IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Beach Place Ventures Ltd. v. British Columbia (Employment Standards Tribunal),* 2020 BCSC 327

Date: 20200306
Docket: S199797
Registry: Vancouver

Between:

Beach Place Ventures Ltd. and Black Top Cabs Ltd.

Petitioners

And

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

Respondents

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Petitioners:	T. Clarke
Counsel for the Respondent, The Employment Standards Tribunal:	J. O'Rourke
Counsel for the Respondent, Director of Employment Standards:	L. Courtenay
Place and Date of Trial/Hearing:	Vancouver, B.C. September 30, 2019 November 7, 2019
Date of Written Submissions	January 24, 2020
Place and Date of Judgment:	Vancouver, B.C. March 6, 2020

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Introduction

[1] This is an application within a judicial review proceeding.

[2] In 2016 and 2017, Ali Abadi-Asbfroushani, Fenton Ramesh Paul, and Arash Karimiam Azimi Saraf (the "Individual Complainants") filed complaints under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*] against Beach Place Ventures Ltd. and Black Top Cabs Ltd. These two companies are the applicants and the petitioners in the main action, the petition (the "Applicants"). A delegate of the Director of Employment Standards (the "Director") conducted an investigation.

[3] On March 29, 2018, the delegate found the Individual Complainants were employees of the Applicants (the "Determination"). Consequently, the Applicants owed the Individual Complainants unpaid wages and interest. The delegate also imposed mandatory penalties on the Applicants for contraventions of the *ESA*.

[4] The Employment Standards Tribunal (the "Tribunal") confirmed the Determination (the "Appeal Decision"). The Applicants applied for reconsideration, which was refused on July 5, 2019 (the "Reconsideration Decision"). The panels in the Appeal Decision, 2019 BCEST 23, and the Reconsideration Decision, 2019 BCEST 61 (collectively the "Tribunal Decisions"), agreed with the delegate that the Individual Complainants were employees of the Applicants under the *ESA*.

[5] The Applicants filed a petition for judicial review of the Tribunal Decisions under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*]. Before me, the Applicants seek an order enjoining the Director from paying out funds held in trust to satisfy the Decisions pending a determination of the issues on judicial review. In the alternative, the Applicants seek an order that the Tribunal and/or the Director and/or the Individual Complainants undertake to pay any and all losses or damages caused to the Applicants as a result of the Tribunal Decisions if they are ultimately quashed.

[6] The Individual Complainants did not appear but the Tribunal and the Director (collectively the "Respondents") both made submissions before me. After the

hearing in this matter concluded, I requested additional submissions regarding whether the privative clause in s. 110 of the *ESA* applies to decisions of the Director. In their supplemental submissions, the Applicants and the Respondents all agreed s. 110 does not apply to decisions of the Director.[1]

[7] In their supplemental submission, the Applicants sought leave to make brief submissions on the Supreme Court of Canada's recent decision regarding standards of review, *Canada (Minister of Citizenship and Immigration) v. Vavilov* , 2019 SCC 65 [*Vavilov*]. The Respondent Director requested leave to make submissions in response. I grant the Applicants leave and have incorporated their comments, and the Respondent Director's response, into this decision.

Background Facts

[8] Following a determination, settlement agreement, or an order of the Tribunal, the Director is responsible for collecting unpaid wages and penalties for violations of the *ESA*: ss. 87–99. Section 99 provides how money collected by the Director is to be attributed. Section 99 does not impose timelines on the disbursement of money collected by the Director.

[9] The Tribunal may order that a determination of the Director is suspended pending an appeal: *ESA*, s. 113. In the course of the appeal process before the Tribunal, the Applicants requested that the Tribunal suspend the Determination pending the outcome of the appeals process. The Applicants and the Director reached an agreement in July 2018 whereby the Applicants deposited $50,000 with the Director, as well as an irrevocable letter of credit in the amount of $85,000. Both were held in trust for the purposes of satisfying the Determination if the Applicants were ultimately unsuccessful.

[10] The Applicants were unsuccessful in both their appeals to the Tribunal.

[1] The Tribunal argued s. 110 of the *ESA* applies indirectly to determinations of the Director because the Tribunal has exclusive jurisdiction to decide appeals of the Director's determinations.

[11] On September 3, 2019, the Applicants applied for judicial review of the Appeal Decision and Reconsideration Decision made by the Tribunal. The grounds for review are the Tribunal Decisions:

I. violated the duty of fairness owed to the Applicants; and

II. were patently unreasonable because, *inter alia*, the Tribunal

A. acted on the basis of wrong legal principles,

B. failed to adequately consider the purposes of the relevant statutory framework,

C. relied on erroneous interpretations of relevant case law,

D. relied on erroneous and unreliable information,

E. failed to consider relevant facts,

F. failed to investigate contested facts, and

G. demonstrated a closed mind.

[12] In *McMillan v. British Columbia (Employment Standards*), 2018 BCCA 233 [*McMillan*], the Court of Appeal interpreted s. 99 of the *ESA* and found this Court should address stays pending judicial review. The court held s. 99 does not give the Director discretion to hold unpaid wages and penalties for infractions of the *ESA* longer than is reasonably necessary for a party to launch judicial review proceedings and to apply to a court for a stay. It is improper for the Director to hold the funds beyond that stage of the process: para. 32.

[13] The Director indicated that in light of *McMillan*, the funds would be paid to the Individual Complainants (the “Director’s Decision”) despite the judicial review. Consequently, the Applicants seek an order enjoining the Director from paying out the trust funds, i.e., a stay of the Director’s Decision to release the funds. The Applicants request I preserve the status quo and order the Director continue to

maintain the trust funds in an interest-bearing account until the final conclusion of the petition and the expiry of all relevant appeal timelines.

[14] Although set out in its notice of application, the Applicants are not seeking a stay of the Tribunal Decisions. In its supplemental submission, the Tribunal takes the position the Applicants must apply for a stay of the Tribunal Decisions to obtain a stay of the Director's disbursement of wages. This is because pursuant to s. 110 of the *ESA* it is the Tribunal Decisions which are the subject of judicial review. In response, the Applicants argue a stay of the Tribunal Decisions should not be necessary because it would have no "operational effect". The Director's Decision would still be outstanding.

[15] The Director and the Tribunal take no position on whether a stay, of either the Director's Decision or the Tribunal Decisions, should be granted, but want to ensure this Court applies the proper legal tests. As already stated, the Individual Complainants did not participate in this application.

Issues

[16] Should I exercise my discretion to grant interlocutory relief:

i. enjoining the Director from paying out funds currently held in trust to satisfy the outstanding wages and penalties owed to the Individual Complainants pending the judicial review; or

ii. staying the Tribunal Decisions pending the judicial review?

[17] To engage in this analysis, what standard of review applies to either the Tribunal Decisions or to the Director's Decision?

[18] If I grant a stay, should I place a time limit on the stay?

[19] In the alternative, should I exercise my discretion to order that the Tribunal and/or the Director and/or the Individual Complainants undertake to pay any and all

losses or damages caused to the Applicants as a result of the Decisions, if they are quashed?

[20] The parties are not seeking costs.

Legal Principles

ESA Framework

[21] The *ESA* constitutes a complete code for ensuring minimum employment standards for most employees in British Columbia. The *ESA* provides "a comprehensive administrative scheme for the granting and enforcement of employee rights": *Macaraeg v. E. Care Contact Centres Ltd*., 2008 BCCA 182 at para. 86, leave to appeal ref'd [2008] S.C.C.A. No. 293 [*Macaraeg*].

[22] The Director administers and enforces the *ESA* and its regulations. The Director, who has broad scope to interpret the *ESA*, is a neutral statutory authority who is independent of employees and employers. The *ESA* provides the Director with exclusive jurisdiction to determine claims under the *ESA*, subject to an appeal to the Tribunal: *Macaraeg* at para. 104.

[23] If the Director investigates a complaint and finds a violation or violations of the *ESA*, the Director may issue a determination setting out what must be done to remedy the violation(s). As stated by Justice Chiasson in *Macaraeg*:

> [88] Section 74 provides for complaints to the Director of Employment Standards for contravention of the *ESA*. Complaints are investigated by the Director, whose investigative powers were defined in s. 84 by reference to the powers of a Commissioner under ss. 12, 15 and 16 of the *Inquiry Act*. Since June of 2007, s. 84 of the *ESA* sets out in full the Director's power to compel persons to answer questions and order disclosure. The authority to investigate now is given expressly to the Director who can obtain the assistance of the Supreme Court with the added force of potential contempt of court proceedings. If the Director were satisfied there has been a contravention, he can require compliance, which includes the payment of, in this case, overtime wages (s. 79). Pursuant to s. 98, contravention of the *ESA* attracts a fine in addition to the obligation to comply with the Director's determination under s. 79.

[24] The Tribunal hears appeals of the Director's determinations. As set out in s. 115:

> (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

[25] Section 116 provides that the Tribunal may reconsider its own decision:

> (1) On application under subsection (2) or on its own motion, the tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

[26] Decisions of the Tribunal are subject to judicial review, but they are protected by a strong privative clause: *ESA*, s. 110.

General Principles of Standard of Review

[27] The recent decision by the Supreme Court of Canada in *Vavilov* represents a significant change in the law regarding the standard of review. The presumption articulated by the majority of the Court in *Vavilov* is that reasonableness is the applicable standard of review. This presumption is rebutted in certain circumstances, two of which are important here. First, the presumption will be rebutted where the legislature prescribes a different standard of review: para. 17. Second, the presumption will be rebutted and the standard of review will be correctness for questions of law that are of central importance to the legal system as a whole: para. 17.

Legislatively Imposed Standard of Review

[28] The majority in *Vavilov* held the legislature can, through statute, impose a standard of review. As the Court stated at para. 35: "We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within limits imposed by the rule of law."

[29] In British Columbia, the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*], governs the standard of review of administrative tribunals if its provisions are incorporated by the tribunal's enabling statute: *ATA*, s. 1.1. Section 58 of the *ATA* prescribes the standard for review for decisions of a tribunal protected by a privative clause. Section 58 is incorporated by s. 103(m) of the *ESA.*

[30] Section 58(2)(a) of the *ATA* provides that in a judicial review of a decision of a tribunal protected by a privative clause, "a finding of fact or law … by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable". Under the *ATA*, patent unreasonableness applies to all questions of fact and law within the Tribunal's exclusive jurisdiction.

[31] Section 58(2)(b) of the *ATA* provides that "questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all the circumstances, the tribunal acted fairly".

Questions of General Law

[32] Prior to *Vavilov*, general questions of law of central importance to the legal system were subject to a correctness standard of review only if they were outside the decision-maker's expertise: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 60. Post-*Vavilov*, there is no requirement that the matter be outside the decision-maker's expertise to be subject to the standard of correctness: para. 58. Consequently, the Applicants argue the question of what constitutes "employment" is a question of general law of central importance to the legal system and is therefore subject to a standard of correctness.

[33] I agree that what constitutes "employment" is an important societal question. However, I am not persuaded this turns the question of who is an employee into a question of general law of central importance to the legal system. As the Court noted in *Vavilov*, "the mere fact that a dispute is 'of wider public concern' is not sufficient for a question to fall into this category'": para. 61. By creating the *ESA* and its

administrative and enforcement regime, the legislature has determined that employment is defined by statutory provisions rather than left to principles of general law. As stated by Justice Harris in *Canwood International Inc. v. Bork,* 2012 BCSC 578 [*Canwood*]:

> [102] The ESA provides statutory protection for entitlements such as wages owing to employees. What and who is entitled to protection under the ESA is a matter of statutory interpretation. The question whether someone is an employee for the purposes of the ESA and whether they are entitled to wages for the purposes of the ESA are also matters of statutory interpretation. Those questions cannot be reduced to the application of common law principles, although those principles may inform the analysis of whether the statute applies to a given relationship or issue.

[34] The question of whether someone is an employee for the purposes of the *ESA* is to be decided in the context of this statutory regime. It is not open to me to disregard the legislative intention and hold what constitutes employment is a matter of general law of central importance to the legal system. I decline to do so.

Conclusion on Standard of Review

[35] The *ATA* governs the standard of review in the underlying judicial review. Questions of fact and law within the Tribunal's exclusive jurisdiction are subject to a standard of patent unreasonableness. The patent unreasonableness standard does not apply to the question of whether the Tribunal breached its duty of fairness. I say more about this below.

Interlocutory Relief

[36] Pursuant to s. 10 of the *JRPA*, this Court is expressly empowered to grant interlocutory relief it considers appropriate pending the final disposition of a petition for judicial review. This includes stays of administrative actions and compelling administrative action to maintain the status quo. Here, the Applicants seek a stay of the Director's Decision rather than a stay of the Tribunal Decisions under judicial review.

[37] The test to be applied on an application for an interlocutory stay was set out by Justices Sopinka and Cory in *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334 [*RJR MacDonald*]:

> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interrogatory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[38] All counsel agree this is the starting point of the analysis. The Supreme Court of Canada's test addresses three questions: whether on the merits there is a serious question to be tried, whether the applicant will suffer irreparable harm without a stay, and whether the balance of convenience favours granting the stay.

[39] In the first part of the test, the determination of whether there is a serious question to be tried, is to be made "on the basis of common sense and an extremely limited review of the case on the merits": *RJR MacDonald* at 348.

[40] The applicant bears the burden under the first part of the test. It is a low hurdle. Unless the ground for review(s) can be said to be frivolous or vexatious, the test will be satisfied: *RJR MacDonald* at 348.

[41] The second part of the test, irreparable harm, refers to the "nature of the harm rather than its magnitude": *RJR MacDonald* at 348. Irreparable harm includes harm that cannot be quantified in monetary terms or where it will be difficult to obtain a monetary redress: *RJR MacDonald* at 350. Irreparable harm may be established if it is unclear that a financial loss can be recovered at the time of a decision on the merits: *RJR MacDonald* at 348.

[42] In British Columbia, the question of irreparable harm is often subsumed in the balance of convenience analysis, the third part of the test: *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.), aff'd [1991] 1 S.C.R. 62; *Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers*

Ltd., 2005 BCCA 5 at paras. 54–55. The balance of convenience test requires a determination of which party will suffer greater harm if the interlocutory relief is granted or denied: *RJR MacDonald* at 350.

[43] A recent case supports this approach. In *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 (Chambers), Justice Newbury stated:

> [19] It is trite law that the three factors do not form a checklist of items each of which must be satisfied before injunctive relief may be granted. As stated by McLachlin J.A. (as she then was) for this court in *British Columbia (Att'y-General) v. Wale* (1986) 9 B.C.L.R. (2d) 333, aff'd. [1991] 1 S.C.R. 62, the three parts of the test are not intended to be separate watertight compartments, but factors that "relate to each other", such that "strength on one part of the test ought to be permitted to compensate for weakness on another. [Emphasis added.]

[44] As with the serious question to be tried, the onus is on the party seeking interlocutory relief to establish that the balance of convenience favours granting the relief sought: *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 at 101 (C.A.).

Interlocutory Relief in the Administrative Context

Legal Principles

[45] There are two distinct approaches to the first part of the test when the application is for an interlocutory stay of an administrative action by an administrative tribunal that is protected by a strong privative clause.

[46] Under the first approach, the threshold is substantially the same as the threshold applied on other applications for interlocutory injunctions, i.e., whether there is a serious question to be tried. The threshold is met unless the question is frivolous or vexatious: *Coast Mountain Bus v. CAW-Canada*, 2008 BCSC 1135 at paras. 19–20 [*Coast Mountain*].

[47] The second approach relies on *Hamilton & Spill Mft. (1974) Ltd. v. British Columbia (Attorney General)*, [1983] B.C.J. No. 216 (S.C.) [*Hamilton*]. In *Hamilton*,

this Court held that where a tribunal is protected by a privative clause, the threshold is more onerous than a serious question to be tried. An applicant seeking to stay a decision of a tribunal which is addressing a matter within its exclusive jurisdiction, and which is protected by a privative clause, needs to establish a strong *prima facie* case to succeed: *Hamilton* at paras. 13–15.

[48] In *RJR MacDonald*, Sopinka and Cory JJ. discussed whether a higher threshold should apply when a decision is addressing a *Charter* issue. At 337, they confirmed the test at the first stage should remain whether there is a serious question to be tried:

> The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores*, at p. 128, that "the *American Cyanamid* `serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

[49] In *Charter* cases, the public interest is paramount. *RJR MacDonald* held that public interest is a special factor to be considered when assessing the balance of convenience rather than by altering the threshold under the first part of the test.

[50] The second approach was adopted by Justice Macintosh in *Community Social Services Employers' Association of B.C. (Re)*, 2014 BCSC 1719 [*Community Social Services*]. Relying on *Hamilton*, Macintosh J. held the requirement of a strong *prima facie* case survives *RJR MacDonald* when the administrative tribunal is protected by a strong privative clause and is addressing a matter within its customary sphere. He emphasized the stay under review in *RJR MacDonald* was addressing the constitutionality of legislation as opposed to the impact of a privative clause: paras. 8–10.

[51] Justice Macintosh supported his conclusion by looking at the reasoning from other labour relations decisions pending judicial review. As he stated:

> [9] For the stay under review in *RJR*, the Court was addressing the constitutionality of legislation as opposed to the impact of a privative clause protecting the decision of a specialized tribunal acting within its sphere of expertise. That, in my view, serves to distinguish *RJR* from both *Hamilton* and the case before me. The conclusion that the requirement of a strong *prima facie* case survives *RJR*, when a privative clause, and the other criteria addressed in *Hamilton*, are present, is supported by reasoning found in *National Waste Services Inc. v. National Automobile, Aerospace*, [2009] O.J. No. 4485 (Ontario Superior Court of Justice), see particularly paras. 6, 11, and 18; and *Hospital Employees' Union et al. v. Canadian Forest Products Ltd. et al.*, 2005 BCSC 877, in particular paras. 5 and 6.

[52] The *Hospital Employees' Union et al v. Canadian Forest Products Ltd. et al*, 2005 BCSC 877 [*HEU*] decision, to which Macintosh J. referred, did not apply the higher threshold. This Court accepted counsel's suggestion that "there is no need to raise the threshold to that of a strong *prima facie* case, but rather the strength of the case is simply measured taking into account the higher burden that will be upon the petitioner where the standard of review is 'patently unreasonable'": *HEU* at para. 6.

[53] Justice Macintosh concluded the applicant had to show a strong *prima facie* case rather than a serious question to be tried. Nevertheless, he emphasized which threshold applied made little practical difference as both "formulations of the test are formidable." Either threshold would lead "to the same difficult place for an applicant": *Community Social Services* at para. 11.

[54] Section 110 of the *ESA* provides:

> 110 (1) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal or reconsideration under Parts 12 and 13 and to make any order permitted to be made.
>
> (2) A decision or order of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

[55] In the case before me, the legislature has granted the Tribunal exclusive jurisdiction to decide issues under the *ESA* and has protected it with a strong

privative clause: *Cariboo Gur Sikh Temple Society (1979) v. British Columbia (Employment Standards Tribunal)*, 2019 BCCA 131 at para. 22 [*Cariboo*]. I agree with Macintosh J. that this creates different considerations than those present in *Charter* litigation.

Positions of the Parties

[56] Not surprisingly, the Applicants argue that the threshold issue is whether there is a serious question to be tried. In support of their position, they rely on, *Canada Bread Co. v. Ontario (Labour Relations Board)*, 2018 ONSC 1399; and *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230 at 306.

[57] The Respondents argue the proper threshold under the first part of the test is the "strong *prima facie* case". In support of their position, they rely on the reasoning of Macintosh J. in *Community Social Services.* They agree with Macintosh J. that even without the higher threshold, the Applicants face an onerous burden given the patently unreasonable standard applied to questions of law and fact on judicial review.

Analysis

[58] Based on these two lines of authority, there is uncertainty in the law in British Columbia regarding the applicable threshold in the administrative law context. Apart from *HEU* and *Community Social Services*, this issue has not attracted recent judicial attention and no Court of Appeal authorities. Consequently, it is unclear whether the higher threshold survived *RJR MacDonald*.

[59] In their supplemental submission, the Applicants point out that since the hearing of this matter, the majority in *Vavilov* held that privative clauses "serve no independent or additional function in identifying the standard of review": para. 49. The Applicants argue this undermines any rationale for relying on the existence of a privative clause as the basis for applying a higher threshold for obtaining a stay.

[60] Although, after *Vavilov*, the specialized nature of a tribunal is no longer a contextual factor relevant to determining the standard of review, with respect to the

ESA, the *ATA* standard of patent unreasonableness is statutorily mandated. This onerous standard applies to the Tribunal Decisions that are subject to judicial review in the underlying petition. The twist here is we have an application within the judicial review proceeding to prevent the Director from dispersing the funds to the Individual Complainants pending the hearing of the petition. So the question becomes, what threshold should apply to this application for a stay of the Director's Decision?

[61] The parties all agree s. 110 of the *ESA* applies only to decisions of the Tribunal, not to those of the Director. As set out by the Applicants at paras. 7 and 8 of their supplemental submission:

> Section 10 of the *Judicial Review Procedure Act* provides that "on an application for judicial review, the court may make an interim order it considers appropriate until the final determination of the application." This is a broad grant of authority that has been exercised by the Court both to stay administrative action and to compel administrative action in the interests of maintaining the *status quo*. The Court also has inherent jurisdiction to fulfil its role on judicial review.
>
> Moreover, the Court of Appeal in *McMillan* opined that "just as the Employment Standards Tribunal deals with suspensions of orders pending appeal, the Supreme Court ought to deal with stays pending judicial review. … A stay of the Determination at that stage should be a matter determined by consent or by court order."

[62] The Applicants' position is consistent with Justice Groberman's discussion in *McMillan.* After outlining the different options, he finds,

> [31] … the most expeditious, economical, and appropriate procedure, it seems to me, would have been to make an application to the Court under s. 10 of the *Judicial Review Procedure Act* in AltaStream's judicial review proceeding. A court could have evaluated the situation, and dealt quickly with the question of what should happen to the funds pending judicial review. …

[63] I agree with the Applicants' supplemental submission that the administrative scheme should not affect this Court's reasoning regarding whether to grant to stay. As the Applicants argue, the "focus should be on the grounds for review of the Tribunal Decisions, which are before the Court on judicial review": para. 9.

[64] I am not persuaded the higher threshold for a stay of an administrative action applies to decisions of the Director. Even though this is an application within the

underlying petition for judicial review and, as the Tribunal argues, s. 110 of the *ESA* applies indirectly to the Director, this does not change the fact the Director is not protected by the privative clause in s. 110.

[65] In any event, like Macintosh J. I find it makes little difference whether the higher threshold at the first part of the test survives *RJR MacDonald.* The parties agree the standard of review for questions of fact and law on the judicial review is patent unreasonableness. The burden to establish a decision is patently unreasonable is high. The strength of the case must be measured against this standard. As stated by Justice Ballance in *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109, aff'd 2009 BCCA 229 [*Victoria Times*]:

> [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 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.

[66] Consistent with Ballance J., more recent decisions have held that the standard of patent unreasonableness commands the highest level of deference from this Court: *Kostiuk v. Workers' Compensation Appeal Tribunal*, 2019 BCSC 363 at para. 18, relying on *Preast v. Workers' Compensation Appeal Tribunal*, 2015 BCCA 377 at para. 52. Given this deferential standard, the Applicants face a high burden to establish either a "strong *prima facie* case" or that there is "a serious question to be tried": *HEU* at para. 6.

[67] I am applying the "serious question to be tried" test to the Director's Decision. Nevertheless, the serious question to be tried threshold must be evaluated in light of the standard of review to be applied to the findings of fact and law.

[68] With this in mind, I turn to the grounds of review.

Grounds of Review

[69] Despite numerous alleged errors in the Decisions identified in the petition, in this application the grounds are framed as follows:

> [6] The Applicants rely on the grounds for judicial review of the Decisions, set out in the Petition, which established several serious issues to be tried.
>
> [7] Generally, the Applicants seek judicial review on the grounds that the Decisions violated the duty of fairness owed to them, and the Decisions were patently unreasonable because, *inter alia*, the Tribunal acted on the basis of wrong legal principles, failed to adequately consider the purposes of the relevant statutory framework, relied on erroneous interpretations of relevant case law, relied on erroneous and unreliable information, failed to consider relevant facts, failed to investigate contested facts, [and] demonstrated a closed mind.

[70] I will focus on the issues that were argued before me on this application.

[71] It appears the Applicants' primary concern with the merits of the Tribunal Decisions was the Tribunal's interpretation of "employment" under the *ESA*. The Applicants submit the Tribunal re-characterized the *ESA* as an open-ended grant of discretion, thereby imposing the *ESA* on all working relationships. They say that by not defining the employment relationship in issue, the Tribunal "supplanted" the law with administrative discretion. Finally, they say the Tribunal did not follow established principles of statutory interpretation by expanding the definition of employment beyond its common meaning.

[72] In their petition, the Applicants argue the Tribunal misinterpreted *Machtinger* and *Rizzo* as standing for the proposition that the *ESA* is intended to apply to as many people as possible — whether they are an employee or not —thereby sweeping every working relationship into an employment relationship. The Applicants sum up their position at Part 2, para. 14 as follows:

> [I]t is clear that the Tribunal set out to reach a certain outcome based on a fixed predisposition, and then tailored its reasoning to support that conclusion. The Tribunal is obviously predisposed to find that every relationship in which labour is used to earn an income is necessarily an employment relationship "for the purposes of the ESA".

[73] The Applicants also took issue with the Tribunal's approach to issue estoppel. They note the Tax Court in *Beach Place Ventures Ltd. v. Canada (Minister of National Revenue)*, 2019 TCC 24 [*Beach Place* TCC], found that Mr. Abadi, one of the Individual Complainants, owned and operated his own business. He was not an employee of Beach Place or Blacktop Cabs. They fault the Tribunal's explanation for coming to a different conclusion based on the different legislative contexts. The Applicants allege the Tribunal did so without any analysis or justification.

[74] Finally, the Applicants raised a number of natural justice and procedural fairness issues, particularly that they were denied an oral hearing and that the Tribunal was biased against the Applicants.

[75] I have reviewed the Tribunal Decisions. I focus on the reasons in the Reconsideration Decision which were extensive.

[76] I must first determine whether the Applicants have satisfied the first part of the test for a stay, as it is applied to questions of fact and law, and whether the Applicants, in all the circumstances, were treated fairly.

Review of Merits

[77] In order to determine whether the Applicants have established there is a serious question the Tribunal Decisions were patently unreasonable, or whether in all the circumstances the Applicants were treated fairly, I undertake a very limited review of the merits of the petition. I engage in a preliminary assessment of the merits only to determine whether the Applicants have met their burden under the first part of the test to obtain interlocutory relief. This analysis is not a summary disposition of the judicial review.

Findings of Fact and Law

The Tribunal's Interpretation of Employment under the ESA

[78] The reconsideration panel reviewed the Appeal Decision. The panel pointed out the *ESA* confers exclusive jurisdiction on the Tribunal to interpret and apply the

ESA. This includes deciding whether a worker is an employee for the purposes of the *ESA*. The reconsideration panel emphasized that different common law factors may have different weight depending on different statutory contexts: at paras. 42 and 55.

[79] The reconsideration panel noted, “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”: Reconsideration Decision at para. 19, citing *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 at para. 46.

[80] The reconsideration panel further explained the existence of an employment relationship “is not determined by way of the application of a test or ‘conception’ of employment, but rather by the application of a number of relevant factors”: Reconsideration Decision at para. 22. A key factor is the level of control the employer has over the worker's activities, which the delegate and the appeal panel considered. The delegate, appeal panel, and reconsideration panel also considered, the following factors:

- whether the worker provides their own equipment;
- whether the worker hires their own helpers;
- the degree of financial risk taken by the worker;
- the worker’s degree of responsibility for investment and management; and
- the worker's opportunity for profit in the performance of their tasks.

[81] The delegate concluded the Applicants did not “merely provide support services to taxi owners and drivers running their own businesses”, but rather they were “really a syndicate operating a single taxi business (i.e. Black Top and Checker Cabs)”. The reconsideration panel agreed with the appeal panel that the delegate applied the proper legal approach in determining whether there was an employment relationship between the Applicants and the Individual Complainants.

[82] The reconsideration panel relied on *Canwood* to establish the Tribunal is not "obliged to interpret the *ESA* harmoniously with the common law" and that the subjective intention of the parties is only one factor to be considered in determining whether there is an employment relationship: Reconsideration Decision at paras. 36 and 38.

Issue Estoppel and the Tax Case

[83] The Applicants argued the Tribunal should have come to the same conclusion as the Tax Court in *Beach Place* TCC regarding whether the Individual Complainants were employees. The reconsideration panel was not persuaded the appeal panel erred by distinguishing this federal authority. The reconsideration panel agreed the appeal panel could distinguish the authority on the basis that the Tax Court decided the issue of employment status under either the common law or a different statutory regime, whereas the Tribunal determines it under the *ESA*.

[84] The reconsideration panel explained that the delegate and the Tribunal considered the evidence through the lens of a particular statutory regime, as does a Tax Court judge. They each come to a conclusion with respect to whether there was an employment relationship for the purposes of that particular legislative context. As the Supreme Court of Canada stated in *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, an individual may be an employee in one statutory context but not in another.

[85] The Applicants argued *Beach Place* TCC is binding under the principle of issue estoppel. The reconsideration panel disagreed because the parties to the Tax Court decision were not the same as those before the Tribunal. Even if they were the same parties, the delegate's Determination, which found an employment relationship between the Individual Complainants and the Applicants, was decided before the December 5–6, 2018 Tax Court hearing which led to the issuance of *Beach Place* TCC on January 29, 2019. Moreover, the reconsideration panel noted issue estoppel is an equitable doctrine and its application is discretionary.

[86] In these circumstances, the reconsideration panel held that the Tribunal was not bound to follow *Beach Place* TCC.

Tribunal Misinterpreted Machtinger and Rizzo

[87] The Applicants argued the Tribunal interpreted the *ESA* to protect "as many people as possible", contrary to the decisions in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 [*Machtinger*]; and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 [*Rizzo*]. The reconsideration panel acknowledged the Supreme Court of Canada said in *Rizzo* that the object of employment standards legislation is "to protect the interests of as many employees as possible", not as many "people" as possible. However, the reconsideration panel noted the delegate referred to "people" as opposed to "workers" in one passage. The appeal panel was silent on this point. The reconsideration panel did not view this silence as a reviewable error because it was not necessary to decide the appeal. Reading the delegate's Determination as a whole, the reconsideration panel found he applied the proper legal approach to the facts before him.

[88] The reconsideration panel agreed with the Applicants that "the passages in *Rizzo* and *Machtinger* do not presume an employment relationship, where that characterization of a relationship is disputed: Reconsideration Decision at para. 34. The reconsideration panel repeated its earlier comments that the Tribunal must consider the facts and circumstances before it in light of the relevant factors such as control, ownership of tools and equipment, opportunity for profit, financial risk, and the permanency of the relationship. The reconsideration panel found this was the approach taken by the delegate and the appeal panel: Reconsideration Decision at para. 35.

Analysis

[89] The Applicants have not established a serious question to be tried that the Tribunal made any patently unreasonable findings in the Tribunal Decisions. The Tribunal provided articulate and well reasoned explanations in each area of concern.

I only summarized a small portion of the Reconsideration Decision. Many other explanations were provided.

[90] The patently unreasonable standard is onerous. The question is not whether this Court is persuaded by the Tribunal's rationale and reasoning. When deciding the merits of the judicial review, this Court must ask whether there is *any* rational or tenable line of analysis supporting the Tribunal Decisions. This a highly deferential standard. A decision should only be quashed if it is clearly irrational or "so flawed that no amount of curial deference can justify letting it stand": *Victoria Times* at para. 65.

[91] I see nothing that suggests the Tribunal or the delegate had a predisposition to "find that every relationship where individuals earn an income is necessarily an employment relationship 'for the purposes of the ESA.'" The Tribunal's interpretation of who is an employee under the *ESA* was based on the application of a number of relevant and well-known factors in employment law to the relationship before it. While the Tribunal came to a different conclusion than the Tax Court, different legal tests are applied in different statutory contexts. For example, in family law there is a longstanding principle that expenses properly deducted for income tax purposes may not be reasonable deductions when it comes to imputing income for the purpose of child support: *Wetmore v. Wetmore*, 2007 BCSC 1177.

[92] I am not determining the merits of the judicial review. However, "a decision is not patently unreasonable unless it is 'clearly irrational', 'evidently not in accordance with reason' or 'so flawed that no amount of curial deference can justify letting it stand'": *Cariboo* at para 24.

[93] While the Applicants may prevail at the end of the day when their arguments are fully developed on judicial review, this is not the test before me. Given the onerous standard of review and the relative strength of the Applicants' case, the Applicants have not persuaded me there is a serious question the Tribunal Decisions are patently unreasonable.

Procedural Fairness

[94] The Applicants argue the Tribunal failed to observe the principles of procedural fairness and natural justice. The procedural fairness argument is with respect to the fact that the delegate did not hold an oral hearing. According to the Applicants, the Tribunal also did not hold an oral hearing despite "numerous credibility issues". The petition stated "it cannot reasonably be argued that [the Applicants'] case is so devoid of merit that no hearing was required": Part 3, para. 61.

[95] The Applicants argue the Tribunal was biased in finding that as many people as possible are employees under the *ESA*.

[96] The Applicants also took issue with the fact the reconsideration panel found it unnecessary to hear from the other parties before making its decision. It only had the Applicants' submissions before it. The Applicants asserted the Tribunal "assumed the role of advocating against the arguments advanced by the Petitioners." This deprived the Applicants of the opportunity to respond to the "arguments and authorities employed by the Tribunal to justify summarily dismissing the Appeal and the Reconsideration": Part 3, para. 61.

[97] The Applicants state the fact that the Appeal Decision and Reconsideration Decision were 23 and 22 pages, respectively, means their submissions must have had merit.

[98] Lastly, the Applicants state they sought reconsideration in light of the evidence that was before the Tax Court in *Beach Place* TCC. They argue they were treated unfairly by not being permitted to adduce this new evidence.

Analysis

[99] The question before me is whether the Applicants have established there is a serious question they were treated unfairly. The natural justice issues must flow from the Tribunal Decisions, not the delegate's Determination. However, the delegate's

Determination informs the review of the Appeal Decision and Reconsideration Decision: *ATA*, s. 58(2)(b); *Canwood* at para. 91.

[100] Whether the Tribunal observed the principles of natural justice is not determined on the patently unreasonableness standard. It is determined regarding whether, in all of the circumstances, the Tribunal acted fairly: *ATA*, s. 58(2)(b); *Gichuru v. Palmar Properties Inc.*, 2011 BCSC 827 at para. 31.

[101] The principles of natural justice are procedural protections that ensure parties are afforded the right to know the case against them, the right to respond, and the right to have their case decided by an impartial decision maker. The content of the duty of fairness is variable and will depend on the circumstances of the particular case. The content varies with "the statutory, institutional and social context in question": *Cariboo* at para 13.

[102] The Applicants raise as an issue the length of the Tribunal Decisions. The likely reason the Tribunal Decisions were lengthy is due to the length of the Applicants' submissions. As stated in the Reconsideration Decision at para. 7: "The Applicants' reconsideration submission is 37 single-spaced pages in length... They have attached their 78-page appeal submission to it, as well as an excerpt from a transcript, and numbered this material consecutively as totalling 223 pages."

[103] In terms of the Applicant's argument the Tribunal was biased by finding that as many people as possible are employees, I find the Tribunal did not adopt this principle and set out the ratio in *Rizzo*. On a preliminary view of the evidence there was no evidence of bias.

[104] The Applicants take issue with the fact the Tribunal found it unnecessary to hear from the other parties. This is done when an adjudicator considers the appeal or review has no merit and does not put the applicants at a disadvantage. The Applicants' full, 223 page submission was before the reconsideration panel. The Applicants argue they were deprived of an opportunity to respond to the "arguments and authorities employed by the Tribunal" to justify summarily dismissing their

reconsideration. The Tribunal does not make arguments; it makes findings. There is no right to respond to the Tribunal's findings. Rather, the Applicants have the right to have the Tribunal Decisions judicially reviewed. They have filed a petition for judicial review.

[105] If, as the Applicants argue[2], the Tribunal relied on a number of authorities the Applicants were not given an opportunity to respond to, depending on the importance of those authorities to the core issues, this might raise an issue of unfairness. At the very least, this issue is not frivolous or vexatious.

[106] Regarding the Applicants' argument that they were entitled to an oral hearing, there is no automatic right to an oral hearing. This Court has determined that the Director or delegate can resolve issues of credibility without an oral hearing: *Canwood* at para. 135. The Court of Appeal has found this to be the case even where a party alleges fraud: *Cariboo* at para. 32. However, some decisions of the Tribunal have found the lack of an oral hearing results in unfairness: *C & W Salvage Ltd*., BC EST D103/12. As a result, I agree their concerns in this regard are not frivolous or vexatious.

[107] Lastly, the Applicants submit that Mr. Abadi's testimony before the Tax Court established that he seriously misled the delegate during the investigation. They say they should have been permitted to present this evidence. While new evidence is generally inadmissible on appeal, because it did not form part of the underlying record, I am also of the view this concern is not frivolous or vexatious.

[2] The Applicants state the following in the petition at para. 61:

> Because the Tribunal decided not to hear any submissions from other parties, it was not in a position of preferring the submissions of one party over the other. The result is that in its Decisions the Tribunal itself assumed the role of advocating against the arguments advanced by the Petitioners. Not only does this create reasonable apprehension of bias, it deprived the Petitioners of any opportunity to respond to the arguments and authorities employed by the Tribunal to justify summarily dismissing the Appeal and the Reconsideration (emphasis added).

[108] I find the Applicants have met their burden under this part of the test. They have satisfied this Court that their duty of fairness concerns are not frivolous or vexatious.

[109] I therefore need to consider the question of the balance of convenience, including the issue of irreparable harm.

Balance of Convenience and Irreparable Harm

[110] The balance of convenience requires a weighing of the harm to each party. This Court must consider the effect upon the parties of staying the administrative action, in light of the purposes of the legislation. I must determine, in all the circumstances, whether the stay is necessary. In making this assessment I must take public interest considerations into account: *RJR MacDonald* at 337; *Coast Mountain* at para. 19.

[111] One of the purposes of the *ESA* is to ensure employees receive the minimum wages and benefits to which they are entitled: s. 2(a). This does not mean every working person is an employee but, if they are, it is in the public interest to protect them through such legislation.

[112] The irreparable harm test is satisfied when the harm cannot be quantified in monetary terms or cured through damages: *RJR MacDonald* at 341. Here the harm is quantifiable at $135,000.

[113] The Applicants argue they need not demonstrate irreparable harm under this branch of the test. They submit the applicable test is whether “the balance of convenience favours granting or refusing to grant the stay in light of the public interest”: *Coast Mountain* at paras. 19–20, citing *Gloucester Properties Ltd. v. Her Majesty the Queen in Right of the Province of British Columbia* (1980), 20 B.C.L.R. 169. The issue is which party will suffer greater harm if the interlocutory relief is granted or denied.

[114] Despite their comments on the legal test, the Applicants argue there is irreparable harm. They argue there is no reasonable prospect they will successfully recover their economic losses if the Decisions are ultimately quashed. This is because the Applicants will simply receive a declaration. They argue because there is no parallel action in tort for making an invalid administrative law decision, this effectively immunizes the Tribunal and the Director from liability for damages in this matter: *Holland v. Saskatchewan*, 2008 SCC 42 at para. 9 [*Holland*].

[115] I agree the Tribunal and Director are not liable for damages: *Holland* at para. 9; *Black Top Cabs v. Passenger Transportation Board*, 2013 BCSC 1166 at para. 13. By the same token, the Applicants will not be required to pay damages to the Individual Complainants. The *JRPA* does not allow this Court to award damages even if the individual applicants are successful: *Taylor v. The Law Society of British Columbia*, 2010 BCSC 1098 at para. 61.

[116] That said, the Individual Complainants did not make submissions as to how the withholding of the funds would harm them or even cause them inconvenience. The Respondents took no position; they simply asked me to apply the correct test. Based on a lack of evidence from the Respondents, the Applicants have established it may be difficult to obtain monetary redress: *RJR MacDonald* at 348 and 350.

[117] I find the balance of convenience favours the Applicants' request for a stay of the Director's Decision. Given my decision in this regard, I need not consider the Applicants alternate argument requesting an order that the Tribunal and/or the Director and/or the Individual Complainants undertake to pay any and all losses or damages caused to the Applicants as a result of the Decisions if they are quashed.

Disposition

[118] The Applicants did not establish there is a serious question the Tribunal Decisions were patently unreasonable.

[119] The Applicants established there is a serious question they were treated unfairly and the balance of convenience favours granting the stay of the Director's Decision. I grant a stay of the Director's Decision to release the funds to the Individual Complainants on this basis until a decision is rendered after the hearing of the petition.

"D. MacDonald J."