

An Application for Reconsideration

- by -

Double 'R' Safety Ltd.  
("Double 'R'")

- 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

**ADJUDICATOR:** David B. Stevenson

**FILE No.:** 2001/476 and 2001/477

**DATE OF DECISION:** October 2, 2001

## DECISION

### OVERVIEW

Double ‘R’ Safety Ltd. (“Double ‘R’”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of two decisions of the Tribunal, BC EST #D192/01 and BC EST #D193/01. Both decisions were decided by the same Adjudicator and are dated April 26, 2001 (“the original decisions”). The former decision confirmed a Determination dated November 1, 2000 and the latter confirmed a Determination dated November 2, 2000. The central issue in both appeals was the same.

The grounds upon which reconsideration is sought are identical in both applications. Double ‘R’ says the Adjudicator of the original decisions failed to consider all the facts and evidence; failed to understand the circumstances; erred in law in the interpretation of “residence” as used in the definition of “work” in Section 1 of the *Act*; and failed to have regard to legislation and decisions from other jurisdictions on the issue considered in the original decision. The submissions in support of the applications are, with the necessary modifications, substantially identical. The central issue in both applications for reconsideration is identical. Both applications seek the identical remedy.

Accordingly, I shall address both applications in this decision

These applications for reconsideration have been filed in a timely way.

### ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied these cases are appropriate for reconsideration, the issue raised in both is whether trailers located at a remote work site, occupied by first aid attendants on call 24 hours a day, are a “residence” for the purposes of the definition of “work” under the *Act*.

### ANALYSIS OF THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116, which provides:

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) *cancel or vary the order or decision or refer the matter back to the original panel.*
- (2) *The director or a person named in a decision or order of the tribunal may make an application under this section.*
- (3) *An application may be made only once with respect to the same order or decision.*

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is "to provide fair and efficient procedures for resolving disputes over the interpretation and application" of its provisions. Another stated purpose, found in subsection 2(b), is to "promote the fair treatment of employees and employers". The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment must also be made of the merits of the Adjudicator's decision. In *Milan Holdings Ltd.*, the Tribunal stated:

The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in a previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. As noted in previous decisions, "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society*, BC EST #D199/96 (Reconsideration of BC EST #D114/96) . . .

The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;

- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

Consistent with the approach outlined above, I must assess whether the applicants have established any matters that warrant reconsideration.

In each of the original decisions, the Adjudicator noted the following:

The employer prepared its submission before the Tribunal issued the reconsideration decision in *Knutson First Aid Services*. The employer was of the view that the Knutson decision was erroneous.

*Knutson* was reconsidered by a three adjudicator panel in *BC EST #RD095/01* with a decision issued February 7, 2001. In my view the facts in *Knutson* are indistinguishable from the case before me in that both cases deal with first aid workers, in remote camp settings, living in temporary accommodation with a requirement to work 12 hours and be on call for a further 12 hours. The issues and facts are identical.

I agree with the submission of the Director that these applications do nothing more than ask that I reach a different conclusion on an issue than has already been addressed and decided by a reconsideration panel of the Tribunal in *Knutson* on identical facts.

It should be noted that in *Knutson*, the reconsideration application was allowed and the issue sought to be raised again in these applications was specifically reviewed:

The Employer's next ground is that the Adjudicator erred in his conclusion that the first aid trailer was not, in the circumstances before him, a "residence". In this respect, the Employer has repeated the arguments it made to the Adjudicator, supplemented by reference to legislation in other jurisdictions, the purposes of the *Act* and the argument that the Adjudicator's decision "ignores the geographical facts of the remoter work sites in British Columbia". In our view, this argument is worthy of review by a reconsideration panel.

These are not appropriate cases for reconsideration. They do not raise any matter that warrants any further reconsideration and are, accordingly, denied.

I will comment on one further matter. There is an implication in later submissions from the representative for Double 'R' on these applications that the approval and ordering of an amendment to the *Employment Standards Regulation* (the "*Regulation*") to add provisions relating to the scheduling of oil and gas field first aid and camp catering workers should bear on the merits of these applications. The amendment does not change the provisions of the *Act* or *Regulation* applicable to the facts of these cases. The Order in Council does not state the amendment is to operate retroactively or retrospectively and the presumption against such an application therefore applies. These applications must be decided on the basis of the law as it was.

### **ORDER**

Pursuant to Section 116 of the *Act*, I order the original decisions, BC EST #D192/01 and BC EST #D193/01, be confirmed.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**