

An appeal

- by -

C and C Taxi Inc. carrying on business as  
Mayfair Taxi  
("C and C Taxi")

- 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:** Shafik Bhalloo

**FILE No.:** 2015A/59

**DATE OF DECISION:** July 21, 2015

## DECISION

### SUBMISSIONS

Sarabjit S. Nagra

on behalf of C and C Taxi Inc. carrying on business as  
Mayfair Taxi

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), C and C Taxi Inc., carrying on business as Mayfair Taxi (“C and C Taxi”), has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 24, 2015 (the “Determination”).
2. The Determination concluded that C and C Taxi had contravened Part 3, section 18; Part 7, section 58; and Part 8, section 63 of the *Act* in respect of the employment of Jean Pierre Fournier (“Mr. Fournier”), and ordered C and C Taxi to pay Mr. Fournier wages and interest in the amount of \$3,357.75, inclusive of accrued interest under section 88 of the *Act*. The Determination also levied two (2) administrative penalties in the amount of \$500.00 each for breaches of section 18 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”). The total amount of the Determination is \$4,357.75.
3. The time limit for appealing the Determination was May 1, 2015. While C and C Taxi’s Appeal Form, filed by its Director and President, Sarabjit S. Nagra (“Mr. Nagra”), is dated May 1, 2015, it was received by the Employment Standards Tribunal (the “Tribunal”) on May 4, 2015, three (3) days after the expiry of the appeal deadline.
4. In the Appeal Form, C and C Taxi has checked off two (2) grounds of appeal; namely, the error of law and the natural justice grounds of appeal. However, C and C Taxi did not include any written submissions on either of these grounds of appeal and asks for an extension of time to file its appeal submissions.
5. In an email attached to the Appeal Form, Mr. Nagra explains that he was battling various medical illnesses and his computer was hacked when he was almost ready to send his appeal submissions, which submissions are now lost. In the circumstances, he states he is unable to make C and C Taxi’s appeal submissions in a timely fashion and wants a time extension.
6. Based on my review of the section 112(5) record (the “Record”), I note that there is a pattern of extension requests by Mr. Nagra that predates the first determination in Mr. Fournier’s complaint made on April 24, 2013 (the “April 2013 Determination”). The April 2013 Determination ordered C and C Taxi to pay to Mr. Fournier wages and interest in the amount of \$5,399.83 and administrative penalties in the amount of \$1,000.00. However, the April 2013 Determination was successfully appealed by C and C Taxi on the natural justice ground of appeal because a number of relevant documents that were delivered to the Employment Standards Branch (the “Branch”) office by C and C Taxi were “lost in the system” as the result of an institutional error. These documents were not seen by the delegate before the April 2013 Determination was made. The Tribunal found this failure to be a breach of natural justice and cancelled the said determination and referred the matter back to the Director.
7. Having said this, in this appeal, the Tribunal granted Mr. Nagra a couple of time extensions to file C and C Taxi’s appeal submissions and supporting documents, with the last extension being June 30, 2015. Mr. Nagra complied with the latter deadline and filed C and C Taxi’s submissions on June 30, 2015.

8. On May 6, 2015, the Tribunal acknowledged to the parties that an appeal had been received from C and C Taxi, and requested production of the Record from the Director. In the same correspondence, the Tribunal notified the parties that no submissions were being sought pending review of the appeal by the Tribunal and that following such review, all or part of the appeal may be dismissed or confirmed.
9. On May 22, 2015, the Record was provided by the Director to the Tribunal and a copy was sent to C and C Taxi on June 16, 2015, with a deadline of June 30, 2015, for C and C Taxi to lodge any objections to the completeness of the Record. C and C Taxi did not provide any objections by this deadline.
10. As indicated previously, on June 30, 2015, the Tribunal received C and C Taxi's written submissions in the appeal. On July 3, 2015, the Tribunal sent a copy of the same to the Director and to Mr. Fournier, and advised both that no submissions were being sought from them pending review of the appeal by the Tribunal. Following such review, all, or part, of the appeal might be dismissed or confirmed.
11. Having reviewed the appeal, including the Reasons for the Determination (the "Reasons") and the Record, I have decided it is appropriate to consider this appeal under section 114 of the *Act*. At this stage, I will assess the appeal based solely on the Reasons, the Appeal Form, the written submissions of Mr. Nagra, and the Record that was before the delegate when the Determination was being made. Under section 114 of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal without a hearing of any kind, for any of the reasons listed in subsection 114(1) of the *Act*. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Fournier will, and the Director may, be invited to file a reply to the question of whether to extend the deadline to file the appeal, as well as provide a submission on the merits of the appeal. C and C Taxi will be given an opportunity to make a final reply to those submissions, if any.

## ISSUE

12. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under any of the provisions in section 114 of the *Act*.

## THE FACTS

13. The summary of facts is based on the Reasons in which the delegate meticulously sets out all relevant facts, undisputed and disputed.
14. C and C Taxi is a taxi company incorporated under the laws of British Columbia.
15. Based on a company search conducted by the delegate on August 24, 2012, there were six (6) directors and officers of C and C Taxi Inc. However, a subsequent search of the company conducted on December 18, 2014, revealed that, effective July 5, 2012, there was a Notice of Change of Directors, and all directors and officers except Mr. Nagra resigned. Therefore, effective, July 5, 2012, Mr. Nagra was the sole director and officer of C and C Taxi.
16. On August 23, 2012, within the time period allowed under the *Act*, Mr. Fournier filed a complaint under section 74 of the *Act*, alleging that he was employed as a taxi driver by C and C Taxi from May 6, 2006, to June 1, 2012, and the latter contravened the *Act* by failing to pay him all regular wages, vacation pay, statutory holiday pay and compensation for length of service (the "Complaint"). Mr. Fournier alleged that C and C Taxi sold its assets to Yellow Cab, and ceased operating its taxi business.

17. On its part, C and C Taxi argued that Mr. Fournier operated under a lease and, therefore, he was an independent contractor and not an employee under the *Act*. Relatedly, C and C Taxi argued that the Complaint was beyond the jurisdiction of the *Act* and, therefore, beyond the jurisdiction of the Director and should be dealt with in the courts. The delegate was not persuaded with this argument and concluded that the Director did have jurisdiction over the dispute between the parties under the *Act* and went on to address two (2) issues in the Determination, namely: (1) whether Mr. Fournier was an employee of C and C Taxi and, if so, (2) whether there were wages owed to him under the *Act*.
18. In its appeal, C and C Taxi only disputes the delegate's conclusion on the question of whether Mr. Fournier was an employee of C and C Taxi. If the delegate erred on this issue, and Mr. Fournier was not an employee of C and C Taxi under the *Act*, then no wages would be found owing to him under the *Act*.
19. In the Reasons, the delegate set out in great detail both the disputed and undisputed facts arising from the submissions of the parties in the investigation of the Complaint. Both the disputed and undisputed facts are instructive in terms of the delegate's decision in the Determination, and in my decision in this appeal and, therefore, I propose to set them out verbatim, as they appear in the Reasons, below.

#### IV. UNDISPUTED FACTS

- C and C Taxi Inc. was the registered owner of the cab driven by Mr. Fournier between May 6, 2006 and June 1, 2012;
- There was a written lease agreement between C & C and Mr. Fournier dated June 4, 2010;
- Mr. Fournier set his own work schedule and was responsible for soliciting his own fares;
- Mr. Fournier had the taxi on a 24 hour per day basis and parked it at his own residence while off duty;
- Mr. Fournier was never provided with T4 or T4A slips;
- Mr. Fournier was responsible for all vehicle infractions including parking tickets;
- C & C did not provide a dispatch service to Mr. Fournier; Mr. Fournier found his own fares through flagging and repeat business from regular customers, and by waiting for fares at the harbour air [*sic*] terminal[;]
- C & C paid for all insurance, licensing and maintenance costs of the cab driven by Mr. Fournier. These costs included repairs and maintenance to the cab including all bank fees and basic administration costs;
- Mr. Fournier was provided a cellular phone and handheld credit and debit card machines by C & C at no charge;
- Mr. Fournier's lease payments were made to Abdelkader Yaman; Mr. Yaman is now deceased and could not be contacted during the investigation;
- Mr. Fournier did not share in the profits of C & C;
- C & C did not provide records relating to hours or payments to Mr. Fournier. They say the records relating to credit card or debit receipts related to Mr. Fournier have been shredded;
- Copies of daily trip sheets were provided by Mr. Fournier;
- Mr. Nagra provided some direction to Mr. Fournier with respect to rules of conduct and procedures. At one point Mr. Nagra had the radio removed from the cab as a disciplinary action toward Mr. Fournier;

- Two ICBC certificates and vehicle registrations provided by C & C identified Mr. Fournier as the principal operator of the taxi;
- C & C provided a copy of a letter from an ICBC adjuster to Mr. Fournier concerning a motor vehicle accident;
- The written lease agreement stipulates that the Lessee (Mr. Fournier) will pay all his own HST, GST, WCB, EI, CPP and any taxes the Federal or Provincial government may impose in the taxi industry[;]
- The lease agreement says that Mr. Fournier agrees to operate the taxi as an Owner operator.

#### V. DISPUTED FACTS

- C & C says the lease rate for the cab was \$800.00 per month, and that all fuel was the responsibility of Mr. Fournier;
- C & C said the credit card receipts never exceeded \$800 in a month;
- Mr. Fournier says he did not pay a monthly lease amount of \$800.00. He says that he made lease payments on a weekly basis. He says the lease payments were 50% of the total fares collected daily, less 50% of the fuel costs;
- Mr. Fournier says he understood that Mr. Nagra was paying all GST, WCB and EI premiums;
- C & C says they terminated the lease with notice because of non-compliance by Mr. Fournier;
- Mr. Fournier says he was terminated without proper notice.

20. The delegate then, under the heading “Findings and Analysis” in the Reasons, dealt with the determinative question of whether Mr. Fournier was an employee of C and C Taxi or an independent contractor. In deciding this question, the delegate considered the application of the statutory definitions of “employee” and “employer” in section 1 of the *Act* and the basic purpose of the *Act* in section 2, namely, the protection of employees through minimum standards of employment. The delegate noted that any interpretation which extends that protection to employees is to be preferred over one which does not.

21. The delegate also sought assistance in filling the definitional void in section 1 of the statute by referring to the traditional common law tests applied by courts to determine whether a person is an employee or an independent contractor. Here, the delegate particularly referred to the Supreme Court of Canada decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, wherein the Supreme Court noted that there is not one conclusive test, but a multitude of factors that need to be evaluated and weighed depending on the particular circumstances and facts of the case in order to determine whether an individual is an employee or an independent contractor. The delegate then delineated the common law tests, stating:

These tests examine the degree of control exercised over the worker regarding the way in which the work was done; whether the worker used the tools, supplies and equipment supplied by another person; whether the worker had a chance of profit and/or risk of loss; whether the work was for a single service leading to a specific result versus providing general efforts on behalf of the other party; whether the work performed is integral to the operation of the business; and, whether there is an ongoing relationship between the parties.

22. Having set out the governing law with respect to the determinative question, the delegate was quick to point out that in this case, as in many others, there are factors which support both parties' positions regarding the nature of the relationship. She then went on to review the evidence of the parties in context of the legal tests in great detail.
23. With respect to the nature and degree of control exercised in the relationship between Mr. Fournier and C and C Taxi, the delegate noted that Mr. Fournier drove the taxi cab pursuant to a lease agreement with C and C Taxi, which agreement indicated that Mr. Fournier would be an owner operator and responsible for the cab as if he owned the cab. He had considerable freedom regarding his hours of work, which included setting his own schedule of hours and days of work. According to the delegate, this factor was indicative of independence and some lack of control regarding Mr. Fournier's activities. The delegate also noted that Mr. Fournier was not provided dispatch by C and C Taxi, and he found his own fares through flagging and waiting for fares at the Harbour Air terminal. All of these factors, the delegate noted, appear to lean more to a finding of an independent contractor rather than an employer-employee relationship. Conversely, the delegate noted that the lease agreement did not contain any reference that Mr. Fournier was allowed to hire or employ a replacement driver or sublease the taxi to others. Further, the taxi Mr. Fournier drove was at times operated by another driver who had a separate lease agreement with C and C Taxi, independent of Mr. Fournier. The delegate also noted that there was no evidence provided in the investigation of the Complaint that Mr. Fournier was able to hire or sublease the taxi he drove for C and C Taxi. These factors are more supportive of an employment relationship rather than one of self-employment.
24. The delegate then moved to the next consideration, namely, whose tools, supplies and equipment Mr. Fournier used. Here, the delegate noted that the most significant equipment Mr. Fournier used was the cab. The ICBC search Mr. Nagra provided during the investigation confirmed the vehicle was owned by C and C Taxi, and Mr. Fournier was listed as the principal operator on the insurance document. The delegate also noted that C and C Taxi paid all costs associated with the licensing, insurance, repairs and maintenance of the vehicle.
25. The delegate also noted that the next most significant tool used by Mr. Fournier was the cellular phone and handheld credit and debit machines, all of which were owned and provided by C and C Taxi and not charged to Mr. Fournier.
26. The delegate also noted that in the taxi industry there is often use of a dispatch service by taxi drivers, and this can be considered a tool. In the case of Mr. Fournier, he was not required to use C and C Taxi's dispatch service, nor did he take advantage of it. However, because the delegate found that all significant equipment, tools and supplies, including the vehicle Mr. Fournier drove were owned by C and C Taxi, this evidence is more indicative of an employment relationship than self-employment.
27. With respect to the risk of loss factor and financial investment, the delegate noted that C and C Taxi was responsible for insuring and maintaining the taxi driven by Mr. Fournier and, therefore, Mr. Fournier was not exposed to financial risk arising from the ownership and operation of the vehicle. Furthermore, C and C paid for the cost of the taxi licence, including all expenses related to the company's handheld credit card and debit machines. Against that, the delegate noted that Mr. Fournier filed his tax returns as a self-employed taxi driver and these tax return forms indicate some expenses that he incurred related to the operation of the taxi. He also included expenses for gas, telephone and utilities, and rent that he paid for the taxi to C and C Taxi. Notwithstanding, on the balance, the delegate concluded that Mr. Fournier had minimal financial investment in the operating of the taxi and, therefore, this factor was more supportive of an employment relationship.

28. With respect to the next consideration, that is, chance of profit, the delegate noted that driving C and C Taxi's vehicle was full-time employment for Mr. Fournier although the parties have a very different view of the lease payments he was making to C and C Taxi under the lease agreement. Having said this, while the delegate requested C and C Taxi, on a number of occasions during the investigation, to provide detailed records and reconciliations of the lease payments made by Mr. Fournier, C and C Taxi failed to provide such records. C and C Taxi's position was that the lease payments were \$800.00 per month. The parties agreed that C and C Taxi collected debit and credit sales from Mr. Fournier. Mr. Fournier also collected some cash fares. In order for C and C Taxi to calculate the lease payments due to it, the delegate said it must have performed monthly or other periodic reconciliations. If debit and credit payments were greater than \$800.00 per month, C and C Taxi would have had to remit funds to Mr. Fournier. Alternatively, if debit and credit payments were less than \$800.00 per month, C and C Taxi would have had to request Mr. Fournier to pay the balance to make up \$800.00. However, as previously mentioned, C and C Taxi failed to provide detailed records and calculations.
29. On the other hand, Mr. Fournier produced to the delegate copies of his daily trip sheets, which identified the fares he earned each day. These sheets also included a handwritten calculation of Mr. Fournier, delineating a calculation of 50% of the fares and 50% of the fuel. According to the delegate, these calculations are consistent with Mr. Fournier's claim that the lease rate was based on payment to C and C Taxi of 50% of the cab's fares, less 50% of the fuel costs. The delegate preferred the evidence of Mr. Fournier as being the most credible evidence regarding the lease rate, and he also found Mr. Fournier's records were consistent with his version of the lease rate. The delegate drew an adverse inference against C and C Taxi for failing to provide these records, despite being requested to do so. Having said this, the delegate then went on to conclude that the remuneration arrangement between the parties was effectively a sharing of the revenues of the taxi, and this was more akin to a commission than a true opportunity for profit and this evidence was more supportive of an employment relationship than an independent contractor relationship.
30. The delegate next considered the duration of the relationship between the parties, stating that the longer and more continuous the relationship, the greater the chance that it was an employment relationship. In this case, the delegate noted that it is undisputed that Mr. Fournier worked for C and C Taxi on a regular and continuing basis for several years, and that this factor is more supportive of an employment relationship.
31. Lastly, the delegate considered the degree to which the work performed by Mr. Fournier was integrated with the operation of C and C Taxi's business. The delegate noted that the more integral the work is, the more likely it is that the relationship is an employment relationship. In this case, the delegate noted that C and C Taxi is involved in a taxi business and for its business to be viable, it needs taxi drivers to drive its taxis. Since Mr. Fournier drove a taxi owned by C and C Taxi, the service he provided was necessary and integral to the business of C and C Taxi. Therefore, this factor is more indicative of an employment relationship between the parties.
32. Having reviewed the evidence of the parties in the context of the common law tests and statutory definitions in section 1 of the *Act*, the delegate noted that the Supreme Court of Canada, in *Sagaz*, emphasized that the finding of an employment relationship is to be based on an assessment of the total relationship of the parties by examining various factors, some of which may point in one direction and some in the opposite direction. In this case, while the evidence supported facts in both directions, the totality of the facts persuaded the delegate to conclude, on the balance, that Mr. Fournier was an employee under the *Act* because his work was of a permanent and ongoing nature and it was integral to the business of C and C Taxi. Furthermore, the remuneration he was paid was "more akin to a wage than a true contract fee/price".

33. Having concluded that Mr. Fournier was an “employee” within the meaning of the *Act*, the delegate went on to hold that C and C Taxi’s treatment of Mr. Fournier as a self-employed individual or an independent contractor contravened the *Act* and, in particular, section 4 of the *Act*, which provides that any agreement to waive the requirements of the *Act* are null and void.
34. The delegate also considered section 37.1 of the *Regulation* which specifically governs taxi drivers, and provides that taxi drivers who drive leased taxis are covered by the *Act* and require the driver’s employer to pay the driver any shortfall that arises if (i) the taxi driver tracks hours under the lease arrangement on a per shift basis, and (ii) the taxi driver does not recover in fares an amount which, in total, is greater than or equal to the lease payment for the taxi plus minimum wage for each hour worked, averaged monthly. Based on this section, the delegate reviewed the records provided by Mr. Fournier and determined that the latter was entitled to the shortfall between the minimum wage and the lease arrangement for a period of the last six (6) months of his employment, totalling \$934.70, plus vacation pay of 6% on the amount owing pursuant to section 58 of the *Act*.
35. The delegate also awarded Mr. Fournier six (6) weeks’ wages as compensation for length of service because the delegate found that the termination of Mr. Fournier’s employment by C and C Taxi was without written notice and without sufficient evidence of just cause.
36. The delegate did not find any statutory holiday pay was owing to Mr. Fournier, pursuant to section 45 of the *Act*. However, the delegate found C and C Taxi breached section 18 of the *Act* for failing to pay all wages owing to Mr. Fournier within 48 hours after terminating his employment. The delegate issued an administrative penalty of \$500.00 under section 29 of the *Regulation* for this contravention.
37. The delegate also levied a further administrative penalty of \$500.00 under the *Regulation* for C and C Taxi’s contravention of section 46 for failing to provide relevant records the delegate requested during the investigation of the Complaint.

### **SUBMISSIONS OF C AND C TAXI**

38. In his written submissions, dated June 29, 2015 and received by the Tribunal on June 30, 2015, Mr. Nagra, on behalf of C and C Taxi, delineates the following basis for C and C Taxi’s appeal:
- The delegate erred in law by “totally ignoring section 37 and section 37.1” of the *Regulation*.
  - The delegate failed to “hold [a] proper hearing into this matter”, thereby denying C and C Taxi the opportunity to cross examine Mr. Fournier under oath and, therefore, C and C Taxi was subjected to “injustice”.
  - The delegate “was biased first of all when [her] earlier decision was canceled [*sic*]”. The delegate should not have been allowed to continue with the investigation of the Complaint when she was “accused of being biased”.
39. In the balance of the written submissions, Mr. Nagra disputes the delegate’s determination that Mr. Fournier was an “employee” within the meaning of the *Act*, and identifies the following factors or considerations the delegate should have weighed more significantly in concluding otherwise, that is, that Mr. Fournier was self-employed or an independent contractor:
- Mr. Fournier admitted to signing a lease agreement with C and C Taxi.



- The trip sheets Mr. Fournier produced to the delegate in the investigation of his Complaint contained handwritten notes by Mr. Fournier, including a handwritten note of the lease payment due to C and C Taxi.
- The lease agreement provides that Mr. Fournier was responsible for paying HST, GST, WCB, EI and CPP.
- C and C Taxi did not issue Mr. Fournier a T4 or T4A slip.
- Mr. Fournier supplied handwritten tax filings for 2012 and 2013, but no tax assessments. He should have been asked to supply earlier tax filings for 2010 to 2012 inclusive, as well as Notices of Assessment from Revenue Canada for these years.
- Mr. Fournier's services were not integral to the business of C and C Taxi as the latter "never gave [Mr. Fournier] any business", so Mr. Fournier's service "was not necessary for [C and C Taxi]".
- C and C never "put advertisement in newspaper or with Employment Canada" looking for a new taxi driver.
- C and C Taxi's taxi was taken away from Mr. Fournier because he was involved in an accident and failed to report the accident to C and C Taxi, and failed to respond to Mr. Nagra's calls on June 4, 2012.
- Mr. Nagra told Mr. Fournier that the "lease agreement was terminated for cause as per the lease agreement and he was asked for the keys to the car" and the car was taken away from him.
- Mr. Nagra advised that "Mr. Fournier was hand delivered a letter on June 6, 2012 [advising him that his lease would be] terminated for cause", and he was further given a notice on April 1, 2012, that his lease would be terminated on June 25, 2012.
- Mr. Fournier provided C and C Taxi copies of the trip sheets, but not any gas receipts.
- C and C Taxi did not provide Mr. Fournier any credit card machine or credit card slips or business cards. Business cards were supplied to him by Tudor Printing for which Mr. Fournier paid directly.
- The telephone C and C Taxi provided Mr. Fournier allowed only incoming calls and allowed him to dial a single 800 number which was pre-programmed so that he could check with the central card provider when customers used credit cards.
- The personal phone Mr. Fournier had was a prepaid phone from 7/11 and the Victoria City Police required him to have a telephone service that permitted outgoing calls, and the City of Victoria has a bylaw that requires the 2-way radio or mobile device to contact the driver.
- The delegate was "biased totally" for failing to consider the "lease part of Taxi Section 37" and for believing "Mr. Fournier[s] version of the story" because he provided "most of the material".
- C and C Taxi could not provide "the delegate anything when [Mr. Fournier] was leasing [the taxi cab] under section 37.1 [of the *Regulation*]".
- Mr. Fournier "worked his own hours", and was "never told...which hours to work".
- Mr. Fournier maintained "inside and outside of the cab".

- Mr. Fournier could not sublease the taxi cab because that would be in breach of his lease agreement.
- Mr. Fournier was not forced to take a taxi cab and park it at his residence, but he asked to park the vehicle at his own residence because he did not have “a vehicle to go back and forth”. C and C Taxi would have preferred to have the taxi parked at its “own place”.
- C and C Taxi was “not in need of [a] Taxi Driver” and when it was Mr. Fournier’s days off from driving, C and C Taxi could have had “other people...drive” the taxi, but C and C Taxi was not in need of a taxi driver to drive its taxi.
- “This matter comes under section 37.1” and C and C Taxi did not have “other material on hand” such as “charge slips which has people[’s] names and credit card number[s]”. This information, in any event, is “beyond the delegate[’s] authority”.

40. Mr. Nagra then turns to the matter of the time extension to file C and C Taxi’s appeal. He states that he provided “medical evidence” in the form of his doctor’s note and that he is “not fit to do anything like this” because he states that his doctor indicates that he is in “very poor...health”.

41. In conclusion, Mr. Nagra states that the Determination should be cancelled, and he is in a position to produce other witnesses.

## ANALYSIS

42. The grounds of appeal are statutorily limited to those found in sub-section 112(1) of the *Act*, which states:

- 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.

43. The Tribunal has consistently indicated that the burden is on the appellant to persuade the Tribunal there is an error in a determination under one of these statutory grounds, failing which the appellant’s appeal may be dismissed.

44. In this case, as previously indicated, C and C Taxi invoked the “error of law” and the “natural justice” grounds of appeal. I will review below both grounds of appeal in context of Mr. Nagra’s written submissions, starting with the error of law ground.

### *(i) Error of Law*

45. The Tribunal has adopted the following factors delineated in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA) as reviewable errors of law:

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 be reasonably entertained; and
  5. adopting a method of assessment which is wrong in principle.
46. The *Act* does not allow for an appeal based on alleged errors in findings of fact unless such findings raise an error of law, if they were based on no evidence or on a view of facts that could not reasonably be entertained based on the evidence before the Director (*Britco Structures Ltd.*, BC EST # D260/03; *Re: Funk*, BC EST # D195/04).
47. It should also be noted that where there is no evidence that the delegate acted without any evidence or on a view of evidence that could not be reasonably entertained, or committed a “palpable, overriding error” or arrived at a “clearly wrong conclusion of fact”, the Tribunal is reluctant to substitute the delegate’s findings of fact even if it is inclined to reach a different conclusion on the evidence (*Re: United Specialty Products Ltd.*, BC EST # D075/12).
48. Having delineated the relevant principles governing the error of law ground of appeal, I note that there are two aspects to C and C Taxi’s appeal under the error of law ground. The first aspect is Mr. Nagra’s dispute with the delegate’s conclusion that Mr. Fournier was an employee of C and C Taxi, and not self-employed or an independent contractor. The question of whether a person is an employee or an independent contractor involves the application of a legal standard to a set of facts, and, therefore, it is a question of mixed fact and law (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235). In this case, I do not find Mr. Nagra, or C and C Taxi, to be challenging the legal standard applied by the delegate in deciding whether Mr. Fournier was an employee or an independent contractor. The delegate considered and based her determination on the definition of “employee” and “employer” in the *Act*, as well as various common law tests, while acknowledging the Supreme Court of Canada’s decision in *Sagaz, supra*, that there is not one conclusive test, but rather a multitude of factors that need to be evaluated and weighed in each case. What is evidently disputed by Mr. Nagra is the application of the facts by the delegate to the legal test. More particularly, Mr. Nagra wants those factors delineated in his submissions, which I have identified in point form under the heading “Submissions of C and C Taxi” in this decision, to be used or preferred by the delegate in deciding the status of Mr. Fournier’s relationship with C and C Taxi. He feels those factors should have led the delegate to conclude that Mr. Fournier is an independent contractor. In my view, the delegate chose to review all of the circumstances and not simply those factors identified by Mr. Nagra in his submissions, to decide the status of Mr. Fournier, and she correctly pointed out that there are factors that support both parties’ positions regarding the nature of the relationship, but on the balance, Mr. Fournier was an employee as contemplated by the *Act*. I find this decision of the delegate to be both rationally and reasonably supported in the law and in the evidence. In these circumstances, there is no basis to interfere with the delegate’s conclusion that Mr. Fournier was in an employment relationship with C and C Taxi.
49. The second aspect of C and C Taxi’s appeal under the error of law ground is Mr. Nagra’s argument that the delegate erred in law by “totally ignoring section 37 and section 37.1 [of the *Regulation*]”. I find Mr. Nagra mistakenly refers to section 37 of the *Regulation* as this section pertains to “fishers”, and has nothing to do with taxis or the taxi business. However, section 37.1 of the *Regulation* concerns the taxi business and sets out an employer’s responsibilities when employing a taxi driver or leasing a taxi to a taxi driver. Having reviewed the Determination in its entirety, including particularly page R10 of the Reasons, I find that Mr. Nagra’s submission that the delegate ignored or failed to consider section 37.1 of the *Regulation* is not tenable. To the contrary, I find the delegate specifically referred to and applied section 37.1 of the *Regulation* (together with the definitions of “employee” and “employer” in section 1 of the *Act* and common law tests for determining

employment relationship) in concluding that Mr. Fournier was covered by the *Act* and the *Regulation*. In particular, subsection 37.1(1)(b) of the *Regulation* provides that when a taxi driver leases a taxi and records the hours worked on a per shift basis, the taxi driver must be paid an amount that is at least equal to the amount of the lease payment, plus minimum wage for each hour worked, averaged on a monthly basis. The delegate, based on this provision, calculated the wages owed to Mr. Fournier under the *Act*. Therefore, I am at a loss why Mr. Nagra states that the delegate ignored this section.

50. For the reasons set out above, I find no merit in C and C Taxi's error of law ground of appeal and dismiss it.

**(ii) *Natural Justice***

51. The principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; to present their evidence; and to be heard by an independent decision maker (*Imperial Limousine Service Ltd.*, BC EST # D014/05).

52. In this case, based on my review of the Record, it is clear that the delegate made both parties aware of any material evidence submitted by the adverse party and afforded each party to provide a written response. Further, in the case of C and C Taxi, it appears that the delegate afforded the latter a few accommodations in the form of extensions of time to file its response because of Mr. Nagra's poor health at various times. I have counted at least four (4) substantive written responses made by Mr. Nagra to the delegate during the investigation, including, on December 30, 2013, February 4, 2014, October 16, 2014, and December 8, 2014.

53. Having said this, I find that there are two (2) aspects to C and C Taxi's natural justice ground of appeal. The first is Mr. Nagra's argument that injustice was done to C and C Taxi because the delegate failed "to hold [a] proper hearing" in this matter. In this case, the delegate proceeded by way of an investigation, and the *Act* specifically authorizes that adjudicative format. An in-person hearing is not an automatic right enshrined in the principles of natural justice. Therefore, I find that there was no breach of natural justice.

54. The second aspect of the natural justice ground of appeal is based on Mr. Nagra's argument that the "delegate was biased" because the April 2013 Determination made by her was cancelled and, therefore, she should not have been further involved in the investigation of the Complaint after the referral back by the Tribunal. Mr. Nagra feels that a different delegate should have been appointed after the referral back.

55. I also note that Mr. Nagra states that the Tribunal's decision cancelling the April 2013 Determination "accused [the delegate] of being biased". I have reviewed the April 2013 Determination and, as previously indicated, it was cancelled by the Tribunal and the matter referred back to the Director because a number of relevant documents that were delivered by C and C Taxi to the Branch were "lost in the system" as a result of an institutional error, and they were not seen by the delegate before the April 2013 Determination was made. This constituted a breach of natural justice. There was no finding of bias made by the Tribunal against the delegate. Mr. Nagra's assertion of bias on the part of the delegate is without any evidentiary foundation; it is no more than a bare assertion. In my view, an allegation of bias is a very serious matter as it impugns the adjudication process and challenges the integrity of the decision-maker. Therefore, it should not be made lightly without any basis.

56. In the result, I find that C and C Taxi's appeal of the Determination has no reasonable prospect of success, and I dismiss it pursuant to section 114(1)(f) of the *Act*.

**ORDER**

57. Pursuant to section 115 of the *Act*, I order the Determination, dated March 24, 2015, be confirmed, together with any interest that has accrued under section 88 of the *Act*.

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