

## In the Supreme Court of British Columbia

BETWEEN: NORTHERN MOUNTAIN HELICOPTERS INC. Petitioner

AND: WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA,  
ATTORNEY GENERAL OF BRITISH COLUMBIA Respondent

AND: THE ATTORNEY GENERAL FOR CANADA as a representative  
Her Majesty and Her servants employed by the  
Department of Human Resources and Development (Canada)  
Respondent

### Reasons For Judgment of the Honourable Madam Justice Saunders (In Chambers)

Counsel for the Petitioner: A. Grant

Counsel for the Respondent, Attorney General for Canada: A.D. Louie  
and R. Eichler

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Place and Date of Hearing: Vancouver, B.C.  
June 10, 11 & 12, 1998

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[1] In areas in British Columbia which are too steep or the soils are too unstable for construction of conventional logging roads, the logging industry uses helicopters to transport fallen logs to ocean drops or landing areas.

[2] Northern Mountain Helicopters Inc. participates in helicopter logging, supplying helicopters, pilots and certain ground crew to the logging industry. The ground crew employed by Northern Mountain Helicopters attach and detach loads of logs to a hook which hangs by cable from the helicopter.

[3] Provincial and federal authorities both assert jurisdiction over the occupational health and safety of those ground crew employees. Proceedings have been launched against Northern Mountain Helicopters by the Workers' Compensation Board (the provincial authority, commonly referred to as the WCB) and the Department of Human Resources Development Canada (the federal authority, commonly referred to as HRDC) arising from the same incident involving the same employees.

[4] Northern Mountain Helicopters has petitioned this court, seeking a declaration that certain decisions of the WCB concerning Northern Mountain Helicopters are of no force because they contravene s.91 of the Constitution Act, 1867 and that occupational health and safety of the ground crew is within the exclusive jurisdiction of the federal government. Alternatively it seeks a declaration that a summons issued against it under federal regulations is of no force because it contravenes s.92 of the Constitution Act, 1867, and that the occupational health and safety of the ground crew is within the exclusive jurisdiction of the provincial government.

[5] In short, the petitioner asks the court to determine that only one set of regulations applies to its ground crew, federal or provincial. The petitioner, whose pilots and other employees are clearly within federal jurisdiction, prefers the sole federal regulatory regime for occupational health and safety for all its employees, including ground crew, but in the alternative says exclusive provincial jurisdiction for the ground crew is preferable to the duplication it now faces.

[6] The issue, then, is whether either level of government has exclusive jurisdiction over occupational health and safety of the ground crews who attach and detach logs to the petitioner's helicopters, and if so, which one. This question requires a close examination of the facts.

## The Circumstances

### A. The Petitioner

[7] The petitioner was incorporated in 1959 as Northern Mountain Airlines. In 1966 it purchased its first helicopter, and in 1974 it changed its name to Northern Mountain Helicopters Inc. From incorporation in 1959 to date it has been federally licensed to provide air services to others. Its present operating certificate authorizes it, among other things, to carry out "heli-logging".

[8] Northern Mountain Helicopters is headquartered in Prince George, British Columbia. It has twelve other permanent bases in British Columbia, two in Alberta and one in Ontario. Northern Mountain Helicopters has a fleet of more than eighty

helicopters providing specialty services to its customers. In addition to helicopter logging, the services include wildlife tracking and counting, global positional surveys and mapping, aerial application in forestry and agriculture, helicopter skiing, wildlife capture, aerial tankers, aerial photography, seismic support and heli-seismic in the oil and gas industry, airborne video for the movie industry and longlining.

[9] Northern Mountain Helicopters employs on average between two hundred and fifty and two hundred and seventy-five persons. Of these, about one hundred employees are pilots, eighty-five are engineers (ground maintenance), thirty are ground support crew, twenty-five work in administration and twenty-five work in management.

[10] The helicopter logging aspect of the petitioner's business employs about eighty employees, or approximately one-third of its employee complement. Of these, twenty-five employees are pilots, twenty-four are engineers, thirty are ground support crew, one person works in administration and six are managers. Thus all ground support crew employed by the company are engaged in helicopter logging and it is the occupational health and safety jurisdiction of these thirty employees that is at issue in this case.

[11] The revenue from helicopter logging is derived from use of five of the company's over eighty helicopters. In 1996 the revenue from helicopter logging was about 17.7% of total company revenue.

[12] Although helicopter logging is a distinct source of revenue in the company and has distinct operational requirements, there is no separate division of helicopter logging; the company is not organized along divisional lines. The management organization chart reveals two persons dedicated to helicopter logging, a manager of helicopter logging and a chief engineer of helicopter logging. The chief engineer of helicopter logging is responsible for maintenance of the heavy helicopters which, while assigned primarily to helicopter logging, are also assigned to seismic, construction and steel setting work. Other key management employees have company wide responsibility, such as the manager of employee relations, the manager of occupational health and safety, the director of maintenance, the controller and the manager of marketing. Chief pilots and other flight personnel train and check all pilots of the company. B. The Jurisdictional Dispute Revealed

[13] Until November 1996, Northern Mountain Helicopters thought that the applicable occupational health and safety standards for its helicopter logging ground crew were those imposed by HRDC (formerly Labour Canada), as they were for its pilots. It maintained a relationship with WCB through payment of premiums for all its

employees, but generally looked to HRDC on issues of compliance with safety standards when it had a helicopter logging operation underway.

[14] In 1996, as a result of three incidents, it became clear to Northern Mountain Helicopters that both the WCB and HRDC were asserting jurisdiction over the ground crew of Northern Mountain Helicopters. The first incident occurred in August of 1996 when a supervisor of Northern Mountain Helicopters was seriously injured by a snag which sprang back and struck him as a result of another worker falling a tree. As the accident occurred on a day that no helicopter was working and it involved only ground personnel, the company reported the accident to the WCB. In late October 1996, the company was advised by HRDC that the accident should have been reported to HRDC and not to the WCB.

[15] The second incident occurred in October of 1996 when representatives of the WCB attended a job site of Northern Mountain Helicopters in Chetwynd, B.C. They issued an inspection report and orders concerning the occupational health and safety of employees working within the yarding and landing crew.

[16] The third incident occurred on November 1, 1996. A ground crew employee of the petitioner was fatally injured at a helicopter-logging site in British Columbia. Following this fatality, both HRDC and WCB claimed that their occupational health and safety standards, found in the respective federal and provincial regulations, applied to the petitioner's helicopter logging operations.

[17] There have been two proceedings taken by the WCB against Northern Mountain Helicopters, one arising from the Chetwynd inspection report and one arising from the fatal accident of November 1, 1996. In addition, Northern Mountain Helicopters was served with a Summons to Appear in Provincial Court in relation to charges under the Canada Labour Code, R.S.C. 1985, c.L-2 arising from the November 1, 1996 accident. Both WCB and HRDC continue to pursue the petitioner for the same alleged infractions of regulations, leading the petitioner to bring these proceedings.

## B. Helicopter Logging

[18] Helicopter logging in British Columbia was introduced in the 1970's. Today it occurs in areas in which logging roads cannot be constructed to the area to be felled, either because the soil is unsuitable (as in portions of the interior of British Columbia) or the terrain is too steep. In such areas, helicopter logging provides a means to transport felled logs to a landing or drop zone where they can be further transported by truck or by water.

[19] A helicopter logging operation comprises felling the trees; attaching the trees to a helicopter; lifting and transporting the logs to either a landing or a drop zone; and when at a landing, detaching the logs from the helicopter, bucking the logs and further loading the logs onto logging trucks.

[20] In the case before me, the petitioner does not employ fallers, buckers or loaders and where its contract may include some aspect of these functions, it contracts that work to sub-contractors. Falling, bucking and loading, it agrees, are all part of traditional logging and are all regulated by the Workers' Compensation Act, R.S.B.C. 1996, c.492. Northern Mountain Helicopters has, however, hired its own employees to attach the logs to and detach the logs from the helicopter and it contends that this work is akin to loading and unloading the helicopter, and is such a part of its helicopter business that it is within federal occupational health and safety regulation.

[21] The attachment of logs to and detachment of logs from a helicopter is performed by a rigging crew usually comprised of four to six riggers, two chasers and one on-site supervisor. The riggers are also known as chokermen, a traditional term in the logging industry.

[22] In a typical helicopter logging operation, a rigging crew is flown to the site in a small helicopter and a large helicopter performs the transportation of the logs. The pilot of the large helicopter and the on-site ground supervisor jointly supervise the operations. Instruction and co-ordination between the ground personnel and the pilot take place by radio communication.

[23] Once a rigging crew is on site, the riggers build loads for carriage by the helicopter. These loads, called "turns" are made of one to ten logs of various lengths. The number of logs in a turn depends upon the weight of the log or logs and the carrying capacity of the helicopter. The weight of the log or logs depends upon the species of tree and the size of the log. The carrying capacity of the helicopter depends upon the size of the helicopter and the point it is in its cycle. The closer the helicopter is to the start of a cycle, the more fuel it carries and the less weight in logs it can safely transport. Conversely, the nearer the helicopter is to the end of a cycle the more weight in logs it can carry.

[24] In building a turn the rigger sets chokers on logs in orderly progression to ensure that the logs on top are lifted first and those on the bottom are lifted last.

[25] A helicopter pilot approaching the site must communicate with the rigging crew by radio to determine which turn is to be picked up next. The helicopter is then flown to the site and the hook below the helicopter is positioned for the rigger to attach the turn. In performing this manoeuvre the helicopter generates considerable rotor wash.

[26] When a helicopter pilot manoeuvres the hook to a rigger's hand, the rigger must discharge its static electricity before touching the hook. The hook weighs two hundred and fifty pounds and is suspended at the end of a two hundred foot line.

[27] Once the hook is attached to the choker and the rigging crew has moved to a secure area, the crew signals to the pilot that it is safe to lift. The helicopter pilot then lifts the turn, ensures that the weight is not too great for safety and flies the short distance to the landing area. As most of the petitioner's work involves transportation of turns to landing areas for subsequent bucking and loading onto trucks, the logs must be landed by the helicopter gently to avoid breakage. Co-ordination between pilot and ground crew is essential to the safety of the ground crew, who must be in a pre-designated secure area for the landing of the logs. The landing crew employees, called "chasers", then disconnect the chokers from the hook and retrieve the other chokers from the load. Chasers reset the chokers by coiling them safely for attachment to the hook and transportation back to the rigging crew.

[28] In recent years special training has been available for persons employed in helicopter logging at the International Heli-Logging Training Institute. Training at the Institute acquaints students with the types of helicopters, their lifting capacities, their fuel cycle, the different densities of wood and assessment of log weight. Students are taught how to construct a turn, learn of dangers specific to helicopter logging such as rotor wash and become familiar with communication techniques including hand signals commonly used in aviation. Most ground crew employees of the petitioner are graduates of the Institute.

## Discussion

### A. Who has Jurisdiction?

[29] This case proceeds on the basis that jurisdiction to regulate the occupational health and safety of these ground crew employees of Northern Mountain Helicopters is either provincial or federal. In Bell Canada v. Quebec (CSST), [1988] 1 S.C.R. 749 and Alltrans Express Ltd. v. B.C. (W.C.B.), [1988] 1 S.C.R. 897. Mr. Justice Beetz speaking for the court, held that the double aspect theory cannot operate to support the applicability of both federal and provincial regulations in the matter of occupational health and safety standards.

[30] The result is that this jurisdiction lies either with the federal government operating through HRDC or the provincial government operating through the WCB.

[31] In determining which government has constitutional jurisdiction in this case the court is guided by the following principles, summarized by Mr. Justice Dickson in

Northern Telecom Ltd. v. Communications Workers of Canada and Canada Labour Relations Board, [1980] 1 S.C.R. 115 at 132, summarizing the principles set out in Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754:

- (a) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
- (b) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
- (c) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
- (d) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.
- (e) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.
- (f) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

[32] In Bell Canada and Alltrans Express, both *supra*, Mr. Justice Beetz considered these principles in the context of occupational health and safety standards. After recognizing that general legislation for health belongs to the provinces subject to the powers conferred on the federal government relating to peace, order and good government: Schneider v. The Queen, [1982] 2 S.C.R. 112, and that provincial workers compensation schemes are applicable to federal undertakings: Workmen's Compensation Board v. Canadian Pacific Railway Company, [1990] A.C. 184, he held that because the pith and substance of occupational health and safety regulations is working conditions, labour

relations and management of an undertaking, provincial occupational health and safety regulations do not apply to federal undertakings. He stated at p.833 of *Bell Canada*:

... the exclusivity rule ... does not apply only to labour relations or to federal undertakings. It is one facet of a more general rule against making works, things or persons under the special and exclusive jurisdiction of Parliament subject to provincial legislation, when such application would bear on the specifically federal nature of the jurisdiction to which such works, things or persons are subject.

[33] The case at bar considers the same provincial scheme as was before the court in *Alltrans Express*, and is similar to the one described in *Bell Canada*.

[34] It follows that the British Columbia occupational health and safety regulations are directed to working conditions, labour relations and management. As such, they may not apply to a federal undertaking. Nor may they apply, in the words of Mr. Justice Beetz in *Bell Canada*, supra, to "a work, thing or person under the special and exclusive jurisdiction of Parliament ... when such application would bear on the specifically federal nature of the jurisdiction to which such works, things or persons are subject". The issue is whether the helicopter logging aspect of Northern Mountain Helicopter's business is or is not, federal.

[35] Northern Mountain Helicopters and the Attorney General for Canada contend that Northern Mountain Helicopters is in substance a business engaged in aeronautics and therefore, on the matter of occupational health and safety of its employees, comes under federal jurisdiction.

[36] The WCB and the Attorney General for British Columbia contend that the jurisdiction is provincial, saying the ground crew work is part of a logging operation within traditional provincial jurisdiction under ss.92 and 92A of the Constitution Act, 1867. Further, they say the ground crew aspect of Northern Mountain Helicopters' business is sufficiently distinct from the balance of the company's business that it is not part of its otherwise federally regulated concern.

[37] The issue of characterization of all or a part of an enterprise is fact dependent. For example, in the *Montcalm Construction* case, it was held by the Supreme Court of Canada that provincial minimum wage legislation applied to employees of a construction company engaged in the construction of an airport, reasoning that the wages to be paid to employees of a construction company engaged in construction of runways was so far removed from aerial navigation or operation of an airport that it was not an integral part of federal competence over aeronautics. This case considered the independence of the construction company which was performing a fleeting aspect

of airport management, and impugned provisions which affected the construction company and its employees rather than the federal government and the construction company, or a federal undertaking and its employees. In contrast in the present case, the business affected is generally under federal jurisdiction and the provincial regulations would affect that federally regulated business and its employees. Further, the application of provincial regulations would endure so long as the company hired ground crew to participate in helicopter transportation of logs, and would not be fleeting as it was in Montcalm Construction.

[38] However, to say that Northern Mountain Helicopters is generally a federally regulated company is not an answer to the question of jurisdiction. Since the decision of Canadian Pacific Railway Company v. A.G. of B.C. (1950), A.C. 122 (the Empress Hotel case), courts have recognized that a company may carry on more than one undertaking or business, and in the event the second business is not properly characterized as federal, it falls to be provincially regulated.

[39] The Empress Hotel case was applied in Canadian National Railway Company v. Nor-Min Supplies Limited, [1977] 1 S.C.R. 322. There the Supreme Court of Canada held that a rock quarry owned by the Railway Company devoted exclusively to providing rock ballast for the railway was not a federal undertaking. At p.332-33, Chief Justice Laskin observed:

... Nor, apart from such federal legislation, do we even reach any issue of immunity from provincial legislation unless the quarry is shown to be more than a convenience, more than a source of supply for railway purposes but, indeed, an essential part of the transportation operation in its day-to-day functioning. In the circumstances of the present case I cannot arrive at such a conclusion. The mere economic tie-up between the C.N.R.'s quarry and the use of the crushed rock for railway line ballast does not make the quarry a part of the transportation enterprise in the same sense as railway sheds or switching stations are part of that enterprise.

[40] In Ontario Hydro v. Ontario Labour Relations Board, [1993] 3 S.C.R. 327 the Supreme Court of Canada considered the application of provincial labour legislation to Ontario Hydro's employees, some of whom were employed at nuclear generating stations. The nuclear generating stations had been declared to be works for the general advantage of Canada. The Supreme Court of Canada held that the matter of labour relations of the nuclear generating facilities fell within federal legislative competence, not provincial. In Ontario Hydro, supra, there was no issue as to the severability of the federally regulated portion of Ontario Hydro's business from the provincially regulated portion.

[41] A different result was found in B.C. Gas Utility Ltd. v. Westcoast Energy Inc. (1998), 156 D.L.R. (4th) 456 (S.C.C.). In this, the most recent decision of the Supreme Court of Canada referred to this court, the court found that gas processing plants which would be connected to interprovincial pipelines were within Parliament's jurisdiction. In reaching this decision, Mr. Justice Iacobucci and Mr. Justice Major, speaking for the majority, stated at pp.487-88:

... a number of cases expressly contradict these submissions by stating that a single federal undertaking may exist notwithstanding that it is engaged in different activities and one of them is not a transportation or communications activity ... In Dome Petroleum, supra, underground storage caverns were held to form part of an interprovincial pipeline undertaking. This was also the view of Gerard V. La Forest in Water Law in Canada (Ottawa: Department of Regional Economic Expansion, 1973) at pp.49-50 ...

In our opinion, the fact that an activity or service is not of a transportation or communications character does not preclude a finding that it forms part of a single federal undertaking for the purposes of s.92(10)(a) under the first test in Central Western, supra. The test remains a fact-based one. As Dickson C.J. made clear in Alberta Government Telephones, supra, at p.258:

It is impossible, in my view, to formulate in the abstract a single comprehensive test which will be useful in all of the cases involving s.92(10)(a). The common theme in the cases is simply that the court must be guided by the particular facts in each situation ... Useful analogies may be found in the decided cases, but in each case the determination of this constitutional issue will depend on the facts which must be carefully reviewed.

That is not to say, however, that it is impossible to identify certain indicia which will assist in the s.92(10)(a) analysis. In our view, the primary factor to consider is whether the various operations are functionally integrated and subject to common management, control and direction. The absence of these factors will, in all likelihood, determine that the operations are not part of the same interprovincial undertaking, although the converse will not necessarily be true. Other relevant questions, though not determinative, will include whether the operations are under common ownership (perhaps as an indicator of common management and control), and whether the goods or services provided by one operation are for the sole benefit of the other operation and/or its customers, or whether they are generally available.

[42] At p.489 they observed:

Whether the Westcoast gathering pipelines, processing plants and mainline transmission pipeline constitute a single undertaking depends on the degree to which they are in fact functionally integrated and managed in common as a single enterprise. What is important is how Westcoast actually operates its business, not how it might otherwise operate it or how others in the natural gas industry operate their businesses.

[43] The federal jurisdiction over aeronautics, and hence over Northern Mountain Helicopters in general, derives from Parliament's general peace, order and good government jurisdiction: Johannesson v. Rural Municipality West St. Paul, [1952] 1 S.C.R. 292. On behalf of the WCB and the Attorney General of British Columbia it was argued that because it derives from the peace, order and good government jurisdiction, federal power over aeronautics is something less than the federal power under s.92(10)(a) in transportation and communications which are expressly assigned by the Constitution Act, 1867 to Parliament. In my view, this submission is not correct. For the same reasons that management of a federal undertaking or interprovincial transportation comes within federal jurisdiction, so too does management of a business which is federal by the peace, order and good government jurisdiction.

[44] The argument that some federal jurisdictions should be narrowly construed was advanced and failed in Ontario Hydro which considered facilities that were federal by operation of the declaratory power. At p.340 Chief Justice Lamer stated:

... I am of the view that the power to regulate the labour relations of those employed on or in connection with facilities for the production of nuclear energy is integral to Parliament's declaratory and p.o.g.g. jurisdictions.

[45] Mr. Justice La Forest, speaking for himself, Madam Justice L'Heureux-Dub, and Mr. Justice Gonthier agreed with the Chief Justice, creating a majority of the court on this issue, at p.362:

... The Chief Justice, on the other hand, is of the view that the power to regulate the labour relations of those employed at these facilities for the production of nuclear energy is integral to Parliament's declaratory and general power. For the reasons that follow, I agree with the conclusion reached by the Chief Justice. In my view, the regulation of the labour relations of employees engaged in the production of nuclear energy falls within the exclusive powers granted to Parliament under the combined effect of the opening and closing words and head (29) of s.91, and s.92(10)(c) of the Constitution Act, 1867.

[46] I consider that the test described in the B.C. Gas case for an entity which is federal by s.92(10)(a) of the Constitution Act, 1867 is equally applicable to a business which is federally regulated as an aeronautics concern: what is the overall degree of functional integration and common management, control and direction.

[47] Here there is no doubt that were these ground crew employed by a logging company, they would be provincially regulated as part of a forestry concern because forestry is a provincial jurisdiction under ss.92 and 92A of the Constitution Act, 1867. Further, they would at least fall within the type of situation described in the Montcalm Construction case as being employees of a provincial company merely interfacing with a federal concern. However, these are not the facts before the court.

[48] The evidence here reveals a business whose main group of employees are primarily engaged in pure aeronautics work: pilots and maintenance persons. There is no separate division for helicopter logging, and if there were, it is conceded that the pilots engaged in it still would be federally regulated. In addition to the pilots, the company employs its own ground crew to ensure adequate training in the helicopter aspect of the work, concerned for the proper operation of the helicopters. Functionally, the work of all Northern Mountain Helicopter's employees relates to the helicopter business. The employees in question interact with the pilots; their supervision on the ground is by the pilots and their supervisor who communicates with the pilots. The ground crew do not produce separate income or provide a service independent of the entire helicopter transportation service. They are under common management with the pilots and maintenance persons, and their hours of work are dependent on availability of the helicopter.

[49] I agree that the actual duties performed by these employees are like duties performed by provincially regulated employees in, for example, balloon logging. However it is not the nature of the duties which dictates the jurisdictional result, it is the nature of the operation: Northern Telecom Ltd., supra. An operation that cannot be divided without artifice, should not be divided.

[50] The facts of each case dictate the result. I find in this case that there is the necessary degree of functional integration and commonality of management between the ground crew component of the helicopter logging and the rest of Northern Mountain Helicopter's operation to conclude that these employees are not within provincial jurisdiction.

[51] The presumption in favour of provincial regulation has been displaced, in this case, by the character of the petitioner's business.

[52] Northern Mountain Helicopters contends that the ground crew's work is akin to loading a ship, as in The Stevedoring case: Reference: Industrial Relations in Dispute

Investigation Act, [1955] S.C.R. 529. While there is some similarity between that case and the one before me, I prefer to base my conclusion on the unity of the helicopter logging enterprise, the practical inability to split the crew and pilots' effort into different divisions or business, and the authority of the B.C. Gas case, *supra*. I find that persons employed by Northern Mountain Helicopters to build turns and attach logs to its helicopter, to detach logs and to supervise such functions, fall within the federal jurisdiction.

[53] The WCB contends that in the least it had jurisdiction to deal with incidents that occurred when the helicopter was not working. In my view the jurisdiction cannot and should not be parsed into such small portions. The only reason for the presence of Northern Mountain Helicopter employees on site was preparation for the helicopter logging. The caution in Northern Telecom Ltd., not to have regard to casual factors in assigning jurisdiction, is apt. Those incidents were fully within the review of HRDC under the federal jurisdiction. B. Must Internal Remedies be Exhausted?

[54] Both the Attorney General of British Columbia and the Workers' Compensation Board contend that the petition is premature because the petitioner has not availed itself of internal remedies under the Workers' Compensation Act. They say that the court should exercise its discretion and decline to hear the petition, relying upon Adams v. Workers' Compensation Board (1989), 42 B.C.L.R. (2d) 228 (B.C.C.A.); Westbank First Nation v. B.C. (Labour Relations Board) (1996), 38 Admin L.R. (2d) 89 (B.C.S.C.) and Re Harelkin and University of Regina (1979), 96 D.L.R. (3d) 14 (S.C.C.).

[55] The Adams and Harelkin cases confirm the general principle applicable in cases of judicial review on the basis of procedural irregularity, that the courts should decline to engage in judicial review where an alternative remedy exists unless the petitioner can show there are compelling reasons to the contrary. One such reason is that the remedy will be inadequate.

[56] This jurisprudence favours the finding of facts and the expression of opinion by the administrative tribunal, laced with the taste of its specialized knowledge of the subject in dispute.

[57] The Westbank First Nations case concerned a court challenge to constitutional jurisdiction of the tribunal at the same time the matter had been appealed internally. In her decision, Madam Justice Levine deferred to the tribunal to permit it to complete its process.

[58] In other cases of court challenge to constitutional jurisdiction, courts have been willing to review the matter before internal remedies are exhausted; e.g. Re Canadian Pacific Transport Co. Ltd. and Loomis Courier Services Ltd. (1976), 72 D.L.R. (3d) 434

(B.C.S.C.); *Banks v. W.C.B. (B.C.)* (1988), 25 B.C.L.R. (2d) 282 (S.C.); *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. In the *Banks* case, Mr. Justice Gibbs considered the existence of an internal remedy in the case of a tribunal that was alleged to have acted outside its statute, and found that in such a case there could be "no internal remedy ... to exhaust preparatory to coming to court." In the *Bell* case, the Supreme Court of Canada observed at p.775:

In my opinion the appellant was not compelled to await the decision [as to the scope of the Act] before seeking to have it determined in a court of law ...

[59] Thus while it is true that in cases of alleged procedural irregularity the courts decline to hear a case before internal remedies are exhausted, in cases of challenge to the tribunal's constitutional or statutory jurisdiction, a court will be less inclined to require internal remedies to be exhausted in the absence of compelling reasons to hold a hearing.

[60] In this case, unlike the *Westbank First Nations* case, all parties will not be before the tribunal should the court decide the matter must proceed through the internal reviews available under the *Workers Compensation Act*. Proceedings before the WCB would be binding only upon the petitioner and the Board, not upon HRDC even though, as a courtesy, the WCB might invite its federal counterpart to make submissions on the issue. Likewise the WCB would not be bound by a court decision in the federal prosecution against the petitioner for violations of the federal occupational health and safety regulations.

[61] Given the dual proceedings against the petitioner, one set instigated by the WCB for breach of the provincial regulations and one set a prosecution for breach of federal regulations arising from the same incident and raising the same issue of constitutional jurisdiction, and given that the issue raised in the petition is jurisdictional in nature, the court ought not to decline jurisdiction. The most appropriate manner of resolving a jurisdictional impasse where there exist competing claims of jurisdiction is referral to a court through a petition, as has been done here.

## Conclusion

[62] For these reasons, the relief sought in paragraphs 1 through 4 of the Amended Petition is granted. The matter of occupational health and safety standards for the petitioner and its ground crew employees who construct turns, attach turns to the helicopter, detach them, supervise such employees, and those who perform work reasonably incidental to these duties, is declared to fall within exclusive jurisdiction of Parliament.

"M.E. SAUNDERS J."

## Court of Appeal for British Columbia

Before: The Honourable Chief Justice McEachern  
The Honourable Mr. Justice Finch  
The Honourable Mr. Justice Hall

BETWEEN: SHIRLEY HARVEY, on behalf of the  
ESTATE OF ALICE STINSON  
PLAINTIFF  
(RESPONDENT)

AND: HER MAJESTY THE QUEEN IN RIGHT OF THE  
PROVINCE OF BRITISH COLUMBIA and  
THE ATTORNEY GENERAL OF BRITISH COLUMBIA  
DEFENDANTS  
(APPELLANTS)

Counsel for the Appellants H. M. Groberman, Q.C.

Counsel for the Respondent A. P. Berry  
A. J. Waldichuk

Place and Date of Hearing: Vancouver, British Columbia  
29 November, 1999

Place and Date of Judgment: Vancouver, British Columbia  
17 December, 1999

Written Reasons by: The Honourable Mr. Justice Finch

Concurred in by: The Honourable Mr. Justice Hall

Concurring Reasons by: The Honourable Chief Justice McEachern (para.18)

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Reasons for Judgment of the Honourable Mr. Justice Finch:

[1] The defendants appeal an order of the Supreme Court of British Columbia pronounced 6 January, 1999 declaring certain provisions of the *Workers Compensation*

*Act*, R.S.B.C. 1996, c.492 (as amended) to be unconstitutional, and ordering that one definition contained in that legislation be amended. The learned chambers judge held the view that the legislation did not conform to the guarantee of equality contained in s.15 of the *Charter*, and infringed the equality rights of Alice Stinson, now deceased, whose estate is represented in this litigation by her daughter, Shirley Harvey.

[2] The text of s-s.15(1) of the *Charter* reads as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[3] The background to this case is an earlier action, *Grigg v. British Columbia* (1996), 138 D.L.R. (4<sup>th</sup>) 548 (B.C.S.C.). The essential facts of that case are adequately summarized in the D.L.R. headnote at 549:

Under the workers compensation legislation in effect in British Columbia prior to April 17, 1985, widows of workers killed on the job were entitled to survivor's benefits in the form of monthly payments which were terminated upon remarriage or entry into a common law relationship. Widowers who were disabled were also entitled to benefits, which were not terminated upon remarriage. In 1985, in response to the coming into force of s.15 of the *Canadian Charter of Rights and Freedoms*, the legislature amended the legislation to extend the same benefits received by a dependent widow to the widower of a deceased spouse. Remarriage or entry into a common law relationship remained a terminating event for both widows and widowers. In 1993 and 1994 the legislation was further amended to remove remarriage and entry into a common law relationship as a terminating event for the entitlement to the survivor's benefit. The amendment, which resulted in the current entitlement scheme found in s.19 of the *Workers Compensation Act*, R.S.B.C. 1979, c.437, was made retroactive to April 17, 1985, the commencement date of s.15 of the *Charter*, with the effect that widows and widowers who had remarried after this date and had become disentitled to benefits had their benefits reinstated and were compensated for the years of their disentanglement. A widow who had been denied the survivor's pension by virtue of s.19 of the Act due to the fact that she had remarried prior to April 17, 1985, commenced an action against the government on behalf of herself

and as representative of her class and brought an application for summary judgment on the issue of whether s.19 of the *Workers Compensation Act* violated s.15 of the *Charter*. She argued that the impugned legislation discriminated on the grounds of age, sex and marital status. In addition to disputing the claims of discrimination, the government argued that the *Charter* did not have retroactive effect such as to revive rights which crystallized and terminated prior to April 17, 1985.

[4] There, the learned chambers judge held that the amendments to the legislation in 1993 and 1994 granting pension benefits to widows who remarried after 17 April, 1985, discriminated on the basis of marital status against widows who had remarried before that date.

[5] In a subsequent order pronounced on 7 November, 1996 the chambers judge in *Grigg* held that the legislative infringement of s.15 was not justified under s.1 of the *Charter*, and he further ordered that the legislation be read and applied so that widows who remarried prior to 17 April, 1985, would have the same workers compensation pension entitlements as those who remarried after that date.

[6] However, he specified that the order should apply only to those widows who were alive on 16 March, 1995. That is the date on which the *Grigg* action was commenced.

[7] Mrs. Stinson, a widow who would otherwise have qualified for benefits under the terms of the *Grigg* order, died on 5 January, 1995, two months before the *Grigg* action was commenced. Therefore, the order by its terms did not apply to her. Her estate asked the Workers Compensation Board to reinstate her survivor's benefits, but the Board refused to do so. This action was commenced on behalf of her estate on 29 August, 1997.

[8] In the court below the defendants argued that the estate's claim should fail for a number of reasons, which the learned chambers judge summarized as follows:

- (a) The subject matter of this claim has been fully and finally adjudicated upon in the *Grigg* case. As no appeal was taken from the final order the matter is *res judicata*;
- (b) The impugned legislation as now interpreted by virtue of the declaration made in *Grigg* does not discriminate against any class of person enumerated or analogous to those set out in s.15 of the *Charter*. Alternatively, any infringement of s.15 is saved by s.1;

- (c) The plaintiff, being an estate, is not a person with rights under s.15 of the *Charter* and therefore has no status to bring this action;
- (d) The claim put forward by the plaintiff to the reinstatement of a pension or for damages, interest and costs are matters within the exclusive jurisdiction of the Workers' Compensation Board and this court does not have the jurisdiction to make the order sought;
- (e) The deceased did not at any time apply to have her survivor's pension reinstated. Only the survivor and not the executrix of the estate has the right to make application for a pension; and
- (f) The remedies sought by the plaintiff are not appropriate.

[9] The judge rejected each of those arguments with oral reasons.

[10] On this appeal, the defendants allege the following errors:

- (a) The learned Chambers Judge erred in failing to find that the plaintiff's claim was barred by the doctrine of *res judicata*.
- (b) The learned Chambers Judge erred in ignoring the effect of the *Grigg* Order in considering whether the plaintiff estate's rights under s. 15 of the *Canadian Charter of Rights and Freedoms* were violated.
- (c) The learned Chambers Judge erred in finding the plaintiff had standing to bring the claim.
- (d) The learned Chambers Judge erred in finding that s.19 of the *Workers Compensation Act*, R.S.B.C. 1996, c.492 violates s.15 of the *Canadian Charter of Rights and Freedoms*.
- (e) The learned Chambers Judge erred in granting a remedy effectively and dramatically amending the *Workers Compensation Act*.

[11] In my respectful view, this appeal should succeed on the third ground, namely that the deceased's estate has no standing to pursue on behalf of the deceased a claim for breach of her s.15 *Charter* rights. Section 15 protects the equality rights of "every individual". The rights guaranteed are personal, and the power to enforce the guarantee

resides in the person whose rights have been infringed. Here it is the estate of the deceased which seeks a remedy for the alleged breach of Mrs. Stinson's right. Such a claim is not open to the estate, as a third party, under the language of the *Charter*.

[12] The estate's lack of standing cannot be overcome by reliance on the *Estate Administration Act*, R.S.B.C. 1996, c.122. Section 59(2) of that Act authorizes an executor or an administrator of a deceased person's estate "to continue or bring and maintain an action for all loss or damage to the person or property of the deceased...". This is not a claim for loss or damage. It is a claim for declaratory relief under s.52 of the *Charter*. The *Estate Administration Act* therefore has no application.

[13] The personal nature of the s.15 equality rights, and their termination upon death of the affected individual was effectively recognized by the learned chambers judge in *Grigg*, when he held that his order would apply only to those who were alive on 16 March, 1995. The personal nature of *Charter* rights was also recognized, in somewhat different circumstances, by Mr. Justice Shabbits in *Wilson Estate v. Canada* (1996), 25 B.C.L.R. (3d) 181 at 186-187, with which I respectfully agree. The remedy sought in *Wilson* invoked the provisions of s.24 of the *Charter*. That is not so in this case where the plaintiff relied only on s.52, and seeks only declaratory relief. Nevertheless, the result is in my view the same.

[14] The personal nature of *Charter* rights was also emphasized in *Irwin Toy Limited v. Quebec, Attorney General*, [1989] 1 S.C.R. 927 where Dickson, C.J.C., Lamer and Wilson, JJ. for the majority said at 1004 in reference to s.7:

That is, read as a whole, it appears to us that this section [s.7] was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings."

[15] The rights affirmed by s.7 are for "everyone". The rights affirmed by s.15 are for "every individual". The rights in both sections are personal in nature, but to my mind, it is even more clear by the use of the words "every individual" in s.15, that those rights belong only to human beings, and not to artificial entities such as an estate.

[16] In my opinion, the plaintiff has no standing to maintain this action and I do not find it necessary to consider the other grounds of appeal.

[17] I would allow the appeal.

**"The Honourable Mr. Justice Finch"**

**I AGREE:**

**"The Honourable Mr. Justice Hall"**

Reasons for Judgment of the Honourable Chief Justice McEachern:

[18] I agree this appeal should be allowed for the reasons given by Mr. Justice Finch.

[19] I only wish to add that I have serious reservations about the correctness of the decision in *Grigg v. British Columbia*, (1996), 138 D.L.R. (4th) 458 (B.C.S.C.), which was not appealed. The reason for my concern about that case is that the plaintiff, and the deceased in this case, remarried before section 15 of the *Charter* came into force. I doubt if that section should be given retrospective application to revive rights and obligations that had been settled by legislation that was valid when section 15 came into force.

[20] As this appeal may properly be decided on the grounds stated by Mr. Justice Finch, I do not think it necessary to give full consideration to the other problem I have described. However, I would not wish this appeal to be concluded without at least mentioning my concern about the correctness of the decision in *Grigg*.

[21] I, too, would allow the appeal.

**"The Honourable Chief Justice McEachern"**

# Court of Appeal for British Columbia

## ORAL REASONS FOR JUDGMENT

Before:

The Honourable Madam Justice Southin

June 1, 2000

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Mackenzie

Vancouver, B.C.

IN THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT,  
RSBC 1996, C.241

AND IN THE MATTER OF THE DECISIONS OF THE WORKERS'  
COMPENSATION BOARD DATED FEBRUARY 26, 1997  
(DECISIONS 99-0354 AND 99-0355)

BETWEEN: GREYHOUND CANADA  
TRANSPORTATION CORP.

PETITIONER  
(APPELLANT)

AND: MARIUSZ BRZOWSKI KAZIMIERZ KOWALSKI, and  
WORKERS' COMPENSATION BOARD

RESPONDENTS  
(RESPONDENTS)

Appearing for the Appellant

G. Altridge

Appearing for the Respondents Mariusz Brzowski and  
Kazimierz Kowalski

M. Ray

Appearing for the Respondent  
Workers' Compensation Board

S. Nielsen and  
L. Courtenay

[1] **MACKENZIE, J.A.:** The respondents were injured in a motor vehicle accident while travelling on a Greyhound bus. The respondents were employees and the appellant, Greyhound Canada Transportation Corp. ("Greyhound"), an employer within the definition of those terms in the *Workers Compensation Act*, R.S.B.C. 1996, c. 492. The Workers' Compensation Board, Appeal Division, held, however, that the respondents' injuries did not arise out of and in the course of their employment. As a consequence, actions by the respondents against Greyhound for damages for the injuries suffered in the accident were not barred by s. 10 of the *Act*. Greyhound's petition for judicial review of that decision was dismissed by Madam Justice Allan in Chambers.

[2] The parties are agreed that the sole issue on this appeal is whether the Chambers judge was correct in concluding that the decision of the Appeal Division was not "patently unreasonable": see *Workers' Compensation Board v. Kovach et al*, 2000 S.C.C. 3, reversing the majority decision in *Kovach v. Singh et al* (1998), 52 B.C.L.R. (3d) 98 (C.A.) for the dissenting reasons of Donald J.A.

[3] Greyhound relies on the exposition of the meaning of the phrase "patently unreasonable" in the context of legislation by Beetz J. in the case of *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board* [1984] 2 S.C.R. 412 at 419-20:

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

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

To this passage, must be added the words of Donald J.A. in *Kovach, supra*, at 112:

...the review test must be applied to the result not the reasons leading to the result. In other words, if a rational basis can be found

for the decision it should not be disturbed simply because of defects in the tribunal's reasoning.

[4] The respondents were commercial fishermen returning to their homes in Victoria from Prince Rupert at the time of the accident. They had been working primarily as divers for clams, sea urchins and sea cucumbers from a fishing vessel owned by Ted Rajkowski. The respondents were paid a percentage of gross sales by buyers and are characterized as independent contractors rather than employees of the vessel owner. They deduct various expenses from the revenue for income tax purposes, including the cost of the bus trip to Victoria.

[5] The *Fishing Industry Regulations* pursuant to the *Act* state that:

...a commercial fisherman's employment is his occupation as a commercial fisherman.

***Regulation 2(2)***

The appellant submits that this definition must be read in the light of s. 4(2) of the *Act*, and a similar regulation which refers to business and employment in *Regulation 14* must also be read in the context of s. 4(2).

4. (2) Where it appears to the board that a provision of this Act or of a regulation made under another section of this Act is inappropriate or unworkable in relation to commercial fishermen, the fishing industry or commercial buyers, or other commercial recipients of the fish, the board may, by regulation, make the rules and give the decisions it considers fair and appropriate having regard to the intent that all commercial fishermen shall as far as possible receive the benefit of and be subject to Part 1.

Greyhound emphasizes the final words of that subsection:

...to the extent that all commercial fishermen shall as far as possible receive the benefit of and be subject to Part 1.

[6] The Appeal Division gave extensive reasons for its decision. The essential passages appear to me to be the following:

The thrust of the principal arguments advanced by defendant's counsel is that the plaintiffs were travelling in the course of their employment at the time of the accident. The general proposition is that accidents that occur

when workers are travelling between their homes and their normal places of work are not compensable (item #18.00). The most straight forward application of this principle is to a worker who lives in an urban area and travels back and forth to the same office every day. However, another general proposition is that, when workers are employed to travel, accidents that occur during the course of that travel are compensable (item #18.40). This principle is applied to, among others, workers such as travelling salespeople. The plaintiffs fall in a grey area that exists between the two ends of the spectrum. They cannot be classified as commuters in the typical sense. The distances they travelled were substantial and the nature of their work required some travel. However, they are also unlike workers such as travelling salespeople. The policies concerning travelling workers provide guidance in determining whether accidents involving workers in the "grey area" are compensable. The answer in the situation before me is not clear. However, I find that the plaintiffs are more analagous to workers who are commuting than they are to travelling salespeople. In this regard, I have found guidance in item #18.22 because it deals with the situation in which workers are travelling to a particular work site. The policy appears to liken the work site to a commuter's normal place of work. However, it states that the remoteness of the work site must be considered. It implies that when a work site is remote, there may be increased risks associated with travel to and from it and an accident will be compensable as a result of the increased risks. If accidents in the course of all travel to such work sites was intended to be compensable, there would be no need for the policy to make a distinction in respect to remoteness. It is clear that the policy is intended to apply to long distance travel (as opposed to being limited to daily travel) because it refers to travel by scheduled flights. In this case, I do not find that Prince Rupert constitutes a remote work site. The plaintiffs were travelling on a regularly scheduled bus trip and the accident occurred on a public highway. Accordingly, unless an exception is applicable, I find that the general proposition that the accident is not compensable is applicable here.

...

In this case, the plaintiffs were travelling home after the Prince Rupert fishing opening. They were not travelling to another work site. They were travelling on a regularly scheduled bus trip and they were paying for the trip themselves. The presence of other factors, such as a method of transportation provided by or paid for by the employer or Mr. Rajkowski, may have been sufficient to bring them within the course of their

employment. However, I find there were insufficient additional factors to bring the plaintiffs within the course of employment. The fact that Mr. Rajkowski had asked them to travel to Prince Rupert to fish is not, in itself, sufficient because it appears to be a factor that would normally exist in respect to all travel to work sites. I find that the applicable policies do not indicate that the accident was compensable. I find the injuries did not arise out of and in the course of the employment of the plaintiffs.

[7] Greyhound contends that the analogy within an employer-employee relationship is patently erroneous and that the correct issue is whether the respondents were engaged in their business or occupation at the time of the accident. As stated above in *Kovach, supra*, it is not enough to criticize a tribunal's reasoning if the result can be rationally supported. The relationship between employment under the *Act* and travel to and from work sites is a vexing one. The Board is charged with the difficult task of drawing the line in particular cases. The Appeal Division had in mind and referred to in its reasons the passages in the *Act* and *Regulations* relied on by Greyhound in this appeal.

[8] I cannot say that the result reached by the Board was patently unreasonable on the facts before it. Accordingly, I think that the Chambers judge was correct in dismissing the petition for judicial review, and I would dismiss the appeal.

[9] **SOUTHIN, J.A.:** I agree.

[10] **HALL, J.A.** I agree.

[11] **SOUTHIN, J.A.** Order accordingly.



# Court of Appeal for British Columbia

## ORAL REASONS FOR JUDGMENT

Before:

The Honourable Chief Justice McEachern

June 16, 2000

The Honourable Mr. Justice Donald

The Honourable Madam Justice Huddart

Vancouver, B.C.

BETWEEN: NORTHERN MOUNTAIN HELICOPTERS INC.

PETITIONER  
(RESPONDENT)

AND: WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA,  
THE ATTORNEY GENERAL OF BRITISH COLUMBIA, AND  
THE ATTORNEY GENERAL FOR CANADA as a representative  
of Her Majesty and Her Servants employed by the  
Department of Human Resources and Development (Canada)

RESPONDENTS  
(APPELLANTS)

Appearing for the Appellant  
Workers' Compensation Board of British Columbia

S.A. Nielsen  
and L. Courtenay

Appearing for the Appellant  
The Attorney General of British Columbia

S. Macdonald

Appearing for the Respondent  
The Attorney General for Canada

A.D. Louie  
and R.M. Yamanouchi

Appearing for the Respondent  
Northern Mountain Helicopters Inc.

A.M. Grant

[1] **DONALD, J.A.:** This is an appeal by the Workers' Compensation Board of British Columbia and the Attorney General of British Columbia from a judgment given by Madam Justice Saunders, then of the Supreme Court, on 30 October 1998 in which she declared that the occupational health and safety regime for the ground crew employees in the petitioner's heli-logging operations is federal rather than provincial.

[2] The decision may be found at (1998), 61 B.C.L.R. (3d) 361 (S.C.), [1999] 8 W.W.R. 674 (B.C.S.C.) and at [1998] B.C.J. No. 2525 (Q.L.)(B.C.S.C.).

[3] The appellants allege a number of errors in the judgment, but in my opinion none of the allegations is made out. The Chambers judge found the relevant facts and applied them to the appropriate tests for determining constitutional jurisdiction over employees. In particular, she found that the ground crew employees were integral to an aeronautics undertaking, a matter assigned to the federal government under the peace, order and good government provision in s. 91 of the *Constitution Act, 1867*: *Johannesson et al v. Municipality of West Saint Paul*, [1952] 1 S.C.R. 292. Moreover, she found that the heli-logging operations formed part of a larger transportation undertaking and were not a discrete business whose constitutional characteristics could be separately assessed.

[4] The facts supporting the finding of functional integration were compelling. The employees in question variously construct the loads, attach them to the line from the helicopter, and detach them at the landing site. These activities require close interaction between ground crew and pilot. The core undertaking of the petitioner is transportation by air, here the transportation of logs by air. The loading and unloading of cargo is essential and integral to the carriage of goods; hence it was decided in the *Stevedoring Reference (Re Validity and Applicability of the Industrial Relations and Disputes Investigation Act (Eastern Canada Stevedoring Company Ltd.))*, [1955] S.C.R. 529, that longshoremen were federally regulated as part of navigation and shipping under s. 91(10) of the *Constitution Act, 1867*.

[5] I would dismiss the appeal for the reasons given by the judge below with which I am in substantial agreement.

[6] Fresh evidence was adduced before us to establish that for a period of approximately 1 1/2 years the petitioner operated a logging company in a joint venture with a provincial logging contractor. This occurred after the facts considered by the Chambers judge. As of May, 1999, the company discontinued the joint venture and resumed its previous mode of operation. The decision in this appeal is limited to the circumstances when the dispute arose.

[7] MCEACHERN, C.J.B.C.: I agree.

[8] HUDDART, J.A.: I agree.

[9] MCEACHERN, C.J.B.C.: The appeal is dismissed.



# In the Supreme Court of British Columbia

BETWEEN: MONA YEE

PETITIONER

AND: WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

RESPONDENT

## Reasons for Judgment of the Honourable Madam Justice Lynn Smith

Counsel for the Petitioner:

P.K. Shergill  
M. Selkirk

Counsel for the Respondent,  
Workers' Compensation Board Legal Services:

D. Neilson

Date and Place of Trial:

New Westminster, BC  
February 25, 2000

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## INTRODUCTION

[1] The petitioner, Mona Yee, seeks judicial review under the *Judicial Review Procedure Act*, R.S.B.C. 1996, chap. 241, of two decisions of the respondent, Workers' Compensation Board, rendered October 29, 1999 and November 17, 1999.

## BACKGROUND

[2] The petitioner made a claim in 1989 under the *Workers Compensation Act*, R.S.B.C. 1996, chap. 492, for assistance in connection with a work-related disability. She has an asthmatic condition which made her unable to continue with her previous work as a hairdresser. Despite an attempt to retrain as a travel agent, and attempts to find other work, it appears that she has remained unemployed. Over the years, she has sought a ruling that she suffers permanent total disability which would make her eligible for benefits under s. 22 of the *Act*. However, despite appeals at all levels, the Board has instead awarded her benefits under s. 23 of the *Act* for permanent partial disability.