

**Decision of the Appeal Division****Number: 2001-1217****Date: June 19, 2001****Panel: Herb Morton, Heather McDonald, Marguerite Mousseau****Subject: Status of Principals of Unregistered Companies (No. 2)**

**WORKERS UNDER THE ACT (PRINCIPAL OF UNREGISTERED FIRM) (LAWFULNESS OF POLICY)** – Plaintiff, principal of company not registered with the Board at the time of the accident – Panel adopts approach of majority in Appeal Division Decision No. 2000-0684 – Decision No. 335 concerns the status of persons under Part 1 of the Act and is not limited to eligibility for compensation – Lawfulness of policy stated in Decision No. 335 – Whether policy offends general legal principles against piercing the corporate veil or offends provisions of the Act concerning compulsory provision of compensation coverage for workers – Policy is viable under the Act – No exceptional circumstances warranting a departure from policy – While policy not so strained to be unlawful, panel notes inherent difficulties and recommends that the Panel of Administrators review the policy – Plaintiff was not a worker.

**Law:** WCA (1996): s. 11, s. 47(2), s. 47(3),**Policy:** APM: #20:30:30, #40:10:30; RSCM: #48.40; Decision No. 335, 5 *Workers' Compensation Reporter* 101**Decisions:** Appeal Division Decision No. 93-0336, 9 *Workers' Compensation Reporter* 705; Appeal Division Decision No. 94-0872, 10 *Workers' Compensation Reporter* 810; Appeal Division Decision No. 95-0320, 11 *Workers' Compensation Reporter* 327; Appeal Division Decision No. 2000-0684, 17 *Workers' Compensation Reporter* 475; *Isaac v. W.C.B.*, [1994] 9 W.W.R. 245 (B.C.C.A.); *B.G. Preeco I (Pacific Coast) v. Bon Street Holdings Ltd.* (1989), 37 B.C.L.R. (2d) 258 (C.A.); *Villetard's Eggs Ltd. v. Canada (Egg Marketing Agency)*, [1995] F.C.J. No. 598 (QL) (F.C.A.); *Mantei v. Morris*, [1997] 9 W.W.R. 203 (Sask.Q.B.), *aff'd*, [1998] 10 W.W.R. 741 (Sask.C.A.)

*Status of Principal of Unregistered Company (No. 2)* [section 11 determination]  
*Appeal Division Decision No. 2001-1217*

17 *Workers' Compensation Reporter* [559]

- (1) The defendants request a determination under section 11 of the *Workers Compensation Act* (the Act) in this legal action.
- (2) Section 11 of the Act obliges the Board to make determinations and provide a certificate to the court in certain matters which are relevant to the legal action. The governors of the Board assigned this function to the chief appeal commissioner and the Appeal Division. The role of the Appeal Division is to determine the status of the parties under the Act. It is for the court to determine the effect of the certificate on the legal action. Section 85.2(6) of the Act provides that a decision of the Appeal Division is deemed to be a decision of the Board.

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- (3) Appeal Division decisions since January 1, 2000 are publicly accessible on the internet. For this reason, Appeal Division decisions are generally written without identifiers to protect confidentiality. A section 11 determination for a court action in British Columbia is filed in the court registry by the Appeal Division, and is thus publicly accessible. Section 11 determinations are therefore generally written with identifiers, and are posted to the internet with identifying information included. However, in this case the legal action is brought outside the province of British Columbia and responsibility for filing the certificate in the action rests with the parties. Where, as here, the Appeal Division does not handle the filing of the certificate in the legal action, the copy of the Appeal Division decision posted to the internet will not include identifying information. To facilitate this process, the body of this decision will be written without naming the parties. The plaintiff is referred to as the plaintiff, the personal defendant as D, and the corporate defendant as C.
- (4) All references in this decision to “the Act” mean the British Columbia *Workers Compensation Act*, unless otherwise specified. All references in this decision to “the Board” mean the British Columbia Workers’ Compensation Board, unless otherwise specified.

### **Issue(s)**

- (5) Determinations are requested as to the status of the parties to the action, at the time of the February 18, 1994 motor vehicle accident. This raises the following questions:
- Was the plaintiff a worker within the meaning of Part 1 of the Act?
  - Did the injuries suffered by the plaintiff arise out of and in the course of employment within the scope of Part 1 of the Act?
  - Was the personal defendant (D) a worker within the meaning of Part 1 of the Act?
  - Did any action or conduct of the personal defendant, D, which caused the alleged breach of duty of care, arise out of and in the course of employment within the scope of Part 1 of the Act?
  - Was the corporate defendant, C, an employer engaged in an industry within the meaning of Part 1 of the Act?
  - Did any action or conduct of the corporate defendant, C, or its servant or agent, which caused the alleged breach of duty of care, arise out of and in the course of employment within the scope of Part 1 of the Act?

### **Background**

- (6) This action relates to a motor vehicle accident which occurred on February 18, 1994, at approximately 2:00 p.m., involving a collision between two vehicles at an intersection. The accident occurred approximately three miles west of Edson, Alberta. The plaintiff was driving

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a rental vehicle. The other vehicle was being driven by the personal defendant (D), whose vehicle was owned by his employer, the corporate defendant (C).

### **Status of the Plaintiff**

- (7) The central issues in this case are whether, at the time of the accident, the plaintiff was a worker within the meaning of Part 1 of the Act and, if so, whether his injuries arose out of and in the course of his employment. The plaintiff is the principal of a limited company (X Ltd.). X Ltd. was not registered with the Board at the time of the accident. More than two years later, X Ltd. registered with the Board (on April 9, 1996).
- (8) Plaintiff's counsel submits that the plaintiff was the president and controlling mind of X Ltd. She submits that the plaintiff was solely responsible for the failure by X Ltd. to register with the Board.
- (9) Following the February 18, 1994 accident, the plaintiff's lawyer wrote to the Board on March 25, 1996 requesting a certificate or letter concerning the plaintiff's status. The plaintiff's lawyer advised that the plaintiff was a businessman/office worker and was not covered by the Board. The enclosed authorization for release of information, signed March 2, 1996, showed the plaintiff's personal residence was in the lower mainland of British Columbia.
- (10) By letter dated April 19, 1996, the claims adjudicator advised the plaintiff that as he was a principal of X Ltd., and as X Ltd. was not registered with the Board at the time of the February 18, 1994 accident, his claim would not be accepted by the Board. The claims adjudicator enclosed a copy of *Workers' Compensation Reporter* Decision No. 335 (Re Principals of Limited Companies, 5 *Workers' Compensation Reporter* 101, April 27, 1981).
- (11) In considering this application for a section 11 determination, the Appeal Division is not bound by the prior decision of a Board officer. We will consider the evidence and argument anew, in making our determination.
- (12) By letter dated April 17, 1997, a representative for the corporate defendant C noted:

In this accident, [the plaintiff] was involved in a motor vehicle accident while on business in Alberta, on 18 February 1994. Although a principal in the company, [the plaintiff] was acting in capacity as a buyer for the firm. It is our understanding that he was purchasing lumber from [an Alberta company]. . . . As such, we were under the impression that this firm would require mandatory registration by the WCB, and not voluntary registration.
- (13) At the time of the accident, the plaintiff was on Highway #47, preparing to turn off to the premises of an Alberta lumber company.
- (14) As noted above, the determination of the plaintiff's status involves two issues. Firstly, was he a worker within the meaning of Part 1 of the Act, and secondly, did his injuries arise out of and in the course of his employment? If the first issue is answered in the affirmative, we find that it

would then be clear that the plaintiff's injuries arose out of and in the course of his employment. Governors' policy at #18.40 of the *Rehabilitation Services and Claims Manual* (the Manual) concerns travelling employees. The policy states:

Employees whose job involves travelling on a particular occasion or generally are covered while travelling. Where they do not travel to their employer's premises before beginning the travelling required by their work, they are covered from the moment they leave their residence. However, they will not be covered if they first travel to their employer's premises even though their vehicle has been provided by their employer and/or they need that vehicle to do the travelling required by their work.

(15) #18.41 of the Manual further provides (in part):

The basic principle followed by the Board is set out in Larson's *Workmen's Compensation Law* as follows:

"Employees whose work entails travel away from the employer's premises are held . . . to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown." [Larson, para. 25.00]

This principle covers the activities of travelling, eating in restaurants, and staying in hotels overnight where these are required by a person's employment.

(16) Policy at #18.42 of the Manual concerns *Trips Having Business and Non-Business Purpose*:

Whatever other requirements there may be for accepting a claim for an injury occurring on a trip made for business and non-business purposes, one essential is that the injury occur at a time when the claimant is or is substantially on the route which leads to the place where the business purpose is to be carried out. No compensation is payable where the injury occurs while the claimant is making a significant deviation from that route for non-business purposes.

(17) Given the evidence that the plaintiff was engaged in a business trip out of the province, and was close to the premises of a company which he intended to visit for a work purpose at the time of the accident, we consider that the plaintiff's activities at the time of the accident were for a "work" purpose. There is no evidence of a deviation by the plaintiff from his route for a non-business purpose preceding the accident. If he were a worker within the meaning of Part 1 of the Act, the policies would support a conclusion that the accident arose out of and in the course of his employment. It is, therefore, the first issue which is central to this determination.

(18) A similar issue was addressed in Appeal Division Decision #00-0684 dated May 11, 2000. This concerns the interpretation of the policy in Decision No. 335. We disclosed Decision #00-0684 to counsel, and the parties have provided us with submissions concerning the reasoning in that decision.

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- (19) We would note, at this juncture, that although Decision No. 335 was a decision of the former commissioners in 1981, its current significance lies in its adoption by the Board of Governors in 1991 as part of their published policies, and then by the Panel of Administrators in 1995.
- (20) Prior to 1991, key decisions of the Board were published in the *Workers' Compensation Reporter* under the authority of the commissioners of the Board. Decision No. 1 of the *Reporter* explained, on page 1, that "the views of the Commissioners on matters of policy and principle should be made clearly known to the staff." The word "policy" did not appear in the Act at that time. Since June 3, 1991, pursuant to the changes contained in Bill 27, the *Workers Compensation Amendment Act, 1989*, under section 82 the governors have authority to "approve and superintend the policies and direction of the Board, including policies respecting compensation, assessment, rehabilitation and occupational safety and health. . ." Decision No. 3 of the governors, effective June 3, 1991 [Published Policy of the Governors, 7 *Workers' Compensation Reporter* 17], stated that the published policies of the governors consisted of the Board's policy manuals and the *Workers' Compensation Reporter* Decision Nos. 1-423, and all decisions of the governors declared to be policy decisions. The powers, duties and functions of the governors are currently discharged by a Panel of Administrators under section 83.1 of the Act. In Decision No. 1 of the Panel of Administrators dated July 17, 1995 [Discharge of Governor Policy-making Function, 11 *Workers' Compensation Reporter* 465], the administrators confirmed that "all policies of the governors immediately prior to the appointment of the panel will continue to apply."
- (21) Current policy in the *Assessment Policy Manual* provides, at No. 20:30:30:

However, in the event of an injury to an active principal of a private company that is not registered with the Board, that active principal is not entitled to compensation benefits. This is based on two principles established in WCB Reporter Decision No. 335:

1. All active principals of a company should be aware of the obligations of the company and should bear the responsibility for registration as an employer under the Act.
2. Except under unusual circumstances, a person who in essence is both a "worker" and an "employer" cannot be given the benefits due to a "worker" unless that person's obligations have been met under the Act as an "employer".

Should an injured principal of a company be denied compensation benefits because of the company's failure to register with the Board, that principal's earnings prior to the date of injury are not assessed.

- (22) Consequently, Decision No. 335 provided policy guidance for the Board when it was first issued in 1981. It remains policy as adopted by the Board of Governors in 1991 and re-adopted by the Panel of Administrators in 1995, and as cited in the current policy set out at No. 20:30:30 of the *Assessment Policy Manual*.

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- (23) In Decision #00-0684, the majority found the principal of the company, who had responsibility for the failure of the company to register with the Board, was not a worker within the meaning of Part 1 of the Act at the time of a motor vehicle accident. The dissenting member of the Appeal Division panel found that the responsible principal was a worker.
- (24) The defendants in this case rely on the dissenting opinion in Decision #00-0684. The defendants argue that Decision No. 335 is limited in its application to the issue of the plaintiff's eligibility for workers' compensation benefits, as the responsible principal of an unregistered company, rather than being determinative of whether or not he is a worker. The defendants further argue that if the majority has interpreted the policy correctly, in finding that the policy was intended to govern the status of the plaintiff and to hold that a responsible principal is not a worker, then the policy itself is unlawful under the Act.
- (25) Decision No. 335 involved a review and reconsideration of the Board's policy previously set out in Decision Nos. 106, 141 and 264 regarding small owner-operated limited companies. It is helpful to examine the opening passages in Decision No. 335, which defined the scope of the issues encompassed in this review (at page 101):

This policy is concerned with the question which the Board must determine under the *Workers Compensation Act* as to who is a "worker", who is an "employer", and who is simply an "independent operator". The rights and liabilities which accrue under the Act differ in accordance with into which of these categories a person falls. For instance, a person has no automatic right to receive compensation for work-related injuries unless he is a "worker" and no right to immunity from legal action in respect of such injuries unless he is an "employer" or a "worker". An "independent operator" does not have the rights of "workers". An "independent operator" does not have the rights of "workers" under the Act unless he has purchased from the Board optional personal protection. Nor does he have the rights or liabilities of "employers" unless he also happens to have employees.

If a person establishes his own business, then he is, under general law, considered to be an independent operator. If he obtains the assistance of other persons in the operation of this business, then those other persons will either be his partners or his employees. Various factors can be considered to determine which of these categories applies, but the major one is whether the other persons will share in the assets and the profits or losses of the business or will simply be paid a wage or salary. If these other persons are considered to be employees, then the person who established the business will be their employer.

This position usually changes if the business which has been established operates through the means of a limited company. The company is then considered the owner and operator of the business and the persons who in the previous paragraph were said to be employees of the independent operator become employees of the company which as a separate legal entity is now considered

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their employer. However, the status of the persons who would in an unincorporated business be the individual proprietor or the partners is at common law less clear. On the one hand, they are no longer the owners of the business or the employers of the employees. On the other hand, it seems that they themselves do not necessarily become employees of the corporation. . . .

- (26) Decision No. 335 was concerned with those principals of an unregistered limited company who had responsibility for the management of the company, and who, if the business were unincorporated, would be its proprietors or partners. Under Decision No. 335, both ownership and responsibility appear to be relevant factors in determining whether an active principal is, or is not, a worker under the Act.
- (27) In Decision No. 335, the Board considered objections to the guidelines established by certain earlier decisions for piercing the corporate veil. The Board considered and rejected several objections which had been raised concerning those guidelines. Decision No. 335 stated, at pages 102–104:

*. . . Of particular significance for the purpose of this decision is the position in relation to a limited company of those persons who would, if the business were unincorporated, be its proprietor or partners. . . .*

*. . . although the Board does generally treat principals as workers of the company, this is subject to its right to pierce the corporate veil in appropriate cases. The circumstances dealt with in Decisions 106, 141 and 264 are felt to be appropriate for doing this since otherwise a person would be able to gain the benefits under the Act without meeting the corresponding obligations which the Act lays down. While technically the obligations may be on the company rather than the principal, the principal's control of the company means that, in reality, he is the one responsible. The result is that, when the Board applies the policy contained in Decisions 106, 141 and 264, it concludes that the principal is not a "worker" under the Act for the purpose of his claim.*

[emphasis added]

- (28) We consider as significant the passage in Decision No. 335 which provides (at page 104):

*In regard to the third objection [raised by the ombudsman], we are unable to agree that the Board's policy is discriminatory. Since the policy results in the principal of the unlimited [sic] company not being a "worker" under the Act, it cannot be maintained that he is being discriminated against in comparison with other workers. He is, in fact, being treated exactly the same as any other independent operator who has failed to purchase coverage for himself. Nor is he being discriminated against in relation to principals of limited companies who are registered with the Board prior to a claim being made. Discrimination only exists when persons in identical situations are treated differently for no valid reason. The situations of*

the principal of an unregistered and a registered company are not identical. Whether they are registered or not is a distinguishing factor which properly allows the Board to treat them differently.

[emphasis added]

- (29) We read Decision No. 335 as being concerned with the status of persons under Part 1 of the Act. It is concerned with who is a worker, an employer or an independent operator, and with the differing rights and liabilities which accrue to such status. The intended general scope of the policy review conducted in Decision No. 335 is clearly flagged by the opening passages of the decision. It is specifically noted on page 101 that a person has no right to receive compensation for work-related injuries unless he is a “worker” and no right to immunity from legal action in respect of such injuries unless he is an “employer” or a “worker.” It is evident that Decision No. 335 was concerned with the bundle of rights and obligations attendant upon the determination of a person’s status as a worker, or employer or independent operator. A determination of a principal’s status under this policy would apply both to a claim for workers’ compensation benefits, as well as to a determination of the principal’s status for the purposes of sections 10 and 11 of the Act. We consider that the later passages in the decision, which refer to the denial of a claim for compensation by a responsible principal of an unregistered company, must be read in light of the context established by the introduction. Such denial of a claim for compensation was based on a determination that the responsible principal was really an independent operator without workers’ compensation coverage, rather than a worker. Much of the analysis in Decision No. 335, which outlines that at common law an active principal is not necessarily an employee of the company, is directed at establishing the foundation for this determination of the principal’s status. We are satisfied that Decision No. 335 was concerned with the larger issues of status, rather than being limited to addressing eligibility for compensation.
- (30) The theoretical basis stated for the denial of workers’ compensation benefits for the principal of the unregistered firm is that the principal is most like an independent operator who elects not to purchase WCB coverage. Such a person is outside the scope of Part 1 of the Act. As stated above, we agree that the reference in Decision No. 335 to the principal “not being a ‘worker’ under the Act” was in reference to the bundle of rights and obligations associated with that status, rather than being concerned only with the principal’s eligibility for workers’ compensation benefits under his claim.
- (31) In Decision #00-0684, detailed reasons were provided by both the majority for their decision, and by the dissenting member. We do not consider it necessary to restate all of the points addressed in those reasons. We are in agreement with the majority in #00-0684, in reference to the interpretation and effect of Decision No. 335. The underlying rationale for the denial of compensation to the responsible principal of an unregistered company is that the principal is not a worker under Part 1 of the Act. We agree that the effect of the policy is to determine the principal’s status, rather than being restricted to barring payment of compensation notwithstanding the principal’s status as a worker.

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- (32) Defence counsel argues, in the alternative, that the policy set out in Decision No. 335 is unlawful. It is necessary to consider, in this regard, whether the policy offends general legal principles against lifting or piercing the corporate veil, or offends the provisions of the Act concerning the provision of compensation coverage for workers on a compulsory basis.
- (33) Chapter 8 of Gower's *Principles of Modern Company Law*, Sixth Edition, 1997, concerns "Lifting the Veil," at pages 148–177. It is noted at page 148:

... it has always been recognised that "the legislature can forge a sledgehammer capable of cracking open the corporate shell" and even without the aid of a legislative sledgehammer the courts have sometimes been prepared to have a crack. To various illustrations we now turn. In the cases where the veil is lifted, the law either goes behind the corporate personality to the individual members or directors, or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies.

- (34) Chapter 8 concludes by describing "the end result" (at page 173):

Where then does this leave "lifting of the veil"? Well, considerably more attenuated than some of us would wish. There seem to be three circumstances only in which the courts can do so. These are:

- (1) when the court is construing a statute, contract or other document;
- (2) when the court is satisfied that a company is a "mere façade" concealing the true facts;
- (3) when it can be established that the company is an authorised agent of its controllers or its members, corporate or human.

And (2) only is a true example of lifting the veil; in (1) and (3) the separate personality of the company is not denied but the practical effect on the parties' rights and liabilities is the same as if it had been. . . .

- (35) It is further noted at page 175 of *Gower's*:

Hence while statutory inroads into the corporate entity principle continue to increase those by the judiciary have contracted.

- (36) Decision No. 335 stated as follows, in connection with the common law rule against lifting the corporate veil (at page 102):

While the Courts do generally accept at face value the forms under which persons operate their business, this is not universally the case. They will, on occasion, examine the substance beneath the form to determine the real nature of the arrangements. They will readily do this when, in the case of an

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unincorporated business, the question arises whether the person carrying it on is really the independent operator he declares himself to be or is, in fact, an employee of some other person, or whether the person who declares himself to be an employee is really an independent operator. They are less willing to do this when the business is incorporated and they are asked to “pierce the corporate veil” and equate the company with its principals. However, they have clearly done this in certain cases.

In determining who is a “worker”, “employer” or “independent operator” under the *Workers Compensation Act*, the Board is, by virtue of Section 99 of the Act, not bound to follow legal precedent. Therefore, it does not have to rigidly follow all the particular rules laid down by the Courts when they have had to decide similar questions. On the other hand, the Board does not regard Section 99 as giving it a licence to completely ignore the common law rules. Rather, its approach is that those rules should in general be adopted but with modification to suit the particular nature of the statute with which they have to deal. The result is that the principles set out above in the preceding paragraphs are in general applicable to workers’ compensation matters.

However, some modifications of the common law principles have been found necessary. Of particular significance for the purpose of this decision is the position in relation to a limited company of those persons who would, if the business were unincorporated, be its proprietor or partner. . . .

- (37) Decision No. 335 further explained the rationale for the Board’s lifting or piercing of the corporate veil as follows (at page 103):

The situations when the Board will examine the substance as opposed to the form of the arrangements will obviously differ from the situations when a court will do the same thing. This will arise in the first place because of the different types of questions the Board has to decide within the particular context of the *Workers Compensation Act*. Furthermore, it does not appear that the Courts have, in any event, laid down particular principles when they will or will not do this. It seems rather to have been done on a case-by-case basis. While we recognize the merits of this approach, as an administrative tribunal it is often necessary for the Board to lay down general guidelines for staff. It is the guidelines for piercing the corporate veil set out in *Decisions 106, 141, and 264* which are the subject of this review.

- (38) Given the apparent acknowledgment in Decision No. 335 that the Board’s policy concerning piercing the corporate veil “will obviously differ from the situations when a court will do the same thing,” we do not consider the lawfulness of the policy can be assessed simply by reviewing court decisions for the purpose of determining whether the policy strictly accords with current court decisions, or whether the courts would likely have reached the same conclusion. Rather, some scope must be left for an administrative tribunal to reach its own interpretations for policy reasons. Obviously, while the Board is not bound by legal precedent, there are limits

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to the extent to which the Board can depart from common law authorities. The Board's determination cannot be patently unreasonable in relation to the common law authorities. As well, the Board's decisions or interpretations must be correct on jurisdictional issues.

- (39) The question as to the authority of the Board to establish policy involving a lifting of the corporate veil was addressed in published Appeal Division Decision #94-0872 (Section 96(4) – Deduction of Assessments from Benefits, 10 *Workers' Compensation Reporter* 801). That decision concerned the lawfulness of the policy at #48.40 of the Manual, which provides for the deduction of overdue assessments from the compensation payments due to an injured principal of the business. #48.40 states:

Assessments owing by a limited company may be deducted from compensation payments made to the sole principal of that company or, where there is more than one principal, from payments made to a principal who is personally responsible for the non-payment of assessments. [See 70:20:80 *Assessment Policy Manual*] This also applies to situations involving personal optional protection premiums owing.

- (40) This policy also stems from Decision No. 335, which stated at page 106:

... while we do not feel that the principal's claim should be refused in the above situation [when a company has registered, but fails to pay its assessments], we do consider that the Board has the right to deduct overdue assessments from the compensation payments made to a principal responsible for non-payment.

- (41) Decision #94-0872 reasoned, in this regard (at page 815–816):

This leaves the issue of whether the Board can pierce the corporate veil in this case. There are many common law cases on piercing the corporate veil. However, we find they have little relevance to the Governors' policies here, other than to establish the general principle that the separate legal status of corporations is not interfered with lightly. The policy of the Governors recognizes this when it states that "the Board hesitates to adopt a policy of piercing the corporate veil unless sound reasons for this can be demonstrated". The policies then set out circumstances in which the corporate veil can be pierced for certain purposes. The policy relates these exceptions to significant policy concerns about employers avoiding their obligations under the *Act*. Policy #7.51 refers to the serious abuse which would result if an employer could evade its obligations as an "employer" by persuading its employees to incorporate. Policy #48.40 developed from decisions which expressed concern that an employer should not be able to gain the benefits of the *Act* without meeting the corresponding obligations. The policy allows the Board to pierce the corporate veil to avoid such abuse.

The Governors are empowered to adopt policy consistent with the *Act*. There is nothing in the *Act* which prevents them from allowing the Board to pierce the corporate veil when there are sound policy reasons. It is not contrary to law.

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Further, the reasons for policy #48.40 appear sound and consistent with the *Act*. If a person runs a business and makes the business decisions, then it is a valid concern that he not be able to gain benefits under the *Act* as part of that business while not meeting the obligations of the business under the *Act*. If the device of incorporation is the only thing that allows a person to do that, then it is consistent with the *Act* for the Governors' policy to allow the Board to look at the substance, and not merely the form, of the matter.

- (42) In considering the lawfulness of the policy at #48.40, the Appeal Division panel had to deal with section 14 of the *Act* which makes it unlawful for an employer to require or to permit a worker to contribute in any manner toward indemnifying the employer against a liability which the employer has incurred under Part 1 of the *Act*. The panel reasoned, on this point (at page 815):

As set out above, generally, corporations are viewed as legally distinct from their shareholders, and their shareholders are not responsible for the debts of the corporation. However, that is not an absolute rule. In certain circumstances, courts have pierced the corporate veil and made shareholders liable for the obligations of the corporation. Thus, it is not contrary to law to pierce the corporate veil for specific purposes. Once that is done, the legal distinction between the shareholder and the corporation disappears for the particular purpose at hand.

Thus, if the Board pierces the corporate veil in the circumstances of this case, there no longer is a legal distinction between the claimant personally and the business. He is a worker and, at the same time, he is the employer. If he is the only worker of the business, then it may be more accurate under the *Act* to describe him as an independent operator rather than an employer. However, regardless of whether he is the sole worker of the business, once the corporate veil is pierced for the purposes of workers' compensation, the business and the worker become one and the same person. If the business as an employer owes money to the Board, the claimant then personally owes that money to the Board. If the Board pays him compensation, they can deduct this debt which he owes personally to the accident fund.

We find this is not contrary to section 14 of the *Act*, which prohibits a worker from contributing to or indemnifying his employer for any liability the employer has incurred under the *Act*. It is reasonable to interpret that section as applying only when the employer and the worker are separate people. It does not make sense to say that a person can contribute to or indemnify himself. One can only contribute to or indemnify others.

- (43) Defence counsel cites the British Columbia Court of Appeal decision in *Isaac v. WCB* (1994), 10 *Workers' Compensation Reporter* 715, also at [1994] 9 W.W.R. 245, as showing that the Board does not have the discretion to deny compensation to a worker under the *Act* on the basis that the worker's employer is not registered under the *Act*. That case involved a member of an

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Indian band, employed by the band in its logging operation on reserve lands. The Board's policy had been that no coverage was provided in respect of band members engaged in band activities on a reserve unless the band had requested such coverage and paid assessments. At the time of Mr. Isaac's death, the band had not requested WCB coverage in respect of its logging operation. There was no evidence Mr. Isaac was in any way involved in the decision of the band to request or decline to request coverage. When Mr. Isaac was killed in a logging accident, the Board denied compensation to his widow on the basis that compulsory coverage did not apply to operations on reserve lands. The Court of Appeal noted, at page 724:

The Board says in effect the *Act* should be construed as if there was a provision stipulating the Board has a discretionary power to deny compensation if the employer has not paid its assessments or if the Board considers such assessments cannot be collected.

As a matter of statutory construction it is, in my view, impossible to imply such a provision. To achieve this result requires the assistance of the legislature, not the courts.

- (44) The Court of Appeal cited the August 5, 1919 judgment of the Judicial Committee of the Privy Council concerning the *S.S. Princess Sophia* case: *Canadian Pacific Railway Company v. Workmen's Compensation Board*, [1919] 3 W.W.R. 178. That judgment affirmed the views of the dissenting judge at the British Columbia Court of Appeal [1919] 3 W.W.R. 167, who reasoned at page 175 (quoted at page 728):

I cannot see upon what principle that it can be said to be *ultra-vires* legislation. It amounts to statutory insurance or pension and is payable to workmen or their dependents by Statute quite independent, *so far as they are concerned, of whether the employers pay the assessments into the accident fund or not*; and the employers who are called upon to pay assessments are employers generally not alone those who are concerned with the accident that gives rise to the compensation payable and the assessments made as against the employers are not referable to any particular accident.

[emphasis in original]

- (45) In the *Isaac* case, the Court of Appeal concluded (at page 729) that the notion of an inextricable link between compensation to a worker and the payment of assessments by his employer was rejected by the Act.
- (46) We note, however, that the application of this analysis requires a determination that an individual is a worker under Part 1 of the Act. That is precisely the issue with which Decision No. 335 is concerned. To the extent the reasoning in Decision No. 335 concerning responsible principals of unregistered firms not being viewed as workers is valid, the decision in the *Isaac* case is distinguishable.

- (47) Defence counsel also cites Appeal Division Decision #93-0336 (Out-of-province Employer: Compulsory Industry, 9 *Workers' Compensation Reporter* 705). That decision held that an out-of-province company which was operating in British Columbia was entitled to the protection of section 10 under Part 1 of the Act despite a lack of registration with the Board. The decision reasoned:

I appreciate the apparent unfairness of that conclusion – that Bow Ridge could fail to remain registered as an employer in B.C. and pay no assessments in B.C., and yet be entitled to the protections found in Section 10 of the Act. However, the Act and the policy of the Board are clear. An employer in a compulsory industry in B.C. is an employer under the Act whether or not it is registered – otherwise the protection of its workers under the Act would be uncertain. An employer who fails to register is subject to certain penalties, but no exception is made in the Act or Board policy regarding the Section 10 protections. That is, there is nothing that allows an employer who fails to register to be found to be an employer for the purposes of assessments and penalties but not for the purposes of Section 10. An employer under Part 1 of the Act is an employer for all of Part 1.

- (48) Defence counsel further points to Appeal Division Decision #95-0320 (Law Corporations as Employers, 11 *Workers' Compensation Reporter* 327), concerning the status of lawyers practicing law through a corporation. The Appeal Division panel reasoned in that case (at pages 330–331):

We find the policy does provide a tenable result. Lawyers choose to incorporate and carry on the practice of law through a law corporation. Undoubtedly, they do this for certain advantages, perhaps relating to succession or tax planning. They do not gain all the advantages of other incorporated businesses, but there must still be some advantages or there would be no reason to incorporate. This is no different than other business people who incorporate. They do it for certain advantages. However, incorporation also gives rise to certain obligations. In workers' compensation, one of the obligations is that the corporation must pay assessments on the wages or remuneration of its active principals. *Thus, the principals lose the ability to opt out of personal coverage under the Act, but they receive entitlement to no-fault compensation coverage and the protection of the bar against legal action in section 10(1) of the Act in appropriate circumstances.*

[emphasis added]

- (49) Defence counsel astutely points out the contradiction between finding that principals lose the ability to opt out of personal coverage under the Act, while at the same time allowing responsible principals of unregistered companies to do precisely that on a *de facto* basis. Defence counsel argues:

The result of the majority's determination in *Decision No. 00-0684* is that a principal of a company, while not entitled to receive compensation benefits for work-related injuries he/she may have suffered, will be entitled to rely upon

any common law rights he/she may have against other persons involved in the accident. Not only does this non-conformity with the mandatory registration requirements under the *Act* appear to benefit the principal (by allowing the principal the opportunity to commence a legal action which he/she may otherwise have been barred from bringing if the company had been registered as required under the *Act*), but it could also impose an injustice on other parties who had complied with the requirements of the *Act*. . . .

[emphasis in original]

- (50) Defence counsel similarly endorses the point made by the minority in Decision #00-0684 that other workers who fail to meet their obligations under the Act (involving timely reporting to the employer under section 53, and to the Board under section 55) face the potential hardship of being denied compensation while remaining subject to the section 10 bar to legal action. He questions the basis for the seemingly differential treatment of non-conforming principals as compared to other workers. We consider that these arguments have considerable force. However, they bring one back to the central point in Decision No. 335, which is that such principals are not clearly workers and may be regarded as independent operators.
- (51) It is apparent that there are some strains or anomalies between the various policies. Decision #93-0336 is distinguishable as dealing with the status of the company, as the employer of workers with compensation coverage despite the lack of registration. There would be no rational basis for finding that the company was not an employer. In general terms, lack of registration does not affect compensation coverage. It is only in the specific situation of a claim by an injured responsible principal of an unregistered company that the lack of registration is taken into account in determining status. There is an underlying consistency between the statement that “an employer under Part 1 of the Act is an employer for all of Part 1,” and the interpretation of Decision No. 335 as concerning the general status of an unregistered principal rather than simply the principal’s eligibility for compensation.
- (52) From a strictly analytical perspective, it would be simpler and more straightforward were the separation between the limited company and its principal to be respected in a uniform fashion. This would lead to the payment of compensation to injured principals (and their dependents in fatal cases), whether or not the company was registered with the Board. Section 47(2) of the Act would then require the Board to charge the company with the full costs of the claim as an additional assessment, subject to the Board finding that the default (failure to register) was excusable so as to warrant exercising the Board’s discretion under section 47(3) to relieve the employer from liability.
- (53) It might be suggested that the full amount of the costs of the claim could be charged to the employer, and then recovered from the compensation payable to the principal under the policy at #48.40. Any legal action by the principal (against a worker or employer under Part 1) might be barred, but the compensation payable to the principal could be attached at source with the net effect that at the end of the day, the principal might end up with nothing although the Board’s records would show it had paid full benefits on the claim. However, if the policy set out in Decision No. 335 fails as contravening the rule against lifting the corporate veil, it may be considered that the policy at #48.40 should similarly fail. This would oblige the Board

to pay compensation, but then undergo the expense and attendant difficulties of seeking to recover these costs from the employer (which might have no assets or have gone out of business). Injured principals of unregistered companies would be at risk of losing the assets of their business under section 47(2). However, that is the same risk to which the firm is already exposed in respect of claims by any other injured workers of the company where it fails to register.

- (54) In practical terms, where the company has few assets or goes out of business, the costs of the claim would be met by the contributions of other employers to the accident fund. This might seem unfair. In one respect, however, it is no more unfair than the situation addressed by the Court of Appeal in the *Isaac* decision, in which compensation coverage was found to apply whether or not registration was made or premiums paid. One distinction, however, is that the *Isaac* decision did not concern the situation of a principal with responsibility for the failure to register.
- (55) To reiterate, it is not the simple failure to register which is significant. Rather, Decision No. 335 was primarily concerned with the issue as to whether the responsible principal is truly a worker or is more akin to an independent operator.
- (56) It is evident that the strong tendency in court decisions is to respect the corporate veil. In the case of *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 37 B.C.L.R. (2d) 258, the British Columbia Court of Appeal stated:

I do not subscribe to the “Deep Rock doctrine” that permits the corporate veil to be lifted whenever to do otherwise is not fair (see: *Pepper v. Litton*, 308 U.S. 295). That doctrine and the doctrine laid down in *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.), cannot co-exist. If it were possible to ignore the principles of corporate entity when a judge thought it unfair not to do so, *Salomon’s* case would have afforded a good example for the application of that approach.

- (57) However, the common law does admit of exceptions, as summarized in *Gower’s Principles of Modern Company Law* (1997). The governors (now Panel of Administrators) have authority under section 82 to provide policy direction to the Board. The policy provides for a lifting of the corporate veil in the circumstances set out in Decision No. 335. We are bound to apply that policy, unless we find the policy unlawful or unless we find there are unique circumstances in this case warranting a departure from the policy.
- (58) In considering whether the policy direction provided by Decision No. 335 is outside the realm of what is legally permissible under the Act, we note two court decisions involving administrative tribunals. The first is a decision by the Federal Court of Appeal in *Villetard’s Eggs Ltd. v. Canada (Egg Marketing Agency)*, [1995] F.C.J. No. 598. *Villetard’s Eggs* was a family partnership in Alberta which carried on business as a producer, grading station and wholesale dealer in eggs. Its licence was revoked in 1992 by the Canadian Egg Marketing Agency for having violated certain conditions of its licence. In 1993, the Agency received new licence applications from a corporation called *Villetard’s Eggs Ltd.*, involving the same address and telephone number. The application was signed by a partner from the partnership as manager of the corporation.

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The Agency denied the licence applications on the basis that they were “colourable” (i.e. presenting an appearance which did not correspond to the reality, or which was intended to deceive). An application for judicial review was allowed, on the basis that the Agency was not empowered to lift the corporate veil unless it found actual *mala fides* or some kind of fraud. However, this decision was reversed by the Federal Court of Appeal, which reasoned:

I simply cannot imagine a licensing authority invested with such a duty, not being capable of denying a licence where it has good grounds to believe that the issuance of the licence would be detrimental to the interests of the public.

In making this proposition I am only responding to the invitation made by the Supreme Court of Canada in *Maple Lodge Farms Ltd. v. Government of Canada* [[1982] 2 S.C.R. 2] to interpret statutes – and, I would add, regulations—such as the ones at issue here in such a realistic way as to allow administrative agencies to function effectively [at page 7]:

In construing statutes such as those under consideration in this appeal [the Export and Import Permits Act], which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the courts should wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved.

(59) The Federal Court of Appeal concluded, at paragraphs 25–28:

For these reasons I have taken the view that the interrelationship between the respondent and the partnership was a proper and, in the circumstances, essential consideration for the Agency to take into account in deciding whether or not to grant the licences applied for. Indeed, had the Agency failed to take that interrelationship into account, that failure might well have constituted a reversible error.

Attempts to import into modern administrative law the theory of the corporate veil developed a century ago by the House of Lords [See: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.)] in the area of corporate law have been facing increasing opposition.

That opposition has come either through findings that what was done by a licensing authority was not piercing the corporate veil or through findings that the corporate veil may be lifted where the corporation is under the control of another person or entity to such an extent that they constitute a common unit, or where one company is in fact the agent or puppet of the other or is being used as a cloak for the actions of the other or, more generally, where fraud or improper conduct is alleged.

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Whether we characterize it as a case of non-application of, or exception to, the doctrine of corporate veil, what the Agency did in the instant case, i.e. enquire into the relationship of an applicant with a third party for the purpose of determining whether the application in the circumstances constituted an attempt to circumvent the regulations, was permissible.

- (60) Another court decision is that in *Mantei v. Morris*, [1997] 9 W.W.R. 203 (Sask. Q.B.), affirmed [1998] 10 W.W.R. 741 (Sask. C.A.), which concerned a decision by the Saskatchewan Workers' Compensation Board. Morris and Walker were the principals and sole shareholders of two companies which were employers under the Saskatchewan *Workers Compensation Act*. Morris and Walker had not opted for personal workers' compensation coverage, nor were they on the payroll of their respective companies. Mantei was a worker who was killed in a motor vehicle accident. At the time of the accident, Morris was driving a vehicle, pulling an industrial trailer owned by Walker. He was taking the trailer to an oil well to conduct repair work. The issue before the Saskatchewan Board was whether Morris and Walker were, personally, employers under the legislation and thereby protected by the statutory bar. The Saskatchewan Workers' Compensation Board found that while the companies existed as entities independent from Morris and Walker, they could not be distinguished from the companies for the purposes of the policy underlying the Saskatchewan *Workers Compensation Act*. The Saskatchewan Workers' Compensation Board reasoned:

The Board recognizes that at law a corporation is treated as a separate entity from its shareholders. However, in the case of a one person company, it is difficult to make any practical distinction. The interests of the individual shareholder and the company are indistinguishable and thus, the policy considerations reflected in sections 44 [concerning the statutory bar to legal action against a worker or employer] and 168 [concerning the jurisdiction of the Saskatchewan Board to determine whether a legal action is barred] apply equally to both. The sole shareholder, in effect, bears the financial burden of the payment of workers' compensation assessments and of the payment of wages and typically makes all management decisions. Importantly, any significant verdict against the sole shareholder is very likely to have the adverse financial impact on the "employer" corporation that the statutory bar was intended to prevent. It is reasonable to expect that any sole shareholder of a corporation facing a substantial verdict would have to fund the liability by taking money out of the corporation. The sole shareholder of a corporation which is an employer is, in reality, in very much the same position as a sole proprietor who employs employees. In the Board's view, it would be an artificial result for the former to be subjected to the legal action and the latter not, simply because of the choice of the corporate structure for the carrying on of the business.

The Board has long been of the view that proprietors of one person companies are entitled to the protection of the statutory bar. . . . In effect, the Board is prepared to pierce the corporate veil in cases such as this. The Board is aware that the courts will pierce the corporate veil on limited grounds. However, under section 25 of the Act, the mandate of the Board is to decide each case

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before it in accordance with the real merits and justice of the case, and the Board is not bound by precedent. Considering the policy reflected in sections 44 and 168, the Board is of the view that individuals such as Mr. Morris and Mr. Walker fall within the scope of the Act as employers.

The Board therefore finds that the action is barred as against both Mr. Morris and Mr. Walker.

- (61) In an application for judicial review, it was argued that Morris and Walker were not employers, as a corporation is in and of itself a legal entity, distinct from its executive officers and employees. The application to quash the Board's decision was, however, dismissed on the basis that the Board's decision was not patently unreasonable. The Court of Queen's Bench decision to dismiss the application was affirmed by the Saskatchewan Court of Appeal in 1998.
- (62) We are asked, in this case, to find the policy set out in Decision No. 335 unlawful. In the two court decisions cited above, decisions by administrative tribunals to pierce or lift or disregard the corporate veil for policy reasons were found to be permissible under the relevant statutes. These court decisions dealing with the corporate veil in the administrative law context, as opposed to the corporate law context, lend support to the view that the analysis set out in Decision No. 335 is permissible under the Act.
- (63) We accept that the reasons for the policy stated in Decision No. 335 are ones which relate to the purposes of the Act. We note in particular, the passage at page 103 which explains:
- The general rule followed by the Board is that a worker's claim is not prejudiced by the fact that his employer has not complied with his obligation to register. However, since a company can only act through its principal, it was felt that the claimant in the situation in question, unlike most claimants, had to accept some personal responsibility for the failure to register. If the corporate form of the business were ignored, the claimant was really an independent operator who had failed to obtain coverage for himself. It would be unfair for him to receive the benefits of the Act without meeting his obligations.
- (64) While no doubt there are other policy approaches which would also be valid, we find that the policy set out in Decision No. 335 is viable under the Act. We further find that the policy is applicable in the circumstances of this case. We do not consider that the policy is unlawful, or that there are exceptional circumstances warranting a departure from the policy in this case.
- (65) We have noted that the plaintiff in this case does not wish to be brought within the umbrella of Part 1 of the Act. Defence counsel argues that the plaintiff is being permitted to benefit from his failure to register, and that in effect, the Board is permitting the plaintiff to opt out of workers' compensation coverage contrary to the intent of the Act. This argument has some force. We do not consider, however, that the determination as to an individual's status can vary from case to case depending on whether the outcome is perceived to be to their advantage or disadvantage. We consider it appropriate that the Board establish general policies which may be applied in a consistent fashion, to avoid an untenable degree of inconsistency.

- (66) We appreciate the difficulties with this approach, which are outlined in the dissent to #00-0684. We note in particular the apparent contradiction between Decision No. 335 and the policy at Nos. 20:30:30 and 40:10:30 of the *Assessment Policy Manual*. These latter policies require an assessment of a principal's earnings when backdating the registration of a company, so long as a claim by an injured principal has not been denied. As set out in paragraphs 32–33 of the reasons of the majority in Decision #00-0684, this raises thorny issues with respect to the principal's status being indeterminate, requiring crystallization upon the occurrence of an event such as the injury to the principal or an application for compensation. The majority found that piercing of the corporate veil is triggered when the principal is injured, rather than when a claim for compensation is made. The majority found the principal's status between the date of "employment" and date of injury may be regarded as being in a state of flux. If, prior to the injury, steps were taken involving registration with the Board, he would be a worker. However, in the absence of such registration or contact with the Board, when an injury occurs the principal is not a worker. The fact that the policy set out in Decision No. 335 requires such strained analysis to support it points to certain inherent difficulties with the policy.
- (67) As indicated above, different approaches would likely be viable. However, we consider that the question as to whether any change is warranted in the Board's general approach to such situations is better addressed as an issue of general policy under section 82 of the Act. Decision No. 36 (*Retroactivity of Policy Changes*, 9 *Workers' Compensation Reporter* 147) notes that a policy change may occur as a result of a reconsideration and rethinking of existing lawful policy, or as a result of a finding of the Appeal Division that a policy is unlawful. We are not persuaded that the policy is so strained as to be unlawful. However, given the concerns flagged above, and in #00-0684, and the "legal gymnastics" required to account for the seeming state of flux in the status of a responsible principal of an unregistered company, we recommend that the Panel of Administrators review the policy to determine whether it remains satisfactory in fulfilling the purposes of the Act. We agree with the majority in Decision #00-0684, who commented in paragraph 41 that in light of the enactment of Part 3 of the Act, and the lack of clarity of the policies concerning principals of unregistered corporate employers, the Panel of Administrators may wish to review the policies. We note, as well, that cogent reasons were provided in the dissenting opinion in Decision #00-0684, in support of seeking clarification of the policy.
- (68) Notwithstanding these concerns, we find that the policy set out in Decision No. 335 is viable under the Act. We do not consider that there are unusual circumstances in the present case requiring a departure from the general policy. We will, therefore, follow the approach set out in Appeal Division Decision #92-1606, *Principal of Unregistered Firm*, 9 *Workers' Compensation Reporter* 621, and of the majority in Appeal Division Decision #00-0684.
- (69) Accordingly, we find that at the time of the February 18, 1994 motor vehicle accident, the plaintiff was not a worker within the meaning of Part 1 of the Act. The injuries suffered by the plaintiff, at the time the cause of action arose, February 18, 1994, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

## Status of the Personal Defendant

- (70) Only limited information has been provided concerning the status of the personal defendant, D. D was employed by the corporate defendant, C. C is a federally regulated company which operates throughout Canada. Defence counsel advises that C is registered as an employer with the appropriate workers' compensation tribunals in most Canadian jurisdictions. In particular, C is registered as an employer for workers' compensation purposes in both Alberta and British Columbia.
- (71) An issue for determination is whether D was, at the time of the February 18, 1994 accident in Alberta, a worker within the meaning of Part 1 of the Act. If so, the further question to be addressed is whether any action or conduct of D, at the time the cause of action arose, February 18, 1994, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Act.
- (72) Defence counsel states that due to the nature of C's operations, C's employees regularly perform work responsibilities in more than one Canadian jurisdiction. No information has been provided specifically concerning D, to show that D regularly performs work responsibilities in British Columbia. No specific evidence or argument has been presented to show that the action or conduct of D at the time of the accident in Alberta, arose out of and in the course of employment within the scope of Part 1 of the Act.
- (73) Defence counsel notes, in this regard:

Since the Federal Government has not implemented a workers' compensation system that is applicable to federally regulated employers (other than employers who are covered by the federal *Government [Employees] Compensation Act*), such federally regulated employers must register with the WCB in each jurisdiction within which it operates. Nevertheless, [C] is a single operating legal entity across Canada, notwithstanding this artificial separation for workers' compensation purposes.

In [C's] view, it is inherently unfair that [C] should be required to pay workers' compensation assessments for all of its employees across Canada, yet at the same time be subject to a legal action in one Provincial jurisdiction simply due to the fact that the Plaintiff is covered by the workers' compensation scheme in another Provincial jurisdiction. Such a legal action is, in our submission, inconsistent with one of the primary foundations of the historic compromise (which led to the present day workers' compensation regimes in Canada) – the protection of the employer from legal action arising from work-related injuries to the employer's workers or to workers of other employers.

There can be no dispute that [C] was an employer registered with the B.C. WCB at the time of the accident on 18 February 1994. Based on the nature of [C's] operations across Canada (and, in particular, in B.C. and Alberta), and on the fact that employees of [C] regularly perform work in more than one jurisdiction

(once again, with particular emphasis on B.C. and Alberta), it is submitted the Appeal Division should find that both [C] (as an employer) and [D] (as a worker) were covered by the B.C. legislation at the time of the accident.

- (74) While not necessary to our decision, we note with interest a decision of the Alberta Court of Appeal in *Glavin et al. v. Dicken Bus Lines Ltd. et al.*, (1988) 51 D.L.R. (4th) 389. The Court of Appeal found, at page 393, that “one province cannot enact legislation affecting the rights of a resident of another province arising out of a cause of action in such other province.” We refer to this decision simply for the purpose of noting that in making our decision under Part 1 of the Act, we must be cognizant of the limits to our jurisdiction.
- (75) Very limited information has been provided concerning D. D was born in 1946, and has never had a claim for workers’ compensation benefits in British Columbia. D was, at the time of the accident, operating a motor vehicle near the town of Edson in Alberta. The vehicle was owned by C, his employer. The defendants admit that D was driving the motor vehicle owned by C with the consent, express or implied, of C, at the time of the accident.
- (76) No specific evidence or argument has been presented to show a link between D, and Part 1 of the Act. It appears, from the limited information available, that D resides in Alberta. He was working in Alberta at the time of the accident. No foundation has been established to support a conclusion that D was, at the time of the accident, a worker within the meaning of Part 1 of the Act. We draw an adverse inference from the lack of any positive evidence to establish a connection between D and his activities, and the scope of the British Columbia workers’ compensation legislation.
- (77) It may be that D’s duties on other dates would bring him to British Columbia, and that he would, in other circumstances, be a worker within the meaning of Part 1 of the Act. However, our determination must focus on D’s status at or around the time of the motor vehicle accident. Our determination is solely in relation to Part 1 of the Act. As stated at the outset of this decision, this means Part 1 of the British Columbia *Workers Compensation Act*. We have no jurisdiction or authority to address the status of the parties under the Alberta workers’ compensation legislation.
- (78) On the evidence before us, we find that at the time of the February 18, 1994 accident, the defendant D was not a worker within the meaning of Part 1 of the Act. Any action or conduct of the defendant D, at the time the cause of action arose, February 18, 1994, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

### **Status of the Corporate Defendant (C)**

- (79) By memo of June 6, 2000, the Assessment Department policy manager confirmed that C was registered as an employer at the time of the accident on February 18, 1994.
- (80) It is not disputed that C was, on February 18, 1994, an employer engaged in an industry within the meaning of Part 1 of the Act. We so find.

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- (81) Defence counsel points out that C was also registered as an employer with the Alberta Workers' Compensation Board.
- (82) It must be noted that under the British Columbia workers' compensation legislation, unlike in some other provinces, the Board has no jurisdiction to certify as to whether the cause of action is barred. The Board only certifies as to the status of the parties, and it is for the courts to determine the effect of the certificate in relation to the legal action.
- (83) In relation to the specific activities of C which relate to the February 18, 1994 motor vehicle accident, we find that no connection with Part 1 of the Act has been established. We find, therefore, that any action or conduct of the defendant C, or its servant or agent, which caused the alleged breach of duty, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

### **Conclusion**

- (84) We find that at the time of the February 18, 1994 motor vehicle accident:
- the plaintiff was not a worker within the meaning of Part 1 of the *Workers Compensation Act*;
  - the injuries suffered by the plaintiff did not arise out of and in the course of employment within the scope of Part 1 of the Act;
  - the personal defendant, D, was not a worker within the meaning of Part 1 of the Act;
  - any action or conduct of the personal defendant, D, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the Act;
  - the corporate defendant, C, was an employer engaged in an industry within the meaning of Part 1 of the Act; and,
  - any action or conduct of the corporate defendant, C, or its servant or agent, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

*Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.*

