Court of King's Bench of Alberta

Citation: Golden Pinnacle Consultants Ltd v Director of Fair Trading, 2024 ABKB 81

Date: 20240213
Docket: 2203 00325
Registry: Edmonton

Between:

Golden Pinnacle Consultants Ltd. and Yan Chi

Appellants

- and -

Director of Fair Trading and the Appeal Board under the Consumer Protection Act

Respondents

Corrected judgment: A corrigendum was issued on April 12, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
of the
Honourable Justice B.H Aloneissi

I. Introduction

[1] The Appellant, Golden Pinnacle Consultants Ltd. (Golden Pinnacle), was issued a Notice of Administrative Penalty under the *Consumer Protection Act*, RSA 2000, c C-26.3, s 158.1 by

the Director of Fair Trading for 16 contraventions of the *Act* and its regulations. The contraventions related to the operation of an immigration consultancy, which the Director found was also operating as an unlicensed employment agency. The Director also ordered Golden Pinnacle and the Appellant, Yan Chi (Ms. Chi), to cease the conduct behind the contraventions.

[2] Together, the Appellants appealed the Director's decision to a statutory appeal board provided for under the *Consumer Protection Act* (the Appeal Board). The Appeal Board conducted a hearing *de novo* and the majority of the Appeal Board upheld 9 of the contraventions found by the Director of Fair Trading. Additionally, the majority confirmed the order to cease the conduct behind the contraventions and, also, reduced the amount of the administrative penalty to the maximum set out in the *Consumer Protection Act*, s 158.1. For the purposes of this decision, I will refer to the majority's decision as the decision of the Appeal Board.

[3] The Appellants now appeal to this Court under s 181 of the *Consumer Protection Act*, raising five different grounds of appeal with respect to the Appeal Board's decision. This Appeal is opposed by the Respondent, the Director of Fair Trading, who also brings a cross-appeal with respect to the Appeal Board's finding that the *Consumer Protection Act* sets a maximum for an administrative penalty issued under s 158.1.

II. Background

[4] Ms. Chi is a registered immigration consultant who provided immigration consultant services through her company, Golden Pinnacle. At various times, Golden Pinnacle was a registered employment agency, although not during the time period of the alleged contraventions.

[5] In 2018 and 2019, 14 complaints were made to Service Alberta about the services provided by Ms. Chi and Golden Pinnacle. Specifically, the complaints related to the Alberta Immigration Nominee Program (AINP), which is a program operated by Alberta Labour for nominating immigration candidates to the Government of Canada for permanent residency. The complainants had retained Golden Pinnacle to help them with applications to the AINP and to provide them with gainful employment in order to meet the requirements for an AINP nomination. In general terms, the complaints raised issues about the services provided and the fees charged by the Appellants, as well as issues relating to the type and terms of the employment provided.

[6] Service Alberta conducted an investigation into the complaints and provided the results of that investigation to the Director of Fair Trading in the form of a report, as well as supplementary materials that were requested by the Director. The Director then contacted the Appellants and provided them with an opportunity to respond to the information gathered in the investigation and the potential contraventions identified in the investigation.

[7] On September 14, 2020, the Director of Fair Trading considered 10 of the 14 complaints and found that Golden Pinnacle had violated the *Consumer Protection Act* and the *Employment Agency Business Licensing Regulation*, Alta Reg 45/2012. The Director found 16 contraventions of the *Act* and the *Regulation*, relating to allegations that Golden Pinnacle was operating an unlicensed employment agency, charged grossly excessive fees, imposed harsh and one-sided terms and conditions, engaged in deception and misrepresentation, and failed to create or

maintain required documentation. The Director issued a Notice of Administrative Penalty and assessed a total administrative penalty of $145,000.

[8] On October 1, 2020, the Appellants sent a Notice of Appeal of the Director's decision. The appeal was heard *de novo* by an Appeal Board constituted under the *Consumer Protection Act*, and on December 2, 2021 the majority of the Appeal Board gave its decision, upholding 9 of the 16 contraventions found by the Director of Fair Trading. The Appeal Board further decided that s 158.1 of the *Consumer Protection Act* imposed a maximum penalty of $100,000, so the original administrative penalty was overturned. However, the Appeal Board agreed with the Director that the Appellant's contraventions were abhorrent and therefore reduced the administrative penalty to the maximum amount of $100,000.

III. Issues

[9] Taken together, the appeal and cross-appeal raise the following issues:

1. What is the standard of review?
2. Did the Respondents have jurisdiction over this matter?
3. Was there an abuse of process by the Respondents for failing to disclose relevant materials to the Appellants?
4. Did the Appeal Board make errors in considering the evidence before it?
5. Did the Appeal Board ignore relevant considerations?
6. Did the Appeal Board error in its interpretation of s 158.1 as setting a global maximum amount for an administrative penalty? and
7. Are the administrative penalties determined by the Appeal Board unreasonable and excessive?

IV. Analysis

Issue 1: What is the Standard of Review?

[10] This matter comes to the Court as statutory appeal under the *Consumer Protection Act*, s 181. ***The Supreme Court in Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 [***Vavilov***] held that a statutory appeal from an administrative decision maker to a court is an indication that the legislature intended appellate standards of review to apply: at para 36.

[11] This means that questions of law, including questions of statutory interpretation and questions about the scope of a decision maker's authority, apply the standard of correctness: *ibid* at para 37, citing ***Housen v Nikolaisen***, 2002 SCC 33 at para 8 [***Housen***]. Questions of fact and questions of mixed fact and law, where the legal principle is not readily extricable, are reviewed on a standard of palpable and overriding error: ***Vavilov*** at para 37, citing ***Housen*** at paras 10, 19, 26-37.

[12] Procedural fairness is a question of law that is reviewed on a correctness standard: ***Law Society of Saskatchewan v Abrametz***, 2022 SCC 29 at paras 26-30 [***Abrametz***]; ***AltaLink Management Ltd v Alberta Utilities Commission***, 2023 ABCA 325 at paras 35-38 [***AltaLink***]; ***Stubicar v Calgary (Subdivision and Development Appeal Board)***, 2022 ABCA 299 at para 46.

Whether there has been an abuse of process is also a question of law that attracts a correctness standard: ***Abrametz*** at para 30.

Issue 2: Did the Respondents Have Jurisdiction?

[13] The Appellants argue that the Respondents acted without jurisdiction, because the College of Immigration and Citizenship Consultants has jurisdiction over this matter and is the exclusive regulatory body for immigration consultants in Canada. Further, the Appellants argue that the Respondents do not have jurisdiction because the regulation of immigration consultants is a valid exercise of federal power.

[14] The Respondent, the Director of Fair Trading, argues the Court should not consider the issue of jurisdiction, because a notice of constitutional question has not been provided. Further, the Director argues that the *Consumer Protection Act* is a valid exercise of provincial jurisdiction, even if there is concurrent federal jurisdiction over immigration consultants.

[15] I agree with the Respondent that the Court cannot consider the question of whether the *Consumer Protection Act* or the *College of Immigration and Citizenship Consultants Act*, SC 2019, c 29, s 292 governs in the absence of a notice of constitutional question.

[16] Section 24(2) of the *Judicature Act*, RSA 2000, c J-2 provides:

> When in a proceeding a question arises as to whether an enactment of the Parliament of Canada or of the Legislature of Alberta is the appropriate legislation applying to or governing any matter or issue, no decision may be made on it unless 14 days' written notice has been given to the Attorney General of Canada and the Minister.

[17] In ***Ernst v Alberta Energy Regulator***, 2017 SCC 1, Justice Abella explained that constitutional notice requirements serve a vital purpose and ensure that courts have a full evidentiary record. They also ensure that governments have a full opportunity to support the validity of legislation: at para 99. Most importantly, she confirmed that, in Alberta, strict adherence to the notice provisions is required: *ibid* at para 100. In other words, without a notice of constitutional question, the Court cannot decide whether provincial or federal legislation governs.

[18] In this case, no notice was given to the Attorney General of Canada or to the provincial Minister of Justice. Consequently, I am unable to decide whether the Respondents had jurisdiction in this matter.

Issue 3: Was There an Abuse of Process?

[19] The Appellants argue that the Respondents ignored misconduct by the Alberta Immigration Nominee Program and Alberta Labour and that this misconduct constitutes an abuse of process. Specifically, the Appellants point to evidence that the AINP offered the complainants nominations under the program in exchange for their complaints against the Appellants. In addition, the Appellants argue that it was an abuse of process for the Director not to disclose the AINP files to the Respondents, so they could not have known about an e-mail about the alleged offer or other related irregularities in the nomination process.

[20] The Appellants rely on the residual category of the doctrine of abuse of process, which recognizes conduct that undermines the integrity of the legal system but does not amount to a procedural unfairness.

[21] The Respondent, the Director of Fair Trading, argues that the Appellants have mischaracterized the evidence that was before the Appeal Board. Further, the Respondent argues that there was nothing improper about the AINP Officer referring applicants to other government agencies to make complaints. As well, the related documents were not initially disclosed, because they were not relied on by the Director. In any case, they were disclosed at the appeal and witnesses were recalled in order to address any concerns about the procedural fairness of the hearing. The Respondent also argues that the irregularities identified by the Appellants are minor discrepancies that do not undermine the Board's credibility findings.

[22] In ***Blencoe v British Columbia (Human Rights Commission)***, 2000 SCC 44 [***Blencoe***], the Supreme Court of Canada confirmed that the doctrine of abuse of process can apply to administrative proceedings: at para 120. The Court explained that there will be an abuse of process if the administrative proceedings are "unfair to the point that they are contrary to the interests of justice": *ibid*. Put another way, there is an abuse of process where "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted": *ibid*.

[23] In ***Blencoe***, the Supreme Court held that there must be some form of prejudice for there to be an abuse of process, even if the prejudice is not to hearing fairness: at para 115. Moreover, the Court explained that an abuse of process in this context will be exceedingly rare: *ibid* at para 120.

[24] More recently, in ***Abrametz***, the Supreme Court revisited the doctrine of abuse of process in an administrative context. The Court expanded on the decision in ***Blencoe***. It also confirmed that the doctrine of abuse of process is characterized by its flexibility and is not encumbered by specific requirements: *ibid* at para 35.

[25] Typically, in an administrative context, the doctrine of abuse of process is invoked in response to excessive delay in the hearing process. This was the basis of the alleged abuse of process in both ***Blencoe*** and ***Abrametz***. However, in ***Clark v Alberta (Institute of Chartered Accountants, Complaints Inquiry Committee)***, 2012 ABCA 152, the Alberta Court of Appeal held that an administrative decision was reasonable where a decision maker held that there had been an abuse of process for the disclosure of confidential information. So, there is some precedent for recognizing an abuse of process for reasons other than an excessive delay.

[26] In principle, this broader view of abuse of process aligns with the purpose of the doctrine, which is to protect the integrity of legal proceedings: see ***Abrametz*** at paras 33-36. So, in my view, it is appropriate to consider the Applicants' arguments in this case. Nevertheless, for there to be an abuse of process for reasons other than excessive delay, I conclude there must still be some form of unfairness or other prejudice that renders the administrative proceedings contrary to the interests of justice. Put otherwise, the high bar for finding an abuse of process set out in ***Blencoe*** and ***Abrametz*** must still be observed.

[27] In this case, the Appeal Board did not make an explicit finding on whether there had been a *quid pro quo* between the complainants and AINP. However, the Board acknowledged the evidence that one complainant said he had been offered a nomination in exchange for a complaint against the Appellants. The Board also took account of the evidence from the AINP investigator, who denied making any such offer to the complainants. Instead, the investigator said she encouraged the complainants to bring complaints against the Applicants, because in her

view they had been mistreated. As well, she said that she encouraged the Applicants to remove Golden Pinnacle as their immigration consultant, because otherwise Golden Pinnacle would continue to be updated about everything that happened with their nominations. Finally, the investigator said that the fact that the applications were approved around the same time as the complaints was due to the fact that she met with the complainants, at which point she was able to both confirm their application information and encourage them to complain about what had happened. Given this evidence, it was open to the Appeal Board to conclude there had not been an abuse of process.

[28] Underneath the argument that the Appeal Board erred by failing to find an abuse of process, it seems the Appellants are trying to relitigate the Appeal Board's assessment of the facts. While it is true that deciding whether an abuse of process exists is a question of law, that determination rests on a series of factual findings by the administrative decision maker, which are more appropriately reviewed on a standard of palpable and overriding error: ***Abrametz*** at para 175; ***Altalink*** at para 36.

[29] In this case, there is no palpable and overriding error in the Appeal Board's assessment of the evidence. The Appeal Board was entitled to accept the evidence of the investigator. Aside from the evidence from Mr. Zhang, there is no direct evidence that Service Alberta was engaged in a *quid pro quo* with the complainants. As a result, even if the Board could have drawn the inference that the investigator was engaged in a *quid pro quo,* in light of the limited evidentiary support for that conclusion, the failure to do so does not rise to the level of palpable and overriding error. Similarly, there is no direct evidence that the Director's failure to disclose the AINP records was the result of intentional misconduct. Accordingly, the Board's decision not to draw that inference also does not rise to the level of palpable and overriding error.

[30] In coming to this conclusion, I note that the Appellants do not directly raise the issue of whether the Board gave adequate reasons about whether there was an abuse of process. Instead, they argue that the Board failed to consider whether there was an abuse of process and therefore erred in law. I agree with the Respondent that the Board clearly turned its mind to the relevant evidentiary issues, as discussed above. It is fair to say that the Board did not draw a direct conclusion on whether there was an abuse of process. However, the question of whether an abuse of process has taken place is evaluated on the standard of correctness, so the Board's failure to indicate a direct conclusion on this issue is not necessarily a fatal error. Instead, given the Board's factual conclusions, there was no conduct identified that could rise to the standard of abuse of process. It follows that the correct application of the law is that there was no abuse of process.

[31] Finally, it is worth noting that the Appellants do not raise any form of prejudice as a result of the alleged improprieties. They do not challenge the procedural fairness of the hearing before the Appeal Board, in as much as they were given the opportunity to request and receive the AINP files, and witnesses were recalled to give further evidence in response to that disclosure. They also do not identify any other form of prejudice that they suffered. Following ***Blencoe*** and ***Abrametz***, for there to be an abuse of process in the administrative context, the Appellants must have suffered some form of prejudice, whether that be a procedural unfairness or some other form of prejudice. So, even if there had been a factual underpinning for the claim that there was an abuse of process, I would not find that the legal test had been met, because the Appellants have failed to show any form of prejudice.

Issue 4: Did the Appeal Board Make Errors in Considering the Evidence Before It?

[32] The Appellants raise two issues with the Board's consideration of the evidence before it: first, they challenge the Board's assessment of the witnesses' credibility and, second, they argue the Board erred by considering a survey of fees charged by immigration consultants.

[33] I will consider each of these arguments separately.

i. Credibility

[34] The Appellants argue that the Board made a palpable and overriding error in its assessment of the credibility of Ms. Chi and the complainants. The Appellants argue that the Appeal Board's bald statements about Ms. Chi and the complainants' credibility was inadequate and, also, that it erred by relying too heavily on the complainants' demeanour.

[35] The Director argues that the Board's assessment of credibility was not based on demeanour alone. The Director also points to a number of inconsistencies in Ms. Chi's evidence that were referred to in the Board's decision and that support the Board's assessment of her credibility.

[36] For a decision to provide adequate reasons, the reasons must be sufficient for the context in which they are given ***R v GF***, 2021 SCC 20 at para 68. The question is whether the reasons, read in context and as a whole, in light of the live issues, explain what the decision maker did and why they did it in such a manner as to permit appellate review: *ibid* at para 69. Findings of credibility attract particular deference from an appellate court: *ibid* at para 81.

[37] The Appellants argue the Board's bald statement that it did not accept Ms. Chi's evidence is inadequate. However, this fails to take into account the context in which this statement was made. In the decision, the Board gave more specific assessments of Ms. Chi's evidence as it considered the issues. In doing so, it considered inconsistencies in Ms. Chi's evidence about when she heard about the AINP investigation and whether she was a director or shareholder of all the corporate entities that employed the complainants. The Board also considered Ms. Chi's failure to provide any specific information about the competitors she said she had contacted. Further, the Board accepted the evidence of the complainants, which contradicted Ms. Chi's evidence. In the context of the overall decision and the submissions of the parties, the Board's assessment of Ms. Chi was not limited to a single bald statement. Instead, looking at the decision as a whole, the Board gave an adequate explanation of why it did not accept Ms. Chi's evidence.

[38] Similarly, the Board was entitled to take into account the demeanour of the complainants in assessing their credibility: ***R v Clarkson***, 2023 ABCA 212 at para 13; ***R v Giroux***, 2017 ABCA 270 at para 7. It is only an error when demeanour becomes the sole or dominant basis for determining credibility: ***Giroux*** at para 7; ***R v Bourgeois***, 2017 ABCA 32 at para 21.

[39] The Board directly addressed the complainants' credibility in its finding that each one endeavoured to recall events and conversations in a straightforward manner and to the best of his or her ability. The Appellants argue that this is demeanour evidence. However, the Board does not refer specifically to the complainants' demeanour. Instead, it makes a general observation about how the complainants gave evidence, which does not necessarily refer to how they held themselves as opposed to how they communicated their evidence.

[40] Moreover, in the context of the entire decision, the issues raised, and the submissions of the parties, it is clear that the Board considered the content of the evidence of the complainants in

coming to its conclusions. On the whole, there is no indication that the Board relied on demeanour to the exclusion of other considerations, so as to ground an error in the decision. In context, the Board's assessment of the complainants' credibility was adequate.

[41] Finally, I note the Appellants argue that the Board's credibility assessment was flawed, because several witnesses required a translator to give evidence. While I agree with the Applicant that the use of a translator may make it more difficult to assess a witness' credibility, the fact that a translator was used in this case does not automatically undermine the Board's credibility assessments absent a specific reason for concern.

ii. Fee Survey

[42] The Appellants argue that the Appeal Board made a palpable and overriding error in concluding that Golden Pinnacle charged a price for services that grossly exceeded the price at which similar services were available, because the Board did not have reliable evidence about the price at which similar services were available. At base, the Appellants take issue with the Board's reliance on a survey from the Canadian Association of Professional Immigration Consultants ("CAPIC") about what immigration consultants charged for provincial nominee program applications.

[43] Legally, the Applicant's arguments encompass two separate complaints. The first is that the admission of the report was unfair and, therefore, a breach of the Board's duty of procedural fairness. The second is that, if the report was admissible, the Board erred in its assessment of the evidence.

[44] The Respondent, the Director of Fair Trading, argues that the Appeal Board had evidence before it about the fees charged and was entitled to accord weight to that evidence. Specifically, the Board was entitled to rely on the CAPIC survey and the complainants' evidence about what they paid.

[45] Beginning with the question of procedural fairness, the Supreme Court in ***Vavilov*** confirmed that the duty of procedural fairness is inherently flexible and context-specific: at para 77. In other words, what the duty requires in a given case can only be determined by reference to all the circumstances: *ibid*, citing ***Baker v Canada (Minister of Citizenship and Immigration)***, 1999 CanLII 699 at para 21, [1999] 2 SCR 817 [***Baker***].

[46] In addition, the Supreme Court confirmed the non-exhaustive list of factors that inform the content of the duty of procedural fairness: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: ***Vavilov*** at para 77, citing ***Baker*** at paras 23-27.

[47] In this case, the statutory scheme directly addresses the rules of evidence that apply to the Appeal Board. Under the *Appeal Board Regulation*, Alta Reg 195/1999, s 14(1), the Appeal Board is not bound by the rules of evidence in judicial proceedings. This means that the Appeal Board is entitled to admit hearsay evidence, so long as it is relevant and can fairly be regarded as reliable: Sidney N Lederman, Michelle K Fuerst & Hamish C Sewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis Canada, 2022) at 6.02[11][a]; David Phillip Jones, QC & Anne S de Villars, QC, *Principles of Administrative Law*, 7th ed (Toronto: Thomson Reuters, 2020) at 337.

[48] The Alberta Court of Appeal has confirmed that this type of statutory provision is sufficient to displace any concerns about procedural fairness from admitting hearsay evidence, absent unusual circumstances that undermine the hearing's fairness: ***Maitland Capital Ltd v Alberta (Securities Commission)***, 2009 ABCA 186 at para 9; ***Pridgen v University of Calgar****y*, 2012 ABCA 139 at para 59; see also Jones & de Villars at 339.

[49] In this case, I conclude that the procedure was not rendered unfair by the admission of the CAPIC survey. The Board was entitled to admit hearsay evidence, and the survey was clearly relevant to the subject matter of the hearing. The Appellants argue that polling data is by its very nature unreliable. However, the survey is a collection of responses from immigration consultants about the fees they charge and not opinion polling. Moreover, the Appellants were entitled to call evidence on this issue, and they chose to rely exclusively on the evidence of Ms. Chi. I conclude there are no unusual circumstances that made admission of the survey unfair. Therefore, any concern with the contents of the report should be addressed as part of the Board's substantive conclusions.

[50] With that in mind, the Appellants also challenge the Appeal Board's evidentiary assessment of the CAPIC survey, arguing that the Board did nothing more than pay lip service to the limitations of hearsay evidence.

[51] In its decision, the Board acknowledged that the report was hearsay evidence and accepted it as evidence of the range of fees charged. The Appellants contend that the Board did not provide any further assessment of the report. However, the Board did take account of the type of information in the report and made note of the fact that there was no specific evidence about fees charged for permanent residency applications. The Board accepted the report as some evidence of the range of fees charged.

[52] In the context of the entire decision, I do not think the Board committed a palpable and overriding error in its assessment of the evidence. The Board considered the fees that had been charged to the complainants, as well as the explanations that Golden Pinnacle had provided for the fees. The Board also considered the type and amount of work that was done by Golden Pinnacle, the fees cited in Golden Pinnacle's ads for immigration work, and the fees one of the complainants paid to a new immigration consultant. Notably, the Board relied on the fact that there was no explanation for the variation in the fees the Appellants charged to the complainants for seemingly similar services.

[53] The Appellants argue that the Board erred by dismissing Ms. Chi's evidence that she had spoken to other immigration consultants who charged similar fees to Golden Pinnacle. However, as discussed above, I see no reason to interfere with the Board's assessment of her credibility.

[54] On the whole, the Board took into account the evidence that was before it. Although the Board considered the report in coming to its conclusion, it did not give the report undue weight, and its conclusions were supported by the evidence that it accepted. I conclude there is no error in the Board's admission and assessment of the CAPIC report or its finding that Golden Pinnacle charged a price for services that grossly exceeded the price at which similar services were available.

Issue 5: Did the Appeal Board Ignore Relevant Considerations?

[55] The Appellants argue that the Appeal Board erred by failing to consider a highly relevant factor. Specifically, the Appellants argue that Ms. Chi was not operating an employment agency,

because the complainants worked for entities owned or controlled by or associated with Golden Pinnacle and Ms. Chi. Therefore, the Appellants were the complainants' employers and did not operate an employment agency as defined by the *Designation of Trades and Businesses Regulation*, Alta Reg 178/1999, s 4.

[56] The Respondent, the Director of Fair Trading, argues that the term employer usually requires some degree of control over the employee, as well as an express or implied contractual link to the employee. In this case, the Respondent argues that the Board correctly concluded there was insufficient evidence to show that either of the Appellants were the complainants' employer.

[57] Ignoring a relevant consideration is typically a ground for judicial review of a discretionary decision by an administrative decision maker: see ***Jones & de Villars*** at 198-99. By contrast, on a statutory appeal, the Court reviews a decision for errors under the normal appellate standards, which divide the issues into questions of law, questions of mixed fact and law, and questions of fact.

[58] The Appellants' main complaint is that the Board did not consider s 2.1 of the *Consumer Protection Act*, which provides:

> In determining whether this Act applies to an entity, a representation or a transaction, a court or an appeal board must consider the real substance of the entity, the representation, or the transaction and in doing so may disregard the outward form.

[59] The Appellants argue that the Board erred by not finding that the Appellants were the complainant's employers, because the Appellants were connected to the corporate employers of the complainants. Framed in terms of an appellate review, it is unclear if the Appellants are arguing that the Board erred in its statement of the law or if the Board erred in its application of the law to the facts. As such, I will address both possibilities.

[60] The *Consumer Protection Act* and its regulations do not define employer. However, when common law terms are used in legislation, they are presumed to retain their common law meaning Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) at 17.2.[1]. At common law, the employment relationship is characterized by the degree of control that the employer has over the employee: ***671122 Ontario Ltd v Sagaz Industries Canada Inc***, 2001 SCC 59.

[61] Of course, this presumption is subject to the express or implied statutory meaning of the common law term. In ***Warkentin Building Movers Virden Inc v LaTrace***, 2021 ABCA 333, the Court of Appeal held that consumer protection legislation should be given a large and liberal interpretation, keeping in mind its purpose of protecting consumers: at para 23. In determining whether the *Consumer Protection Act* applies, the Court must therefore consider the real substance of the entity, representation, or transaction, meaning "what is really going on": *ibid* at para 24.

[62] In its decision, the Appeal Board reviewed the corporate registry information for Golden Pinnacle and each of the corporate employers, as well as the letters proving employment of some of the complainants. The Board concluded that there was not sufficient evidence that Ms. Chi was the guiding mind of all the corporations or that she controlled their decision making, except for one of the corporate entities.

[63] The Board also considered whether the Appellants were common employers, and concluded there were not enough links between the Appellants and the corporate entities. The Board noted there was no evidence that the Appellants had any day-to-day control of the complainants' employment, bore any payroll obligations, or had any authority to discipline or dismiss them, with the exception of one complainant who understood Ms. Chi to be the boss of the businesses she worked for.

[64] In this case, the Board did not directly cite s 2.1. However, it is clear from the decision that the Board examined the substance of the relationship between the complainants, the businesses they worked for, and the Appellants. The Board took into account the degree of control the Appellants had over the complainants, as well as the corporate structures and the other typical indicia of employment, such as pay role obligations. I therefore conclude that the Board did not commit any error in the principles that it applied.

[65] I further conclude that the Board did not err in its application of the law to the facts in deciding that the Appellants were not the complainants' employers. The Board fully assessed the relationships between the complainants, their corporate employers, and the Appellants and took into account all the relevant evidence. I find there is no palpable and overriding error to the Board's conclusion that there were insufficient connections to find that the Appellants were the complainants' employers.

Issue 6: Did the Appeal Board Err in its Interpretation of s 158.1?

[66] On the cross-appeal, the Director of Fair Trading argues that the Appeal Board erred in its holding that s 158.1 of the *Consumer Protection Act* limits an administrative penalty to a total of $100,000 for all included contraventions of the *Act*. The Director relies on the plain language of s 158.1 and argues that it would be overly formalistic to require the Director to issue a Notice of Administrative Penalty for each separate contravention of the *Act*.

[67] In response, Ms. Chi and Golden Pinnacle argue that the plain language of s 158.1 limits the total administrative penalty to a maximum of $100,000. They point to the restrictions in the *Administrative Penalties (Consumer Protection Act) Regulation*, Alta Reg 135/2013, s 2, which apply on a per contravention basis. This is in contrast to the maximum in the *Consumer Protection Act*, which applies per administrative penalty. Further, the Respondents on the cross-appeal argue that, under the *Interpretation Act*, RSA 2000, c I-8, s 26(3) singular words include the plural, so a single administrative penalty may refer to multiple conventions. As well, administrative penalties are by their nature non-punitive, so it makes sense to put a limit on the global amount.

[68] Section 158.1 of the *Consumer Protection Act* provides:

> 158.1(1) If the Director is of the opinion that a person
>
> (a) has contravened a provision of this Act or the regulations, or
>
> (b) has failed to comply with a term or condition of a licence issued under this Act or the regulations,
>
> the Director may, by notice in writing given to the person, require the person to pay to the Crown an administrative penalty in the amount set out in the notice.
>
> (2) Where a contravention or a failure to comply continues for more than one day, the amount set out in the notice of administrative penalty under subsection

> (1) may include a daily amount for each day or part of a day on which the contravention or non-compliance occurs or continues.
>
> (3) The amount of an administrative penalty, including any daily amounts referred to in subsection (2), must not exceed $100 000.

[69] On its face, s 158.1 states that an administrative penalty must not exceed $100,000. In this case, the Director assigned different amounts to each contravention in his decision but, in the Notice of Administrative Penalty, assessed a single administrative penalty of $145,000. Taken simply, this exceeds the maximum amount of $100,000 per administrative penalty.

[70] This interpretation is supported by the fact that other provisions dealing with administrative penalties specify a maximum amount per contravention, such as the *Administrative Penalties (Consumer Protection Act) Regulation*, s 2. It is presumed that legislative expressions are used consistently, so different wording is presumptively an indication of a different meaning: Sullivan at 8.04. As such, the fact that the regulation has identified maximum administrative penalties on a per contravention basis strongly suggests that something different was intended by the more general wording in s 158.1.

[71] The Director of Fair Trading argues that it would be overly formalistic to require the Director to issue a separate Notice of Administrative Penalty for each contravention. However, the interpretation proposed by the Director of Fair Trading suggests that the Director could issue aggregate administrative penalties for amounts over $100,000 for related contraventions of the governing legislation. This is contrary to the purpose of administrative penalties, which are intended to ensure compliance with the legislation and are not intended to be a form of punishment. In this context, it makes sense that a maximum of $100,000 would apply to a single administrative penalty, even when it relates to more than one contravention.

[72] As a result, I agree with the Appeal Board that s 158.1 imposes a maximum penalty of $100,000.

Issue 7: Are the Administrative Penalties Unreasonable and Excessive?

[73] The Appellants argue that the Appeal Board erred by failing to reconsider the Director's decision about the amount of the administrative penalty in light of the Appeal Board's decision that 7 of the contraventions found by the Director had no merit. The Appellants argue that the Appeal Board merely listed the factors considered by the Director and failed to consider all the issues afresh. The Appellants argue further that the Appeal Board's decision was flawed, because the Appeal Board erred in evaluating the evidence and failed to give effect to mitigating factors. Additionally, the penalties are significantly higher than any other reported decision.

[74] The Respondent, the Director of Fair Trading, argues that the administrative penalty imposed by the Director was proportionate to the amounts paid by the complainants to the Appellants. The Respondent further argues that the contraventions for which the Director did not assess a penalty were not upheld, so they did not impact the amount of the administrative penalty. Similarly, the Appeal Board upheld one contravention in each of the cases where the Director assessed a single penalty for two contraventions, so there was no impact on the overall assessment of the penalty. The remaining contraventions that were not upheld were assessed for penalties totalling $10,000, which is less than the amount that the Appeal Board reduced the administrative penalty by.

[75] In more general terms, the Respondent argues that a high administrative penalty is necessary so that it is not considered a cost of doing business. Additionally, the Respondent argues that the Appeal Board considered the nature of each of the contraventions in the remainder of its decision, so the Board did more than just list the factors considered by the Director. Finally, the Respondent argues that the high amount of the administrative penalty recognized the goal of deterrence and is proportionate to the contraventions.

[76] In ***Guindon v Canada***, 2015 SCC 41, the Supreme Court of Canada explained that the overarching goal of administrative penalties is to deter actions that do not comply with an administrative regime: at para 79. The Supreme Court recognized that, in some cases, a high penalty will be necessary, so the penalty is not simply considered a cost of doing business: *ibid* at para 80.

[77] In an earlier case, ***Re Cartaway Resources Corp***, 2004 SCC 26, the Supreme Court considered the goal of deterrence, and explained that deterrent penalties work on two levels: they may target society generally and they may target the individual wrongdoer specifically (at para 52). In either case, the deterrence is prospective, meaning that it looks to prevent future misconduct rather than to punish past misconduct.

[78] In ***Alberta (Securities Commission) v Brost***, 2008 ABCA 326, the Court of Appeal explained that, to a certain extent, all penalties will be seen as punitive by the person who receives them. However, that does not mean the penalty does not also serve a valid regulatory or administrative purpose when viewed in the context of the circumstances and the applicable regulatory scheme: *ibid* at para 54.

[79] In this case, the *Consumer Protection* Act sets out specific considerations that guide the decision on the amount of an administrative penalty. Specifically, s 2(2) of the *Administrative Penalties (Consumer Protection Act) Regulation* lists factors the Director may consider when setting the amount of the administrative penalty for a contravention. They are:

> (a) the seriousness of the contravention or failure to comply;
>
> (b) the degree of wilfulness or negligence in the contravention or failure to comply;
>
> (c) the impact on any person adversely affected by the contravention or failure to comply;
>
> (d) whether or not the person who receives the notice of administrative penalty has a history of non-compliance;
>
> (e) whether or not there were any mitigating factors relating to the contravention or failure to comply;
>
> (f) whether or not the person who receives the notice of administrative penalty has derived any economic benefit from the contravention or failure to comply;
>
> (g) any other factors that, in the opinion of the Director, are relevant.

[80] In its decision, the Appeal Board recognized that the Director's decision allocated an amount to each contravention but assessed a single administrative penalty of $145,000. The Appeal Board reviewed the factors considered by the Director, including the intentional nature of the contraventions, the impact on the complainants, the exploitative nature of the contraventions,

the monetary benefit derived from the contraventions, and the overall magnitude of the contraventions. Taking into account the $100,000 maximum under s 158.1, the Appeal Board explained that it shared the Director's abhorrence for the contraventions but was constrained by the statutory maximum. The Appeal Board therefore varied the administrative penalty to $100,000.

[81] On a statutory appeal, the Appeal Board's assessment of the amount of an administrative penalty is a question of mixed fact and law, which is to be reviewed on a standard of palpable and overriding error, absent an extricable question of law. In this case, the Appellants have not set out any extricable error of law. I also do not find a palpable and overriding error in the Appeal Board's decision on the administrative penalty. On the evidence, the Appellants' conduct was intentional and exploitative, and the Appellants gained a significant monetary benefit. In these circumstances, there is no palpable and overriding error in awarding the maximum amount allowed under the *Consumer Protection Act*.

V. Conclusion

[82] The appeal is dismissed. The cross-appeal is also dismissed.

[83] If the parties cannot agree on costs, they may contact me in writing within 30 days of this decision.

Heard on the 8th day of September, 2023.
Dated at Edmonton, Alberta this 13th day of February, 2024.

B.H Aloneissi
J.C.K.B.A.

Appearances:

Simon Renouf K.C.
For the Appellants

Natalie Tymchuk
For the Respondent (Director of Fair Trading)

Corrigendum of the Memorandum of Decision
of
The Honourable Justice B.H Aloneissi

Corrigendum to change the citation from 2023 ABKB 081 to 2024 ABKB 81