
3 Mr. J. Tyler of the Board's Assessment Department responded by setting out some of the facts and saying:

In considering all the above information, we have concluded that the individuals are commission salesmen of the Electrolux Corporation of Canada Inc. and as such, are workers of your company, rather than independent contractors. Where a direct sales operation employs salesmen to sell their products door-to-door and, the salesmen are paid a commission based on the selling price, we view the employment relationship as one of employer/worker.

4 Electrolux through its solicitors made submissions to the Assessment Department. Mr. Du Gas, Director of Assessments, treated the submissions as an appeal and responded. In the course of his letter, he said:

The essence of your appeal is that the Electrolux salesmen (dealers) are independent and not workers of Electrolux.

When considering whether the commission salesmen are independent, it is not unusual to have factors that both indicate independence and also are indicative of an employer/employee relationship. No commissioned sales person is completely independent of the parent company and then it becomes a question of degree as to whether a contract has a sufficient amount of independence which would allow us to consider these individuals to be self employed and therefore independent.

I have considered the point submitted by you which would indicate the independence of the sales persons and also the following points which would be more indicative of an employer/employee relationship.

He set out ten points. Mr. Du Gas then dealt with a reported decision that had been drawn to his attention by the solicitor, mentioned factors that he thought important in arriving at the decision and referred to the court rulings drawn to his attention by the solicitor. He concluded the letter by saying:

After reviewing your submission I would consider that on balance, the commission sales persons are workers of Electrolux for the purposes of the *Workers Compensation Act*.

5 Mr. Du Gas' decision was appealed to two Commissioners of the Board. They denied the appeal after reviewing the facts and the submissions, concluding thus:

Having carefully considered all the available evidence, and the detailed legal arguments provided on your behalf by Mr. Marquardt, the Commissioners are in agreement with the reasoning and conclusion expressed in Mr. Du Gas' decision of 14 December 1989. They consider that Mr. Du Gas' decision was in accordance with the policy stated in the 17 February 1986 decision by the Commissioners. They do not consider that any factual or legal grounds have been provided which warrant reaching a different conclusion in your case. The Commissioners have concluded that your commission sales persons are your workers for the purposes of the *Workers Compensation Act*.

6 Electrolux challenged the finding pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209.

7 The Chambers judge set aside the decision and remitted the matter to the Board. In the course of his reasons he said:

The agreement between the sales persons and the Corporation provides that the persons are entitled to sell products of other companies as long as they don't sell the products which, for the most part are three, vacuum cleaners and a couple others, that are in direct competition with Electrolux. This means that an Electrolux sales person, on the telephone or at somebody's home, is entitled during the same conversation or the same interview to sell other products, such as Fuller brushes, Avon products, or what have you. If in the course of such a transaction more than one product is sold and the sales person is injured it might be open to the Workers' Compensation Board on an application for compensation to say you were not working for Electrolux at the time, you sold the Avon product, and we find you were injured as a result of demonstrating the Avon product not the Electrolux machine and therefore there's no compensation. I think that it's patently unreasonable to mislead these employees, if that's what they are.

So my view is that as long as these engagements which permit the persons to sell any place at any time by any means in any territory, they're not exclusive engagements at all, they just allow them to sell Electrolux products and at the same time allow them to sell any products that are not in competition, then to say that they're workers of Electrolux to me is patently unreasonable.

Counsel for the petitioner suggests inasmuch as the matter has been decided by the Board and they've had an opportunity to consider the decision should be quashed and not sent back to them. I'm not satisfied on the material before me that they have fully considered the issue on which I based my decision, and so for that reason I'm going to refer it back to the Board.

8 I would not have thought that the problems arising from a dealer selling the products of several companies would necessarily cause the Board to conclude that a person who was otherwise a "worker" was not a "worker". Those problems will arise when the Board is considering whether an injury arose "out of and in the course of the employment".

9 The Board had exclusive jurisdiction to decide the question that it decided. The privative clause is specific:

96. (1) The board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part, and the action or decision of the board on them is final and conclusive and is not open to question or review in any court, and no proceedings by or before the board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise into any court, nor shall an action be maintained or brought against a governor, officer, appeal commissioner or employee of the board in respect of an act, omission or decision done or made in the belief that it was within the jurisdiction of the board; and, without restricting the generality of the foregoing, the board has exclusive jurisdiction to inquire into, hear and determine

- (a) the question whether an injury has arisen out of or in the course of an employment within the scope of this Part;

-
- (j) whether a person is a worker, a subcontractor, a contractor or an employer within the meaning of this Part.

10 The decision of this Court in *Acme Home Improvement Ltd. v. Workmen's Compensation Board* (1957), 23 W.W.R. 545 is directly on point. In that case the Board decided that applicators of siding were "workmen" within the *Act*. That decision was set aside on *certiorari*, the trial judge being of the view that the applicators were independent contractors. This Court held that the question was for the Board to answer and allowed the appeal.

11 The effect of the privative clause was made clear in *Farrell v. Workmen's Compensation Board*, [1962] S.C.R. 48 at 51; (1961), 37 W.W.R. 39. There Judson J., for the Court, said:

The issue here is a very simple one — whether there was an accident arising out of and in the course of employment. This issue is unquestionably within the jurisdiction of the Board under Part I of the *Act* and even if there was error, whether in law or fact, it was made within the exercise of the jurisdiction and is not open to any judicial review, including *certiorari*.

Two decisions of this Court have held that no Court has the power to decide in an action whether the case is one for compensation under the *Act* and whether the right of action is taken away under Part I. These decisions are: *Dominion Cannery Limited v. Costanza* [1923], S.C.R. 46, 1 D.L.R. 551, and *Alcyon Shipping Co. Ltd. v. O'Krane*, [1961] S.C.R. 299, 27 D.L.R. (2d) 775. They are not confined in their application to the precise point under Part I of the *Act* which fell to be decided in them. They are of general application to all questions which arise for decision under Part I of the *Act* and which, by the very terms of s. 76(1), are within the exclusive jurisdiction of the Board and on which the decision of the Board is final and conclusive and not open to judicial review. This is the essential basis of the judgment under appeal and of the judgment of the same Court in *Acme Home Improvement Limited v. Workmen's Compensation Board* (1957), 23 W.W.R. 545, 11 D.L.R. (2d) 461, and I am in complete agreement.

12 I accept that *Farrell* has been qualified by more recent decisions of the Supreme Court of Canada, but nothing in those later cases authorizes an appeal. Only errors that go to jurisdiction, either in the sense that the Board has exceeded the

jurisdiction established by the statute or that it has committed an error that caused it to lose jurisdiction, permit interference by the courts. A patently unreasonable decision can fall into the latter category.

13 The term patently unreasonable means much more than merely wrong. Beetz J. for the Supreme Court of Canada in *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412 at 420, put it this way:

A mere error of law is to be distinguished from one resulting from a patently unreasonable interpretation of a provision which an administrative tribunal is required to apply within the limits of its jurisdiction. This kind of error amounts to a fraud on the law or a deliberate refusal to comply with it. As Dickson J. (as he then was) described it, speaking for the whole Court in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at p. 237, it is

. . . so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review . . .

An error of this kind is treated as an act which is done arbitrarily or in bad faith and is contrary to the principles of natural justice.

14 The proper approach was summed up by La Forest J. in *C.A.I.M.A.W., Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 at 1003-4; (1989), 40 B.C.L.R. (2d) 358:

Where, as here, an administrative tribunal is protected by a privative clause, this Court has indicated that it will only review the decision of the Board if that Board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function; see *C.U.P.E. Loc. 963 v. N.B. Liquor Corp.*, [1979] 2 S.C.R. 227. The tribunal has the 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 by the relevant legislation and demands intervention by the court upon review” (p. 237). The test for review is a “severe test”; see *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, at p. 493. This restricted scope of review requires the courts to adopt a posture of deference to the decisions of the tribunal. Curial deference is more than just a fiction courts resort to when they are in agreement with the

decisions of the tribunal. Mere disagreement with the result arrived at by the tribunal does not make that result “patently unreasonable”. The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, 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. Privative clauses, such as those contained in ss. 31 to 34 of the Code, are permissible exercises of legislative authority and, to the extent that they restrict the scope of curial review within their constitutional jurisdiction, the court should respect that limitation and defer to the Board.

15 The language of Judson J. in *Farrell, supra*, at 50, is applicable to this case:

It is, I think, plain that the learned judge really conducted a rehearing of the whole application by way of appeal, which is a procedure not provided by the *Act* and beyond the competence of a judge sitting on a motion for *certiorari*.

16 A second argument made on behalf of Electrolux raises a point that was not dealt with by the Chambers judge. It is argued that the decision blindly followed a policy of finding commission salespersons who do not own the product to be workers. There is no indication here of a blind following of policy without concern for the facts of the case. The reasons given at each stage of the proceeding indicate that this error was not committed.

17 In the end, the argument for Electrolux is that the conclusion of the Board was wrong. That question is beyond the competence of a court hearing an application for judicial review.

18 I would allow the appeal.

19 The questions argued in the cross-appeal would only arise if the appeal were dismissed.

Court of Appeal for British Columbia

Electrolux Corporation of Canada Inc.

– v. –

Workers' Compensation Board

Concurring Reasons by Mr. Justice Goldie:

20 I have had the benefit of Mr. Justice Seaton's reasons for judgment. I will refer to the appellant as the "Board" and to the respondent as "Electrolux". I agree with Mr. Justice Seaton but I wish to refer in greater detail to the submission that the Board blindly followed a policy rather than considering the facts of this particular case.

21 On that point, Electrolux says the Board's decision rested on a statement of policy which distinguished a worker from an independent operator solely on the basis of the ownership of the goods sold to the public. The statement of this policy is said to be found in an internal memorandum of the Board dated June 12, 1985. The relevant part reads as follows:

Where a direct sales operation employs salesmen to sell their product door-to-door and the salesmen are paid a commission based on the selling price, we view the employment relationship as one of employer/worker.

Where a direct sales operation employs independent dealers on a "franchise" type of basis with the dealer purchasing the product and reselling it, representing himself as vendor, we view the relationship as one of independent parties.

The situation with this firm has characteristics of both, but, on balance, we feel that where the dealer/salesperson does not purchase the equipment prior to it being sold to the homeowner, the salesman is a worker.

22 This memorandum was said to be the basis for a Board decision dated February 17, 1986. This decision dealt with somewhat analogous circumstances in which the same issue as that in the case at bar was raised by another employer. It was to this decision that the Board referred in the penultimate paragraph of the Electrolux decision:

Having carefully considered all the available evidence, and the detailed legal arguments provided on your behalf by Mr. Marquardt, the Commissioners are in agreement with the

reasoning and conclusion expressed in Mr. Du Gas' decision of 14 December 1989. They consider that Mr. Du Gas' decision was in accordance with the policy stated in the 17 February 1986 decision by the Commissioners. They do not consider that any factual or legal grounds have been provided which warrant reaching a different conclusion in your case. The Commissioners have concluded that your commission sales persons are your workers for the purposes of the *Workers Compensation Act*.

23 It will be seen the Board's decision is far from stating that the "... policy stated in the 17 February 1986 decision ..." decided the Electrolux matter. Had it done that the observations of Mr. Justice Macdonald, then a judge of the Supreme Court of British Columbia, in *Snell v. Workers' Compensation Board* (1987), 17 B.C.L.R. (2d) 238 (S.C.Ch.) at 244 would have been apposite:

However, a guideline must not become a rigid rule. While the development and application of a policy is permissible for a tribunal exercising a broad discretion, an opportunity must always be given to an affected party to question the guidelines and their applicability to his case: ...

Had what is stated in the last clause occurred here I would have considerable sympathy for the proposition the Board misdirected itself to the extent of failing to exercise its jurisdiction.

24 Mr. Marquardt's submission, however, takes the point one step further: he says if the other factors to which he drew the Board's attention were in fact considered by the Board then it was patently unreasonable for it to have reached the decision it did. These other factors, he says, put the Electrolux dealers in question firmly on the side of independent businessmen. But once that argument is made we are being invited to substitute our opinion for that of the Board and that is something we cannot do. A finding that the Board has in fact not done that which it said it did is not supportable on the same grounds which were rejected as inadequate for the purpose of demonstrating the patent unreasonableness of the decision.

25 I might have reached a different conclusion on "all the available evidence" but that is not the issue. The record reveals the Board considered the factors raised by Electrolux and concluded the scales were tipped in favour of the characterization it adopted. This is a very different process from the application of a predetermined policy without regard to the challenges raised to that policy.

26 In the result I agree with the disposition of this submission proposed by Mr. Justice Seaton.



In the Supreme Court of British Columbia

Between: The Burlington Northern Railroad
And: Workers' Compensation Board

Reasons for Judgment of The Honourable Mr. Justice Low**April 30, 1993**

A.K. WOOSTER, Esq.	appearing for the Petitioner
S. NIELSEN, Esq. and G.W. MASSING, Esq.	appearing for the Respondent
W.M. EVERETT, Esq.	appearing for Canadian Forest Products
R.M. MACKENZIE, Esq.	appearing for the City of New Westminster

THE COURT: (Oral) I find that a judicial review now of the 1975 decision of the Workers' Compensation Board to shift the cost of the claim of Karen Firth under section 10(8) of the *Workers Compensation Act* from her employer, Canfor, to the petitioner, The Burlington Northern Railroad, would, as contemplated by section 11 of the *Judicial Review Procedure Act*, cause substantial prejudice or hardship to the Board, Canfor, the City of New Westminster and to Ms. Firth.

After considering the authorities cited by counsel and the circumstances of this case, I have reached this decision for several reasons:

(1) Almost eighteen years went by from the Board's decision in May of 1975 to the filing on December 8, 1992 of the petition now before the court. Burlington did not dispute the 1975 decision at any time in the interim. After the decision, the Board fixed the cost of the claim to Burlington at \$86,000. Burlington was content to abide the Board's decision as to liability for compensation until, as it must have always known might happen, the claim was increased following an application in 1985 by Ms. Firth when it became apparent her brain injury made her unsuitable for further employment after Canfor closed the plant in which she had been working and had been able to function. The additional cost to Burlington was \$300,000 which I understand represents

the present value of a pension increase awarded to Ms. Firth by the Board, a decision made following submissions on behalf of Burlington and from which Burlington unsuccessfully sought judicial review in this court in 1992. It was not until Burlington reached the end of the line in its attempts to avoid payment of additional compensation that it decided to bring this petition challenging the 1975 decision of the Board. In those circumstances, it must be said that Burlington acquiesced in the Board's power and jurisdiction to make the decision as to liability in 1975 on the basis of the evidence before it. It also implicitly waived the right to seek judicial review of the decision, to the extent it has such a right under the privative section of the *Workers Compensation Act*.

(2) Burlington's delay in attacking the 1975 decision is patently unreasonable and a reversal now of that decision would cause substantial prejudice and hardship to the Board in the performance of its statutory duties, with respect to this case and generally. On rehearing, the Board would have to review the circumstances of an accident which occurred in August, 1973, some twenty years ago. The 1975 decision was made, without objection as I understand it, solely on the basis of witness statements and other documents. No *viva voce* evidence has been preserved. It would be almost impossible for the various concerned parties to attempt to reconstruct, through evidence, either the scene of the accident or how it physically occurred. The Board would be severely hampered in any attempt to properly adjudicate the matter, a result brought about solely by the delay of Burlington in seeking a quashing of the 1975 decision and a rehearing of the issue. A reversal of the 1975 decision with the resulting imposition of liability on Canfor or the City of New Westminster, would give the party newly suffering liability the right to seek review of the various decisions of the Board as to the amount of compensation. The Board should be able to conduct its business without that sort of uncertainty and the unnecessary additional administrative costs that inevitably would be incurred. Although section 11 of the *Judicial Review Procedure Act* specifically says that judicial review is not barred by effluxion of time, at some point there must be finality to the decisions of the Board. The point of finality in this case, if not in all cases, should be seen to be reached substantially prior to eighteen years after the decision. Permitting a review in the circumstances of this case, would invite reviews in other cases many years down the road and would tend to inject undesirable uncertainty into the conduct of the Board's business, contrary to the interests of both workers and employers covered by the legislation.

(3) I find that both Canfor and the City of New Westminster both would be prejudiced in attempting to deal with the issue decided by the Board in 1975 some twenty years after the accident and some eighteen years after the Board's decision. They could not now present evidence to the Board in support of their respective positions on the issue of causation of the accident. It would be almost impossible for them to put their cases together and adequately brief counsel.

(4) There is one more reason for refusal of the court to hear this petition on the merits because of Burlington's delay that is perhaps more compelling than all the others. It would put the quantum of Ms. Firth's compensation at risk. Canfor or the City would have the standing to challenge the amount of the compensation if one of them was held responsible for the accident on a rehearing of the issue by the Board following a quashing by this court of the Board's 1975 decision. I believe the Board fixed her compensation in 1987, six years ago. A review of that decision would be most unfair to her at this late date, but that would be a possible, if not probable, result following success by Burlington in the presentation of this petition and on a rehearing of the liability issue by the Board. I find that risk to Ms. Firth to be a substantial prejudice to her under section 11 of the *Judicial Review Procedure Act*.

The extensive delay in this case is both unreasonable and inadequately explained. The arguments are compelling that the court should not exercise its discretion in favour of Burlington.

I find it unnecessary to consider the argument that this type of application is subject to a six-year limitation period under section 3(4) of the *Limitation Act*.

The petition is dismissed with costs on scale 3.



REPORTER

In the Supreme Court of British Columbia

Between: Patricia Florence Isaac, and the infants, Thomas David Isaac,
David Thomas Isaac, Cyril Kimball Isaac and Myrna Carol Isaac,
by their Guardian ad litem, Patricia Florence Isaac
And: Workers' Compensation Board

Reasons for Judgment of The Honourable Mr. Justice Meredith

January 11 and 12, 1990

Counsel for the petitioners: Caroline McCool

Counsel for the respondent: Scott H. Nielsen

This is an application under the *Judicial Review Procedures Act* to set aside a decision of the commissioners of the Workers' Compensation Board. To succeed the petitioners must show, at least, that the commissioners were in error to the extent that their decision was beyond their jurisdiction.

I agree with the decision and with the reasons upon which it is founded.

The commissioners allowed an appeal from a decision of the Board of Review. This extract from the decision of the Board is explanatory:

This is a widow's appeal from a decision of the Claims Adjudicator of the Workers' Compensation Board that was transmitted in a letter dated March 5th, 1984. In that letter the appellant was informed that because the Necoslie Indian Band Council was not registered with the Workers' Compensation Board for logging operations at the time of her husband's death and as the Indian Band is not required by law to register with the Workers' Compensation Board for any operations, municipal or otherwise as it is optional, her claim for benefits as a result of her husband's death was denied.

This appeal was filed on March 16th, 1984 and it is contended that the Indian Band is required by law to register for its logging operations and as such therefore the deceased's death arose out of and in the course of his employment.

The facts of this case are not in dispute and they are as set out in the appellant's file and are as follows. The deceased and his widow were married on August 1, 1970. From this marriage four children were born and currently reside with the widow. The deceased was a member of the Necoslie Indian Band and was employed by the Band Council as a faller. Furthermore the deceased was working for the Necoslie Indian Band Council on the Necoslie Indian Reserve at the time of death on January 18, 1984. On January 18th, 1984 the Necoslie Indian Band Council was registered with the Workers' Compensation Board for coverage of Indian Band operations but it was not registered for logging coverage.

The issue involved in this appeal is purely legal, and the argument put forth by the widow's legal representative is as follows.

There are two issues in this appeal.

The first relates to whether logging is an industrial undertaking listed under Schedule A of the *Workers Compensation Act*.

With respect to the first issue, reference was made in the representative's submission to Section 2(1) of the *Workers Compensation Act*, which states as follows:

"This part applies to employers and workers (b) in or about the operation of industrial undertakings listed in Schedule A"

We find that Schedule A is a list of industrial undertakings which specifically includes logging.

Reference was also made to Sections 36, 38 and 39 of the *Workers Compensation Act*. These relate to assessments for the "Accident Fund" and all contain the word "shall". Reference was also made to Section 29 of the *Interpretation Act* (R.S.B.C. 1979 c 206) which states that "shall" is to be construed as imperative.

We find that the Necoslie Indian Band was required to register with the Workers' Compensation Board and be assessed for its logging operations.

The Board of Review held that the application of the petitioners for compensation under the *Act* be allowed.

The commissioners reversed the ruling. The effect of their decision was to confirm the decision of the claims adjudicator for the reasons that are referred to.

Three commissioners apparently initially reviewed the decision of the Board of Review. Mrs. Isaac was informed:

Your claim has been reviewed by a panel of three commissioners. They would have to conclude that under existing Board practice, your claim would have to be rejected since Indian Band Councils are not subject to compulsory coverage under the *Workers Compensation Act*. The commissioners have decided to review this practice before making a final decision on your claim. This review will, however, take some time since it will be necessary to consult with other interested parties. The effect of the Board's allowing your claim would be that the Necoslie Indian Band Council and other similar organizations in the province would be required to register with the Board as employers and pay assessments to the Board. This would be a major step which it would not be proper to take without obtaining the views of all those affected. You will, of course, have an opportunity to make submissions to the Board in support of your position.

Copies of that letter went to Necoslie Indian Band Council and to Karen Wight, who represented the petitioners before the Board of Review. I do not know who the other interested parties were. But the letter to Mrs. Isaac from the Director of Appeals administration reporting the final decision of the commissioners says:

As part of that review, Mr. Bates would be contacting the various interested parties. He has done this, but has been unable to obtain any response.

It is not surprising that the Necoslie Indian Band Council and perhaps other Band Councils, all of whom would be affected by the decision, did not respond. They could not support the petitioner's claim without conceding that the provisions of the *Act* extended to employers and employees on an Indian Reserve. This they would not want to do.

I think I can do no better than to adopt the reasons of the commissioners set forth in their letter dated 26 March 1987 to Mrs. Isaac. I extract portions of that letter which explain the reasoning of the commissioners with which I agree:

Your husband suffered a fatal accident on January 18, 1984, while employed as a faller in a logging operation carried on by the Necoslie Indian Band. He was a member of the Band. The question at issue is whether the Band's operations are subject to compulsory coverage under the *Workers Compensation Act* and the Band was required to be registered as an employer with the Board. Your claim can only be accepted if it was required to register.

Section 91(24) of the *Constitution Act* assigns exclusive legislative authority over "Indians, and lands reserved for the Indians" to the Parliament of Canada. This means that legislation of a provincial legislature which is specifically directed at Indians is beyond its authority. However, the courts have held that provincial legislation of general application may apply to Indians except where it incidentally affects or derogates from an Indian's "Indianness". Where an Indian's "Indianness" is affected by some of the provisions of such legislation, then the other provisions of the legislation may still apply.

Pursuant to its authority under the *Constitution Act*, Parliament has enacted the *Indian Act*. Section 88 of that Act provides as follows:

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The commissioners have concluded that, while on surface the *Workers Compensation Act* may appear to be a law of general application, its compulsory provisions do not apply to Indian Bands because certain essential provisions affect the "Indianness" of Indians or conflict with provisions of the *Indian Act*.

In order to explain this conclusion, it is necessary to set out the main elements of the *Workers Compensation Act*. The *Act*, firstly, requires the Board to enact and enforce regulations and do other things necessary to prevent the occurrence of employment injuries or diseases and to pay compensation to workers who experience such injuries or diseases or to the dependants of workers who die as a result of them. Secondly, the financing of these activities is provided for by provisions of the *Act* which require the Board to levy and collect assessments from the employers who are covered by it. Employers are divided into classes and subclasses and sufficient assessments must be collected from each of these to pay for the costs to which it gives rise. There are thus two essential parts of the system, neither of which can exist without the other.

As matters now stand, there may be no actual conflict between the first of these two elements and Indian status. The Board could possibly pay compensation and carry out health and safety activities without infringing provisions of the *Indian Act*. However the commissioners refer you to the following sections of the *Act*.

73. The Governor in Council may make regulations
.....

- (g) to provide medical treatment and health services for Indians;
- (h) to provide compulsory hospitalization and treatment for infectious diseases among Indians;
- (i) to provide for the inspection of premises on reserves and the destruction, alteration or renovation thereof;
.....
- (k) to provide for sanitary conditions in private premises on reserves as well as in public places on reserves;

81. The council of a Band may make by-laws not inconsistent with this *Act* or with any regulations made by the Governor in Council or the Minister, for any or all of the following purposes, namely;

- (a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;
.....

-
- (h) the regulation of the construction, repair and use of buildings, whether owned by the Band or by individual members of the Band;

It seems to the commissioners that there is a potential for the Governor in Council or an Indian Band making regulations or by-laws under these provisions which would conflict with the terms of the *Workers Compensation Act*. The Board could be faced with the difficult situation of coverage under the Act fluctuating between different persons and times as regulations or by-laws were enacted or changed or different bands made different by-laws. Furthermore, with respect to health and safety, two of the major sanctions which the Board has for enforcing its requirements are to close down the employer's operations and to levy penalty assessments. The former would likely conflict with the terms of the *Indian Act* and the latter would raise the same problems as are discussed below with regard to the second of the two elements of the system set out above, namely the financial provisions of the *Act*.

The conflict raised by these financial provisions is, in the commissioners' opinion, of crucial significance. In this connection, the commissioners refer you to the following provisions of the *Indian Act*.

87. Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to Subsection (2) and to Section 83, the following property is exempt from taxation, namely:

- (a) the interest of an Indian or a Band in reserve or surrendered lands; and
- (b) the personal property of an Indian or Band situated on a reserve;

and no Indian or Band is subject to taxation in respect of the ownership, occupation, possession, or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property . . .

89. (1) Subject to this Act, the real and personal property of an Indian or a Band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian.

The commissioners consider that one or both of these provisions would make it impossible for the Board to collect assessments from Indian Bands. Either the initial levying of an assessment would violate Section 87 of the *Indian Act* or, even if the levying was authorized, Section 89 would prevent the Board from obtaining payment from the band's property if it declined to pay. Since the Board cannot carry out health and safety activities or pay compensation if it has not first collected sufficient money from employers to pay these activities, the non-application of the financial provisions to Indian bands means that none of the provisions of Part 1 of the *Workers Compensation Act* can be applied compulsorily in their case.

In the result, the commissioners have decided not to implement the Review Board finding. Your claim must be denied on the grounds that your husband at the time of his death was not a worker covered by Part 1 of the *Workers Compensation Act*.

As I think the commissioners were not in error, I dismiss the petition for the reasons given.

The petitioner has also invoked the provisions of section 15 of the *Charter of Rights* providing for freedom from discrimination. The *Indian Act* provides for and protects the rights of Indians. It does not put Indians at a disadvantage by discriminating "against them". In my view the section has no application.

Editors' note: This decision is currently under appeal to the Court of Appeal of British Columbia.

