Mr. Illsey and reasoned as follows:

> In the absence of any evidence from Twin Mining to support its assertion that the complainant was not an employee, I find that the best evidence supports a finding that the Complainant was an employee of Twin Mining. The undisputed evidence of the Complainant was that he had no interest in Twin Mining and no business presence of his own but rather was hired by [Mr. Hirak] to work for Twin Mining for the 2018 season. Mr. Hirak set his rate of pay and determined when and how much he would be paid. I also find that Joe Hirak and later Mike Hirak directed what days and times the Complainant would work and what work he would do. In the circumstances, I find Joe Hirak and Mike Hirak exercised direction and control over the Complainant at their remote work site. I also find that the Complainant was performing work on behalf of Twin Mining and not as a person in business on his own account. In light of these factors, I do not find the fact that the Complainant agreed to be compensated by way of a per centage [*sic*] of the gold mined to be determinative of his status as an independent contractor.

22. Having determined that Mr. Illsey was an employee of TMGP, the Delegate next considered whether he was owed any wages and if so, how much. While Mr. Hirak was not present at the hearing, the Delegate did consider TMGP's documents Mr. Hirak previously sent by mail to the Branch Assistant and received by the latter on June 25, 2019. These documents consisted of handwritten pages of records listing the days and hours that TMGP claimed Mr. Illsey worked, including the total amount of wages, $7,167.97, TMGP said it advanced to Mr. Illsey, as recorded by Gerry Bell ("Mr. Bell"), TMGP's camp cook. Mr. Illsey disputed this evidence at the hearing. He said that neither he nor TMGP kept contemporaneous records of his days and hours worked because his compensation was based on percentage of the net income of TMGP from its operations. He claimed that he usually worked a 12-hour day with few days off, which was corroborated by his witnesses, a co-worker, Scott Repay ("Mr. Repay"). Mr. Illsey's mother, Ginna Illsey ("Mrs. Illsey"), with whom Mr. Illsey spoke by Skype from the remote worksite frequently, also testified that he was "very busy" and "was working everyday". In preferring the evidence of Mr. Illsey and his witnesses, Mr. Repay and Mrs. Illsey, over TMGP's, the Delegate reasoned as follows at R7 and R8 of the Reasons:

> Where the evidence of the Complainant and Employer regrading the Complainant's days and hours of work are in dispute, I prefer the evidence of the Complainant. First, I find that neither party kept contemporaneous record of the Complainant's days and hours of work and therefore it is unclear what information Mr. Hirak relied on in making his list. Second Mr. (Joe) Hirak left the work site on or about July 11, 2018 due to an injury and did not return for the rest of the season.

> Consequently, he would not have had first hand knowledge of the Complainant's days and hours of work after that date. Third, I accept the evidence of the Complainant that he worked long days for continuous periods of time because there was only a short window of time to find as much gold as possible and given that he was working and living in a remote area, there was little else to do. In the circumstances, I find it unlikely that the Complainant regularly worked between 4 and 8 hours per day and had frequent days off as the Employer alleges. For all these reasons, I reject the Employer's list of days and hours of work because it is unreliable and I find instead the best evidence of the Complainant's days and hours of work was provided by the Complainant and his witnesses.

23. In calculating the amount owed to Mr. Illsey, the Delegate noted that while TMGP claimed that Mr. Illsey was paid a total $7,167.97, Mr. Illsey said he was paid $6,269.97. In, again, preferring the evidence of Mr. Illsey over TMGP's, the Delegate stated that while TMGP presented Mr. Bell's written statement claiming that he kept "accurate accounts of all wages" paid to Mr. Illsey, Mr. Bell did not attend at the hearing to be questioned on his statement and therefore, the statement could not be considered reliable. The Delegate also noted that TMGP did not provide any banking or payroll records to corroborate the payments it alleges it made to Mr. Illsey and therefore, it failed to discharge its onus to show that it made the payments it says it made to Mr. Illsey. In the result, the Delegate found that Mr. Illsey was only paid $6,269.97. The Delegate then noted that while the parties agreed that Mr. Illsey was supposed to be paid 5% of the operation's net income, there was no evidence adduced to show TMGP's net income earned except for the text message from Mr. Hirak to Mr. Illsey on November 5, 2018 wherein he says to Mr. Illsey that his understanding was that everyone was getting paid on a percentage basis and because they did not do well, there is no money to pay him. As a result, the Delegate proceeded to construct the amount Mr. Illsey should have been paid for all hours he worked including overtime work, based on the then minimum wage rate of $12.65 per hour and determined that Mr. Illsey was only paid $4.30 per hour for all hours of work and he is owed $14,252.45, after deducting the $6,269.97 TMGP paid him.

24. The Delegate also levied five (5) administrative penalties of $500.00 each against TMGP for contraventions of sections 16, 17, 18, 27, and 28 of the *ESA.*

25. The Determination was made on October 25, 2019, and sent on the same date by registered mail to the attention of Mr. Hirak, Mr. M. Hirak, and Mr. Williamson at TMGP's registered address. The Determination was also emailed the to Mr. Hirak's email address on November 12, 2019. The record shows that the email was successfully delivered to the recipient's email address.

26. The Determination contained "Appeal Information" on page D3 which provides:

> Should you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 pm on December 2, 2019.
>
> The Employment Standards Tribunal is separate and independent from the Employment Standards Branch. Information on how to appeal a Determination can be found on the Tribunal's website at www.bcest.bc.ca or by phone at (604) 775-3512.
>
> Should you appeal this Determination, wages must still be paid to the Director and will be held in trust until the end of the appeal process. Collections activity may commence if payment is not received.

27. On May 1, 2020, almost five (5) months after the expiry of the appeal period, Cynthia Hirak ("Ms. Hirak") emailed the Tribunal four documents, one was a Supreme Court filing and three others were PDFs of the same Determination. On the same date, the Tribunal emailed Ms. Hirak advising her that "it appears that you wish to request an extension of the time to file an appeal of a determination issued by the Director of Employment Standards" and requested the following documents be provided no later than 4:30 p.m. on May 8, 2020, to comply with the requirements for filing an appeal:

- Completed and signed copy of the Appeal Form
- Written reasons and argument supporting each ground of appeal
- Any supporting documents

28. The Tribunal also attached in their email to Ms. Hirak an "Overview of the Appeal Process" containing information on the Tribunal's usual appeal process, the Appeal Form, a guide on "How to Prepare and File an Appeal" and a guide on "How to Request an Extension of the Appeal Period". The email also informed Ms. Hirak that the deadline of May 8, 2020, for providing the Tribunal with the above-noted documents "*is not an extension to the appeal period but is a deadline to provide the Tribunal with the requested documents*" (italics mine).

29. On May 6, 2020, the Tribunal received an Appeal Form from Ms. Hirak showing her as the "Appellant's lawyer or agent". Subsequently, there was a telephone conversation between Ms. Hirak and the Tribunal, which conversation is summarized in the Tribunal's email of same date to Ms. Hirak. In this email, the Tribunal confirms that Ms. Hirak informed them that all three (3) persons named in the Determination, Mr. Hirak, Mr. M. Hirak, and Mr. Williamson, were appealing the Determination. The Tribunal requested Ms. Hirak to provide the following documents in order to proceed with the incomplete appeal and provided Ms. Hirak an extension for submission of the documents to May 15, 2020:

- Revised Appeal Form listing all three (3) persons appealing the Determination (see section 3 of the Appeal Form)
- Written reasons for filing the appeal after the statutory appeal deadline
- Written reasons and argument in sufficient detail supporting each selected ground of appeal
- List of documents you wish to provide the Tribunal as well as the relevance of the documents to the appeal

30. The Tribunal in the same email, referred Ms. Hirak to the Information Sheet entitled "How to Request an Extension to the Appeal Period", previously disclosed to her on May 1, 2020. The Tribunal also informed Ms. Hirak that the extension of the deadline for filing the appellants' documents to appeal to May 15, 2020, "*is not an extension to the appeal period but is a deadline to provide the Tribunal with the requested documents*" (italics mine).

31. On May 26, 2020, the Tribunal attempted to contact all three (3) persons named in the Determination by email to Mr. Hirak's email address to request their written authorizations of representation by no later than 4:00 pm on May 29, 2020.

32. On May 29, 2020, the Tribunal attempted to contact all three (3) persons named in the Determination by emailing a letter of same date from the Registrar of the Tribunal (the "Registrar") to both Mr. Hirak's and Ms. Hirak's email addresses. The Registrar's letter appears to have been prompted by Ms. Hirak's request, on May 28, 2020, for a further extension of time to submit documents supporting the appeals of all three parties. In the letter, the Registrar grants "a two-week extension of time to the appellants to perfect the three individual appeals" by June 12, 2020, and requests all three to provide the Tribunal with the following:

- A written submission from Joe Hirak and Keith Williamson confirming that Michael Hirak is authorized to file the appeal on their behalf and that he is their representative (as the Tribunal, at the time, only had a single appeal form submitted on May 14, 2020 naming all three appellants but signed only by Mr. M. Hirak).
- A submission indicating the relevance of the supporting documents the appellants wish to submit.
- A submission setting out the reasons and argument supporting each ground of appeal in sufficient detail for the Panel to consider whether the appellant has a strong *prima facie* case.

33. The Registrar's letter stated that the new deadline for providing the above materials to the Tribunal "*is not an extension to the appeal period but is a deadline to provide the documents to the Tribunal*" (italics mine). The letter also stated in bold print:

> **If the Tribunal does not receive the submission, the Tribunal may be unable to proceed with the appeals.**

34. As at June 12, 2020, the Tribunal only received written authorizations of Mr. Hirak and Mr. Williamson that Mr. M. Hirak and Ms. Hirak are authorized to act on their behalf, but no other documents or submissions requested by the Registrar in their letter of May 29, 2020. On June 16, 2020, the Registrar, by email to both Mr. Hirak and Ms. Hirak, sent a letter of same date advising all three individual appellants that as a result of their failure to send all the requested documents, the Tribunal was unable to proceed with the appeals and closed its files:

> The Tribunal is unable to proceed with the appeals based on the documents received to date. Accordingly, the Tribunal has closed the above-noted files.

35. On March 30, 2021, the Tribunal received an email of same date from the office of Mr. Hirak's new counsel informing the Tribunal that Mr. Hirak has retained their firm to represent him in the appeal of the Determination and they are seeking "clarification on where in the process these appeal files have been left". On the same date, the Tribunal responded to counsel by email and provided a brief summary of the history of exchanges between the Tribunal and Ms. Hirak and Mr. Hirak that occurred in and during May and June 2020 and advised counsel that, "[a]s noted in the Tribunal's May 29, 2020 correspondence, if [Mr. Hirak] wishes to file his appeal at a later date, he may do so by meeting the requirements for filing an appeal after the appeal period has expired". The Tribunal also attached copies of communications that occurred previously between the Tribunal and Ms. Hirak and Mr. Hirak in May and June 2020.

36. Over two months later, on June 7, 2021, counsel for Mr. Hirak perfected Mr. Hirak's appeal of the Determination and applied for an extension of the deadline to file the appeal to June 15, 2021.

**ARGUMENTS**

37. In Mr. Hirak's application for an extension of the deadline to file an appeal, counsel submits:

> The Appeal period had previously expired on May 29, 2020 after being extended from the December 2, 2019 date in the Determination. This occurred after the discovery of the determination by the parties after Mr. Williamson's paycheque had been seized after the government health orders in March 2020. Up until the point of the paycheque seizure, the parties were unaware of either the hearing [on] September 6 or the determination as issued on October 25, as they had not been properly notified of either.

38. Counsel then refers to the often-quoted decision of the Tribunal in *Re: Niemisto* (BC EST # D099/96) ("*Niemisto*") and goes on to argue that Mr. Hirak's case satisfies the five (5) non-exhaustive criteria that may be considered when an applicant seeks an extension to the deadline for filing an appeal. I have set out these criteria under the "ANALYSIS" section below.

39. With respect to the first criterion in *Niemisto*, counsel submits:

> The reason for the failure to request and appeal within the extended statutory time limit is that the petitioners were under the impression that the appeal had been filed correctly in May 2020, before the end of the deadline. Around this time Joe, Michael, and Keith were all dealing with the COVID-19 pandemic and government orders which were affecting their personal business operations. Twin Mining had never had to go through legal proceedings before and were under the impression that their correspondence requesting an extension in June was received and that with it they had fulfilled all the requirements to pursue an appeal. They assumed they were waiting further instruction on how the process would unfold, which is highlighted by Mr. Smith's request to the Tribunal for the information regarding the appeals made on March 30, 2021.

40. With respect to the second criterion, counsel submits that Mr. Hirak and TMGP had a genuine and ongoing intention to appeal the Determination, and this is evidenced by TMGP not making any payments ordered under the Determination because "they believed that the appeal was still being considered by the Tribunal". Counsel also adds that they were retained in March 2021 "after one of [TMGP's] previous partners had begun to have their wages garnished in fulfilment of the debt, at which point they discovered that the Appeal file had already been closed."

41. With respect to the third criterion, counsel states that both Mr. Illsey and the Director were notified of the "initial Appeal attempt in May of 2020."

42. With respect to the fourth criterion, counsel submits that Mr. Illsey will not be unduly prejudiced if an extension of the appeal period were granted.

43. With respect to the fifth criterion, counsel contends that there is a strong *prima facie* case in favour of Mr. Hirak on the basis that the Director erred in law and breached the principles of natural justice in making the Determination. With respect to the natural justice basis of Mr. Hirak's appeal, counsel refers to the decisions of the Supreme Court of Canada in *Baker* v *Canada (Minister of Citizenship and Immigration),* [1999] SCR 817 ("*Baker*") for the proposition that the purpose of participatory rights protected by the duty of procedural fairness is to ensure that administrative decisions are made in a fair

and open process with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Counsel also relies of the decisions of the British Columbia Supreme Court in *Kikals* v *British Columbia (Residential Tenancy Branch),* 2009 BSCS 1642 ("*Kikals*"), *Ganitano v Metro Housing Corporation,* 2009 BCSC 787 ("*Ganitano*"), and *Johnson v Patry,* 2014 BCSC 540 ("*Johnson"),* which rely on the principles referred to in *Baker*, and argues that the latter three cases, involving judicial review of orders made by Dispute Resolution Officers of the Residential Tenancy Branch in which the Court found petitioners were denied their natural justice rights, are similar factually to the case at hand and there should be a similar finding of breach of natural justice by the Tribunal in this case. Counsel more specifically identifies the following factual basis for their contention that Mr. Hirak was denied procedural fairness:

- Mr. Hirak was never in receipt of any communication that the September 6, 2019 hearing was scheduled because he was outside of cell service, which was known to the arbitrator.
- Mr. Hirak was "notified via telephone the day of the hearing [ ] when it was known and on record that he was out of cell service".
- The hearing was conducted in the absence of Mr. Hirak and TMGP.
- Mr. Hirak did not receive any "mail postage".
- While a phone call was made to Mr. Hirak on the hearing day, on September 6, 2019, and a message left, he did not receive a message even after he "had entered back into cell service."
- Mr. Hirak, Mr. Williamson and M. Hirak were all "wholly unaware that a hearing had occurred and that a [D]etermination had been made until such a time that [Mr.] Williamson's paycheque had been seized in partial fulfilment of the debt from the [D]etermination.

44. With respect to the error of law ground, counsel refers to the leading decision of the Supreme Court of Canada that sets out the variables determining the legal status of a person performing work, namely, *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983, and argues that:

> The Director determined the Complainant was an employee based on the reasons that Twin Mining set his rate of pay and controlled his hours. However, both the Director and the Complainant acknowledge that the "rate of pay" was to be determined based entirely by way of percentage of gold mined by the Complainant. As a result, the opportunity for profit was directly tied to the Complainants [*sic*] performance. Furthermore, there is sufficient evidence that the Complainant set his own hours. First, neither party kept a record of hours because pay was to be commission based on the amount of gold mined. Second, the Complainant was able to come and go from the worksite as he pleased and take time off when he wanted without asking for permission from Twin Mining.
>
> Both of these facts lean heavily in favour of a finding that the Complainant was an independent contractor with full control over the way in which he conducted his work. The financial risk and opportunity for profit were directly tied to the time that the Complainant decided to devote to his work. Twin Mining did not prescribe hours of work nor restrict time off and held no direct control over the way in which he conducted himself while on site. Compensation was to be provided in a commission-like manner where the Complainant would be paid based on the services provided.

45. Counsel also submits that all three individuals – Mr. Hirak, Mr. Williamson and Mr. M. Hirak – were not engaged in business as TMGP when Mr. Illsey was working:

> Joe Hirak and Michael Hirak were at all times conducting business as individuals with a verbal agreement between them that they were to split the profits of any gold they might find. Keith Williamson had no involvement whatsoever in the mining operations at the time these events took place. No one was operating as an employee or agent of Twin Mining, and so it would stand to reason that when the Complainant arrived at the mine, he was not hired by Twin Mining, but rather entered into an agreement as an individual conducting business on his own right, as a partner with Joe and Michael able to set his own hours and conduct his own business as he saw fit. Each individual had full control of their own activities and took on the full risk and potential awards available to them under the verbal agreement in place between them. Twin Mining was registered as a partnership previously for reasons not connected to the mining operations conducted at that time. At no point did Joe or Michael act, or ever claim to act, as Twin Mining. This fact is confirmed by the lack of a record of business activities of Twin Mining, or any profit accrued to Twin Mining in the year in question.

46. In the result, counsel contends that the Director erred in law that Mr. Illsey was an employee of TMGP.

## ANALYSIS

47. Section 112(3) of the *ESA* delineates the appeal period for appealing a determination:

> 112 (3) The appeal period referred to in subsection (2) is
>
> (a) 30 days after the date of service of the determination, if the person was served by registered mail, and
>
> (b) 21 days after the date of service of the determination, if the person was personally served or served under section 122(3).

48. Section 122 of the *ESA* provides:

> 122 (1) A determination or demand or a notice under section 30.1(2) that is required to be served on a person under this Act is deemed to have been served if
>
> (a) served on the person, or
>
> (b) sent by registered mail to the person's last known address.
>
> (2) If service is by registered mail, the determination or demand or the notice under section 30.1(2) is deemed to be served 8 days after the determination or demand or the notice under section 30.1(2) is deposited in a Canada Post Office.

49. In this case, the Determination was issued on October 25, 2019, and sent on that very date by registered mail to TMGP's registered address in Chilliwack, and by email, on November 12, 2019, to Mr. Hirak's email address that he had provided to the Branch Assistant. While Mr. Hirak did not respond to the email, the record shows it was delivered to the recipient's email which was Mr. Hirak's email address. The Determination indicated that the appeal deadline was December 2, 2019. Counsel for Mr. Hirak filed a perfected appeal on June 7, 2021, about 18 months after the expiry of the appeal period.

50. Counsel for Mr. Hirak is asking for an extension of time to file the appeal of the Determination because Mr. Hirak and others (Mr. Williamson and Mr. M. Hirak) were not aware of the hearing of September 6, 2019 or the Determination that was issued subsequently on October 25, 2019, until after Mr. Williamson's "paycheque had been seized in partial fulfillment of the debt from the [D]etermination" which occurred "after the government health orders in March 2020".

51. Section 109(1)(b) of the *ESA* sets out the Tribunal's authority to extend the time period for requesting an appeal under section 112. This section states:

> 109 (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:
>
> …
>
> (b) extend the time period for requesting an appeal or applying for reconsideration even though the period has expired.

52. While the Tribunal has discretion to exercise its statutory authority for extending the time period for requesting an appeal when the appeal period has expired, the burden is on the appellant seeking an extension of time to show, on a balance of probabilities, that compelling reasons exist before the Tribunal will exercise its discretion under section 109(1)(b). In *Metty M. Tang*, (BC EST #D211/96) the Tribunal stated:

> Section 109 (1) (b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

53. In *Niemisto*, the Tribunal delineated the following criteria which the appellant should satisfy in seeking an extension of time to file an appeal:

> i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
>
> ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
>
> iii) the respondent party (*i.e*. the employer or employee), as well the Director, must have been made aware of this intention;
>
> iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
>
> v) there is a strong *prima facie* case in favour of the appellant.

54. This Tribunal has indicated previously that the criteria in *Niemisto* are not intended to constitute an exhaustive list, nor are they conjunctive in nature. The Tribunal will consider and weigh factors identified in *Niemisto* and other factors it considers relevant, and make its decision to, or not to, exercise its discretion to extend the time for filing the appeal based on the totality of all factors it considers.

55. Having said this, with respect to the first criterion in *Niemisto*, I am not persuaded that there is a reasonable and credible explanation for Mr. Hirak's failure to request an appeal within the statutory time limit. The Determination was sent to TMGP and Mr. Hirak on October 25, 2019, by registered mail at the former's registered address, which is also the residential address of Mr. Hirak according to the Registry Search of TMGP. The Determination was also emailed to Mr. Hirak, on November 12, 2019, at his personal email address which he provided to the Branch Assistant during the Complaint proceedings and which the Branch Assistant used throughout the Complaint proceedings to communicate or send information or materials to him. The email was successfully delivered to the email address of Mr. Hirak. Incidentally, it was the same email address that the Notice of Mediation was sent to Mr. Hirak on May 14, 2019, and Mr. Hirak attended the mediation by telephone conference on May 27, 2019, while he was away at the remote mine site. It stands to reason that Mr. Hirak was receiving emails at that email address and able to teleconference when he attended the mediation call. The Branch Assistant continued using the same email address and also the Store address (which Mr. Hirak said he could receive mail at while he was away) when sending communications to TMGP and Mr. Hirak. The communication the Branch Assistant sent Mr. Hirak at the Store by registered mail, including the Amended Notice, were received at the Store. If there was any issue with Mr. Hirak not receiving any emails at the email address he had provided to the Branch Assistant or his mail at the Store when he was or should have been aware that the Complaint proceedings were continuing because the mediation did not result in a settlement agreement, then he should have communicated this to the Branch. He should have at least made an inquiry about the progress of the Complaint after May 27, 2019, when the parties did not settle, assuming he was not getting any emails or the correspondence the Branch Assistant sent to the Store. That would be the reasonable thing for Mr. Hirak to do and not sit idly for months.

56. The deadline for filing the appeal, December 2, 2019, is clearly set out at page D3 of the Determination. The Tribunal first became aware that Mr. Hirak may be wishing to request an extension of time to file an appeal of the Determination when, on May 1, 2020, almost five months after the expiry of the appeal date, Ms. Hirak, on behalf of Mr. Hirak, contacted the Tribunal by email.

57. On the same date, the Tribunal, by email, requested Ms. Hirak provide certain documents to the Tribunal, including a completed and signed Appeal form, reasons and argument supporting each ground of appeal, and any supporting documents. The Tribunal requested the documents be provided no later than 4:30 p.m. on May 8, 2020. The Tribunal's email to Ms. Hirak expressly states "[p]lease note, the above-noted deadline is not an extension to the appeal period but is a deadline to provide the Tribunal with the requested documents." On May 26, 2020, Mr. Hirak and the other appellant were granted until no later than May 29, 2021, to provide the Tribunal with written authorization for their representative to file an appeal on their behalf. The Tribunal did not extend the deadline to file the appeal to May 29, 2020, as counsel for Mr. Hirak appears to suggest in Appendix B of the Appellant's appeal submissions.

58. I am also not persuaded by counsel's submission that "the petitioners were under the impression that the appeal had been filed correctly in May 2020" in the face of subsequent correspondences of the Tribunal and the Registrar with Ms. Hirak and Mr. Hirak in May 2020. More particularly, on May 6, 2020, after Ms. Hirak submitted an appeal form to the Tribunal, the Tribunal contacted Ms. Hirak by email. In that email, the Tribunal summarized their telephone conversation with Ms. Hirak wherein the latter confirmed that all three (3) persons named in the Determination were appealing the Determination. The Tribunal expressly requested Ms. Hirak to provide (i) a revised Appeal Form listing all three (3) persons appealing

the Determination; (ii) written reasons for filing the appeal after the statutory appeal deadline; (iii) written reasons and argument supporting each ground of appeal; and (iv) a list of documents the appellants may wish to provide the Tribunal and the relevance of the documents to the appeal. The Tribunal also noted that Ms. Hirak had requested an extension to 4:30 p.m. on May 15, 2020, to provide these documents and the Tribunal was granting her request. The Tribunal ended the email stating, again: "[p]lease note, this deadline is not an extension to the appeal period but is a deadline to provide the Tribunal with the requested documents."

59. On May 14, 2020, the Tribunal received a Revised Appeal form signed by Mr. M. Hirak listing all three (3) persons appealing the Determination, but the appeal form did not list a representative for any of the three appellants. As a result, on May 26, 2020, the Tribunal emailed all three appellants at Mr. Hirak's email address and requested Mr. Hirak and Mr. Williamson to confirm in writing to the Tribunal, by no later than 4:00 p.m. on May 29, 2020, whether Mr. M. Hirak will be their representative during the appeal process. The Tribunal said that if the Tribunal does not receive a response for Mr. Hirak or Mr. Williamson by the deadline imposed, the Tribunal may be unable to proceed with their respective appeals. On May 28, 2020, Ms. Hirak asked for an extension of time to submit documents supporting the appeals of all three individuals. The Registrar, in a letter dated May 29, 2020, granted the appellants a two-week extension, until 4:00 p.m. on June 12, 2020, to perfect their three individual appeals. The Registrar also specifically asked for (i) a written submission from Mr. Hirak and Mr. Williamson confirming that Mr. M. Hirak is authorized to appeal on their behalf and that he is their representative; (ii) a submission indicating the relevance of supporting documents the appellants wish to submit; and (iii) a submission setting out the reasons and argument supporting each ground of appeal in sufficient detail for the Panel to consider whether the appellants have a strong *prima facie* case. On June 12, 2020, the Tribunal received from Ms. Hirak a written authorization from Mr. Hirak for both Ms. Hirak and Mr. M. Hirak to act on his behalf in the appeal and *nothing more*.

60. On June 16, 2020, the Registrar, by email to both Mr. Hirak and Ms. Hirak, sent a letter of same date advising all three individual appellants that, as a result of the failure of the appellants to send the requested documents, the Tribunal is unable to proceed with the appeals and is closing its files. In light of all of the exchanges referred to above, including particularly the Registrar's correspondence of June 16, 2020, it is perplexing why Mr. Hirak would think that the appeal had been filed correctly in May 2020, or that Ms. Hirak's email to the Tribunal forwarding Mr. Hirak's written authorization that Ms. Hirak and Mr. M. Hirak are acting on his behalf in the appeal "fulfilled all the requirements to pursue an appeal". There is no objective basis to believe that Mr. Hirak was "waiting further instruction on how the process would unfold". It is also curious that if Mr. Hirak thought his appeal was "filed correctly in May 2020" that he would allow the matter to sit for about ten (10) months without making any inquiry about its progress.

61. It is also noteworthy that after Mr. Hirak engaged counsel to look into the matter and counsel contacted the Tribunal on March 30, 2021, to obtain "clarification on where in the process these appeal files have been left" and received a prompt reply from the Tribunal on the same date summarizing the state of affairs with the appeals, another two months lapsed before Mr. Hirak's appeal was perfected and received by the Tribunal. I find the delay of about 18 months since the expiry of the appeal period for appealing the Determination is inordinate and there is no reasonable and credible explanation for the failure to request the appeal within the statutory time limit.

62. With respect to the second and third criteria in *Niemisto*, I find no evidentiary basis for a genuine an on-going *bona fide* intention to appeal the Determination before the appeal period expired on December 2, 2019. The very first time there was any indication that Mr. Hirak may have been interested in appealing the Determination was on May 1, 2020, about five (5) months after the expiry of the appeal period, when Ms. Hirak contacted the Tribunal by email. However, the failure of Mr. Hirak to perfect his appeal despite numerous extensions provided to submit his supporting documents only speaks against an ongoing *bona fide* intention to appeal. Mr. Illsey and the Director were made aware of Mr. Hirak's attempt to appeal by the Tribunal during the normal course of the Tribunal's administrative appeal process in May 2020. As counsel points out, it was only "after one of [TMGP's] previous partners had begun to have their wages garnished in fulfilment of the debt" that Mr. Hirak engaged counsel to proceed with the appeal. The decision to proceed with the late appeal appears to be closely related to the collection efforts undertaken by the Director.

63. With respect to the fourth criteria in *Niemisto*, allowing an extension of the appeal period in this case would prejudice Mr. Illsey in terms of receiving wages, which have been owing to him for more than 18 months now. I would also add that an extension, in the circumstances here, is inconsistent with one of the purposes of the *ESA,* as set out in section 2(d), namely, "to provide fair and efficient procedures for resolving disputes".

64. With respect to the fifth and last criteria in *Niemisto*, I find that there is *not* a strong *prima facie* case in favour of Mr. Hirak. Mr. Hirak appeals the Determination on the error of law and natural justice grounds of appeal (which I have summarized in paragraphs 43 to 45 inclusive under the "Argument" section above). I will discuss the natural justice ground of appeal first.

***(i) Natural Justice***

65. I have reviewed the cases of *Baker*, *Kikals*, *Ganitano* and *Johnson* counsel refers to in their submissions under the natural justice ground of appeal. These cases underscore the importance of procedural fairness in administrative decision-making which, *inter alia*, includes the opportunity for those affected by the decisions to have an opportunity to know the case against them, the right to present their evidence, and to have that evidence considered by a neutral decision-maker. Counsel contends that Mr. Hirak was denied procedural fairness like the petitioners in *Kikals, Ganitano* and *Johnson*, and specifies the particular shortcomings in the Complaint proceedings that constitute breach of natural justice in this case. More particularly, counsel submits that "Mr. Hirak was never in receipt of any communication that the September 6, 2019 hearing was scheduled due to being out of cell service, a fact which was known by the arbitrator" and the "hearing was conducted in his absence and the duty of procedural fairness was broken". I disagree with counsel as there is much context missing in counsel's submissions which I will discuss here.

66. Both TMGP and Mr. Hirak were aware of the Complaint and the latter spoke with the Branch Assistant by telephone, on May 14, 2019, about one month after the Complaint was filed. During the telephone call, while Mr. Hirak informed the Branch Assistant that he was travelling to a remote mine operation the next day, he said he could receive mail at the Omenica General Store in Manson Creek, British Columbia. The Branch Assistant, on the same date, sent Mr. Hirak, at the email address the latter provided, a copy of the Complaint, Employment Standards fact sheet on mediation, and a Notice of Mediation Session. This package included information about the time of day the mediation would take place, the dial-in number

and the participant ID. The mediation fact sheet, among other instructions, indicated that "[*i*]*f the parties can't reach an agreement, the issues will proceed to a hearing or investigation with a different officer of the Employment Standards Branch* (italics mine)." On May 27, 2019, Mr. Hirak participated in the mediation by teleconference, and therefore, it stands to reason, that he received the Branch Assistant's emailed mediation package and he also had telephone access to call into mediation.

67. The mediation, apparently, was not successful and therefore, Mr. Hirak would have known that the matter would proceed to a hearing or an investigation based on the instructive mediation fact sheet he had received from the Branch Assistant. Subsequently, on June 6, 2019, the Branch Assistant sent to Mr. Hirak, at the same email address, and by registered mail to the Store and to TMGP's registered address, a Notice of Complaint Hearing (the "Hearing Notice") and Demand for Employer records dated June 5, 2019. The Hearing Notice stated that the hearing would be conducted by a teleconference call on July 18, 2019. While the registered mail sent to TMGP's registered address was returned unclaimed, the registered mail sent to Mr. Hirak at the Store address was successfully delivered on June 12, 2019. The Branch Assistant also emailed Mr. Illsey's documents to Mr. Hirak at his email address on June 6, 2019, and followed up the next day, on June 7, 2019, by mailing to Mr. Hirak hardcopies of the Branch Records for the hearing at the Store. Mr. Hirak and TMGP had to have received communication from the Branch Assistant at Mr. Hirak's email address and/or the Store address as Mr. Hirak subsequently, sent the Branch TMGP's documents for the hearing by mail. The Branch Assistant received the documents on June 25, 2019, and the Branch Assistant confirmed receipt of the documents by email of same date to Mr. Hirak.

68. On July 2 and 3, 2019, the Branch Assistant sent further emails to Mr. Hirak at the same email address enclosing additional documents and updated witness list that Mr. Illsey had submitted for the hearing. On July 17, 2019, the Branch Assistant emailed both Mr. Hirak and Mr. Illsey separately to advise that the Complaint hearing scheduled for July 18, 2019 was adjourned. The Branch Assistant then followed up with Mr. Hirak on August 14, 2019, by sending him the Amended Notice by email and by registered mail to the Store address and TMGP's registered address. The Amended Notice provided that the hearing would be conducted by teleconference call on September 6, 2019 at 9:00 a.m. and provided a dial-in number and conference ID for the call. While the Amended Notice sent to TMGP's registered address was returned unclaimed, the Amended Notice sent to the Store address was delivered on August 21, 2019.

69. On September 6, 2019, the hearing proceeded as scheduled, after no one attended on the call on behalf of TMGP and after the Delegate unsuccessfully attempted to contact Mr. Hirak at both telephone numbers he had provided to the Branch Assistant.

70. On October 25, 2019, the Determination was made and sent on the same date by registered mail to Mr. Hirak and TMGP at the latter's registered address. On November 12, 2019, the Branch Assistant also sent the Determination to Mr. Hirak at his email address. The record contains evidence that the email was successfully sent to Mr. Hirak's email address.

71. While counsel says that Mr. Hirak never received any "mail postage", I am not convinced of this. Mr. Hirak informed the Branch Assistant, on May 14, 2019, that he could receive mail at the Store address, and the Branch Assistant obliged by sending him mail there. I have no reason to doubt that the Store did not receive the mail. To the contrary, there is evidence in the record that the Store received mail sent by the Branch Assistant to Mr. Hirak. I also do not think it was a coincidence that, on June 6, 2019, after the Branch Assistant sent Mr. Hirak, by registered mail to the Store, and to his email address, a Notice of

Complaint Hearing (scheduled on July 18, 2019) and Demand for Employer Records, Mr. Hirak sent the Branch Assistant TMGP's documents for the hearing by mail which were received by the Branch on June 25, 2019. On the preponderance of evidence, I find that Mr. Hirak was receiving his mail and did have access to his mail at the Store.

72. I am also not convinced that Mr. Hirak did not have access to the emails and disclosures the Branch Assistant made to Mr. Hirak by email at the personal email address of Mr. Hirak which the latter provided to the Branch Assistant.

73. As for counsel's contention that it was "known by the arbitrator" that Mr. Hirak was "out of cell service" on September 6, 2019, the date of the hearing, there is nothing in the record that suggests that either the Branch Assistant or the Delegate conducting the hearing were aware that Mr. Hirak's phone was "out of cell service". Counsel has not provided any objective evidence of this. It is noteworthy that Mr. Hirak was able to successfully attend the mediation conducted by teleconference on May 27, 2019, when he was away at a mine in a remote location. He was also aware of the July 18, 2019 hearing date for which he sent TMGP's documents on June 25, 2019. When the July 18, 2019, hearing did not proceed, I would have thought that Mr. Hirak would have inquired of the Branch Assistant of the new hearing date, *if* indeed he was not aware of the rescheduled hearing date of September 6, 2019.

74. I am also unconvinced that Mr. Hirak was not aware of the Determination until Mr. Williamson's paycheque had been seized in the collection efforts by the Director. The Delegate sent the Determination to the registered address of TMGP on October 25, 2019, which was also Mr. Hirak's residential address based on the Registry Search. While the Determination was returned as unclaimed, the Branch Assistant, on November 12, 2019, also emailed the Determination to Mr. Hirak at his email address. As indicated previously, there is evidence in the record showing that the email was successfully delivered to the recipient.

75. If Mr. Hirak's residential address changed or his email or cell reception was not functional, the onus was on him to let the Branch know and source out other more convenient means to receive timely communication about the Complaint which he had to have known was proceeding after the failed mediation. It is also curious that, if Mr. Hirak was not receiving any "mail postage" or any communication about the September 6, 2019 hearing, and if the last contact Mr. Hirak had with the Branch was at the unsuccessful mediation on May 27, 2019, he would make no inquiry whatsoever for several months about the progress of the Complaint until after Mr. Williamson's paycheque was garnished in the collection proceedings in or about March 2020.

76. For all of the above reasons, I do not find that Mr. Hirak has made out a strong *prima facie* case of breach of natural justice on the part of the Delegate in making the Determination.

77. I also find that the cases of *Kikals*, *Ganitano* and *Johnson,* involving judicial review of the orders of dispute resolution officers of the Residential Tenancy Branch, are factually distinguishable from this case. In this case, unlike the petitioners in the above cases, I find that Mr. Hirak was aware of the Complaint proceeding and the Director afforded him an opportunity to participate at all stages of the Complaint process. I find there is no merit in Mr. Hirak's natural justice ground of appeal.

***(ii) Error of Law***

78. With respect to the error of law ground of appeal, counsel contends that the Director erred in law in finding Mr. Illsey was an employee. Counsel states that Mr. Illsey was an independent contractor because (i) "neither party kept a record of hours because pay was to be commission based on the amount of gold mined" and (ii) "[Mr. Illsey] was able to come and go from the worksite as he pleased and take time off when he wanted without asking for permission from (TMGP]". Counsel adds that Mr. Illsey's financial risk and opportunity for profit were directly tied to the time he spent working, as TMGP did not set his hours of work nor restrict his time off. He states TMGP also "held no direct control" over how Mr. Illsey conducted himself while on site. Mr. Illsey was to be compensated "in a commission-like manner" based on services he provided.

79. Counsel also submits that Mr. Hirak, Mr. M. Hirak and Mr. Williamson were not engaged in business as TMGP when Mr. Illsey was working on the site. Mr. Hirak and Mr. M. Hirak were at all times conducting business as individuals with a verbal agreement to split the profits of any gold they might find. Mr. Williamson was not involved in the mining operations. TMGP had no employees or agents and when Mr. Illsey arrived at the mine, he entered into an agreement as an individual "conducting business [in] his own right" as a partner with Mr. Hirak and Mr. M. Hirak. All three of them were able to set their own hours and had full control over their own activities and "took on the full risk and potential [rewards] available to them under the verbal agreement in place between them". Neither Mr. Hirak nor Mr. M. Hirak act on behalf of TMGP. TMGP was registered previously for reasons unconnected to the mining operations.

80. I find that counsel's submission summarized in paragraphs 78 and 79 above largely contain factual assertions that neither Mr. Hirak nor TMGP made to the Delegate before the Determination was made. Mr. Hirak, in his telephone conversation of May 14, 2019, with the Branch Assistant, simply asserted that Mr. Illsey was not an employee because "he was on welfare" at the time and was "up there to live cheap and pass time doing prospecting" and that there was an agreement that "the gold would be split". The latter assertion is repeated by counsel in their submission but all else is additional evidence that was not communicated by Mr. Hirak to the Branch Assistant or to the Delegate at any time during the Complaint proceedings and before the Determination was made. As indicated in paragraph 21 above, the Delegate preferred the undisputed evidence of Mr. Illsey over Mr. Hirak's in concluding that Mr. Illsey was an employee of TMGP, which it was open for the Delegate to do. Before considering whether the Delegate erred in law in so concluding, it should be noted that the evidence counsel is now proffering, including that Mr. Illsey was a partner of both Mr. Hirak and Mr. M. Hirak, is evidence that would not qualify as "new evidence" according to the test this Tribunal is bound by in determining whether evidence qualifies as new evidence for acceptance on an appeal delineated in *Re: Merilus Technologies Inc.*, (BC EST # D171/03). More particularly, the evidence would fail on the first of the four (4) conjunctive requirements for admission as "new evidence" because it is evidence that Mr. Hirak or TMGP could have, with the exercise of due diligence, discovered and presented to the Director during adjudication of the Complaint and prior to the Determination being made.

81. I now turn to the question of whether the Delegate erred in law in concluding whether Mr. Illsey was an employee of TMGP. Errors of law are defined in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA) as:

1. a misinterpretation or misapplication of a section of the Act;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

82. In assessing the legal status of a person performing work, the Tribunal has adopted the analysis of the Supreme Court of Canada in in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.,* [2001] 2 S.C.R. 983 at paragraphs 46 – 48, the Court said as follows:

> [T]here is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor . . . [W]hat must always occur is a search for the total relationship of the parties . . .
>
> . . . 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.
>
> 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.

83. The Delegate considered the definitions of "employee" and "employer" contained in the *ESA* as well as common law tests. The Delegate noted the factors that led them to a conclusion that the relationship between Mr. Illsey and TMGP was that of employee-employer and why the fact that Mr. Illsey agreed to be compensated by way of a percentage basis was not determinative of his status as an independent contractor. I am satisfied that the Delegate conducted a sufficient analysis of the statutory and common law tests (as set out in paragraph 20 above), and considered the facts in light of those tests (as set out in paragraph 21 above), consistent with the instructive comments of the court in *671122 Ontario Ltd.* above. I find that Mr. Hirak has failed to discharge the onus upon him to show that the Director committed a palpable or overriding error in arriving at that conclusion. In the circumstances, I do not find that there is a strong *prima facie* case in favour of Mr. Hirak under the error of law ground of appeal.

84. Accordingly, the appeal is denied as being out of time.

**ORDER**

85. Pursuant to sections 109(1)(b) and 114(1)(b) of the *ESA*, I deny the application to extend the time for filing an appeal. Pursuant to section 115, I order the Determination dated October 25, 2019, be confirmed, together with any interest that has accrued under section 88 of the *ESA*.

**Shafik Bhalloo**
**Member**
**Employment Standards Tribunal**