Citation: McNeill Fishing Ltd. (Re)
2021 BCEST 89

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

McNeill Fishing Ltd.
(the "Applicant")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Robert E. Groves

FILE No.: 2021/050

DATE OF DECISION: November 15, 2021

DECISION

SUBMISSIONS

Christopher Harvey	counsel for McNeill Fishing Ltd.
David Hanson	on his own behalf
Sarah Beth Hutchison	delegate of the Director of Employment Standards

OVERVIEW

1. McNeill Fishing Ltd. (the "Applicant") applies pursuant to section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration (the "Application") of a decision of an appeal panel of the Tribunal (the "Appeal Panel") issued on April 28, 2021, 2021 BCEST 38 (the "Appeal Decision").

2. This matter arose when David Hanson (the "Complainant") filed a complaint (the "Complaint") with the Director of Employment Standards (the "Director") under section 74 of the *ESA* alleging that the Applicant contravened the statute by improperly deducting business expenses from his wages and declining to pay him compensation for length of service.

3. A delegate of the Director (the "Delegate") conducted a hearing of the Complaint and issued a determination on December 4, 2020 (the "Determination"). The Determination ordered that the Applicant pay $25,322.62 in wages and interest in respect of the Complaint. It also ordered the Applicant to pay an administrative penalty of $500.00. The total found to be owed was $25,822.62.

4. The Applicant appealed the Determination pursuant to section 112 of the *ESA*. The Tribunal's Appeal Decision ordered that the Determination be confirmed.

5. I have before me the Applicant's application for reconsideration and the submissions delivered in support, the submissions of the Director and the Complainant in these proceedings, as well as a copy of the underlying appeal including the Applicant's appeal submissions, the Determination and its accompanying Reasons (the "Reasons"), the record the Director was required to deliver to the Tribunal pursuant to section 112(5) of the *ESA*, the submissions of the Director in response to the appeal, and the Appeal Decision, .

6. The Applicant delivered an unsolicited document, a 1994 Report on Collective Bargaining Legislation in the Fishing Industry (the "1994 Report"), several weeks after the stipulated date for a final reply (which the Applicant did provide to the Tribunal in a timely fashion). The Applicant did not give a compelling explanation for why it did not provide the document earlier, merely stating it was not able to locate it earlier and was providing it in support of arguments the Applicant had already made in its earlier submissions. In these circumstances, I would decline to consider the unsolicited document for the purposes of the Application.

7. In any event, I have reviewed the document and find it would not alter the conclusions I reach in this matter, even if I were to consider it. The 1994 Report makes recommendations on legislative changes to facilitate collective bargaining in the fishing industry. While it discusses some of the case law and issues raised in this matter, including that fishers have been considered "co-adventurers" at common law, it does so in a different legislative context and for a different purpose. I am not persuaded the 1994 Report's observations and recommendations are determinative of the issues before me in this matter. As set out below, I find this matter can and must be decided on the basis of the parties' arguments made with respect to the *ESA*, which is the relevant legislative context in this case.

FACTS

8. Unless I indicate otherwise, I accept, and incorporate by reference, the facts set out in the Determination and the Appeal Decision.

9. The Applicant operates a commercial fishing business in Prince Rupert. The Complainant worked as a skipper of the "Megabite", one of the Applicant's fishing vessels, from September 1, 2016, until January 17, 2019.

10. The parties agreed that the Complainant would receive a percentage of the net proceeds of each catch as remuneration for his work. Disputes arose later as to the percentage rate the Complainant was to receive for one type of catch, and more generally regarding the types of expenses, if any, that were to be deducted before a net proceeds figure was established.

11. In the proceedings before the Delegate, the Applicant contended that the Complainant must be construed, in law, as a "co-adventurer" who shared in the risks of fishing success or failure while working for the Applicant. However, the Delegate decided that the Complainant was an "employee" for the purposes of the *ESA*. In reaching this conclusion the Delegate noted (Reasons at R3) that section 1 of the *Employment Standards Regulation* (the "*Regulation*") defines a "fisher" as a person:

> (a) who is employed on a vessel engaged in commercial fishing, and
>
> (b) whose remuneration is a share or portion of the proceeds of a fishing venture,…

12. A summary of the rationale for the Delegate's conclusion regarding the Complainant's status is captured in the following excerpts from the Reasons (R11 – R12):

> The definition of 'employee' in section 1 of the Act includes a person entitled to wages for work performed for another, and a person who performs the work normally performed by an employee. An employer is a person who has direction and control over an employee, or who is responsible directly or indirectly for an employee's employment.
>
> Fishers are specifically included in the Regulation as a type of employee covered by the jurisdiction of the Act.
>
> Mr. Hanson confirmed that he had no ability to independently decide where or what the Megabite would fish, and this evidence was confirmed by Ms. McNeill and Mr. McNeill. Mr. McNeill explained that he was the person who made the vessels owned by McNeill Fishing move.
>
> Although McNeill Fishing argued that Mr. Hanson was a co-adventurer, and Mr. Rosario gave evidence as to the tax-treatment of commercial fishers, there is no evidence before me to

> overturn the presumption that as a fisher, as defined by the Regulation, Mr. Hanson's employment relationship falls under the jurisdiction of the Act. I find that Mr. Hanson, as a fisher under the Regulation, was an employee under the Act.

13. Having decided that the Complainant was an employee, the Delegate determined that the Complainant was owed wages because the Applicant had deducted certain business costs from the Complainant's proper share of the proceeds of fishing ventures, contrary to section 21 of the *ESA*. The Delegate concluded that the Complainant had failed to establish he was entitled to a higher percentage of the proceeds of a particular type of catch than the Applicant was prepared to pay. The Delegate also rejected the Complainant's claim for compensation for length of service because section 37 of the *Regulation* renders such an award inapplicable to fishers.

14. The Complainant did not appeal the Determination.

15. The Applicant's appeal to the Tribunal did not challenge the facts as found by the Delegate, or the Delegate's calculations of the amounts payable by the Applicant as set out in the Reasons. Instead, the Applicant asserted that the Determination should be set aside for error of law or, alternatively, referred back to the Director for consideration afresh in accordance with the correct legal principles.

16. The crux of the Applicant's submission on appeal may be summarized as follows:

- At common law, the relationship between a fishing vessel owner and a master is not that of employer and employee. Instead, they are "co-adventurers" in a fishing venture. This is how the Canada Revenue Agency addresses this type of relationship for tax purposes.
- Common law rights can only be abrogated by clear legislation. There is nothing in the *ESA* that supports a legislative intention to alter the common law regarding the relationship between fishing vessel owners and masters. Moreover, the definition of "fisher" in the *Regulation*, on its own, cannot extend the regulatory scope of the *ESA*.
- Accordingly, the Complainant was not an "employee" for the purposes of the *ESA*. Rather, he was, according to "ancient and settled" maritime law, a "co-adventurer" in a fishing venture.

17. A statement in the Applicant's submissions in the appeal that the *ESA* "must be construed as not to apply to matters which are within the exclusive legislative authority of Parliament" caused the Appeal Panel to ask the Applicant whether it was raising a constitutional "division of powers" issue. If so, section 8 of the *Constitutional Question Act* RSBC 1996 c. 68 would be engaged.

18. In response, the Applicant submitted that it was not asserting it was beyond provincial constitutional competence to assert a regulatory power over labour relations in the fishing sector. Rather, the Applicant's reference in its argument to the federal power over the contractual relationship between an owner, master, and crew in a fishing venture was relevant because it would assist as "an aid to the true construction of the [*ESA*]" for the purposes of the appeal. In support of that position, the Applicant had stated in its submission delivered in the appeal that "where…common law rights are part of Canadian maritime law, any provincial legislation touching them must be narrowly construed so as to respect the constitutional division of powers."

19. The Delegate delivered a submission in the appeal. In it, the Delegate asserted that "provincial jurisdiction over property permits the province to regulate aspects of the business of fishing, including labour relations (see *Morton v. British Columbia (Agriculture and Lands)* 2009 BCSC 163 *[sic 136]*, at para. 170)." The Delegate also argued that the Reasons contained an analysis explaining why the Complainant fell within the definition of an "employee" for the purposes of the *ESA*. The Delegate went on to say that "…the Act and Regulation are properly and lawfully enacted legislation which, unless unconstitutional, displaces any common law that would otherwise govern the relationship between a vessel owner and vessel master."

20. In reply, the Applicant contended that while it was axiomatic a statute could displace common law principles that would otherwise be applicable, there was nothing in the precise wording of the *ESA* to indicate the legislature had intended to overwhelm the presumption in favour of the continuance of the common law status of the relationship the courts had found to exist between fishing vessel owners and fishing masters. That being so, even if one were compelled to rely upon the definition of "fisher" found in the *Regulation* to determine the status of the Complainant for the purposes of the Complaint, it is the common law principles that must be applied.

21. The Appeal Panel accepted the Applicant's submission that a person could not be a "fisher" absent an underlying employment relationship. However, the Appeal Panel also affirmed that the question whether an individual was an "employee" for the purposes of the *ESA* needed to be resolved having regard to the definitions of "employee", "employer", "wages", and "work" contained within section 1 of the statute. Those definitions read as follows:

> "employee" includes
>
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
>
> (c) a person being trained by an employer for the employer's business,
>
> (d) a person on leave from an employer, and
>
> (e) a person who has a right of recall;
>
> "employer" includes a person
>
> (a) who has or had control or direction of an employee, or
>
> (b) who is or was responsible, directly or indirectly, for the employment of an employee;
>
> "wages" includes
>
> (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
>
> (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
>
> (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,

(d) money required to be paid in accordance with

(i) a determination, other than costs required to be paid under section 79 (1) (f), or

(ii) a settlement agreement or an order of the tribunal, and

(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,

but does not include

(f) gratuities,

(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,

(h) allowances or expenses,

(i) penalties, and

(j) an administrative fee imposed under section 30.1;

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

(2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

22. The Appeal Panel noted that the *ESA* contained no definition of "co-adventurer". However, the Appeal Panel referred to several previous decisions of the Tribunal in which it was claimed that crew members on fishing vessels, hired on the basis that the remuneration for their work would be a share of the catch, were "co-adventurers", and therefore they could not be employees under the *ESA*. However, in all of those cases, the Tribunal concluded otherwise (see *Warrior Marine Fishing Company Ltd.*, BC EST # D170/98 and BC EST # D579/98; *Wishinski*, BC EST # D321/98; *Hanson*, BC EST # D040/06).

23. The Appeal Panel determined that the Delegate's conclusions in support of the Determination were correct, in substance, and that the Complainant was the Applicant's employee for the purposes of the Complaint, and the application of the *ESA*.

24. The Appeal Panel observed further that the case authorities offered by the Applicant deciding that masters and crew members on fishing vessels were not employees of the vessel owner at common law were distinguishable, at least because they had not been decided for the purpose of establishing the degree to which employment standards legislation might be applied to such relationships.

25. The Applicant delivered the Application to the Tribunal on June 2, 2021, a few days beyond the section 116(2.1) time limit of thirty days following the issuance of the Appeal Decision. The Application lists the following orders sought by the Applicant:

- An order pursuant to section 109(1)(b) of the *ESA* extending the time for requesting a reconsideration.

- An order pursuant to section 109(2) *[sic section 113]* of the *ESA* that the Tribunal suspend the Determination with respect to payment of funds to the Complainant pending determination of the Application, including payment of the $10,000.00 deposit paid by the Applicant into the trust account held by the Director.
- An order that "new evidence" in the form of the affidavit of Teresa-Lynn McNeill sworn May 10, 2021, be considered by the Tribunal.
- An order quashing the Appeal Decision.

ISSUES

26. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

a. Does the request meet the threshold established by the Tribunal for reconsidering a decision?

b. If so, should the decision be confirmed, cancelled, varied, or referred back to the original panel or another panel of the Tribunal?

ARGUMENTS

27. The Applicant states that it delivered a petition for judicial review to the Director on May 28, 2021, the date, coincidentally, on which the period within which it might have delivered an application for reconsideration of the Appeal Decision expired. The Applicant was subsequently informed that the Director would argue in the judicial review proceeding that the Applicant had failed to exhaust its administrative remedies. I infer from this that the Applicant was advised the *ESA* contemplates a party who wishes to challenge a decision of the Tribunal in an appeal must first utilize the reconsideration procedure established in section 116 of the statute. The Applicant then delivered this Application to the Tribunal, on June 2, 2021.

28. The Applicant submits that considerations of justice and equity permit the Tribunal to exercise its discretion to extend the time for the delivery of its Application. It argues that it served its petition for judicial review within the statutory time limit for making an application for reconsideration, thereby giving notice of its intention to challenge the Appeal Decision in a timely way. The Applicant states that its reasons for seeking a reconsideration are the same as were set out in its application for judicial review served prior to the expiry of the time for the delivery of the Application. It submits further that the length of time between the expiry of that time and the delivery of the Application in proper form to the Tribunal was but a matter of a few days. In these circumstances, the Applicant submits there is no prejudice if the Application is permitted to proceed. It also states that counsel have agreed the petition for judicial review should be held in abeyance pending the outcome of the Application.

29. The Complainant submits that no extension should be permitted, as the dispute has "gone on long enough".

30. The Director advises that it takes no position regarding the Applicant's request for an extension.

31. Regarding the request for a suspension, the Applicant states that when it made a payment into trust of a deposit of $10,000.00, prior to the appeal, the Director gave an undertaking that the funds would not be disbursed, and no collection proceedings would be taken, until the appeal was decided. The Applicant's submission on this Application states that the undertaking has now expired, and it needs to be renewed.

32. The Applicant argues that a reconsideration of the Appeal Decision is warranted. It states that the issue to be resolved is a question of mixed law and fact: whether the relevant relationship between the Applicant and the Complainant was one of employer and employee, or co-adventurers. The Applicant asserts that where, as here, the facts are not disputed, the determination to be made turns on a question of law involving the proper statutory construction of provisions of the *ESA*. It submits, in addition, that an error in the construction of a governing statute, which it alleges the Appeal Panel made in this instance, should suffice, on its own, as a basis for reconsideration where the error undermines the efficacy of the Appeal Decision as a whole.

33. In addition, the Applicant submits that the resolution of the question it has posed is important, because the Appeal Decision, if upheld, will have the effect of disrupting all the existing sharing arrangements upon which the fishing industry is based.

34. The Applicant asserts that the Appeal Decision is incorrect. As it has done throughout these proceedings, the Applicant submits that the co-adventurer relationship of fishing vessel owner and master cannot be reconciled with a legislative directive in the form of an *ESA* that seeks to regulate the relations between employers and employees.

35. The Applicant alleges the discussion of the parties' relationship in the Appeal Decision is devoid of analysis and ignores the custom in the fishing industry, as well as the factual and legal context in which the Complainant found himself when he worked for the Applicant.

36. That said, the Applicant acknowledges that the Delegate recognized it was, at least, not unusual for persons involved in a fishing venture to share revenue and expenses. The Applicant also points out, as it did in the appeal, that the Canada Revenue Agency does not consider fishers who share in the proceeds of a catch as employees.

37. The Applicant supplies several authorities relating to other legal contexts, in addition to those on which it relied in the appeal, supporting the position that fishers, and especially masters of vessels, are not to be construed as employees when engaged in a fishing venture, whether one characterizes them otherwise as co-adventurers, partners, or joint venturers. For any of these legal categories into which an individual fisher might fall, the Applicant says the *ESA* is inapplicable.

38. The Applicant argues that it was patently unreasonable for the Appeal Panel to adopt the Delegate's conclusion it was a principal of the Applicant, as owner of the Megabite, who made the vessel move, and therefore had the power to direct and control the actions of the Complainant as master. This is so, notwithstanding an owner may give directions regarding a fishery before departure, because it is an established principle of maritime law that it is the master who has total control of a vessel when it is at sea.

39. The Applicant submits that the Appeal Panel's conclusion is illogical because the concepts of "control or direction" are only relevant if the person controlled and directed is an "employee" for the purposes of the statutory definition.

40. The Applicant submits the wording of the *ESA* makes it clear that it is only "employees" who are meant to be included within its purview. The Applicant argues that since none of the non-exhaustive categories of persons expressly included within the definition of "employee" in section 1 of the *ESA* incorporate a reference to joint venturers, one must conclude that the legislature did not intend to "…artificially expand the common law definition of employee" to include them.

41. The Applicant argues, once more, that case authorities support the principle it is open to a legislature to "re-define" the common law meaning of the word "employee" to render it applicable, in a statute, to the master and crew of a fishing vessel. However, when a legislature chooses to do that, it must do it explicitly. It follows, the Applicant submits, that if the wording a legislature chooses does not make it clear the term "employee" is to include fishers, the inference to be drawn is that the legislature had no such intention. The Applicant refers to federal and provincial statutes where this has occurred, and it makes the point that this has not happened in the case of the *ESA*. It submits that if the legislature had intended to extend the scope of the *ESA* to fishers it would have employed the same legislative device appearing in the statutes to which the Applicant refers.

42. The Applicant also asserts that there is nothing in the purposes of the *ESA*, set out in section 2, which suggests the legislature intended the statute to disrupt the status of traditional business practices within the fishing industry. With respect to the admonitions contained within section 21 of the *ESA* relating to deductions from wages, the Applicant contends that they would "revolutionize" the customs of the industry, most especially because they would render illegal the common arrangement owners, masters, and crew agree upon that the business expenses of a fishing venture are shared.

43. Another argument the Applicant repeats is that the Delegate fell into error when she relied upon the reference to the definition of a "fisher" in section 1 of the *Regulation* to support a finding that the *ESA* regulates co-adventurer relationships in the fishing industry. The Applicant asserts that the Delegate needed to do this because there is nothing in the wording of the *ESA* to ground such a claim. The Applicant states, again, that a regulation cannot extend the scope of a statute, and since an "artificial definition" of "employee" that includes co-adventurers cannot be found in the *ESA*, "it does not exist in law".

44. The Delegate has delivered a submission on the merits in response to the Application.

45. Regarding the Applicant's request that the affidavit of Teresa-Lynn McNeill (“Ms. McNeill”) be admitted as "new evidence", the Delegate submits that the documents attached as exhibits to the affidavit are copies of materials that form part of the record that was before the Delegate in making the Determination, and which the Director delivered to the Tribunal pursuant to section 112(5) of the *ESA*. As for the statements by Ms. McNeill in the affidavit, the Delegate says they refer to facts that either were, or could have been, presented to the Delegate before the Determination was issued. Accordingly, the evidence the Applicant seeks to admit is not "new".

46. The Delegate submits that the submissions of the Applicant in support of its Application are the same, in substance, as the ones it asserted in the appeal. The Delegate says that the Tribunal has stated a factor

weighing against its exercising the discretion to reconsider one of its decisions is that an applicant merely seeks to have its appeal re-heard, in the hope that another panel of the Tribunal will decide the matter differently.

47. The Delegate makes the point that according to a definition offered by the Applicant, if the Complainant was engaged in a "joint venture" with the Applicant, it means he must have had an equal voice in controlling the project. The Delegate refers to findings of fact set out in the Reasons – findings that are not disputed by the Applicant – that the Complainant was subject to the direction and control of the Applicant. The Delegate argues that evidence of direction and control is a critical factor in determining whether an employment relationship exists both under the *ESA* and at common law, and, in this instance, it is an important justification for a conclusion that the Complainant was not a joint venturer.

48. The Delegate argues that, notwithstanding the fact the Complainant, as master of the Megabite, had independent authority to operate the vessel at sea, such a responsibility is not inconsistent with a finding that the Complainant was an employee and entitled to the protections provided in the *ESA*.

49. The Delegate submits that factors like the degree of authority reposed in individuals, the extent of their independence, discretion and responsibility, the nature of their remuneration, and the custom of an industry are relevant when considering employment status, but they are, in the end, subordinate to the definitions contained in the *ESA*. The Delegate asserts that since the Tribunal affirmed that the relevant definitions in the *ESA* rendered the Complainant an "employee" for its purposes, the Appeal Decision must be confirmed.

50. The Applicant's final reply re-affirms its position that questions of "direction and control" are "irrelevant" if the person directed and controlled is not an "employee". This flows, the Applicant argues, from a part of the wording of section 1 of the *ESA* defining an "employer" as including a person "who has or had control or direction of an employee". An example the Applicant provides is that an air traffic controller is not an "employer" of an aircraft captain for the purposes of the *ESA*, notwithstanding that the controller directs and controls the actions of the captain.

51. The Applicant's reply also repeats its argument that the masters of fishing vessels are co-adventurers with the vessel owner, and not employees. It asserts that if the legislature intended to change this arrangement it would have adopted a different definition of "employer". Since the legislature decided not to place "a square peg in a round hole", its choice should be respected.

ANALYSIS

52. I have decided to grant the Applicant's request for an extension of the time to make the Application. The Tribunal's power to grant extensions under section 109(1)(b) is discretionary. Here, the Applicant demonstrated a timely intention to challenge the Appeal Decision. The Director, at least, was made aware of that intention within the stipulated time, and the period following the expiry of time for an application before the Application was made was quite short. In the circumstances, I find any prejudice to the Respondent that an extension of a few days would add will be minimal.

53. The Applicant has also requested an order continuing the suspension of the enforcement of the Determination while the Application proceeds. I am informed that the Delegate has advised the Tribunal

the Director will continue to hold the $10,000.00 deposited by the Applicant in trust pending the outcome of the Application. Accordingly, there is no need to make a suspension order.

54. Regarding the Applicant's request that "new evidence" be considered on this Application, I agree with the Delegate that the evidence tendered is not "new". It was largely evidence that was before the Delegate. It would therefore be part of the section 112(5) record of proceedings before the Director (Delegate) and can be considered as such. To the extent there is new evidence that was not provided to the Delegate, it would be inappropriate for me to consider that evidence (see *Re Merilus Technologies Inc.*, BC EST # D171/03). I note, in any event, that this Application turns primarily on legal argument rather than any significant dispute as to the underlying facts.

55. Regarding the substantive merits of the Application, the power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

56. As the Tribunal has stated repeatedly, the reconsideration power is discretionary and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

57. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *ESA*, which identifies as purposes of the legislation, the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the statute. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112.

58. With these principles in mind, the Tribunal has adopted a two-stage analysis when considering applications for reconsideration (see *Re Milan Holdings*, BC EST #D313/98). In the first stage, the Tribunal considers an applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant wishes to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. A “yes” answer means that the applicant has raised questions of fact, law, principle, or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

59. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an appeal decision of the Tribunal (see *Re Middleton*, BC EST # RD126/06).

60. If the applicant satisfies the requirements at the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

61. While the Applicant has delivered submissions in support of the Application that are more detailed and elaborate than those presented in the appeal, the arguments it has made in this proceeding are in substance the same. It submits that since there can be no question a master like the Complainant is not an employee at common law, and because the language of the *ESA* does not clearly establish that a "fisher" like the Complainant is an employee for the purposes of the statute, the Delegate and the Appeal Panel should have decided that the Complainant was not an employee within the meaning of the *ESA*.

62. Despite this, I have decided that a reconsideration is warranted because the position of the Applicant raises a serious question of law relating to the application of the provisions of the *ESA* to the fishing industry in this province, generally, and not merely to the resolution of the specific dispute that has arisen between the parties who are now before me.

63. The Applicant's position is that well-established common law principles, grounded in the customs of the fishing industry, have determined the Complainant's working relationship and, in this instance, must be characterized as a joint venture, and not an arrangement between an employer and an employee. Further, the Applicant says that since the *ESA* does not explicitly extend its relevant definitions of "employee" and "employer" to incorporate "fishers", the Complainant is not an employee within the meaning of the *ESA*.

64. I accept that the definitions of "employee" and "employer" in the *ESA* say nothing about "fishers", expressly. However, they say nothing about the customs of the fishing industry either. This is not to say that customs are irrelevant when determining a person's employment status under the statute. They can be a factor, but there are several other criteria which must also be considered.

65. The most oft-cited statement regarding the common law test for employment in Canada appears in the reasons for judgment of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] SCJ No.61. There, the court acknowledged that there is no single conclusive formula that can be applied to determine a person's work status. Instead, the parties' total relationship must be considered. The court said this, at paragraphs 47 and 48:

> . . . The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

66. It is important to understand the interplay between the common law tests and the definitions appearing in the statute. On this point, the Tribunal has stated on several occasions that the common law tests, while useful, must yield to the statutory definitions, including not only the definitions of "employee" and "employer", but also of "wages" and "work" (see, for example, *Re Sin*, BC EST # D015/96; *Re Trigg*, BC EST

D040/03; *J. F. Ventures Ltd*., BC EST # D131/05; *Re Welch (c.o.b. Windy Willows Farm)*, BC EST # D161/05; *Re North Delta Real Hot Yoga Ltd. (c.o.b. Bikram Yoga Delta)*, BC EST # D026/12).

67. The limitations of applying the common law tests exclusively have been expressed by the Tribunal in several of its decisions. In *C. A. Boom Engineering (1985) Ltd.*, BC EST # D129/04, for example, the Tribunal noted:

> The common law tests originated chiefly for the purpose of determining whether an employer could be held vicariously liable for wrongs done by its employee, and not for the purpose of determining whether an employee is entitled to the minimum protections of the [*ESA*]. The inadequacies of the common law tests have been noted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.,* [2001] 2 S.C.R. 983, and by the Federal Court of Appeal in *Wolf v. Canada,* 2002 F.C.A. 96.

68. In *Re Canada Rockies International Investment Group Ltd.*, BC EST # D133/14 the Tribunal said this:

> . . . In a very real sense it is counter-productive to spend a significant amount of time analyzing the relationship from the perspective of common law tests and criteria. It unnecessarily complicates the issue and invites appeals . . . The Tribunal has repeatedly said the question of the status of a person under the [*ESA*] is determined in the context of the definitions of "employee", "employer" and "work". The only appropriate "test" is whether the relationship of the putative employee and employer can be found within the relevant provisions and purposes of the [*ESA*].

69. It follows, and the Tribunal has stated, that a person may be construed to be an employee under the *ESA*, and treated in that manner for its purposes, but the person may not be an employee for the purposes of another statute or, for that matter, at common law (see *Re B. J. Heatsavers Glass & Sunrooms Inc.*, BC EST # D137/97). It is for this reason that I concur with the conclusions of both the Delegate and the Appeal Panel that finding the Complainant was not an employee by the Canada Revenue Agency, for tax purposes, is in no way conclusive of his status under the *ESA* (see, for example, *Re Project Headstart Marketing Ltd.*, BC EST # D164/98; *Re Beitel (c.o.b. The A. V. Group)*, BC EST # D152/01; *Re International Paper Industries Ltd.*, BC EST # D276/03; *Re Richmond Certigard Auto Ltd. (c.o.b. Petro-Canada)*, BC EST # D003/10). The fact, then, that masters of fishing vessels are deemed to be co-adventurers at common law, and not employees, is not determinative of the dispute arising from the Complaint.

70. In this case, the Appeal Panel reviewed the Delegate's Reasons, and the analysis it contained, relating to the question whether the Complainant was an "employee" having regard to the provisions of the *ESA*. The Appeal Panel concluded that the evidence demonstrated that the Complainant satisfied the definition. The comments of the Appeal Panel in support of this conclusion are captured at paragraphs 24 and 25 of the Appeal Decision:

> The delegate, at pages R11 – R12, specifically turned her mind to whether the complainant was an “employee” as defined in the *ESA*. The delegate determined – and these factual findings are not challenged in this appeal – that the complainant “had no ability to independently decide where or what the Megabite would fish”. In other words, he was subject to the direction and control of the appellant. The complainant’s compensation (or “wage”) – based on a share of the catch – while contingent on factors perhaps outside his control, nonetheless, was a form of “commission” payable for “work” and was related to “production or efficiency”. The delegate also

> noted that the catch would be sold to a buyer who "pays the crew (including the Complainant) directly based on instructions provided by [the appellant]" (page R2).
>
> Further, the evidence before the delegate showed that the complainant "did not put any of his own money in the Megabite or its operations, did not provide his own fishing equipment, and had no say in deciding to whom the catches were sold, or for what price" (page R6). The complainant did not own any of the fishing licenses – these were either owned by First Nations bands, the appellant, the appellant's principal in his personal capacity, or by the latter in trust for the appellant (pages R8 – R9). The appellant's accountant "received instructions from [the appellant] for calculating [the complainant's] shares" (page R9). "[The appellant] would prepare the [share] breakdown for the crew and [the buyer] would make payments to the crew according to those figures" (page 10).

71. I am not persuaded the Applicant has established reviewable error in respect of this analysis.

72. The Applicant argues that the high degree of independence and responsibility reposed in a master of a fishing vessel at sea is inconsistent with the position that the Complainant was an employee. I do not disagree that this aspect of the working relationship should be considered as a factor, but, as the authorities mandate, it can only be one factor out of many that must be weighed. For example, an individual acting as the CEO of a firm – who is only supervised intermittently – may nevertheless be construed as an employee despite their high degree of autonomy (see *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044, at paragraph 73). Here, while the Complainant as a master had significant independence and responsibility with respect to movements and operation of the fishing vessel while it was at sea, the vessel moved from the dock to the sea with the Complainant at the helm further to the overall direction and control of the Applicant, who had engaged him for that purpose.

73. I also agree with the Applicant's contention that the references to "fisher" in the *Regulation* cannot augment the jurisdictional scope of the *ESA* itself. However, while the Delegate may have relied on the *Regulation* to support the conclusions reached in the Determination, in part, the Appeal Panel, in paragraph 23 of the Appeal Decision, made it clear that the sole question at issue was whether the Complainant met the definition of "employee". The Appeal Panel went on to say:

> Whether the complainant was also a "fisher" as defined in the *Regulation* is not particularly relevant *in this appeal*, since it does not concern statutory benefits to which fishers are not entitled by reason of section 37 of the *Regulation* (although, it should also be noted that the delegate determined that the complainant was a "fisher", and thus not entitled to any section 63 compensation for length of service – the complainant did not appeal this finding).

74. I cannot accede to the Applicant's assertion that the issue of the "direction and control" exercised by the Applicant over the Complainant is irrelevant to a determination of whether he was an "employee" because the *ESA* definitions only contemplate its being considered if an individual has already been found to possess that status.

75. Such an interpretation would contradict the analytical basis of countless decisions of the Tribunal which have recognized that the degree of direction and control a purported employer exercises over an alleged employee is one of several of the common law factors that may be of assistance when deciding how the

statutory definitions should be applied to resolve a dispute over employment status for the purposes of the *ESA*.

76. It is true that the Tribunal is not bound to follow its previous decisions, but the arguments the Applicant has presented in the Application do not convince me that the Tribunal's previous decisions regarding this issue are incorrect. In any event, the Applicant's arguments do not persuade me that the Appeal Panel in this case erred in concluding that the Complainant was an employee of the Applicant within the meaning of the *ESA*, for the reasons given in the Appeal Decision.

ORDER

77. The Application is dismissed. Pursuant to section 116 of the *ESA*, the Tribunal's Appeal Decision, referenced as 2021 BCEST 38, is confirmed.

Robert E. Groves
Member
Employment Standards Tribunal