

An Application for Reconsideration

- by -

Richard Welsh, a Director and Officer of Cantech Manufacturing Ltd.

- 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)

**TRIBUNAL MEMBER:** Robert E. Groves

**FILE No.:** 2016A/89

**DATE OF DECISION:** November 23, 2016

## DECISION

### SUBMISSIONS

Michael D. Carter	counsel for Richard Welsh, a Director and Officer of Cantech Manufacturing Ltd.
Greg Smithman	on his own behalf
Amanda Clark	on behalf of the Director of Employment Standards

### OVERVIEW AND FACTS

1. Richard Welsh (the “Applicant”) requests an extension of the time to file an application for reconsideration under section 116 of the *Employment Standards Act* (the “*Act*”). He seeks reconsideration of decision BC EST # D065/15 of the Tribunal dated July 7, 2015 (the “Final Appeal Decision”). The application for the extension is brought pursuant to Rule 28 of the Tribunal’s *Rules of Practice and Procedure*.
2. In the event that the extension is granted, the Applicant seeks an order cancelling the Final Appeal Decision.
3. Fifteen employees filed a complaint with the Director of Employment Standards (the “Director”) alleging that several corporations, acting in concert as their employer, had failed to pay wages to them and, in some cases, had required them to pay business costs.
4. On June 12, 2014, the Director issued a determination (the “Corporate Determination”) finding the named corporate respondents to be associated companies pursuant to section 95 of the *Act*. The Corporate Determination also found them in contravention of section 18 of the *Act* for failing to pay wages and interest totalling \$89,059.30. Certain administrative penalties were also imposed on some of the corporate respondents.
5. On the same day, the Director issued a parallel determination (the “Director Determination”) finding the Applicant to be a director and officer of one of the corporate respondents, Cantech Manufacturing Ltd. (“Cantech”), from May 10, 2013, to June 3, 2013, when the complainants’ wages were earned and payable. The Director determined that the Applicant was liable to pay \$80,367.12 in unpaid wages and interest, pursuant to section 96 of the *Act*.
6. The Applicant appealed the Director Determination pursuant to section 112 of the *Act*, claiming that he was never a director of Cantech. On December 12, 2014, in decision BC EST # D128/14 (the “First Appeal Decision”), the Tribunal dismissed the appeal. In doing so, the Tribunal expressly affirmed the Director’s finding that the Applicant was a corporate director of Cantech at the relevant time. However, the Tribunal referred back to the Director the matter of the proper calculation of the amount owed by the Applicant pursuant to section 96.
7. On December 30, 2014, the Director delivered a recalculation of the amount owed by the Applicant under section 96. The Applicant disagreed with the manner in which the Director had recalculated the amount of his liability and, therefore, the amount it was alleged he owed.

8. In decision BC EST # D022/15, issued on February 27, 2015 (the “Second Appeal Decision”), the Tribunal found that the Director had erred when performing the recalculation, and ordered that the amount of the Applicant’s liability be referred back once more for clarification, or recalculation if necessary.
9. On May 5, 2015, the Director responded with a further recalculation, which fixed the amount of Applicant’s liability for wages and interest under section 96 at \$79,165.14.
10. In the Final Appeal Decision which followed on July 7, 2015, the Tribunal affirmed the amount of the Applicant’s personal liability established in the Director’s May 5, 2015, report.
11. I have before me the Director Determination and the Reasons for it, the Applicant’s Appeal Form and submissions in the appeal, the record the Director was required to deliver to the Tribunal pursuant to section 112(5) of the *Act*, the submissions of the other parties to the appeal including the Director, the three decisions of the Tribunal in the appeal proceedings, the application for reconsideration, including the request for the extension of time, the Applicant’s submissions on that issue, and on the merits of the application for reconsideration, as well as submissions from the Director and one of the complainants.
12. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I find I can decide this application based on the written materials filed, without an oral or electronic hearing.

## ISSUE

13. The issues before me are these:
  - 1) Should the Applicant’s request for an extension of time to file for reconsideration be granted?
  - 2) If the answer to #1 is “yes”, has the Applicant met the threshold established by the Tribunal for reconsidering the Final Appeal Decision?
  - 3) If the answer to #2 is also “yes”, should the Final Appeal Decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

## ARGUMENT

14. The Applicant contends that he should be granted an extension of the time to file his application for reconsideration, notwithstanding that his application was delivered to the Tribunal over a year after the Final Appeal Decision was issued.
15. The Applicant states that the principal reason for the delay was that he had sought advice from multiple lawyers as to the manner in which he should proceed.
16. One of the alternatives for action the Applicant chose was to place Cantech into bankruptcy. However, the Applicant later concluded, correctly in my view, that this step would not have the effect of his avoiding the personal financial liability imposed on him in the Final Appeal Decision.
17. Once that option failed to provide relief, the Applicant states that he sought other legal advice. One of the opinions he received was that he might challenge the Tribunal’s conclusion in the First Appeal Decision

confirming the Director's finding in the Director Determination that he was a director of Cantech, and therefore subject to personal liability for unpaid wages under section 96 of the *Act*. However, the Applicant decided not to pursue that argument, at least not at that time.

18. The Applicant then attempted to negotiate a settlement of his liability with the Director. His approach was based on the belief that if he merely renewed the mortgage on his home at the appropriate times, and no material terms were altered, the certificate of judgment for his section 96 liability that had been placed as a charge on the title to the home would continue to be registered but would remain unpaid for many years. The Applicant says that he hoped this factor would induce the complainants to accept less than the full sum owed, and that if that were the case he might have been able to obtain the necessary funds to pay out the settlement amount.
19. The Applicant says, however, that when he approached the Director to discuss a settlement, he was rebuffed. He says he was told that no negotiations would occur and that the Director would simply wait for payment in full.
20. Once the settlement option appeared to be foreclosed, the Applicant says he re-visited the other alternative he had canvassed with counsel following the Final Appeal Decision, but had declined to pursue. He states that he decided to challenge the conclusion of the Tribunal in the appeal process that he was a corporate director for the purposes of section 96 of the *Act*. In taking that approach, the Applicant now submits that the conclusion he was a director of Cantech, and liable for unpaid wages under section 96, was made in error.
21. On the merits of this point, the Applicant submits that while another principal of Cantech appointed him as a director of Cantech, the appointment was made without his knowledge or consent, and there was nothing in his conduct while associated with Cantech which would support, in a significantly probative way, a conclusion that he had acted in a manner indicative of his being a director of the company.
22. In a letter to the Tribunal the Applicant has delivered in support of his application, his legal counsel argues that the "functional director" test which has formed the basis for several decisions of the Tribunal finding individuals liable as directors pursuant to section 96 of the *Act* is no longer applicable in light of the changes to the definition of "director" since the enactment of the *Business Corporations Act* SBC 2002 c.57 (the "*BCA*"). Counsel refers to subsection 122(4) of the *BCA*, which provides that no appointment of an individual as a director is valid unless the individual consents. Subsection 123(1) of the *BCA* states that an individual may consent by providing a written consent, which there is no evidence the Applicant did in this case, or by performing functions of, or realizing benefits exclusively available to, a director of a company, after the individual knew or ought to have known of his appointment as a director.
23. Counsel also challenges findings of fact made by the Director in the Director Determination, and relied upon by the Tribunal in the First Appeal Decision, to the effect that no evidence had been presented rebutting the presumption that the Applicant was a director of Cantech. Counsel states that these findings ignore the Applicant's statements that he had never applied to be a director, was unaware that he had been appointed as one, and did not act within the company in a manner consistent with his being a director.
24. Counsel also contends that the First Appeal Decision reveals that the Tribunal relied on facts which were not alluded to in the Director Determination. More specifically, counsel refers to comments made in the First Appeal Decision to the effect that the Applicant at no time advised the Director, or produced documents which might have established, that he had no management or supervisory responsibilities in the affairs of Cantech, or another of the corporate respondents, and had no involvement in the financial affairs of the business. I pause to say that it appears, indeed, that the Tribunal relied, for these comments, on the

submission of the Director during the appeal proceedings, made in response to statements made by the Applicant in his submission in support of his appeal.

25. The Director has delivered a submission in response to the application for reconsideration. In it the Director alludes to the fact that the *Act* was amended as at May 14, 2015, to include a new subsection 116(2.1) providing that an application for reconsideration may not be made more than 30 days after the date of the decision in respect of which a reconsideration is sought.
26. In the alternative, the Director asserts that the Applicant has failed to meet the criteria for a successful application for an extension, having regard to the criteria set out in Rule 28 of the Tribunal's *Rules of Practice and Procedure*. In particular, the Director says that the Applicant has failed to provide a reasonable and credible explanation for the delay in the filing of his application. The Director states that the Applicant was notified of the Final Appeal Decision in a timely manner, and he acknowledged the finding that he was personally liable to pay wages when he initiated settlement discussions with the Director in an effort to have the certificate of judgment the Director had obtained removed as a charge from the title to his home in order to facilitate a sale.
27. On the merits of the application, the Director submits that the Applicant has established no error on the part of the Tribunal during the appeal process. The Director says that the essence of the Tribunal's conclusion that the Applicant was a director of Cantech was based on the principle, recognized in several decisions of the Tribunal, that corporate records, particularly those appearing in the British Columbia Corporate Registry, raise a rebuttable presumption of correctness. In this instance, a finding was made that the Applicant had failed to produce evidence sufficient to rebut the presumption. To the extent that the Applicant's roles and responsibilities at the relevant time were considered, they were not weighed for the purpose of determining whether the Applicant performed the functions of a director. Rather, they were only examined in relation to an assessment of the reliability of the Applicant's assertion that he was unaware he had been appointed as a director and never consented to the appointment. In sum, the Director argues that the "functional director" test was not applied by either the Director or the Tribunal in this case.
28. In addition, the Director submits that the facts continue to affirm the correctness of the records in the Corporate Registry. The Director refers to the fact that the Applicant has consented to his appointment as a director of Cantech because he has continued to perform the functions of a director after having been made aware of his appointment. The Director points to the fact that the corporate records for Cantech continue to list the Applicant as a director, and he has exercised authority as a director by initiating the bankruptcy proceedings for Cantech to which he referred in his submission in support of his application for reconsideration.
29. Counsel for the Applicant has provided a response to the submission delivered by the Director.
30. Counsel objects to my considering certain documents enclosed with the Director's submission. They are a recent corporate search for Cantech, a facsimile relating to the Cantech bankruptcy proceedings, and a property listing printout. Counsel argues that these documents constitute inadmissible "fresh evidence" and, in any event, they relate to facts which are irrelevant.
31. Counsel also takes issue with certain statements made by the Director in relation to the facts of this case. Counsel argues that it is incorrect for the Director to assert that the Director Determination stated the Applicant made a financial investment in the business of Cantech. Counsel says that the Applicant made a loan to Cantech, but that did not make him an owner of the company. While the Applicant was a manager, and therefore a member of the leadership team, any actions or communications on his part, whether to

address employee concerns or otherwise, did not constitute an acknowledgment of any personal responsibility as a director.

32. Counsel states, correctly, that subsection 109(1)(b) of the *Act* permits the Tribunal to extend the time for filing an application for reconsideration. Counsel disputes the statement of the Director in the Director's submission on the application that the Applicant acknowledged he was personally liable for wages by engaging in settlement negotiations after the Final Appeal Decision was issued. Counsel submits that this statement is inaccurate, that attempts to settle disputes are in the public interest, and that discussions in aid of settlement are privileged. That said, counsel argues that since settlement negotiations are in the public interest, the fact that the Applicant initiated them should be weighed in his favour when the Tribunal decides whether the delay in filing the application for reconsideration was reasonable.
33. On the merits, counsel submits that since the Applicant was unaware he had been appointed as a director there were no corporate records that would establish he had not consented to the appointment, and so there was nothing for him to submit in order to rebut the presumption of the correctness of the information contained in the Corporate Registry. Counsel submits further that the Applicant did provide evidence rebutting the information in the Corporate Registry when he stated he was unaware he had been appointed as a director and had not consented to the appointment. Counsel asserts, in addition, that if the Applicant had intended to become a director of Cantech he would have made himself aware of the financial circumstances of the company, he would have seen that those circumstances were dire, and so it is improbable that he would become a director, only to find that the company ceased to do business but a few weeks later.
34. Counsel also rejects that there is substance to the Director's argument that the Applicant has acted in a manner consistent with his being a director of Cantech by initiating bankruptcy proceedings for the company and failing to take steps to remove his name from the Corporate Registry. In answer, counsel says that the Applicant has believed himself to be an employee of Cantech, and not a director, throughout these proceedings, the bankruptcy proceedings were commenced after the Final Appeal Decision, and that in the current circumstances his taking steps to remove his name from the Corporate Registry would be inconsequential.

## ANALYSIS

35. Rule 28 of the Tribunal's *Rules of Practice and Procedure* states that if it is to allow a request to extend the time for filing an application for reconsideration the individual seeking the extension must provide a reasonable and credible explanation for the failure to request a reconsideration within the statutory time limit set out in subsection 116(2.1) of the *Act*.
36. In addition to this requirement, decisions of the Tribunal have affirmed that there are other factors which should be considered. These factors are the same as those considered by the Tribunal when deciding whether the time for filing an appeal under section 112 of the *Act* should be extended (see *Viewpoint Developments Ltd.*, BC EST # RD021/16). The following is a non-exhaustive list of the factors that are normally considered in applications of this sort, derived from the decision of the Tribunal in *Re Niemisto*, BC EST # D099/96:
- 1) Has there been a genuine and ongoing *bona fide* intention to file an application for reconsideration?
  - 2) Have the other parties, and the Director, been made aware of the intention to file the application?
  - 3) Will the other parties be unduly prejudiced by the granting of the extension?

4) Is there a strong *prima facie* case in favour of the applicant?

37. It has also been stated that an analysis of the question whether there is a strong *prima facie* case in favour of an applicant must take into account that the Tribunal's discretionary authority to reconsider under section 116 of the *Act* is to be exercised with restraint. Another way of stating this is to say that the evaluation of the strength of an applicant's case on an application for an extension must remain consistent with the approach taken by the Tribunal in deciding whether reconsideration is warranted at all (see *Serendipity Winery Ltd.*, BC EST # RD108/15).
38. 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, cancel or vary the order or decision or refer the matter back to the original panel or another panel.
39. The reconsideration power is discretionary. As I have said, it 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.
40. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *Act*, 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 *Act*. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112 of the *Act*.
41. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have an appeal decision of the Tribunal overturned.
42. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that the Tribunal is persuaded to reconsider.
43. 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 original decision (see *Re Middleton*, BC EST # RD126/06).
44. If the applicant satisfies the requirements of 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 the appeal decision at this second stage, the standard applied is one of correctness.
45. In my opinion, the Applicant's request for an extension of the time to file his application for reconsideration should be denied. My reasons follow.

46. One of the factors that I believe should inform a consideration of whether the Applicant has provided a reasonable and credible explanation for the delay is the length of time between the date of the Final Appeal Decision and the filing of the application. Here, the application was filed more than a year after the Final Appeal Decision was issued. Such a delay is inordinate and, on its own, undermines significantly the policy of the *Act* that proceedings brought pursuant to it should be concluded fairly and efficiently. Thus, while there is no evidence suggesting that the reasons the Applicant has given for the delay are untrue, the length of the delay must be taken into account when deciding whether the reasons given constitute an explanation that is reasonable under the circumstances.
47. That said, no single factor should be considered in isolation. All the factors should be evaluated on their merits, and then balanced against each other before reaching a final conclusion.
48. In this instance, there are other factors in addition to the length of the delay which support a refusal to allow an extension. The evidence does not support a genuine and ongoing *bona fide* intention to apply for reconsideration after the Final Appeal Decision was issued. Instead, it reveals conduct on the part of the Applicant designed to avoid, or to minimize, his personal financial exposure arising from the Director Determination, and the appeal decisions of the Tribunal which followed it, either by means of taking proceedings to place Cantech in bankruptcy, soliciting the views of different lawyers to that end and, latterly, attempting to negotiate a settlement with the Director. As the Applicant says in his submission on this application, all of those “avenues” involved months or weeks of activity. It was only after those attempts bore no fruit that the Applicant decided to file an application for reconsideration. As the Applicant also states in his submission: “Perhaps I should have started with a reconsideration but being uninitiated in these matters I was looking for advice from others and kept hoping something would work out.” I agree with this statement. The Applicant should have filed his application for reconsideration in a timely way. The other paths down which he proceeded could have been explored concurrently.
49. Since the Applicant, until recently, had no genuine and ongoing *bona fide* intention to file an application for reconsideration, it cannot be said that the complainants and the Director were made aware, in a timely way, of such an intention.
50. I have no evidence that the complainants will, or will not, be unduly prejudiced by an extension. However, I note that the complaints were made over three years ago. The process under the *Act* is meant to be summary, so as to vindicate the values of fairness and efficiency set out in section 2.
51. There is another reason why I believe the Applicant has failed to provide a reasonable explanation for the delay. The Applicant’s application seeks reconsideration of the Tribunal’s Final Appeal Decision BC EST # D065/15 dated July 7, 2015. The Tribunal decision which affirmed the Applicant’s liability as a director of Cantech was the First Appeal Decision, issued on December 12, 2014. The Applicant never sought a reconsideration of that decision. The Second Appeal Decision and the Final Appeal Decision only concerned the proper calculation of the amount of the Applicant’s personal liability for unpaid wages under section 96 of the *Act*. Those decisions proceeded on the assumption that the matter of the Applicant’s being a director of Cantech had been settled. Indeed, in his submission to the Tribunal prior to the issuance of the Final Appeal Decision, the Applicant stated expressly that he accepted that he was a director of Cantech.
52. Now, on this application for reconsideration, the Applicant seeks, for the first time, to re-visit the finding in the First Appeal Decision that he was a director of Cantech, based on a legal argument that might, with proper diligence, have been presented to the Director prior to the issuance of the Director Determination, or to the Tribunal in the appeal proceedings.



53. In addition, as I noted earlier, the Applicant states in his submission on this application that he did receive legal advice in the period following the Final Appeal Decision suggesting that there was be a plausible legal basis on which he might challenge the decision that he was a director of Cantech, yet the Applicant did not act on that advice. Instead, a further period was consumed in an attempt to negotiate a settlement with the Director.
54. Given all of these facts, I cannot conclude that the Applicant has provided a reasonable explanation for the delay in filing his application for reconsideration. Indeed, I am of the view that if the extension were to be granted, it would erode, unreasonably, the integrity of the investigative and appeal processes that have preceded the Applicant's application.
55. These facts also must be taken into account when deciding whether the Applicant has established a strong *prima facie* case for reconsideration. In my view, the Applicant has failed to do so.
56. It is the First Appeal Decision which deals with the issue whether the Applicant was a director of Cantech for the purposes of the *Act*. It is clear from that decision that the Tribunal was alive to the provisions of the *BCA* regarding appointments of directors and the need for consent. The Tribunal noted, correctly in my view, that the Director was entitled to rely on the corporate records for Cantech located in the Corporate Registry, and that they created a rebuttable presumption that the Applicant was a director and officer of Cantech at the relevant time (see *Wilinofsky*, BC EST # D106/99). The Tribunal stated that the Applicant provided no evidence to the Director during the investigation that the corporate records were incorrect. The Tribunal did acknowledge that the Applicant had informed the Director during the investigation of the complaints that he did not apply to be appointed as a director of Cantech and did not consent to his appointment. However, the Tribunal declined to find that the Director Determination revealed an error of law when it determined, as a matter of fact, that the bald statements of the Applicant as to his status with Cantech were insufficient to rebut the presumption of fact created by the information recorded in the Corporate Registry.
57. The Applicant did provide some evidence that he was not informed of his appointment, and did not consent to it, when he filed his appeal of the Director Determination. His submission on appeal included the letter from another principal of Cantech to the effect that the principal had filed a change of directors, naming the Applicant as a new director, without the Applicant's knowledge or consent. The Tribunal in the First Appeal Decision stated, again correctly in my view, that the evidence of the principal was available to the Applicant during the Director's investigation. Accordingly, it was not evidence that was "new", and so it could not ground a successful appeal under subsection 112(1)(c).
58. I am in agreement with the submission of the Director on this application that the statements in the Director Determination and the First Appeal Decision which address the Applicant's conduct while associated with Cantech at the relevant time were not intended to fortify an argument that the Applicant was a director because he functioned as such. Rather, those statements were made in relation to whether the Applicant had led evidence sufficient to rebut the presumption that he was a director of Cantech, based on his status as such in the records of the company located in the Corporate Registry.
59. For these reasons, I am not persuaded that the Applicant has presented a strong *prima facie* case which supports a conclusion that reconsideration is warranted under the circumstances, and if it were to occur the Tribunal should provide a remedy to the Applicant pursuant to section 116 of the *Act*.

**ORDER**

- <sup>60.</sup> Pursuant to section 109(1)(b) of the *Act*, I order that the Applicant's request for an extension of the time to file an application for reconsideration of Tribunal decision BC EST # D065/15 be and is hereby denied.

---

**Robert E. Groves**  
**Member**  
**Employment Standards Tribunal**