

# REPORTER

## Decision of the Appeal Division

**Number:** 91-1085  
**Date:** December 20, 1991  
**Panel:** Connie Munro, Chief Appeal Commissioner  
**Subject:** Fettering of Discretion

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The employer is appealing a decision of the Assessment Department dated February 26, 1991. This decision reclassified the employer's registration with the Board from class 140605 to class 062202 on a compulsory basis, effective January 1, 1992.

The appeal is pursuant to Section 96(6) of the *Workers Compensation Act* which states that:

- (6) An employer who has received notice of
  - (a) an assessment under section 39, 40 or 41,
  - (b) a classification, special rate differential or assessment under section 42, or
  - (c) an additional assessment, levy or contribution under section 73

may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, special rate, differential or additional assessment, levy or contribution to the appeal division on the grounds of error of law or fact or contravention of a published policy of the governors.

The employer is a non-profit society funded by the Ministry of Social Services and Housing. It operates programs to provide social rehabilitation, family counselling, and special education services to children who are referred to the society from the Ministry of Social Services and Housing.

From August 15, 1960 to January 7, 1978, the employer was classified in class 6, subclass 26 for assessment purposes.

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In a letter dated March 28, 1978, the Board informed the employer of a change of classification as part of the ongoing review of registrations. Effective January 1, 1978, it would be registered in class 14, subclass 06 (social service agency). The employer did not object to the change.

In December 1990, the Classification Committee of the Assessment Department introduced a new practice set out in a Classification Committee Minute (the "Minute"). This Minute purports to bring the community care industry into line with similar industries. The classification criteria no longer depend on licensing and funding. Rather, according to the Minute:

- Where a Social Service or Health Facility provides overnight accommodation with physical assistance, the classification will be 062608
  - on request, if fewer than 10 bedrooms
  - compulsory, if 10 or more bedrooms.
- Where there is no overnight accommodation such as Day Care Centres, Crisis Centres, or Clinics, the classification will be 140605 on request.

The Minute provides the following explanation for these changes:

The Assessment Department, in an attempt to update the policy, *conducted a study of the Community Care Industry.*

We found that the *Community Care Facility Act* is administered by a number of different bodies such as the Provincial Adult Care Licensing Board, the Provincial Child Care Licensing Board, the Ministry of Health and the Ministries of Social Services and Housing. All of these bodies control certain aspects of the industry which makes it difficult to keep abreast of their policies and changes in the industry.

We also found during the study that not all facilities fell under the *Community Care Facility Act* such as Crisis Centres, Drop-in Centres, etc., although they do receive funding through grants from the Ministry of Health and some also receive grants from the Ministry of Social Services and Housing. Where the funding comes from depends upon whether the services provided lean toward mental health issues or family crisis issues (i.e. financial difficulties, or family housing and support problems, etc.). Each of these facilities determine their own educational requirements for the staff and no special licensing is required.

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*It became clear that it would be difficult, if not impossible, to develop and maintain a policy in an industry such as this if it were based on the licensing and criteria as outlined above, hence the Committee's decision, which will become effective January 1, 1992 for firms registered prior to October 18, 1990. (emphasis added)*

As indicated earlier, by letter dated February 26, 1991, the Board informed the employer that its registration would be reclassified to class 062202 on a compulsory basis, effective January 1, 1992. The effect of this is a rate increase.

On March 27, 1991, the Board wrote to the employer, confirming reclassification of its account from class 140605 to class 062202 effective January 1, 1992. The Board stated in its letter that "the change is more equitable with other industrial undertakings doing the same kind of work."

On July 23, 1991, the employer wrote to the Board, expressing its intention to appeal the reclassification decision. The employer stressed that it is a social service society, licensed under the *Community Care Facilities Act* and funded by the Ministry of Social Services and Housing. The employer stated:

The *Act* does not indicate that because a social service agency provides overnight accommodations with or without physical assistance that this changes the nature of the operation so that it would fall under class 6 rather than class 14.

On October 1, 1991, the employer provided the Appeal Division with a written submission in support of its appeal. The gist of the employer's argument is that the Board's practice, as set out in the Minute, is inconsistent with Section 36 of the *Workers Compensation Act* (the "Act").

More specifically, the employer submits that:

A review of the classification policy statement (30:10:00) indicates that industries are not classified according to occupations. Classifications are assigned to accounts on the basis of the industry in which the employer is operating (30:20:10). Some of the factors that are considered are type of product or service that is being provided and the type of industry with which the employer is in competition. As we have already indicated, we are not in competition with apartment, boarding or lodging homes. Our prime function is social rehabilitation, family counselling and special education. Occupations of individual workers may be reviewed when assigning the classification but only as an indicator as to the type of

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industry being carried on by the firm. As we have noted above, the majority of our staff are people qualified to provide social rehabilitation, family counselling and special education services. *We are not in the service industry.* We are a non-profit social service agency.

*The Act does not indicate that, because a social service agency provides overnight accommodations with or without physical assistance, this then changes the nature of the operation so that it would fall under Class 6 rather than Class 14. We do not feel that it is equitable to be treating social service agencies (social rehabilitation centres) differently under separate classifications based on the criterion of whether they do or do not provide overnight accommodation. We do not understand the rationale for using this criterion in interpreting the wording of Section 36. (emphasis added)*

The issues arising in connection with this appeal are twofold:

- (1) Is the Board's practice, as expressed in the Minute, inconsistent with the provisions of the *Act*? and
- (2) Does the Board's practice offend any of the general principles of administrative law?

### **The Board's Practice and Section 36 of the Act**

Section 36 of the *Act* reads in part as follows:

36. For the purpose of assessment in order to create and maintain a fund, to be called the accident fund, for the payment of the compensation, outlays and expenses under this Part and for payment of expenses incurred in administering the *Workplace Act*, all industries within the scope of this Part shall, subject to section 37, be divided into the following classes:

...

Class 6. – light manufacturing, service and trade industries;

...

Class 14. – municipal corporations and agencies;

In *Commission of Inquiry Workmen's Compensation Act, 1966*, Mr. Justice Charles W. Tysoe stated that:

Section 30 of the Act (now Section 36) sets out the classes into which industry is divided for the purpose of assessment to maintain the Accident Fund. The Board is empowered to make and has made changes

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in such classes. Reference to the *Classification and Rate List, 1963*, (Exhibit 23A), shows that the various classes are divided again into subclasses ...

*The designation of subclasses is principally for the purpose of a more exact classification of industries according to risk.* (emphasis added)

(at 98)

In *Workers' Compensation in Canada*, Professor T.G. Ison explains that:

The classification system is by type of industry, not by occupation of each worker. The classification is intended *to reflect the output of the industry.* (emphasis added)

(at 262)

The *Assessment Policy Manual* states in Policy No. 30:10:00 that:

... classification by industry and forming a group large enough to be a valid insurance base, are the basis of the classification system.

The *Act* is silent on how the Board is to assign classifications to accounts.

Policy No. 30:20:10 in the *Assessment Policy Manual* provides that:

In assigning the classification, some of the factors considered are the type of product or service that is being provided and the type of industry with which the employer is in competition.

Policy No. 30:20:10 also notes that:

This manual does not contain the specific criteria for putting a firm in a particular classification, because of the immense number and detailed nature of these rules. However, these rules, along with copies of the Classification Committee Minutes (see Section 30:20:50), are available for viewing at any one of the Board's offices throughout the province. When applying these rules to specific situations or firms, *individual consideration will be given and variations from the policy will be implemented where the Board's judgement suggests that literal application may be inappropriate or inequitable.* (emphasis added)

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To the extent that the classification system under the *Act* is intended to reflect the output of an industry according to some notion of average accident risk, the Board's practice is consistent with this intention. It is a reasoned attempt at demarcating between the kinds of services provided in terms of the accident risks inherent in the nature of the service provided (overnight accommodation, physical assistance, etc.).

The employer suggests that the Board ought to make some allowances for the fact that they are a non-profit society. There are two possible arguments in support of this position. One argument is that, in averaging the risk over an industry, the Board ought to allocate more of the burden to profit-making institutions. In other words, it is more equitable to treat a non-profit society differently for assessment purposes. This is not, however, an argument addressing the issue of proper classification. Rather, it is an argument for differential treatment within a class. Nothing in the *Act* countenances that approach.

An alternative hypothesis is that the risk associated with profit-making institutions is necessarily higher than the risk associated with non-profit operations. This argument is based on the notion that, since by definition a profit-making institution tries to minimize costs, it will necessarily incur more risks. Although this argument has some appeal, I find it too sweeping to be persuasive.

I have considered the possible meanings of the word "agencies" under class 14 in Section 36 of the *Act*. Class 14 reads as follows:

Class 14 – municipal corporations and agencies;

The legislative evolution of this section reveals that class 14 was originally intended to include only municipal entities. Class 14 in Section 30 of the *Workmen's Compensation Act* R.S.B.C. 1960, c.413 read as follows:

Class 14 – Municipalities and municipal boards:

The *Workmen's Compensation Act* R.S.B.C. 1960, c.413 was repealed in 1968 and replaced by the *Workmen's Compensation Act*, S.B.C. 1968, c.59. Section 34 of the *Workmen's Compensation Act*, S.B.C. 1968, c.59 dealt with the classification of industries. Class 14 of Section 34 read as follows:

Class 14 – Municipal corporations and agencies:

The wording of class 14 has been unchanged since.

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It is worth noting that, historically, municipalities tended to fund social service agencies and that the Board created a subclass for social service agencies under class 14. This would suggest that the word “agencies” under class 14 should be read as including all social service agencies. The underlying assumption would be that, once municipalities stopped funding social service agencies, it might have seemed natural for the legislative drafters to keep social service agencies in the same class as municipal corporations, and the Board acted on this. On the other hand, a reading of the legislative provision dealing with class 14 may also suggest that the word “agencies” acquires meaning only with reference to the word “municipal” and should therefore be understood as “(municipal) agencies.”

In the absence of any evidence of the legislative intent behind the change in wording of class 14, I am unable to conclude that the word “agencies” should be interpreted to mean all “social service agencies.”

Neither a purposive nor a textual reading of the legislative provision dealing with class 14 persuades me to accept the employer’s argument that the Board’s practice is inconsistent with the *Act*. The Board’s practice may fail to address all the relevant factors that need to be taken into account in classifying operations according to risk. This is not, however, the same as saying that it is inconsistent with the *Act*.

### **The Board’s Practice and Fettering of Discretion**

A general principle in administrative law is that administrative bodies must not fetter their discretion. In other words, a body entrusted with a discretion must not disable itself from exercising its discretion in individual cases by adopting a fixed rule of policy. As summarized by Jones and de Villars in *Principles of Administrative Law* (Vancouver, 1985):

... the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases.

(at p. 137)

Or, as stated by Lord Denning M.R., in *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 at 1008 (H.L.), the Board ought not to make up its mind in advance.

This principle is, however, sensibly applied. It does not bar administrators from formulating policies in advance to guide their determination of particular types of application. Such policies may themselves engender administrative justice by ensuring greater consistency of decision-making. If properly announced, they may prove of great value to citizens planning their affairs.

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What this principle tries to prevent, however, is the failure to exercise discretion by the purely mechanical application of a general policy without any willingness to consider any special circumstances of the individual case that might warrant departure from the general policy.

In *British Oxygen Co. Ltd. v. Minister of Technology* [1971] A.C. 610 (H.L.), a leading decision of the House of Lords, Lord Reid stated explicitly at p. 625 that there can be no objection to the formulation of “a policy so precise that it could well be called a rule ... provided the authority is *always willing to listen to anyone with something new to say* ... (emphasis added).” The Supreme Court of Canada adopted a similar position in *Capital Cities Communication Inc. v. Canadian Radio-Television Commission* [1978] 2 S.C.R. 141. Both cases suggest that guidelines, policies and rules cannot be so rigid as to deny an affected party the opportunity to question them and their applicability to the individual case.

The case law on fettering of discretion provides numerous examples of courts striking down policies where there was never any inquiry into or consideration given to the situation of the person aggrieved by the official charged with discretionary powers. See, for instance, *Lloyd v. Superintendent of Motor Vehicles* (1971) 20 D.L.R. (3d) 181 (B.C.C.A.); *Lewis v. B.C. Supt. of Motor Vehicles* (1979) 18 B.C.L.R. 305 (S.C.); *Deptuck v. Law Society of Sask.* [1985] 2 W.W.R. 433 (Sask. C.A.).

Admittedly, in *Western Forest Products Ltd. v. Workers' Compensation Board* (1983) 8 Admin. L.R. 43, the B.C. Supreme Court upheld a general policy of the Workers' Compensation Board that an experience rating is not transferable if the ownership of the employer changes. This decision appears to relax considerably the judicial test for fettering. It is significant, however, that in rendering her decision, Madam Justice Proudfoot emphasized the existence of a privative clause in the legislative scheme. Her reasoning suggests that her conclusion on the issue of fettering of discretion was influenced by the fact that the impugned policy was within the protection of a privative clause.

It is also noteworthy that, in weighing the advantages of allowing administrative bodies to formulate policies, Madam Justice Proudfoot stated that:

The petitioner cannot successfully argue that the board had established a pre-existing policy and that was enough to fetter their discretion. It is far more beneficial for a tribunal to develop policy guidelines for the sake of consistency rather than dealing on an ad hoc basis, *providing the guidelines still allow flexibility and consideration of the merits*. For the case at Bar, the board considered the merits. (emphasis added)

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The Appeal Division need not adopt the test for fettering as formulated in the context of judicial reviews where the courts have had to give regard to the existence of a privative clause. The Appeal Division is not constrained by this consideration.

In light of the general principle against the fettering of discretion, I have come to the conclusion that the proper way to view a policy or rule such as the Board's practice is as a default rule. The Board must give parties affected by this default rule the opportunity to rebut it. Where there is some dispute as to the applicability of the default rule to a particular set of circumstances, there should be some investigation into the nature of the operation or the firm that is being assessed. The Board cannot "shut its ears" to a disagreement as to the applicability or fairness of the default rule in a particular case.

This approach is entirely consistent with the governors' published policy. Policy No. 30:20:10 of the *Assessment Policy Manual* states that:

... individual consideration will be given and variations from the policy will be implemented where the Board's judgement suggests that literal application may be inappropriate or inequitable.

The case before me suggests questions might be addressed such as the rate of utilization of beds, the qualifications of the workers employed, the worker/children ratio on the premises or the nature of the physical assistance being provided. These questions may be germane to predicting the accident risks associated with providing certain services. The evidence before me suggests that the Board never concerned itself with these questions. The evidence suggests that, once it decided upon the course of action outlined in the Minute, the Board refused to entertain any possible departure from this course and, in effect, "shut its ears" to the employer's disagreement.

Admittedly, the employer's arguments could have been stronger but the Board's response never allowed all of the relevant issues to be fully analyzed. In responding to the employer, the Board never went beyond invoking the general applicability of the Board's practice. The proper exercise of its discretionary powers required the Board to move from this general stance to the investigation of the particulars of the employer's operation and the specific type of risks involved in this operation. It required the Board to assess why the risk of the employer's operation is more comparable to one class than another. This the Board never did nor ever proposed to do. It, therefore, fettered its discretionary powers.

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The factors which the Board's practice takes into account (number of beds and physical assistance) may be strong indicators of the degree of risk inherent in providing certain services, but they are not conclusive. They may legitimately serve as the starting point but should not be the conclusion of the analysis. Under our workers' compensation legislation, the average accident risk associated with different types of industries is the guiding principle underlying the classification system for assessment purposes. The theory is that firms providing similar products or similar services will encounter roughly similar risks in producing the products or providing the services. The Board's practice goes only part way towards establishing classification criteria that are faithful to this principle. This is why rigid adherence to this practice is unacceptable and defeats the purpose of the Board's practice, namely classification according to the relative risks of producing certain products or providing certain services.

I note that, as set out in the Minute, the very wording of the Board's practice displays rigidity. No mitigating words such as "normally" or "generally" are used to qualify the Board's practice.

Both in its wording and in its implementation, the Board's practice in this instance was overly rigid. It confined the analysis for proper classification to an unjustifiably small number of variables. The Board thereby disabled itself from considering other variables which may be very relevant in assessing accident risks.

I, therefore, set aside the Board's reclassification of the employer's registration on the grounds of error of law. The Board must undertake an investigation that will allow it to assess the particulars of the employer's operation, in light of the objectives underlying Board practice.

*Editors' note: This decision has been edited for publication.*