

REPORTER

In the Supreme Court of British Columbia

Between: Pioneer Plumbing & Heating Inc.

And: Workers' Compensation Board of British Columbia

Oral Reasons for Judgment of The Honourable Madam Justice Allan

April 15, 1993

D. Grossman (in person) for the Petitioner

S.A. Nielsen, Esq. for the Respondent

THE COURT: (Oral) Mr. Grossman, the president of Pioneer Plumbing & Heating Inc. petitions the Court pursuant to the *Judicial Review Procedures Act* for an order setting aside the decision of the Worker's Compensation Board and directing that an oral hearing be held.

The history of this matter may be stated briefly. On March 30, 1990 the petitioner was employed to unblock a sewer in Vancouver. A seven-foot trench was excavated and before it had been sloped or shored, Mr. Brookes, an Occupational Safety and Health officer from W.C.B., attended to conduct a safety inspection. He discovered that one of the workers had entered the excavation in violation of Regulation 38.06 of the *Industrial Health and Safety Regulations*. That regulation states:

- (1) No worker shall enter any excavation over 4 feet (1.22 m) in depth unless:
 - (a) the sides of the excavation are sloped to a safe angle, or;
 - (b) the sides have been supported by the use of sheet piling, or shoring and bracing meeting the minimum standards contained in these regulations, or;
 - (c) the workers are protected by other effective means.

At Mr. Grossman's request, an oral penalty hearing was held on July 19, 1990. Mr. Grossman argued that he had instructed his workers not to enter the trench and that Mr. Sommerfield, the worker in question, had not entered the excavation below the four-foot level and thus had not violated the regulation; rather, he had descended three

REPORTER

In the Court of Appeal for Ontario Grange, Arbour and Weiler J.J.A.

Between: The Workers' Compensation Board
And: Mandelbaum, Spergel Inc.
Trustee-in-Bankruptcy for the Bankrupt
Heard: December 7, 1992

John A. Keefe and Soraya Farha for the appellant

Richard D. Howell for the respondent

Hart Schwartz for the Attorney General of Ontario,
intervenor

Grange J.A.:

This appeal concerns, among other things, the proper interpretation and effect of s. 9 of the *Workers Compensation Act*, R.S.O. 1980, c. 539 and s. 136 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3. The order in appeal held that the former section was ineffective and inapplicable on the facts of this case because it was in conflict with the latter section which was paramount.

Evelyn Stevens Interiors Limited ("the bankrupt") was a subcontractor of Trist Construction Limited and Begg & Dayk Limited ("the principals"). At the completion of the contract and at the date of bankruptcy, the principals together owed the bankrupt \$13,350.00. The Trustee sought this sum from the principals which brought into consideration the two statutes referred to.

Section 9 (3) and (4) of the *Workers Compensation Act* are as follows:

(3) Where a person, whether carrying on an industry included in Schedule I or not, in this subsection and in subsection (4) referred to as the principal, contracts with any other person, in this section referred to as the contractor, for the execution by or under the contractor of the whole or any part of any work for the principal, it is the duty of the principal to see that any sum that

REPORTER

In the Supreme Court of British Columbia

Between: James Bourgeois, Petitioner
And: Workers' Compensation Board, Respondent

Oral Reasons for Judgment of Chief Justice Esson
Pronounced in Chambers June 6, 1994

IN THE MATTER OF THE *WORKERS COMPENSATION ACT*, R.S.B.C. 1979, c. 437

AND

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*, R.S.B.C. 1979, c. 209

K. Woodruff
S.A. Nielsen
J. Hogg

Appearing for the Petitioner
Appearing for the Respondent
Appearing for Zimmerlee

THE COURT: The petitioner was seriously injured in a motor vehicle accident which took place on December 11, 1987. He was travelling in a car driven by one, Debra Zimmerlee, when it collided with a logging truck on a gravel road in the Clinton area.

He now seeks to set aside a determination made by the Workers' Compensation Board that, at the time in question, he was a worker within the meaning of Part 1 of the *Workers Compensation Act*, and that the injuries suffered by him arose out of and in the course of his employment. If the determination stands, of course, the effect is that his action for personal injuries will be barred. In that action, as he was travelling as a passenger, and as it appears to be common ground that the accident came about entirely through the negligence of Zimmerlee, he would stand to recover whatever damages might be assessed. The decision is by the chief appeal commissioner and by definition is a decision of the Board.

The facts of the matter, so far as I find it necessary to deal with them, are as follows: Both Zimmerlee and the petitioner were employees of Ainsworth Lumber Co. Ltd. On the morning in question, they were on their way to work at the Ainsworth Mill. The road in question is a gravel road which is in a semi-circular shape, so that one can get on to one end of it, just off Highway 97, and circle round and leave it at the other

end. It is the only road by which access can, at least conveniently, be gained to the Ainsworth Mill, which is situated about two kilometres from the intersection. The car had travelled about half the distance from the highway to the mill when the collision took place. The road was snow covered. The other vehicle was a logging truck which had dumped its load at the mill and was returning for another load. It had come to a stop before the collision.

The road is used to get to other establishments than the Ainsworth Mill. There is a Petro-Canada key lock, and it is also used, to some extent, by local farmers, ranchers, hunters, and so on. There apparently are no restrictions on the use of the road.

The claims adjudicator who investigated the accident concluded that the petitioner was not a worker, and that he was not injured within the course of his employment. That decision was subsequently appealed to the Chief Appeal Commissioner.

The petitioner, as I have already said, brought an action against Zimmerlee and various others, and it is that action that he wishes to proceed with.

The issue arises, of course, from the language of s. 5 of the *Workers Compensation Act* and particularly the words, "where personal injury arising out and in the course of the employment is caused to a worker, compensation shall be paid."

It does not seem to me there is any real question that the petitioner was a worker although, at the time in question, he was not engaged in the work of his employer. But clearly he was party to a contract of employment. Whether that was through a collective agreement or otherwise does not matter for these purposes. The real question, as I see it, is whether it can be said that the accident took place and injury was suffered in the course of the employment. In the most ordinary sense, of course, neither he nor Zimmerlee were within the course of their employment. They were travelling to it.

The basis for the decision is what is called the Captive Road Doctrine. This has been the subject of decisions within the Board for 20 years or more. The claims manual provides, in Clause 18.10, that the general rule is that there is no coverage while a worker is travelling along the roads which lie between his place of residence and the employer's premises. But it goes on to say that, in some cases, the nature of the road leading to the employer's premises may give coverage while on that road. In the next clause, a captive road is defined as one which is "technically a public highway, but as a practical matter, leads only to the premises of the particular employer and is for practical purposes under the control of that employer." In such a case, the road ". . . might be classified as part of the employer's premises for compensation purposes."

The decisions of the Board which have dealt with this matter over the years have emphasized the question whether the maintenance of the road was the responsibility of the employer. They have also laid some stress on the question whether there is hazard to users of the road arising from the particular industry in which the employer is engaged, and the operations of that employer.

In this case, the Chief Appeals Commissioner gave very extensive reasons for concluding that the road was a captive road. She made no specific finding of the existence of any hazard related to the employer, although the fact that logging trucks were using the road might satisfy that test. She considered the fact that one other employer used the road for the purposes of its business in a limited way, and that others had access to it.

The case has been argued very largely on the question whether the Commissioner correctly interpreted and applied the earlier decisions and the policies laid down in the manual. As I see it, that is not the real issue. The Board has held, over a very long time, that an extended meaning can be given to the words, "course of employment," by extending it to travel from home to employment in the limited circumstances covered by the doctrine of the captive road. It is not seriously contended that it is beyond the jurisdiction of the Board so to interpret the words of the *Act*, and I see no reason to hold that its power is so limited. It could well be a different matter, of course, if the issue arose in some other context such as the vicarious liability of an employer, but s. 96 of the *Act* gives to the Board very broad powers to interpret and apply the *Act*. The fact that this decision may go somewhat further than any earlier decision of the Board is not a matter, in my view, which could provide a ground to set aside the determination. Once one arrives at the conclusion that the Board has the jurisdiction to extend the obvious meaning of the language to circumstances like this, then I can see no basis for holding that it is unreasonable, much less patently unreasonable, to relax some of the restrictions which have previously been applied.

The petitioner made a strenuous policy argument based on s. 99 of the *Act* which requires the Board to resolve issues in accordance with that possibility which is favourable to the worker. It is pointed out that, by resolving the issue in the way it has in this case, the Board has resolved the issue against his interest which is to effect the greater recovery by way of an action. On the other hand, the Board's approach in relation to such a question can hardly be so narrowly restricted to the facts of the particular case. That is demonstrated by the fact that the order in question includes a similar determination in respect of Ms. Zimmerlee. It is to her benefit that she will be entitled to compensation if she suffered injuries because, as the person at fault, she could not recover under a tort claim. In any event, in my view, s. 99 has no application because this is not a case in which the disputed possibilities are evenly balanced.

There is also a submission that the Board breached its obligation in respect of the rules of natural justice because it did not give an oral hearing. It seems clear that no oral hearing was requested by this petitioner, although the subject was raised at one stage by another party. In any event, the usual practice of the Board is to not give oral hearings, and there is nothing on the facts of this case which would give the slightest ground for thinking that the petitioner was prejudiced in any degree by not having an oral hearing. A very complete opportunity to make submissions and present evidence was given.

FOR THESE REASONS, I WOULD DISMISS THE PETITION.

REPORTER

In the Supreme Court of British Columbia

Between: George Ernest Hunt, Plaintiff

And: T & N, plc, Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited, Carey Canada Inc., formerly known as Carey-Canadian Mines Ltd., Flintkote Mines Limited, The Flintkote Co., JM Asbestos Inc., Lac D'Amiante du Quebec Ltee., formerly known as Lake Asbestos Company Ltd., National Gypsum Co., and The Quebec Asbestos Mining Association, Defendants

And: Workers' Compensation Board, Henfrey Samson Belair Ltd., Receiver-Manager for Victoria Machinery Depot Company Limited, Third Parties

Reasons for Judgment of The Honourable Mr. Justice Thackray Heard at Vancouver, B.C., May 26, 1994 (in Chambers)

J.J. Camp, Q.C.

Jack Giles, Q.C.

T.R. Britnell

Counsel for the Plaintiff

Counsel for Atlas Turner Inc.,
Asbestos Corporation Limited and
Bell Asbestos Mines Limited

Counsel for Workers' Compensation Board

This is an application by the defendants Bell and Atlas for an order that the plaintiff produce for inspection and copying all documents and records relating to the question whether the action is statute barred under the *Workers Compensation Act*, R.S.B.C. 1979, c. 437.

The defendants assert that this action is brought in the name of the plaintiff by the Workers' Compensation Board. In *Hunt v. T & N plc* (1992), 68 B.C.L.R. (2d) 133 (S.C.B.C.), the Chief Justice said that, "For the purposes of discovery of documents, I regard its [the Board's] possession or control of a document as being that of the plaintiff." This application could have been brought against either the Board or the plaintiff and consequently it is appropriate in its present form.

The defendants Bell and Atlas put the statutory bar matter in issue by delivering amended defences alleging that the action is statute barred against them by virtue of the provisions of the *Act*. The Board refused to make production of documents and asserted

that the Court does not have the jurisdiction to adjudicate, in this case, the issue of a statutory bar.

The question before the court is one of statutory interpretation. The relevant sections of the *Act* are as follows:

10. (1) The provisions of this Part [1] are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of actions is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, his servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.

10. (7) If, in an action brought by a worker or dependant of a 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 or damage caused by that negligence shall be determined although the employer or worker is not a party to the action.

11. Where an action based on a disability caused by industrial disease, personal injury or death is brought, the board shall, on request by the court or by any party to the action, determine any matter that is relevant to the action and within its competence under this *Act* and, without limiting the generality of the foregoing, may determine whether

- (a) a person was, at the time the cause of action arose, a worker within the meaning of this Part;
- (b) injury, disability or death of a worker arose out of, and in the course of, his employment;
- (c) an employer or his servant or agent was, at the time the cause of action arose, employed by another employer; and

(d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of this Part,

and shall certify its determination to the court.

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 proceeding by or before the board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable be 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;
- (b) the existence and degree of disability by reason of an injury;
- (c) the permanence of disability by reason of an injury;
- (d) the degree of diminution of earning capacity by reason of an injury;
- (j) whether a person is a worker, a subcontractor, a contractor or an employer within the meaning of this Part.

Submissions

The defendants submit that the Board does not have exclusive jurisdiction to determine the statutory bar question and that, accordingly, the ultimate issue as to whether or not the action is statute barred is for the court. The Board agrees that the court has the responsibility to decide this issue. However, it contends that the Board has the exclusive jurisdiction to “inquire into, hear and determine all matters and questions of fact and law” which arise from the defendants’ pleadings.

The statements of defence of Bell and Atlas allege that they were at all material times employers within the scope of the *Act* and that the plaintiff was a worker as described in the *Act*. They say that as a result “no damages, contributions or indemnity are recoverable by the plaintiff in whole or in part.”

The defendants contend that the statutory bar question is not one which “arises” under Part 1 of the *Act* for decision by the Board. Therefore, it is left to the court. This submission was supported by a review of the history of the *Act*. Prior to 1968 the *Act* contained a provision the statutory bar question was to be decided by the Board. In 1968, following the recommendations of Mr. Justice Tysoe in his *Commission of Inquiry into the Workmen’s Compensation Act*, this provision was deleted from the *Act*.

This is the basis for the concession by the Board that the court has the jurisdiction to determine the ultimate issue as to whether or not a claim is statute barred.

The defendants submit that section 11 contains language that is inconsistent with the Board having exclusive jurisdiction to decide any question material to the statutory bar question, such as who is an employer. They submit that section 11 shows that the Board does not even have concurrent jurisdiction to decide such matters unless it is requested to do so by either the court or a party to the action.

The Board further states that it has searched for and does not have the documents sought by the defendants. It therefore contends that the issue is moot and, on the authority of *Grant v. British Columbia* (1990) 2 C.N.L.R. 21 (B.C.C.A.), the application should be dismissed as academic.

Judgment

The foundation upon which the statutory bar determination rests is within the exclusive jurisdiction of the Board. Section 96 provides that it is within the exclusive jurisdiction of the Board to determine whether persons are workers or employers within Part 1 of the *Act*.

If at trial these matters, and others within section 96, need to be determined then the court would have no alternative but to request such a determination by the Board. The Board is then required by s. 11 to make the determination and pursuant to s. 96 it is *only* the Board that may make this determination.

In *Anderson v. Spaidal* (1985), 68 B.C.L.R. 135 (B.C.C.A.) the trial judge said:

I have belatedly come to the conclusion that the board having determined the matter and filed its certificate in this action that the defendant was not a “worker” at the time the cause of action arose is determinative of that issue.

The Court of Appeal agreed with that conclusion. However, the defendants in the case at bar rightly point out that in *Anderson* the Board had already filed its certificate of determination.

This was similarly the case in *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.). It was submitted that a determination by the Board under s. 11 should not be binding and conclusive on the Supreme Court of British Columbia pursuant to s. 96. It was contended that this is in conflict with the function of a judge of the court. Mr. Justice Carrothers, with whom the other judges agreed, said at page 362:

This submission fails to combine the reading of the binding determination clause, s. 11, and the privative clause, s. 96, with limitation or extinguishment of actions provisions of s. 10, all of the *Workers Compensation Act*. The effect of s. 10 is to take away the cause of action, not to adjudicate upon the cause of action.

I cannot read s. 11 independently of s. 10 and do not agree that a determination by the board under s. 11 is interference in the decision in the action, but is a determination whether the action is to take place at all. Under s. 11 the board is not concerned with the tort, merely the compensation. Section 11 is not concerned with the wrongdoing, but merely with the status of the parties under the scheme. Section 11 is part of the scheme of the statute and part of the function of the board in carrying out that scheme.

I am of the opinion that these cases cannot be distinguished from the case at bar simply on the basis that the Board's certificate of determination had been filed. The *Act* gives to the Board an exclusive jurisdiction which is not dependent upon either the carrying out of the determination or the filing of the certificate.

There may be cases where the court's function of answering the ultimate issue of a statute bar will require findings beyond those matters over which the Board has exclusive jurisdiction. It is conceivable that in such cases it will be open to order production of documents. However, where the issue, as here, is based solely on a determination of the employer/employee relationship, this court's function will be limited to pronouncing the legal result of the Board's determination.

Should a party want to challenge the determination of the Board this would be by way of judicial review. In *Radhak v. Workers' Compensation Board of British Columbia and Gill* (1990), 45 B.C.L.R. (2d) 94, Mr. Justice Spencer of this court concluded that the Board's specialized jurisdiction is subject to review for errors that are "patently unreasonable." Even so he held that he "may not answer that question in the Board's place. It has the exclusive jurisdiction to do so." The matter was therefore remitted back to the Board for reconsideration.

Having decided that the application is dismissed, it is not necessary for me to rule as to whether it should be dismissed as being moot.



REPORTER

In the Supreme Court of British Columbia

Between: City of Vancouver, Petitioner

**And: Workers' Compensation Board of British Columbia, J.C. and
R.T., Respondents**

Oral Reasons for Judgment of The Honourable Mr. Justice Thackray Pronounced in Chambers March 25, 1994

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*, R.S.B.C. 1979, c. 209

IN THE MATTER OF TWO DECISIONS OF THE APPEAL DIVISION OF
THE WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
EACH DATED OCTOBER 26, 1992

A.D. Winter
R.M. Powers and
S.A. Nielsen
J.J. Steeves

Appearing for the Petitioner
Appearing for W.C.B.

Appearing for the Respondents —
J.C. and R.T.

Editors' note: This British Columbia Supreme Court Finding may be read as a cross-reference to Appeal Division Decision Number 92-1717, published in Volume 8 of the Workers' Compensation Reporter, page 715.

THE COURT: The City of Vancouver petitioned under the *Judicial Review Procedure Act*, R.S.B.C. 1979, ch. 209 for a review of two decisions of the Appeal Division of the Workers' Compensation Board of British Columbia. The decisions are both dated October 26, 1992 and allowed the appeals of the respondents J.C. and R.T.

I will quote the opening paragraph from the Appeal Division's decision in the J.C. decision:

The worker, Mr. J.C., appeals from the January 28, 1992 finding of the Workers' Compensation Review Board which allowed the employer's appeal regarding deduction from compensation

under s. 34 of the *Workers Compensation Act*. The Review Board found that the worker was not entitled to receive a full loss of earnings pension while, at the same time, receiving accumulated sick leave and vacation benefits that amount to full salary. The issue in this appeal is whether the employer is entitled to reimbursement out of the accident fund for payment of these accumulated benefits.

Section 34 of the *Workers Compensation Act* reads:

In fixing the amount of a periodic payment of compensation, consideration shall be had to payments, allowances or benefits which the worker may receive from his employer during the period of his disability, including a pension, gratuity or other allowance provided wholly at the expense of the employer, and a sum deducted under this section from the compensation otherwise payable may be paid to the employer out of the accident fund.

The City of Vancouver petitions for relief and asks that the decisions be set aside and that the matters be remitted to the Appeal Division for reconsideration. The *Judicial Review Procedure Act* provides for both of these remedies:

5. (1) On an application for a judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision, the court may direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application for judicial review relates.

- (2) In giving a direction under subsection (1), the court shall
- (a) advise the tribunal of its reasons; and
 - (b) give it such directions as it thinks appropriate as to the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

Section 7 provides:

Where an applicant is entitled to a declaration that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may, instead of making a declaration, set aside the decision.

The grounds upon which relief is sought are as follows:

1. The findings of the Appeal Division in its two October 26, 1992 decisions (that the Petitioner was not entitled to be reimbursed for the sick leave benefits paid to Mr. J.C. and to Mr. R.T. respectively during the period that each claimant was granted a disability pension award from the Workers' Compensation Board of British Columbia) constituted a patently unreasonable interpretation and application of Section 34 of the *Act*.
2. The findings of the Appeal Division in its two October 26, 1992 decisions (that the Petitioner was not entitled to be reimbursed for the sick leave benefits paid to Mr. J.C. and to Mr. R.T. respectively during the period that each claimant was granted a disability pension award from the Workers' Compensation Board of British Columbia) have resulted in the Workers' Compensation Board refusing to exercise the required statutory jurisdiction conferred on it pursuant to Section 34 of the *Act*.
3. In considering the Petitioner's obligation to pay sick leave benefits, and the claimants' entitlement to receive sick leave benefits, pursuant to the provisions of the Collective Agreement between the Petitioner and the Vancouver Firefighters Union, Local 18 which applied at the relevant time to Mr. J.C. and Mr. R.T. respectively, the Appeal Division so misinterpreted Section 34 of the *Act* as to embark on an inquiry which was extraneous to, and in excess of, its jurisdiction with respect to the matters before it.

Mr. Winter, counsel for the petitioner, conceded that the City is not seeking reimbursement from the respondents. He contended that this does not make the matter "moot" in that the petitioner asserts that the Appeal Division erred in its interpretations of s. 34. No case has been made out under s. 7 of the *Judicial Review Procedure Act* to declare the decisions unauthorized or invalid. Mr. Winter said that what is wanted is to remit the matter to the Board for reconsideration and have it take into account principles and evidence that he submitted were either misconstrued or overlooked. The decisions of the Appeal Division, in the submissions of the petitioner, were "patently unreasonable".

Counsel for the petitioner conceded that the "focus here is narrower than at the Appeal Division". He said that the scope of the questions has changed and that before the Appeal Division the City, without legal representation, erred in the position that it took. There is no doubt but that the petitioner wants a rehearing to correct errors which it made as the matter proceeded to this stage. If the decisions were patently unreasonable, the City admittedly contributed to such a result.

The City submitted that the principles governing “double-dipping” were not appropriately perceived by the Appeal Division. Section 34 of the *Workers Compensation Act*, R.S.B.C. 1979, ch. 437 has been thoroughly reviewed in this hearing. I might be tempted to philosophize as to the principles of double-indemnity but those principles have been reviewed elsewhere and most recently in the Supreme Court of Canada in *Miller v. Cooper*, March 17, 1994. Mr. Winter would have the court distinguish that case on the basis that it is a case in tort. However, the whole subject is academic in that regardless of principles and whether or not tort principles apply to compensation payments, s. 34 of the *Act* does not have to be interpreted on the basis of philosophical principles.

The parties disagree as to the interpretation of the word “may” as it appears in s. 34 of the *Workers Compensation Act*. That is, whether it is directive or permissive. The Appeal Division considered this and concluded:

Published policy of the Governors in section 34.40 of the *Rehabilitation Services and Claims Manual* (the *Manual*) makes it clear that Section 34 of the B.C. *Act* is discretionary. It requires that the Board must consider the matter, and that any compensation deducted under this section *may* be paid to the employer. The section is permissive, not mandatory.

Counsel for the petitioner conceded that there was a statement by his client before the Appeal Division that “may” was permissive. He pointed out that this was made without the benefit of counsel and that the Appeal Division did not necessarily rely upon the concession. He said that in spite of that ill-advised concession, his client asserted that it should be reimbursed for the whole of the sick leave. He therefore submitted that the concession should be put into context.

I have done so but nevertheless am in agreement with the conclusion that in section 34 “may” is permissive.

The Appeal Division also dealt with the provision in section 34 that consideration shall be had to payments, etc, “provided wholly at the expense of the employer”. It found that such was not the case and in doing so referred to sections of the Collective Agreement. Mr. Winter submitted that no evidence was before the Appeal Division that the first six shifts of sick leave were paid by the union. He said that the only evidence was that the employer made these payments. I find that difficult to accept. The Collective Agreement was before the panel and while it may not have been specifically commented upon, it was open to the Appeal Division to assume that the consideration was in keeping with the Agreement.

Furthermore, this matter is one of the concessions made by Mr. Winter on this hearing. He conceded that the first six shifts were not “wholly at the expense of the employer”. He excluded that portion of the claim and in doing so changed the scope of this hearing relative to what was before the Appeal Division.

Counsel have agreed on the principles as set forth in well-known leading cases. They indicate that a tribunal is permitted to make an error of law so long as it acts within its jurisdiction provided that part of its jurisdiction is to decide the question of law. Mr. Justice Beetz of the Supreme Court of Canada in *U.E.S. Local 298 v. Biebeault* [1988] 2 S.C.R. 1048 at 1086, said:

. . . if the question of law at issue is within the tribunal’s jurisdiction, it will only exceed it’s jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer may make errors in so doing without being subject to judicial review.

There is no consensus in the courts as to an analytical method to be used in determining whether a decision is patently unreasonable. It is because of this that the issue of tribunals acting in excess of jurisdiction is still fraught with difficulty. Mr. Justice Seaton once suggested a pragmatic definition for the term. In a discussion paper he said:

I do not think it can now be said that patently unreasonably errors are errors of a particular type as opposed to errors of a particular magnitude. I think that the test is rather, is this a decision that we can let stand? [my underlining]

If I were to reserve and write lengthy reasons for judgment, I would, to a great extent, adopt the submissions made in the chambers’ briefs of the Workers’ Compensation Board and Messrs. J.C. and R.T. I would not base my decision upon either mootness or that some alternative remedy is available to the petitioner. However, reserved reasons would not change the decision which I have made in this case: that is, that there was no loss of jurisdiction by the Board, nor were the decisions made and the reasons given patently unreasonable.

In Mr. Justice Seaton’s terminology, “this is a decision that we can let stand”. The petition is dismissed.



In the Court of Appeal for 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, Petitions (Appellants)

And: Workers' Compensation Board, Respondent (Respondent)

Written Reasons by: The Honourable Mr. Justice Goldie

Concurred in by: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Taylor

Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Taylor
The Honourable Mr. Justice Goldie

C. McCool and C.E. Reasons	Counsel for the Appellants
S.A. Nielsen	Counsel for the Respondent
Place and Date of Hearing	Vancouver, British Columbia May 31, 1994
Place and Date of Judgment	Vancouver, British Columbia July 12, 1994

Reasons for Judgment of Mr. Justice Goldie

This appeal is from the dismissal of an application under the *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209, for review of the refusal of the Workers' Compensation Board (the "Board") to pay survivor benefits to the appellant in accordance with the provisions of the *Workers Compensation Act*, R.S.B.C. 1979, c. 437 as amended (the "Act").

Shortly before his death on January 18, 1984, Mr. Isaac, a member of the Necoslie Indian Band, was employed by the band in its logging operation on reserve lands near Fort St. James, British Columbia. His death resulted from an accident which occurred while so employed.

On January 31, 1984 Mrs. Isaac, on behalf of herself and her four dependent children, applied to the Board for benefits under the *Act*. Her claim was ultimately rejected by the Board in March, 1987 and in April, 1988 Mrs. Isaac, in her personal

capacity and as guardian ad litem of her infant children, launched the present petition. It was dismissed in a judgment pronounced February 12, 1990. From this judgment Mrs. Isaac appeals.

Mrs. Isaac's claim was founded on s-s. (1) of s. 5 of the *Act* which provides:

5. (1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part shall be paid by the board out of the accident fund.

Mr. Isaac was, to outward appearances, a worker engaged in an industry within the scope of Part 1 of the *Act* who suffered a fatal accident arising out of and in the course of his employment.

Mr. Isaac was, however, a band member employed by the band in an industrial undertaking on a band reserve. The Board's policy, formulated before Mrs. Isaac's application, was that no coverage would be provided in respect of band members engaged in band activities on a reserve unless the band had requested such coverage and had paid the assessments required to maintain the accident fund from which compensation is paid. At the time of Mr. Isaac's death the Necoslie Lake Band had not requested coverage in respect of its logging operation. There is no evidence Mr. Isaac was in any way involved in the decision of the band to request or decline to request coverage.

It will be convenient at this point to sketch briefly the procedural history of this matter.

Procedural History

Mrs. Isaac's application of January 31, 1984 was rejected by the local claims adjudicator on March 5, 1984 whose letter stated in part:

Because the Necoslie Band council was not registered with the Board for logging operations at the time of your husband's death, I must inform you that I have no alternative but to reject this claim. . . .

On April 2, 1984, utilizing the procedure available under s. 90 of the *Act*, as it then stood, Mrs. Isaac appealed this decision to a board of review. Her notice of appeal was preceded by her legal advisor's inquiry of the Board questioning the basis in the *Act* for the adjudicator's decision. This was responded to by the Board's director, Assessments. In the relevant parts of his reply, dated April 24, 1984, he stated:

The justifications for not demanding compulsory coverage for operations conducted on an Indian Reserve are:

1. The Reserve is considered to be federal rather than provincial property.
2. The Reserve is under the jurisdiction of the Federal Government pursuant to the *Indian Act*.
3. Without the Indian Band permission the Board does not have the right to enter Indian property to:
 - (a) Audit payroll for assessment purposes.
 - (b) Conduct Industrial Health and Safety inspections.
 - (c) Seize assets in payment of outstanding assessment.
 - (d) Conduct any other Board activity normally associated with the administration of the *Workers Compensation Act*.

Considering the lack of Board authority over Indian operations it is reasonable to conclude that they are not compulsorily included within the scope of the *Workers Compensation Act*.

Over a year later, on May 15, 1985 a hearing took place before a board of review consisting of the chairman and two members. The board's decision was communicated to Mrs. Isaac on September 6, 1985. The review board allowed the appeal, stating "... The Workers' Compensation Board should accept responsibility and provide benefits according to the provisions of s. 17 of the *Workers Compensation Act* . . . ". The review board would also have awarded costs to Mrs. Isaac.

The decision of a board of review was not, however, binding on the Board. S-s. 90(3) of the *Act* provided:

90. (3) Where the board of review does not confirm the original decision, that decision will be reconsidered by the board.

The next step was communicated to Mrs. Isaac by letter dated March 10, 1986 from the Board's director, Appeals Administration. She was told her claim was to be reviewed by the Board after consultation with others. A relevant paragraph in the letter stated:

Your claim has been reviewed by a panel of three Commissioners (sic). *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.

(emphasis added)

In the meantime, on January 16, 1986, Mrs. Isaac's legal advisor had issued a writ claiming damages under the *Family Compensation Act*, R.S.B.C. 1979, c. 120, and naming as defendants members of the band council and Mr. Isaac's immediate supervisor in the logging operation. This writ has been served but no further steps have been taken. It would be barred by s-s. 10(1) of the *Act* if Mrs. Isaac is successful in her claim for compensation under the *Act*.

Another year passed before Mrs. Isaac was informed of the promised decision on her claim. The purport of the decision, as conveyed to Mrs. Isaac in a letter dated March 26, 1987, was expressed in these terms:

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*.

In reaching their decision, which was the decision of the Board, the commissioners were influenced by the perceived impact of the *Indian Act*, R.S.C., C. I-5 on the duties of the Board. They concluded, for many of the reasons advanced before us, there was such a conflict between the *Indian Act* and the provisions of the *Act* that the assessment and collection of the levies necessary to maintain the accident fund and the Board's promotion of occupational health and safety could not be undertaken where the employer was an Indian band engaged in an industrial undertaking on a reserve employing band members. Implicit in this conclusion is the proposition that coercive jurisdiction over employers is the mainspring of the *Act*.

Mrs. Isaac's petition was launched April 6, 1988. By notice of motion returnable January 11, 1990, the Board sought to have the petition dismissed on the ground that Mr. Isaac was not a "worker" and the band was not an "employer" within the definitions of those words in s. 2 of the *Act*. The Board also sought declarations, (which are the subject of cross appeal in this Court) in the event the petitioner succeeded, relating to the enforcement of the Board's remedies against an employer who refused or neglected to pay the levy assessed by the Board for the purpose of creating and maintaining the accident fund. The petition had been amended December 15, 1989. One of the amendments invoked s. 15 of the *Canadian Charter of Rights and Freedoms*.

The petition was heard January 11 and 12, 1990. Adopting in large measure the reasons of the Board, the chambers judge dismissed the petition on February 12, 1990.

Although the notices required to be given under the *Constitutional Question Act*, R.S.B.C. 1979, c. 63 are not in the appeal book we were informed such notices were given and that neither the Attorney General of Canada nor the Attorney General of the province intimated a desire to appear. Counsel are reminded that neither the constitutional validity nor the constitutional applicability of an enactment of Canada or the Province may be considered unless there has been compliance with the provisions of s-s. 8(1) of that *Act*. The same condition precedent to this Court's jurisdiction applies to a constitutional remedy under s-s. 24(1) of the *Canadian Charter of Rights and Freedoms*. The record in proceedings such as this is not complete without proof of compliance with the statutory requirements.

The Practice Direction of June 18, 1991 with respect to notices under this act is a necessary reflection of this jurisdictional requirement.

The notice of appeal to this Court was filed March 12, 1990. The cross appeal was filed March 30, 1990. The appeal books were filed in July, 1992, and the appellant's factum in February, 1993. The respondent's factums on the appeal and as appellant by way of cross appeal were filed in August, 1993 and the reply factum in November, 1993.

I have set out this history at some length as it may be a cause of wonder that the claim of a widow resulting from the death of the family's breadwinner should take ten years to reach this Court.

The lapse of time cannot be wholly attributed to difficulties in funding the petitioners' costs by the Legal Services Society.

One reason for delay was the failure of the Board to recognize that the issue here was one of law rather than one of practice. A board of review concluded in September, 1985 the question was one of law. Notwithstanding this, the Board took over a year, from March 10, 1986 to March 26, 1987, to consult interested parties before deciding whether to alter "existing Board practice".

It is troubling to compare this history with that of the leading case on the constitutional validity of the *Workers Compensation Act* of this province. When litigation arose out of the loss of the S.S. *Princess Sophia* in October, 1918 it was resolved within a year by a judgment of the Judicial Committee of the Privy Council on August 5, 1919, after an application in the Supreme Court of British Columbia in November, 1918 and a judgment of this Court on May 2, 1919.

Issues

1. Whether, without regard to constitutional considerations, the *Act* entitles the petitioner to compensation for the death of her husband?
2. If the answer to 1 is yes, whether, by reason of the provisions of the *Indian Act*, the *Act* is inapplicable to the petitioner?
3. If the answer to 2 is no, whether this Court may interfere with the decision of the respondent Board denying the petitioner's claim?

The petitioner's contention is straightforward: by virtue of the plain provisions of the *Act*, in particular s-s. 5(1), she says she is entitled, in common with all workers in the province whose employment is within the scope of Part 1 of the *Act* and their survivors, to compensation on a scale of compensation determined by the *Act*.

The Board's contentions are somewhat more complex. Mr. Nielsen says on its behalf:

- (a) Under Part 1 of the *Act* the payment of compensation out of the accident fund and the payment of employer assessments to that fund are inseparably linked, as counterparts of a social contract.
- (b) Under this view of the *Act* the worker has given up any right of action against an employer or fellow employee in return for the right to no-fault compensation. The employer is required to pay into the accident fund an amount of money reflecting the accident experience within the employer's industry, in place of damages reflecting his liability in individual cases. Compensation to the worker and compulsory payment of the levy to the accident fund are said to be two sides of the same coin.
- (c) Part 1 of the *Act* is more comprehensive than the social contract suggests: the Board is required to encourage the prevention of work-place accidents, as well as to provide compensation.

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- (d) The Parliament of Canada is exclusively empowered to legislate in respect of “Indians, and Lands reserved for the Indians” — to repeat the words used in this regard in Head 24 of s. 91 of the *Constitution Act, 1867*. The *Indian Act* confers special rights upon Indians and lands reserved for the Indians which make the assessment and collection of the levies necessary to maintain the accident fund impossible to administer, other than on a voluntary basis.
- (e) Having regard to these and related contentions, the *Act* must be construed so as to exclude people like Mr. Isaac from compensation and employers like the Necoslie Indian Band from the payment of the assessment and levies under the *Act*, unless the latter have voluntarily agreed to pay, and do pay, the required assessments.
- (f) With respect to s. 15 of the *Charter*, the Board says the *Indian Act* is valid federal legislation which has for its purpose a constitutionally entrenched objective of protecting Indians and lands reserved for the Indians to which s. 15 can have no application.

Issue 1 — Whether, without regard to constitutional considerations, the *Act* entitles the petitioner to compensation for the death of her husband?

This issue is solely concerned with the meaning of the *Act*.

A literal reading of the relevant provisions of the *Act* establishes, in my view, Mrs. Isaac’s right to compensation as the dependant of a worker engaged in an industrial undertaking within the scope of Part 1 of the *Act*.

Mr. Isaac was, in the words of the definition of “worker”, a person who worked under a contract of service. His employer was a person who, within the definition of that word, had in his service under a contract of hiring a person engaged in work in or about an industry. The activity in question was, within the definition of “industry”, an undertaking. The definitions referred to are in s. 1 of the *Act*.

I turn to Part 1 of the *Act* to determine whether Mr. Isaac was a worker entitled to compensation under the *Act*:

Part 1 consists of five divisions. The first — Scope of this Part — consists of four sections.

Sub-section 2(1)(b) states that Part 1 applies to employers and workers in or about the operation of industrial undertakings listed in Schedule A. Logging is so listed. It is conceded logging

describes the nature of the undertaking in which Mr. Isaac was engaged at the time of his death. Section 2(2) lists to what and to whom Part 1 does not apply. Neither Mr. Isaac nor his employer come within any listed exception to the scope of Part 1.

Sub-section 3(1) permits the Board to admit an employer and his workers in an industry not within the scope of Part 1 as being within its scope. The Board has relied upon this in its dealings with Indian bands. But before s-s. 3(1) can apply it must be shown that a band as an employer falls outside s-s. 2(1). I can find no provision in the *Act* exempting a band as an employer under s-s. 2(1) or that enables the Board to remove from the scope of Part 1 an undertaking otherwise within it by virtue of s-s. 2(1).

Division (2) — Compensation — consists of 12 sections of which s. 5 is the first. In full, it provides:

5. (1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part shall be paid by the board out of the accident fund.

(2) Where an injury disables a worker from earning full wages at the work at which he was employed, compensation is payable under this Part from the first working day following the day of his injury; but medical aid only is payable under this Part in respect of the day of his injury.

(3) Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation shall not be payable unless the injury results in death or serious or permanent disablement.

(4) In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.

(5) Where the personal injury or disease is superimposed on an already existing disability, compensation shall be allowed only for the proportion of the disability

following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The measure of the disability attributable to the personal injury or disease shall, unless it is otherwise shown, be the amount of the difference between the worker's disability before and disability after the occurrence of the personal injury or disease.

S-s. 5(1) confers a benefit upon a worker in an industry within the scope of Part 1. It is not seriously suggested that Mr. Isaac's death did not arise out of and in the course of his employment. I can find no express provision in the *Act* which exempts the Board from its obligation to pay compensation out of the accident fund because the employer has failed to make contributions to that fund.

Section 10(1) states that the provisions of Part 1 are in lieu of any rights of action which a dependant may have against the employer. There is no express provision in the *Act* which qualifies this bar to an action based upon common law or statutory causes of action. On its face, any claim by Mrs. Isaac under the *Family Compensation Act* is barred by virtue of this section.

Division (3) — Scale of Compensation — consists of 19 sections. The section applicable to Mrs. Isaac's claim is s. 17 and I can find no express provision that would affect the compensation payable to Mrs. Isaac as calculated under that section.

Division (4) — Accident Fund and Assessments — consists of 17 sections.

Section 37 provides that for the purpose of assessment in order to create and maintain the accident fund all industries within the scope of Part 1 shall be divided into classes. Class 1 consists of forest products industries. It is conceded logging is within Class 1.

The combined effect of ss. 39 and 40 is to subject every employer to an annual assessment in an amount determined by the class of industry concerned for the purpose of providing sufficient funds to meet the estimated requirements of the accident fund. Every employer in a class is bound to pay to the Board the amount so assessed and the Board is given extensive powers of enforcement.

I can find, however, no express provision authorizing the Board to deny compensation on the basis of the refusal or neglect of an employer to pay assessments or because the Board is unable to enforce its levy.

Division (5) — Procedure and Miscellaneous — consists of 25 sections. None relevant to Mrs. Isaac’s claim, at least at this stage, can be found in this division. I note, however, s. 73 which enables the Board to make an additional assessment where it considers a particular employer has given insufficient attention to preventive measures or where the Board considers an injury in respect of which compensation is payable is due substantially to culpability on the part of the employer.

There is no provision authorizing the Board to withhold compensation otherwise payable until it collects the additional assessment.

Division (6) — Workers’ Compensation Board — consists of 22 sections. None is immediately relevant to Mrs. Isaac’s claim except to the extent referred to earlier under the heading Procedural History.

In summary, there is no provision in the *Act* which either directs the Board or authorizes it in its discretion to deny Mrs. Isaac’s claim.

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

As a matter of statutory construction it is, in my view, impossible to imply such a provision. To achieve this result requires the assistance of the legislature, not the courts. There is nothing in the *Act* comparable to s. 9 of the *Alberta Workers Compensation Act*:

9 (1) This *Act* applies to all employers and workers in all industries in Alberta except the employers and workers in the industries designated by the regulations as being exempt.

(1.1) Notwithstanding subsection (1), an employer in an industry exempted under the regulations may apply to the Board for an order declaring that the *Act* applies to workers in his employment in that industry.

In the case of *Re Auger and Workers' Compensation Board* (1989), 61 D.L.R. (4th) 660 (Alta. Q.B.) ("*Auger's Case*") the Lieutenant-Governor in Council of Alberta, acting under s-s. 9(1), passed a regulation which listed industries exempted from the application of the Alberta act. The list included "any industry carried on by an Indian or band on a reserve".

On an application for judicial review of the Board's denial of the applicant's claim for compensation the court concluded the regulation was *intra vires* and, on the evidence before it, that there had been no violation of the applicant's rights under s. 15 of the *Canadian Charter of Rights and Freedoms*. An appeal to the Court of Appeal was dismissed: *Re Auger and Workers' Compensation Board* (1990), 73 D.L.R. (4th) 357 (Alta. C.A.), and leave to appeal to the Supreme Court of Canada has been denied.

I will deal later with the interaction of the *Indian Act* and the *Act* where *Auger's Case*, *supra*, is again relevant.

There is a further aspect to the question of construction: is compensation so inextricably linked to payment of the employer's assessments that the Board is forbidden to pay the one without receipt of the other?

Mr. Nielson points out that the only sources of money for the accident fund are employer contributions. He says the *Act* should not be construed as throwing the burden of compensating the employees of an employer who cannot be compelled to contribute onto the backs of the contributing employers of that particular class. There is no provision in the *Act* for making up a shortfall in the accident fund other than through increased assessments levied on those who can be compelled to contribute.

Parenthetically, I note from the material before us that the source of the Board's operating funds in 1988 were, in rounded numbers, \$442,000,000 from assessments and penalties and \$273,000,000 from investment income.

But to put this contention in perspective it will be necessary to review briefly the legislative antecedents of the *Act* (sometimes here referred to as the "present *Act*") and relevant appellate judgments.

The present *Act* is a direct descendant of the *Workmen's Compensation Act*, S.B.C. 1916, c. 77 (the "1916 *Act*"). That *Act* repealed a predecessor act of the same name, S.B.C. 1902, c. 74 and, as consolidated, R.S.B.C. 1911, c. 244 (the "1902 *Act*").

A material difference between the 1902 *Act* and the 1916 *Act* was a change in the source of compensation to the injured workman or his dependants: in the 1902 *Act* the employer was directly liable to the employee and the reforming feature was a statutory

cause of action. In the 1916 *Act* the compensation was paid by the Workmen's Compensation Board out of an accident fund created by employer contributions and any employee cause of action against the employer was abolished or barred. It was conceded before us that the 1916 *Act* and the present *Act* exhibit the same principles.

It was the 1916 *Act* which was judicially considered in the *S.S. Princess Sophia* case: *Canadian Pacific Railway Company v. Workmen's Compensation Board*, [1919] 1 W.W.R. 1068 (B.C.S.C.); appeal dismissed, [1919] 3 W.W.R. 167 (B.C.C.A.); appeal allowed *sub nom*, *Workmen's Compensation Board v. Canadian Pacific Railway Company*, [1920] A.C. 184, [1919] 3 W.W.R. 178 (J.C.P.C.).

These were the circumstances. The ship, the property of the Canadian Pacific Railway Company, was lost with all hands in foreign waters. It was registered in the Port of Victoria from which it was operated in the owner's coastal steamship service and where its crew signed on. When the Workmen's Compensation Board proposed to pay compensation to dependents of lost crew members the owner sought to enjoin those payments, saying the relevant sections were *ultra vires* and in conflict with federal legislation. The injunction was granted.

The primary ground accepted by the trial judge was that in conferring a right to compensation to workmen and their dependants for an accident occurring outside the province the Legislative Assembly acted beyond the powers conferred under s. 92 of the then named *British North America Act, 1867*. Mr. Justice Clement considered it relevant that in Alaska, in whose waters the ship was lost, there was no comparable legislation and the effect of s. 8(b) of the 1916 *Act* was to deprive the owner of the benefit of a civil right to immunity from assessment in that jurisdiction.

This Court dismissed the appeal, McPhillips J.A. dissenting. An appeal was taken directly to the Judicial Committee, upon whose advice the appeal was allowed.

In the result the relevant sections of the 1916 *Act* were held to be *intra vires* the province. Of the 1916 *Act* this was said by Viscount Haldane at A.C. p. 188:

It will be convenient in the first place to turn to the provisions of the *Act* in question. It was passed in 1916, and its primary purpose is to confer on workmen, out of an accident fund which it established, compensation for personal injury by accident arising out of and in course of their employment. The right of the workman does not, so far as Part I. of the *Act*, with which alone their Lordships are concerned in this case, applies, depend on negligence on the part of the employer, as in ordinary employers' liability legislation, but arises from an insurance by the Board against fortuitous injury. The insurance money is not, as in

the case of the British *Workmen's Compensation Act* of 1906, to be paid by the employer directly, but is provided by the Board from a fund which it collects from certain groups of employers generally.

I might add that the 1902 *Act* was modelled on the British act referred to in the above extract.

The 1916 *Act*, like the present *Act*, consisted of two substantive parts: Part I, entitled "Compensation to Workmen and their Dependants", and Part II, entitled "Liability of Employers in Industries not within the Scope of Part I". Section 8 of Part I, which was directly challenged, conferred benefits upon resident workers injured outside the province in the course of their employment. In substance this is continued in s. 8 of the present *Act*. At A.C., p. 191, this was said of s. 8 of the 1916 *Act*:

The right conferred arises under s. 8, and is the result of a statutory condition of the contract of employment made with a workman resident in the province, for his personal benefit and for that of members of his family dependent on him. . . . This right arises, not out of tort, but out of the workman's statutory contract, and their Lordships think that it is a legitimate provincial object to secure that every workman resident within the Province who so contracts should possess it as a benefit conferred on himself as a subject of the Province.

and at A.C., p. 192:

For the question is not whether there should be damages for a tort, but whether a contract of employment made with persons within the Province has given a title to a civil right within the Province to compensation.

In my view, these passages are equally applicable to s. 8 and, in principle, to s-s. 5(1) of the present *Act*.

The owner characterized the assessments as taxation. Without accepting this characterization the Judicial Committee said at A.C. p. 192:

For the taxation complained of in the present case is imposed with the object of establishing an institution which shall provide insurance benefits for persons whose contract of employment arises within the Province, and it is not directed to the very different purpose of making the employer directly compensate

his workman by way of damages for injury arising out of what has not the less to be proved as a tort because it may have happened, in the language of s. 503, without his actual fault or privity.

I think in all essential points the Judicial Committee affirmed the views of the dissenting judge in this Court. I refer to the judgment of McPhillips J.A. at p. 175 of [1919] 3 W.W.R.:

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

(emphasis added)

The *Princess Sophia* case, *supra*, has been judicially considered a number of times. One such was in *Bell Canada v. Quebec*, [1988] 1 S.C.R. 749. Mr. Justice Beetz, speaking for the Court, said at p. 763 the case held that provincial workmen's compensation schemes were applicable to federal undertakings. He then referred at the same page to Mr. Justice Martland's emendation in *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767:

... in *Bell Canada 1966*, Martland J., writing the unanimous reasons for judgment, took a different view ... of the right conferred by the legislation impugned in *Workmen's Compensation Board*:

Compensation was payable not by the employer, but out of a fund administered by the Board to which employers were required to contribute. Viscount Haldane (p. 191) refers to the employee's right under the *Act* as the result of a "statutory condition of employment", *but I think it is more accurately described as a statutory right*. The *Act* did not purport to regulate the contract of employment. What it did do was to create certain new legal rights which were to be in lieu of all rights of action to which the employee or his dependants might otherwise have been entitled at common law or by statute.

(emphasis added)

I am, with respect, in agreement with Mr. Justice Martland’s description of the worker’s right to compensation under Part I of the *Act* as a “statutory right”.

The result in *Bell Canada v. Quebec*, supra, is of further interest. The Court in it and in two companion cases, including one from British Columbia — *Alltrans Express Ltd. v. British Columbia (Workers’ Compensation Board)*, [1988] 1 S.C.R. 897 — concluded that the preventive provisions, that is to say, those provisions relating to occupational health and safety, were constitutionally inapplicable to federal undertakings as affecting the labour relations and working conditions of those undertakings — a field of legislative competence assigned exclusively to the Parliament of Canada. The compensation scheme of the *Act* remained applicable to the resident employees of such undertakings. It should be noted the *Canada Labour Code* and the regulations under that act contained provisions relating to safety and health in the work place.

On the basis of the foregoing it appears to me that the notion of an inextricable link between compensation to a worker and the payment of assessments by his employer was rejected in the 1916 *Act* and is rejected in the present *Act*.

To summarize my views on the first issue: on the plain wording of the *Act*, having due regard to its remedial purpose as judicially considered and to the absence of any language qualifying the statutory right created for the benefit of workers employed within the scope of Part 1 of the *Act*, the petitioner was entitled to compensation for the death of her husband.

Issue 2 — If the answer to 1 is yes, whether by reason of the provisions of the *Indian Act*, the *Act* is inapplicable to the petitioner?

As I would answer the question of statutory construction raised under issue 1 in the affirmative, I turn to the interaction of the *Act* and the *Indian Act* to determine whether the former can be read down in the constitutional sense or whether compliance with the latter involves a breach of the former.

I am concerned only with the assessment and collection of employer contributions to the accident fund as the judgment of the Supreme Court of Canada in *Alltrans Express Ltd. v. British Columbia (Workers’ Compensation Board)*, supra, is clear authority for the proposition that the compensation aspect of the *Act* is severable from the preventive aspect. There is the distinguishing feature of the federal safety regulations applicable to the appellant Alltrans’ undertaking.

These were not sufficient to remove the compensation aspect from provincial legislative jurisdiction.

It is not necessary to decide whether the preventive aspect of the *Act* applies to industrial undertakings of a band on reserve lands, although it may by reason of the referential provision of s. 88 of the *Indian Act*. What is necessary for the purposes of this case is to determine whether the assessment and collection provisions apply to such industrial undertakings and, if so, their effect.

Mr. Nielsen pointed out a number of provisions in the *Act* potentially affected by ss. 87 and 89 of the *Indian Act*. I say “potentially” as it is conceded there is little explicit conflict between the two acts. The underlying assumption in the Board’s submission is that a band council, in operating an industrial undertaking within the scope of Part 1 of the *Act* on reserve lands and employing resident members of the band, can disregard its responsibilities as an employer and impede the Board in the performance of its functions.

This is hypothetical in the case at bar as there is no evidence the Necoslie Lake Band Council has acted in this fashion. In commenting on the examples of conflict said by the Board to arise between the assessment and enforcement provisions of the *Act* and the *Indian Act* I emphasize there is no *lis* before us which requires a judgment of this Court with respect to these examples.

It was suggested at the outset that the Board would be stymied in arriving at the amount of the annual assessment required to be made by it under s. 39 of the *Act* if the band council simply failed to furnish payroll estimates. I note, however, that s-s. 38(2) authorizes the Board to make its own estimates and that the employer is bound by these estimates.

But it was suggested that Board employees could not enter a reserve to determine the nature of the undertaking, or to arrive at an estimate of the payroll, or to inspect the site of an accident, or for any of the other manifold reasons found in the *Act*, because its employees may thereupon commit an act of trespass contrary to s. 30 of the *Indian Act*.

The evidence in the case at bar is that within hours of the fatal accident two Board employees were at the site, conferred with the employer’s representative, filed a report and set up future meetings.

I am not prepared to assume this is not typical of the behaviour of band council employers. Nor am I persuaded without further argument that Board employees engaged in a lawful purpose who enter a reserve without permission are necessarily “trespassers” under the *Indian Act*. They may be limited in what they can do at the work site, as in the *Alltrans* case, but that does not leave the Board powerless to arrive at an estimate of the assessment.

It is convenient to set out here the provisions of ss. 87 and 89 of the *Indian Act* as they are the more obvious sources of conflict. These sections provide:

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,

(a) the interest of an Indian or a band in reserve lands or surrendered lands; and

(b) the personal property of an Indian or a band situated on a reserve.

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

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.

We were invited to accept that assessments could never be collected as they constituted the taxation of property on reserves within the principles stated in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 and *Metlakatla Ferry Services Ltd. v. The Queen* (1987), 12 B.C.L.R. (2d) 308 (B.C.C.A.).

These authorities support, of course, the principle that the provisions of s. 89 are to be given a broad and liberal interpretation and I will assume, without deciding, that the assessments constitute taxation. I do so although I note a contrary view was reached in *Auger's Case*, *supra*.

On this assumption a judgment in the Board's favour representing delinquent assessments could not be enforced under either s. 87 or s. 89 of the *Indian Act* so long as the product of the industrial undertaking was confined to the reserve. But this does not

exhaust the Board's remedies. Under s. 52 of the *Act* a lien in favour of the Board attaches to the property produced in or by the industrial operation. While such a lien would be unenforceable so long as the property in question was on the reserve it would attach when it left the reserve and reached the hands of a buyer. The unenforceability of a provincially created lien to the extent it conflicts with the objectives of a federally protected undertaking does not necessarily affect other remedies. See: *Campbell-Bennett Limited v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207.

Boards have shown considerable ingenuity in collecting unpaid assessments. See, for example, *Re Enoch Band and Workers' Compensation Board of Alberta* (1994), 106 D.L.R. (4th) 279 (Alta. C.A.) where the Alberta Workers' Compensation Board successfully garnisheed a band's bank account maintained off the reserve. In the course of the majority judgment this was stated at p. 289:

Nor is this reference to situs mere happenstance. Parliament's deliberate policy is to leave exposed to the benefits and burdens of ordinary commerce and law those assets and enterprises of Indians or Indian bands which are not located on a reserve: (citations).

I am not prepared to assume the Board is powerless in the collection of unpaid assessments.

Other examples were canvassed. But in answer to the general proposition advanced by the Board I am of the view there is, in the case before us, no persuasive evidence of such an irreconcilable conflict that a court must conclude the assessment and enforcement provisions in Division (4) of Part 1 of the *Act* are constitutionally rendered wholly inoperative.

I repeat, there is no express contradiction between the federal and provincial statutes and there is no evidence of any impediments placed in the way of the Board in its relations with the Necoslie Indian Band.

I refer again, however, to *Auger's Case*, supra. There, in upholding the validity of the regulation exempting any industry carried on by an Indian or band on a reserve, the trial judge, after observing he was satisfied from the evidence there was little interest in mandatory coverage, found the evidence also established the Alberta board had experienced considerable difficulty in collecting arrears from Indian employers owing to the difficulties in collection created by ss. 89 and 90 of the *Indian Act*. Apparently out of some 42 bands in Alberta, 17 had been voluntarily admitted under the Alberta act, and of these, five were delinquent in payment of their assessments. He concluded on this evidence there was a deleterious effect on the integrity of the fund from which all benefits are paid.

The evidence in the case at bar is to this effect: of the 195 Indian bands in the province of British Columbia, 183 were, as of October, 1989, voluntarily registered under s-s. 3(1) of the *Act*.

The Necoslie Band itself has been an employer covered on an intermittent basis since 1976 and was admitted under s-s. 3(1) in respect of its logging operations on January 25, 1984.

I have been unable to find any evidence which would permit a finding comparable to that made in *Auger's Case*.

As I have said, the premise of the Board's argument is that without the same facilities available to it for making and enforcing the collection of assessments in respect of band council employers engaged in industrial undertakings on reserve lands as are available against other employers in the same industry the *Act* must be construed as barring Mr. Isaac's dependents from compensation and exempting the Necoslie Lake Band as an employer within the scope of Part 1 of the *Act*. As I am unable to accept the submissions based upon the alleged conflict between the two acts, I reject a premise which dictates this result.

It may be that future experience and enabling legislation will lead to the same result as in *Auger's Case* but that does not affect the claim made by Mrs. Isaac in 1984.

I have thus far not mentioned the petitioner's submission with respect to s. 88 of the *Indian Act*. That section provides:

88. Subject to the terms of any treaty and any other Act of Parliament, 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 those laws are inconsistent with this *Act* or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this *Act*.

Mr. Nielsen suggested that the *Workers Compensation Act* is not a law of general application. He bases this on the existence of the two classes: those employees and employers in industrial undertakings and occupations in the Province within the scope of Part 1 of the *Act* and those who are not within the scope of Part 1. The latter fall within the scope of Part 2 of the *Act*. With respect, this is an untenable interpretation of the phrase "laws of general application". See: *Dick v. The Queen*, [1985] 2 S.C.R. 309.

The *Act* by its terms applies uniformly throughout the province. Neither purpose nor policy requires it to be applied in a manner which could impair the status or capacities of a particular group.

But I do not think this is the significant feature as I am of the view the *Act* applies, and has applied since 1916, at least as to its compensation aspect, *ex proprio vigore*, that is, of its own force, to employers and employees in circumstances like those in the case at bar.

In this respect I start with the observation of Laskin C.J.C. in *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751 at p. 734:

When s. 88 refers to “all laws of general application from time to time in force in any province” it cannot be assumed to have legislated a nullity but, rather, to have *in mind the provincial legislation which, per se, would not apply to Indians under the Indian Act unless given force by federal reference.*

[emphasis added]

This view was approved by the Court in *Dick v. The Queen*, supra, at p. 327 where Mr. Justice Beetz referred to what was said by Dickson J., as he then was, in *Kruger and Manuel v. The Queen*, [1978] 1 S.C.R. 104:

In *Kruger*, Dickson J. wrote at p. 115:

There is in the legal literature a juridical controversy respecting whether s. 88 referentially incorporates provincial laws of general application or whether such laws apply to Indians *ex proprio vigore*. The issue was considered by this Court in *Natural Parents v. Superintendent of Child Welfare* (1975), 60 D.L.R. (3d) 148, [1976] 2 S.C.R. 751.

This controversy has so far remained unresolved in this Court.

I believe that a distinction should be drawn between two categories of provincial laws. There are, on the one hand, provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation; there are on the other hand, provincial laws which cannot apply to Indians without regulating them *qua* Indians.

Laws of the first category, in my opinion, continue to apply to Indians *ex proprio vigore* as they always did before the enactment of s. 88 in 1951 — then numbered s. 87 (1951 (Can.), c. 29) — and quite apart from s. 88.

In my view, the compensation scheme of the *Act* has applied in law since 1916 to those residents of British Columbia who are workers in occupations within the scope of Part 1 of the *Act*. I am of the further opinion that to apply in fact the compensation scheme to workers like Mr. Isaac would not impair their “Indianness”.

At this point it is appropriate to consider the petitioner’s attack on the Board’s decision as a violation of s. 15 of the *Charter*. I would not give effect to this contention.

There is no “law” which purports to create the alleged discrimination. As I have endeavoured to show, the *Act* itself contains no basis for the denial of Mrs. Isaac’s claim and we have been referred to no regulation which purports to authorize the Board’s decision.

Nothing has been done by the Legislative Assembly or by the Lieutenant-Governor in Council which can be pointed to as violating rights under s. 15, and, as a corollary, there is nothing “prescribed by law” to which the test under s. 1 of the *Charter* can be applied.

Furthermore, even though the Board’s practices may be subject to *Charter* scrutiny the practice in question does not, in my view, come within s. 15 of the *Charter*. It reflects the Board’s conclusion that the special rights conferred in the *Indian Act* were constitutionally paramount by reason of head 24 of s. 91 of the *Constitution Act, 1867*. As has been seen, I do not think this is a case of paramountcy. But if it was, and in the absence of a challenge to the *Indian Act*, the special rights provided in that act do not come within the ambit of s. 15.

Issue 3 — If the answer to 2 is no, whether this Court may interfere with the decision of the respondent Board denying the petitioner’s claim?

As in my view the question raised in issue 2 must be answered in the negative, I turn to a consideration of the scope of judicial review of a decision of the Board, protected as it is by a privative clause, as set out in s. 96 of the *Act*.

I do not think the Board is immune from judicial review in the case at bar. It has proceeded upon a view of the *Act* which in my opinion is plainly wrong. It has not exercised a jurisdiction it is directed to exercise because of assumed difficulties in the making and enforcement of assessments. As I have endeavoured to show this does not justify a denial of the statutory right conferred on Mrs. Isaac under the *Act*.

We are not bound to extend to a specialized tribunal the deference the authorities contemplate where there is an error in law resulting in the tribunal denying a jurisdiction which its constituent statute requires it to exercise.

The technical merits of Mrs. Isaac's claim which might require a specialized tribunal to exercise its skills and experience in deciding issues at the core of its expertise have never been at the heart of this controversy. See: *British Airways Board v. Workers' Compensation Board* (1985), 61 B.C.L.R. 1 (B.C.C.A.), leave to appeal denied. In my view, the Board's decision cannot be shielded from judicial scrutiny. The Board, and by extension the court below which adopted the Board's reasons, erred in law.

Cross Appeal

We were invited by the Board to make general declarations. I would decline to do so as inappropriate in the absence of parties whose interests may be affected and unsuitable in the circumstances of those who are before us.

Conclusion

In my view, the appeal must be allowed and the matter remitted to the Board for reconsideration in accordance with these reasons.

Costs

The petitioner is not seeking costs. In view of the procedural history I have outlined, I would nevertheless direct that she recover her costs of this appeal.

REPORTER

In the Supreme Court of British Columbia

Between: Slocan Forest Products Ltd., Plaintiff

And: Workers' Compensation Board of British Columbia, Respondent

Reasons for Judgment of The Honourable Mr. Justice E.R.A. Edwards

Counsel for the Plaintiff:	Alan D. Winter
Counsel for the Respondent:	Scott A. Nielsen
Date and Place of Hearing:	20 & 21 October, 1994 Vancouver, B.C.

This is an application for judicial review of a decision of the Appeal Division of the Workers' Compensation Board ("W.C.B."), upholding an additional or "penalty" assessment against the petitioner ("Slocan").

At issue is whether a forest service road was a "place of employment" under s. 71(1) of the *Workers Compensation Act* R.S.B.C. 1979 Ch. 437 ("the Act") at the relevant time.

If it wasn't, as Slocan submits, then Slocan says the W.C.B. had no jurisdiction to make regulations applicable to the road under s. 71(1), no jurisdiction to inspect the road pursuant to s. 71(3) and no jurisdiction to impose an additional assessment under s. 73(1) of the *Act*. Those subsections provide:

71. (1) *The board may make regulations, whether of general or special application and which may apply to employers, workers and all other persons working in or contributing to the production of an industry within the scope of this Part, for the prevention of injuries and industrial diseases in employments and places of employment,*

....

(3) *An officer of the board or a person authorized by the board may at all reasonable hours inspect the place of employment of a worker within the scope of this Part.*

....

-
73. (1) *Where the board considers that*
- (a) sufficient precautions are not taken by an employer for the prevention of injuries and industrial disease;
 - (b) the place of employment or working conditions are unsafe; or
 - (c) *the employer has not complied with regulations, orders or directions made under section 71,*
- the board may assess and levy on the employer an additional assessment determined by the board and may collect the additional assessment in the same way as an assessment is collected. The powers conferred by this subsection may be exercised as often as the board considers necessary. The board, if satisfied the default was excusable, may relieve the employer in whole or in part from liability. [my emphasis]*

....

The relevant facts are as follows. In 26 January 1989 an Occupational Safety Officer of the W.C.B. prepared an inspection report which included this statement:

THERE ARE SEVERAL DOZEN SNAGS ALONG ROADS NO 2 AND ROAD NO 39 EAST OF VAVENBY. THESE SNAGS ARE A HAZARD TO THE MANY WORKERS WHO TRAVEL THESE ROADS. THIS IS A *REPEAT* VIOLATION OF IH&S REG 60.232

ALL SNAGS, DANGER TREES, LOOSE ROCKS, STUMPS, OR OTHER UNSTABLE MATERIAL SHALL BE REMOVED OR CLEARED FOR A SAFE DISTANCE BACK FROM ROADSIDES OR ROADSIDE BANKS WHEN THEY PRESENT A HAZARD TO USERS OF ROADWAYS.

THIS APPLIES TO ALL ROADS

He recommended a sanction in the following terms by memo dated 30 January 1989:

On 26 January, I travelled over Roads #2 and #39, east of Vavenby. These are both active haul roads. I was accompanied by Mr. Leverne Burnell, Woods Foreman. There are a large number of snags within a tree length of these two roads. Mr. Burnell's estimate was approximately 100 on each road.

This order has been written 3 times at the Valemout Division and copies were reviewed by the Vavenby Division. They are

well aware of the requirements, even though separate divisions of the same company.

I feel a sanction is justified since there had been absolutely no effort made to do any snag falling on these two roads and the hauling started in December, 1988. The snags are not questionable and are all within striking distance of the roads. Photos 1–8 show these snags.

Slocan responded to the proposed assessment in a letter to the W.C.B. dated 20 March 1989, in part as follows:

We have some serious concerns about the possible assessment for snags . . . which were noted by Roy Nesbitt during his inspection on January 23, 1989. We are definately [sic] not denying that the snags should have been removed to enhance safe travel of the roads. We are however concerned that our Company is the one which is having the assessment levied against it.

Our Company did not operate in the Adams drainage from January of 1987 to December 1988, which is a period of approximately 1½ years.

In conclusion, I feel that we have had an excellent record of maintaining safe work practices concerning snag-falling in the past and will continue in the future. We were at fault on Road #2 and Road #39 along with several other Industrial users as Road #2 is the main artery to the North Adams Valley from the North Thompson Valley. It is therefore unfair to charge our Company with full responsibility of the poor saftety [sic] practice on these two roads.

The additional assessment was imposed by letter from the W.C.B. to Slocan dated 6 November 1989 which included the following:

. . . We conclude the violations outlined in our letter of 13 March 1989 occurred and a penalty assessment is warranted. A penalty of \$15,000.00 will be assessed against your firm for this violation.

An appeal was denied by the W.C.B. commissioners on 23 March 1990.

The *Act* was subsequently amended to provide appeals to a new Appeal Division of the W.C.B. Slocan appealed again and the appeal was rejected by the Appeal Division in 17-page written decision dated 29 April 1993.

Counsel for Slocan acknowledged the road could be a place of employment in some circumstances, for example it would be a place of employment for those constructing or repairing it, while those workers were on the site. He submitted however, the definition of “place of employment” which the Appeal Division articulated is too broad. That definition states:

. . . the concept of “places of employment” must be interpreted broadly to include:

every place where any process or operation, directly or indirectly related to any industry, trade or business, is carried on, and where any person is, directly or indirectly, employed by another for direct or indirect gain or profit.

Counsel for Slocan also acknowledged that so-called “captive” roads, those owned or operated exclusively by an employer, would be “places of employment” of the workers driving over them, but said as soon as they left such roads to travel a public highway on the same journey these workers left their “place of employment”. He argued that the W.C.B.’s definition effectively made every public road or highway a place of employment for some employer, and specifically had that effect in this case for Slocan since the forest service road in question was a public road.

Counsel argued this must mean the W.C.B.’s definition of “place of employment” was too broad because it appropriated to the W.C.B. the authority to dictate safety standards on public roads and highways which is the jurisdiction of highway authorities. The Crown as the primary highway authority, whether through the Ministry of Transportation and Highways or Ministry of Forests, is also an “employer” under the *Act*, and would be subject to penalties for failing to meet W.C.B. regulated standards. This he argued resulted in a conflict and the safety regime imposed by the highway authority, not the W.C.B., should prevail since the Crown had direct responsibility for highway safety.

At one time the W.C.B. had imposed additional assessments on the Ministry of Forests for failure to meet W.C.B. regulations on forest service roads. The Ministry then designated forest service road licensees “principal contractors” for various portions of those roads. It was conceded Slocan was the principal contractor responsible to meet Ministry of Forests’ maintenance requirements, including snag falling, on the road in this case. Under terms of Slocan’s Road Permit the Ministry could have done the necessary work and collected the cost, but no added penalty if Slocan failed to meet permit requirements.

The Attorney General is served with all applications for judicial review. If the Crown was concerned the W.C.B. had, by misinterpreting the *Act*, usurped its power as a highway authority to set safety standards on public roads, I assume the Attorney General would have appeared to make submissions to that effect.

I reject the argument that the W.C.B. definition of “place of employment” must be wrong because it amounts to a usurpation of jurisdiction over highway safety standards. Even if that is the effect of the W.C.B.’s interpretation of the legislation, that does not mean it is wrong. The interpretation placed on the *Act* by the Appeal Division does not lead to an absurd result in the face of any provision of the *Highway Act*, the *Forest Act*, the *Highway (Industrial) Act* or any regulations under any of those Acts brought to my attention by counsel.

Slocan pointed to the possibility of inconsistency between the W.C.B. and Ministry jurisdictions, but not to any actual legislative or operational conflict. If such a conflict arose, the legislature could resolve it.

Counsel for Slocan also argued that the language of the *Act* itself compelled a narrower interpretation of “place of employment”. Specifically, the fact that s. 71(3) requires the inspector of a “place of employment” to “cause to be posted in a conspicuous place, at or near the works, establishment or premises, a statement showing what portion of the works, establishment or premises has been inspected” was said to imply that a place of employment must be a work, establishment or premise over which the employer had effective control.

When the *Act* was amended in 1968 the words “place of employment” in that part of s. 71(3) which authorizes inspections replaced those in the pre-1968 equivalent, s. 59(3), which authorized inspection of “the establishment of any employer.” The legislative intention must have been to authorize inspection of places of employment which were not the “work, establishment or premises” of an employer. The legislature may have inadvertently failed to extend the requirement to post a report to cover this wider scope of inspection, but its intention to widen that scope must be inferred from the 1968 amendment. It appears to have been widened to correspond with the words “places of employment” which were in ss. (1) before it became s. 60(1) in the 1968 amendment, i.e. to make the inspection power parallel the regulation-making power. While it might have been arguable before 1968 “places of employment” in ss. (1) corresponded to “the establishment of an employer” in ss. (3), that narrow interpretation of “places of employment” cannot now be supported in light of the amendment to ss. (3) [now s. 71(3)].

The Appeal Division recognized that it “cannot be allowed to make an error on a question upon which its very jurisdiction depends” and seems to have acknowledged in its reasons that the interpretation of “place of employment” which underlies the

W.C.B.'s jurisdiction to regulate, inspect and assess penalties is such a question. That being so, the Appeal Division's decision is not one which is insulated from judicial review by the privative provisions of the *Act*.

When reviewing the decision of a specialized and expert tribunal on a question which involves the interpretation of its constituent statute, the Court does not extend curial deference to the tribunal in respect of its interpretation of a provision conferring jurisdiction. However, according to recent decisions of the Court of Appeal interpreting the leading Supreme Court of Canada authorities, the Court should apply a "pragmatic and functional" or "purposive" approach and ". . . rise above technicalities of all kinds, particularly legal and drafting technicalities . . .". See: *I.A.M. Lodge 692 v. U.B.C. & J.A. et al* [1993] 87 B.C.L.R. (2d) 98 at 105 and *District of Metchosin v. Metchosin Board of Variance* [1993] 81 B.C.L.R. 156.

Applying that approach in this case, I am unable to conclude that the interpretation the Appeal Division placed on the term "place of employment" was wrong. Accordingly, the W.C.B. had the jurisdiction to regulate, inspect and impose the additional assessment on Slocan.

The petition is dismissed with costs on scale 3.