IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gorenshtein v. British Columbia (Employment Standards Tribunal),* 2013 BCSC 1499

Date: 20130819
Docket: S130604
Registry: Vancouver

Between:

Tatiana Gorenshtein and ICN Consulting Inc.

Petitioners

And

Employment Standards Tribunal, Director of Employment Standards, Maria Tagirova, Anna Baranova

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraphs 1 and 3 on August 26, 2013

Before: The Honourable Madam Justice Harris

On judicial review from: the Director of Employment Standards, dated May 3, 2012, ER#123-583 and the Employment Standards Tribunal, dated September 27, 2012, BC EST #D101/12 and November 27, 2012 BC EST #RD128/12

Reasons for Judgment

Appearing on her own behalf:	T. Gorenshtein
Counsel for the Respondent, Employment Standards Tribunal:	E. Miller
Counsel for the Respondent, Director of Employment Standards:	M. J. Alman
Counsel for the Respondents, Maria Tagirova and Anna Baranova:	A. L. Lim
Counsel for the Attorney General of British Columbia:	J. M. Walters

Place and Date of Trial/Hearing:	Vancouver, B.C. June 19 - 20, 2013
Place and Date of Judgment:	Vancouver, B.C. August 19, 2013

Introduction

[1] In this case the Petitioners, ICN Consulting Inc. ("ICN") and Tatiana Gorenshtein, seek judicial review of a determination of the delegate of the Director of Employment Standards (the "Director") dated May 3, 2012, and two decisions of the Employment Standards Tribunal (the "Tribunal") dated September 27, 2012, and November 27, 2012.

[2] The Petitioners ask this Court to quash the findings of the Director that ICN operated as an employment agency without a valid employment agency licence contrary to s. 12 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*], and charged a fee to persons seeking employment contrary to s. 10 of the *ESA*. The Petitioners also ask the Court to quash the decisions of the Tribunal refusing to extend time for filing an appeal of the Director's determination to the Tribunal.

Background

[3] The Petitioner Tatiana Gorenshtein is an immigration consultant who provides services, through ICN, to persons seeking to come to Canada. Ms. Gorenshtein is authorized under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*], to represent such persons in connection with proceedings or applications under the *IRPA* and to charge a fee for her services. Ms. Gorenshtein and her husband, Michael Gorenshtein, are the owners and directors of ICN.

[4] The individual respondents, Maria Tagirova and Anna Baranova, entered into agreements with ICN for services in connection with their coming to Canada under the federal government's Live-In Caregiver Program (the "LCP"). Live-in caregivers are individuals who are qualified to provide care for children, elderly and disabled persons. To hire a foreign live-in caregiver, an employer must submit, among other things, an application for a Labour Market Opinion and a signed employment contract with the caregiver to Human Resources and Skills Development Canada.

[5] A foreign caregiver must apply for a work permit from a Canadian visa office overseas before entering Canada. In order to apply for a work permit under the LCP,

a foreign caregiver must have a copy of a positive Labour Market Opinion issued to the caregiver's employer in Canada, and a signed written employment contract with the employer.

[6] The contracts between ICN and Ms. Tagirova and Ms. Baranova provided that they would each pay $500 upon signing the service contract; $1,000 upon receiving the Labour Market Opinion; and three instalments of $500 upon their arrival in Canada - for a total payment of $3,000 USD. They also signed a promissory note in favour of ICN.

[7] ICN also entered into a service agreement with two employers, who wished to hire caregivers. Each employer paid $750 upon signing the agreement with ICN.

[8] Ms. Tagirova and Ms. Baranova paid the initial installments to ICN. However, after they arrived in Canada in 2008 to work as live-in caregivers, they became aware of the provisions of the *ESA* and, specifically, the provisions prohibiting the charging of fees for information about employers and obtaining employment. On the basis of their belief that the fees were impermissible under the *ESA*, they refused to pay further installments to ICN. They also filed complaints with the Director claiming that ICN charged them fees to provide information about employers or to obtain employment for them, in contravention of ss. 10 and 12 of the *ESA*.

Initial Determination by the Director of Employment Standards

[9] On December 21, 2009, a delegate of the Director issued a determination concluding that ICN contravened ss. 10 and 12 of the *ESA*. That decision was appealed to the Tribunal, which decided on May 13, 2010 that the decision of the delegate should be set aside for a breach of procedural fairness in failing to provide ICN with certain documents. The Tribunal directed the complaints be referred back to the Director for a new investigation and hearing.

[10] It took a considerable amount of time to conclude the new investigation and hearing. The determination of the Director was issued two years after the Tribunal had referred the matter back to the Director.

Provincial Court

[11] In the meantime, on June 21, 2010, Ms. and Mr. Gorenshtein filed separate civil claims in Provincial Court against Ms. Tagirova and Ms. Baranova on behalf of ICN, seeking the balance of the monies it claimed were owing under their agreements. The civil claim against the Defendant, Ms. Tagirova, was heard by Justice of the Peace Armstrong (as he then was) on September 10, 2010, through a simplified trial process. He issued judgment on October 19, 2010, indexed as *Gorenshtein and ICN Consulting Inc. v. Tagirova*, 2010 BCPC 0384.

[12] At the outset of his reasons for judgment, the judge referred to the proceedings before the Director which had been initiated by Ms. Tagirova to recover fees she had paid to ICN, at paras. 8-10:

> The Defendant complained to the Director Employment Standards (herein the "Director") alleging that the Claimant was in breach of Section 74 of the Employment Standards Act (herein the "Act") by charging a fee for providing information about employment. After an investigation of that complaint, the Director's delegate concluded that the fee charged to the Defendant was in contravention of Section 10 of the Act and that the Claimant was operating as an employment agency without a valid employment agency licence thereby contravening section 12 of the Act.
>
> The claimant successfully appealed the delegate's decision and the Director's determination was cancelled and the Defendant's complaints were referred back to the Director of Employment Standards for a hearing or new investigation by a different delegate.
>
> The claimant then commenced this proceeding on June 21, 2010. The investigation by a new delegate of the Director has not proceeded.

[13] The judge then proceeded to consider the claim before him and noted that counsel for Ms. Tagirova admitted the non-payment of the balance outstanding but asserted that the contract for services breached s. 10 of the *ESA*. Section 10 of the *ESA* provides that:

> 10 (1) A person must not request, charge or receive, directly or indirectly, from a person seeking employment a payment for
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> (a) employing or obtaining employment for the person seeking employment, or
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> (b) providing information about employers seeking employees.

> (2) A person does not contravene this section by requesting, charging or receiving payment for any form of advertisement from the person who placed the advertisement.
>
> (3) A payment received by a person in contravention of this section is deemed to be wages owing and this Act applies to recovery of the payment,

[14] Ms. Tagirova claimed that because the contract was prohibited under s. 10, it was illegal and that the illegality barred ICN's right to recover the balance of the fees and also entitled Ms. Tagirova to the return of fees already paid. She asserted that the "Contract was not solely for 'immigration consulting services' but for 'employment recruitment services' … bundled together for a fee".

[15] The judge rejected Ms. Tagirova's argument based upon the terms of the contract between ICN and the Defendant, and between the ICN and the employer, at paras. 24 and 25:

> It is clear that the words in the Contract, in light of the process wherein the Immigration authorities required a Labour Market Opinion (arranged by the Claimant) and an offer of employment from a Canadian employer as prerequisites to obtaining a visa for the Defendant, were not intended to mean that the Claimant was charging a fee to obtain employment for the Defendant. The relevant words of the Contract "for the purpose of obtaining a labour contract," do not imply that the Claimant's charges were "for obtaining employment for the person seeking employment".
>
> In the context of this rather complicated procedure for obtaining a visa for the Defendant, I conclude that the charges for services referred to the Defendant under the Contract were not charges that contravened Section 10 of the Act but were truly charges for consulting services ancillary to the object of obtaining a visa for the Defendant under the Live-in-Caregiver Program. Obtaining a labour contract was a necessary step in the immigration process and, in the circumstances, was not synonymous with obtaining employment.

[16] Accordingly, the court found ICN did not breach s. 10 of the *ESA* and the contract was enforceable against Ms. Tagirova. He issued judgment against her for $1,524.30 together with Court Order interest from November 2008 and costs of $176, to be paid on or before December 31, 2010.

[17] The judgment of the Provincial Court against Ms. Tagirova was not appealed. The claim against Ms. Baranova was adjourned by Judge Chen on December 22, 2010.

Second Determination by the Director of Employment Standards

[18] The determination of the Director's delegate was subsequently rendered May 3, 2012. The Director again found in favour of Ms. Tagirova and Ms. Baranova. The Director provided extensive reasons for the determination. The essential findings may be briefly summarized as follows.

1. The Director found that ICN operated an "employment agency" without a valid employment agency licence, contrary to s. 12 of the *ESA*. The Director rejected ICN's claim that it provided solely immigration related services. The Director said it was "impossible to rationally separate" the role played by ICN in assisting the complainants with their eventual employers from any services which are permissible immigration services, and that ICN bore the risk of failing to make this distinction.

2. The Director found that ICN charged a fee to individuals seeking employment contrary to s. 10 of the *ESA*. The Director concluded the evidence clearly indicates that "at least some (if not the main) services ICN provided fall within the scope of providing assistance with finding employment and/or information about employers seeking employees".

3. The Director rejected ICN's claim that the *ESA* did not apply because its business fell within federal jurisdiction. The Director said that although immigration may fall within federal jurisdiction, nothing in the investigation or determination purports to regulate ICN's immigration work, apart from those aspects of its business that have been found to be "employment agency work."

4. The Director also determined it should not stop investigating the complaints despite the proceedings and judgment of the Provincial Court. The Director said that in the "unique circumstances of this case", neither the doctrine of estoppel or *res judicata* should be applied. As the exclusive jurisdiction over the enforcement of the complainants' potential s. 10 entitlements rests with the Director, the court "should not have chosen to

exercise the authority to review ICN's contract and make any award flowing from any decision about the application of section 10 of the Act to that contract."

5. The Director declined to dismiss the complaints for being frivolous or vexatious, finding there was no convincing evidence that the complaints lacked merit.

6. The Director also declined to conclude there was not enough evidence to prove the complaints.

[19] In light of its findings, the Director issued two $500 fines to ICN for the contravention of ss. 10 and 12 of the *ESA*, and directed it to repay of the amount of monies initially claimed by the complainants falling within the six month statutory recovery period, except for the monies paid by Ms. Tagirova to ICN pursuant to the Provincial Court order.

Appeal to Employment Standards Tribunal

[20] ICN sought to appeal the determination of the Director to the Tribunal, as is provided in the *ESA*. The appeal period was stated in the Determination of the Director to expire at 4:30 pm on June 11, 2012. Ms. Gorenshtein asserts that she called the Tribunal's office on May 31, 2012, and spoke to Emma McLoughlin, the Tribunal's Registry Administrator, to advise that she was intending to appeal the Director's Determination but, due to upcoming surgery, she might not be able to file the appeal before the deadline. Ms. Gorenshtein says Ms. McLoughlin took Ms. Gorenshtein's name and file number and said that she would "keep an eye on her".

[21] Ms. McLoughlin's evidence is that she remembers speaking with Ms. Gorenshtein prior to June 11, 2012. She also recalls advising Ms. Gorenshtein that she would keep an eye out for any documents Ms. Gorenshtein would be submitting. Ms. McLoughlin does not recall the exact date of the conversation.

[22] Ms. Gorenshtein faxed a letter to the Tribunal on June 11, 2012, to inform the Tribunal of ICN's intention to appeal the Determination of the Director. She advised the Tribunal that she was the person responsible for preparing the appeal and requested an extension of time to file the appeal due to her having had surgery on June 4, 2012. She said that due to the surgery and effects of the narcotic pain medicine she had been prescribed (which caused drowsiness and dizziness), she was unable to complete the work on the appeal and submit it on time. She said that she was willing to do so as soon as possible after her recovery.

[23] Ms. McLoughlin wrote to Ms. Gorenshtein by letter dated June 11, 2012, confirming a telephone conversation earlier that day and her receipt of Ms. Gorenshtein's letter. Ms. McLoughlin enclosed the Appeal Form and Guide to the Appeal Process and indicated that Ms. Gorenshtein should attach to the Appeal Form, a full copy of the Determination being appealed, detailed reasons for the appeal and detailed reasons why a late appeal is being filed. Ms. McLoughlin did not specify any time frame for submitting this information, although she did "confirm that the Tribunal is not proceeding with an appeal at this time."

[24] Ms. Gorenshtein says that she was told that she had to submit all of the material for the appeal at the same time. On July 17, 2013, Ms. Gorenshtein submitted a completed Appeal Form, along with a lengthy submission detailing the reasons for the appeal. She also submitted further information on the reasons for requesting to extend the time period for filing the appeal, including a letter from her family physician, Dr. Leong-Sit, dated June 18, 2012, confirming that Ms. Gorenshtein underwent surgery on June 4, 2012, and was prescribed a narcotic (Percocet). He then stated:

> For medical reasons as noted above, she needs to be excused from not being able to deliver her appeal to the Tribunal on time on June 11, 2012.
>
> She is still recuperating from surgery and needs pain medication which can cause nausea, drowsiness and dizziness. Therefore, time wise, once she has recovered from the surgery in the next several weeks, she should be able to complete and submit the appeal.

[25] In respect of her request for an extension of the time for filing an appeal, Ms. Gorenshtein submitted there is a strong *prima facie* case in favour of ICN for various reasons, including the "conflict between the Director's Determination and the Provincial Court's Decision on the same matter, jurisdictional and other complex legal issues involved in the case".

[26] The submission on the merits of the appeal focussed on the jurisdiction of the Director over immigration consultants authorized under the *IRPA*; errors of law made by the Director; errors in the assessment of credibility; and failure to observe the principles of natural justice in conducting the investigation.

Decision of the Employment Standards Tribunal

[27] After inviting and receiving submissions in relation to the application to extend the appeal period, Tribunal Member Roberts issued her decision on September 27, 2012. It dealt only with the issue of whether the Tribunal should exercise its discretion under s. 109(1)(b) of the *ESA* to "extend the time period for requesting an appeal even though the period has expired".

[28] The Tribunal decided that it should not exercise its discretion and extend the time period for requesting an appeal. It referred to the criteria which had been established in the *Niemisto* case (BC EST #D099/96):

> 1. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
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> 2. there has been a genuine, and on-going *bona fide* intention to appeal the Determination;
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> 3. the respondent party, as well as the Director, has been made aware of this intention;
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> 4. the respondent party will not be unduly prejudiced by the granting of an extension; and
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> 5. there is a strong *prima facie* case in favour of the appellant.
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> These criteria are not exhaustive.

[29] The Tribunal noted that although Ms. Gorenshtein "says she underwent a surgical procedure on June 4, 2012", she did not give any explanation for ICN's

failure to appeal before that day. The Tribunal also noted that ICN has two directors, either of whom could have prepared the appeal or, alternatively, ICN could have engaged counsel or sought assistance in preparing the appeal.

[30] Further, the Tribunal said ICN had not demonstrated a genuine and ongoing *bona fide* intention to appeal by the statutory deadline as, although Ms. Gorenshtein asserts that she telephoned the Tribunal on May 31, 2013, there was "no evidence" ICN contacted the Tribunal to indicate its intention to appeal the Determination until June 11, 2012.

[31] On the issue of whether the respondents would be unduly prejudiced, the Tribunal said it was unable to find there will be undue prejudice given that much of the delay in the case is unrelated to this appeal.

[32] The Tribunal then referred to s. 112(1) of the *ESA*, which provides that a person may appeal a determination on the grounds:

> (a) the director erred in law;
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> (b) the director failed to observe the principles of nature justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

[33] The Tribunal concluded that it was not persuaded that ICN had a strong *prima facie* case on any of the statutory grounds of appeal and noted that the Appellant has "the burden of demonstrating one of the grounds of appeal". It said "ICN has failed to provide any compelling reasons why the deadline should be extended" and, therefore, denied ICN's application.

Reconsideration Decision of the Employment Standards Tribunal

[34] Ms. Gorenshtein, on behalf of ICN, sought reconsideration of the decision of the Tribunal pursuant to s. 116 of the *ESA,* which provides that:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (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.
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> (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
>
> (3) An application may be made only once with respect to the same order or decision.

[35] On reconsideration, Tribunal Member Thornicroft considered whether the Tribunal had erred in refusing to grant ICN's application to extend the appeal period. He referred to his discretionary authority under s. 116 of the *ESA* and the decision of the Tribunal in *Director of Employment Standards and Milan Holdings Inc. et al.*, BC EST #D313/98. In that decision the Tribunal established a two-stage process for reconsideration applications: first, whether the application is timely, is obviously frivolous or is simply an attempt to re-weigh issues of fact already determined and, second, whether the application raises a serious question of law, fact or principle, or suggests that the decision should be reviewed because of its importance to the parties and/or because of its potential implications for future cases.

[36] After reviewing Tribunal Member Roberts's decision, he commented that she had more than sufficient reasons for her decision.

[37] He rejected the ICN's contention that Ms. Gorenshtein was the only person who could have dealt with the matter and said that this assertion stands in contrast to "the fact that Mr. Gorenshtein was involved in the matter during the delegate's investigation (see delegate's reasons, page R9)".

[38] Further, he said the fact that Ms. Gorenshtein claimed she was "trying hard to submit the appeal before her surgery date" does not explain why her appeal materials could not have been completed in the one month period prior to her surgery. He notes that although her appeal materials were extensive, they were largely a "repackaging" of previous arguments.

[39] With regard to ICN's claim that the initial decision of the Tribunal did not deal with her arguments in relation to jurisdiction and whether the Determination was inconsistent with the Provincial Court judgment, Tribunal Member Thornicroft noted

the Tribunal was not adjudicating the appeal on its merits but was considering the narrower issue of whether there were grounds for an extension.

[40] On the merits of the appeal, Tribunal Member Thornicroft said:

> With respect to the merits, I agree with Tribunal Member Roberts that ICN's appeal is not, on its face, meritorious. In my view, the Supreme Court of Canada's decision in *Law Society v. Mangat*, [2001] 3 S.C.R. 113 (discussed in the delegate's reasons at pages R29 - R 30) is a complete answer to ICN's jurisdictional argument. ICN's business operations as an employment agency operating in British Columbia under the provisions of the *Act* do not conflict with the federal *Immigration Act* (the statute principally governs ICN's operations as an immigration consulting firm). I consider the B.C. Provincial Court decision of Armstrong, J.P. in the *ICN v. Tagirova* matter to have been wrongly decided as it stands contrary to the B.C. Court of Appeal decision in *Macaraeg v. E Care Contact Centers Ltd.,* 2008 BCCA 182, (leave to appeal to the Supreme Court of Canada refused): 2008 Can LII 537990) and that appears to be the view of the Provincial Court Chen who refused to proceed with the small claims court trial in the *ICN v. Baranova* matter.

[41] Additionally, he noted that there was no cogent proof in respect of ICN's allegation that certain evidence was fabricated.

[42] In conclusion, Tribunal Member Thornicroft said:

> Finally, and perhaps most importantly, ICN has simply failed to provide a credible explanation for its failure to file a timely appeal.

[43] Accordingly, he concluded that ICN's s. 116 application did not pass the first threshold of the *Milan Holdings* test.

Decision on Judicial Review

[44] The Petitioners seek to review the decisions of both the Director and the Tribunal. The focus of the Petitioners' claim is that, as immigration consultants, they are federally regulated and not subject to regulation by the Director or the Tribunal pursuant to the *ESA*. The Petitioners say that the Director erred in law by finding that the *ESA* applied. They also claim that the Director and Tribunal acted unfairly and failed to observe the principles of natural justice by failing to provide adequate reasons, and by not adjudicating the jurisdictional question, given the importance of the case to the petitioners and its potential implications for future cases.

[45] The Respondents assert that only the Tribunal's decisions are properly the subject of judicial review. They rely on the scheme of the *ESA*, which provides that the Tribunal has exclusive jurisdiction to review the Director's determinations, and recent decisions of this Court which have held that it is the Tribunal's decisions and not the underlying determination which are subject of judicial review, including *Canwood International Inc. v. Bork*, 2012 BCSC 578. In that case, Mr. Justice Harris considered an application for judicial review of the Director's determination as well as the appeal to the Tribunal and the reconsideration by the Tribunal of that appeal. He held that:

> [17] It is clear that the original Director's determination is not the subject of this judicial review. The Legislature has put in place a statutory scheme providing for appeals of determinations by the Director. That process is protected by a privative clause. As Mr. Justice Pitfield said in *Laguna Woodcraft (Canada) Ltd. v. British Columbia (Employment Standards Tribunal)*, [1999] B.C.J. No. 3135 (S.C.) [*Laguna*] at para. 11:
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> > Under the Employment Standards Act an appeal lies to the Tribunal from any decision made by the director. Judicial review, in the ordinary course, is not available where there is an appeal to higher authority. The judicial review should be pursued, where appropriate and necessary, in relation to decisions of the Tribunal and not of the director.
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> [18] The particular significance of the presence of a privative clause was noted by Mr. Justice Davies in *Gulf Coast Materials Ltd. v. Helgesen*, 2010 BCSC 1169. In that case, the petitioner had pursued judicial review of the Director's original determination, but abandoned it during argument. The Court noted at para. 86:
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> > [86] Abandonment of direct judicial review of the Director's Determination and the Director's Recalculation Determination by Gulf Coast was not gratuitous. It was mandated by application of s. 110(1) of the *Employment Standards Act*, which provides:
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> > > 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.

[46] The Court of Appeal in *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung*, 2011 BCCA 527, also confirmed that only the reconsideration decision is properly under review in administrative schemes which

include a power to make a first instance decision and a reconsideration power. In that case, the Labour Relations Board (the "LRB") was prepared to concede that the judicial review of the reconsideration panel's decision had to include the question of whether the original panel's decision in respect of the duty of fair representation was patently unreasonable. The Court of Appeal held that the LRB's concession was contrary to its privative clause and to the deference owed to the LRB:

> [33] I shall return to the question of reasons, but, in my view, the Board's understandable reluctance to be obliged to give reasons is not sufficient grounds to open original decisions to court intervention by way of judicial review. While a party may wish to have an original decision and the reasons for it reviewed judicially, the Legislature has limited the scope of review. It is not for the court to determine whether the original decision is patently unreasonable, unfair or incorrect. If the Board concludes the original decision is not inconsistent with the principles expressed or implied in this *Code* or in any other Act dealing with labour relations, a court on judicial review is entitled to determine whether that conclusion is patently unreasonable, unfair or incorrect. If it is not, there the matter should end.
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> [34] In my view, this approach to judicial review is consonant with the scheme of the legislation. It reflects the highly specialized jurisdiction of the Board and leaves the Board, rather than the court, to determine matters at the core of industrial relations. This case illustrates the point.
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> …
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> [46] Recognizing that generally an applicant must exhaust internal remedies by seeking leave for reconsideration suggests that the Legislature intended to limit court intervention out of deference to the highly specialized jurisdiction of the Board. In my view, if the Board concludes that an original decision is not inconsistent with the principles of the *Code* and this conclusion is not patently unreasonable, unfair or incorrect, it is not consistent with the obligation on an applicant generally to exhaust internal remedies and makes little sense for a court to embark on a judicial review to determine whether the original decision itself was correct, unfair or patently unreasonable.

[47] I note that while the Court concluded that judicial review is properly taken only of the reconsideration decision, it commented that the original panel's decision would "inform" the court's review.

[48] Based upon this authority, I find that the decisions under review in the instant case are the decisions of the Tribunal not to extend the time period for ICN to file an appeal of the Director's determination. The decision of the Director is not under review, although it may inform the review.

I also find that the review should be based on the record before the Tribunal, as per *Canwood* at paras. 9-14.

Standard of Review

[49] Before addressing the issues raised in this appeal, I must address the appropriate standard of review to be applied in reviewing decisions of the Tribunal. By virtue of s. 103 of the *ESA*, s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, applies to the Tribunal. Section 58 of the *Administrative Tribunals Act* provides that:

> **58** (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
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> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
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> (a) a finding of fact or law or an exercise of discretion 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,
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> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
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> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
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> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
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> (b) is exercised for an improper purpose,
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> (c) is based entirely or predominantly on irrelevant factors, or
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> (d) fails to take statutory requirements into account.

[50] The Tribunal's enabling legislation contains a privative clause in s. 110 of the *ESA*, which gives it exclusive authority to hear and determine matters within its jurisdiction:

> 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.

[51] In *Kerton v. Workers Compensation Tribunal*, 2011 BCCA 7, the Court of Appeal, following *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, clarified that the approach to determine if a matter is within the exclusive jurisdiction of a tribunal is to "examine whether the privative clause covers the 'matters' in issue" (at para. 29). The matter in issue in *Kerton* was, as in this case, a decision not to extend time to file an appeal. The Workers' Compensation Appeal Tribunal ("WCAT") has a similar privative clause to the Employment Standards Tribunal. Section 254 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492, provides that:

> 254 The appeal 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 determine under this Part…

[52] The Court held that the language of the privative clause in the *Workers Compensation Act* manifestly places the decision of whether to extend time to appeal within the exclusive jurisdiction of WCAT. Accordingly, the Court concluded the learned chambers judge had erred in finding that the WCAT decision raised a jurisdictional issue reviewable on the standard of correctness.

[53] Based on this legislation and this jurisprudence, it is clear that the standard which applies to the decisions of the Tribunal on the timeliness of the appeal is subject to review on the standard of patent unreasonableness.

Patent Unreasonableness

[54] The question of what constitutes a patently unreasonable decision has been the subject of much comment in administrative law. It is apparent that the standard affords a high degree of deference to a tribunal protected by a privative clause. The meaning of "patently unreasonable" was recently reviewed by the Court in the decision of Mr. Justice Smith in *B.C. Ferry and Marine Worker's Union v. B.C. Ferry*

Services Inc., 2012 BCSC 663, in the context of its application under the *Administrative Tribunals Act:*

> [24] Although *Dunsmiur* has eliminated the patently unreasonable test as a separate standard at common law, that does not alter the standard of review set out in the ATA. The Court of Appeal said in *Auyeung*:
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> > [70] In *Viking Logistics Ltd. v. British Columbia (Workers' Compensation Board)*, 2010 BCSC 1340, 14 B.C.L.R. (5th) 176 Madam Justice H. Holmes had this to say:
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> > > ... 'patently unreasonable', in s. 58(2)(a) of the *ATA*, is not to be simply replaced by 'reasonable', because such a substitution would disregard the legislator's clear intent that the decision under review receive great deference. Standing at the upper end of the 'reasonableness' spectrum, the 'patently unreasonable' standard in s. 58(2)(a) nonetheless requires that the decision under review be defensible in respect of the facts and the law. It is the inquiry into whether the decision is so 'defensible' that the decision will enjoy the high degree of deference the legislator intended.
> >
> > [71] That is, while an analysis under the standard of patent unreasonableness in this case includes consideration of whether the Board's decision was defensible in respect of the facts and the law, this does not dilute the considerable deference to which Board decisions are entitled.
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> [25] In *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, the Court of Appeal referred to a number of formulations of the patently unreasonable standard, including:
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> - "Patently unreasonable" means openly, clearly, evidently unreasonable: *Canada (Director of Investigation and Research) v. Southam Inc.,* [1997] 1 S.C.R. 748.
> - The review test must be applied to the result not to the reasons leading to the result: *Kovach v. British Columbia (Workers' Compensation Board)* (2000), 184 D.L.R. (4th) 415 (S.C.C.)
> - A decision based on no evidence is patently unreasonable**,** but a decision based on insufficient evidence is not: *Douglas Aircraft Co. of Canada Ltd. v. McConnell*, [1980] 1 SCR 245, and *Board of Education for the City of Toronto v. Ontario Secondary School Teachers' Federation et al* (1997), 144 D.L.R. (4th) 385 (S.C.C.).
>
> [26] In *Office & Professional Employees' International Union, Local 378 v. British Columbia Labour Relations Board*, 2001 BCCA 433, the Court said:
>
> > [28] It has been said, and correctly, that the standard to be applied here is one of patent unreasonableness. To my mind the practical way to address that standard is to first look at the section in issue, then to read the decisions in issue of the Labour Relations Board and finally

> to ask oneself whether anything leaps out that indicates a lack of reason. Nothing leapt out here.

[55] In the instant case, the decision of the Tribunal not to extend time was a decision within the exercise of its discretion, such that s. 58(3) of the *Administrative Tribunals Act* applies. Under s. 58(3), a decision will be patently unreasonable if the discretion is exercised in bad faith, is exercised for an improper purpose, is based entirely or predominately on irrelevant factors, or fails to take statutory requirements into account. This provision reflects the administrative law principles referred to in the *B.C. Ferry* case.

Adequacy of Reasons

[56] The Petitioner claims that the reasons of the Tribunal breached the rules of natural justice in failing to explain the evidence relied on, the findings made, and how the conclusions were reached. Although the Petitioners frame these claims as separate grounds for appeal, counsel for the Respondents correctly point out that any issue with respect to the adequacy of the reasons is now to be considered as part of the assessment of the reasonableness of the decision under review. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the Supreme Court of Canada "clarified that the 'adequacy' of reasons is not an independent or stand-alone basis to set aside or quash a decision of an inferior tribunal": *Phillips v. Workers' Compensation Appeal Tribunal,* 2012 BCCA 304 at para. 32. The adequacy of the reasons of the Tribunal must be considered as part of the overall analysis of whether the decisions are patently unreasonable.

Are the Tribunal's decisions patently unreasonable?

[57] As noted above, the Tribunal has established criteria to provide guidance in determining whether or not to extend the time period for appeals from decisions of the Director. The criteria, which are stated not to be exhaustive, are outlined in its decision in *Niemisto*. While the criteria are not inappropriate and are clearly within

the authority of the Tribunal to establish, in my view the application of the criteria by the Tribunal in this case cannot be sustained on any reasonable basis.

[58] One of the criteria for the Tribunal is whether there is a strong *prima facie* case in favour of the appellant on any of the grounds of appeal. In Tribunal Member Roberts' decision, she does not review the merits of ICN's position as it relates to this aspect of the criteria. She simply says that she is "not persuaded" that ICN has a strong *prima facie* case and describes the Director's decision as being "well-reasoned and thorough" and as having "reviewed the court decisions and addressed all of ICN's issues". She observes that ICN's "extensive and comprehensive arguments" appear to be nothing more than a restatement of its previous position. She does not explain on what basis she concludes that ICN did not have a strong *prima facie* case. She makes no comment on the jurisdictional issue raised by ICN or the effect of the Provincial Court judgment - although those arguments were central to ICN's appeal.

[59] In addressing the merits of ICN's appeal, Tribunal Member Thornicroft says that he agrees with member Roberts that it is "not, on its face, meritorious". He refers to the Supreme Court of Canada's decision in *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, and states it is a "complete answer to ICN's jurisdictional argument. ICN's business operations as an employment agency operating in British Columbia under the provisions of the *Act* do no conflict with the federal *Immigration Act".* No further explanation on this point is provided.

[60] In my view, the *Mangat* case does not answer the question of whether there is a conflict between the *ESA* and the *IRPA* as it pertains to fees charged by immigration consultants, and to the extent that it addresses the legislative scheme affecting immigration consultants, it *may* support the position of ICN.

[61] At issue in *Mangat* was whether immigration consultants, who were not authorized to practise law in the Province, could represent persons and charge a fee for their services before the Immigration and Refugee Board (the "IRB"). The Supreme Court of Canada said that while the matter of representation by counsel

before the IRB has both federal and provincial aspects, in this case there was a conflict between the *IRPA* and the *Legal Professions Act*, S.B.C. 1998, c. 9, such that dual compliance with both statutes would be impossible without frustrating Parliament's purpose in establishing the IRB. The Court held the *IRPA* prevailed over the *Legal Professions Act*, and, therefore, non-lawyers could represent persons before the IRB and were entitled to collect a fee for purposes in connection with this service as provided under the federal legislative scheme.

[62] Although Tribunal Member Thornicroft may well be correct in his conclusion that the relevant provisions of the *ESA* and *IRPA* are generally not in conflict with one another, in the instant case there was a finding by the Director that because she could not separate out or proportion the fee charged by ICN for permissible immigration services provided and the impermissible fee paid for employment agency related services, Ms. Tagirova and Ms. Baranova were entitled to the full amount claimed. In so doing, the Director effectively disallowed fees which she recognized were permissible under the *IRPA*. Viewed from this perspective, the Director's decision and the Tribunal's endorsement of it, are *prima facie* inconsistent with the finding in *Mangat* that the Province could not preclude immigration consultants from charging fees for services authorized under the *IRPA.*

[63] It may ultimately be concluded that the provisions of the *ESA,* which prohibit charging fees to persons seeking employment and those which require licensing of employment agencies, can be reconciled with the provisions of the *IRPA,* which allow authorized immigration consultants to charge fees for immigration related services. However, this conclusion requires an analysis of the relevant federal and provincial legislative schemes and a determination that dual compliance is possible. There is no indication from the decisions of the Tribunal Members that they fairly considered the significance of the Court's decision in *Mangat* as it applied to a consideration of the merits of ICN's appeal.

[64] It is also significant that in considering the merits of ICN's position, Tribunal Member Thornicroft said that the Provincial Court judgment of Justice of the Peace

Armstrong in *ICN Consulting Inc.* was "wrongly decided" and "contrary to the B.C. Court of Appeal decision in *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182". In my view, these comments demonstrate a misunderstanding of the import of both the *Macaraeg* and the Provincial Court judgments.

[65] In *Macaraeg*, the Court of Appeal considered whether the overtime provisions of the *ESA* are incorporated, as a matter of law, as terms of non-union employment contracts and whether entitlement to overtime in accordance with such provisions can be pursued by civil court action. The Court overturned the chambers judge, finding that she erred in "concluding that rights granted by employment standards legislation are incorporated into employment contracts a matter of law regardless of the intention of the parties". The Court of Appeal found that the payment of overtime is a statutorily-conferred right that is *not* conferred at common law, and which, therefore, cannot be enforced through a civil action. The Court noted that, had the cause of action been conferred by common law, the right of parties to commence civil actions to enforce their common law rights was preserved under s. 118 of the *ESA.*

[66] In *ICN Consulting Inc.*, Justice of the Peace Armstrong was not considering a claim to enforce statutorily-conferred rights through a civil action, as was the case in *Macaraeg.* Rather, he was considering a contractual claim by ICN for monies owing for services provided. He clearly had jurisdiction to consider a claim for breach of contract and, in the course of doing so, had the authority to interpret any applicable provincial legislation, including the *ESA*. After considering the relevant provisions of the *ESA* and in the absence of any Determination by the Director regarding the Defendant's complaints, he concluded that the fee charged by ICN did not offend s. 10 of the *ESA* and was truly a charge for immigration consulting services.

[67] Whether or not the Provincial Court decision is correct, it was not appealed. In any event, in my view, Tribunal Member Thornicroft should not have dismissed the Provincial Court's judgment out of hand as "wrongly decided" and certainly not on the basis it is contrary to *Macaraeg*. The Court of Appeal in *Macaraeg* expressly

recognized that the statutory scheme for granting and enforcing employee rights under the *ESA* does not affect a party's right to enforce common law rights in court.

[68] The Provincial Court finding that the immigration fee did not violate s. 10 of the *ESA* and was truly a fee for immigration services, should have signalled to the Tribunal that there was a serious issue to be heard on the appeal on the jurisdictional issue in this case. In that regard, it is also significant that the Tribunal gave no consideration as to whether this finding by the Provincial Court created an estoppel or rendered the matter *res judicata*, nor did the Tribunal consider how ICN could be fined for a fee which was upheld by the Provincial Court.

[69] The Tribunal's misapplication of *Mangat* and *Macarae*g, in my view, fundamentally undermines its finding that ICN's appeal was without merit. However, there are other aspects of the Tribunal's decisions not to extend the timelines which are not defensible.

[70] As noted above, the criteria established by the Tribunal in *Niemisto* to guide applications to extend the time period for appeals, also include whether there is a reasonable and credible explanation for failing to request an appeal within the statutory time frame; whether there has been a genuine, ongoing *bona fide* intention to appeal the determination; and whether the respondent will be unduly prejudiced by the delay.

[71] Tribunal Member Thornicroft concludes that ICN "failed to provide a *credible* explanation for its failure to file a timely appeal" [emphasis added]. The Tribunal Member seems to suggest that Ms. Gorenshtein was not being truthful in her contention that she was the only one who could have dealt with the appeal and says that "her assertion stand in contrast to the fact that Mr. Gorenshtein was involved in the matter during the delegate's investigation (see delegate's reasons, page R9)". However, page R9 of the "delegate's reasons" refer only to Mr. and Mrs. Gorenshtein having attended a meeting regarding ICN's position. This is not evidence of his suitability to prepare the appeal submission. On the evidence

Ms. Gorenshtein was the individual who had been the one who had drafted submissions on behalf of ICN throughout the proceedings before the Tribunal.

[72] Tribunal Member Roberts similarly concludes that ICN failed to demonstrate a "genuine" and "*bona fide*" intention to appeal, and asserts there is "no evidence" ICN contacted the Tribunal to indicate an intention appeal until June 11, 2012. However, this finding is not consistent with the evidence of Ms. Gorenshtein that she did contact the Tribunal's Registry Administrator on May 31, 2012, to indicate she was intending to appeal. While the Administrator does not recall on what date she spoke to Ms. Gorenshtein, she confirms speaking with Ms. Gorenshtein prior to June 11, 2012.

[73] In my view, the evidence before the Tribunal shows that Ms. Gorenshtein did provide the Tribunal with a reasonable and credible explanation for not filing within the statutory time frame and that she did indicate her intention to appeal prior to the conclusion of the appeal period. While it theoretically may have been possible for her to have retained someone to assist her or to have completed her submission prior to her surgery, given her extensive and long standing involvement in the matter on behalf of ICN, it was unreasonable to expect that she do so in circumstances where she had surgery, was on pain medication, had been trying to complete the appeal submission within the appeal period, and had been in communication with the Tribunal about these circumstances prior to the expiry of the appeal period. As the Tribunal conceded, there was no undue prejudice to the complainants given that much of the delay they have experienced is unrelated to this specific appeal.

[74] In all of the circumstances, I consider it was patently unreasonable for the Tribunal to have concluded that ICN failed to provide a "credible explanation" for its failure to file a timely appeal. Applying the Tribunal's own criteria from *Niemisto* and from *Milan Holdings,* it is evident that ICN had a legitimate basis upon which to request an extension of time to file their appeal. The deficiencies in the decision in respect of ICN's explanation for the late filing of its appeal are, as noted above,

compounded by the Tribunal's mistaken conclusion that *Mangat* and *Macarae*g confirm ICN's appeal had no merit.

Constitutional Issue

[75] The Petitioners submit that I should decide the constitutional issue as to the application of the *ESA* to immigration consultants authorized to provide services under the *IRPA*, relying on *Dunsmuir* and *Actton Transport Ltd. v. British Columbia (Employment Standards)*, 2010 BCCA 272. The Petitioners served notice to the Attorneys General of British Columbia and Canada prior to the judicial review hearing. Counsel for the British Columbia Attorney General appeared at the judicial review hearing.

[76] The Respondents say, in response, that if I conclude that the decision of the Tribunal is patently unreasonable, the proper course of action is for me to refer the matter back to the Tribunal to consider the merits of the appeal, including the constitutional/jurisdictional issue, relying on various cases including *Actton*; *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2003 BCSC 534; *Alberta (Information and Privacy Commissioner v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Northstar Lumber v. United Steelworkers of America, Local No. 1-424*, 2009 BCCA 173; and *Canwood*.

[77] On the basis of the authorities cited, I agree with the Respondents that the matter should be referred back to the Tribunal, and that the Tribunal should have the opportunity to consider the matter afresh, including the constitutional issue raised by ICN. I note in *Actton*, the Court of Appeal stated that a judge on judicial review should not usurp of the role of a tribunal by embarking upon a *de novo* hearing on a constitutional issue. I am also mindful, in that regard, of the submission of counsel for the Attorney General of British Columbia, that a consideration of the constitutionality of legislation would ordinarily require evidence of the respective legislative schemes.

Conclusion

[78] As a consequence of my finding that the Tribunal's decisions on the timeliness of ICN's appeal in this case were patently unreasonable, I have concluded that the Tribunal's decisions of September 27, 2012, and November 27, 2012, be set aside.

[79] I have also concluded that in the circumstances the appropriate relief is to refer ICN's appeal of the Director's May 3, 2012 Determination back to the Tribunal for consideration of the appeal on its merits.

"Harris J."