Employment Standards TRIBUNAL

An appeal

- by -

ICN Consulting Inc. carrying on business as Caregivers.ru, also known as Nannies for Hire, also known as International CaregiversNetworks.ca
("ICNC")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2013A/76

DATE OF DECISION: April 16, 2014

DECISION

SUBMISSIONS

Tatiana Gorenshtein and Michael Gorenshtein	on behalf of ICN Consulting Inc. carrying on business as Caregivers.ru, also known as Nannies for Hire, also known as International CaregiversNetworks.ca
Ai Li Lim	counsel for Anna Baranova and Maria Tagirova
Michelle J. Alman	counsel for the Director of Employment Standards
Jean M. Walters	counsel for the Attorney General of British Columbia

OVERVIEW

1. This decision considers an appeal by ICN Consulting Inc. carrying on business as Caregivers.ru, also known as Nannies for Hire, also known as International CaregiversNetworks.ca ("ICNC") under section 112 of the *Employment Standards Act* (the *"Act"*) of a Determination issued by a delegate (the "delegate") of the Director of Employment Standards (the "Director") on May 3, 2012.

2. The Determination found ICNC had contravened sections 10 and 12 of the *Act* in respect of the employment of Anna Baranova ("Ms. Baranova") and Maria Tagirova ("Ms. Tagirova") as live-in caretakers in British Columbia.

3. The Director also imposed administrative penalties on ICNC under Section 29(1) of the E*mployment Standards Regulation* (the *"Regulation")* in the amount of $1,000.00.

4. The total amount of the Determination is $3,273.97.

5. This file has a fairly lengthy history at the Employment Standards Branch and the Employment Standards Tribunal (the "Tribunal") which, for the purposes of completeness, I will briefly summarize. As indicated above, the Determination at issue in this appeal was issued on May 3, 2012. There had been an earlier Determination on complaints filed by Ms. Baranova and Ms. Tagirova issued on December 21, 2009, that was cancelled by the Tribunal in BC EST # D050/10, with the complaints being referred back to the Director for a new hearing or investigation before a different delegate. The complaints were investigated and the May 3, 2012, Determination issued. There was an appeal of the Determination by ICNC which was filed late and dismissed by the Tribunal on that basis in BC EST # D101/12. A reconsideration of that decision was sought by ICNC and denied by the Tribunal in BC EST # RD128/12. Judicial review of the Tribunal's decisions, BC EST # D101/12 and BC EST # RD128/12, was sought by ICNC and Tatiana Gorenshtein ("Mrs. Gorenshtein") and, in a decision rendered on August 19, 2013, the British Columbia Supreme Court set aside the Tribunal's decisions and referred ICNC's appeal of the May 3, 2012, Determination back to the Tribunal for consideration on its merits.

6. While the specific arguments will be fleshed out later, in its appeal, ICNC says the Director acted outside the scope of the *Act* and the authority of the Director under the *Act* by assuming jurisdiction over a federally regulated undertaking, erred in law in making the Determination, erred in assessing the credibility of

Ms. Baranova and Ms. Tagirova and failed to observe principles of natural justice in making the Determination.

7. ICNC seeks to have the Determination cancelled.

8. The appeal raises a constitutional question relating to the application of the *Act* to the business of ICNC. The Attorney Generals of Canada and British Columbia were given notice by ICNC and invited by the Tribunal to make submissions. The Attorney General of British Columbia ("AGBC") filed a submission on the constitutional question. The Attorney General of Canada has advised the Tribunal he does not intend to file any submissions on the matter at this time.

9. Counsel for Ms. Baranova and Ms. Tagirova and counsel for the Director filed submissions on the appeal.

10. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. I find the matters raised in this appeal can be decided from the material in the file, which is substantially represented by the contents of the section 112(5) "record", together with the submissions of the parties and any additional evidence allowed by the Tribunal to be added to the "record".

ISSUE

11. The particular issues raised in the appeal can be summarized as follows: the constitutional jurisdictional question; whether the delegate erred in law and whether the delegate failed to observe principles of natural justice in making the Determination. Some elements of the appeal also raise questions concerning the introduction of evidence that was not provided to the delegate during the complaint process but which has been included and referred to in this appeal.

THE FACTS

12. I will briefly summarize the facts that are relevant to this appeal. Accordingly I do not intend to include reference to the facts relating to the first Determination, the Tribunal decision on that Determination, the decisions of the Tribunal on the timeliness of the earlier appeal of the Determination at issue here, the small claims proceedings or the judicial review decision unless reference to aspects of those matters are necessary to place an argument in context or to provide an answer to a point made in the arguments of any of the parties.

13. I will also, in providing the summary, confine myself to the factual findings made in the Determination, appreciating ICNC challenges many of those findings for reasons that have been provided in the appeal and which will be examined later in this decision.

14. Ms. Tagirova and Ms. Baranova filed complaints with the Director, on August 19, 2008, and November 29, 2008, respectively, alleging ICNC had contravened the *Act* by charging a fee for providing information about employers and/or obtaining employment for them. In January 2011, Ms. Tagirova filed a further complaint with the Director seeking payment for the amount of a Small Claims Court judgement she was ordered by the Court to pay to ICNC. Ms. Tagirova claimed the requirement to pay this amount contravened section 10 of the *Act*.

15. ICNC was incorporated on January 2, 2004. From the date of its incorporation until January 29, 2008, ICNC was licensed under the *Act* as an "employment agency". During the period of time relevant to the complaints and investigation, ICNC operated two internet websites: a Russian language website located at http://www.caregivers.ru/ and an English language web site located at http://e.nanniesforhire.ca/ previously located at http://c.caregiversnetwork.ca/.

16. There were three main issues the delegate had to decide:

(i) whether ICNC contravened section 12 of the *Act* by operating as an "employment agency;

(ii) whether ICNC contravened section 10 by charging a fee to Ms. Baranova and Ms. Tagirova and, if so, are wages owed to them for that contravention; and

(iii) whether the Director should have stopped, or refused to continue, investigating the complaints pursuant to sections 76(3) (b), (c), (e), (f), (g) and/or (i) of the *Act*.

17. The delegate received evidence from Ms. Baranova and Ms. Tagirova, in support of their claims, from Mr. and Mrs. Gorenshtein in support of their position, from Oxana Small, who employed Ms. Tagirova, and from Wayne Flann, who employed Ms. Baranova. The delegate also acquired information from ICNC's English website, http://e.caregiversnetwork.ca/.

18. The delegate found ICNC had, relative to Ms. Baranova and Ms. Tagirova, operated as an "employment agency", as that term is defined in the *Act*, without a valid employment agency licence. In reaching the finding on this issue, the delegate indicates she relied:

> . . . on all the information on record; notably including ICNC's website representations about the services offered; the nature of its business relationship with Ms. Small and Mr. Flann; and the nature of its business relationship and the services provided to the two complainants.

19. The delegate noted the following conclusions in the Determination:

- the business of maintaining and profiling a database of potential caregivers/employees specifically for prospective employers to access, and to increase the chances of those same employees obtaining employment, fits within the meaning of recruiting or offering to recruit and indicates ICNC operated as an employment agency;
- information contained on ICNC's website gives weight to a conclusion that the services being provided to Ms. Baranova and Ms. Tagirova by ICNC had the objective of finding them employment and providing services related to that employment that established a distinction between ICNC's business and immigration agencies offering services linked only to assistance meeting immigration requirements;
- a reasonable interpretation of ICNC's Service Agreement with Ms. Small is that "part, if not the main thrust," of their service to her was designed to recruit an employee for a fee;
- evidence of the circumstances of the relationship with Ms. Small and Mr. Flann reflects the core business of an employment agency – recruiting employees for employers for a fee;
- evidence from Ms. Small and Mr. Flann indicates ICNC was recruiting Ms. Baranova and Ms. Tagirova to be their employees for a fee;

- there is no evidence that ICNC clearly indicated to Ms. Small, Mr. Flann, Ms. Baranova or Ms. Tagirova that the employment assistance/information was being provided free of charge and/or they could cease using ICNC's services at any time and deal independently with each other.

20. The delegate found ICNC had charged a fee to Ms. Baranova and Ms. Tagirova for providing assistance with finding employment and/or information about employers seeking employees. In making this finding, the delegate rejected the contention of ICNC that the services they provided which assisted Ms. Baranova and Ms. Tagirova in obtaining employment had been provided free of charge. The delegate devotes several pages in the Determination to explaining this finding and providing the reasons for it. In finding Ms. Baranova and Ms. Tagirova were owed wages, the delegate made the following finding in respect of each of them:

> I find the fees ICNC charged and received from the complainants are deemed to be wages owing. Based on the evidence before me, I can find no reasonable rationale [sic] way to separate out or proportion the fee among the permissible immigration services provided and the impermissible paid for employment agency related services.

21. The delegate found Ms. Baranova and Ms. Tagirova were entitled to the full amount initially set out by each complainant in their complaint, subject to section 80 limitations. The delegate's calculation of the wages owing to each complainant has not been appealed.

22. The delegate considered the submissions of ICNC that the Director should exercise the discretion given in section 76 to "refuse to accept, review, mediate, investigate or adjudicate a complaint" or "stop or postpone reviewing, mediating, investigating or adjudicating a complaint". The delegate found none of the arguments made by ICNC justified, in fact, law or on a consideration of principles and purposes found in the *Act*, using the discretion in section 76 to stop reviewing, investigating, adjudicating or otherwise dismissing the complaints.

ARGUMENT AND ANALYSIS

23. ICNC argues the delegate erred in law in several respects and failed to observe principles of natural justice in making the Determination.

24. The errors of law alleged in the appeal include: the constitutional jurisdictional question; the *locus* of the relationship between ICNC and Ms. Baranova and Ms. Tagirova; fabricating evidence and relying on that evidence to make critical findings of fact; misstating the record in making findings of fact; generally misstating the evidence; not disclosing evidence to ICNC; disregarding evidence; making findings of fact without evidence; making findings of fact in the face of contradictory objective evidence; making "distorted" and unreasonable findings of fact; failing to properly address the credibility of the complainants; placing not enough weight on evidence; placing too much weight on evidence; and making findings on "meaningless" evidence.

25. ICNC submits the failure of the delegate to observe principles of natural justice is reflected in: the delegate refusing to deal with the jurisdictional issue at the outset of the process; the delegate holding a new investigation instead of a complaint hearing; the delegate factually approving the complainants' actions in a civil court; the delegate acting in a way that was unfair, ineffective, unreasonable and unclear; and the delegate failing to act as an impartial decision maker. ICNC says these failings demonstrate an actual, or reasonable apprehension of, bias.

JURISDICTION

26. The submissions of ICNC relating to jurisdiction raise two issues relating to the application of the *Act* to the circumstances of this case. The first is the issue of constitutional jurisdiction; the second is the issue extra-territoriality.

I. Constitutional Jurisdiction

27. The summary of ICNC's argument on this issue borrows from both the appeal submission and the Notice of Constitutional Question. The constitutional question as set out in the Notice of Constitutional Question is:

> Whether the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the *"ESA"*) applies to this case. In other words, how is the business services provided by the petitioners in this case to be characterized as a matter of constitutional law? Federal or Provincial?

28. In my view, that question frames the constitutional jurisdictional question much too narrowly and an answer to the constitutional jurisdictional issue compels a much more nuanced analysis than is directed by the above question.

29. ICNC submits it is a company providing immigration consulting services and Mrs. Gorenshtein, a director and manager of ICNC, is a regulated immigration consultant who is able to represent or advise persons for a fee, or other consideration, in respect of a proceeding or application under the *Immigration and Refugee Protection Act* (the *"IRPA"*). ICNC argues its business and its consultant are federally regulated.

30. I note at this point that it does not appear that assertion is disputed by any other party, at least as it relates to the activities of ICNC which fall within the *IRPA* and the *Immigration and Refugee Protection Regulations* (the *"IRPR"*).

31. ICNC points to several provisions of the *IRPA* and *IRPR* which it says are applicable in the circumstances of this case: *IRPA*, section 11(1) and *IRPR*, sections 2, 13.1, 110, 111, 112, 200, and 203.

32. ICNC asserts, and in this respect they run into conflict with findings of fact made by the delegate in the Determination, that Ms. Baranova and Ms. Tagirova secured ICNC's services to assist them in achieving their goal of obtaining permission to enter Canada under the Live-in Care Program (the "LCP"), (a stream of the Temporary Foreign Workers Program authorized and administered under the *IRPA*) and that **all** services ICNC provided to Ms. Baranova and Ms. Tagirova were directly related to their applications under the *IRPA* and were provided to them under the *IRPA* and *IRPR*.

33. ICNC argues their business is a federally regulated undertaking that is one and indivisible, with the components making up the whole being integral to each other and vital to the success of the entire undertaking. ICNC submits the requirement under the *IRPR* to submit an employment contract with a Canadian employer and a positive Labour Market Opinion ("LMO") warrant a finding that the "services provided", which in context can only be finding and matching employers and employees, was "absolutely necessary" to enable Ms. Baranova and Ms. Tagirova to come to Canada under the LCP.

34. ICNC submits comments made in the Determination at pages R19, R22, and R25 indicate the delegate found the "employment related" aspect of the business to be "fairly characterized as functionally integrated within, or an essential component of, or otherwise ancillary to ICNC's interprovincial and international immigration consulting business".

35. ICNC argues that, having made this finding, the delegate failed to proceed to the logical conclusion, that ICNC was one undertaking falling under federal jurisdiction.

36. ICNC additionally submits the relationship between them and Ms. Baranova and Ms. Tagirova does not fall within the *Act*; that Ms. Baranova and Ms. Tagirova signed their contracts with ICNC and received all of the services contemplated by that contract while residing in Russia and before they came to Canada. ICNC also says some of the clients for whom foreign domestics are found, reside in provinces other than British Columbia.

37. ICNC argues sections 10 and 12 of the *Act* conflict with section 13.1 of the *IRPR* and the delegate's finding to the contrary is unreasonable. ICNC submits the relevant provisions of the federal legislation allow ICNC to charge a fee to employers and employees for services relating to obtaining work in Canada for foreign nationals under the LCP. Section 13.1(1) of the *IRPR* states:

> ***13.1*** *(1) Subject to subsection (2), no person who is not an authorized representative may, for a fee, represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the Board.*

38. Relying on comments made by the Supreme Court of Canada in *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113 (*"Mangat"*), ICNC argues that even if the *Act* applies to this case, it cannot operate to prohibit what the *IRPA* and *IRPR* allow. ICNC submits that, in the circumstances, the provisions of the federal legislation allow ICNC to charge a fee and must prevail over whatever prohibitions are in the *Act* against receiving payment for employing or obtaining employment for a person or providing information about employers.

39. ICNC also argues that all the services provided by ICNC were "for the general advantage of Canada" and were therefore subject to federal regulation and the business services provided by ICNC are subject to federal regulation by reason of either, or both, sections 92(10)(a) and 92(10)(c) of the *Constitution Act* (the"*CA").*

II. Extra-territoriality

40. ICNC submits it is an "interprovincial and international business" that serves persons who reside overseas and in other parts of Canada. ICNC says, in this case, Ms. Baranova and Ms. Tagirova were Russian nationals who signed their contracts with ICNC and received all of the services listed in the contracts while they were still residing in Russia, before they came to Canada. ICNC says the Determination is an improper attempt to extend the application of the *Act* to other countries.

ERRORS OF LAW

41. ICNC says the delegate committed several errors of law, which, predominantly, relate to how the Director dealt with evidence provided by the parties. The submissions include allegations the delegate fabricated evidence, misstated evidence, misstated the material found in the record, acted without evidence, on insufficient evidence or without regard to the evidence, reached wrong conclusions on the evidence, made unreasonable findings on the evidence and made findings that contradicted the evidence in the record.

42. ICNC also submits the delegate exhibited a real or reasonable apprehension of bias in a number of respects, including: accepting a bank receipt provided by Ms. Baranova concerning an amount paid by her to ICNC as "the best evidence" of the amount of the payment; accepting a translation of the same bank receipt provided by Ms. Baranova; accepting conflicting statements from Ms. Baranova and Ms. Tagirova and ignoring ICNC's submissions pointing out those conflicts, by refusing to deal with the constitutional jurisdictional question at

the outset of the proceedings; by "factually approving" the actions of Ms. Baranova and Ms. Tagirova in civil court; and by failing to act as an impartial decision maker.

43. ICNC says the delegate erred in assessing the complainants' credibility, arguing that "a reasonable person acting judicially and properly instructed after a careful examination of the evidence could not have come to the conclusion" Ms. Baranova and Ms. Tagirova were "clear, convincing, consistent and reasonable" in the presentation of their evidence or that their evidence was "sufficiently clear, coherent, logical and detailed". Part of the argument on this point provides twelve "statements" from the section 112(5) "record" and submits some of the statements are unclear and lack detail, other statements, when compared, show inconsistencies or contradictions. ICNC submits the complainants' stories, generally, are "totally lacking in reasonableness and plausibility" and both had a financial motive to provide false and misleading evidence to the delegate.

FAILURE TO OBSERVE PRINCIPLES OF NATURAL JUSTICE

44. ICNC submits the refusal of the delegate to deal with the constitutional jurisdictional question at the outset was "wrong in principle" and resulted in an "unfair and inefficient" process that would not have been required if it was found the *Act* did not apply. The position of ICNC on this argument is that by not examining this question at the outset, the Director, and the delegates who dealt with the file, became 'invested" in finding the *Act* applied and were biased toward reaching that result.

45. ICNC says the decision of the Director to decide the file through an investigation rather than by a complaint hearing was inefficient and unfair toward ICNC, denying ICNC an opportunity to produce their own witnesses at a complaint hearing, to hear the evidence of Ms. Baranova and Ms. Tagirova under oath and to cross-examine them on that evidence and failing to use the most efficient process to resolve the dispute.

46. ICNC says the delegate showed bias by delivering a letter to the Provincial Court relating to the civil actions brought by ICNC on the contracts signed with them by Ms. Baranova and Ms. Tagirova. This submission addresses both the manner by which the letter was provided to the parties and its contents, which ICNC says "gave approval to the complainants to commence a civil action" against ICNC.

47. More generally, ICNC says the investigation by the delegate took too long and a final decision was delayed without a clear reason in "callous disregard" for ICNC's numerous requests to finalize the investigation and issue a decision. Overall, ICNC says the process was "unfair, ineffective, unreasonable and unclear".

48. Finally, ICNC says the delegate failed to comply with the legitimate expectations of ICNC that the process be "fair, open and transparent". This part of the argument raises the matter of the involvement of the Director in the Provincial Court action between ICNC and Ms. Baranova, asserting such conduct by the Director indicates a direct interest in the civil process and impacts on the impartiality of the entire process and, more particularly, of the decision making of the delegate.

49. The responses of counsel for Ms. Baranova and Ms. Tagirova and counsel for the Director address all of the issues raised in the appeal. The response of counsel for the AGBC addresses the constitutional jurisdictional issue only. I shall summarize the arguments of the responding parties under the same headings that I have used to set out the submissions of ICNC.

JURISDICTION

I. Constitutional Jurisdiction

50. Counsel for Ms. Baranova and Ms. Tagirova says the delegate had jurisdiction to make the Determination, arguing ICNC assumed functions outside the ambit of sections 2 and 13.1 of the *IRPR* and assumed the function of an "employment agency" under the *Act*. Counsel says the delegate correctly found ICNC functioned as an employment agency, providing services that matched potential live-in caregivers with prospective employers for a fee.

51. Counsel argues ICNC's argument misinterprets the scope of sections 200(1), 112 and 203(1) of the *IRPR* and the interplay of those provisions with section 2 and section 13.1 of the *IRPR*. Counsel submits that while the *IRPR* authorizes licensed consultants to charge a fee for representing or advising a person with an application before the Minister of Citizenship and Immigration Canada ("CIC"), it does not authorize those consultants to charge a fee for finding a job, obtaining a labour contract, or securing an offer of employment. Counsel says the processes for obtaining employment and securing employment contract are "ostensibly severable, divisible and distinct from the service of securing a work permit in accordance with Canadian immigration law". Counsel adds that subsections 203(1) and (2) of the *IRPR* refer to an LMO process that is "severable, divisible and distinct" from the function of securing a work permit, as the former is made on the request of an employer while the applicant in the latter is the employee. The LMO process does not contemplate matching employees and employers.

52. Counsel refers to *Can-Achieve Consultants Ltd.*, BC EST # D099/97, to support the position that sections 10 and 12 of the *Act* can operate provided they do not conflict with the federal power over immigration. Counsel submits sections 10 and 12 regulate matters that are distinct from the matters addressed in section 2 of the *IFPA* and section 13.1 of the *IFPR*.

53. In reply to the argument that ICNC is an indivisible federal entity, counsel for Ms. Baranova and Ms. Tagirova says ICNC has failed to provide sufficient evidence to support that contention. Counsel says the legal test for functional integration, set out in *Accton Transport Ltd. v. Director of Employment Standards*, 2008 BCSC 1495, at paras. 30-32, is fact dependent and requires an examination of the enterprise as a whole and of the characterization of the activity being considered within that enterprise. Counsel submits the evidence does not show the business of ICNC is one indivisible federal undertaking.

54. Counsel for Ms. Baranova and Ms. Tagirova disagrees with the argument of ICNC that there is a conflict between sections 10 and 12 of the *Act* and section 13.1 of the *IRPR*. Counsel submits section 13.1 of the *IRPR* contemplates functions that facilitate the immigration process, but does not contemplate performing employment recruitment functions such as selecting employees for employers. Counsel submits providing advice about a potential employee's eligibility under *IRPR* and *IRPA* is not equivalent to selecting candidates for a job and *IRPA* does not authorize a representative to "interview selected employees to confirm they meet the employer's requirements"; that function has no relation to the immigration process and no bearing on the *IRPA*.

55. Counsel submits the Court's decision in *Mangat* does not apply in this case; the circumstances are different. Counsel submits this is not a case where one law cannot be followed without frustrating the other. Rather, counsel says, in this case, provincial and federal legislation are not in direct conflict and unless it is impossible to give effect to the provincial legislation without frustrating the purpose of the federal law, both should be applied within their respective areas of application and operation. Counsel submits the *IRPA* and *IRPR* do not purport to regulate the creation of employment relationships in the province or contain provisions

regulating employment agencies and prohibiting requesting, charging or receiving a fee for providing services relating to creating an employment relationship.

56. On this issue, counsel for the Director first notes that many of the arguments made in the appeal on this issue were never made, or were not made in the same terms, during the complaint process. In any event, the Director submits the constitutional arguments are without merit. To summarize, counsel for the Director submits:

a. Activities involving the recruitment of employees for employers or finding employment for prospective employees are not inherently activities involving naturalization and aliens; they are activities properly characterized as activities involving property and civil rights which are not converted to activities involving naturalization and aliens because some immigration businesses choose to engage in recruitment activities to assist their clients with immigration.

b. ICNC is a business incorporated under British Columbia's statutes and its business operations are located in the province. ICNC uses the internet to enter into contracts with persons outside of British Columbia; that fact does not mean it is not operating with the jurisdictional boundaries of the province. Counsel also notes ICNC's argument on extra-territoriality is undermined by the business having sought to enforce the contracts between ICNC and Ms. Baranova and Ms. Tagirova in British Columbia Provincial Court.

c. Counsel submits the argument asserting the application of section 92(1)(c) of the *CA* irrationally seeks to assert federal jurisdiction over the activities of the business because the language of one aspect of the immigration process mirrors one phrase from the *CA*. Counsel says that to fit within the bounds of section 92(1)(c) the entirety of ICNC's activities would need to be declared by Parliament as being for the general advantage of Canada or for the advantage of two or more provinces.

d. In response to ICNC's argument invoking section 92(13) of the *CA*, counsel says that while the contracts in question were signed by Ms. Baranova and Ms. Tagirova in Russia, ICNC were located in British Columbia and the contracts have been the subject of enforcement proceedings in the province.

e. Counsel says section 92(16) does not apply as the activities of ICNC are not extra-territorial; ICNC operates in British Columbia and the contracts with Ms. Small, Mr. Flann, Ms. Baranova and Ms. Tagirova were entered into by ICNC in British Columbia.

57. Counsel submits there is no conflict between sections 10 and 12 of the *Act* and the immigration services performed by ICNC; that there is room for compliance with the *Act* without impeding their immigration activities.

58. Counsel for the Director notes that ICNC had a licence under the *Act* to operate as an employment agency until 2008 and submits the Director properly concluded the activities of ICNC that required that licence did not change in 2008.

59. Counsel says ICNC is incorrect in attempting to apply federal paramountcy to establish its contracts to deliver employment related services come under federal jurisdiction because it also engages in providing immigration services. Counsel provides comments from the Supreme Court of Canada in *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407 (*"Fastfrate"*) at paras. 27-28, describing the "constitutional landscape" of labour relations, submitting the "functional integration" asserted by ICNC is not sufficient oust application of the *Act* to the employment services rendered by ICNC because

there is nothing in the *IRPA* that addresses such matters; Parliament has not chosen to assert a jurisdiction over what fees, licensing requirements and employment assistance ought to exist for immigration consultants representing persons seeking to immigrate to Canada under the LCP.

60. Counsel says the Supreme Court of Canada decision *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. No. 22 (*"Canadian Western"*) answers the submission of ICNC that the listing of "naturalization and aliens" in section 91(25) of the *CA* dictates there should be federal jurisdiction over the labour relations of businesses providing employee recruitment and employment agency services along with immigration services. In *Canadian Western*, the Court discussed the principle of "interjurisdictional immunity" and concluded the principle did not apply because the bank failed to demonstrate operational incompatibility between the federal and provincial legislation at issue in that case or show frustration of a federal purpose in the application of the provincial legislation.

61. Counsel for the Director says, like the bank in *Canadian Western*, ICNC has not shown any "real, operational conflict between the provisions of the IRPA and the application of the *Act* to [ICNC's] recruitment and employment agency activities" such that there is any frustration of the federal purpose to regulate immigration.

62. The response of counsel for the AGBC addressed only the constitutional issues. No submission was made on the "extra-territoriality" issue. The submission sets out counsel's summary of the essential argument of ICNC as being: "whether the application of valid provincial legislation to the appellant would frustrate Parliament's purpose within the doctrine of federal paramountcy" and has raised other arguments relating to federal regulation of labour relations and extraterritoriality. The submission notes ICNC has not raised the constitutional issue of "interjurisdictional immunity" or asserted the *Act* is not generally constitutionally valid.

63. Counsel for the AGBC takes the position that none of ICNC's constitutional arguments have any merit and the provisions at issue apply to them. Counsel takes no position on whether those provisions have been breached. Counsel submits the "occupied field" doctrine, upon which ICNC appears to rely has "long been rejected in Canadian constitutional law" and the Supreme Court of Canada has affirmed in numerous cases that the approach of constitutional doctrine is to accommodate the laws of both Parliament and the provinces where possible; the Court has affirmed that constitutional doctrine facilitates, and does not undermine, "co-operative federalism" in dealing with the inevitable overlap in rules made at the two levels of legislative power: *Canadian Western*. The fact there may be some overlap does not render a provincial law inapplicable unless, under the doctrine of interjurisdictional immunity, the provincial law "impairs the core" of Parliament's legislative authority in an area (which has not been argued) or, under the doctrine of federal paramountcy, there is actual conflict in the operation of the two laws or the operation of the provincial law is incompatible with the purpose of the national legislation.

64. Counsel says that, in respect of the doctrine of federal paramountcy, the onus of evidentiary proof of frustrated purpose is on the party seeking to invoke the doctrine, and the standard of proof is high. Also, for there to be a frustration of federal purpose, the federal provision must consist of a right created by the legislation that the provincial law denies: *Quebec (Attorney General) v. Canadian Owners and Pilots Association (COPA)* 2010 SCC 39, at paras 62-69; *Quebec (Attorney General) v. Lacombe*, 201 SCC 38, at paras. 118-129.

65. Counsel says in this case there is no operational conflict between sections 10 and 12 of the *Act* and the *IRPA* and *IRPR*; to the contrary, those provisions of the *Act* are entirely consistent with Parliaments objectives under the *IRPA*.

66. Counsel for AGBC has provided submissions on the appropriate constitutional analysis in the circumstances of this case, referencing principles established and statements made by the Court in *Mangat*, *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, at paras 48, 49 and 65-70, and *Canadian Western*, at paras. 69-75.

67. Counsel reviews the purposes of the *IRPA* and the LCP, submitting:

> . . . in the area of economic immigration programs the overarching approach to immigration of both the federal government and provincial governments, and as is reflected in the IRPA is one of cooperation with mutual objectives.

68. Counsel submits there is no basis to conclude Parliament intended to maintain a legislative enclave around those who may assist applicants under these programs or what the conditions around assistance might be. The purpose of both levels of government is the same – to facilitate economic immigration while ensuring the interests of the applicants under the programs are protected. The intent of section 91 of the *IRPA* is the protection of vulnerable persons who apply to come to Canada as temporary foreign workers from "unscrupulous" immigration consultants.

69. Counsel submits the purpose of sections 10 and 12 of the *Act*, as reflected in section 2, are entirely consistent with the purposes of the *IRPA* in seeking to protect immigrants and in establishing a regulator for those immigration consultants who are not otherwise regulated by a law society of a province. The purpose of section 10 is to protect potential employees from having to pay to seek employment. The purpose of section 12 is to develop employment agencies that understand, appreciate and agree to conform to the requirements of the *Act* and *Regulation*.

70. In addition to the submission on application of the "federal paramountcy" doctrine in this case, counsel for the AGBC points to some factors that demonstrate the *IRPA*/*IRPR* and the *Act*/*Regulation* operate harmoniously. These include:

- A shared legislative jurisdiction over immigration under the *CA*;
- A stated intention by Parliament in the *IRPA* to approach immigration from a co-operative perspective;
- Shared federal and provincial objectives for immigration;
- The existence of federal-provincial agreements in relation to immigration; and
- A recognition by Parliament and British Columbia that relevant provincial legislation continues to operate.

71. Counsel for the AGBC submits ICNC's argument that they are subject to federal regulation by reason of section 92(10)(a) of the *CA* is not correct. Counsel says the class of undertakings to which that provision applies is limited and does not include the business of ICNC.

72. Lastly, counsel says it is an error to say provincial legislation can never apply to federally regulated businesses, providing the example of the bank in *Canadian Western* that was subject to provincial laws in relation to the selling of insurance.

II. Extra-Territoriality

73. Counsel for Ms. Baranova and Ms. Tagirova submits the argument by ICNC that the *Act* does not apply as they are an interprovincial and international business misinterprets the law on extra-provincial jurisdiction, which is governed by the test of "sufficient connection" set out in *Can-Achieve Consultants Ltd.*, BC EST # D463/97. Counsel says the facts of this case demonstrate a "sufficient" connection" between ICNC, the complainants and the employment that was facilitated by ICNC to find the relationship is governed by the *Act*.

ERRORS OF LAW

74. Counsel for Ms. Baranova and Ms. Tagirova submits that many of the "so-called" errors of law are disagreements with conclusions made by the delegate on the evidence and, as such, cannot be characterized as errors of law.

75. Counsel also submits that any alleged mistaken statements made in the Determination must be shown by ICNC to be sufficiently material to the associated finding made by the delegate as to affect the resulting Determination: *ILS Entertainment Group Ltd.*, BC EST # D370/00 (*"ILS"*). Counsel notes the Tribunal has adopted a definition for "error of law" that was set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.). In the context of findings of fact, that test for determining whether there has been an error of law requires showing the finding was made without any evidence or on a view of the facts which could not reasonably be entertained. Counsel submits all of the delegate's findings were well-reasoned and grounded in evidence provided by the parties.

76. Counsel addresses all of the challenges to the findings of fact made in the appeal submission of ICNC and summarizes by contending ICNC has failed to establish the delegate committed any error of law in the findings of fact or the conclusions reached by the delegate based on the findings of fact.

77. Counsel for Ms. Baranova and Ms. Tagirova submits ICNC has failed to show the delegate committed any error of law in assessing the credibility of the complainants. Counsel says the analysis was correctly and properly based on a consideration of the evidence as a whole applied to the well established test for assessing credibility described by the BC Court of Appeal in *Faryna v. Chorney*, [1952] 2 D.L.R. 352 (*"Faryna"*). Counsel says the inconsistencies that are alleged by ICNC – to the extent they may be considered "inconsistencies" at all – are superficial rather than substantive, are exaggerated conjecture and speculation which, overall, do not support the contentions being made.

78. Counsel for the Director also submits ICNC has failed to establish the delegate committed any error of law in the Determination. The submission of counsel points to those parts of the Determination that consider the challenges made by ICNC and contends the delegate's findings were based on a consideration of the entirety of the evidence and were entirely reasonable. Counsel notes that section 112(1) of the *Act* does not authorize the Tribunal to consider appeals based on a disagreement with findings of facts unless those findings amount to error of law.

79. Similarly, counsel for the Director submits the delegate's assessment of the credibility of the complainants shows no error of law. Counsel submits the arguments on this point made by ICNC are based on exaggerating the importance of minor errors and inconsistencies in the section 112(5) "record" and in the Determination itself. Counsel also notes the delegate's assessment of the credibility of the complainants was only part of the reason for finding ICNC contravened section 10 of the *Act*.

FAILURE TO OBSERVE PRINCIPLES OF NATURAL JUSTICE

80. Counsel for Ms. Baranova and Ms. Tagirova submits there was no failure on the part of the Director, or the delegate, to observe principles of natural justice.

81. Counsel has noted and has provided a brief response to each of the elements of "breach of natural justice" made by ICNC in their appeal. Those responses make the following points:

- It is apparent from the "record" that the delegate dealt with ICNC's jurisdictional arguments;
- Section 76 of the *Act* provided the delegate with a broad discretion, which has been confirmed in the Court of Appeal's decision in *Karbalaieali v. British Columbia (Deputy Solicitor General)*, 2007 BCCA 553 to determine how to proceed on the matter of the jurisdictional issue;
- That discretion includes a discretion not to adjudicate the jurisdictional issue separately, as that question was "deeply interwinded" with the facts and could not have been made in a factual vacuum;
- The delegate's decision on whether she was authorized to hear the case goes to the very heart of the Director's jurisdiction under section 76 of the *Act* and the statutory obligation of the Director to decide whether to proceed with the claims once the complaints were filed;
- The delegate's decision to proceed by way of investigation is an aspect of the discretion granted in section 76 and does not objectively indicate a breach of principles of natural justice: *Emmanuel's House of Dosas Inc.*, BC EST # D006/11;
- The decision to re-investigate was, in the circumstances, reasonable;
- The allegation that the Director factually approved of the complainants' actions in civil court is pure conjecture – speculative and baseless. The letter from the delegate does nothing more than state the Director was seized of the matter and an investigation had commenced;
- ICNC's allegations based on the length of the investigation ignores that the delegate had to read, analyze and evaluate over 1500 pages of documents, meet with the parties and respond to ICNC's "voluminous submissions and relentless emails over the course of the investigation"; and
- The Director's appearance in civil court, providing submissions on the Court's jurisdiction over the matter before the court, did not reflect bias but rather reflected the Director's efforts to provide guidance on a matter considered by the Director to be within her exclusive jurisdiction under the *Act* and not subject to a Provincial Court proceeding.

82. The response of the Director also takes the position there was no failure to observe principles of natural justice in making the Determination. As a general response to the several allegations of bias, counsel submits the burden on a person alleging bias, actual or apprehended, against the Director or a delegate requires "clear and convincing" evidence that allows for objective findings of fact showing a "real likelihood" of bias: *Gordon Cameron*, BC EST # D076/06, and *Dusty Investments Ltd. dba Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98).

83. Counsel for the Director submits section 76(3) of the *Act* grants the Director discretion to refuse to process, or to stop processing, a complaint and to decide how a complaint will be processed: by way of investigation

or complaint hearing. Counsel submits the discretion granted to the Director in that section allowed an investigation and Determination to be made on all aspects of the complaint.

84. Counsel says there was no breach of principles of natural justice in conducting an investigation and not a complaint hearing. Counsel says the decision to process the complaint by way of investigation was clearly justified considering the voluminous record – 1,537 pages – and the complexity of the arguments being made to the delegate. As well, counsel says there is no absolute right to an oral hearing before a delegate: *Director of Employment Standards and Leticia Macaranas Sarmiento*, BC EST # RD082/13.

85. Counsel rejects the contention that the Director was "factually approving" the complainants' counterclaims in ICNC's Small Claims action. Counsel contends there is no evidence supporting the allegations made either in the context of the delegate sending the letter to the complainants by fax or in the sense of the circumstances establishing the delegate was "factually approving" the complainants bringing counterclaims; the allegations are completely speculative and the evidence provided in support is not a reasonable basis on which to find actual or apparent bias.

86. Counsel for the Director says the assertions by ICNC that the actions of the delegate were "unfair, ineffectual, unreasonable and unclear" are clustered around reference to a series of dates interspersed with commentary that in the main complains of the length of time taken by the delegate to complete the investigation and issue the Determination. Counsel submits that no reasonable reading of the material supporting these assertions can support a conclusion the delegate was "delaying the process for unclear reasons and in callous disregard" of ICNC. Counsel says the length of time taken by the delegate is answered by reference to the size of the section 112(5) "record" and the number and complexity of arguments and issues the delegate needed to address in the Determination. Counsel submits the allegations made by ICNC is no more than a transparent effort to elevate disagreements with the delegate's view of the evidence and findings of fact to breaches of natural justice.

87. In paragraphs 76 to 84 of her submission, counsel for the Director addresses several claims of breach of natural justice made in ICNC's appeal.

88. Counsel says the delegate did not "ignore" or "fail to respond" to the jurisdictional submissions made by ICNC in November 2011; ICNC had previously made the arguments contained in that submission in similar terms; natural justice and procedural fairness do not require the delegate to mention and analyze each and every argument raised by a party to a proceeding on each occasion it is raised.

89. Counsel says the allegation that the delegate "fabricated" and "modified" evidence are serious accusations that are clearly without foundation; the delegate, as any other decision maker, was not obliged to quote directly in all respects when rendering their decisions.

90. Similarly, counsel says the allegation the delegate acted as advocate for the complainants by referring to their 2010 submissions as answering ICNC's submissions on jurisdiction are also serious and also unjustified; the delegate had advised the parties in June 2011 that she would consider evidence and submissions from the first investigation.

91. Counsel rejects the contention the delegate failed to disclose a payment receipt to ICNC, pointing out that the section 112(5) "record" shows the document had been disclosed.

92. Counsel also rejects the contention that the delegate demonstrated bias by finding Ms. Baranova's untranslated receipt provided the "best evidence" upon which to decide the amount she had given ICNC as

her second payment. Counsel submits that in the circumstances the delegate was entitled to accept that receipt for the facts it contained. While ICNC prepared and presented its own receipt relating to that matter, there was no effort on its part to provide a translation of the receipt provided by Ms. Baranova or otherwise contest its accuracy.

93. Counsel submits the allegations that the delegate made findings on "no evidence" are incorrectly based on the apparent insistence by ICNC that only direct quotations and complete accuracy in the repeating of evidence or drawing conclusions from evidence are acceptable. Counsel submits principles of natural justice cannot be considered breached because ICNC dislikes the delegate having followed a practice, typical of decision makers, of summarizing evidence or because ICNC disagrees with the conclusions made in the Determination.

94. Counsel similarly asserts the allegations the delegate presented evidence from ICNC's website in a misleading way and distorted the purpose of the website do no more than disagree with the delegate's summary of the evidence and the conclusions drawn from it and have no merit.

95. Counsel says the allegations the delegate reached conclusions "in either a perverse or capricious manner, or without regard to the material before her" are not borne out on any reasoned assessment of the Determination and the accusation of bias which follows those allegations have no evidentiary basis, and is nothing more than an expression of disagreement with the delegate's view of the facts, which it is submitted, generally underlies ICNC's bias accusation.

96. Counsel submits the other allegations of breach of principles of natural justice raised in the appeal submission, which arise from minor errors in the Determination, are not of such a nature that should justify finding a breach of natural justice.

97. Counsel for the Director submits the argument by ICNC that the delegate had failed to act as an impartial decision maker misconstrues the circumstances and the basis for the Director's involvement in the Small Claims Court matter involving Ms. Tagirova. Counsel has provided several documents, an explanation of those documents and the rationale for the position taken by the Director in the matter. Counsel submits there is nothing in the documents or the conduct of the Director, or Director's counsel, that can reasonably be seen as the Director having demonstrated "self-interest" or prejudgment of the complaints against ICNC.

The Final Reply of ICNC

98. ICNC has provided a final reply to submissions of the other parties. I will preface my summary of the final reply with the observation that the opportunity for final reply in matters before the Tribunal is provided to allow an appellant to address matters that have arisen for the first time in submissions of the responding parties and which could not reasonably have been contemplated when the appeal submission was framed and filed. This opportunity is grounded in the statutory purposes of fairness and efficiency. Final reply is not provided, nor does the Tribunal allow it to be used, as an opportunity to raise new grounds or fashion new arguments of appeal. Nor is final reply an opportunity to reiterate the arguments made in the appeal. The appeal of ICNC was 48 pages and 29 exhibits; the Notice of Constitutional Question was another 14 pages. The final reply submitted by ICNC is 29 pages and 7 exhibits, comprising another 52 pages. Much of the final reply adds nothing to the submissions made by ICNC in the appeal. Other elements of the final reply merely express ICNC's disagreement with the submissions of the responding parties and add nothing to the merits of the respective arguments. Other parts of the final reply introduce new evidence and arguments.

99. I will briefly summarize the position of ICNC in each of the eleven headings of the final reply.

100. ICNC disputes the characterization of the constitutional question in the submission of counsel for the AGBC as misstating its position. ICNC restates its position, continues to challenge findings of fact made in the Determination and asserts facts that are not in evidence: see points 4(c), 10-15, 20, 21, 22, 23, and 25 of ICNC's response to the submission of the AGBC.

101. In response to the submission of counsel for the AGBC, that ICNC had not raised "interjurisdictional immunity" or made any arguments on the doctrine of "federal paramountcy", ICNC says that was intentional and has "left it for the Court to deal with that" and submits that to not deal with all the potential constitutional issues would be to take an unreasonably narrow approach. In response to the submission of counsel for the AGBC that ICNC was relying on a concept – "functional integration" – that does not apply in the circumstances, ICNC says it was the delegate, not ICNC who brought this concept into the Determination, but ICNC does not say it is not relying on it.

102. ICNC reiterates the arguments in respect of the allegations made in the appeal submission, that the Director started a new investigation on the request of the complainants; that the Director failed to act as an impartial decision maker and demonstrated bias by factually approving the complainants bringing counterclaims in Small Claims Court and becoming involved in the application to adjourn the Small Claims action between ICNC and Ms. Baranova on December 22, 2010; that the Director erred by not deciding the jurisdictional question at the outset; and that the Director erred by conducting an investigation instead of a hearing.

103. ICNC makes submissions on statements made in the affidavit of Rod Bianchini, the Regional Manager for the Lower Mainland Office of the Employment Standards Branch, a copy of which was attached to the submission of counsel for the Director.

104. ICNC raises the circumstances of a second complaint filed by Ms. Tagirova relating to the monies she was required to pay to ICNC under an order made in the Small Claims action between ICNC and Ms. Tagirova.

105. ICNC reiterates its allegation that the delegate fabricated evidence against ICNC and modified witness testimony and restates its argument on that allegation.

106. ICNC reiterates its allegation that the delegate erred in finding Ms. Baranova's untranslated receipt to be the "best evidence", and submits the argument made by counsel for the Director "clearly demonstrates and confirms the Director's bias".

107. ICNC reiterates its position that the delegate ignored their November 22, 2011, jurisdictional submissions.

ANALYSIS

108. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

> *112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was being made.*

109. An appeal to the Tribunal under section 112 is not intended as an opportunity to either resubmit the evidence and argument that was before the Director in the complaint process or submit evidence and argument that

was not provided during the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions.

110. The Tribunal has established that an appeal under the *Act* is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds of review identified in section 112. More particularly, a party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

111. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation.

112. Generally, the Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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.

CONSTITUTIONAL QUESTION

113. The Tribunal has the authority to deal with constitutional questions concerning "division of powers" arising under sections 91 and 92 of the *CA*. Under those sections, power is distributed to either level of government to make laws in relation to matters enumerated in each. The constitutional question in this appeal is whether sections 10 and 12 of the *Act* apply to ICNC's recruitment services and invokes a consideration of the following provisions of sections 91 and 92:

> ***91.*** *It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects hereinafter enumerated, that is to say,*
>
> . . .
>
> *25. Naturalization and Aliens.*
>
> . . .
>
> ***92.*** *In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say,*

> . . .
>
> *10. Local Works and Undertakings other than such as are of the following Classes:*
>
> *(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:*
>
> . . .
>
> *(c Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or More of the Provinces.*
>
> . . .
>
> *13. Property and Civil Rights in the Province.*
>
> . . .
>
> *16. Generally all Matters of a merely local or private Nature in the Province.*

114. I substantially agree with counsel for the AGBC, that the appropriate constitutional analysis begins with an assessment of the "pith and substance" of the impugned legislation, in this case sections 10 and 12 of the *Act*. I also agree that the constitutional validity of those provisions of the *Act* are not in dispute; it is their operability in the face of the provisions of the *IRPA* and *IRPR* that ICNC has identified as central to the constitutional question. To be clear, in this case I find the province has a clear legislative authority to regulate employment and employment agencies under section 92(13) of the *CA*.

115. As suggested by counsel for the AGBC, I do not find it necessary to consider the doctrine of interjurisdictional immunity. That doctrine requires there to be a sufficiently serious encroachment on the exercise of a protected federal power by a provincial statute that *trenches on, and impairs, the protected "core" of a federal power*. There is no such concern here. Sections 10 and 12 of the *Act* do not, on any analysis, impair the "core" competence of the federal government over immigration, or more particularly, the conditions under which a person may immigrate to Canada under the IRPA.

116. As well, I rely on the reference in *Marine Services International Inc. v. Ryan Estate* (*"Marine Services"*), at para. 50, attributing a comment to Dickson, C.J. in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, "that the dominant tide of constitutional interpretation, which favours, where possible, the operation of statutes enacted by both levels of government, militates against interjurisdictional immunity. A broad application of the doctrine is inconsistent with a flexible and pragmatic approach to federalism": see also the comments of McLachlin, C.J. in *COPA*, *supra*, at para. 45.

117. Nothing in sections 10 and 12 of the *Act* impairs the federal power over immigration. Interjurisdictional immunity does not apply here.

118. The constitutional argument made by ICNC, although not framed in such terms, is consistent with an application of the doctrine of "federal paramountcy", which says that, "when the operational effects of the provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility": *Marines Services*, at para. 65. This notion is central to ICNC's arguments and its reliance on *Mangat*. The concern under this doctrine is not with the validity of the enactments being considered, but whether they are inconsistent. Inconsistency can arise from two forms of conflict: an actual conflict in operation, "where the federal statute says 'yes' and

the provincial statute says 'no', or vice versa": *Marine Services*, at para 68; and where provincial law frustrates the purpose of the federal law. As noted by the Court in *Marine Services*:

> The "fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject": *Canadian Western Bank*, at para. 74. Courts must not forget the fundamental rule of constitutional interpretation: ". . . [w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes": *Canadian Western Bank*, at para. 75 . . . The "standard for invalidating provincial legislation on the basis of frustration of federal purpose is high; permissible federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission": *COPA*, at para. 66.

119. There are other principles flowing from *Canadian Western Bank* that underlie the doctrine. These are summarized in the submission of counsel for the AGBC.

120. Applying the above to the facts of this case, I do not accept the contention by ICNC that sections 10 and 12 of the *Act* cannot be applied to their business.

121. The burden of demonstrating the federal and provincial laws are in fact incompatible by establishing it is impossible to comply with both laws or that to apply the provincial law would frustrate the purposes of the federal law is on ICNC: *Canadian Western Bank*, *supra*, at para 75.

122. First, I find ICNC has not established there is any actual conflict between section 91 of the *IRPA*, sections 2 and 13.1(1) of the *IRPR* and sections 10 and 12 of the *Act*. I cannot equate any function within the scope of *IRPA* and *IRPR* with providing employment recruitment services – finding a job, obtaining a labour contract or securing an offer of employment – for a fee. I agree with the statement in the Determination, that "[f]ederal immigration legislation does not purport to regulate the business of employment agencies. Nor does provincial employment standards legislation regulate ICNC's immigration services": at page R30.

123. ICNC argues the functions of obtaining a work permit, which is issued on an offer of employment, and preparing a positive LMO under the *IRPA* and *IRPR*, are integrally related to the recruitment functions offered to prospective care-givers for a fee.

124. I have read the submissions of all the parties relating to this point. They are extensive. However, I accept the position of all the responding parties on this point that providing immigration services, including the process of obtaining a work permit and preparing an LMO, is distinct, and severable, from functions to which sections 10 and 12 of the *Act* apply. As submitted by counsel for the Director:

> . . . it is entirely possible to provide immigration services without directly or indirectly charging employees fees for helping them find employment or for providing them with information about employers seeking employees, and without operating as an employment agency charging employers fees for helping them to find employees.

125. As indicated above, I find nothing in the provisions of the *IRPA* and *IRPR* upon which ICNC relies that authorizes an immigration representative to operate as a an employment or recruitment agency or to charge a fee for employing or obtaining employment for a person or providing information about employers.

126. There is no evidence that it is not possible for a person to comply with the *Act* and still provide the immigration services contemplated in the *IRPA* and *IRPR*. The *IRPA* and *IRPR* do not require, or even

specifically allow, an "authorized representative" to charge fees for helping a person find employment or provide information about employers seeking live-in caretakers. There is no mention in the *IRPA* and *IRPR* to an "authorized representative" operating an employment or recruitment agency.

127. The inference in the provisions prohibiting an employer from recouping fees they have paid to a third party recruiter is not inconsistent with the requirement in section 10 that a person must not ask for or receive, directly or indirectly, from a person seeking employment, a payment for employing or obtaining employment for that person.

128. Second, I find an application of the requirements of sections 10 and 12 of the *Act* would not "frustrate" the purpose of the *IRPA* and *IRPR*. Having reviewed the provisions of the *IRPA* and *IRPR*, including the statement of purposes in section 3, the appeal submission of ICNC, the submissions of counsel for the AGBC on this point and the reply of ICNC to it, I agree and accept there is no basis, in either the evidence or the language of the *IRPA* and *IRPR*, to conclude Parliament intended to create a "legislative enclave" around who may assist applicants under the LCP program or what the conditions around that assistance might be. This finding is supported to a large extent in the reply submission of ICNC, which states, at para. 9:

> ICNC submits that even though the purposes of the *ESA* are consistent with the purposes of the *IRPA* in relation to the protection of immigrants, the *ESA* cannot provide a complete and effective administrative structure for granting and enforcing rights to foreign workers, while the *IRPA* can.

129. There is no evidence or authority provided by ICNC to support this very broad and general statement. There is no evidence, for example, that the *IRPA* provides a "complete and effective administrative structure" for granting and enforcing rights relating to terms and conditions of employment – hours of work, wages, annual and statutory holiday pay and overtime – for immigrant workers employed in each of the provinces. The material provided by ICNC to prop up this submission is not relevant to the concerns raised in this case, but addresses the relationship between an employer and a "recruiter", reinforcing the prohibition against an employer seeking to recover recruitment fees from an employee.

130. It follows that I reject the contention by ICNC that the business services being provided in this case were in connection with matters arising from the *IRPA* and *IRPR* and were subject only to federal regulation, or to put it in the context of the *Act*, were not regulated by sections 10 and 12 of the *Act*.

131. The arguments of ICNC seeking to link their recruitment services with the immigration services provided by ICNC are not grounded in any clear language found in the federal legislation and are frequently grounded in submissions that are not rationally justifiable when examined objectively. For example, there is no clear language that establishes operating an employment agency and charging a fee to a person for finding them employment or connecting them with employers as an essential element of, or linked in any way, to preparing a work permit or an LMO under the *IRPA* and *IRPR*.

132. The other constitutional jurisdiction arguments may be addressed briefly.

133. ICNC is not a business within the class of "works and undertakings" included in section 92(10)(a) of the *CA*. That section allocates to Parliament the authority over interprovincial or international shipping lines, railways, canals, telegraphs and other modes of transportation or communication: see *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] S.C.R. 407 ICNC does not fit within that class.

134. Section 92(10)(c) does not apply as there is no evidence ICNC has been declared to be a work for the general advantage of Canada or for the advantage of two or more provinces.

135. ICNC argues the *Act* does not apply because Ms. Baranova and Ms. Tagirova entered into contracts with ICNC in Russia, while they resided in Russia and before they came to Canada. I reject this argument for a number of reasons. First, the basis for the involvement of the Director were the requirements and prohibitions found in sections 10 and 12 of the *Act*. Those are statutory requirements and prohibitions that exist entirely independent of the contracts signed by Ms. Baranova and Ms. Tagirova. Second, and in any event, even though Ms. Baranova and Ms. Tagirova signed their agreements with ICNC while they were in Russia, it was contemplated those agreements would govern their relationship in the province and, based on ICNC's bringing action on the contract in Provincial Court, were intended to be enforceable in the province. Third, the focus and aim of sections 10 and 12 of the *Act* is to regulate the business of persons who perform activities relating to employment in the province; in such circumstances the *Act* will validly apply to their actions in the province even though their actions may form part of a transaction which originates and ends with a person outside the province: see *Can-Achieve Consultants Ltd.*, BC EST # D463/97, at page 9, and cases cited therein.

136. Finally, ICNC submits the *Act* does not apply because its business should be viewed as a single, integrated federal undertaking that includes recruiting or offering to recruit prospective employees for a fee.

137. First, I agree with counsel for the AGBC, that in making this argument ICNC seeks to rely on the concept of "functional integration" which does not apply in these circumstances. The constitutional question here, which has already been raised and considered, is whether sections 10 and 12 of the *Act* can regulate aspects of the business of ICNC.

138. In any event, "functional integration" is used to decide whether employees of a local company are, by virtue of their relationship with the business or services of a federally regulated company, to be governed by federal, rather than provincial, labour or employment relations: see *Actton Transport*, *supra* at para. 46. The test in applying this concept is strict; constitutional facts are important. The burden of presenting those facts would be on ICNC in the circumstances and those facts must show the provincial undertaking to be "vital or essential", not just integral, to the federally regulated undertaking. If this were a case for considering "functional integration", I would find ICNC has not met the burden of showing their recruitment services are "vital or essential" to their immigration services.

139. For all of the above reasons, I dismiss the constitutional jurisdiction arguments.

ERRORS OF LAW

140. As noted above, the arguments by ICNC alleging error of law by the delegate predominantly challenge many of the findings and conclusions of fact made in the Determination.

141. On my assessment of the Determination, those parts of the section 112(5) "record" relating to the "error of law" issue, the submissions of ICNC, the replies of counsel for the Director and counsel for Ms. Baranova and Ms. Tagirova and the final reply of ICNC, much of this ground of appeal may be characterized as disagreement with conclusions reached by the delegate on the available evidence. Many of the areas of disagreement arise in the context of non-material facts.

142. The delegate was not required to accept everything each party said – that would be absurd and make the process unworkable – nor was the delegate prohibited from accepting the position of one party and rejecting the position of the other so long as reasons were provided for the choice made and those reasons were based on relevant considerations. In deciding the merits of the complaints, the delegate had to make some choices between the competing positions of the parties. The choices were made and I find the reasons for those

choices were provided by the delegate in the Determination. ICNC may not like the choices made, but mere disagreement is not a basis upon which an appeal may be grounded. As already stated, the burden on ICNC is to show the delegate committed an error of law in making those choices.

143. As stated above, section 112(1) of the *Act* does not allow an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law. The burden of showing an error of law based on an error in the facts is not an easy one to meet.

144. The appeal submission refers to thirty-nine statements in the Determination with which ICNC takes issue. A few of these raise natural justice considerations and will be addressed under that ground of appeal. ICNC says the delegate fabricated evidence in stating, at page R5 of the Determination:

> When they received the contract and promissory note, the complainants stated they contacted ICNC to discuss their concern the contract did not explicitly set out ICNC's employment services. The complainants stated ICNC provided assurances the fee included help finding employment in Canada, based upon which the complainants entered into the contract with ICNC.

145. ICNC contends the statements of the complainants "do not have a mention of a fee" and the delegate's indication they had was a fabrication by her.

146. However, page 8 of the "record" contains a statement from Ms. Tagirova that: "Michael told me that the charge for finding an employer for me is $3,000US". Ms. Baranova makes the same statement in a document found at page 86 of the "record". As well, the Determination, at pages R22-R29, contains reference to the material relied on by the delegate in finding ICNC had charged the complainants a fee to find them employment in Canada, which included the information provided by the parties, the contract terms for services to the complainants, ICNC's website information, the written and oral statements made by the complainants and ICNC to the first delegate, the written statements of some of ICNC's former care-giver clients and the evidence given by the complainants' employers. ICNC's argument does not address this evidence.

147. I do not find this argument by ICNC to be borne out by a consideration of all the evidence considered and relied on by the delegate. No error of law has been established.

148. I note ICNC's "final reply" on the above point, while it provides a broader reference to the basis for the allegation, continues to fail to address the totality of the evidence relied on by the delegate in making the finding.

149. On my analysis and assessment of the "record", and keeping in mind the burden on ICNC to show the findings of fact present an error of law, the finding in the Determination was one that could reasonably have been made from the evidence available to the delegate.

150. Some of ICNC's assertions claiming factual error also have little merit. ICNC says a receipt of wire payment in Russian from Ms. Tagirova to Mrs. Gorenshtein was never disclosed to ICNC. While that might be technically correct, as I can find no Russian version of that receipt in the "record", the inference of the submission made by ICNC is that they were deprived of having that information at all when, in fact, ICNC was provided with an English translation of that receipt as part of the "record" relating to the initial investigation of the complaints. In another area, ICNC asserts the delegate's statement concerning the timing of an e-mail concerning Ms. Baranova's prospective employer was wrongly stated to be March 9, 2008, when it was May 9, 2008. The "record" contains that e-mail at page 109 and clearly shows March 9, 2008, as the date it was sent.

151. More to the point, however, is that neither of these matters is shown by ICNC to have any relevance to the Determination that was made. This same point can be made of other alleged errors of law based on the findings of fact made in the Determination. Some of the challenged findings relate to matters unrelated and irrelevant to the final decision. Among other matters, this observation applies to ICNC's submissions on whether Ms. Tagirova applied to the Canadian consulate in Moscow "on her own" and that Ms. Tagirova had not provided an English translation of a receipt for money that was issued in Russian.

152. ICNC makes much of the decision of the delegate not to place much weight on eight written statements from former clients that were provided to the delegate in January 2012. At page R28, the delegate explained why these statements were not being given the weight ICNC asserted they should have. ICNC disagrees with that, but there is nothing in the appeal that shows an error of law was made by the delegate in respect of that evidence. The delegate also notes these statements, even if accepted, would not, in the face of the remaining evidence, have altered the finding that ICNC had contravened section 10 of the *Act*. The delegate has the authority to determine the weight to be given to evidence submitted during a complaint investigation and to make factual findings based on the totality of the evidence. Unless it is shown the delegate made an error of law in assessing the evidence and making the findings of fact, the Tribunal has no authority to interfere with them. ICNC has not shown the delegate committed an error of law in respect of how the written statements were treated or in finding ICNC contravened section 10 of the *Act*. As stated in *Dragon and Branka Tarailo*, BC EST #RD109/05:

> . . . accepting the evidence of one person instead of the conflicting evidence of another person or persons is not an error of law. It is a matter of the weight of the evidence and that is something that is not subject to appeal. The weight of the evidence is a matter of fact for the Delegate to determine and is not subject to review by this Tribunal. (at para. 19)

153. Overall, I do not accept ICNC's contention the delegate erred in law by misapplying the "best evidence" rule, by misstating evidence, acting without evidence, acting contrary to the evidence, making wrong findings from the evidence or acting on a view of the evidence that could not reasonably be entertained. None of the arguments made by ICNC are, as a matter of law, supported on a reasoned analysis of the entirety of the "record". Most of the assertions made by ICNC in respect of the evidence fail to meet the burden of showing an error of law in respect of those findings of fact, which at its core requires ICNC to objectively demonstrate the evidence did not provide any rational basis for the findings made, were made by the delegate without any evidence or were perverse and inexplicable. The extensive submissions made by ICNC fall well short of what is required to succeed in its arguments.

154. I am not persuaded the delegate committed any error of law in the findings of fact. The findings made by the delegate are consistent with the evidence presented by the parties and are an entirely reasonable response to that evidence. The arguments made by ICNC reflect nothing more than disagreement with the factual findings and conclusions reached by the delegate.

155. ICNC specifically challenges the assessment by the delegate of the credibility of Ms. Baranova and Ms. Tagirova, which is expressed in the Determination at pages R26-R29. I do not accept the delegate erred in law in assessing the credibility of Ms. Baranova and Ms. Tagirova. It is clear from the Determination that the delegate was alive to ICNC's position on the credibility of Ms. Baranova and Ms. Tagirova. Having reviewed the Determination on that point, the material in the "record" referred to by ICNC and the appeal submission, I agree completely with the delegate's assessment, at page R27 of the Determination, that, "any discrepancies [advanced by ICNC] were exaggerated, not significant and/or not central to the claim". It is a fair and rational observation of the basis upon which ICNC attacked the credibility of Ms. Baranova and Ms. Tagirova.

156. I also note that the appeal submissions on this point are afflicted by the same selective reference to the supporting evidence that I have referred to above in addressing the submissions on alleged errors of law. Only part of the evidence is quoted, omitting other parts of the evidence that place the first statement in a clearer context or provide a further perspective on the statement.

157. I am not persuaded the delegate erred in concluding there was no evidentiary basis for finding Ms. Baranova and Ms. Tagirova lied, or had misrepresented and distorted facts. I agree with the delegate that what ICNC proffered as examples of those things were, "simply examples of the complainants stating their position, their argument or their interpretation of the material facts": at page R27 of the Determination.

FAILURE TO OBSERVE PRINCIPLES OF NATURAL JUSTICE

158. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal briefly summarized the natural justice concerns that typically operate in the context of the complaint process:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96).

159. In the context of the above summary, ICNC alleges the delegate demonstrated an actual bias or a reasonable apprehension of bias and failed to act as a neutral, or impartial, decision maker.

160. The actual, or reasonable apprehension of, bias allegations arise in several areas, much of it related to the delegate's investigation and decision making processes: accepting the complainants' evidence as the "best evidence"; finding the testimony of the complainants to have been "clear, consistent and reasonable"; refusing to "deal with the jurisdictional issue at the outset"; and failing to act impartially.

161. Actual, or reasonable apprehension of, bias must be found on the evidence. As the Tribunal noted in *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), the test for determining actual bias or a reasonable apprehension of bias is an objective one, the evidence presented should allow for objective findings of fact:

> . . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.

162. The Tribunal also noted the following in *Alpha Neon Ltd.*, BC EST # D105/11, at para. 64:

> An allegation of bias or reasonable apprehension of bias against a decision maker is serious and should not be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

163. At para. 63 of *Alpha Neon Ltd.*, *supra*, the Tribunal stated the following in respect of the test that must be met when it is alleged, as it is here, that a decision maker is not impartial:

The test for finding a reasonable apprehension of bias is well known. In *R. v. R.D.S.,* [1997] 3 S.C.R. 484, the Supreme Court articulated the test as follows:

> When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias. . . . It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. . . . The manner in which the test for bias should be applied was set out with great clarity by de Grandpre J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394:
>
> > [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . [The] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. . . ."
>
> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. . . . Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold".

164. In *R. v. S. (R.D.), [1997] 3 S.C.R. 484,* the Supreme Court added the following to the concern expressed above:

> Regardless of the precise words used to describe the test (of apprehension of bias) the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the ***personal*** integrity of the judge, but the integrity of the entire administration of justice. (emphasis added)

165. As well, the Tribunal has adopted the view that allegations of bias against a delegate must be considered in light of the fundamental nature of the statutory process within which a delegate functions and which was described as follows in *The Director of Employment Standards (re Milan Holdings)* (BC EST # D313/98):

> An investigation is, by its nature, different from a proceeding conducted in the cool detachment of a quasi-judicial hearing where all the parties are present and procedural niceties are attended to. Investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77 which requires only that "If an investigation is conducted, the director must make *reasonable efforts* to a give a person under investigation an opportunity to respond". This modification of the common law standard is legislative recognition that the Director's role is more subtle and more complicated than can be expressed by the label "quasi-judicial". On completing an investigation, the director may make a determination: s. 79(1). At the time such a determination is made, it is an unavoidable practical reality that other investigations on related subjects may still be underway and that tentative conclusions may have been reached in respect them, pending a decision as to what, if any enforcement action is appropriate on an individual or more general basis: *Re Takarabe* (BCEST #D160/98). This is precisely the situation which presents itself here.

166. It follows from all of the above that the burden of proving actual, or a reasonable apprehension of, bias requires clear and convincing objective evidence. Subjective opinions, however strongly held, are insufficient to support a finding of actual or a reasonable apprehension of bias.

167. I will state at the outset of my analysis, there is no evidence at all of actual bias.

168. If the bias allegations are to be met it will be on the basis of showing a reasonable apprehension of bias. With those principles in mind, I turn to the particular allegations made by ICNC.

I. Deciding to Conduct an Investigation

169. The Director, and, by extension, the delegates, have a discretion to decide the process by which a complaint will be determined. That is the effect of section 76 of the *Act*. The Tribunal's authority over an exercise of discretion by the Director is limited to consideration of whether the exercise of discretion was for *bona fide* reasons, if it was arbitrary or if it was based on irrelevant factors: see *Jody L. Goudreau and Barbara E. Desmarais, employees of Peace Arch Community Medical Clinic Ltd.*, BC EST # D066/98.

170. The discretionary authority of the Director to decide how complaints should be processed cannot be interfered with by the Tribunal unless the process selected by the Director is found to contravene a legal principle: see *Director of Employment Standards (Re Ningfei Zhang)*, BC EST # RD635/01, and *Director of Employment Standards and Old Dutch Foods Ltd.*, BC EST # RD115/09. It appears from material in the "record" the delegate considered the jurisdictional question to be one issue in dispute and communicated to ICNC her intention to consider that issue in the Determination, along with the other issues in dispute: see April 19, 2011, e-mail from the delegate to ICNC. It is apparent from the e-mail that the delegate did not determine the facts asserted by ICNC decided the jurisdictional question.

171. It is unclear what legal principle was contravened by the delegate conducting a further investigation on the complaints before making a decision on the jurisdictional question. ICNC is the only party that feels the jurisdictional question was so clear that a decision on it could have been made without further investigation. The other parties point to the discretion of the delegate in section 76, the sheer volume and complexity of the constitutional arguments, the need to determine the constitutional facts and establish an evidentiary record on the jurisdictional question.

172. The best that can be said about the factual basis provided by ICNC for this argument is that they had a strongly held belief that further investigation of the complaints without deciding the jurisdictional question would be unfair and an inefficient use of resources to investigate complaints to which the *Act* may not apply. The argument and allegation made by ICNC is not supported by the evidence. ICNC has not provided any objective and convincing evidence that would satisfy any right-minded person the decision not to bifurcate the complaint process, in the circumstances, gave rise to a reasonable apprehension of bias.

II. Choosing Re-Investigation Instead of Oral Hearing

173. It is well established that there is no absolute right to an oral hearing. Nor does the Tribunal presume that any particular form of complaint process will automatically result in a denial of fair hearing: *Director of Employment Standards and Leticia Macaranas Sarmiento*, BC EST # RD082/13. There is nothing in the submission of ICNC on this point that even suggests the chosen form of process denied ICNC any of the procedural protections provided in the *Act* or by application of the principles of natural justice. The farthest the submission of ICNC goes is to express their opinion that the process chosen was "unreasonable", "inefficient and unfair towards ICNC" – although the submission does not say in what way it was "unfair".

It would be inappropriate to speculate whether any of those terms might include a failure to observe principles of natural justice; there are certainly no established objective facts associated with the use of these terms that would allow such a finding.

174. I find ICNC has failed to establish, on the facts, there was a breach of principles of natural justice associated with the decision of the delegate to conduct a further investigation.

III. "Factually Approving" the Complainants' Actions in Provincial Court

175. Once again, the argument and allegation made by ICNC here falters on the evidence. The entire argument on this point is grounded in pure speculation. ICNC has failed to logically explain why faxing a copy of the letter to the complainants and mailing it to ICNC establishes a reasonable apprehension of bias. ICNC's submissions on this point refers to several questions concerning the letter that were raised with Mr. Bianchini nearly a year after the letter was prepared and sent to the parties. In the absence of a complete answer to all those questions ICNC has decided the letter was sent by the delegate to support the complainants' actions in Provincial Court and, following from that, is evidence the Director actually gave approval to the complainants to commence a civil action in Provincial Court. A fair and reasonable reading of the impugned letter, however, indicates it is neutral in its tone and content. I accept that it was prepared at the request of the complainants, or their representative, and delivered to parties, but the letter does nothing more than set out the current state of the complaint files, set out the issues in dispute and propose a process for moving forward.

176. This factual matrix does not establish a reasonable apprehension of bias.

IV. Delegate's Actions were Unfair, Ineffective, Unreasonable and Unclear

177. ICNC's submissions on this point are primarily directed to the length of time it took the delegate to complete the investigation and write the decision. Nowhere in those submissions does ICNC show how the length of time taken by the delegate interfered with their opportunity to know the case against them, to present their evidence, and to be heard by an independent decision maker. The "record" shows ICNC continued to make substantive submissions on the complaints until the end of November 2011, when they delivered another request for the delegate to make an immediate decision on the jurisdictional authority of the delegate to investigate the complaints.

178. In a March 6, 2012, e-mail to the delegate, ICNC alleged the delay in making a decision was negatively affecting the "interests of ICNC", damaging ICNC's reputation and causing "psychological and physical suffering" to ICNC's workers. While it has taken a considerable length of time to administer the complaint process after the decision of the Tribunal cancelling the first Determination, BC EST #D050/10, there is no evidence the time taken to get to the Determination was either a breach of principles of natural justice or gives rise to a reasonable apprehension of bias. While it is fair to say the process could have proceeded more quickly, when considered against the amount of material generated by the complaints, the complexity of the jurisdictional arguments being made by ICNC, the propensity of ICNC to challenge the most mundane aspects of the material in the "record" – see for example ICNC's July 27, 2011, submission – and the regular development of new arguments expanding the horizon of the matters needing to be addressed in the final decision – see ICNC's September 17, 2010, and May 9, 2011, submissions – the length of time taken does not appear unacceptable and has not been shown to have resulted in any unfairness to ICNC.

179. The suggestion by ICNC that the delegate was delaying the process "in callous disregard for ICNC's numerous requests to finalize the investigation" is simply not borne out by the "record". The "record" over

the period from July 2011 does indicate ICNC made several requests for the process to be concluded, but it cannot be said these requests were ignored or "callously disregarded". Rather the "record" suggests the delegate was working on the decision and advised ICN of that on several occasions.

180. I am unable to accept the notion that the delegate was delaying the process "unfairly and in callous disregard" for ICNC's numerous requests for completion of the process and find ICNC has not established there was any breach of natural justice either in the delay or resulting from the delay.

V. Failure to Act as an Impartial Decision Maker

181. This argument does not relate to any conduct by the delegate, but concerns the involvement of the Director in the Provincial Court proceedings initiated by ICNC against Ms. Baranova and Ms. Tagirova. There is no evidence the delegate had any direct involvement in the matters before the Provincial Court or that the Director had any involvement in writing the Determination.

182. Rather, this argument invokes an examination of the role and responsibility of the Director under the *Act* in order to assess whether the Director has stepped over the bounds of neutrality and impartiality. It is well established that the legislature intended the Director to have primarily responsibility for the administration of the *Act* and to be initially responsible for its interpretation: see *British Columbia Securities Commission*, BC EST # RD121/07 (Judicial Review dismissed, *British Columbia Securities Commission v. Burke*, 2008 BCSC 1244); *BWI Business World*, BC EST# D050/96. Even a cursory examination of the *Act* reveals the legislative intent to provide the Director with an overseeing role and the approach both the Tribunal and the Courts have taken to the role of the Director under the *Act* has been fashioned to be consistent with its provisions. For example, the Director is a party to a proceeding under the *Act*. The Director has interests that transcend the immediate concerns of the person filing a complaint; the Director may even apply for reconsideration on its own behalf of a Tribunal decision. Such applications deal with questions of statutory interpretation and the authority of the Director, further emphasizing the legislature's intent to provide the Director with an overseeing role.

183. Regardless of the specific points raised in the arguments made by ICNC, the overarching question raised here is whether, on a review of the matter and content of the Director's submissions and participation, the Director has acted outside the role contemplated and permitted by the legislature.

184. This question involves an analysis of the Director's actions that form the basis for this argument. Notwithstanding the inflammatory rhetoric directed at the Director and counsel for the Director in their submission, the event that has precipitated ICNC's position was the involvement of the Director in the Provincial Court action between ICNC and Ms. Baranova, which, I think it is fair to say, was precipitated by a Provincial Court decision in a similarly based action between ICNC and Ms. Tagirova. In that decision, the Judge found ICNC did not breach section 10 of the *Act* for the amounts charged to Ms. Tagirova under the contract she signed with ICNC for "immigration consulting services".

185. It is apparent that the decision of the Director to become involved at the Provincial Court level related to questions of the sort addressed in *Macaraeg and E Care Centres Ltd.*, 2008 BCCA 182. At issue was the "home statute" of the Director. At stake was the interpretation of a statutory provision in the *Act* prohibiting persons from directly or indirectly charging fees for finding employment for another person and the scope of the jurisdiction of the Director to decide all questions relating to the *Act*. At the core of the dispute was statutory interpretation, both as it was raised in Provincial Court and in the complaints to the Director. The matter did not, except incidentally, concern the complainants' claims; it was not those claims that were the reason for the involvement in Provincial Court. Rather, it was the Court's view of its authority to interpret

section 10 and the resulting interpretation. This matter, at its core, was not a simple dispute between ICNC and the complainants; the effect of the actions of the Provincial Court Judge and of the interpretation placed by him on section 10 was to severely restrict the scope of that provision. It is not apparent from a review of the Judge's reasons in the Tagirova decision that any consideration was given to the unique nature of employment standards legislation or the principles that govern its interpretation and application.

186. The *Act* is socially beneficial legislation and the need for a broad and purposive interpretation and application of its provisions has long been recognized. In *British Columbia Securities Commission*, *supra*, the Tribunal included the following statement, at para. 14:

> The Supreme Court of Canada has noted the unique nature of employment standards matters and legislation. In *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 ("*Rizzo & Rizzo Shoes*"), the Court explained that the Ontario Court of Appeal "…did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized": para. 23. The Court then went on to reference its earlier decision in *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986 ("*Machtinger*"), in which it held that "…an interpretation of the Act which encourages Commissions to comply with the minimum requirement of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not": *Rizzo & Rizzo Shoes*, para. 24, citing *Machtinger*, p. [1004].

187. The issue on which the Director took a position has considerable significance to the proper administration of the *Act* as it not only impacts the exclusive jurisdiction of the Director, but also addresses a fundamental concept under the *Act*: that a person should not have to buy a job.

188. In my view, the legislature, by making the Director responsible for the administration of the *Act* and initially responsible for its interpretation, conferred a status on the Director that from time to time requires the Director to become a protagonist in cases involving the administration and interpretation of the *Act*. That is exactly what the Director did here and, to reiterate, there is no evidence the delegate who decided this Determination participated in that action in any way.

189. I find the Director did not affect the impartiality of the delegate to make the Determination by appearing in the Provincial Court action between ICNC and Ms. Baranova.

190. This argument is dismissed.

191. For all of the forgoing, the appeal is dismissed.

ORDER

192. Pursuant to section 115 of the *Act*, I order the Determination dated May 3, 2012, be confirmed in the amount of $3,273.97, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal