Date: 20010509
Docket: CA 166227

NOVA SCOTIA COURT OF APPEAL

Cite as: Queen Elizabeth II Health Sciences Centre v. Nova Scotia (Workers' Compensation Appeals Tribunal) , 2001 NSCA 75

Glube, C.J.N.S.; Hallett and Cromwell, JJ.A.

BETWEEN:

QUEEN ELIZABETH II HEALTH SCIENCES CENTRE

Appellant

- and -

WORKERS' COMPENSATION APPEALS TRIBUNAL

First Respondent

- and -

DAVID HANS ERL

Second Respondent

- and -

DR. ROSS LEIGHTON, DR. M. GLAZEBROOK, DR. S. CONNOLLY, DR. J. RANDALL, MICHALE SUTTON and BRENT THOMPSON

Third Respondents

REASONS FOR JUDGMENT

Counsel:	Carman G. McCormick, Q.C. and Christa M. Hellstrom for the appellant Sarah Bradfield for the first respondent Janet E. Curry for the Workers' Compensation Board Glenn E. Jones for the second respondent Third respondents not appearing

Appeal Heard: January 16, 2001

Judgment Delivered: May 9, 2001

THE COURT: Appeal allowed and the decision of the Workers' Compensation Appeals Tribunal in relation to the appellant hospital is set aside per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Hallett, J.A. concurring.

CROMWELL, J.A.:

I. INTRODUCTION:

[1] Workers' compensation legislation is often described as an "historic trade-off" of workers' and employers' rights. Workers lose the right to sue for damages caused by work place injuries but receive guaranteed, no fault compensation without litigation. Employers must contribute to the accident fund out of which the compensation is paid, but they receive immunity from civil suits for work place injuries.

[2] This appeal raises an issue at the heart of this historic trade-off. It concerns the scope and definition of an employer's immunity from a civil suit brought by an injured worker who has received compensation benefits. The effect of the Workers' Compensation Appeals Tribunal decision under appeal is that the appellant hospital must contribute to the accident fund but, in some circumstances, it is not immune to civil actions by injured workers.

[3] Mr. Erl, one of the respondents, was injured in a work place accident for which he received workers' compensation benefits. His injury required treatment by a number of doctors at the Queen Elizabeth II Health Sciences Centre ("QE II" or "hospital") as well as by other medical personnel. Mr. Erl thought that they had treated him negligently and wished to sue. His counsel was concerned, however, that the action might be barred by the **Workers' Compensation Act**, S.N.S. 1994 - 95, c. 10. Consistent with the historic trade-off, s. 28 of the **Act** provides that its benefits are in lieu of all rights of action to which the injured worker may be entitled, not only against his own employer but also against any other employer subject to the **Act**.

[4] Section 29 of the **Act** gives the Workers' Compensation Appeals Tribunal ("WCAT") exclusive jurisdiction to determine whether or not an action is barred by s. 28. Mr. Erl, therefore, went to WCAT to have this question resolved. WCAT decided that the action against the doctors and the QE II was not barred by the **Act**. The QE II appeals.

II. WCAT'S DECISION AND POSITION OF THE PARTIES

[5] The bar of civil actions in s. 28 of the **Act** applies to rights of action to which a "worker" may be entitled "... as a result of any personal injury by accident... arising out of and in the course the worker's employment..." against any "...employer subject to this Part...": see s. 28(1)(b) and (d).

There was no dispute that Mr Erl was a worker within the meaning of the **Act**. There were two other questions raised. The first was whether the right of action advanced in the civil suit resulted from a "personal injury by accident arising out of and in the course of [Mr. Erl's] employment". The second, for the purposes of this appeal, was whether the QE II was an employer subject to the **Act**.

[6] On the first issue, Mr. Erl's submission to WCAT was that the medical negligence represented a new cause of injury and, therefore, his right of action did not result from an injury by accident which arose out of and in the course of his employment. If this were so, the medical negligence action would not be barred.

[7] WCAT rejected this submission, relying on two recent decisions from the Supreme Court of Canada, **Kovach v. British Columbia (Workers' Compensation Board**), [2000] 1 S.C.R. 55 and **Lindsay v. Saskatchewan (Workers' Compensation Board)**, [2000] 1 S.C.R. 59. Mr. Erl's work place accident continued, in WCAT's view, to be the operative cause of his injury and his claim relating to negligent medical treatment resulted from the original work place injury.

[8] The second issue was whether the hospital is an employer subject to the **Act** within the meaning of s. 28(1)(b). As noted, s. 28 bars action, not only against an injured worker's own employer but also against "... any other employer subject to this Part [i.e., Part I] ...": see s. 28(1)(b). The question, then, is whether the hospital is such an employer.

[9] Section 3 of the **Act** defines those to whom Part I of the **Act** applies:

> 3 (1) This Part applies to employers and workers engaged in, about or in connection with any industry prescribed by the Governor in Council by regulation.
>
> (2) The Governor in Council may, by regulation, exclude any employer, class of employer, or class of worker engaged in, about or in connection with any industry prescribed pursuant to subsection (1).

[10] Section 3(1) and (2) refer to regulations. They may be found in the Workers' Compensation General Regulations, N.S. Reg. 22/96, as amended up to and including N.S. Regulation 17/2000. Sections 2 and 3 of the Regulations provide for inclusions and exclusions from the operation of the **Act**. Section 2 deals with "industries" which are listed in Appendix A and which are subject to the **Act**. Appendix A, which is headed "List of Occupations Subject to the Act" includes "operation of hospitals, nursing

homes, homes for the aged, welfare homes, municipal homes, convalescent homes and veterinary hospitals." Section 3 of the Regulations, which provides for exclusions from the operation of the **Act**, reads in part as follows:

> 3.. Despite Section 2, employers and workers engaged in, about or in connection with the following industries are excluded from the operation of the Act:
>
> ...
>
> (d) educational institutions, surgical medical, veterinary work and dental surgery. (emphasis added)

[11] The Tribunal was thus faced, on one hand, with the "operation of hospitals" as being expressly subject to the **Act** and, on the other, the express exclusion from it of the "surgical medical" industry. WCAT resolved the apparent conflict by deciding that while the hospital was, generally, "...included within the coverage of the Act", it was not subject to the **Act** for the purposes of this civil action. It reasoned that the particular actions of the hospital's servants and agents which gave rise to the civil claim related to ".. those activities upon which surgical or medical competence and professionalism touch" and that such activities were excluded from the "operation of hospitals". WCAT outlined its reasoning as follows:

> Pursuant to s. 2 of the *Regulations* and Appendix "A" to the *Regulations*, the industry of the "operation of hospitals" is included within the scope of coverage of the *Act*. The Respondent Hospital is an operating hospital, and is therefore a covered employer. However, pursuant to s. 3 of the *Regulations*, employers and workers engaged in, about or in connection with the surgical medical industry are excluded from the scope of coverage of the *Act*. In the Panel's view, the Governor in Council has seen fit to carve out an aspect of the operation of hospitals that is not covered by the *Act*. The Panel accepts the submission of Counsel for the Respondent Hospital that to interpret the exclusion of the "surgical medical" industry to exclude the operation of hospitals, when the operation of hospitals was specifically included in s. 2 of the *Regulations*, would lead to an absurd and contradictory result. Counsel for the Respondent Hospital appears to submit, however, that the term "surgical medical" refers only to the actual performing of medical surgery. The Panel does not find that such a narrow interpretation is warranted upon a reading of the relevant sections.
>
> The Panel finds that the term "surgical medical" contained in s. 3 of the *Regulations* applies to the activities which gave rise to the Applicant's cause of

action. The Applicant allegedly received medical treatment from the Respondent Physicians and, therefore, even had the Panel found that physicians were initially included within the coverage afforded by the *Act* or the *Regulations* (which the Panel has not found), the Respondent Physicians would fall within the exclusion contained in s. 3 of the *Regulations*. The Panel further finds that the Respondent Hospital in these circumstances was, in the words of s. 3(d) of the *Regulations*, "an employer engaged in, about or in connection with" the surgical medical industry and, therefore, is excluded from the operation of the *Act* on the facts of this case.

The Panel finds that the term "surgical medical" refers to the provision of medical treatment by medical professionals to patients generally, and not solely to actual "surgery" in the dictionary sense of that word. The Panel notes that Appendix "A" to the *Regulations* includes the operation of veterinary hospitals but excludes, pursuant to s. 3(d), actual "veterinary work". The Panel finds the exclusion of veterinary work when the operation of veterinary hospitals is included in the scope of coverage, analogous to the exclusion of surgical medical work when the actual operation of hospitals themselves is included in the scope of coverage. The Panel notes that Donald J.A. in *Kovach* found it "vexing" that a physician secured immunity from action through participation in the workers' compensation scheme as an employer or a worker. The initial non-inclusion of professionals and the related "surgical medical" exclusion contained in the Nova Scotia regime avoids such a vexing result.

In short, professionals and professional activity are not included in the Nova Scotia workers' compensation scheme. The operation of hospitals is included. However, the "surgical medical" exemption excludes from the regime, those activities upon which surgical or medical competence and professionalism touch. The "surgical medical" exemption reinforces and gives effect to the initial non-inclusion of professional activity in the workers' compensation regime. (emphasis added)

[12] QE II submits that WCAT's decision is patently unreasonable. It says that WCAT's interpretation is inconsistent with the intention of the Legislature, contrary to the purpose of the legislation and that it creates an absurd result. These submissions are summarized as follows in the appellant's factum:

97. If the WCAT's decision is allowed to stand, the result will be absurd. The Appellant would continue to be an employer assessed at a relatively high rate pursuant to the *Act*, and be required to contribute to the accident fund millions of dollars while, on the other hand, the Appellant would be subject to damage awards arising from such claims as the one before this Honourable Court, as well as claims for workplace injuries. It would be both inconsistent and an absurd

result to have the Appellant be financially responsible in both the workers' compensation system and the tort system.

[13] The Board, in its submission, notes that the effect of WCAT's decision is that a major employer with a large number of employees and which contributes nearly $4 million in assessments to the workers' compensation scheme does not have the benefit of the historic trade-off. Simply put, the hospital pays into the accident fund, but is not immune from civil suits. The Board also advises that WCAT's decision is inconsistent with the accepted practice of over 40 years standing.

[14] The respondent, Mr. Erl, submits that WCAT's interpretation of the relevant provisions is reasonable and the Court should not intervene.

III. ISSUES

[15] On appeal, no issue is taken with the propositions that Mr. Erl is a worker and that his claim results from an injury in the course of employment within the meaning of the **Act**. The main point in controversy is whether WCAT committed reversible error in concluding that the civil action is not barred because the hospital is not an employer subject to the **Act** in this case. There are, however, threshold issues concerning this Court's jurisdiction and the applicable standard of review.

IV. ANALYSIS:

(a) Jurisdiction and Standard of Review:

[16] At first reading, the provisions of the **Act** dealing with this Court's jurisdiction appear to conflict. Section 29 entrusts to WCAT the determination of whether an action is barred by s. 28. It also appears to preclude appeal of its decision. Section 29(3) and (4) read as follows:

> 29 (3) The Appeals Tribunal has <u>exclusive jurisdiction</u> to make a determination of whether the right of action is removed by this Part.
>
> (4) <u>The decision of the Appeals Tribunal pursuant to this Section is final and conclusive and not open to appeal, challenge or review in any court,</u> and if the Appeals Tribunal determines that the right of action is barred by this Part, the action is forever stayed.
>
> (emphasis added)

[17] However, s. 256(1) provides for an appeal to this Court from "a final order, ruling or decision of the Appeals Tribunal ... on any question as to the jurisdiction of the Appeals Tribunal or on any question of law but on no question of fact." This is a general right of appeal and would appear to include an appeal from a finding of the Tribunal under s. 28. The threshold questions, therefore, are whether an appeal lies to this Court from the Tribunal's determination under s. 28 and, if so, what standard of judicial review applies to its decision.

[18] To address these issues, it will be helpful to set out some of the relevant legislative history which, I think, helps to explain how the apparent inconsistency came about and also how it should be resolved.

[19] Under the predecessor to the current legislation (**The Workers' Compensation Act**, R.S.N.S. 1989, c 508), there was, as there is under the current legislation, an appellate tribunal (then called the Workers' Compensation Appeals Board). As under the current legislation, there was an appeal from that tribunal, by leave, to the appellate court (at the time, the Appeal Division of the Supreme Court) on questions of law or jurisdiction. There was also a bar on civil actions comparable to that found in the current legislation. However, unlike the current **Act**, there was no procedure set out for determination of whether a particular action was barred. That determination, under the former **Act**, was made by a judge: see **Goulden v. Taylor** (1999), 177 N.S.R. (2d) 382 (N.S.C.A.) at § 4; **Spencer v. Mansour's Limited, et al.** 2000 NSCA 59 (application for leave to appeal to S.C.C. dismissed [2000] S.C.C.A. No. 374).

[20] When the current statute was first enacted **(Workers' Compensation Act**, S.N.S. 1994 -1995, c. 10), it changed the previous legislation in two relevant respects. First, it entrusted to the new appeals tribunal, WCAT, the exclusive jurisdiction to determine whether civil actions are barred by the **Act**: s. 29. Second, the new legislation limited the grounds of appeal from WCAT to the Court of Appeal to questions of jurisdiction: s. 256.

[21] As initially enacted, the new legislation did not create an inconsistency in any practical sense between the privative clause protecting the Tribunal's decisions under s. 29 and the right of appeal to this Court on questions of jurisdiction under s. 256. This is noted in **Imperial Oil Ltd. v. Parsons** (1998), 170 N.S.R. (2d) 374 (C.A.). Freeman, J.A. stated:

> The Tribunal's jurisdiction to determine whether an action is barred under **s. 28** is contained in **s. 29**, as follows: .....
>
> These are provisions of the current **Act**, which came into effect on February 1, 1996. The question was raised in oral argument on the appeal, but not before the Tribunal, whether the previous legislation might apply. Without deciding the question, the panel proceeded on the assumption, shared by the Tribunal, that the current **Act** applies to the respondent's claim in the pleadings, as amended in 1997. As the privative clause in **s. 29(4)** would be *ultra vires* without reading in an exception providing for a resort to the courts on issues of jurisdiction (see **Crevier v. Attorney General of Quebec**, [1981] 2 S.C.R. 220), it was further assumed that the appeal was properly before the panel pursuant to the statutory right of appeal in s. 256(1): ...

[22] In addition to Freeman, J.A.'s reference to **Crevier v. Quebec (Attorney General) and Cofsky and Alberta (Attorney General)**, [1981] 2 S.C.R. 220, I would also note decisions to the same effect in **United Nurses of Alberta v. Alberta (Attorney General)**, [1992] 1 S.C.R. 901 at 936 and **United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.,** [1993] 2 S.C.R. 316 at 333. It follows that the privative clause in s. 29 of the **Act** must be understood as permitting judicial review on the question of jurisdiction.

[23] The general right of appeal on jurisdictional questions and the privative clause were easily reconciled. There was a clear legislative intention to have a general right of appeal to this Court, on jurisdictional grounds only, from final decisions of WCAT. The privative clause protecting WCAT's determination could not be effective to oust judicial review on jurisdictional grounds. Therefore, there was no practical inconsistency between a right of appeal to this Court restricted to jurisdictional issues and the privative clause protecting WCAT's determination of whether a civil action is barred.

[24] The clarity of this situation was muddied, somewhat, by the 1999 amendments to the legislation: S.N.S. 1999, c. 1. In those amendments, the scope of appeals to this Court was expanded to include questions of law as well as of jurisdiction. The privative clause in relation to WCAT's determinations concerning the bar of civil actions (s. 29) was left unchanged. The result, as noted, is that s. 29 provides that there is no appeal from WCAT's determination of whether the right of action is barred, while s. 256 provides that there is an appeal from any final decision of WCAT on any question of law or jurisdiction.

[25] If taken literally, these provisions could be seen as giving rise to two internal inconsistencies in the statute. The first is the obvious one that the **Act** permits appeals to this Court from WCAT on questions of law while, on the other, provides that WCAT's decisions concerning the bar of civil proceedings are not subject to appeal. The second arises from the fact that the legislation apparently intends there to be a general right of appeal to this Court from all final WCAT decisions under the **Act**, but s. 29 would require judicial review of WCAT's application of the bar to take place in the Supreme Court by way of *certiorari*. As noted, s. 29 does not preclude judicial review on jurisdictional grounds, but requiring that to be done in the Supreme Court is inconsistent with the apparent intent that all judicial review of WCAT's final decisions under the **Act** be by way of appeal to this Court.

[26] This is one of those occasions on which the literal meaning of the words in the statute must give way to an interpretation which is consistent with the internal coherence of the statute. As Pierre-André Côté states in *The Interpretation of Legislation in Canada* (3d, 2000, Carswell) at p. 321:

> The courts may be justified in setting aside a meaning that seems clear and precise at first glance, if in so doing the internal consistency of the statute is re-established. The "Golden Rule" allows the judge to dismiss the ordinary sense of a word or expression in the interests of a coherent interpretation of the law as a whole.

[27] In my view, the apparent inconsistency is easily explained by legislative oversight when the scope of appeals to this Court was expanded in 1999. The inconsistency became a practical problem only when appeals to this Court could address errors of law as well as jurisdiction. The apparent inconsistency is easily reconciled, however. Section 256 may be applied by affirming that there is an appeal to this Court from WCAT's s. 29 determinations. The privative clause in s. 29 may be given effect by applying a standard of review (as the Court did in **Parsons**) that permits judicial intervention only in the case of jurisdictional errors.

[28] Jurisdictional error will occur when the tribunal errs in interpreting provisions limiting its jurisdiction or makes a patently unreasonable decision: see **Pasiechnyk v. Saskatchewan (Workers' Compensation Board)**, [1997] 2 S.C.R. 890 at 904. As determined in **Pasiechnyk**, provisions such as s. 28 are not, to use the traditional language, "jurisdiction limiting" provisions. In the face of a full privative clause, such as that in s. 29, judicial review should be limited to the patently unreasonable standard.

[29] As noted by Bastarache, J. in **Pushpunathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982 at § 26, the central inquiry in determining the appropriate standard of judicial review is the legislative intent of the statute creating the tribunal whose decision is being reviewed. He referred to Sopinka, J. in **Pasiechnyk, supra**, who defined the inquiry this way: "[w]as the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?" In discovering this legislative intent, the court is to adopt a pragmatic and functional approach (see **U.E.S. Local 298 v. Bibeault**, [1998] 2 S.C.R. 1048. This requires the weighing of a number of factors including the presence or absence of privative clauses, the nature of the tribunal, the purpose of the legislation as a whole and the nature of the problem or issue to be addressed. In short, there is to be less emphasis on attaching labels such as "jurisdictional" to particular issues or provisions. There is to be more emphasis on a rigorous interpretation of the relevant legislation to determine the legislature's intended division of labour between the tribunal and the reviewing court.

[30] As Bastarache, J. said in **Pushpunathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982 at 1004:

> [28] Although the language and approach of the "preliminary", "collateral" or "jurisdictional" question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of "jurisdictional questions" which must be answered correctly by the tribunal in order to be acting intra vires. But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.
>
> (emphasis added)

[31] The distinction between questions of law and jurisdiction is, of course, relevant in the statutory appeal to this Court, the scope of which is defined in those terms by the legislation: see s. 256. As noted earlier, provisions such as s. 28 have been found not to be "jurisdiction limiting" provisions. The appropriate standard is, therefore, patent unreasonableness. In light of

Pasiechynk and **Parsons**, the "functional or pragmatic" approach also strongly supports the conclusion that the appropriate standard of review of WCAT's decisions respecting the bar of civil actions is the patently unreasonable standard.

[32] The selection of this standard also restores internal coherence to the statute. It is consistent with the privative clause in s. 29 because the application of the patently unreasonable standard of review effectively restricts the appeal on this issue to review for jurisdictional error. It also gives effect to the Legislature's intent, as expressed in s. 256, that there should be a general right of appeal, by leave, to this Court from all final decisions of WCAT under the **Act**.

[33] I, therefore, conclude that the appeal is properly before the Court under s. 256 and that the standard of review is that of patent unreasonableness.

(b) Merits of the Appeal

[34] As noted, the bar of civil actions is a central feature of the workers' compensation system and one that is fundamental to its integrity: **Pasiechnyk, supra** per Sopinka, J. at 909 and 911. Courts have been justly reluctant to interfere with decisions about the definition and scope of the bar of civil actions made by specialized workers' compensation tribunals. These tribunals, when making decisions on this subject, are generally protected, as they are in the Nova Scotia legislation, by strong privative clauses and the subject-matter is at the core of their jurisdiction and specialized functions.

[35] Judicial reluctance to intervene is reflected in the scope of review which courts apply: judicial intervention is warranted only with respect to patently unreasonable determinations. This is a very strict test: see **Huron (County) Huronview Home for the Aged v. Service Employees' Union** (2000), 50 O.R.(3d) 766 (C.A.) per Sharpe, J.A. at 774. Various phrases have been advanced to explain or define it. Cory, J. used the phrases "clearly irrational" and "evidently not in accordance with reason": see **Canada (Attorney General) v. Public Service Alliance of Canada, (P.S.A.C.)**, [1993] 1 S.C.R. 941 at 963 - 4. Sopinka, J. spoke of interpretations "not reasonably attributable to the words" in **United Brotherhood of Carpenters & Joiners of America, Local 579 v. Bradco Construction Ltd.**, **supra** at 340 - 1. Iacobucci, J. in **Canada (Director of Investigation and Research) v. Southam Inc.**, [1997] 1 S.C.R. 748 at 777 referred to a "defect .. apparent on the face of the tribunal's reasons" .

[36] This limited scope of review is not simply a matter of judicial restraint, but of legislative judgment. As Bastarache, J. said for the majority of the Court in **Pushpanathan, supra** at 1004, judicial deference derives from the conclusion that the question raised was one intended by the legislature to be left to the exclusive decision of the tribunal.

[37] The application of the patently unreasonable standard must be informed by the reasons for its existence. The standard is rooted in the notion that a tribunal may be better placed than a court to make sound decisions in certain kinds of cases. The first task of the court in applying the standard is to try to understand the full legislative, policy and practical context in which the decision was made so that its rationality may be judged in the particular regulatory setting in which the tribunal operates. Applying the standard is not a simple matter of measuring the extent of the deviation by the tribunal from what the Court thinks is the right result: **Huronview Home for the Aged, supra** at 775. The court should do what it can to satisfy itself that any irrationality it perceives in the tribunal's decision does not result from the court's lack of relevant information about or understanding of the regulatory scheme or of the nature or implications of the issue. A tribunal decision may appear unreasonable precisely because the court is not sufficiently informed about the practical realities and functioning of the regulatory scheme or about the policy implications of the particular decision. In short, the very reasons that the court should afford deference may also make that difficult to do.

[38] In the present case, WCAT's decision is that an employer may be subject to the **Act** in general terms and, at the same time, not subject to the **Act** on a case by case basis for the purposes of the bar of civil actions. Whether the employer is subject to the **Act** in particular cases will depend, in the Tribunal's view, on the nature of the activities of the employer's servant and agents which give rise to a cause of action. As the Tribunal put it, "... the term "surgical medical" ... applies to the activities [i.e. of the medical professionals] which gave rise to the applicant's cause of action" and thereby "... carve[s] out an aspect of the operation of hospitals that is not covered by the Act ... on the facts of this case."

[39] In my respectful view, this is an interpretation of the relevant legislation that is not reasonably attributable to the words. Three reasons compel this conclusion. First, WCAT's interpretation makes the **Act** unworkable. Second, it unreasonably confuses the questions of whether an employee is a worker within the meaning of the **Act** with the question of whether an

employer is subject to the **Act**. Third, it is fundamentally at odds with a core principle — the historic trade-off — of the workers' compensation scheme. I will address each of these points in turn.

[40] The bar to a civil action established by s. 28(1)(b) applies to workers' actions against employers who are "subject to this Part". However, whether an employer is "subject to this Part" is not defined by the legislation uniquely for the purposes of the bar of civil actions; it is defined in the same way for all of the many purposes under the **Act** for which this is a relevant consideration. The question of whether an employer is subject to the **Act** is fundamental, not only to the bar of actions, but to the operation of the **Act** in general. It is a determination made on the basis of a single set of provisions, that relates not only to whether a particular civil action is barred, but to a host of other determinations under the **Act**.

[41] Whether or not an employer is subject to the **Act** relates to whether an employer has a duty to report an accident (s. 86(1) and s. 2(n) of the **Act**) as well as to the many other duties of such employers set out in ss. 88, 90 to 92, 97 and 98. It determines whether an employer is liable to contribute to the accident fund (s. 115) and has the duties associated therewith (see, e.g. s. 129).

[42] It follows that the question of whether an employer is "subject to this Part" cannot depend, as WCAT concluded that it does, on a case by case analysis of the actions of an employer's servants or agents on a particular occasion which gave rise to a cause of action. It is not possible for the many other provisions in the **Act** whose operation depends on whether an employer is subject to the **Act**, to have any sensible operation if, as WCAT decided, an employer may, at the same time, be both subject and not subject to the **Act**. In other words, WCAT's interpretation is patently unreasonable viewed in the context of the **Act** as a whole.

[43] This interpretation is also unreasonable when the relevant provisions are examined in isolation from the rest of the **Act**. The Regulations deal with included and excluded "employers ... engaged in, about or in connection with the ... industries" set out in Appendix A and section 2 thereof. The structure of s. 3 of the **Act** and of ss. 2 and 3 of the Regulations makes it clear, in my view, that an employer is either included or excluded and cannot be both. These provisions define included and excluded employers for all purposes under the **Act**. This requires a characterization of the employer as one or the other for all purposes. WCAT, instead, attempted to fit the

employer into both categories by examining the particular activity giving rise to the particular cause of action and "carving out" an aspect of the employer's activity on a case by case basis. With respect, this approach, as well as its result, appear to me to be unreasonable.

[44] Again with respect, WCAT unreasonably confused the question of whether a servant or agent is covered by the **Act** with the question of whether an employer is subject to the **Act**. The provisions deal with both issues. But the inclusion or exclusion of an employer does not depend on whether its servants or agents, whose activities gave rise to a particular cause of action, are workers (and therefore covered) within the meaning of the **Act**. The statute clearly distinguishes between workers (who are covered by the **Act**) and the broader class of servants and agents (who may not be). An employer may have servants and agents who are not workers covered by the **Act** but that does not mean that their employer is not subject to the **Act**.

[45] WCAT confused these two issues. It noted that, in Nova Scotia, medical professionals have never been included in the workers' compensation scheme (With this no issue is taken on appeal). WCAT then reasoned that if the hospital has servants or agents who are medical professionals and, therefore, who are not workers under the **Act**, there must be an "aspect of the operation of hospitals" that is not covered by the **Act**. This is an unreasonable interpretation. The fact that certain servants and agents of an employer may not be workers subject to the **Act** because they are engaged in surgical medical activities does not affect the classification of the employer as being subject to the **Act** if it is covered precisely by the legislation's list of inclusions. It is hard to imagine how a hospital could be more precisely included than by the words "operation of hospitals" used in the governing provision.

[46] The QE II pays nearly $4 million in assessments under the **Workers' Compensation Act**. WCAT offers no explanation for how it is that an employer is generally subject to the **Act** for assessment purposes but not for the purposes of s. 28 of the **Act**. As noted, the same definition of the employers who are subject to the **Act** applies for both purposes.

[47] As noted, great deference is owed on an issue like this one which is so central to the operation of the whole workers' compensation scheme. However, there was no defence by the Board of this aspect of the Tribunal's decision. In fact, the Board has submitted that WCAT's decision is contrary to the historic trade-off underlying workers' compensation and contrary to the Board's long-standing practice. This provides me a measure of

reassurance that what I perceive to be irrationality in the Tribunal's decision is not, in fact, the product of a lack of appreciation on my part of the policy or practical implications of the issue facing the Tribunal.

[48] I would allow the appeal and set aside WCAT's finding in relation to the appellant hospital.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.
Hallett, J.A.