

## Reasons for Judgment of the Honourable Mr. Justice B.D. MacDonald

In the Supreme Court of British Columbia

**Between: Surinder S. Badesha, Petitioner**

**And: Workers' Compensation Board of British Columbia, Respondent**

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The petitioner applies under the *Judicial Review Procedure Act*, RSBC 1979, c.209, for an order that certain decisions of the Board, confirmed on February 5, 1990 by the commissioners on appeal, be overturned and referred back to the Board for proper calculation. The petitioner concedes that the Board had the jurisdiction to make the two calculations in issue, but argues that the result reached by the Board in both instances is patently unreasonable.

### The Issues

The petitioner was injured in a sawmill accident on April 22, 1986. His right (dominant) hand was caught in saw blade, resulting in the loss of about one-half of each of his little and ring fingers, and nerve and tendon damage to the side of his middle finger.

The Board calculated, for the purposes of initial compensation payments, and to form a base for his disability pension, that the petitioner's "average earnings and earning capacity" at the time of the injury was \$167.84 per week. The Board then fixed the petitioner's disability at 12.5% of total. Those are the two conclusions which the petitioner alleges to be patently unreasonable.

### The Legislation

The *Workers' Compensation Act*, RSBC 1979, c.437 (the Act), provides for the making of those two decisions by the Board.

33. (1) *The average earnings and earning capacity of a worker shall be determined with reference to the average earnings and earning capacity at the time of the injury, and may be calculated on the daily, weekly, or monthly wages or other regular remuneration which the worker was receiving at the time of the injury, or on the average yearly earnings of the worker for one or more years prior*

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*to the injury, or on the probable yearly earning capacity of the worker at the time of the injury, as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of injury, but not so as in any case to exceed the maximum wage rate, except that where, owing to the shortness of time during which the worker was in the employment of his employer, or in any employment, or the casual nature of his employment, or the terms of it, it is inequitable to compute average earnings in the manner described in this subsection, regard may be had to the average daily, weekly or monthly amount which, as shown by the records of the board, was being earned during the one or more years or other period previous to the injury by a person in the same or similar grade or class of employment.*

23. (1) *Where permanent partial disability results from the injury, the impairment of earning capacity shall be estimated from the nature and degree of the injury, and the compensation shall be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and shall be payable during the lifetime of the worker or in another manner the board determines.*

(2) *The board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.*

In addition, the Act contains in S.96(1) a formidable privative clause declaring the decisions of the Board to be final and conclusive, and not open to question or review in any court. It is settled law, however, that such a clause does not insulate decisions of the Board from attack on the grounds that they are patently unreasonable.

## **The Petitioner's Argument**

### **(a) Average Earning Capacity**

In making its calculation of average earnings and earning capacity under S.33(1) of the Act, the Board was faced with an unusual situation insofar as the petitioner's work history was concerned. After coming to Canada from India in 1970, the petitioner obtained employment in the lumber industry with L. & K. Sawmills in North Vancouver. He worked there from 1971 to 1983, when that company went out of business due to bankruptcy or receivership. Despite being an IWA member, the petitioner (along with hundreds of other sawmill workers laid off due to the serious economic downturn which began in late 1981) was unable to find new employment.

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Except for a period of 12 weeks when he worked for a pizza outlet in Delta, the petitioner was unemployed until April of 1986. Only a few days before the accident in which his hand was injured, the petitioner was hired at a non-union mill (Richmond Forest Products) at \$9.90 per hour, with no benefits, a rate of pay considerably below the then-current IWA scale. By the time the average earnings and earning capacity calculation was under consideration by the Board, some two months post-accident, Richmond Forest Products had shut down its operations due to US tariff changes.

Thus, earnings at the time of the injury were not appropriate because of the temporary nature of that work. To average the petitioner's earnings over the prior year alone would have afforded him only six or seven days out of 365 as income-producing. The Board chose to use a five-year average (he was earning \$13.33 per hour plus benefits when L. & K. Sawmills ceased operating in 1983), which included the 2½ years between 1983 and 1986 during which the petitioner was unemployed. The result was the \$167.84 per week average earnings figure.

The petitioner submits that such a conclusion is patently unreasonable. He was earning almost \$400.00 per week at the time he was injured. Evidence tendered on his appeal to the Review Board, from an IWA official, was that employment had been found by 1987 for most union sawmill workers laid off because of the economic downturn in the early 1980's. Because of his injured hand, the petitioner is now virtually unemployable as a manual labourer in the sawmill industry. It is patently unfair, he argues, to establish an earning capacity for him which takes into account an unprecedented period of mass unemployment in the industry in which he had worked since coming to Canada. That period of unemployment cannot be attributed to him.

The petitioner submits that the chances of a similar period of widespread unemployment in the industry (three out of five years) in the future is too remote to allow the five years pre-injury to form a basis for the Board's calculation. He argues that it is patently unreasonable to use a method which clearly does not represent his actual loss by reason of his injury. He suggests that the current IWA pay scale, or at the very least, the \$9.90 per hour he was earning at the time of his injury should be used. The Board's calculation fixes his earning capacity, had it not been for this injury, at approximately \$4.20 per hour.

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## (b) Extent of Disability

The Board “enhanced” a scheduled award (see S.23[2] of the *Act*) by some 3% to arrive at the 12.5% disability figure. Because he speaks little English, and because he is now unemployable in the sawmill industry as a manual worker, the petitioner claims that assessment to be patently unreasonable.

## Discussion

Whether or not I would reach the same result as the Board, on the evidence which was before it, is not the question to be answered on this petition. The decision of the commissioners on February 5, 1990, which this petition seeks to overturn, deals with the same arguments raised here. It concludes that periods of unemployment in the sawmill industry are a fact of life and must be considered when calculating average earnings. It points out that the 12-year employment history of the petitioner with L. & K. Sawmills included some years in which his hours worked were less than 50% of others. It reflects use of the IWA wage scale due to the petitioner’s lack of a union job for three years and his non-union employment at the time of the injury. It states that the rate paid by the pre-injury employer would have been used had there been any evidence of potential long-term employment with that employer. The very purpose of using a five-year base is to take into account fluctuations in the economic cycle.

On the subject of the extent of disability, the commissioners said that whatever errors regarding the scope of their jurisdiction may have been made by the Review Board which considered this question, the sole concern of the commissioners was to determine whether a proper result had been reached.

While he may not have been obliged to do so on the authorities (see, *Farrell v. WCB* [1961] 37 WWR 39 [SCC] at p. 40), counsel for the Board on this hearing took pains to establish the evidentiary basis on which the Board reached the two conclusions under attack.

This is not one of those cases, referred to by McLachlin, J. in *Plumbers Local 740 v. W.W. Lester (1978) Ltd.* (1990) 91 CLLC 14,002 (SCC) – (judgment rendered December 7, 1990), where the evidence, viewed reasonably, is incapable of supporting the tribunal’s findings of fact.

That the Board can take economic factors such as periodic shutdowns in a particular industry into account in determining average earnings (or wage loss) seems clear. (See, *Re Prevost and WCB* [1990] 59 DLR [4th] 478.) While the exercise of the Board’s judgment and discretion must be done fairly, there is an element of discretion in the conclusions under attack here which is entitled to curial deference, particularly since these conclusions lie at the heart of the Board’s specialized jurisdiction.

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In *Paccar v. CAIMAW Local 14* (1989) 40 BCLR (2d) 1 (SCC), the court outlines the following steps in determining whether an administrative tribunal has exceeded its jurisdiction by answering a question in a patently unreasonable manner:

- (a) determine the tribunal's jurisdiction (that is conceded here);
- (b) adopt a posture of deference to the decisions of the tribunal, since the court will only review such decisions in the face of a privative clause, where there has been a patently unreasonable error.

At pp. 19–21 of the *Paccar* decision, LaForest, J. states:

*... does not ... allow a court to substitute its judgment for that of the board ....*

*... if the courts could intervene every time they were of the opinion that a ... decision ... did not accord with the objectives ... the notion of curial deference would be deprived of virtually all meaning.*

*The tribunal has a right to make errors, even serious ones, provided it does not act in a manner so patently unreasonable that its construction cannot be rationally supported ... and demands intervention by the court upon review.*

*The test for review is a severe test.*

*The courts must be careful to focus their inquiry on the existence of a rational basis for the decision ... and not on their agreement with it. The emphasis should not be so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result.*

The petitioner emphasizes the result for him of the combination of the two decisions of the Board which he attacks; namely, a pension of \$111.00 per month, which translates into some 70¢ per hour. However, the petitioner is not totally disabled, even though he may no longer be employable as a manual labourer in the sawmill industry. There is a serious question concerning his apparent lack of motivation to both upgrade his English skills (and thus broaden his employment opportunities) and to accept employment outside the sawmill industry (e.g. as a janitor), particularly if such employment attracts a wage little above his current Canada Pension Plan disability payments.

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At the end of the day, I find myself in substantial agreement with the argument of counsel for the WCB when he submits:

*Essentially, the Petitioner is seeking to appeal the decision of the Board .... The petition is premised on the court being invited to review the evidence ... the court is being asked to usurp the function of the Commissioners under S.33 of the Act ... and reach a conclusion different than that reached by the Board.*

While some doubt is thrown upon it by the dissenting judgment in a 4–3 split, the following statement by Mr. Justice Gonthier for the majority at p. 22 in *National Corn Growers v. Canadian Import Tribunal* (SCC, November 8, 1990 – not yet reported – #21366 SCC 90 – 110) purports to define “patently unreasonable”:

*... the courts, in the presence of a privative clause, will only interfere with the findings of a specialized tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or of the law.*

The statement by LaForest, J. at p. 22 of the *Paccar* case effectively summarizes my view of this case.

*I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is “correct” in the sense that it is the decision I would have reached had the proceedings been before this court on their merits. It is sufficient to say that the result arrived at by the board is not patently unreasonable. Indeed, I would go so far as to say that the result reached by the board is as reasonable as the alternative. It is not necessary to go beyond that.*

As occurred on this hearing, it may not be possible to determine the “patently unreasonable” issue, where the disputed decisions involve questions of fact, without a review of not only those facts on which the tribunal acted, but also those which it considered and rejected, and even those which it should have considered but did not. To that extent, the difference between an application such as the hearing of this petition and an appeal from the decisions of the Board in question may not be apparent on the surface and argument will range over much the same factual ground. But the outcome turns on a much different test than would be the case if this were an appeal. In the words of counsel for the Board, “... the petitioner has couched his petition in phraseology which is appropriate to judicial review, but he is essentially conducting an appeal.”

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## **Judgment**

THIS PETITION IS DISMISSED WITH COSTS AGAINST THE PETITIONER.

4 March 1991  
Vancouver, British Columbia



## Reasons for Judgment of the Honourable Mr. Justice Taylor

In the Court of Appeal for British Columbia  
(Wallace, Taylor, and Proudfoot JJ.A.)

**Between: Gurdev Kooner, Petitioner**

**And: Workers' Compensation Board of British Columbia, Respondent**

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This appeal is concerned with the circumstances in which the Workers' Compensation Board may submit for reconsideration to a new 'medical review panel' issues which have already been decided by such a panel in the claimant's favour on an appeal by the claimant against a decision of the Board.

### **(a) The Background**

The respondent, Gurdev Kooner, suffered a neck injury 12 years ago when the carrier vehicle he was driving at the lumber mill where he worked went over a piece of wood, causing him to hit his forehead on the steering wheel.

Mr. Kooner's claim for compensation for this work injury of July 6, 1978, was accepted by the Board and temporary total disability benefits for wage loss were paid to him for 3½ years, from July 7, 1978 to December 27, 1981. At the end of 1981 a claims adjudicator advised Mr. Kooner the Board had decided that his medical condition had "plateaued" and that his total disability benefits would be discontinued, but that an assessment would be made to determine whether he was eligible for partial disability benefits. On February 11, 1982, a disability awards officer told him his disability had been assessed at 5 per cent and he had been awarded a pension of \$75.09 per month. On January 23, 1984, a board of review denied Mr. Kooner's appeal from these decisions and two commissioners thereafter dismissed his further appeal.

The commissioners found that certain head movements exhibited by Mr. Kooner to which his claim for total disability benefits was related were legitimate but were exaggerated as to frequency, severity and continuity, and did not, in any event, result from his July 6, 1978, accident at work.

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Mr. Kooner appealed against this decision of the Board by requesting a 'medical review panel' and submitted a doctor's certificate, as required by Section 58(3) of the *Workers' Compensation Act*, RSBC 1979, Chapter 437, stating that a medical dispute existed. The doctor diagnosed Mr. Kooner's problem as a neurological disorder known as *spasmodic torticollis* and attributed it to the accident of seven years before. A medical review panel was accordingly established. The Board directed that it consist of two neurologists with a general practitioner as chairman. Its principal task was to decide whether the petitioner was indeed suffering from spasmodic torticollis and, if so, whether this resulted from his accident at work. But the terms of reference given to it by the Board were not limited to that question; they required the panel to report generally on Mr. Kooner's condition and on whether he was disabled and, if so, the nature, extent and cause of his disability.

On June 2, 1988, the panel gave its decision by way of a certificate and report. It found Mr. Kooner was not suffering from spasmodic torticollis but rather from a "psychogenic movement disorder." It said his condition rendered him incapable of performing manual or sedentary work, that the work injury of July 6, 1978, was of "causative significance" in bringing it about, and that the disability was "most probably permanent."

By letter of August 17, 1988, the Board appeals administrator told Mr. Kooner and his employer that the file would be referred to its claims department to "implement" the certificate of the medical review panel. On the same day the Board pensions adjudicator informed Mr. Kooner he had been granted a permanent total disability pension as a result of the decision of the medical review panel, with retroactive benefits. Ten days after this, Mr. Kooner's employer objected to the Board against the decision of the administrator on the ground that the medical review panel had exceeded its jurisdiction by making a diagnosis outside the scope of its expertise, and asserted that its decision was a nullity. On March 15, 1989, a panel of two commissioners rejected the employer's objections but expressed concern that the panel, having been composed with a view to dealing with a neurological issue, had gone on to make findings on matters not central to that expertise. The commissioners concluded that the Board should therefore refer the matter under Section 58(5) to "a second medical review panel with specialists in psychiatry."

After that decision was confirmed, on June 2, 1989, by other commissioners, Mr. Kooner brought the present proceedings to enjoin the Board from instituting the second review.

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Mr. Justice A.G. MacKinnon granted the order sought under the *Judicial Review Procedure Act*, RSBC 1979, Chapter 209, prohibiting the Board from establishing the new panel. His reasons for judgment are reported at 60 DLR (4th) 434, summarized 19 ACWS (3d) 167, and I will proceed on the assumption that those interested in the present decision will have read them.

## **(b) The Panel's Certificate**

The statutory scheme under which medical review panels are established and carry out their function is to be found in Sections 58 to 65 of the *Workers' Compensation Act*.

Section 58(3) and (4) provide that a worker or an employer may require the establishment of such a panel to review a medical decision of the Board on producing within 90 days of the decision a doctor's certificate stating that a medical dispute exists. Section 58(5) provides that the Board may establish a panel of its own motion and puts no restriction on the circumstances in which it may do so. Section 59 says that, where a panel is called for, whether under Section 58(3), (4) or (5), claimant and employer are each to select from an approved list "one specialist in the particular class of injury or ailment in respect of which the worker has claimed compensation." These specialists together with a chairman appointed on a standing basis by order-in-council constitute the medical review panel. In the present case it was because the medical certificate supplied by Mr. Kooner said he suffered from a neurological problem that the Board specified that the panel members be specialists in neurology. But the fact that the Board submitted the whole question of Mr. Kooner's condition to that panel for decision, and not merely the neurological aspect, seems to indicate that the Board was of the view that specialists in neurology would be able to decide all the medical questions which might reasonably be expected to arise.

Section 61 requires that a panel report within a reasonable time after examination of the worker and give its decision on such matters as "the condition of the worker," "the existence or non-existence of a disability," "its nature and extent," "its cause, and if there is more than one cause, how much of the disability is related to one cause and how much to another." The panel in this case was required by the Board to answer all these questions and others as well. The issues posed by the Board and the answers certified by the panel are as follows:

### **Medical Issue Stated by the Board**

1. *What is the condition of the claimant?*

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2. *Does he now have a disability with respect to his head movements? If not, could the Panel advise the Board whether historically they believe that the claimant did, at any time, have a disability with respect to his head movements?*
  3. *If he has or had such a disability, what is its nature and extent and in what ways has it affected the body function of the claimant? In particular, in what ways has it limited his capacity for work?*
  4. *If he has or had such a disability, was his compensable injury of 6 July 1978 of causative significance and, if so, in what way?*
  5. *If he has or had such a disability, was the disability wholly or partly the result of causes other than his compensable injury of 6 July 1978? If so, what other causes were there, and how and to what extent was each cause significant?*
  6. *If there were two or more causes of the claimant's disability with respect to his head movements, could the Panel please explain:*
    - (a) *Did each cause independently result in some disability and, if so, what proportion of the disability found by the Panel?*
    - (b) *If each cause did not independently result in some disability, did two or more causes act together to produce a disability and, if so, which causes acted together to produce this disability?*
  7. *The Board has recognized that the claimant was fully disabled as a result of his compensable injury of 6 July 1978 for the period set out in non-medical fact #3 and #5 of this statement. Would the Panel please state whether they feel that the claimant was disabled for any further period or periods as a result of his compensable injury of 6 July 1978 and, if so, what the nature and extent of the disability was during this further period of time.*
  8. *Did the claimant suffer from any pre-existing condition or disability and, if so, was it activated, accelerated, or aggravated by his compensable injury of 6 July 1978?*
  9. *If the claimant now has a disability, is it permanent and, if so, when did it stabilize?*

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### Answer “Certified” by the Panel

1. *The claimant is now suffering from a non-organic movement disorder of the head and neck, and a chronic pain syndrome.*
2. *The claimant now has a disability with respect to his head movements.*
3. *The disability the claimant has is a psychogenic movement disorder of the head and neck and perceived neck pain, and this combination renders the claimant incapable of performing his duties as a carrier driver, or performing manual labor, or sedentary labor.*
4. *The Panel believes that the claimant’s compensable injury of July 6th, 1978, is of causative significance in producing his disability in that it triggered a series of events including: many investigations, a surgical procedure, several hospitalizations, multiple medical examinations by a variety of medical specialists with varying opinions as to the nature of the claimant’s condition, and multiple psychotropic analgesic and anti-inflammatory drug use, all of which have continued to reinforce the claimant’s perceived pain, movement disorder, restricted range of neck movement, weakness and disability*
5. *The Panel does not know the exact cause of the claimant’s chronic pain syndrome and non-organic movement disorder, but we do believe the compensable injury of July 6th, 1978, was of major significance as the initiating factor.*
6. (a) *Non-applicable.*  
  
(b) *The Panel believes that the many events outlined in No. 4 above acted together to produce the claimant’s disability. The Panel is unable to identify the relative contribution of the various factors listed.*
7. *On a strictly medical basis the Panel believes the claimant, as a result of his compensable injury of July 6th, 1978, has been disabled for a period beyond those recognized by the Board, i.e. from July 17th, 1978 until October 1st, 1978, and from June 8th, 1979, until December 27th, 1981. The Panel believes the claimant has been fully disabled from performing manual or sedentary work from December 27th, 1981, until the present. The disability the claimant suffered during this time was the non-organic movement disorder of the head and neck and the*

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*chronic pain syndrome which have rendered him incapable of performing manual work or sedentary work.*

*The claimant did not suffer from a pre-existing condition or disability which was activated, accelerated or aggravated by his compensable injury of July 6th, 1978.*

*The claimant now has a disability which the Panel considers is most probably permanent. The Panel believes the disability became stabilized by December, 1981.*

So the nominated specialists in neurology and the general practitioner who chaired the panel agreed that the claimant was not suffering from the specific neurological condition diagnosed by his own physician, but went on to deal, as Section 61 would seem to contemplate and their instructions from the Board clearly required, with other medical issues relevant to the question whether or not Mr. Kooner was nevertheless disabled.

In accordance with Section 65 the panel's certificate, provided it was a valid certificate – something which the Board expressly accepted in this case and the employer has not further contested – thus became “conclusive as to the matters certified” and “binding on the board”.

### **(c) The Issue Raised**

The issue raised on this appeal has been distinctly limited by the position taken by counsel for each side.

Counsel for the Board says that the Board seeks in this case to establish a new medical review panel under Section 58(5), not with a view to reversing the decision already made on the basis of the first panel's report with respect to compensation due to Mr. Kooner for his past disability, but only for the purpose of deciding what, if any, compensation should be paid thereafter. Counsel for Mr. Kooner concedes that the Board does have jurisdiction under some circumstances to appoint a second medical review panel to review a claimant's condition for the purpose of determining entitlement to future benefits. Counsel insists, however, that the Board may do this only if there is evidence of some change in circumstances justifying a further review. It is common ground that the statement in Section 65 that the panel's certificate is “conclusive as to the matters certified” and “binding on the board” does not mean it is necessarily to be regarded as “final” – that is to say as precluding any later review of the claimant's status by another panel.

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This is a point of obvious importance to the outcome of the appeal. In normal circumstances it would be difficult to conceive of a decision being “conclusive” and “binding,” and yet not “final.” But it is of the essence of the scheme established by the *Act* that decisions on compensation will be open to review in the light of changing conditions, whether the change be to rehabilitative or employment opportunities, medical knowledge or the medical status of the claimant. Decisions of the Board must be open to reconsideration where new considerations arise. It would be incongruous in such circumstances that the decision of a medical review panel on appeal from a decision of the Board could not be reconsidered. If that were so, then it would follow that a decision of the Board upheld on appeal by a panel would be immutable, whereas a decision not appealed, because the worker had accepted it, could be reconsidered.

Chief Justice Sloan, who recommended the establishment of the medical review procedure in his 1952 *Report on the Workmen’s Compensation Act and System*, said (at p. 143) that the decision of a review panel (“Medical Review Board”) should be “final and binding only at the time it is made” and “final and binding in relation to the facts and circumstances existing at the time of the decision,” and that it should remain so “unless and until there is a material change in those facts and circumstances.” No doubt because of the contradiction inherent in the concept of “qualified finality,” the word “final” is omitted from the legislative language used to create the scheme.

The issue now raised is whether the Board has unlimited discretion to order further medical review panels with respect to future benefits – so that the Board might, in theory, appoint successive panels until it obtained a result acceptable to it – and, if not, whether the facts of the present case, in which there is no suggestion of any “new circumstances,” are still such as would permit it to appoint a second panel.

In *Caputo v. British Columbia (Workers’ Compensation Board)* (1987), 29 Admin. LR 145 (BCCA), on which the Board particularly relies, this court considered a case in which the Board had submitted a dispute to a medical review panel under Section 58(5) after the employer’s request for a panel under Section 58(4) had been found defective for lack of the required doctor’s certificate. An application for an order in the nature of prohibition was dismissed in the trial court, and the appeal to this court failed. Mr. Justice Anderson giving the judgment of this court said (at p. 153) that the Section 58(5) power is broad and could be invoked to remedy a “technical defect” in an application under Section 58(3) or (4) “so as to avoid an appearance of injustice which might result from a rigid and overly technical

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approach.” While the decision emphasizes the need to avoid undue rigidity in interpreting the Board’s powers, it does not seem to me helpful to the Board in the present case.

The Board has wide power to decide when to appoint a medical review panel of its own motion under Section 58(5). But its powers with respect to the appointment of panels under Section 58(3) or (4) are circumscribed. So soon as a proper request is made by claimant or employer the Board must proceed with the establishment of the panel. It must therefore be subject to rules of fairness in deciding the specialty from which nominees are to be chosen, in framing the terms of reference and generally with respect to proceedings leading to the decision and also with respect to its implementation. The panel is not, of course, an advisory body but an appellate tribunal by which a disputed decision of the Board may be reversed. The purpose of the review is to decide whether the Board has arrived at the correct decision in a medical matter. It follows that in regard to the proceedings before the medical review panel and to the manner in which the Board deals with the panel’s decision there must be careful adherence to the intent of the statute, including observance of rules of fairness. For such an independent review procedure to be effective, the broad discretionary authority which the Board normally enjoys must be qualified.

The question here is whether, when a panel has allowed an appeal from a decision of the Board in accordance with its terms of reference, the Board may reject its report so far as future pension entitlement is concerned, and adopt instead the report of a subsequently appointed and differently constituted panel, without violating the requirement of Section 65 that the report of the first is to be considered “conclusive” and “binding on the board.” In the absence of any new evidence, or other development not known when the original panel was established, this is not, in my view, a matter in respect of which the Board’s decision can be protected by Section 96 against review by the courts, nor one in respect of which the Board can claim, as it does, the benefit of “curial deference.” Since the Board’s jurisdiction must, by Section 65, be subordinated to that of the medical review panel, the Board cannot have discretion with respect to implementation of the panel’s decision. It must be that curial deference is due in these circumstances to the decision of the panel.

Counsel for the Board says the proposed second medical review panel is required in order to “clarify ambiguity and resolve the concerns of the commissioners” with respect to the decision of the first panel. But counsel does not elaborate on the “ambiguities” and “concerns,” or why they could

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not have been resolved by a request to the first panel, the course which according to the Board's published *Rehabilitation Services and Claims Manual* would normally be taken.

The decision of the commissioners recorded in the Board's letter of March 15, 1989, to the employer, says that the question whether the claimant's compensable injury "is the sole cause of his present disability" is not answered by the panel's certificate. The Board notes that the panel "does not know the exact cause of the claimant's chronic pain and movement disorder." When the panel's certificate is read as a whole it seems to me that it says quite clearly that Mr. Kooner's work injury is the sole cause of his disability in the sense that the work injury and series of medical events which occurred as a result of it acted together to bring about his disability. The panel says the work injury "triggered" the other events and was itself "of major significance as the initiating factor." The panel's inability to identify the "exact cause" of the disability, and the relative contribution of the various factors which contributed to it, must be considered in this context. The certificate leaves no doubt that the panel attributes the disability solely to the work injury and the medical events which followed as a result of it. Whether in these circumstances the work injury is properly described as "the sole cause" is, at most, a matter of semantics, and not a matter of ambiguity which another panel could resolve.

The Board does not contend that distinction should be drawn, for compensation purposes, between disability caused by a work-related injury itself and disability caused by medical attention received as a result of such an injury.

Counsel for the Board takes the position that the questions "whether there is ambiguity in a medical review panel certificate which bears upon the issue of compensability (causation)" and "whether that ambiguity requires a subsequent panel having 'specialist' qualifications not possessed by the previous panel" are matters in respect of which the Board has exclusive jurisdiction. The concerns of the commissioners to which counsel refers have to do with the fact that a panel chosen for neurological expertise diagnosed a psychiatric condition as a disability from which Mr. Kooner was suffering and attributed it to his work-related injury. It is in the end on this ground that the Board maintains that it is not necessarily bound by the panel's findings but entitled to establish another, and to prefer the decision of the second panel.

It must, however, be emphasized that the Board does not suggest that the first panel in any way exceeded its jurisdiction. It has, indeed, rejected that contention.

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**(d) The “Multiple-Expertise” Situation**

Since the language of Sections 58 to 65 leaves without specific resolution the problems which may arise where investigation of a claimant’s condition involves more than one area of medical expertise, the Board has adopted a policy to be applied in such situations which it describes in its *Rehabilitation Services and Claims Manual*.

The *Manual*, while obviously not a binding statement of principles invariably to be applied by the Board, has been prepared on the basis of the Board’s experience and seems to deal quite appropriately with this problem. Paragraph 103.32, headed “Medical Dispute Concerns Two Specialties,” says:

*Both the worker and the employer should receive the same list of specialists for nomination for service on the Medical Review Panel. In cases where more than one specialty is relevant, the worker and employer may each be provided with both lists. This would apply to cases where the medical question in dispute was in a borderline area between two specialties (i.e. orthopaedic surgery and psychiatry), a choice must be made as to which of the two specialties is of primary relevance to the matter in dispute. Disparate specialties cannot be combined on one Medical Review Panel.*

*In certain exceptional circumstances, this will result in a need for two Medical Review Panel appeals on a claim, in different areas of specialization. However, the need for the involvement of specialists from other areas may normally be met by a Medical Review Panel obtaining a consultation report from a specialist in another area.*

*Where an appeal is being taken to a Medical Review Panel, there can be a question of how to deal with psychological problems without the expense and complexity of a separate psychiatric panel. On this point, it is obviously desirable that a panel of, say, orthopaedic surgeons should not reach conclusions on a complex psychiatric problem that requires the expertise of psychiatrists. On the other hand, there is no objection to a panel of, for example, orthopaedic surgeons reaching a conclusion on the psychological aspect of the matter insofar as the ordinary psychological consequences of injury are a matter normally dealt with by orthopaedic surgeons. In other words, if the main problem is orthopaedic, one would expect a panel of orthopaedic surgeons to comment and advise on any psychological problem to the extent that orthopaedic surgeons normally*

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*consider related psychological problems. But if it looks as if the psychological problem is the major disability, it may well be desirable that the panel should be composed from the psychiatric list in the first instance.*

Substituting “neurological” for “orthopaedic” as the area of expertise concerned, the example given seems to me to describe the situation which arose in this case.

The record shows that the Board had for many years taken the position that Mr. Kooner’s problem was either neurological or psychiatric in origin or else was not medically based at all but essentially self-created for compensation purposes. When Mr. Kooner called for a medical review panel by way of appeal against the Board’s decision denying him total disability benefits, the Board knew psychological or psychiatric issues might be raised; these are mentioned both in the decision of the Board which was under appeal and in the statement of facts the Board provided to the panel. So it was open to the Board to take either of the courses described in its *Manual* – to refer the whole dispute to a panel composed of neurological experts with a view to having that panel dispose of any psychiatric issues which might arise as well as the neurological issues or, alternatively, to advise the claimant and employer that there would be two panels, the first to dispose of the neurological issues and the second to decide thereafter the psychiatric questions which might remain should the first panel find no neurological disability.

The Board knew that Mr. Kooner had long been under the care of neurologists and there can be no doubt that his condition had a neurological origin because he underwent surgery at one time for cervical discectomy and fusion to relieve nerve root entrapment. It was plainly a case in which if there were psychiatric complications they would be of a sort with which neurologists would be familiar.

It was with this knowledge that the Board made the decision to establish a single panel, consisting of neurologists and a general practitioner, to decide the whole question of the existence of any disability and its cause.

It was therefore on that basis that claimant and employer made their nominations and the appeal proceeded. The panellists, like the claimant, plainly believed that the enquiry encompassed the whole question of his medical status and the nature and cause of any disability from which he might be suffering. The Board cannot have been taken by surprise any

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more than the worker and employer, when the panel explored psychiatric as well as neurological explanations for his complaint. There can be no basis for suggesting that it was not expected that the panel would consider psychiatric explanations. The possibility of a psychiatric explanation would seem to be something which would necessarily have to be considered in such a case in deciding whether or not the complaint had a neurological origin, and here there was nothing in the panel's terms of reference which restricted it to dealing with neurological matters or suggested that a psychiatric panel would later be appointed should no neurological explanation be found. Had the possibility of a psychological issue arising not been apparent prior to appointment of the panel, but only have come to light as a result of the panel's report, establishment thereafter of a panel with psychiatric expertise might, perhaps, have been a different matter, but here there was no such surprise.

According to its *Manual*, the Board in exercising discretion given to it by the *Act* to rehear and redetermine matters which have been the subject of its own decisions has adopted a policy of undertaking such review only where a change in the claimant's condition has occurred since the Board's decision, or new evidence has been produced which suggests that the original decision was wrong or that was not considered by the Board, or where it is established that an error of fact or law was committed by the Board. It is, perhaps, interesting that the *Manual* mentions as an example of error "failure to adopt a valid certificate of a Medical Review Panel." These seem to be appropriate rules for the Board to adopt in the exercise of its discretion to reconsider issues which it has previously decided itself. It seems to me that at least as high a test must be met before review of the decision of a medical review panel is ordered.

That this is so seems to me to be recognized both by Chief Justice Sloan in his 1952 report, to which I have referred, and also by Mr. Justice Tysoe in his 1965 Report on *Inquiry into the Workmen's Compensation Act* (at pages 367–394). The same view is reflected in the Board's *Manual*, which under the heading "Reconsideration of Certificate," says:

*There are two types of new evidence relating to matters to which a Medical Review Panel has certified. The first type is evidence which indicates that the panel made a fundamental mistake concerning the claimant's medical condition or status at the time the certificate was issued. For example, it may become evident that the panel was provided with the wrong x-rays or examined the wrong part of the worker's body. The second type is evidence which indicates that the claimant's*

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*condition or status may have changed since the certificate was issued, so that the compensable consequences of the certificate are no longer appropriate. For example, a partial disability may have deteriorated into total disability or a condition not previously disabling may have worsened and become disabling.*

*As a result of Section 65, the Board itself is unable to act on the first type of evidence. That does not necessarily mean, however, that there is nothing which can be done if it is determined that a fundamental mistake was made by a Medical Review Panel. If, within a reasonable period after a certificate is issued, perhaps one year, new evidence becomes available indicating that a fundamental mistake has been made and if it is possible for the Board to reconvene the Medical Review Panel which issued the certificate, the Board may, at its discretion, do so. Where the panel determines that, as a result of its mistake, its previous certificate was wrong, the certificate will be considered null and void and the panel will issue a new certificate to be substituted for it. Where, however, a longer period has elapsed before the mistake becomes evident or the original panel members can no longer be reconvened, the Board will, if it concludes that further action is necessary, convene a new Medical Review Panel. In this case, the certificate of the original panel would be binding up to the date of any certificate issued by the new panel.*

I have already noted that counsel in this case are agreed that the panel's certificate is in some circumstances open to review.

If Mr. Kooner's disability does indeed prove not to be as the panel has diagnosed it, one would expect that to come to light in the future in the course, for instance, of treatment which Mr. Kooner may be required by the Board to take, or as a result of psychiatric or other examination which the Board may require Mr. Kooner to undergo while in receipt of disability benefits. If so, there might be new evidence available justifying further medical review. That the Board should establish a second medical panel in the present circumstances – one whose decision would receive preference over that of the first – without any new circumstance being suggested which casts doubt on the correctness of the certificate of the first, is, in my review, inconsistent with the intent of the legislative scheme. The adoption of such a procedure after the first panel has reached a decision contrary to that of the Board raises an appearance of unfairness and defeats the purpose of the independent appeal procedure.

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The panel's certificate must, in my view, be accepted as "conclusive" and "binding on the Board" in the sense that the Board is required to act on it unless and until some significant new circumstance comes to light.

**(e) Conclusion**

In dealing with this jurisdictional question it seems to me that a balance has to be struck between, on the one hand, the need to ensure that the Board remains free to reconsider medical findings in the light of any new information which comes to light concerning a claimant's condition, and, on the other hand, the need also for proper recognition of the status of a medical review panel as an independent appellate tribunal.

It cannot be enough to entitle the Board to initiate another review that it has changed its mind, after the first panel has reversed the Board's decision, and has decided that a problem which it knew at all times might involve two specialties ought to have been submitted partly to one panel and partly to another rather than wholly to one. If the purpose of the medical review panel were advisory, the course which the Board seeks to follow might not have been objectionable. But having in mind that the panel sat on an appeal from the Board's decision, it seems to me that in this case the Board was bound by the procedure adopted in establishing the panel and its terms of reference, and that nothing has happened which would entitle the Board to reject the panel's findings in favour of those of another.

I agree with the decision of Mr. Justice MacKinnon and would dismiss this appeal.

APPEAL DISMISSED.

## In the Supreme Court of British Columbia

**Between:** Privest Properties Ltd. et al.  
**And:** The Foundation Company of Canada Limited et al.  
**And:** Lordina Limited  
**And:** Workers' Compensation Board et al.

### Ruling of The Honourable Mr. Justice Drost (November 13, 1991)

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#### The Application

This is an application by the Workers' Compensation Board (the "W.C.B.", or, the "Board"), pursuant to Rule 19(24)(a) of the Rules of Court, for the following Orders:

- (a) that the Third Party Notices issued by the defendants W.R. Grace & Co. of Canada Ltd. ("Grace Canada"), W.R. Grace & Co. – Conn. ("Grace Conn") (collectively, the "Grace Defendants"), Eng & Wright Partners, Architects ("Eng & Wright"), and The Foundation Company of Canada ("Foundation"), be struck out on the grounds that they disclose no reasonable cause of action against the W.C.B.;
- (b) that all actions against the W.C.B. be dismissed and judgment be entered in its favour; and
- (c) that the W.C.B. recover special costs as against the said defendants, or, in the alternative, costs assessed on Scale 4.

#### Background

In the underlying action the plaintiffs are seeking damages to compensate them for loss, damage, expense and inconvenience allegedly suffered as a consequence of the application to their building (the "Building") of an asbestos-containing spray fireproofing material known as Monokote 3 ("MK-3").

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They allege that the MK-3 was manufactured and distributed by Grace Canada under the direction and control of Grace Conn.; that it was applied during the years 1973 to 1975 in the course of a major construction and renovation project (the “Project”) for which Foundation had been engaged as head contractor and Eng & Wright to provide architectural and supervisory services.

The plaintiffs allege that at all relevant times the defendants were aware that MK-3 contained asbestos, a substance which they knew or ought to have known is hazardous to health.

After completion of the Project, the Building was occupied by tenants and operated normally until March 1987. Then, in the course of further renovations, it was discovered (allegedly for the first time) that the said spray-fireproofing material contained asbestos. The W.C.B. thereupon issued a Cease Work Order which, the plaintiffs say, prevented them from completing the renovations until the MK-3 had been removed and replaced, and precipitated the loss, damage, expense and inconvenience for which they claim damages.

## The Test

When deciding whether a pleading should be struck on the ground that it discloses no reasonable claim or defence, the test to be applied was defined by the British Columbia Court of Appeal in *Minnes v. Minnes* (1962), 39 W.W.R. 112. It is that:

So long as the pleading, as it stands or as it may be amended, discloses a question fit to be tried, the mere fact that the case is weak or not likely to succeed is no ground for striking it out. If the action involves investigation of serious questions of law or questions of general importance, or if facts are to be known before rights are definitely decided, the rule ought not to be applied.

That test was approved recently by the Supreme Court of Canada in *Carey Canada Inc. et al. v. Hunt et al.* (1990), 74 D.L.R. (4th) 321. In doing so the court stated that:

Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. *Only if the action is certain to fail because it contains a radical defect* ranking with the others listed in Rule 19(24) of the *British Columbia Rules of Court* should the relevant portion of a [pleading] be struck out under Rule 19(24)(a). (Emphasis added)

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In order to succeed on this application, the W.C.B. must meet that test. If it is unable to do so, the impugned pleadings will not be struck; if it is partly successful, the offending part or parts of the pleadings will be struck.

## **The Allegations of Fact**

On an application of this nature every allegation of fact contained in the pleadings is taken to be true, and it is to be assumed that the plaintiff will be successful against each of the defendants (*McNaughton & McNaughton v. Baker et al.*, (1988) 25 B.C.L.R. (2d) 17 (B.C.C.A.)).

The following is a summary of the relevant allegations made, firstly, by the plaintiffs and secondly, by each of the defendants named in this application.

### **1. The Allegations Made by the Plaintiffs**

#### **A. Regarding the Grace Defendants**

They allege that the Grace Defendants:

- a) negligently manufactured and sold the MK-3;
- b) negligently recommended the use of MK-3 when there were other asbestos-free products available which were suitable to the purpose;
- c) knew or ought to have known that the use of MK-3 could cause physical injury to persons and damage to property during the construction period or afterwards; and
- d) knowing that MK-3 would be used in the renovation of the Building (the “project”), failed to warn the plaintiffs that it contained asbestos, or that its use could pose a hazard to human health and safety.

#### **B. Regarding Eng & Wright**

The plaintiffs allege that Eng & Wright, negligently and in breach of contract:

- a) failed to take sufficient care in drafting specifications, in particular by failing to specify that the spray-fireproofing material used was to be asbestos-free;

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- b) failed to inspect the improvements that were made as part of the Project so as to ensure that asbestos was not contained in the material used;
  - c) failed to ascertain the presence of asbestos in the material; and
  - d) failed to warn the plaintiffs that an asbestos-containing material was being used and of the dangers involved in such use.

**C. Regarding Foundation**

The plaintiffs allege that Foundation, negligently and in breach of contract:

- a) failed to ascertain the presence of asbestos in the spray-fireproofing material;
- a) failed to ensure that the spray-fireproofing material used was asbestos-free, when asbestos-free alternatives were available;
- b) failed to warn that MK-3 contained asbestos and could pose a threat to human health and safety and cause damage to property; and
- c) failed to ensure that the building would be fit for human occupation, and for allowing its sub-contractor, Donalco, to use an inherently dangerous product.

**2. The Allegations Made Regarding the W.C.B.**

**A. By the Grace Defendants**

They allege that:

- a) at all relevant times the W.C.B. had statutory and regulatory powers to:
  - i) inspect manufacturing plants, construction sites and buildings in British Columbia; and
  - ii) identify, advise, and warn of and to order the remedying, removal or replacement of construction methods, building conditions, building products and components which are hazardous to human health and workers' safety;

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- b) the W.C.B. had a duty to exercise its powers with reasonable skill and care;
  - c) at all relevant times the W.C.B. and its employees regularly inspected the plant where the Grace Defendants manufactured spray-fireproofing products and knew, or ought to have known, that some of them contained asbestos;
  - d) the W.C.B. and its employees regularly inspected the project during construction and knew or ought to have known that some of the spray-fireproofing material supplied for installation in the project was manufactured by the Grace Defendants and contained asbestos;
  - e) at all relevant times the W.C.B. and its employees owed to all of the parties involved in the Project (the “Participants”) statutory, regulatory and common law duties to know about asbestos and asbestos-containing products and the health and medical concerns related to them; and especially to know that at high levels of exposure over extended periods of time asbestos may be hazardous to human health and workers’ safety;
  - f) prior to the commencement of or completion of the project the W.C.B. had issued cease-work orders, warnings, directions and other orders regarding the installation of asbestos-containing spray-fireproofing material in other construction projects in Vancouver, and elsewhere in British Columbia, and that the Participants reasonably relied on the W.C.B. and its employees to issue such orders, warnings and directions regarding this project had it been necessary;
  - g) the W.C.B. negligently breached the duties it owed to the Participants by:
    - i) failing to provide adequate notice to them of the results of its inspections of the Project and the fireproofing being applied;
    - ii) failing to warn them of the possible dangers of inhaling airborne asbestos fibres; and
    - iii) failing to warn them that products supplied for use in the Project contained asbestos.

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The Grace Defendants further allege, in the alternative, that:

- h) in or about 1987 and onwards, the W.C.B. and its employees conducted inspections of the Project;
- i) the W.C.B. and its employees owed the Participants statutory, regulatory and common law duties not to give incorrect or unnecessary advice, directions or orders regarding, amongst other things, the removal of building products or components from the Building;
- j) the W.C.B. and its employees knew or ought to have known that the Participants relied upon the advice, directions and orders of the W.C.B.;
- k) it was not necessary that the plaintiffs remove or incur any expense in respect of the fireproofing material and the W.C.B. negligently breached its statutory, regulatory and common law duties when it ordered them to do so;
- l) the W.C.B. caused the loss and damage to the plaintiffs by ordering the removal of the asbestos from the project when other less costly and intrusive remedies were available;
- m) the breach of the statutory, regulatory and common law duties of care owed by the W.C.B. to the participants caused or contributed to the loss, damage and expense allegedly suffered by the plaintiffs; and
- n) it was reasonably foreseeable that those breaches would cause the plaintiffs to commence legal proceedings against the Grace Defendants, thereby causing them to suffer loss, damage and expense.

The Grace Defendants claim against the W.C.B. for:

- a) a declaration that any loss, damage or expense suffered by the plaintiffs was caused or contributed to by the negligent breach of statutory, regulatory and common law duties or other fault of the W.C.B. and its employees for whose acts and omissions it is vicariously liable;

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- b) contribution and indemnification from the W.C.B. for any liability that they may have to the plaintiffs;
  - c) damages for negligent breach of statutory, regulatory or common law duties; and
  - d) indemnification for legal expenses and disbursements incurred by them or paid to other parties.

**B. By Eng & Wright**

Eng & Wright claim that the W.C.B. owed to them statutory and common law duties of care, including a duty to:

- a) take such reasonable and proper steps as may have been necessary to ensure that no hazardous or potentially hazardous materials were offered for sale or use in British Columbia or were specified or employed in the construction of the project;
- b) take those reasonable and proper steps which may have been necessary to ensure that if asbestos is a hazardous or potentially hazardous material, it was not present in any spray fireproofing specified or employed at the project;
- c) warn it that:
  - i) MK-3 contained a certain amount of asbestos as an ingredient;
  - ii) there was a potential danger in the use of MK-3;
  - iii) there might be an increased risk and/or cost associated with renovations to or removal of materials sprayed with MK-3 in the future because of the *Workers Compensation Act* and other health or safety regulations of which the W.C.B. was or ought to have been aware; and
  - iv) alternative spray-fireproofing products were available which did not contain asbestos.

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The Defendants Eng & Wright further allege that:

- a) the W.C.B. failed in the above noted duties, causing it to allow the use of MK-3 on the project which may have had the result of causing the plaintiffs harm;
- b) the W.C.B. knew or ought to have known that Eng & Wright relied on it to exercise its statutory and common law duties of care to take such reasonable and proper steps necessary to ensure that no hazardous or potentially hazardous materials were offered for sale or use in British Columbia or were specified or employed in the construction of the project.
- c) the W.C.B. knew or ought to have known that Eng & Wright also relied on it to take those reasonable and proper steps necessary to ensure that if asbestos was a hazardous or potentially hazardous material that it was not present in any spray fireproofing specified or employed at the project.

Eng & Wright claim against the W.C.B. for:

- a) contribution and indemnity for any liability it may have to the plaintiffs;
- b) contribution and indemnity for any liability it may have to the Grace Defendants;
- c) indemnity for the full legal costs for the defence of the actions brought by the plaintiffs and other parties against it; and
- d) damages for negligence and breach of duty to warn.

**B. By Foundation**

Foundation claims that the W.C.B. owed to it and to its co-defendants and the plaintiffs, statutory and common law duties of care, including a duty to:

- a) take such reasonable and proper steps as were necessary to ensure that no hazardous or potentially hazardous materials which the W.C.B. knew or ought to have known were

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hazardous or unsafe were offered for sale or use in British Columbia or were specified or employed in the construction of the project;

- b) take those reasonable and proper steps necessary to ensure that if asbestos is a hazardous or potentially hazardous material that it was not present in any spray fireproofing specified or employed at the project;
- c) warn them that MK-3 contained asbestos, that there was a potential danger in the use of MK-3, and that there was an increased risk or cost that might be associated with renovations to or removal of material sprayed with MK-3 in the future, arising out of the *Workers Compensation Act* and other health or safety regulations of which the W.C.B. was or ought to have been aware; and
- d) advise of the availability of alternative spray fireproofing products which did not contain asbestos.

Foundation further alleges that:

- a) The W.C.B. failed in the above noted duties of care and this failure may have had the result of causing the plaintiffs harm, loss or damage;
- b) That the Defendant Foundation reasonably relied on the W.C.B. to exercise its statutory and common law duties to take reasonable and proper steps to ensure no hazardous workplace was created and to warn of the possible dangers of the use of an asbestos-containing product.

Foundation claims against the W.C.B. for:

- a) contribution and indemnity for any liability of the Defendant Foundation to any of the plaintiffs;
- b) contribution and indemnity for any liability of the Defendant Foundation to the Grace Defendants;

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- c) indemnity for the full legal costs of the defence of the actions of the plaintiffs and other parties against the Defendant Foundation; and
  - d) damages for negligence and breach of duty to warn.

## The Law

Counsel agrees that, for the purposes of this application, the distinction between “policy” and “operational” matters is not in issue, and that I should assume that all of the allegations directed against the W.C.B. relate to operational matters. I will, therefore, concern myself only with the question of whether or not a duty of care was owed by the W.C.B. to the third party claimants.

The leading Canadian authority in this area of the law is *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, where the Supreme Court of Canada adopted the “two-stage test” first prescribed by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728. This test requires that, for the purpose of determining whether or not a public authority owes a duty of care, the following two questions be asked:

- (1) is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
- (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

In two recent decisions, *Just v. Her Majesty the Queen in Right of the Province of British Columbia*, [1989] 2 S.C.R. 1228 and *Rothfield et al. v. Manolakos et al.*, (1989), 63 D.L.R. (4th) 449, the Supreme Court of Canada has affirmed the use of that test. Although in *Manolakos*, Cory J. noted that “critical comments have been made with regards to the *Anns* case,” he nevertheless went on to say that:

... the approach set forward in the *Anns* case which has been confirmed and approved by this court in the *City of Kamloops v. Nielsen*, *supra*, is sound. It can be applied effectively and should be applied in any case where negligence or misconduct has been alleged against a government agency.

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These and many other authorities show that the key question to be asked when determining whether or not a public authority owes a duty of care to a claimant is “what is the purpose of the legislation?” If a duty is found to exist, it then becomes necessary to examine the scope of that duty in order to determine whether or not the type of loss claimed falls within the ambit of the legislative intent.

### **The Statutory Scheme**

The W.C.B. is a statutory body whose authority is presently established and governed by the *Workers Compensation Act*, R.S.B.C. 1979, c.437 as amended and the Regulations enacted thereunder. It is of interest to note that the original *Workmen’s Compensation Act*, enacted in 1916, stated in its preamble that it was “An Act to provide for compensation to the workmen for injuries sustained and industrial diseases contracted in their course of employment.”

The W.C.B. asserts that the “duty premise” of the third party claims is not only outside the purpose of the statute, but that it is completely at odds with that purpose. It says that the statutory and regulatory scheme of the Act is entirely oriented towards compensating and promoting the safety and health of workers and that there is nothing in the Act or regulations from which one might conclude that the Legislature intended that it should protect the property or economic interests of building owners, product manufacturers and supplies, building contractors or architects and engineers.

The Board maintains that it is duty-bound to protect the interests of workers even where those interests collide or conflict with the economic or property interests of persons such as the defendants. It says that the defendants do not fit within the purpose and scope of the legislation and that there is no provision in the legislation or regulations which could be interpreted as creating a duty to warn the defendants of the dangers of asbestos, prohibit its use or take their interests into account when regulating asbestos use for the protection of workers. Simply stated, it says: “The third party claimants in this case are not within the class of persons which are intended to benefit from the statutory and regulatory scheme.”

The W.C.B. further argues that the third party notices served upon it expressly claim for damages resulting from the cost of removing the asbestos-containing fire-proofing from the project. The type of harm contemplated by the Act and regulations, it says, is harm to the health of workers. It says that the loss pleaded in this case is not traceable to any sort of personal injury; rather that it arose out of damage or injury to property interests.

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In that regard it must be remembered that although the plaintiffs do not allege that any individual has yet been injured by the presence of MK-3 in the Building, they do seek from each of the defendants indemnification for any present or future damage, loss or expense which has been or may be incurred by reason of the plaintiffs' liability to tenants and occupiers of the building, both past and future.

The position taken by the defendants is that the W.C.B. had statutory, regulatory and common law duties which they exercised negligently. The defendants say that the W.C.B. knew of the hazards said to be associated with the use of asbestos; that they were in a proximate relationship to the W.C.B.; that it was in negligent breach of its statutory, regulatory and common law duties and is therefore liable to all those who it was reasonable to conclude might suffer loss through that negligence.

In this regard, Mr. Hayley, counsel for the Grace Defendants, cited the words of Mr. Justice LaForest in *Manolakos (supra)* at p. 454:

... the city, once it made the policy decision to inspect building plans in constructions, owed a duty of care to *all who it is reasonable to conclude might be injured by the negligent exercise of those powers.* (emphasis added)

In addition, the Grace Defendants argue that they were proximate to the W.C.B. because their plants were subject to W.C.B. inspections and they allege that the W.C.B. knew that their products included asbestos-containing fireproofing.

Contrary to the position taken by the W.C.B., the defendants submit that the scheme of the Act also contemplates the protection of the economic interests of employers. Insuring that workers are healthy and productive because they work in a non-hazardous workplace is, they say, of economic benefit to the employers through reduced wage costs and employee turnover and increased productivity.

In this regard, Mr. Hayley referred to the observation of Madam Justice Wilson, in *Kamloops (supra)* at pp. 679-80, that:

It is noted that in the *Dutton* case [*Dutton v. Bognor Regis United Building Co. Ltd.*, [1972] 1 All E.R. 462] Sachs. L.J. put great emphasis on the fact that the defendant was a public authority and stated that the type of loss recoverable was the type of loss the private law duty arising under the statute was designed to prevent. If economic loss was within the purview of the statute, then it should be recoverable for breach of the private law duty arising under the statute whether or not it is recoverable for breach of a duty at common law.

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He also cited *Rivtow Marine Ltd. v. Washington Iron Works* (1973), 40 D.L.R. (3d) 530 (S.C.C.) as authority for the proposition while there may be no recovery for economic loss directly flowing from the Board's negligence, there is recovery for additional damage flowing from its failure to warn.

Whether or not the Third Party Notices should be struck turns on the question of the characterization of the *Workers Compensation Act*. If, as Mr. Walsh suggests on behalf of the Board, it is merely directed toward protection and compensation of workers, and has no wider legislative intent, then they should be struck. If, on the other hand, it is possible that the intent of the legislation is broader than that and encompasses more than simply the protection of workers, i.e., that it also affords benefits to employers and ensures protection not only of workers but of other persons as well, then there may be a duty owed to these Third Party claimants and to the plaintiff.

A brief reference to the relevant statutory and regulatory provisions is therefore necessary in order to determine whether or not it may be validly argued that the W.C.B. owed a duty of care to the defendants and/or the plaintiffs to:

- a) prevent physical injury to persons; and/or
- b) prevent economic loss.

The Act governing the duties and responsibilities of the W.C.B. when the MK-3 was specified and installed in the Building was the Workmen's Compensation Act 1968 S.B.C. 1968, c.59 as amended. Part 1 of the 1968 Act provided, in S.60(1), that the W.C.B. might:

... make regulations, whether of general or special application, and which may apply to both employers and workmen, for the prevention of injuries and industrial diseases in employments and places of employment ...

Section 60(2) provided that:

The Board may issue orders and directions specifying the means or requirements to be adopted in any or all employments or places of employment for the prevention of injuries and industrial diseases.

Section 60(3) clothed the Board with statutory powers to inspect the place of employment of any workmen coming within the scope of Part 1.

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In 1974 the *Workmen's Compensation Amendment Act* was passed. In addition to changing the name of the statute to the *Workers Compensation Act*, it amended S.60(1) by striking out the words "both employers and workmen," and substituting the words "employers, workers and all other persons working in or contributing to the production of any industry within the scope of this part" (emphasis added). As well, it amended the definition of "industrial disease," which, in the 1968 Act read "any of the diseases mentioned in Schedule 'B' and any other disease which the Board may by regulation or otherwise designate or recognize as an industrial disease" to include "any disablement resulting from exposure to contamination."

Thus, it may be argued that in 1974 it was the intent of the Legislature to broaden significantly the scope of the Act.

So far as the regulations enacted by the Board are concerned, it is interesting to observe that as early as the 1940's asbestosis, asthma, and respiratory irritation were recognized by the W.C.B. as industrial diseases arising from processes where there was exposure to fibres or other contaminants. In 1959, the W.C.B. promulgated a regulation entitled "Re Asbestosis" which set out detailed procedures regarding the mandatory medical examination of persons employed in asbestos mines. In 1966, Regulation 43/66 was enacted and it empowered the Board to determine the nature of hazardous work, and to insist that means be provided to reduce the hazard to levels satisfactory to the Board.

B.C. Regulation 64/72, enacted in 1972, included an omnibus provision entitled "Health Hazards in Harmful Substances" which demonstrated a growing particularization with respect to asbestos hazards. That regulation contained a section dealing with the "Control of Hazards", which confirmed the Board's authority to require the reduction of contaminants to or below a threshold level determined by the W.C.B. Section 12.30 of the regulation specifically addressed the hazards of asbestos, and stated that "... means shall be provided to control asbestos dust at or below threshold levels ...."

Finally, and perhaps most significantly, S.12.32 of Regulation 64/72 provided that, subject to certain express exceptions, "no person shall remain in any place where the work atmosphere contains asbestos dust in harmful concentration." That section is of particular relevance in this application in that it applies not just to workmen and employers, but arguably confers an obligation and a corresponding benefit to other persons.

There are a number of other regulations which, Mr. Hayley argues, support the existence of statutory and regulatory duties of care on the part of the W.C.B. toward the Third Party claimants and plaintiffs. I do not propose to refer to them other than to note that several relate to the powers of the Board to inspect, undertake investigation, conduct research, and obtain further information regarding the hazards of such materials as asbestos, and to compel employers to comply with W.C.B. recommendations and orders.

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The defendants base their arguments on the fact that at all relevant times the W.C.B. had statutory and regulatory powers to inspect manufacturing plants, construction sites and buildings in British Columbia. Those powers, they submit, are the source of the W.C.B.'s authority to direct that remedial action be taken so as to ensure that "workplaces" are safe places. They allege that a broad range of "workplaces" fell within the scope of the 1968 Act, and within what they describe as the W.C.B.'s "safe workplaces mandate." They plead that, in breach of duties owed to them and to other persons connected with the project, the W.C.B. failed to exercise its "safe workplaces" powers with respect to the project, thereby causing harm to those participants, including the plaintiffs and the Grace defendants. They argue that such a plea, coupled with the allegation of reasonable reliance, supports, for the purposes of this application, their claims for contribution, indemnity and damages.

They argue that the existence of the W.C.B.'s "safe workplaces" mandate was recently acknowledged by our Court of Appeal in *Hunt v. T&N plc et al.* (1991) 77 D.L.R. (4th) 375, when Lambert J.A. (Carrothers and Proudfoot JJ.A. concurring) said:

The Workers' Compensation Board also has a capacity to carry out functions to improve the safety of every workplace in the province of every employer covered by the Act.

The defendants submit that, because the Legislature saw fit to cast this part of the W.C.B.'s mandate in terms of improving the safety of the "workplace," the duties of the Board are not narrowly restricted to the protection of workers. They argue that, when exercising its powers, the Board must act reasonably so as to protect *any persons* who are in sufficient proximity to it from harm that may result from the existence of unsafe workplaces. They argue that third parties benefit in ways that are specific to their particular status. For example, owners benefit by having their buildings constructed with a minimum of health and safety related delays and by taking delivery of buildings, at the end of construction, that are safe places for potential occupiers, including tenants and workers.

The defendants emphasize the fact that the W.C.B. had both specific and implied powers to inspect the building during the course of its renovation during the 1970's and, under S.72(1) of the 1968 Act, the power to "order the employer to close down forthwith the full or any part of the employment or place of employment and the industry carried on therein" whenever the Board, or one of its officers, determined that "conditions of immediate danger exist ... which would likely result in serious injury or death to any of the workmen employed therein."

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The defendants point to the fact that nowhere in the 1968 Act, or any of the successor Acts, is the W.C.B. expressly exempted from liability for its actions. The only provision of that nature is found in S.79, which states that no action shall be maintained or brought against any “members of the Board in respect of any act, omission, or decision done or made in the *bona fide* belief that the same was within the jurisdiction of the Board.” It is submitted that, because the section only provided protection to “members of the Board,” it must be assumed that the Legislature contemplated the possibility of actions being brought against the W.C.B. itself for its negligent acts or omissions.

Finally, the defendants submitted that the questions of reliance and proximity should be determined at trial (*Wilson v. Robertson* (1991), 43 C.L.R. 117 (B.C.S.C.)), and that claims for pure economic loss should go to trial where the claim is that a private common law duty of care for economic loss arises from statutory duties and powers (*Sergius v. Janex Design & Drafting Services Ltd.* (1991), 55 B.C.L.R. (2d) 107 (S.C.)).

## Conclusion

In *Hunt v. T&N plc et al.* (1990) 72 D.L.R. (4th) 567 (B.C.S.C.) (leave to appeal denied) (1990, 75 D.L.R. (4th) 349; review denied (1991), 77 D.L.R. (4th) 375), Chief Justice Esson examined the overall purpose and scope of the B.C. Workers’ Compensation legislation. He quotes with approval the following passage taken from the 1967 Royal Commission Report of Mr. Justice Tysoe:

The prime mission of those who administer Workmen’s Compensation and the prime purpose of the Act is not to furnish financial benefits, but to promote and encourage measures for the prevention of injury to workmen in the course of their work and, should any be so unfortunate as to become disabled as a result of such injury means for their rehabilitation and return to useful employment as soon as possible. To keep work-connected injuries to a minimum is the first object.

Nonetheless, the Chief Justice rejected the application made by the W.C.B. to strike out the third party claims brought against it in that case, and in doing so he said:

Having in mind the important policy considerations lying at the root of the Board’s duty to protect *workers* against injury or disease, it seems arguable to allow an action against the Board for injuries suffered from its failure to carry out those duties would not be contrary to the overall purpose of the Act. (emphasis added)

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I have concluded, firstly, that while it seems clear that the primary purpose of the legislation is to protect workers from the risk of injury and industrial diseases, it may be that the relevant Act and regulations also imposed a duty upon the Board to protect other persons from such risks. That duty may be found to exist in section 12.32 of Regulation 64/72 which purports to prohibit “other persons” from remaining in an area contaminated by asbestos dust.

Mr. Walsh suggested that, because the plaintiffs’ claim for a declaration of indemnity specifically mentioned “tenants or other occupiers” and did not include “workers,” the W.C.B. could not be held liable to the defendants. I do not agree. The references to “other persons” in the amended S.60(1) and in Regulation 64/72 clearly provide a basis for the defendants’ submission that a duty was owed by the Board to tenants or occupiers of the Building. Therefore it can reasonably be argued that, if the plaintiffs should be found liable for physical injury to tenants or other occupiers and, by means of a declaration of indemnification, the defendants are found liable to the plaintiffs for such injury, the W.C.B. should share that responsibility. Thus, a triable issue has been raised.

Secondly, while I think it a far less likely proposition, I find that the defendants have raised a triable issue as to whether the Board may have had a duty to keep the defendants safe, if not from pure economic loss, then from the consequences of a failure to warn them and the other Participants of the presence of asbestos in the Building and the dangers associated with its use, at the time of its application, and later, of the risks and costs associated with its removal.

Whether or not these issues are weak or unlikely to succeed, they are complex and novel and this court should allow them to be pursued to trial.

For those reasons the applications are dismissed. Costs shall be in the cause.

*Editors’ note: This ruling has been transcribed unedited.*



## In the Court of Appeal for British Columbia

**Between:** George Ernest Hunt  
**And:** T&N, plc et al.  
**And:** Workers' Compensation Board  
**And:** Henfrey Samson Belair Limited, Receiver-Manager for Victoria  
Machinery Depot Company Limited

### Reasons for Judgment of The Honourable Mr. Justice Lambert (Carrothers and Proudfoot, J.J.A. concurring) (January 29, 1991)

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This is an application for a review of an order made by Mr. Justice Gibbs in chambers.

The application that was brought before Mr. Justice Gibbs was an application for leave to appeal from a decision of Chief Justice Esson. Before describing the reasons of Chief Justice Esson I should indicate the nature of these legal proceedings.

The plaintiff is George Ernest Hunt. He is said to have suffered from the effects of working with asbestos, I believe at a shipyard in Vancouver where he worked with asbestos supplied by a number of mining companies and, perhaps also, manufacturers. He applied for Workers' Compensation and was granted Workers' Compensation. The effect of the grant of Workers' Compensation was to cause the Workers' Compensation Board to be subrogated to his legal rights, if any, against the mines, manufacturers and suppliers of the asbestos.

The Workers' Compensation Board, in the name of Mr. Hunt as plaintiff, brought this action against the defendants, who are involved with manufacture, production and distribution of asbestos products. Some of the defendants joined the Workers' Compensation Board as a third party. The basis of that joining is an allegation that the Workers' Compensation Board was in breach of its alleged duty of care to workers in the Province through an alleged failure to inspect the nature of the working premises of people who work with asbestos products, failure to warn workers of the danger of the asbestos products, and similar failures in relation to carrying out its statutory functions in relation to promoting safety in the work place.

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It was in those proceedings that counsel for the Workers' Compensation Board, as third party, brought on the application before Chief Justice Esson, essentially to have the third party proceedings struck out as having been improperly brought.

Chief Justice Esson dealt with the applicability of Rule 19(24)(a) to (d) and he decided that none of those paragraphs was applicable. That Rule relates to striking out a pleading on the ground that it is scandalous, frivolous, or vexatious.

Chief Justice Esson went on to deal with the application as an application for summary judgment by a defendant, that is, in this case, the third party, under Rule 18(6). The test of the applicability of Rule 18 and sub-rule (6) of Rule 18 is that the proceedings will not be struck out unless they are bound to fail. Chief Justice Esson decided that the proceedings in this case were not bound to fail.

The essence of the argument that was put to Chief Justice Esson depends on subsection 10(7) of the *Workers Compensation Act*, R.S.B.C. 1979, c.437. I will set it out:

10. (7) If, in an action brought by a worker or dependant of the worker or by the Board, it is found that the injury, disablement or death, as the case may be, was due partly to a breach of duty of care of one or more employers or workers under this Part, no damages, contributions or indemnity are recoverable for the portion of the loss or damage caused by the negligence of that employer or worker; but the portion of the loss of damage caused by that negligence shall be determined although the employer or worker is not a party to the action.

The argument that was made in support of the application before Chief Justice Esson was that subsection 10(7) had the effect of taking away any right of action against the Workers' Compensation Board on the part of Mr. Hunt and that it followed that any right to third party proceedings was also taken away. The argument rests on what is said to be a straightforward interpretation of what is said to be a clear provision in the Statute.

The difficulty arises because, of course, the Workers' Compensation Board has a group of functions in which it is itself an employer of workers and from which a right of action, but for the Statute, could rest in the employees against the Workers' Compensation Board, an employer, for its own unsafe work place.

The Workers' Compensation Board also has a capacity to carry out functions to improve the safety of every work place in the Province of every employer covered by the Act.

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The question is whether the right of action that is taken away against the Workers' Compensation Board as an employer is also taken away against the Workers' Compensation Board in carrying out its other functions, because it is indeed still an employer when it carries out those functions.

There are authorities in this Court, and in Courts of Appeal of other provinces, which tend to support the application that was made before Chief Justice Esson. Notable among them is *Virk v. Bannister* (1989), 58 D.L.R. (4th) 53.

It was also argued by counsel for the Board, in this hearing, that the effect of subsection 10(7) was not only to take away the right to recover damages, or contribution, or indemnity from an employer or workers under the relevant part of the *Workers Compensation Act*, but also to take away entirely the right to bring an action at all. In my opinion, that submission is not borne out by the way the subsection is framed, because on its face it takes away only the right to damages, contribution, or indemnity, and there may well be circumstances where it is appropriate to bring the action even though the outcome against that particular defendant cannot be an award of damages, contributions, or indemnity. At the very least it is arguable that the subsection does not take away the right of action but only certain remedies. If it does not take away the right of action then the point that the applicant wishes to have decided in the action it is entitled to bring is a question of law about the interpretation of subsection 10(7) of the *Workers Compensation Act*.

If the question of law is not so clear cut that the proceedings are bound to fail then the proper Rules to apply are the Rules relating to a point of law, namely, Rule 33, dealing with a special case, and Rule 34, dealing with proceedings on a point of law. Both of these Rules contemplate either the concurrence of all the parties or, alternatively, an application to the Court, before a point of law is separated from the rest of a law suit. In determining such an application, the question that is proper for the Court to consider is whether there will be a saving of expense to the parties, and a saving of time of the Court itself, in separating out the question of law; or whether the question of law ought properly to be determined in the main proceedings.

Chief Justice Esson decided that the third party proceedings against the Workers' Compensation Board were not bound to fail. In my opinion, that was a correct decision on a question of law. It was not an exercise of his discretion. If he had decided that they were bound to fail he might nonetheless have permitted them to go ahead. In those circumstances what he would have done would have been, in my opinion, an exercise of discretion. However, that was not what he did in this case.

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On the application before Mr. Justice Gibbs for leave to appeal from the order of Chief Justice Esson, Mr. Justice Gibbs referred to the decision as being on an interlocutory matter and being one of discretion. In my opinion, when Mr. Justice Gibbs referred to it as a matter of discretion he was thinking in the context of a question of law being separated out, and he treated such an issue as a matter of discretion.

Nothing that has been said this morning has persuaded me that the third party proceedings against the Workers' Compensation Board are bound to fail. Accordingly, I agree with the decision made by Chief Justice Esson, and I agree with the decision of Mr. Justice Gibbs refusing the application for leave to appeal from that decision.

I would dismiss this application for a review of the order of Mr. Justice Gibbs.

CARROTHERS, J.A.: I agree.

PROUDFOOT, J.A.: I agree.

CARROTHERS, J.A.: The order granting leave to appeal is refused.

*Editors' note: These reasons for judgment have been transcribed unedited.*