EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Anne Elizabeth Lowan and Timothy James Lowan
operating as
Corner House

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO: 97/718

DATE OF HEARING: March 31, 1998

DATE OF DECISION: June 9, 1998

DECISION

APPEARANCES:

John Lowan	Spokesperson on behalf of Anne and Timothy Lowan
Anne Elizabeth Lowan	On her own behalf
Timothy James Lowan	On his own behalf
Adelle Adamic	Counsel for the Director
Wayne Denis	I.R.O., Delegate
Alan Agopsowicz	Spokesperson on behalf of Jo-Ann Richards
Jo-Ann Richards	
Delayne Sartison	Counsel for C.S.S.E.A.
Ken Saunders (CSSEA)	Observer
Chris Jones (Ministry of Children and Families)	Observer

OVERVIEW

This is an appeal by Anne Elizabeth Lowan and Timothy James Lowan ("the Lowans") operating as Corner House ("Corner House") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination (File No. 083211) dated September 5, 1997 by the Director of Employment Standards (the "Director").

Corner House is a licensed Respite Care Home for mentally challenged children in Victoria operated by the Lowans. Jo-Ann Richards ("Richards") worked for them as a relief person from June 1995 until April 1997. She typically worked 9, 15, or 24 hour shifts during which time she would stay at the home and would often sleep there during the longer shifts. The Lowans considered her to be a "residential care worker" and by virtue of section 34(1)(x) of the *Regulations* to the *Act* exempt from the "overtime" provisions contained in Part 4 of the *Act*. The Director determined that Richards was not a residential care worker and that she was entitled to the benefit of the provisions of Part 4 of the *Act*. The Director determined that Richards was entitled to unpaid wages in the amount of $23,600.14.

The Lowans appeal on the grounds that the Determination was incorrect and that Richards was a residential care worker and therefore Part 4 did not apply.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether Richards was a residential care worker.

PRELIMINARY ISSUES

1. The Lowans asked to both, in part, represent themselves, and to have a spokesperson present their case for them. With the agreement of the other parties this was accommodated.

2. Ms Richards wished to be represented by a friend, Alan Agopsowicz, and this was also accommodated.

3. The Community Social Services Employers Association (CSSEA) applied for standing at this appeal as an interested party. CSSEA is the employer's association for the social services sector created pursuant to the *Public Sector Employers Act.* Corner House is designated an employer pursuant to the regulation of the *Public Sector Employers Act* and is, therefore, required to be a member of CSSEA. CSSEA represents approximately 650 employers, 200 of which provide community living services to physically and mentally challenged individuals. CSSEA submitted that those 200 members employ the equivalent of 6585 full-time employees (i.e. "FTEs") representing many more actual individuals who have a material interest in the definition of "residential care worker".

   Section 112(1) of the *Act* provides that any person served with a Determination may appeal to the Tribunal and is therefore a party to the appeal. CSSEA was not served with the Determination which is under appeal. The issue is whether it should be granted standing as an intervenor and thereby allowed to participate in this appeal. The Tribunal's Rules of Procedure are silent on this issue but Rule 22 allows the Tribunal to "conduct an appeal or other proceeding in the manner it considers necessary where the rules are silent". The Tribunal has applied Rule 22 to grant intervenor status on prior occasions, for example to the West Coast Domestic Worker Association in a case of importance to their association. The Tribunal may grant intervenor status to a person or organisation if it will assist the Tribunal to canvass an issue of sufficient general importance.

   I concluded that, in this case, there was an issue of significant general importance to the members of CSSEA to grant the association standing at this appeal and it would assist the Tribunal to canvas the issues in this appeal.

4. The Lowans indicated that they wished to argue that they were not the employer in this case. They submitted that because of their relationship with Government that they themselves were employees of the Government and that they could not be the employer of Ms Richards. They suggested that Richards was, therefore, also an employee of the Government and not Corner House. This issue is being investigated by the Director in relation to complaints filed in November and December 1997.

I concluded that, because this issue had not been raised with the Director at the time of the investigation, I was not going to allow it to be raised at this appeal. Such matters require careful investigation and it is not proper for the appellant to raise this matter for the first time on appeal.

FACTS

Corner House is a respite home for mentally challenged children. It is licensed pursuant to the *Continuing Care Facility Act* and funded through the Ministry of Children and Families. Approximately five or six children stay at the home at any given time and may stay for a weekend or longer periods of time to provide respite to family care givers. Most of the children suffer from deep mental handicaps with "sub 70 IQ". Fourty percent will need help with feeding, dressing and the bathroom. Most will have behavioral problems. A number will require full personal care including diapers. Many children require attendance through the night time for such things as medications, attending the bathroom, changing diapers or wet bedding, and emotional care for bad dreams or sleeplessness.

Richards worked as a relief worker at Corner House from June 1995 to April 1997. She typically worked 9, 15, or 24 hour shifts. She usually worked "overnight" shifts from 6:00 pm Friday to 9:00 am Saturday but often shifts were combined so that she could work for up to 24 hours. During her shift Richards was required to be on the premise attending to her duties throughout the whole shift without scheduled breaks. If she was not working directly with the children she would have household tasks to perform. She was essentially "on task" at all times.

During her shifts Richards "stayed" at the house at all times (with the exception of infrequent times she might go to the store if there was someone else available to watch the children). There was a bedroom available in which Richards was allowed to sleep, and did sleep, at night as her duties allowed. Richards had some meals at work, kept some nightclothes and some toiletries at the house.

Timothy Lowan testified that he and his wife, Anne Lowan, would usually work through the week including the nighttime from Sunday through Thursday. They employed two or three people who would cover for them on weekends, holidays, or if they were sick or away for any reason. He testified that Jo-Ann would usually work weekends but accepts the records of times worked as set out in the Determination. He said that Jo-Ann's duties would be to look after the children and also clean and cook. She would play with the children after dinner and put them to bed. He said that Jo-Ann kept pyjamas, a tooth brush, and personal things at the house and that she would sleep in the staff bedroom.

Timothy Lowan testified that the relief staff would be responsible to take off the bedding and wash it after their shift. Staff were allowed to have visitors at the house but had to have authorization because of security issues for the children. Criminal record checks would be required. He said that Richards boyfriend visited infrequently and never slept-over at the house.

On cross examination by Mr Agopsowicz Mr Lowan stated that he "resided" at Corner House but agreed that he and his wife maintained a separate private home. He claimed to live at Corner

House about 50% of the time. When he stayed over at Corner House he used the same staff bedroom. He said that Corner House is his principal residence and he considered the sleeping room as "his bedroom". The bedroom has no television, no couch, no phone and does not have an ensuite bathroom. Bathroom facilities are shared. He agreed that Corner House was not open all year round and there was not always staff at the house.

Anne Lowan testified that staff did not have to stay at the house all the time but could take the children out and about. She agreed that staff were "on task" at all times during their shift. She said that staff were encouraged to have visitors but a visitor could not stay over night unless they were in a permanent relationship. She testified that she slept over at the house on Sunday Monday and Tuesday nights and that Tim slept over on Wednesday and Thursday nights. The rest of the time they maintained a private shared family home. She also slept in the staff bedroom. She said that they tried as much as possible to make the house seem like a second home for the staff.

Ann Lowan agreed that Jo-Ann Richards had raised the issue of overtime pay a number of times during her employment at Corner House. She said that she had checked with the Employment Standards Branch and that she believed that Richards was a residential care worker and therefore not entitled to overtime pay.

From the evidence of both of the Lowans it was clear that when relief workers worked for a 24 hour period they did not get an eight hour uninterrupted rest period as required for residential care workers by section 22 of the *Regulations* and they were not paid for the times they were required to work during the sleep periods.

Richards testified that she had a permanent residence in Victoria which she considered her home for the past six years. She described her duties at work and said that with some children "you can be up most of the night". Her duties during the nighttime would include getting children to the bathroom, helping them with dreams or nightmares, changing wet beds or diapers, giving medications, and keeping children in the house.

She described the staff bedroom as not personal. It had no closet or dresser. She did not keep her wardrobe of clothes there except for nightwear. She had no personal furnishings and the bedding, towels etc. were communal. She said that when she first worked at Corner House the bedding was actually shared and not washed between use by each staff person. In the later years the bedding was still shared but was washed between each use. She could eat meals at the House but often would not. She did have the use of the television in the House and had the use of a "munch-card" to rent videos.

Richards lived at her own home for six nights per week and during much of her time employed by Corner House she had two other jobs during the week.

ANALYSIS

The primary issue in this case is whether Richards was a "residential care worker" as defined by the *Regulations:*

"residential care worker" means a person who

(a) is employed to supervise or care for anyone in a group home or family type residential dwelling, and

(b) is required by the employer to reside on the premises during periods of employment,

but does not include a foster parent, live-in home support worker, domestic or night attendant.

The reason that this definition is important is that section 34(1)(x) of the *Regulations* states that Part 4 of the *Act* does not apply to a residential care worker. Part 4 is that part of the *Act* which sets out the minimum standards for hours of work and payment of overtime.

If Richards was a "residential care worker" then the employer would not be required to comply with the provisions of Part 4 of the *Act* including, for example, to ensure meal breaks, pay for a minimum number of hours, provide for time off between shifts, pay overtime, or set any limit to prevent employees working excessive hours.

Richards was employed to supervise or care for children in a group home and therefore part (a) of the definition is met but the key question is whether she was required to *"reside on the premises during periods of employment"* ("the phrase").

The Lowans submit that the phrase "reside on the premises during periods of employment" does not mean that the residence must be the employee's permanent home, sole residence, full time residence or principal residence. It simply means that the employee resides there while on shift i.e. during periods of employment. They submit that this is the clear, logical, and simple meaning of the phrase. They submit that if the legislation meant something more it could have been more specific.

This argument is supported by the intervenor, CSSEA. They submit that to interpret "reside" in this context as meaning to live full time or a principal residence or domicile is too restrictive. They submit that the term should be given a "fair, large and liberal construction" (*Interpretation Act* - RSBC Chapter 206, 1979). They submit that a person can have a permanent home or domicile and still reside at another location "during periods of employment". They say that Richards and other like employees "reside" at their place of employment when they are required to stay overnight and sleep, eat, shower, and keep personal belongings on the premises.

CSSEA refers me to a number of memoranda indicating that the ministry's interpretation of the phrase has been the subject of some debate and even change over the years. The present interpretation by the ministry is that "reside" must mean that the premise is the employee's home and principal domicile. CSSEA says that this interpretation ignores the words "during periods of employment". They submit that these words must mean that a person could reside in one location when not at work and another location during employment.

CSSEA questions why an employee should be entitled to wages, likely payable at overtime rates, for hours they spend asleep while on the employer's premises. They submit that if the employee is included in the definition of residential care worker then provisions are in place for rest and remuneration if that rest is disturbed.

Counsel for the Director submits that the phrase should be interpreted narrowly because it takes away benefits and protections conferred by the *Act*. She submits that when interpreting a remedial statute clear language is required to take away benefits otherwise conferred by the legislation. If there is any uncertainty in the language it should be interpreted in the manner most consistent with the overall intention of the Statute which is to provide minimum standards and benefits for employees.

It is clear from the extensive materials provided to me at this appeal that the various government ministries and agencies have been working together for a number of years to try to come up with a working definition that would clearly include the situation of workers like Richards. I understand that these discussions are continuing. However, until the *Act* or *Regulation* is changed or until a variation is applied for under the *Act* these discussions and/or opinions given by various agencies can not, and do not, override the provisions of the legislation.

In *North Shore Association for the Mentally Handicapped* BC EST #D342/96 the employer appealed on the basis that the Employment Standards Branch had changed their definition of "reside" for residential care workers in March 1996 and that the employee had worked for them prior to notification of the changed interpretation. This refers to the Branch adopting the definition that reside would now be interpreted as meaning "the employee's home and principle domicile". The Adjudicator on behalf of the Tribunal stated:

> *"One cannot help but express some sympathy for the plight of the employer in this case. It would appear that the employer was acting in good faith when it purported to contract with Bambrough to avoid its liability for overtime pay.*
>
> *On the other hand, in the Determination the Director has only given the term "reside" its plain and ordinary meaning and, by any reasonable measure, it is clear that Bambrough does not fall within the definition of "residential care worker", either under the current Act, or, indeed, under the old Act.*
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> *As I conceive the situation, the Director's previous view as to the meaning of "reside" was incorrect as a matter of law and could have been successfully challenged by any employee who wished to do so. The fact that this Employer (and, apparently, other employers as well) relied on a favourable interpretation by the Director in order to avoid its (and their) legal obligation to pay overtime is, in my view, irrelevant to the question of whether or not Bambrough was entitled to overtime under the Act".*

The Adjudicator also found that Bambrough did not reside at her place of employment and was therefore not a residential care worker. Ms Bambrough's working schedule and live-in requirements were not set out in the decision and therefore, although finding that the interpretation by the Branch was not relevant, the decision does not assist me in the correct interpretation of "reside".

Another decision by the Tribunal submitted to me, *Barnacle (c.o.b. Karen's Home Help Service)* BC EST #D 022/98, found that the employee was at times working as a "night attendant" but that she was not a "residential care worker". The Adjudicator for the Tribunal accepted the employees evidence that the place where she lived was not at the home of the employer and found that:

> *"All other employees who are employed to supervise or care for anyone in a group home or family type residential dwelling, but DO NOT reside on the premises (as their primary domicile) will be entitled to full coverage under the ESA and Regulation, including Part 4, hours of work and overtime."*

The problem with importing the term "domicile" into the definition of "reside" is that domicile has specific meaning in law and has been interpreted by the courts in other contexts. Counsel referred me to the decision of the Alberta Surrogate Court in *Gillespie v. Grant [1992] 6 W.W.R. 599 @ 609* in which the Court noted that domicile has been defined as a person's permanent home which requires both the act of residence and the intention to remain there permanently. This definition of domicile is simply the restatement of a principle accepted by the Courts of most common law jurisdictions. Thus domicile is something more that the act of residence itself. The Court notes that a person may have more than one home but can only have one domicile.

Counsel further submitted the decision of the Ontario Hight Court in *Morrone et al v. Wawanesa Mutual Insurance Co.* [1990] 72 O.R.(2d) 220 in which the Court was called upon to interpret the term "reside" for the purpose of certain insurance coverage. The Ontario Court referred to a number of sources of a definition but in particular referred to the Supreme Court of Canada consideration of "residence" in connection with taxing statutes in *Thompson v. M.N.R.* [1946] S.C.R. 209. The Supreme Court's discussion is helpful:

> There is no definition in the Act of "resident" or "ordinarily resident" but they should receive the meaning ascribed to them by common usage... The Shorter Oxford English Dictionary gives the meaning of "reside" as being "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place".
>
> A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally, or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question.

Residence seems to be a notion which the courts and legislatures have rarely clearly defined. It seems to be a notion which is accepted in a common sense way. Residence then is something short of domicile, i.e. the intention to remain in that place permanently, but something more than temporary or intermittent. It has some degree of permanence; it is the person's settled abode; it is the place they carry on the settled routines of life. It would be the place one hangs one's hat, keeps one's clothes, stores treasures and family memories; a place of privacy protected in law from state

intrusions; and a place of retreat from the turmoil of the workplace. It would be a place to entertain one's friends. It would be an address of one's own, a phone number, and a place to receive mail.

This is not to say that there are not situations where an employee gives up some of the benefits of a private residence to live communally or at a place of work. For a workplace to also be considered a residence the place of work must assume some of the qualities of a residence. There must be some degree of privacy; a space, all be it limited, to call one's own. There must be some degree of settlement to carry on as much of those everyday things as possible, subject only to the minimum necessary intrusions of the requirements of the employment. There must be some element of permanence as opposed to the intermittent or temporary.

The *Regulation* then defines a residential care worker as someone who is required by the employer to "reside on the premises during periods of employment". I am asked by the Lowans and CSSEA to interpret this phrase in a fair large and liberal manner while counsel for the Director submits that it should be interpreted narrowly.

I am mindful of the provisions of the *Interpretation Act* and agree that the minimum requirements of the *Act* should be interpreted in a manner that is "fair, large and liberal" as best ensures the attainment of its objects. The objects of the *Act* are, inter alia, to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment and to promote the fair treatment of employees and employers.

In *Awassis Home Society,* BC EST #D019/97 the Adjudicator for the Tribunal concluded that:

> *...however, exceptions to those minimum requirements such as the exclusions under Section 34 of the* Regulations *must be interpreted in the most narrow manner in order to preserve the intent and purposes of the Act.*

I agree with this analysis and in my opinion employees should only be excluded from the protections of Part 4 of the *Act* in the clearest of cases.

In this case Richards maintained her own residence away from her workplace. It was that personal residence as referred to above. The staff sleeping room at Corner House could not, under any interpretation, even the fairest, largest and most liberal, be considered a place of residence. It was shared with both the employers, one of whom considered it his primary residence. It was basic and functional and no more. Richards slept there one night per week subject to the exigencies of the job. She did not keep her clothes or personal belongings at the House. Her guests had to be pre-authorised and were subject to police checks. In my opinion she did not "reside" there at any time, even "during periods of employment".

I was asked find that "during periods of employment" could mean that an overnight shift is a period of employment. However, for the purpose of this decision I do not need to decide what might constitute a period of employment as I have found that Richards did not reside at Corner House at any time.

Other arguments were advanced by the Lowans. They suggested that Richards was a "sitter" and therefore excluded from the *Act* under section 32 of the *Regulations*. I do not agree with this argument as a sitter is defined as a person employed in a private residence and does not include an employee of a business that is engaged in providing such services. Corner House is such a business.

It was also submitted that anyone who works in a Residential Care Home should be defined as a residential care worker. This may be logical but it is not the definition contained in the legislation as discussed above.

It was also submitted that anyone who replaces a residential care worker or carries out a replacement shift should be considered a residential care worker. This submission also has some logic to it and I note that it has been discussed with the Government as a possible amendment but again it is not the current legislation.

There is no issue in this case on the amount of hours worked by Richards and the employer accepts the calculations made by the Director's Delegate. There is also no doubt in my opinion, and I would so find, that Richards was "at work" throughout her shifts even when sleeping in the staff bedroom. Section 1(2) of the *Act* provides that:

> *(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.*

As discussed above Richards was on call at a location designated by the employer that was not her residence.

I conclude that Richards was not a residential care worker and that she was "at work" throughout her shifts as found by the Director's Delegate.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

JOHN M. ORR
Adjudicator,
Employment Standards Tribunal