EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 116 of the
Employment Standards Act, R.S.B.C. 1996, c. 113

- by -

Carol LaCroix and Kevin LaCroix
operating as Lone Wolf Contracting
("Lone Wolf")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal"**)**

ADJUDICATOR: John McConchie

FILE NO.: 96/360

DATE OF DECISION: May 30, 1997

DECISION

OVERVIEW

This is an application by Carol Lacroix and Kevin Lacroix operating Lone Wolf Contracting ("Lone Wolf") under Section 116(2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of Decision No. D267/96 (the "Decision") which was issued by the Tribunal on September 16, 1996. The Director of Employment Standards (the "Director") also requests reconsideration of the Decision.

The Decision arose from Determination No. CDET 002248, dated May 13, 1996, which concluded that Lone Wolf was liable to pay an amount of $7,056.30 to eight former employees (the "Complainants"). The Complainants had been engaged by Lone Wolf to participate in a silviculture program designed by Lone Wolf for First Nations People. The amount comprised payment for regular and overtime hours, annual vacation on the additional amounts recorded by the Director and unauthorized deductions.

Lone Wolf appealed the Determination. It argued that the wage and overtime calculations made by the Director were wrong and based on inadequate and incomplete records; that some of the time characterized by the Director as "work" was volunteer training time ("Training Time") and so none of the complainants should be paid for that time; that some of the time characterized by the Director as "work" was, in fact, unpaid travel time; that the deductions from pay were not made without authorization; and that the investigating officer acted in bad faith and contrary to the principles of natural justice by failing to provide Lone Wolf with an adequate opportunity to be heard.

In Decision No. D267/96, following an oral hearing conducted by Adjudicator Stevenson (the "Adjudicator"), the Tribunal confirmed the Determination with the exception that it be varied to exclude travel time hours from what was confirmed to be "work" under the *Act.* The wage and overtime hours were to be adjusted accordingly.

On October 10, 1996 and November 5, 1996 Lone Wolf provided reconsideration request submissions. Those submissions were further expanded and newly retained Counsel for Lone Wolf advanced additional grounds for reconsideration in a submission on January 8, 1997.

ISSUES / GROUNDS FOR RECONSIDERATION

There are ten grounds for reconsideration. Lone Wolf's application for reconsideration raises the following issues:

1. Whether Lone Wolf is outside the jurisdictional competence of the Employment Standards Branch as its labour relations fall within federal jurisdiction.

2. Whether Lone Wolf was denied a basic right of procedural fairness and natural justice at the hearing that preceded Decision No. D267/96 when the Adjudicator denied Ms. Lacroix the opportunity to present material evidence.

3. Whether the reconsideration panel will hear new evidence that has become available since the completion of the hearing.

4. Whether the Adjudicator made an error of law in failing to appreciate the fundamental nature of Lone Wolf's relationship with the individual Complainants.

5. Whether the Adjudicator erred in finding that Lone Wolf was not authorized to make deductions for safety equipment and first aid courses.

6. Whether the Adjudicator made a number of erroneous findings of fact regarding the entitlement of Gordon Marchand.

7. Whether the Adjudicator erred in extending the application of the *Act* to the graveyard and Emery land work.

8. Whether the Adjudicator erred in not making provision for deductions for lunch breaks.

9. Whether the Director should be compelled to produce to Lone Wolf a copy of the records of Dwayne Louis' hours.

The Director seeks reconsideration on the following issue:

10. Whether the employees are entitled to payment of wages and overtime for time spent in traveling to and from work sites after meeting at the marshalling point designated by Lone Wolf.

I have reviewed and considered the several lengthy written submissions and arguments that have been made by the parties to these reconsideration applications and have made this decision without an oral hearing.

FACTS

The facts are set out in the Decision. The arguments of the parties are set out in their extensive written submissions in this proceeding. For ease of reference I have below outlined the parties' positions sequentially with respect to each issue in its turn.

A. Preliminary Issue

As a preliminary matter the Director raises the issue of delay on the part of Lone Wolf by raising new grounds for reconsideration in its January 1997 submission. The Director submits that it is unfair to allow Lone Wolf to protract the Tribunal's adjudicative process by these means as most of the latest grounds are matters that could and should have been raised much sooner. The Director notes that Lone Wolf previously had the benefit of other counsel prior to the issuance of the Determination and in drafting the notice of appeal from the Determination. The Director submits that representation by new counsel should not automatically permit the late raising of entirely new issues.

Lone Wolf requests that all of its grounds of reconsideration proceed and specifically argues that the jurisdictional issue must be addressed despite being raised at such a late instance as the Tribunal cannot proceed if it is without jurisdiction to do so.

B. Grounds for Reconsideration

1. Jurisdiction

Lone Wolf submits that a new hearing should be convened to consider whether the labour relations of Lone Wolf are provincially regulated. Relying on the principles enunciated in *Re: Industrial Relations and Disputes Investigation Act* [1955] S.C.R. 529 and *Four B. Manufacturing Ltd. v. United Garment Workers' of America et al*, (1979), 102 D.L.R. (3d) 385 (S.C.C.) and the decisions of the Federal Court in *Saqkeeng Alcohol Rehab Centre Inc. v. Abraham et al* [1995] 1 C.N.L.R. 184 (F.C.C.) and the B.C. Labour Relations Board in *Nisga'a Valley Health Board* (1995) 27 C.L.R.B.R. (2d) 301 (B.C.L.R.B.), the position of Lone Wolf is that its labour relations are an integral part of, or necessarily incidental to, federal jurisdiction over "Indians or Lands reserved for the Indians" as enumerated in Section 91(24) of the *Constitution Act 1867* and, as such, it is not properly subject to the *Employment Standards Act*. Lone Wolf cites various factors which it claims support a finding that its operations and normal activities are so intrinsically identified with "Indianness" that its labour relations are an integral part of or necessarily incidental to primary federal jurisdiction over Indians. These factors include the provision by Lone Wolf of basic silviculture training to First Nations' peoples to provide them "with a skill"; the funding available from FRBC to First Nations' applicants which, if a successful first season is obtained, may entitle a First Nation's community to further funding for training, employment and asset acquisition; the "exclusive" provision of such training work to First Nations' people at the

time of the Okanagan Indian Band contract; the provision of the bulk of the training on Band land; Lone Wolf's character as a First Nations' contractor and it's adherence to the express requirement of the Band that training be provided to First Nations' people only. Lone Wolf submits that, to the extent to which the relationship between Lone Wolf and the Complainants may be described as labour relations, Lone Wolf's focus was "exclusively on First Nations' peoples" and those relations are, in its view, federally regulated.

The Director submits that Lone Wolf has mistakenly pointed to federal jurisdiction over the persons of the employers and employees in this case and improperly relied upon that for its assertion of federal jurisdiction over the employer's operations. The Director notes that the holding in *Four B Manufacturing* (supra) is that it is the nature of the operation that determines whether or not an enterprise can be described as a federal enterprise. The Director maintains that there is nothing inherently "Indian" in the silviculture contracting and training business operated by Lone Wolf; that Lone Wolf has implied it is no longer exclusively involved in performing work for First Nations communities and that its efforts to train First Nations people in silviculture were dependent upon the receipt of provincial funding. The Director submits that the mainly non-Indian nature of Lone Wolf's operations render it subject to the *Act* and the jurisdiction of the Branch and this Tribunal over its employment relationships.

Complainant Denise Marchand provided a written submission noting that the training was not performed principally on First Nations Lands and, with the exception of a few days, all of her work was performed off reserve and not on First Nations Lands.

In reply, Lone Wolf reiterates it's previous submissions on what it believes is the "inherently Indian" character of its business and again submits that "[A]s a First Nations' contractor, training First Nations' peoples thereby promoting First Nations' employment and providing training in an area that fosters sustainable and environmentally friendly development of Indian lands", its labour relations vis a vis the Complainants should fall within federal jurisdiction. The nature of Lone Wolf's business before or after the time under review and the provincial source of funding is, in Lone Wolf's view, irrelevant. What is relevant is the policy behind the funding which is to put in place specific initiatives aimed at promoting aboriginal participation in forest renewal activities.

2. Procedural Fairness and Natural Justice at the hearing before Adjudicator Stevenson

Lone Wolf submits that Mr. and Ms. Lacroix attended at the hearing unrepresented by Counsel and each expected to present evidence. It alleges that on several occasions during the hearing the Adjudicator denied Ms. Lacroix the opportunity to "speak and present evidence" in areas where only she had first hand information. The areas of evidence which were allegedly not allowed to be presented are identified by Lone Wolf as a conversation between Ms. Lacroix and Mr. Marchand which, in its view, would demonstrate that Mr. Marchand was to be paid on a contract rather than an hourly basis. The "unnecessarily and improper" limiting of the evidence furnished by Lone Wolf breached its rights of natural justice and procedural fairness and Lone Wolf requests a new hearing be convened to allow Ms. Lacroix to furnish evidence.

The Director submits there was no denial of procedural fairness or natural justice to Ms. Lacroix. Based on information supplied by the Industrial Relations Officer who was present as the Director's delegate at the hearing, the Director asserts that Lone Wolf presented its evidence

solely through the testimony of Mr. Lacroix and declined to call any other witnesses, including Ms. Lacroix, or to present further evidence despite being invited to do so by the Adjudicator.

The Director also notes that during Mr. Lacroix's testimony, Ms. Lacroix repeatedly attempted to interrupt him and add additional unsworn comments of her own which the Arbitrator repeatedly and properly advised her against doing.

Ms. Marchand, who also attended the hearing, states that everyone was invited to present evidence and the Adjudicator gave everyone equal opportunity to do so.

3. New Evidence

Lone Wolf claims it was unable to present evidence of one of the trainees, a Mr. Asapace, before the Adjudicator as his whereabouts were unknown until shortly after the conclusion of the hearing when he returned to B.C. from Saskatchewan where he was travelling as a singer with a native drum band. The evidence which Lone Wolf wishes to present through Mr. Asapace involve a conversation which he witnessed between Ms. Lacroix and Mr. Marchand regarding the payment for Mr. Marchand's current and proposed future contracts; a discussion which Mr. Asapace, along with other trainees, had with Mr. Lacroix regarding no remuneration for the grave yard work; and group discussions among the trainees regarding the necessity of and deductions for safety equipment and first aid training; and the nature of the work and length of training on Emery's property. Lone Wolf submits that a new hearing should be convened to allow Mr. Asapace the opportunity to present evidence.

The Director submits that this ground should not be considered in that the evidence sought to be offered might have been obtained from Mr. Asapace had Lone Wolf sought to subpoena him a reasonable amount of time prior to the hearing. This allegedly important "new evidence" was never considered previously necessary by Lone Wolf and should not now be permitted to be the cause of reconsideration. The Director further submits that the evidence Mr. Asapace is described as being able to offer is no different from evidence that might have been offered by other witnesses at the hearing. Lone Wolf's description of the expected evidence clearly identifies the existence of other witnesses besides Mr. Asapace who presumably could have been called at the hearing to give evidence of conversations or discussions or the nature of training and work.

Ms. Marchand notes that there was a close personal relationship between the Lacroix's and Mr. Asapace and expresses doubts about the truth of the "new evidence".

4. Fundamental Relationship of Employer / Employee

Lone Wolf submits that the Adjudicator erred in concluding that Lone Wolf was an employer, that the trainees were employees, and that the training work fell within the definition of work under the *Act.* Lone Wolf maintains that the Complainants were essentially students of Lone Wolf and that any provision of remuneration was gratuitous and not indicative of an employer-employee

relationship. The Band contracted with Lone Wolf to prepare a proposal to be submitted to FRBC for the allocation of funding to train First Nations people in basic silviculture work and the whole objective of Lone Wolf's program was to provide First Nations people with "hands on" experience and basic training so they could obtain a ticket and look for future employment with outside silviculture contractors and possibly work for the Band in any subsequent program. While Lone Wolf acknowledges that the definition of employee includes "a person being trained by an employer for the employer's business", Lone Wolf maintains that all of the Complainants, except Mr. Marchand, were not doing work for Lone Wolf's business, but rather the beneficiary was the Band.

The Director submits that the request for reconsideration on this ground should be denied as, in its view, the issue amounts to no more than an attempt to reargue the evidence presented at the hearing in a light more favourable to Lone Wolf. The Director notes that the Adjudicator had before him testimony and documentary evidence which indicated that Lone Wolf issued pay stubs to the "trainees" and made the necessary statutory deductions for those individuals. The Director submits that Lone Wolf treated them lie employees, bid for and received provincial monies to train them and presumably made some profits for its efforts.

5. Unauthorized deductions

Lone Wolf submits that the Adjudicator erred in concluding that the deductions for gear were payroll deductions and that they were unauthorized. According to Lone Wolf it was a known term and condition of entry in the training program that the trainees have proper gear or they could not train. When funding from the Band was not available Lone Gear volunteered to cover the employees until they were paid. Lone Wolf argues that by agreeing to continue the training and accepting the "gratuitous" payments provided for the training work the trainees manifested their consent to the deductions.

As with Ground #4 above, the Director submits that the request for reconsideration on this ground should be denied as, in its view, the issue amounts to no more than an attempt to reargue the evidence presented at the hearing in a light more favourable to Lone Wolf. Similarly, the Adjudicator had before him testimony and documentary evidence in support of the findings he made concerning Lone Wolf's having made unauthorized payroll deductions from the trainees.

6. Findings of fact about Mr. Marchand's claims

Lone Wolf maintains that Mr. Marchand was working for a flat fee contract, that his evidence at the hearing confirmed that and, further, he manifested his consent to that term by accepting a second contract. If his contract is to be examined on an "hours worked basis" then Lone Wolf submits that the Adjudicator erred in accepting the hours of work claimed by Mr. Marchand. Lone Wolf proposes that Mr. Marchand's claim includes overtime each day for time spent driving from his

home to pick-up a truck from Lone Wolf and time spent traveling from the drop off point to his home on return. Lone Wolf further argues that Mr. Marchand should not be entitled to claim for non-compensable lunch and rest breaks, nor should he be compensated for the volunteer work at the graveyard.

The Director opposes this ground of reconsideration except to the extent that it is necessary to make a correction to an error in the amount used as the hourly wage rate for the calculations of wages and overtime owing to Mr. Marchand for work he performed in October 1995 regarding a two-week contract with Lone Wolf for which he agreed to accept a flat rate of $1,500.00 in wages. In the Determination, the Director's delegate used the same hourly wage rate for all work performed by Mr. Marchand, which was a factual error not corrected by the Arbitrator. Mr. Marchand's wage amounts owing on the $1500.00 contract should have been calculated using method set out in subdefinition (b) of the term "regular wage" which produces an hourly wage rate of $16.21. The Director has attached corrected calculation sheets to its submission for amounts owing to Mr. Marchand. Applying that corrected hourly rate to the calculations for the total owing to Mr. Marchand for wages, overtime and holiday pay yields $2, 125,73.

7. Grave Yard and Emery Land Work

Lone Wolf submits that the "work" at the Grave Yard and Emery Property was voluntary and that the Adjudicator's finding to the contrary was made without regard to the evidence before him. Lone Wolf notes that the contract between the Band and FRBC did not include any grave yard work; that the work was performed, at the trainees' suggestion, to show respect for the elders; the trainees were advised they would not be paid for this work and the fact that it is was purely voluntary is exhibited by the fact that most of the Complainants did not log this time as hours worked. With respect to the Emery work, Lone Wolf maintains that this was clearly training as the trainees were "introduced" to the equipment and experimented with it by cutting trees for Emery. Lone Wolf submits that all those who claimed for Graveyard work, and all those except Mr. Marchand who claimed for the Emery training should not be awarded wages for that time.

The Director submits that the Adjudicator properly held that the definitions of "employee" and "work" in the *Act* mean that the trainees directed by Lone Wolf to work at the Graveyard site are entitled to compensation for their efforts and whether or not Lone Wolf agree to do the work with or without compensation is irrelevant.

8. Deductions for Lunch Breaks

In its October 10, 1996 submission Lone Wolf questions the hours provided by Gordon and Denise Marchand. Lone Wolf provides that it understands it is responsible for paid coffee breaks, but wants to ensure that lunch hours are deducted when the hours are recalculated.

The Director submits that insofar as this ground concerns lunch breaks it should not be reconsidered on the basis that Lone Wolf did not raise a claim at the hearing that employees were not entitled to payment for lunch breaks and nor did it lead evidence to show that employees had more than a single ½hour lunch break per day. The Director notes that all of the Complainants' claims include time spent from initial check-in at the marshalling point until returning to the

marshalling point and this strongly implies an understanding that they would be paid for their lunch breaks. The Director maintains that no reduction in the amounts owing under the Determination should be made for those lunch breaks.

9. Lone Wolf's Requests for Documentation

In its November 5, 1996 submission Lone Wolf requests a copy of Complainant Dwayne Louis' hours and calculations from the original determination as it claims that it has never received any information on these hours and calculations. The Director makes no reply to this request.

10. Travel Time

The Director submits that the Adjudicator's denial of wages and overtime owing for time spent by Lone Wolf's employees in travel is inconsistent with other decisions and constitutes an error of law in that there is no statutory or common law basis for the requirement that Lone Wolf's employees had to "demonstrate some very compelling reason" why travel time should be treated as work. Relying on the principle enunciated in *Broadway Entertainment Corporation operating as Wharfside Eatery ,* BC EST #D210/96 and the case of *Comcare Canada Ltd.,* BC EST #D036/96 where permissible sleeping on the job was compensable as "work", the Director submits the Complainants should be paid wages for their travel time as they were required to be available for work and were not free to pursue their own interests from the scheduled departure hour from the designated marshalling point or pick-up time at their homes until their return to that marshalling point or drop-off at their home. The Director further submits that the Adjudicator improperly shifted the burden of proof of the incorrectness of the Determination from the employer to the employees by imposing the requirement that the employees show a "compelling reason" why they were owed wages for time spent in travel. The Director argues that there is nothing in the *Act* nor in the common law which requires employees to prove that they are entitled to payment for their time spent after attending at a location designated by an employer or making themselves available for pick-up for work by the employer at a certain time.

Lone Wolf submits that the Adjudicator's decision to exclude travel time is consistent with applicable jurisprudence and sensible public policy. Lone Wolf notes that the *Wharfside* case (supra) involved remaining on site for extended hours rather than a claim for travelling to work and in *Comcare,* (supra) by being available or "on call" for work the complainant in that case was in effect working. In the case at hand Lone Wolf notes that the Complainants were free to make their own way to the job site but chose to avail themselves of the transportation provided by Lone Wolf. While they were not free to come and go as they pleased, nor is any employee in transit. The Adjudicator's findings are sensible regardless of any question about onus of proof.

ANALYSIS

In *Harrison (Re)*, BC EST #D344/96, this Tribunal considered the permissible scope of review under section 116 of the Act:

> The Tribunal has issued several decisions regarding the permissible scope of review under section 116 of the Act: see *Zoltan T. Kiss* (BCEST # D122/96). The Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error in law. The reconsideration provision of the *Act* should not be a second opportunity to challenge findings of fact made by the adjudicator, especially when such findings follow an oral hearing, unless such findings can be shown to be as lacking in evidentiary foundation.

Each of the grounds of review will be considered in its turn.

A. Preliminary Issue

Lone Wolf is not precluded from raising a fundamental issue of jurisdiction at this stage of the proceedings. If the Tribunal did not have jurisdiction to make a determination of the rights of the parties, then this is a matter which can properly be decided in these reconsideration proceedings.

B. Grounds for Reconsideration

1. Jurisdiction

The parties do not appear to disagree about the applicable law. It is well settled. They disagree on how the law should be applied to the facts. There are two key propositions of law which govern the outcome of this issue. The first is the test set forth in the *Four B* case (supra). The test employed by adjudicators in determining the issue of constitutional jurisdiction is the "functional test" which focuses on the nature of the subject operation in terms of "its normal or habitual activities": see *Four B* at pp. 395-396. The second important proposition is found in another Supreme Court of Canada case. In *Northern Telecom Ltd. v. Communications Workers of Canada* (1980), 98 D.L.R. (3d) 1, the Court said that in order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

Applying these propositions to the facts of this case, Lone Wolf's submissions must fail. The operation that is in issue in this case is not the Okanagan Indian band, it is Lone Wolf. Lone Wolf's business is training and contracting in silviculture. There is nothing inherently "Indian" about this activity. The analysis of Beetz, J. in *Four B* is apposite:

> There is nothing about the business or operation of Four B which might allow it to be considered as a federal business: the sewing of uppers on sports shoes is an ordinary industrial activity which clearly comes under provincial legislative authority for the purposes of labour relations. Neither the ownership of the business by Indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal permit, nor the federal loan and subsidies, taken separately or together, can have any effect on the operational nature of that business. By the traditional and functional test, therefore, the Labour Relations Act applies to the facts of this case, and the Board has jurisdiction.
> (p. 396)

That is not the end of the analysis. As Lone Wolf points out in its submissions, a focus solely on the nature of the work may "gloss over" the issue rather than answer it. (See the cases mentioned earlier in the recital of the arguments). Lone Wolf points to a number of elements which tend to identify Lone Wolf and its work with "Indianness". However, there is a fatal flaw in Lone Wolf's approach to this issue. Lone Wolf wishes to have the Tribunal decide its constitutional jurisdiction on a transactional basis. When it was pointed out by the Director in her submissions that Lone Wolf has not limited its activities to solely First Nations concerns, Lone Wolf did not answer the Director's submissions but instead said that its activities before and after the Okanagan contract were not relevant to the inquiry. These "before and after" activities are not only relevant but essential so long as they illustrate the ongoing nature of Lone Wolf's business. As the Supreme Court observed in *Northern Telecom* (supra), the focus of the constitutional inquiry is on the subject's business as a "going concern". If Lone Wolf's claim to "Indianness" applies only to its transaction with the Okanagan Band, and is not its exclusive or even predominant concern, then this is highly relevant. Its defining characteristic is that it is a company concerned with training and contracting in silviculture; its defining characteristic is not its "Indianness".

The only available conclusion on the submissions is that Lone Wolf's portrayal of its activities in connection with First Nations people is merely a snapshot of its business at a specific point in time and not a true picture of its ongoing activities. Its failure to answer the Director's assertion permits the inference that its ongoing activities embrace contracts with entities other than First Nations entities.

Its business as a going concern falls within provincial legislative competence.

2. Procedural Fairness Issue

The material in the submissions does not establish that the adjudicator prevented an employer witness from giving material evidence. There has been no demonstrable breach of the rules of natural justice.

3. New Evidence

Lone Wolf has not established that there is compelling new evidence that was not available at the time of the appeal hearing. Accepting that the particular witness in question was not in the jurisdiction, the evidence could have been adduced through other persons.

4. Fundamental Relationship of Employer / Employee

This was a central issue before the adjudicator. The matter was fully argued at the hearing and a decision reached. There is no error of law in the decision. This ground fails.

5. Unauthorized Deductions

This issue was an important issue before the adjudicator and was fully argued. There is no error of law in the decision and no basis on which to reconsider the decision.

6. Findings of Fact about Mr. Marchand's claims

Lone Wolf wishes to have the reconsideration panel reconsider Lone Wolf's relationship with Mr. Marchand. This includes (among others) reviewing the issue of overtime and entitlement to breaks. The Director has replied opposing the application but seeking its own "correction" to the hourly wage rate used for calculation purposes. The "error" to which it points originated in the Determination and was confirmed by the adjudicator in error.

The issues presented under this ground were central to the decision before the adjudicator. As to Lone Wolf's application, it simply seeks a rehearing and re-characterization of the evidence; this is not a basis for reconsideration. As to the Director's request for a "correction", this comes only as a reply to the application for reconsideration filed by Lone Wolf. The Director did not appeal the decision on this ground. It involves a review of evidence and the application of the *Act*. It is not appropriate for this reconsideration panel to consider this issue at this stage in the process, particularly where the alleged error originated with the Determination and was apparently not raised directly at the hearing by any party. Reconsideration does not present a second opportunity to challenge findings of fact made by the adjudicator. This ground fails.

7. Graveyard and Emery Land Work

Lone Wolf's original submission on appeal addressed the issue of the graveyard. It only raised the issue of Emery Land work in its later submissions. There is nothing in the submissions to suggest that reconsideration is appropriate in the case of Emery Land. The graveyard work presents other considerations.

Lone Wolf's arguments on the graveyard work raise the most troubling issues of fact in these proceedings. The evidence before the adjudicator could have supported a finding that the employees performed the work for the benefit of their own people and that it was not work required of them by their employer. If, for example, a construction employee in training were permitted by an employer to use company equipment to perform work on the family home in off-hours, it would be a surprise were the employee to claim wages from the employer for the "work". That is because the work was not done for the benefit of the employer. Although a reconsideration panel might be tempted to second-guess the adjudicator on factual issues of this kind, it will not do so unless the adjudicator's findings are shown to be lacking in evidentiary foundation. That cannot be said here. There was evidence to support the arguments of both parties. Lone Wolf invites the

reconsideration panel to find its evidence was the strongest. That is not the proper function of reconsideration. This ground fails.

8. Deductions for Lunch Breaks

The essence of this argument appears to be that the adjudicator was not given full information at the hearing on the issue of lunch breaks or did not advert to the issue in making his decision. In this sense, it is similar to the Director's argument (mentioned earlier) for a recalculation of the complainant Mr. Marchand's wage entitlement. For the same reasons, this ground fails. An important purpose of the *Act* is to ensure both expedition and conclusiveness in appeals. To deal with these kinds of issues on reconsideration flies in the face of that purpose.

9. Lone Wolf's Requests for Documentation

This ground does not disclose a basis for review and is dismissed.

10. Travel Time

In the initial Determination, the Director's delegate had found the employer responsible for "travel time". The employees of Lone Wolf did not live at the work site and it was therefore necessary that they travel to and from the site on a regular basis. There was a marshalling point for such travel and the employer made transportation available to those who wished to use it. However, as the adjudicator noted, the Lone Wolf employees were free to make their own way to the job site as they saw fit and some did so. The adjudicator did not find this situation "particularly unique". In the absence of "some very compelling evidence" why the travel time here should be treated as work, the adjudicator upset the Determination on this point. The Director argues that this establishes a new test and reverses the usual onus of proof.

A sympathetic reading of the decision establishes that the decision creates no new tests. It does not reverse the usual burden of proof on a party to proceedings of this kind. In the ordinary course, employees who travel to work do so on their own time. They are not performing services for their employer when they do so. They are travelling to a place at which they will perform services. In the absence of evidence to take the situation out of the norm, there is no reason to assume that the employer is responsible for the time an employee takes to travel to work. Depending on the specific facts, in some cases an evidentiary onus will be cast on the employee and in others it will be cast on the employer. Depending on the required departure from custom or common understanding, a party's burden of adducing evidence can be a substantial one. In this case, the adjudicator made it clear that, on the facts, the employees had an evidentiary onus to establish that they were at "work" in the course of travelling. On the facts, the adjudicator determined that the evidence must be compelling. They failed to meet that onus. There is no error of law in this aspect of the case. The cases relied on by the Director are distinguishable for the reasons set out in Lone Wolf's submissions.

ORDER

Pursuant to Section 116 of the *Act*, I decline to vary or cancel the Tribunal Decision BC EST #D267/96.

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John McConchie
Adjudicator
Employment Standards Tribunal

JLM:jel