COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Beach Place Ventures Ltd. v. Employment Standards Tribunal,* 2022 BCCA 147

Date: 20220425
Docket: CA47693

Between:

Beach Place Ventures Ltd. and Black Top Cabs Ltd.

Appellants
(Petitioners)

And

The Employment Standards Tribunal, the Director of Employment Standards, Ali Abadi-Asbfroushani, Fenton Ramesh Paul and Arash Karimian Azimi Saraf

Respondents
(Respondents)

Before: The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Voith
The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated July 28, 2021 (*Beach Place Ventures Ltd. v. British Columbia (Employment Standards Tribunal)*, 2021 BCSC 1463, Vancouver Docket S199797).

Counsel for the Appellants (via videoconference):	T.E. Clarke
Counsel for the Respondent Employment Standards Tribunal (via videoconference):	E.F. Miller
Counsel for the Respondent Director of Employment Standards (via videoconference):	L.M. Courtenay
Place and Date of Hearing:	Vancouver, British Columbia February 9, 2022
Place and Date of Judgment:	Vancouver, British Columbia April 25, 2022

Written Reasons by:
The Honourable Mr. Justice Voith

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Marchand

Summary:

The appellants challenge the dismissal of their judicial review petition, which sought to quash a decision of the Employment Standards Tribunal. The Tribunal affirmed the decision of a delegate of the Director of Employment Standards, which found the respondents were employees of the appellants for the purposes of the Employment Standards Act, despite a Tax Court of Canada decision that found that one of the respondents was not an employee for tax purposes. The appellants argue the judicial review judge failed to find the Tribunal's interpretation of "employee" to be patently unreasonable. They argue the respondents' employment status was res judicata and the Tribunal was estopped from determining that one of the respondents was an employee in light of the decision of the Tax Court. Further, the appellants argue the Tribunal's interpretation of "employee" was overly expansive and its reasons were internally inconsistent. Held: Appeal dismissed. The Tribunal's decision was not patently unreasonable. It is well established that "employee" can mean different things in different contexts and that the Director and Tribunal have particular expertise in dealing with employment issues and the interpretation of the Employment Standards Act. The Tribunal was not bound by the decision of the Tax Court. Moreover, the Tribunal's interpretation of "employee" was consistent with previous decisions and principles of statutory interpretation, and its reasons were internally consistent. The decision under review was not patently unreasonable.

Reasons for Judgment of the Honourable Mr. Justice Voith:

[1] The Employment Standards Tribunal (the "Tribunal") upheld a determination that three taxi drivers, the individual respondents, were employees of the appellants, Beach Place Ventures Ltd. and Black Top Cabs Ltd. The appellants contend that the Tribunal's decision was patently unreasonable. The chambers judge who considered the appellants' application for judicial review concluded that the Tribunal's decision was not patently unreasonable and dismissed their petition. For the reasons that follow, I too am of the view that the Tribunal's decision was not patently unreasonable and I would dismiss the appeal.

Background and History of Proceedings

[2] The three individual respondents filed complaints with the Director of Employment Standards (the "Director") in 2016 and 2017 under s. 74 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*]. Those complaints were

amalgamated and dealt with by way of investigation. The main issue was whether the complainants and the appellants were in an employment relationship.

[3] The controversy at the heart of the dispute arises from the business structure under which the appellants operated their respective businesses. The judge explained:

> [7] The shareholders of Black Top own and operate the taxis. Black Top holds the taxi licences on behalf of its shareholders. Black Top is also the sole shareholder of Beach Place, which provides administrative, accounting, and dispatch services to taxis owned by the shareholders of Black Top.
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> [8] The taxi owners have the option of leasing their taxis to another taxi driver, who is referred to as a "Lease Driver". A taxi driver who is not a taxi owner or Lease Driver can acquire a license to drive a taxi by paying a fee to the owner in exchange for the right to operate the taxi for a period of time. Those drivers are called "Spare Drivers". Lease Drivers and Spare Drivers are entitled to keep the fares earned while operating the taxi during the lease or license period, less the rent or license fee payable for that period.

[4] In this case, two of the complainants were Spare Drivers and one was a Lease Driver.

[5] It is also relevant and important that one of the complainants, Mr. Abadi, who regularly drove a Black Top taxi between 1998 and 2016, had considered himself to be an independent contractor until 2014 and had filed his tax returns accordingly. In 2014 and 2015, he reported his taxable income as having been earned from employment. The judge succinctly summarized what then ensued:

> [11] In 2015, Mr. Abadi broke his wrist and applied for employment insurance benefits. The Canada Revenue Agency ("CRA") investigated and agreed with Mr. Abadi that he had indeed been an employee of Beach Place all along. On November 8, 2016, the Minister under the *Employment Insurance Act,* S.C. 1996, c.23 [*EI Act*], and the *Canada Pension Plan*, R.S.C., 1985, c. C-8 [*CPP*], assessed Beach Place for unremitted CPP contributions and employment insurance premiums for the reporting period from January 24, 2015, to January 1, 2016.
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> [12] Beach Place appealed that decision to the Tax Court of Canada. Mr. Abadi applied for and obtained intervenor status in the appeal.
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> [13] In his decision dated January 29, 2019 (subsequently amended on February 20, 2019), *Beach Place Ventures Ltd. v. The Queen*, 2019 TCC 24 [*Beach Place TCC*], Justice Bocock allowed the appeal and vacated the Minister's decision, concluding that Mr. Abadi was, at the material time,

> engaged in his own business venture and was not an employee of either or both of the petitioners as the Minister had found.
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> [14] Although an appeal was taken from that decision, it was later abandoned.

[6] On March 29, 2018, a delegate of the Director issued a determination (the "Determination") with respect to the complaints filed under the *ESA* by the complainants. The Determination found the complainants were employees of the appellants for the purposes of the *ESA* and that the appellants owed them monies for unpaid wages.

[7] On April 9, 2018, the appellants filed an appeal of the Determination with the Tribunal under s. 112 of the *ESA*. On January 30, 2019, the appellants wrote to the Tribunal enclosing a copy of the *Beach Place Ventures Ltd. v. The Queen*, 2019 TCC 24 (the "Tax Decision").

[8] On March 15, 2019, an appeal panel of the Tribunal issued *Re Beach Place Ventures Ltd. and Black Top Cabs Ltd.*, 2019 BCEST 23 (the "Appeal Decision"), which varied the Determination in two respects, but otherwise dismissed the appeal and affirmed the Determination.

[9] On March 19, 2019, the appellants applied to the Tribunal under s. 116 of the *ESA* for reconsideration of the Appeal Decision. On July 5, 2019, a reconsideration panel of the Tribunal (the "Reconsideration Panel") issued *Re Beach Place Ventures Ltd. and Black Top Cabs Ltd.*, 2019 BCEST 61 (the "Reconsideration Decision"), which dismissed the appellants' application for reconsideration.

[10] On April 28, 2021, the appellants filed an Amended Petition seeking an order in the nature of *certiorari* quashing the Appeal Decision and the Reconsideration Decision. On July 28, 2021, Justice Milman dismissed the appellants' petition for judicial review. He concluded that the proper focus of judicial review was the Reconsideration Decision, that the applicable standard of review for all issues raised in the application was patent unreasonableness, and that the Reconsideration Decision was not patently unreasonable.

[11] There is an additional aspect of these proceedings that I wish to identify. A review of these various decisions and of the submissions or pleadings that were filed in relation to them reveals two things. First, the appellants have advanced an unusual number of discrete arguments at different stages of these proceedings. In the Amended Petition, for example, the appellants raised no less than 15 distinct grounds for why the Reconsideration Decision was patently unreasonable. Second, there has been a significant evolution in the submissions advanced by the appellants at different times. Some issues have been abandoned, others added, and still others have been transformed such that their initial focus has shifted. Both of these considerations are relevant to the issues the appellants now raise.

Issues on Appeal

[12] The appellants raise two issues on appeal. They contend the chambers judge:

i) "identif[ied] the wrong standard of review on the issue of *res judicata* [arising from the Tax Decision] and fail[ed] to find that the Tribunal's application of issue estoppel was incorrect"; and

ii) "fail[ed] to find that the Tribunal's interpretation of … the term "employee" in the ESA … was patently unreasonable". The appellants also argue that the Reconsideration Decision "was internally incoherent and therefore patently unreasonable."

Standards of Review and the Decision Under Review

[13] The parties agree that in an appeal of a judicial review decision, the role of the appellate court is to "step into the shoes" of the judge below by determining whether the chambers judge identified the appropriate standard of review and then applied it correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36 at para. 45; *Holojuch v. Residential Tenancy Branch*, 2021 BCCA 133 at para. 15. The Supreme Court of Canada has recently confirmed that this approach accords no deference to the reviewing judge. The appellate court

performs a *de novo* review of the administrative decision: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10–12.

[14] The parties further agree, and the chambers judge concluded, that it is only the Reconsideration Decision that is properly reviewable, although both the Determination and Appeal Decision can be considered for context: *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 16.

[15] The parties also agree, as they did before the judge, that the question of whether an individual is an employee under the *ESA* is a question of mixed fact and law that lies within the Tribunal's exclusive jurisdiction and is subject to review on a standard of patent unreasonableness. This is on account of the combined effect of ss. 110 and 103 of the *ESA* and s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*]. Section 110 of the *ESA* contains a privative clause and confirms that a decision or order of the Tribunal on a matter within its exclusive jurisdiction "is final and conclusive and not open to question or review in any court." Section 103 of the *ESA* provides that s. 58 of the *ATA* applies to the Tribunal, with the result that decisions of the Tribunal on matters within its exclusive jurisdiction are reviewable on a standard of patent unreasonableness: *Cariboo Gur Sikh Temple Society (1979) v. British Columbia (Employment Standards Tribunal)*, 2019 BCCA 131 at para. 23.

[16] The statutory standard of patent unreasonableness set out in s. 58 of the *ATA* is unaffected by the common law standard of reasonableness articulated in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. It "continues to mean what it meant when the [*ATA*] came into being": *Red Chris Development Company Ltd. v. United Steelworkers*, *Local 1-1937*, 2021 BCCA 152 at para. 29, leave to appeal to SCC ref'd, 39668 (29 September 2021). Furthermore, the majority in *Vavilov* confirmed that "where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law": at para. 35.

[17] There are numerous decisions that explain the nature of the review that is undertaken under the patent unreasonableness standard. In *Law Society of*

New Brunswick v. Ryan, 2003 SCC 20, the Supreme Court of Canada said that a decision is not patently unreasonable unless it is "clearly irrational" or "evidently not in accordance with reason" or "so flawed that no amount of curial deference can justify letting it stand": at para. 52, cited by this Court in *Cariboo* at para. 24. Recently Justice Saunders, writing for the Court in *Red Chris*, developed the issue more fully:

> [30] A useful explanation of patent unreasonableness is found in *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 (aff'd *Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 25-G*, 2009 BCCA 229):
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> > [65] When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the *Ryan* [*Law Society of New Brunswick v. Ryan*, 2003 SCC 20] formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in *Ryan*, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.

[18] The remaining standard of review issue underlies the appellants' first ground of appeal.

Issue 1: Did the Reconsideration Panel err in refusing to follow the Tax Decision?

[19] Before the judge, the appellants argued that the Tribunal did not apply the correct legal test for issue estoppel as set out in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44. Instead, the Tribunal chose to disregard the Tax Decision primarily because it was decided in a different legislative context. The appellants also argued that the failure of the Tribunal to properly apply the doctrine

of issue estoppel should, on the authority of *Toronto (City) v. C.U.P.E, Local 79*, 2003 SCC 63 [*City of Toronto*], be reviewed on a correctness standard.

[20] On appeal, the appellants again contend that the appropriate standard of review of an administrative decision-maker's consideration of equitable doctrines, such as issue estoppel and *res judicata*, is correctness. The appellants also appear to argue that even if they are unsuccessful with this contention, the Reconsideration Decision is nevertheless patently unreasonable.

[21] The judge recognized that in *City of Toronto* the Court applied a correctness standard when setting aside an arbitrator's decision to reinstate a dismissed employee. Referring to the *City of Toronto* case, at para. 55 he said:

> The City had dismissed the employee because he had been convicted criminally of sexual assault. In arriving at the decision under review, the arbitrator did not treat the conviction as conclusive proof that the offence had occurred and instead came to a different conclusion on that issue. Justice Arbour found this to be a legal error in the application of a rule or principle (namely, *res judicata*) that was of fundamental importance to the legal system as a whole and as such, one that attracted a correctness standard of review.

[22] The judge thereafter referred to a number of subsequent decisions and concluded that:

> [S]ubsequent jurisprudence has clarified that *City of Toronto* should not be taken to mandate the application of a correctness standard of review whenever a statutory decision-maker is alleged on judicial review to have incorrectly applied a rule or principle, like issue estoppel, that is of general importance to the legal system.

[23] The judge first referred to this Court's decision in *Gorenshtein*, where the Court considered a similar issue in the same legislative context. In that case, the Tribunal on reconsideration upheld the delegate's refusal to defer to an earlier Provincial Court decision involving the same parties and subject matter. On judicial review, the Tribunal was alleged to have erred by refusing to apply the doctrine of *res judicata* and issue estoppel in light of the Provincial Court decision. In dismissing an application seeking judicial review, the hearing judge had reviewed this aspect of the reconsideration panel's decision on a patently unreasonable standard and found

no fault with it. On appeal from the judicial review decision, Saunders J.A., writing for the Court, described the issue:

> [40] The appellants contend that the reconsideration Tribunal was bound to find error in the delegate's refusal to defer to the Provincial Court order, and that the judge erred in not setting aside the reconsideration decision for failure to do so. This broadly-stated issue is one that was required to be addressed by the judge on the standard of patent unreasonableness, as provided by s. 58(2)(a) of the *Administrative Tribunals Act*.

[24] In *Gorenshtein*, Saunders J.A. found "no error in the judge's conclusion that the reconsideration Tribunal was not patently unreasonable in failing to defer to the judgment of the Provincial Court": at para. 86.

[25] In the present case, the judge also referred to *Victoria University (Board of Regents) v. GE Canada Real Estate Equity*, 2016 ONCA 646, leave to appeal to SCC ref'd, 37269 (9 March 2017), where the Court of Appeal for Ontario rejected the argument that an alleged failure to apply the doctrine of issue estoppel attracts a correctness standard of review. The case concerned the review of a decision by a panel of arbitrators who had refused to apply the doctrines of issue estoppel or *res judicata* and where the applicant, relying on *City of Toronto*, sought to have the arbitrators' decision reviewed on a correctness standard. In rejecting this assertion, the Court said:

> [89] I disagree with the approach suggested by [the review applicant]. The jurisprudence supports construing the issue being analyzed narrowly and in the particular circumstances of the case. That narrowly construed issue, not the application of a broadly stated legal doctrine, has to be of general importance to the legal system.
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> …
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> [93] In this case, the [arbitrators] considered well-established principles regarding issue estoppel. The arbitrators had to decide whether those principles, and the exceptions to them, applied in this case. In other words, [they] only had to decide whether to apply well-established principles in this particular case. That does not attract a correctness standard and is not a legal question of general importance to the legal system as a whole. As such, a reasonableness standard applied.
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> [Emphasis in original.]

[26] The judge also referred to *Immigration Consultants of Canada Regulatory Council v. Rahman*, 2020 FC 832, which had the benefit of the decision of the Supreme Court of Canada in *Vavilov* and engaged similar issues. The Court said:

> [13] Furthermore, the Supreme Court recognized that administrative decision makers may adapt common law or equitable principles to their administrative context; they are not required necessarily to apply such principles in the same manner as courts for their decisions to be reasonable: *Vavilov*, above at para 113. Whether the "decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination": *Vavilov*, above at para 113. While *res judicata* generally is central to the importance of the legal system as a whole, it does not follow that the Discipline Committee's contextual interpretation of one of the preconditions to the application of issue estoppel (i.e. the narrow issue of whether the ICCRC was a privy for the Complainant) must be reviewed for correctness: *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 28. See also *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 25-27.

See also paras. 11–12.

[27] There are still other more recent decisions that are relevant, that postdate and refer to *Vavilov*, and that rely on both *Rahman* and *Victoria University*: see e.g., *Cerna v. Canada (Citizenship and Immigration)*, 2021 FC 973 at paras. 29–32.

[28] Finally, this issue, albeit in a different context, was recently addressed in *1193652 B.C. Ltd. v. New Westminster (City)*, 2021 BCCA 176, leave to appeal to SCC ref'd, 39773 (9 December 2021), where Justice Dickson, for the Court, said:

> [47] In *Vavilov*, the Court gave examples of general questions of law that could not be resolved by applying a reasonableness standard because the decision would have legal implications for a wide variety of other statutes and the proper functioning of the justice system. These included broad legal questions such as when an administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process, the scope of the state's duty of religious neutrality and the appropriateness of limits on solicitor-client privilege. However, the Court stressed "the mere fact that a dispute is 'of wider public concern' is not sufficient for a question to fall into this category—nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue": at para. 61. It also noted that a decision maker's expertise is no longer a consideration when identifying general questions of law of central importance sufficient to attract a correctness standard: at paras. 60–61.
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> [48] In my view, the question of whether the *Community Charter* authorizes municipalities to enact bylaws that protect tenants from

> renovictions even though the *Residential Tenancy Act* regulates landlord-tenant renovictions may well be a matter of wide public concern, but it is not a general question of law of central importance to the legal system as a whole. Rather, it is a specific question of statutory interpretation concerned solely with the legislative schemes established in the *Community Charter* and the *Residential Tenancy Act*. This question does not engage any larger principle or subject matter that transcends the schemes at issue. I would also note that I see the question posed by 119 as too abstract to constitute a centrally important general question of law.
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> [Emphasis added.]

[29] The appellants argue that the various decisions the judge referred to are either wrongly decided or are distinguishable. I disagree. As was the case in *Victoria University*, the Reconsideration Panel considered and applied well-established principles that were described in *Danyluk*. The question for the Reconsideration Panel turned on the application of these principles and the exceptions to them in the narrow and specific circumstances of the case before it. In such circumstances, the appropriate standard of review is patent unreasonableness.

[30] The appellants also appear to argue that the Reconsideration Decision, in failing to follow the Tax Decision, was patently unreasonable. Though this is not clear in their factum, it was an error alleged in their Amended Petition.

[31] The Reconsideration Panel did not consider itself bound by the Tax Decision for various reasons. The appellants now challenge each of these reasons, as they did before the judge. The third reason was that the Reconsideration Panel exercised its discretion to not apply the doctrine of issue estoppel because to do so would give rise to an injustice. This conclusion, if not patently unreasonable, would be dispositive of all of the other issues the appellants raise.

[32] In their decision, the Reconsideration Panel said:

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

> as each decision goes (that is, in its particular statutory context). As the Supreme Court of Canada noted in *McCormick v. Fasken Martineau Dumoulin LLP*, 2014 SCC 39 ("*McCormick*"), an individual may be an "employee" in one statutory context but not in another.
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> …
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> 59. Here, assessed in the context of the statutory regime established by the *ESA*, we find the Member did not err in upholding the Delegate's decision that the relationship between the Complainants and the Applicants was one of employment for purposes of the *ESA*. The decision in [the Tax Decision] does not persuade us otherwise. To the extent that the Tax Court judgment gives rise to a question of issue estoppel (as opposed to arguably being subject to a question of issue estoppel itself in light of the earlier Determination), we decline to apply the doctrine because in our view to do so would work an injustice.

[33] The distinction drawn by the Reconsideration Panel between the *ESA*, as a remedial statute whose policy focuses on protecting employees, as opposed to the statutes over which the Tax Court has jurisdiction, is well supported. This distinction is one the Tribunal has drawn in the past. The judge referred to two such decisions in his reasons. *Re Westminster Lift Truck & Services Ltd*. (17 September 2004), BC EST #D166/04 [*Westminster*] is also helpful. In *Westminster*, although the Tribunal did not have before it competing decisions as to the employment status of one party (Beaverstock), the Tribunal nevertheless said:

> [The Tribunal is] not bound by the principle of issue estoppel to conclude that Beaverstock is an independent contractor because he may have been found to be an independent contract by CCRA for the purpose of income tax or GST or by the Workers' Compensation Board for the purposes of the *Workers' Compensation Act* ("*WCA*"). … The enactments governing the CCRA and the WCB have different objects and purposes. The fact that the CCRA or the WCB may treat a person as an employee or an independent contractor for the purposes of their governing enactments is not determinative of whether or not that same person is an employee for the purposes of the *Act*.

[34] The Canadian Human Rights Tribunal also recently determined that issue estoppel did not apply between the determination of a labour arbitrator (upheld by the Court of Appeal) and the Canadian Human Rights Tribunal because "[t]he definition of employee under the *Canada Labour Code* and the [*Canadian Human Rights Act*] are different as are the two legislative schemes": *Fick v. Loomis Express*, 2022 CHRT 2 at para. 89.

[35] In the current case, the Reconsideration Panel noted, citing *McCormick v. Fasken Martineau Dumoulin LLP*, 2014 SCC 39, that the definition of "employee" can mean two different things in two different statutory contexts. At issue in *McCormick* was the interpretation of "employee" under the *Human Rights Code*, R.S.B.C. 1996, c. 210. The appellants suggest that human rights legislation is not analogous as it allows for a wider interpretation of what constitutes an employee. However, *McCormick* is not so restricted—with respect to other statutory schemes, the Court noted that the meaning of "employee" "must always be assessed in the context of the particular scheme being scrutinized": *McCormick* at para. 25.

[36] Finally, *Gorenshtein* is relevant and helpful. In *Gorenshtein*, the Court dealt with a dispute between ICN, an employment agency, and two employees, Ms. Baranova and Ms. Tagirova. In 2007, both employees entered contracts with ICN under which they paid certain fees to ICN. They later came to believe those fees were contrary to the *ESA*. They stopped paying the fees and in 2008 filed a complaint under the *ESA* with the Director. In 2009, a delegate of the Director determined that the fees were contrary to the *ESA*. That determination was appealed to the Tribunal, which remitted the complaints to another delegate of the Director. Before a final determination was made by the Director's delegate, ICN commenced a small claims action for amounts owing under the contracts with both Ms. Tagirova and Ms. Baranova. In October 2010, the Provincial Court gave judgment in favour of ICN against Ms. Tagirova, but the claim against Ms. Baranova was adjourned. Finally, in May 2012, the delegate found that the 2008 complaints were well founded and ICN had improperly charged fees under s. 10 of the *ESA*. ICN appealed the determination to the Tribunal. That appeal was dismissed and the Tribunal refused to reconsider the appeal decision. ICN's application for judicial review was dismissed, as was its subsequent appeal to this Court.

[37] In *Gorenshtein*, among other things, ICN argued that the issues were *res judicata* by virtue of the Provincial Court order and that the Tribunal erred by not setting aside the reconsideration decision. This Court rejected that contention:

> [73] The delegate addressed the exercise of her discretion on the issue of *res judicata* and concluded that it weighed against application of the doctrine. I conclude that her assessment on this issue was well within the bounds of reasonableness ….
>
> [74] … Three factors weigh heavily against applying *res judicata* …. [M]ost importantly, expertise in *Employment Standards Act* issues rests with the Director and the Tribunal, who are assigned the role of interpreting and applying the will of the Legislature as expressed in the *Act*.
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> [75] To allow the principles of *res judicata* to supplant a decision by the legislatively mandated authority is, in my view, to "undermine the integrity of the administrative scheme" (*Penner*, para. 31). I see no basis upon which to say the judge erred on the issue of *res judicata*.

[38] In my view, there is no merit to this issue and I would dismiss this ground of appeal.

Issue 2: Was the Reconsideration Panel's interpretation of the term "employee" in the *ESA* patently unreasonable or were its reasons internally inconsistent?

[39] Throughout the various proceedings that give rise to this appeal, the appellants have advanced different arguments that are, in one way or another, based on purported errors of interpretation. Under the heading "Did the reconsideration panel err in its application of the test for determining employment status?" the judge said:

> [86] Several of the arguments that the petitioners put to the reconsideration panel and that it ultimately rejected, are raised again in this Court under the rubric of this second ground of review. The Reconsideration Decision addressed the petitioners' arguments in this category under the following headings:
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> a) Failure to articulate a clear conception of what constitutes an employment relationship (paras. 18-24);
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> b) No direct economic benefit from the Complainants' taxi work (paras. 25-28);
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> c) Misinterpretation of the *ESA* and misconception of its purposes (paras. 29-35); and
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> d) The subjective intention of the parties as a factor (paras. 36-42).

> [87] The petitioners' argument on review in this Court focused more narrowly on the following alleged errors:
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> a) a failure to consider the statutory definitions in s.1 of the *ESA* at any stage of the analysis;
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> b) a failure to apply the common law test consistently and harmoniously with those statutory definitions and the stated purposes of the *ESA* as set out in s. 2; and
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> c) a reliance, instead, on a misreading of the jurisprudence to yield a rule of interpretation that would see the remedial provisions of the *ESA* applied to "as many people as possible".

[40] On this appeal, the appellants have again reframed aspects of their arguments. They now argue that the Reconsideration Decision is patently unreasonable on account of two broad concerns: a) the Reconsideration Panel applied an erroneous interpretation of the *ESA*; and b) the Reconsideration Decision is internally inconsistent.

a) The Interpretation Issues

[41] The appellants raise several arguments under this heading. First, and perhaps most prominently, they contend that the Reconsideration Decision reflects "an expansive conception of 'employee.'" They argue, as they did before the Reconsideration Panel and the judge, that the "application of the ESA requires … a clear and coherent conception of employee/employer relationships" and they assert "[n]owhere in these decisions is there to be found any articulation of a conception of employment to justify the outcome."

[42] The appellants' insistence on the need for a general "conception" of who is an employee is difficult to understand. That insistence contemplates some concise, consistent and fixed expression of what constitutes an employee in different circumstances. It pre-supposes a monolithic "conception" of employment within which there is significant consistency between the common law, other statutory schemes and the *ESA*.

[43] However, throughout these proceedings, the various statutory decision-makers, in accordance with established jurisprudence, have relied on a

context-specific and fact-specific framework when deciding whether the complainants were employees for the purposes of the *ESA*.

[44] The Reconsideration Decision expressly addressed the appellants' argument that the Determination and the Appeal Decision had failed to articulate an "intelligible, coherent and transparent" concept of employment:

> 19. … it has long been recognized that the existence of an employment relationship is best determined by considering relevant factors, not by articulating and applying a precise legal test or definition. As explained by Major J. for the Supreme Court of Canada in the leading common-law authority on this issue, *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., [2001] 2 S.C.R. 983 ("*Sagaz*") at para. 46:
>
> > In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan*, *supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations ..." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing *Atiyah*, supra, at p. 38, that what must always occur is a search for the total relationship of the parties:
> >
> > > [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... <u>The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones</u>.
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> [Emphasis in original.]

[45] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, the Supreme Court of Canada addressed the application of vicarious liability to a bribery scheme in a commercial transaction. The Court examined, at considerable length, various tests that had been developed in the case law to help determine whether a

worker was an employee or an independent contractor. The Court observed that this distinction applied not only to vicarious liability, "but also to the application of various forms of employment legislation, the availability of an action for wrongful dismissal, the assessment of business and income taxes, the priority taken up upon an employer's insolvency, and the application of contractual rights": at para. 36.

[46] After describing various tests that had been used to address the distinction between an employee and an independent contractor at paras. 37–45, the Court concluded:

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, *supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[47] In the Determination, the delegate had set out his findings of fact under the following headings: a) Control and Direction; b) Equipment, Tools and Supplies; c) Financial Investment and Risk; d) GST and WorkSafeBC; e) Personal Tax Filings; f) Opportunity for Profit; g) Permanency of Relationship; and h) Status of Shareholder as Employer.

[48] The overlap of these factors with the factors that are identified in *Sagaz* at para. 47 and in other parts of the judgment is obvious. Using these findings of fact, the Reconsideration Panel did what the *ESA* requires; it considered whether, on the facts as found by the delegate, the delegate was justified in finding that an employment relationship existed. The Reconsideration Panel observed that its role

was to analyze the status of the complainants in a contextualized manner and "not by articulating and applying a precise legal test or definition."

[49] What constitutes an employee under the *ESA* is necessarily framed by the statutory definitions in the *ESA*, the *ESA* itself and relevant jurisprudence. Beyond that, however, further insistence on the need for conceptual rigour is at odds with the recognition in *Sagaz* that "there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor" (at para. 46) and that the "relative weight of each [factor] will depend on the particular facts and circumstances of the case" (at para. 48).

[50] In my view, the unwillingness of the Reconsideration Panel to formalize a "conception" of "employee" for the purposes of the *ESA* was not patently unreasonable.

[51] The appellants raise several other arguments that relate to issues of interpretation. First, they accept that the Reconsideration Panel properly and accurately referred to Driedger's modern principle—that the words in a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of Parliament. They assert, however, that the Tribunal did not "engage in a formal exercise of statutory interpretation."

[52] There will be cases where an administrative decision-maker pays "mere lip service to text, context and purpose rather than conducting a genuine analysis": *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para. 42, leave to appeal to SCC granted, 39418 (22 April 2021); *English v. Richmond (City)*, 2021 BCCA 442 at para. 63. For example, in *English* this Court recently concluded that a decision-maker's interpretation of a regulation was unreasonable because it did not accord with various extrinsic materials and with the language of the relevant provision "considered in its entirety, in context and with reference to the purpose of both the provision and its surrounding scheme": at para. 106.

[53] However, the present case is different. First, the majority in *Vavilov* recognized that administrative decision-makers are not required to engage in a formalistic statutory interpretation exercise in every case and that the interpretive exercise conducted by an administrative decision-maker may look quite different from that of a court: at para. 119. A reviewing court is required to consider the record as a whole and with due sensitivity to the administrative regime governing the decision. Accordingly, the "specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise": *Vavilov* at para. 119; *Yu v. Richmond (City)*, 2021 BCCA 226 at paras. 53–55.

[54] Further, though the appellants assert the Reconsideration Decision did not engage in a formal exercise of statutory interpretation, they have not on appeal undertaken any meaningful analysis of the provisions, structure or purposes of the *ESA*. They are unable to identify any focused or concrete issue of interpretation that pertains to statutory language, context or purpose that was raised with the Reconsideration Panel and that is patently unreasonable.

[55] For example, in the Determination, the delegate began his analysis with reference to the definitions of "employee," "employer," and "work" in s. 1 of the *ESA*. Before the judge, the appellants argued the Appeal Decision and the Reconsideration Decision failed to address the statutory requirement that the "work" in issue be performed "for" an employer. The judge disagreed with the appellants' characterization of what had occurred before the Tribunal. Neither this issue, nor other similar issues of interpretation, are now raised on appeal.

[56] The appellants next contend that the Tribunal did not look at the legislative history of the *ESA* and that that history does not "support an expansive conception of 'employee.'" In aid of this submission, the appellants seek to rely on a 1994 report by Professor Mark Thompson entitled *Rights and Responsibilities in a Changing*

Workplace: Review of Employment Standards in British Columbia (Victoria: Ministry of Skills, Training and Labour) (the "Thompson Report").

[57] The appellants accept that this is a new argument and that the Thompson Report is new evidence. However, they argue that since the Tribunal was called to address questions of statutory interpretation, this necessarily required them to address the *ESA*'s legislative history.

[58] I disagree for several reasons. First, the delegate, the Tribunal, and the judge were not asked to consider this issue or this evidence. This Court has cautioned against allowing a party to introduce new issues on judicial review because doing so risks usurping the role the legislature has entrusted to administrative decision-makers and deprives the reviewing court of the benefit of the administrative decision-maker's reasons in relation to the new issue: *Johnson v. British Columbia (Workers' Compensation Board)*, 2011 BCCA 255 at paras. 49–52, leave to appeal to SCC ref'd, 34348 (19 January 2012); *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at paras. 34–36, 54; *Silver Campsites Ltd. v. Pulham*, 2011 BCCA 352 at para. 32.

[59] Second, it is unrealistic to suggest that the Tribunal in this case should have, on its own initiative, undertaken this sort of research into issues pertaining to legislative history.

[60] Third, it is apparent that there are other relevant materials that may bear on the issue. The respondents have referred to a more recent report by a project committee of the British Columbia Law Institute entitled *Report on The Employment Standards Act*, (Vancouver: British Columbia Law Institute, 2018) ("BCLI"), in which the project committee has "revisited and debated" the very aspects of the Thompson Report's recommendation on which the appellants seek to rely. Some of the conclusions of the project committee appear to be at odds with certain aspects of the earlier conclusions in the Thompson Report: see e.g., BCLI at 33–34. At a minimum, they approach the issues differently. In such circumstances, I do not consider that it

would be either fruitful or appropriate to engage in the exercise the appellants propose.

[61] Next, the appellants submit that the Reconsideration Decision failed to adequately consider various interpretive presumptions that assume consistency between words used in legislation and words used in the common law. They argue that "when used in legislation, common law terms are presumed to retain their common law meaning" and that "courts value harmony between the several sources of law, presuming an unwillingness by the legislature to change the common law."

[62] I again disagree for two reasons. First, the *ESA* is "benefits-conferring" legislation: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 36, 1998 CanLII 837. In my view, the *ESA* is in the nature of "program legislation." "Program legislation" is distinct from "reform legislation," and the significance of that distinction, for present purposes, is explained in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014) at 265–67:

> **§9.15** ***Reform legislation.*** Prior to the emergence of the so-called administrative state, most statutes passed by Canadian legislatures would be considered reform legislation. This is legislation enacted to amend what historically has been thought of as "private" law — the law of property, the law governing the relations of subjects to one another.
>
> **§9.16** Reform Legislation is generally modest in its aspirations. It is meant to cure perceived defects or oversights in existing law by introducing new rules. … [T]he new rules are meant to operate within the established framework of existing private law.
>
> …
>
> **§9.19** ***Program legislation.*** Program legislation is the type of legislation on which the modern administrative state is founded. It addresses social or economic problems by establishing programs of regulation or benefit distribution and creating departments or other agencies to administer them. In program legislation the starting point is not existing law, but an area of human activity to be regulated or a social problem to be tackled. First, the problem is defined; then long-range goals are formulated and the resources available for pursuit of those goals are assessed; finally a program is devised. At this point legislation is required to establish a legal basis for the program.
>
> **§9.20** Most program legislation takes the form of a more or less self-contained statute setting out the goals of the program and establishing a legal framework within which delegated powers are exercised and reviewed.

> The statute may create new bodies or offices or confer new powers on existing ones. The powers may be legislative, administrative or judicial.
>
> …
>
> **§9.22** These distinctive features of program legislation have affected its interpretation in a number of ways:
>
> - by drawing the focus away from the meaning of rules and their relation to the common law;
> - by emphasizing the *function* of rules, in relation to the scheme set out in the legislation and its ultimate goals;
> - by enlarging the concept of purpose from the cure of specific defects in the common law to include broad social and economic policies and long-range goals; and
> - by fostering the development of principles for judicial review, such as fairness, natural justice and the doctrine of curial deference.
>
> [Footnotes omitted.]

[63] At 539–40, Sullivan states:

> **§17.7 *Area of law dealt with.*** The courts readily assume that reform legislation is meant to be assimilated into the existing body of common law. This assumption is likely to apply to any legislation dealing with so-called "private" law — the law of equity, contracts, torts, restitution and private property. Historically, the law governing these matters is rooted in the common law and still is closely associated with common law principles and values.
>
> …
>
> **§17.9** Conversely, when legislation is addressed to matters outside the traditional concerns of judge-made law, the courts readily concede the primacy of the legislature. This is so particularly when dealing with program legislation — a statute-based social program, for example, or a comprehensive regulatory scheme. In interpreting such legislation, resort may be had to the common law, but only as needed to carry out the legislature's purpose and to ensure the effective operation of its scheme.
>
> [Footnotes omitted.]

[64] Certainly, the common law provides interpretive context to the *ESA*. But the appellants' emphasis on the primacy of the common law or on the need to interpret the *ESA* in a manner that mirrors the common law fails to recognize these various principles and distinctions.

[65] Second, the appellants submit that the word "employee" was "obviously intended to be understood with some regard to common law jurisprudence." It is clear that in each of the Determination, the Appeal Decision, and the Reconsideration Decision, the question of whether the complainants were "employees" was firmly tethered to *Sagaz* and other court decisions and to the guidance that such decisions provide.

[66] Finally, the appellants assert that the delegate's statement in the Determination that the *ESA* is intended to protect "as many people as possible," reflected an impermissibly expansive interpretation of the *ESA*. This issue was raised in the Appeal Decision, the Reconsideration Decision and before the judge. The appellants argue that the failure of the Tribunal to expressly disclaim or endorse the delegate's assertion was "a failure to engage in a proper process of statutory interpretation."

[67] The Reconsideration Decision recognized and directly addressed this aspect of the appellants' submissions:

> 30. We are not persuaded the Determination or the Appeal Decision reflects a "profound misconception regarding the interpretation and application" of the *ESA* and its purposes. The phrase identified by the Applicants as erroneous – "the *ESA* is intended to apply to as many people as possible" – is found in one passage in the Determination (p. R39), in which the Delegate states:
>
> > As the [*ESA*] is remedial, benefits-conferring legislation designed and intended to protect as many people as possible (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 ["*Rizzo*"]), an interpretation of the [*ESA*] which encourages employers to comply with the minimum requirements of the [*ESA*], and so extends its protection to as many employees as possible, is to be favoured over one that does not (see *Machtinger* v. *HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 at 507 ["*Machtinger*"]).

[68] The Reconsideration Panel rejected the appellants' submissions:

> 33. We are not persuaded the impugned phrase in p. R39 of the Determination reveals bias, pervasive legal error, or otherwise establishes a proper basis to reconsider the Appeal Decision's upholding of the Determination. In the sentence containing the impugned phrase, the Delegate accurately paraphrased the passage from *Machtinger*, in which the Supreme

> Court of Canada stated that an interpretation of employment standards legislation "which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not". In *Rizzo*, the Supreme Court of Canada … stated that the object of employment standards legislation is "to protect the interests of as many employees as possible". The Delegate, in paraphrasing this passage, said "people" instead of "employees". We are not persuaded this choice of words reveals reviewable error. We find it is clear when the Determination is read as a whole that the Delegate applied the proper legal approach to the facts before him in deciding whether an employment relationship existed between the Applicants and the Complainants under the *ESA*.
>
> 34. The Applicants complain that, although on appeal they urged the Member to clarify that the *ESA* is not intended to apply to as many "people" as possible, the Appeal Decision is silent on this point. We find this silence does not reveal a reviewable error. It was not necessary for purposes of deciding the appeal to address the Applicant's question about the Tribunal's general interpretation of the *ESA*. Furthermore, we too find it unnecessary to address this question, beyond stating that we agree with the Applicants that the passages in *Rizzo* and *Machtinger* do not mean there is a "presumption" of an employment relationship, where that characterization of a relationship is disputed.
>
> 35. Where a respondent to a complaint disputes that the complainant is their employee within the meaning of the *ESA,* that issue falls to be determined on the basis already described in this decision. The delegate must consider the facts and circumstances before her or him in light of relevant factors such as control, ownership of tools and equipment, opportunity for profit, financial risk, permanency of the relationship, etc. This is precisely the approach taken by the Delegate in the Determination and approved by the Member in the Appeal Decision.

[69] The concern the appellants voice is that the decisions of the Tribunal have, with some regularity, used similarly expansive language. They identified several such decisions in their reconsideration submissions and they have identified further decisions of the Tribunal in their factum. In such circumstances, they argue it was necessary for the Tribunal to squarely address this concern.

[70] I consider that the Reconsideration Panel, in stating that "*Rizzo* and *Machtinger* do not mean there is a 'presumption' of an employment relationship," properly addressed the appellants' submission. Specifically, the Reconsideration Panel confirmed that neither *Rizzo* nor *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, 1992 CanLII 102, allow a decision-maker under the *ESA* to start their analysis with the presumption that an individual is an "employee" for the purposes of

the *ESA*. Both *Rizzo* and *Machtinger* were directed to workers whose status as employees was not controversial. Neither decision addressed the narrow question that arises in this case of when a worker should be considered an employee as opposed to an independent contractor. Finally, neither decision suggested that "as many people as possible" should be deemed to be employees. The Reconsideration Decision makes quite clear that the question of whether an individual is an employee for the purposes of the *ESA* is to be determined contextually and on the basis of, among other things, the numerous context-specific factors identified in *Sagaz* and other decisions.

[71] In my view, the appellants are unable to establish the Reconsideration Decision is patently unreasonable on the basis of any of the submissions advanced under this ground of appeal.

b) Is the Reconsideration Decision internally incoherent?

[72] Under this ground of appeal, the appellants contend that the Reconsideration Decision is inconsistent because, while the Reconsideration Panel agreed there is no presumption of an employment relationship, it failed to address language in the Determination and Appeal Decision that reflected a presumption of such a relationship. The appellants provide several examples from the Determination that they assert demonstrate the delegate analyzed the issue before him as though a presumption of employment existed.

[73] There are several independent difficulties with this submission. First, the Reconsideration Decision did address aspects of this argument and it rejected the submission being made. For example, the appellants contend that the Determination reveals a presumption of an employment relationship in its finding that the subjective intention of the parties has less relevance in the *ESA* context because one cannot contract out of the *ESA*. The appellants contend that this reflects a presumption of employment because the "provision in the ESA that its 'requirements' cannot be contracted out of makes sense only where there is an employment relationship."

[74] The Reconsideration Decision directly addressed "the subjective intentions of the parties as a factor" in its analysis. The Reconsideration Panel noted that "the Tribunal has made it clear that the intention of the parties is only one factor that may be considered, and that it does not trump the reality of the nature of the relationship as revealed by other relevant factors": at para. 38.

[75] The Reconsideration Decision further stated:

> 39. In the present case, the Delegate similarly noted that the Applicants argued they merely provided support services to taxi owners and drivers running their own businesses, and stated he recognized that "most of the documents the [Applicants] submitted suggested that they attempted to organize their affairs to reflect this on paper" (Determination, p. R47). However, the Delegate added, "the form of the [Applicants'] intended relationship with the Complainants does not align with its substance" (*ibid.*). We find no error in this analysis. As stated in *LoveAgain*, the contractual "form" of the relationship "never triumphs over substance" when deciding whether or not it is one of employment for purposes of the *ESA*.
>
> …
>
> 41. We are therefore satisfied the Delegate considered the Applicants' evidence and argument with respect to the subjective intention of the parties. We further find he did not err in looking at the totality of the evidence before him, not just the evidence of the subjective intention of the parties. We find it was open to him to conclude that, even taking the evidence of subjective intention at its highest and assuming the parties subjectively intended that their relationship not be one of employment, the totality of the evidence before him established the Complainants were employees of the Applicants for purposes of the *ESA*.
>
> 42. As the Member noted in the Appeal Decision, the subjective intention of the parties, as a factor in determining whether an employment relationship exists, "may have greater relevance in other legislative contexts, but it generally has little relevance in the employment standards context" (para. 105). As he further noted, this is because of the generally unequal bargaining power between employees and employers noted by the Supreme Court of Canada in *Machtinger* at para. 31 (quoted in the Appeal Decision at para. 99), and <u>because one cannot contract out of the minimum protections provided by the *ESA*</u>. Bearing this context in mind, we agree with the Appeal Member that the Delegate's assessment of the subjective intention of the parties as one factor in determining whether theirs was an employment relationship for purposes of the *ESA* does not reveal reviewable error.
>
> [Emphasis added.]

[76] The appellants seek to give particular significance to the underlined portions of para. 42 of the Reconsideration Decision. However, I do not consider that this

statement has the effect the appellants contend or that it reflects the application of a presumption in favour of employment. It is necessary to consider the whole of the Reconsideration Decision and certainly those parts of the reasons that addressed this issue. It is apparent from the paragraphs I have quoted that the decision of the Reconsideration Panel was based on a consideration of multiple findings that were relevant to the subjective intentions of the parties. Further, the subjective intentions of the parties was only one of multiple other contextual factors that informed the Determination and, ultimately, the Reconsideration Decision. Based on a consideration of these various factors, in combination, the Reconsideration Panel agreed "with the Appeal Member that the Delegate's assessment of the subjective intention of the parties as one factor in determining whether theirs was an employment relationship for purposes of the *ESA* does not reveal reviewable error": at para. 42.

[77] The second difficulty with the appellants' submission is that the Reconsideration Panel was not required to respond to each issue or sub-issue that was raised by the appellants. In *Vavilov*, the majority confirmed that judicial review is not a line-by-line treasure hunt for error and a tribunal's reasons are not to be assessed against a standard of perfection: *Vavilov* at para. 91.

[78] The majority in *Vavilov* also repeated its admonition from *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16, that the fact reasons do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not, without more, a basis to set the decisions aside: at para. 91. A decision-maker is not required to "respond to every argument or line of possible analysis" or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion": *Newfoundland Nurses*: at paras. 25 and 16.

[79] It is important for parties and counsel to limit the number of issues they raise and to focus their submissions. When they fail to do so, statutory decision-makers and judges will necessarily address the primary or central questions that they

understand to be in issue. In this case, the Reconsideration Panel observed that it had been provided with lengthy submissions and a significant volume of material. The Reconsideration Panel then summarized the appellants' submissions into seven separate arguments and proceeded to deal with each of those arguments in turn.

[80] Third, when speaking of "presumptions," it is necessary to distinguish between presumptions of law and presumptions of fact, though this distinction can be further developed into additional categories: see e.g., Sidney N. Lederman, Allan W. Bryant, & Michelle K. Fuerst, *The Law of Evidence in Canada*, 5th ed. (Markham, Ont.: LexisNexis, 2018), ch. 4. A presumption of law assigns the burden of proof on an issue. A presumption of fact permits a trier of fact to draw a presumed conclusion, unless the party against whom the presumption operates is able to rebut the presumed fact: David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law Inc., 2015) at 583–85. See also *Li v. Canada (Citizenship and Immigration)*, 2015 FC 459 at paras. 37–38; and *R. v. Boyle* (1983), 148 D.L.R. (3d) 449 at 461, 1983 CanLII 1804 (Ont. C.A).

[81] In the Determination, the delegate did not relieve the complainants of the burden of proving their status as employees, nor did he place any burden on the appellants to disprove the existence of such a relationship. Instead, the delegate considered numerous contextual factors and then weighed the evidence provided by the complainants and appellants respectively in relation to those factors. Based on that analysis, the delegate concluded that the complainants had established they were in an employment relationship with the appellants. The Reconsideration Panel, in turn, was satisfied this analysis had been undertaken properly.

[82] In my view, that Reconsideration Panel's conclusions were not patently unreasonable and there is no merit to this further ground of appeal.

Disposition

[83] In my view, the appeal should be dismissed.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Marchand"