

REPORTER

In the Court of Appeal for British Columbia

Between: City of Vancouver
And: Workers' Compensation Board of British Columbia
And: June Mowat

**Oral Reasons for Judgment Before
The Honourable Mr. Justice Carrothers,
The Honourable Mr. Justice Gibbs,
The Honourable Madam Justice Ryan**

**February 10, 1995
Vancouver, B.C.**

A. Winter	appearing for the City of Vancouver
S.A. Nielsen and R.M. Powers	appearing for the Workers' Compensation Board
J.J. Steeves and G. Coustalin	appearing for June Mowat

GIBBS, J.A.: On a petition for judicial review the trial judge made an order setting aside a decision of the Appeal Division of the Workers' Compensation Board. This is an appeal against the order.

The issue before the trial judge was, in her words, "whether the appropriate standard of proof was applied by the Appeal Division in its consideration of the statutory rebuttable presumption contained in s.6(3) of the *Workers' Compensation Act*, [R.S.B.C., 1979, c.437]." Her decision is reported in (1994) 88 B.C.L.R. (2d) 381.

The background facts are simple and undisputed. Victor Mowat was a fire fighter employed by the City of Vancouver. He developed malignant melanoma. He applied to the W.C.B. for compensation. The compensation was declined by a claims adjudicator. Mr. Mowat died. His widow, June Mowat, applied for dependant's benefits. Her application was denied by a claims adjudicator. Both of the claims adjudicator decisions

were taken to the Workers' Compensation Review Board and denied. An appeal was then taken to the Appeal Division which allowed the appeal. The petition for judicial review which brought the matter before the trial judge followed.

The trial judge set aside the decision of the Appeal Division and referred the matter back for reconsideration. In my respectful opinion she erred in doing so.

At p. 385 of 88 B.C.L.R. the trial judge redefined the issue before her in these words:

There seems to be no dispute that the Appeal Division's determinations did indeed involve questions of fact and law under Part 1 of the *Act* and that the decision is therefore, by definition, one made within the exclusive jurisdiction of the Board. The issue, however, is whether the Appeal Division's interpretation of the statutory presumption found in s. 6(3) of the *Act* is so patently unreasonable that that tribunal can be said to have embarked on a inquiry which was in excess of its jurisdiction and thus subject to a review by this Court.

The reference in that redefinition to the exclusive jurisdiction of the board is an application of s.96(1) of the *Act*. Section 96(1) is the privative clause which vests in the board "exclusive jurisdiction to inquire into, hear and determine all matters of fact and law arising under this Part." There can be no doubt that when adjudicating upon the Mowat claims the Appeal Division was performing the functions vested in it by the authorizing statute: *Omineca Enterprises v. B.C (Ministry of Forests)* (1994) 85 B.C.L.R. 85 at p. 90. That finding by the trial judge is not, therefore, open to challenge, and it is not challenged.

The second sentence of the redefinition invokes the patently unreasonable test with specific reference to a statutory presumption in s.6(3) of the *Act*. The first three subsections of s.6 provide that:

6. (1) Where

(a) a worker suffers from an industrial disease and is thereby disabled from earning full wages at the work at which he was employed or the death of a worker is caused by an industrial disease; and

(b) the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments,

compensation is payable under this Part as if the disease were a personal injury arising out of and in the course of that employment. Medical aid may be paid although the worker is not disabled from earning full wages at the work at which he was employed.

(2) The date of disablement shall be treated as the occurrence of the injury.

(3) If the worker at or immediately before the date of the disablement was employed in a process or industry mentioned in the second column of Schedule B, and the disease contracted is the disease in the first column of the schedule set opposite to the description of the process, *the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved.*

(trial judge's emphasis)

It was the way the Appeal Division dealt with the presumption and the burden of proof in this case that led the trial judge to find, in her words, "an error in law" and "a serious misapprehension" towards the end of her reasons. The focus was upon these findings at p. 12 of the Appeal Division decision:

It has been accepted that malignant melanoma is a primary cancer of the skin. Because of this acceptance and our finding that he had prolonged contact with coal tar products, arsenic or cutting oils, Mr. Mowat is entitled to the presumption contained under Section 6(3) of the *Act* and Schedule B, Item 4(g). The Review Board found that the evidence was sufficient to rebut a Schedule B presumption on the basis that there was insufficient medical evidence to support a causal relationship between such exposures and malignant melanoma. However, Section 6(3) of the *Act* provides that the disease shall be deemed to have been due to the nature of the employment unless the contrary is proved. The panel finds that the contrary has not been proved. Rather, the evidence on this question is best described as uncertain. The epidemiological studies have not proven that there is no relationship between malignant melanoma (a primary cancer of the skin) and prolonged contact with coal tar products, arsenic or cutting oils. In fact, the average SMR/PMR relating to an association between fire fighters and risk of death from malignant melanoma was 1.73, which both Drs. Howe and McDiarmid indicated was significant. Dr. McDiarmid's evidence was that there was an argument of biological plausibility.

On her review of the Appeal Division reasons, with particular attention to that paragraph, the trial judge summarized her views at p. 394:

On a consideration of the language of the decision as a whole, but more particularly the language found at page 12 (which I have highlighted earlier), I am satisfied that what occurred here amounts to an error in law on the Appeal Division's part. In my view, the language used leads to the

inescapable conclusion that the Appeal Division applied a standard of proof akin to certainty or approaching certainty, in determining whether the statutory presumption was rebutted. Accordingly, I must conclude that the Board acted upon a serious misapprehension of the burden of proof provision contained in s. 6(3) and thereby misdirected itself during the course of its inquiry.

What is strangely absent from the decision of the trial judge is any reference to the reported cases on curial deference to the decisions of administrative tribunals. The reason would appear to be that she was persuaded to the view that if the Appeal Division applied the wrong standard of proof when determining whether, in the words of s.6(3), “the contrary is proved” it thereby exceeded its jurisdiction. That was the position of the City of Vancouver before the trial judge and on the appeal. It is so stated at p. 387 of 88 B.C.L.R. under the sub-heading “Appellant’s Position”:

As I noted earlier, the appellant does not submit that this evidence either does or does not support the respondent’s claim for dependant’s relief. It concedes that such a finding lies within the exclusive jurisdiction of the Board. Rather, the appellant submits that by virtue of the language used in its written decision, one must conclude that in weighing the biological and the epidemiological evidence, the Appellate Division of the Board applied a standard of proof far greater than a balance of probabilities and rather applied a burden of proof either akin to certainty or approaching certainty. In so doing, the appellant says that the Appellate Division acted outside its jurisdiction, thus justifying the Court’s intervention.

It is worth noting however, that the legislature did not impose any particular standard of proof to the contrary in s.6(3), that the Appeal Division made no reference to the standard of proof, and that the p. 12 determination is expressed in language which tracks the wording of s.6(3). One could only conclude therefore that the Appeal Division applied “a standard of proof akin to certainty or approaching certainty” by way of inference, and I am unable to draw that inference from the record or from the reasons of the Appeal Division.

Even if the inference could be fairly drawn I have grave doubt that there would be grounds for intervention by the Court. Section 6(3) seems to leave to the board the discretion to determine whether the evidence tendered in opposition to the claim is of sufficient weight to discharge the burden of overcoming the presumption that the industrial disease was due to the nature of the employment.

In any event, when it became apparent that there was evidence which the Appeal Division could rely upon in reaching its conclusion, and when it became apparent that the substantive issue was whether the weight of the evidence led by the City of

Vancouver overcame the combination of other evidence plus the presumption, the contention that there was an issue of jurisdiction ceased to be a tenable proposition. With respect to the trial judge, the case ought then to have been disposed of by the application of the principles of curial deference.

In that connection we have the advantage, which the trial judge did not have, of the Supreme Court of Canada judgment in *Pezim v. B.C. (Superintendent of Brokers)* (1994) 114 D.L.R. (4th) 385. At p. 404 the Court described the principles of judicial review, opening the discussion with these two paragraphs:

From the outset, it is important to set forth certain principles of judicial review. There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.

Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause is deciding a matter within its jurisdiction and where there is no statutory right of appeal.

(case authority cited)

These are case authorities cited in the judgment to support the spectrum concept and the elements present in cases where deference is at the highest. All of the elements are present in this case. Furthermore, the Appeal Division is a specialized tribunal. It was performing a function at the heart of its special jurisdiction calling for the application of its expertise. The record does not disclose anything unreasonable in the interpretation of the *Act* by the Appeal Division or in the exercise by it of its jurisdiction.

Given the principles of curial deference propounded by the Supreme Court of Canada, in my respectful opinion the trial judge erred when she granted the relief requested in the petition.

For all of these reasons I would allow the appeal; I would set aside the order made by the trial judge; and I would restore the decision of the Appeal Division.

CARROTHERS, J.A.: I agree.

RYAN, J.A.: I agree.

CARROTHERS, J.A.: The appeal is allowed and it is ordered accordingly.