Docket: CA 160577
Date: 20000714

NOVA SCOTIA COURT OF APPEAL

[Cite as: Halifax Employers Association v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2000 NSCA 86]

Roscoe, Hallett and Cromwell, JJ.A.

BETWEEN:

HALIFAX EMPLOYERS ASSOCIATION (Workers' Compensation Board Claim No. 134981-18)

Appellant

- and -

THE NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL and THE WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

Respondents

REASONS FOR JUDGMENT

Counsel:	George W. MacDonald, Q.C. for the appellant Aleta Spalding for the respondent Tribunal David Farrar and Madelaine Hearns for the respondent Board
Appeal Heard:	May 30, 2000
Judgment Delivered:	July 14, 2000
THE COURT:	Appeal dismissed per reasons for judgment of Cromwell, J.A.; Hallett and Roscoe, JJ.A. concurring.

CROMWELL, J.A.:

I. INTRODUCTION:

[1] Workers' compensation benefits are paid out of an accident fund administered by the Workers' Compensation Board ("Board"). The money for the fund is raised by assessments levied by the Board on employers. The Board has a broad legislative mandate to establish and administer this assessment scheme, including the power to determine how the assessments will be made and to set the applicable rates.

[2] At the root of this case is the appellant's argument that the Board has erred in the way its assessment scheme was applied to the appellant's business. The Workers' Compensation Appeals Tribunal ("Tribunal") upheld the Board's approach. The question on the appeal to this Court is whether the Tribunal made a reviewable error in doing so. A threshold issue is the proper scope of review of the Tribunal's decision.

II. FACTS AND PROCEDURAL HISTORY:

[3] The appellant is the designated bargaining agent for all employers of unionized employees in the long-shoring industry in the Port of Halifax. In addition, the appellant administers training programs for longshoremen. The appellant is subject to the **Workers' Compensation Act**, 1994 - 5 c. 10, as amended (the "**Act**") and is, therefore, liable to contribute to the accident fund through assessments levied by the Board.

[4] Under the assessment scheme established by the Board, employers are classified for assessment purposes according to "... the principal activity of the

business" and then assigned to an industry group by combining classifications which have similar business activities. The main question before the Board and the Tribunal in this case was whether the appellant's "principal activity" for classification purposes was marine cargo handling or labour organization.

[5] The Board found that the proper classification was marine cargo handling and that a multiple classification (i.e. one combining the two suggested classifications) was not appropriate. The Tribunal upheld this approach. The appellant now appeals the Tribunal's decision to this Court. To understand the issues raised, it is necessary to review, in detail, the scheme for employer assessments under the **Act** and the way in which the Board and the Tribunal dealt with the appellant's assessment.

(a) The Assessment Scheme:

[6] Workers' compensation benefits are funded out of the accident fund which is provided for by s. 114 of the **Act**. The Board is required by the **Act** to assess and collect from employers sufficient funds for that purpose. The accident fund secures payment of benefits under the **Act** and this security of payment has been recognized as one of the essential features of workers' compensation legislation: **Pasiechynk v. Saskatchewan (Workers' Compensation Board)**, [1997] 2 S.C.R. 890 at 907.

[7] The Board has broad discretion with respect to assessments. Its statutory mandate is to determine how much money will be required, to devise the principles of assessment and to divide employers into classes and subclasses for assessment

purposes. The Board's discretion with respect to rates of assessment is also very wide. It is entitled to establish rates and to levy different assessments even on employers it assigns to the same class or subclass. I set out below several sections of the **Act** which capture the breadth of the Board's authority in these areas:

> **115** (1) For the purpose of creating and maintaining an adequate Accident Fund, the Board shall in every year make an assessment on and collect from the employers, subject to this Part, sufficient funds to
>
> (a) meet the cost of all claims payable during the year;
>
> (b) subject to Section 116, meet the future cost of all claims for injuries occurring during the year;
>
> (c) pay the expenses incurred in administering this Act; and
>
> (d) pay all other amounts payable from the Accident Fund.
>
> **120** (1) For purposes of assessment, the Board may
>
> (a) divide employers into classes and subclasses;
>
> (b) rearrange or make new classes or subclasses of employers;
>
> (c) transfer any employer to any other class or subclass.
>
> (2) Where an employer engages in more than one industry, the Board may assign the employer to more than one class or subclass.
>
> (3) Where an employer's industry covers more than one class or subclass, the Board may assign the employer to
>
> (a) the class or subclass of its primary business or undertaking, determined in any manner the Board considers appropriate; or
>
> (b) more than one class or subclass.
>
> (4) The Board may levy different assessment rates on employers in the same class or subclass.
>
> **121** (1) The Board may establish rates of assessment among any class or subclass and where, in the opinion of the Board, the record, risk, cost or experience in any class or subclass over a period of time determined by the Board differs from the average in other classes or subclasses, the Board may
>
> (a) confer or impose a special rate, differential or assessment to correspond with the relative hazard of the class or subclass; and
>
> (b) adopt a system of rating to take into account the relative costs of claims of the class or subclass.
>
> **134A** (1) There is hereby established a Rating Review Commission composed of one person representing the Board and such number of persons, representing equally employer and employee groups, as determined by the Minister.
>
> (2) The members of the Rating Review Commission shall be appointed by the Minister for such terms and on such conditions as determined by the Minister.
>
> (3) The Minister shall designate one of the members of the Rating

> Review Commission to be chair of the Commission.
>
> (4) The Governor in Council shall prescribe the remuneration to be paid to members of the Rating Review Commission.
>
> **185** (1) Subject to the rights of appeal provided in this Act, the Board has exclusive jurisdiction to inquire into, hear and determine all questions of fact and law arising pursuant to this Part, and any decision, order or ruling of the Board on the question is final and conclusive and is not subject to appeal, review or challenge in any court.
>
> (2) Notwithstanding subsection (1) but subject to Sections 71 to 73, the Board may
> (a) reconsider any decision, order or ruling made by it; and
> (b) confirm, vary or reverse the decision, order or ruling.

[8] Prior to 1996, the assessment model employed by the Board was based on a rate adjustment system. According to the evidence before the Tribunal, the notion of collective liability was not working well under the former system. There were too many rate codes with too few employers within them so that the statistics relating to claims experience within the codes lacked statistical credibility. When rates were adjusted, they were often adjusted universally so that, for example, all firms might receive the same percentage increase regardless of risk. The Board concluded that the old system did not fairly recognize the differences in either industrial or firm risk.

[9] In 1996, the Board established a new rate setting classification and experience rating system. The new system is designed so that industries and firms share costs on two different levels, that is, at both the industry and the firm level. Collective liability is thus established at these two levels. First, there is the rate setting level, which is determined by industry, not by occupation. As the record describes it, although a firm may have people doing many different types of occupation, it will have one rate because the firm operates in a particular industry. Second, there is the firm

level. Within a particular rate, there will be adjustments by virtue of the firm's claims experience. For example, in the present case, although the base rate for the appellant's classification is $8.05, its actual rate for 1997 was $7.15, a figure arrived at by taking into account its favourable experience rating.

[10] In its Assessment Guidelines, the Board has stated its philosophy of how it classifies employers for assessment purposes:

> Every employer required to register with the Nova Scotia Workers' Compensation Board must be assigned to an industrial classification in order that payroll and claim cost experience is properly recorded and used in the rate setting process.
>
> If Industry A is responsible for twice the claim cost per payroll dollar as Industry B then Industry A should have an assessment rate twice that of B. It is important, therefore, that each employer is assigned to an industry group that represents the same or similar industry characteristics and that claim costs and payroll are properly allocated. Each industry group should be relatively homogeneous since all firms in the industry group will be assigned the same basic assessment rate.
>
> The Workers' Compensation Board uses the Standard Industrial Classification code produced and maintained by Statistics Canada. The code is a comprehensive listing of virtually all industrial undertakings known and is used by all Workers' Compensation Board's across Canada. The classification structure consists of 18 divisions (A through R) which are segregated into major groups and then further divided into groups and then classes.
>
> THE MAJOR PRINCIPLE IN CLASSIFYING EMPLOYERS IS THAT WE ASSIGN SIC NUMBERS BASED ON THE <u>INDUSTRY</u> OF THE EMPLOYER AND <u>NOT</u> BY OCCUPATION. (emphasis in the original)

[11] The Board is empowered to make policies to be followed in the application of the **Act**: s. 183(2). There are several such policies relating to assessment. The most relevant is Policy 9.3.1. As its interpretation is at the heart of the appeal, I will set it out at length:

> **POLICY NUMBER: 9. 3. 1** ...

Policy Statement

1. The following describes the process for classifying employers and setting assessment rates.

1.1 Step 1 - Classification of Employers by Standard Industrial Classification (SIC)

Each employer is classified based on the principal activity of the business. The framework used to classify employers is the SIC published by Statistics Canada.

1.2 Step 2 - Industry Group Formation

Industry groups are determined by combining SIC's which have similar business activities.

1.3 Step 3 - Rate Group Formation

Rate groups are determined by combining industry groups with similar accident experience.

1.4 Step 4 - Setting of Rates by Rate Group

Assessment rates are determined for each rate group based on the rate group's five-year accident experience. This is referred to as the rate group's baseline rate.

1.5 Step 5 - Setting of Basic Rates by Employer

Each employer's basic rate (prior to experience rating) is determined by moving the current rate toward the rate group baseline rate over a transition period (see Policy 9.3.2 - Transition).

Step 6 - Experience Rating

Each employer's accident experience is compared to the average accident experience of the rate group over a period of three years. Employers with better than average accident experience will receive merits (rate decreases) while employers with worse than average accident experience will receive demerits (rate increases) (see Policy 9.4.2, re: Maximum merit/demerit).

[12] It will also be helpful to touch briefly on the Standard Industrial Classifications relevant to the issues on appeal. The nature of this Statistics Canada document is described in the Board's Assessment Guidelines which I have set out above. In Division G "Transportation and Storage Industries" there is a Major Group 45 relating to "Transportation Industries". That major group is described as follows:

> Establishments primarily engaged in the transportation of goods and passengers by air , railway, water and motor vehicles but excluding pipelines. **Included are services incidental to such modes of transport.** ... (emphasis added)

Within Major Group 45, there is a group referred to as 4551 “Marine Cargo Handling” which has a description and then lists four classifications:

> Establishments primarily engaged in providing stevedoring and other marine cargo handling services.
>
> loading ships or boats stevedoring service
> Longshoremen service Unloading ships or boats

[13] Under Division R is found major Group 98 “Membership Organization Industries” described as follows:

> Establishments primarily engaged in operating organizations for religious activities, business associations, professional membership associations, labour organizations, political organizations and civic and fraternal organizations or for promoting the interests of its members. (emphasis added)

Within that major group is group 9841 “Labour Organizations” described as follows:

> **Establishments primarily engaged in operating membership organizations of workers** such as tradesmen, public servants and teachers for the improvement of wages and working conditions.
>
> Federation of workers, labour organization
> labour association
> labour organization
> (emphasis added)
>
> labour organization
> trade union
> workers’ union, labour organization

[14] The Board applies its assessment process to roughly 16,000 employers, using some 40 rate groups derived from over 700 SIC rate codes.

(b) The Assessment of the Appellant:

[15] The issue in this case relates to the interpretation of the first sentence of Policy 9.3.1. It requires that each employer be classified “... based on the principal

activity of the business." The appellant's fundamental complaint is that the Board did not apply this policy correctly in that it made the classification decision on the basis that the appellant's business was part of a particular industry rather than by looking solely at the nature of its individual business activity. To understand the issue, it is necessary to review the nature of the appellant's activities and the way in which the Board and the Tribunal characterized them for assessment purposes.

[16] The appellant is the bargaining agent for all employers in the long-shoring industry in the Port of Halifax. It came into existence by virtue of the requirement set out in s. 34 of the **Canada Labour Code**, R.S.C. 1985, c. L-2. That section provides that where employees in the long-shoring industry have been certified, the employers of those employees must jointly choose and appoint a representative. The appellant was created for this purpose by the five employers of the employees in the long-shoring industry within the unit determined by the Canada Labour Relations Board to be appropriate for collective bargaining in the Port. The employers then designated it to be their representative as required under the **Code**. Pursuant to s. 34(5), an employer representative is deemed to be an employer for the purposes of the relevant part of the **Code.** It has the power to discharge all duties and responsibilities of an employer including the power to enter into collective agreements on behalf of those employers whom it represents. The appellant is bargaining agent solely for employers in the long-shoring industry in the Port of Halifax. It does not represent employers in any other industry. The appellant also administers a training program for longshoremen.

[17] The appellant came into existence on December 31, 1996, and fulfills

essentially the same role as its predecessor, the Maritime Employers Association. That association had been given a multiple classification by the Board for assessment purposes as both SIC Code 9841 (Labour Organizations Industry) and SIC Code 4551 (Marine Cargo Handling Industry). In late 1996, presumably as part of the transition to the new entity from its predecessor, the appellant registered with the Workers' Compensation Board for coverage. It applied for the same multiple classification as had been held by its predecessor. The Board advised the appellant in February of 1997 that it did not qualify for multiple classification pursuant to the Board's new policy relating to multiple classifications and that the appellant would be classified as SIC Code 4551 (Marine Cargo Handling). The firm appealed that decision and the appeal was denied by a Reconsideration Officer.

(c) Appeal to the Hearing Officer:

[18] There was a further appeal to a Hearing Officer. She found first, that the appellant was properly classified as a part of the marine cargo handling industry SIC Code 4551; and second, that the appellant was not eligible for multiple classification pursuant to the new Board Policy 9.2.1.

[19] In addressing the argument that the appellant ought to receive the same classification as its predecessor, the Hearing Officer stated:

> ..... I agree that, in general, a successor employer will be assessed at the same rate as the predecessor employer. However, a new *Workers' Compensation Act* has recently come into force and the Board created a number of Assessment policies which may have the effect of changing the classification and, therefore, the assessment rates of employers. These new policies are applied to all employers, regardless of whether they are predecessors or successors. It is the application of these policies that will determine the employer's classification and assessment rate, not the classification and assessment rate of a predecessor employer. Thus, I do not accept the argument that the successor Firm should be classified and assessed in the same manner as the predecessor employer ... I

> must apply the relevant portions of the *Act* and the Board's policies to determine the appropriate classification for the Firm.

[20] The Hearing Officer noted that the Board relies primarily on the Standard Industrial Classification 1980 (referred to as "SIC") for this purpose and that the major principle applied in classifying employers is that a classification will be assigned based on the industry of the employer and not by occupation. She went on to observe that the primary business activity determines the classification. As the Hearing Officer put it, "An employer is classified and assessed on the basis of its main operation with all other work considered incidental." The Hearing Officer concluded that although the appellant is involved in two main business activities which are different in nature (i.e., administration of collective agreements and training), both activities fell within the scope of the long-shoring industry.

[21] The Hearing Officer found that the appellant is a bargaining agent solely for employers with employees in the long-shoring industry, that only four collective agreements are administered by it on behalf of those employers and that it does not represent employers in any other industry. The Hearing Officer also noted that the appellant's training program relates exclusively to the long-shoring industry and therefore all of its activities fall within the scope of the long-shoring industry.

[22] With respect to the question of whether the appellant was entitled to a multiple classification, the Hearing Officer applied Board Policy 9.2.1 which sets out five requirements for such a classification. The Hearing Officer found that two of these were not met, specifically, that the industry activities were not performed by specific

personnel as their sole function and that the product or service was not offered to the public at large.

(d) Appeal to WCAT:

[23] The appellant appealed the Hearing Officer's decision to WCAT which dismissed the appeal. The Tribunal decided that, pursuant to the Board's policies, the appellant was properly classified under SIC Code 4551 and that in light of its findings as to the correctness of that classification, it did not have to address the multiple classification issue.

[24] The Tribunal noted that the appellant had presented the two classification alternatives which I have set out earlier. It recognized that neither was "an ideal fit." It concluded, however, that Marine Cargo Handling was the better classification for two primary reasons. First, the Labour Organizations category is not appropriate because, in the Tribunal's view, it is intended to be a relatively narrow category limited to employee and union representation. The appellant, of course, does not represent employees but employers. Second, the Tribunal found that the appellant's business is an activity ancillary to the Marine Cargo Handling Industry; the services provided by the appellant, but for the requirement imposed upon the employers who created it by the **Canada Labour Code**, would be undertaken by and integral to the employers themselves. The Tribunal's reference to "ancillary activity" I take to be in relation to the fact that Major Group 45 in the SIC includes "services incidental" to the various modes of transport included in the group.

[25] Pursuant to leave granted on consent, the appellant appeals to this Court.

III. ISSUES:

[26] I would formulate the issues for decision as follows:

1. Did the Tribunal commit an error of jurisdiction by asking itself the wrong question?
2. Did WCAT commit reviewable error by failing to consider whether the appellant was entitled to a multiple classification?
3. Did WCAT commit reviewable error in its interpretation or application of the Board's rate-setting and experience process policy 9.3.1?

IV. ANALYSIS:

(a) First Issue: Did WCAT commit an error of jurisdiction by asking itself the wrong question?

[27] There is no dispute that the applicable standard of review for jurisdictional error is correctness.

[28] The appellant submits that WCAT committed jurisdictional error because it asked itself whether the employer was properly classified for assessment purposes under SIC Code 4551 Marine Cargo Handling rather than whether it was correctly classified under SIC Code 9841 Labour Organizations Industry. The latter question, the appellant notes, is one of the questions upon which leave to appeal to the Tribunal from the Hearing Officer had been sought and granted.

[29] A Tribunal may commit jurisdictional error if it misinterprets the provisions of a statute so as to embark on an inquiry or answer a question not remitted to it (see for example, **Canada (Attorney General) v. Public Service Alliance of Canada,** [1993] 1 S.C.R. 941 per Cory J. at 955, citing with approval **Canadian Union of Public Employees v. New Brunswick Liquor Corp.** , [1979] 2 S.C.R. 227 at 237**; Service Employees International Union, Local 333 v. Nipawin District Staff Nurses Association et al.** [1975] 1 S.C.R. 382 per Dickson, J. at p. 389) or where it does not perform the task required of it by the relevant legislation. (see **Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796**, [1970] S.C.R. 425 at p. 434). A tribunal does not, in my opinion, commit jurisdictional error simply by rephrasing the issues before it for the purposes of analysis so long as the tribunal addresses the substance of an issue properly before it and within its jurisdiction.

[30] The decision which was appealed to the Tribunal in this case upheld the Board's classification of the appellant for assessment purposes under SIC Code 4551, Marine Cargo Handling. The fundamental issue before the Tribunal, however it might be expressed, was whether the Board's classification was correct. In its decision, the Tribunal noted that it was presented with two classification alternatives: Marine Cargo Handling or Labour Organizations. The appellant's position before the Tribunal was that that it falls within the latter or, alternatively, should be jointly classified. The Tribunal concluded that the appellant was best categorized under SIC Code 4551, Marine Cargo Handling Industry. In addition, it made a specific finding that the appellant was not engaged directly in the operation of a membership organization of

workers within the meaning of SIC Code 9841 Labour Organizations. The Tribunal therefore addressed and decided the fundamental issue which was both within its jurisdiction and properly before it. To rephrase the issues as it did was not an error, let alone a jurisdictional error. I agree with the submission on behalf of the Board that the appellant's argument on this ground of appeal is one of semantics, not of jurisdiction.

(b) Second Issue: Did WCAT commit reviewable error by failing to consider whether the appellant was entitled to a multiple classification?

[31] Before the Tribunal, the appellant had alternative submissions: either it was entitled to be classified as a labour organization, or in the alternative, to a multiple classification of both marine cargo handling and labour organization. As noted, the Tribunal found against the appellant on the first point and then determined on that account that it was not necessary to address the second point. The appellant submits that the Tribunal committed reviewable error by failing to address the question of the appellant's entitlement to a multiple classification.

[32] I cannot accept this argument. The Tribunal made a specific finding that the appellant is not engaged in the operation of a membership organization of workers so as to fall within SIC Code 9841 Labour Organization Industry. Having made that finding, it would have been futile for the Tribunal to consider nonetheless whether the appellant was entitled to a joint classification of which labour organization industry would be a part. In my view, the Tribunal did not commit reviewable error in failing to address more specifically the question of multiple classification having found, first, that the

single classification as Marine Cargo Handling was the most appropriate, and second, that one of the industries which it was submitted ought to form part of the multiple classification (Labour Organization) was inapplicable.

(c) Third Issue: Did WCAT commit reviewable error in its interpretation or application of the Board's rate-setting and experience process policy 9.3.1?

[33] The substantial issue in this appeal, in my view, is whether the Tribunal committed a reviewable error in the interpretation and application of the Board's classification policy. The resolution of this issue requires consideration of the applicable standard of review and then application of that standard to the Tribunal's decision.

(i) Standard of Review:

[34] There is a right of appeal (by leave) from the Tribunal to this Court on questions of law and jurisdiction but not of fact: see s. 256(1) of the **Act**. The appellant submits, and the Board accepts, that the interpretation of a Board Policy is a question of law within the meaning of that section. I will assume that to be case for the purposes of this appeal. I note that the policies of the Board are binding (with exceptions not relevant to this case) on the Board and the Tribunal: see s. 183(5).

[35] The appellant and the Board part company on the applicable standard of review. The appellant's position, briefly put, is that this is a statutory appeal on a question of law and, therefore, the applicable standard of review is correctness. (The appellant's factum accepted that the applicable standard was patently unreasonable, but that position was abandoned during oral submissions in favour of the correctness

standard.) The Board, on the other hand, says that having regard to the nature of the Tribunal and the issue before it, the appropriate standard is somewhere between reasonableness *simpliciter* and patently unreasonable. (The Board, on the other hand, submitted in its factum that the patently unreasonable standard applies to the Tribunal in this case. However, in oral submissions, that position was abandoned in favour of a standard between reasonableness and patent unreasonableness.)

[36] There is no question that the Tribunal was required to review the Hearing Officer's decision on the correctness standard: **Doward v. Workers' Compensation Board (N.S.)** (1997), 160 N.S.R. (2d) 22 (C.A.) at § 60 - 86.

[37] In order to determine the applicable standard of review on a statutory appeal from a tribunal to a court, it is necessary to look at several factors. Contrary to the appellant's submission, it does not follow simply from the existence of a statutory right of appeal from a tribunal to a court that the standard of review is correctness. The applicable standard is determined by having regard to the nature of the problem before the Tribunal, the relevant law properly interpreted in light of its purpose and the area of the Tribunal's specialization and expertise. Authorities dealing with different statutory schemes, different tribunals and different issues cannot simply be applied without careful attention to all of these factors.

[38] This point has been made repeatedly by the Supreme Court of Canada. For example, in **Bell Canada v. Canada (Canadian Radio-Television and**

Telecommunications Commission), [1989] 1 S.C.R. 1722 Gonthier, J. for the Court said at p. 1745 - 46:

> ... within the context of a statutory appeal from an administrative tribunal, additional consideration must be given the principle of specialization of duties. **Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise.**

Similarly, in **Pezim v. B.C. (Superintendent of Brokers)**, [1994] 2 S.C.R. 557, Iacobucci, J. for the Court noted at 591 that:

> ... even where there is no privative clause and where there is a statutory right of appeal, the concept of specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise.

[39] The Court also emphasized that in determining the appropriate degree of judicial deference, it is necessary to focus on the specific question of law in issue: at p. 596. Thus, for the purposes of determining the applicable standard of review, the role and characteristics of the particular tribunal and the specific question under review, as well as the other factors to which I referred earlier, must be considered.

[40] Generally, the applicable standard will be correctness where there is a broad, statutory appeal on questions of both law and fact and where there is no legislative provision limiting the scope of review and no aspect of particular expertise involved: see for example **T.A.T.O.A. v. Dell Holdings**, [1997] 1 S.C.R. 32 at § 48. However, as mentioned, great care must be taken in making general statements because the determination of the appropriate standard in each case turns on an examination of the particular tribunal, its role within the statutory scheme and the nature of the specific

question being considered: **Director of Investigation and Research v Southam Inc.**, [1997] 1 S.C.R. 748 per Iacobucci, J. for the Court at p. 765 -6.

[41] In this case, there is a right of appeal on questions of law, but not on questions of fact. There is no privative clause which limits the scope of appellate review by this Court of the Tribunal's decisions on questions of law. While both of these factors tend to support review for correctness of the Tribunal's determinations of questions of law, it is nonetheless necessary to consider the other relevant factors identified by the Supreme Court of Canada in order to identify the appropriate standard of review.

[42] I begin with a brief review of the purposes of the legislative scheme. In **Pasiechnyk v. Saskatchewan (Workers' Compensation Board)**, **(supra)**, at p. 907 and following, Sopinka, J., for the majority, reviewed the history and purpose of workers' compensation legislation in Canada. He noted that it is a system of compulsory mutual insurance administered by the state with four essential features: compensation is to be paid without fault, workers should enjoy security of payment, administration of the scheme and adjudication of claims is to be handled by an independent commission; and finally, that compensation to injured workers should be provided quickly without court proceedings. Justice Sopinka noted at p. 909 that these four principles are inter-connected:

> .....security of payment is assured by the existence of an injury fund that is maintained through contributions from employers and administered by an independent commission, the Workers' Compensation Board.

He continued at p. 912:

> The third aspect of the system, the injury fund, also comes under the authority of the Board. The Board has the responsibility to maintain the fund and collect assessments from employers. It establishes classes of industries ..., and can sub-divide those classes according to the hazard they present. ... The Board then assesses employers in each class a percentage of their payroll that it considers sufficient to pay for injuries to workers in industries in that class. ...

[43] In my view, it is significant that this case concerns the interpretation of a policy made by the Board in carrying out its broad and highly discretionary mandate in relation to the maintenance of the accident fund. Where, as here, the policy being interpreted relates to an area of broad, statutorily conferred discretion as to the manner in which assessments shall be conducted, there is good reason for the court to afford some measure of deference to the Tribunal's decisions. Simply put, the Legislature has provided a broad framework which leaves it largely to the Board, subject to appeal to the Tribunal, to set up and administer its own assessment system. The Board, through its policies, has put flesh on this legislative skeleton. It seems to me that absent evidence that the assessment system is being applied unfairly or irrationally, the court should be slow to substitute its interpretation of Board policies in this particular area for that of the Tribunal.

[44] Also relevant is the role of the Tribunal. It has broad powers of review with a statutory mandate to "confirm, vary or reverse" the decision made by the Hearing Officer : see s. 252(1) and, for example, **Workers' Compensation Board of Nova Scotia v Richard** (1998), 170 N.S.R. (2d) 270 (N.S.C.A.) at § 38 et seq. and the authorities there cited. In general, the Tribunal exercises on appeals to it the same discretion as is exercised by the Board acting through a Hearing Officer.

[45] That a tribunal has specialized functions is one factor tending to favour a measure of judicial deference to its conclusions where the issue is within its jurisdiction and engages those specialized functions. As was noted by the Supreme Court of Canada in **United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.**, [1993] 2 S.C.R. 316 at p. 335:

> Even where the tribunal's enabling statute provides explicitly for appellate review ... it has been stressed that **deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.** (emphasis added)

[46] I would also note that Bastarache, J. pointed out in **Pushpanathan v Canada**, [1998] 1 S.C.R. 982 at p. 1007 - 1008, that the three factors, namely expertise, the purpose of the legislation and the nature of the problem are closely inter-related. As he put it at p. 1008, the purpose of a statute is often indicated by the specialized nature of the legislative structure and the need for expertise is often manifested as much by the requirements of the statute as by the specific qualifications of its members.

[47] The policy of the Board, which is at the heart of this appeal, states that its purpose is to "describe the process for classifying employers and setting assessment rates." The key statement in the Policy for present purposes is found in Article 1.1 which provides that each employer is classified based on the principal activity of the business. The framework used to classify employers is the SIC published by Statistics Canada.

[48] There is no suggestion that this policy is inconsistent with the authority of the

Board to undertake assessments and set rates. The issue raised by the appellant is that the Board and the Tribunal did not apply this policy correctly because, instead of determining the principal activity of the appellant's business, they determined the industry of which the appellant's business is a part.

[49] In my opinion, the assessment process is at the heart of the worker's compensation system and squarely within the jurisdiction of the Tribunal. Moreover, the Tribunal is highly specialized, dealing on an ongoing and day to day basis with the interpretation and application of the **Act** and the regulations and policies made under it. Providing that the Board's policies are consistent with the **Act,** the Tribunal is bound to apply them, thus giving, within that limit, effective control to the Board over the application of the **Act** through this policy-making power (see s. 183(5)). Where, as here, a specialized Tribunal is interpreting policies made pursuant to the extremely broad legislative mandate given to the Board in the area of assessment, these factors support a measure of judicial deference to the conclusions of the Tribunal. This is particularly the case where, as here, the Tribunal affirms the Board's interpretation of its own policy.

[50] The nature of the specific interpretative issue raised in this case also supports a somewhat deferential approach to the Tribunal's decision. We are not concerned here with the interpretation of jurisdictional provisions in the **Act** or even with general questions of statutory interpretation or the application of general legal principles. In cases raising issues of that sort, the Tribunal is not, to use the words of Chipman, J.A.

in **Doward**, supra, "... acting as experts in a sensitive area with which this court is not familiar." : at § 89. In contrast to those sorts of issues, the question in this case relates to the interpretation of a policy in an area in which the Board has tremendously broad discretion and which is both technical and central to the overall scheme of the assessment process. Given the breadth of the Board's authority in relation to assessment, the overall consistency and fairness of the scheme is of great importance. The Board's obligation is to classify some 16,000 employers according to over 700 SIC rate codes within 40 rate groups. It can be dangerous to the effective operation of the scheme, therefore, to parse the words of an assessment policy without a specialized knowledge of its overall operation. The Tribunal, given its specialized functions, often may be in a better position than this Court to interpret such policies in ways which are consonant with their purposes within the overall assessment scheme.

[51] The Supreme Court of Canada has also recognized that the scope of review may be influenced by the extent to which the resolution of the question before the Tribunal has the potential to apply widely to many cases. The narrower and more fact-specific the determination by the tribunal is, the more likely that some judicial deference is appropriate: see **Southam**, **(supra)**, at § 36. There is no dispute here that the issue on appeal is a question of law for the purposes of the jurisdiction of this Court under s. 256 of the **Act**. However, the term "question of law" includes a variety of issues of markedly different degrees of generality and precedential value.

[52] The question in this case relates to the application, according to a Board policy, of a Statistics Canada classification document to the particular circumstances of

an employers' representative in the long-shoring industry. The highly case-specific nature of this enterprise, as well as the specialized nature of the question, support a conclusion that some deference should be given by the Court to the Tribunal's decision.

[53] Taking all of these factors into account, where the Tribunal is interpreting a Board policy made pursuant to an extremely broad legislative mandate, and where there is no issue as to the consistency of the policy with the **Act** and no evidence of a discriminatory application of the scheme, the appropriate standard of review is reasonableness *simpliciter*. It may be that with respect to other sorts of questions arising under the **Act** or Board policies, a different standard may be appropriate. I wish to be clear that I am dealing in these reasons only with the standard that should be applied in the review of WCAT decisions dealing with the interpretation of the Board policy in issue in this case.

(ii) The Merits of the Appeal:

[54] The main point advanced on behalf of the appellant is that the Board and the Tribunal erred at the first step of the interpretation and application of Policy 9.3.1. That policy requires that:

> Each employer is classified based on the principal activity of the business. The framework used to classify employers is the SIC published by Statistics Canada.

[55] The appellant's submission is that the Board and the Tribunal erred in classifying employers into industry groups by asking of which industry the employer's business forms part. The appellant's position is that the approach mandated by the Policy is to do the classification on the basis of the employer's particular business

activity, not according to the industry to which that activity may most strongly relate.

[56] The Hearing Officer, whose decision was upheld by the Tribunal, described the approach to classification used by the Board as follows:

> Industries are classified by the Board according to the "primary business activity guidelines" developed by Statistics Canada. Since January 1, 1987 the Board has relied, primarily, on the *Standard Industrial Classification*, 1980 [SIC], for this purpose. The *SIC* was first published in 1948, under the authority of the Minister of Supply and Services Canada, and is a system of industrial classification whereby producing units are arranged into specific industries, based on primary business activity. The classification system is achieved by dividing economic production into industries, that is, groups of producing units engaged in similar types of activities in relation to similar goods and services. The classification structure consists of 18 divisions (A through R) which are segregated into major groups and then further divided into groups and classes. <u>The major principle applied in classifying employers is that a classification will be assigned based on the industry of the employer and not by occupation</u>. (emphasis added)

[57] In this case, the Board, the Review Officer, the Hearing Officer and the Tribunal all concluded that the appellant's primary business activity was long-shoring and stevedoring. In short, the conclusion was that the appellant, who is a bargaining agent created in response to statutory direction (s. 34 of the **Canada Labour Code**), engaged in representing only employers in the long-shoring industry and all of whose activities relate to that industry is engaged in the long-shoring business. As the Tribunal put it in its decision:

> ... the services provided by the Appellant, but for the requirement imposed upon its clientele by the *Canada Labour Code*, would otherwise be activities undertaken by and integral to the clientele themselves.
>
> .... The appellant's business is an activity ancillary to the marine cargo handling industry.

[58] To link this finding more explicitly to the terms of the policy, the determination has been that the employer's principal activity (and indeed its only activity) is to provide

service to employers in the long-shoring industry in Halifax. Its business, therefore, is the long-shoring business.

[59] The Board's Assessment Guidelines give an example remarkably close to the case giving rise to this appeal. It states:

> In extreme cases, employers may even by classified (sic) in an SIC that seems totally inappropriate at first blush. For example, a firm that advertises being in the "moving business", contracts with an individual or a firm to move goods from point A to B and the customer does not make arrangements with any other firm than the one in question. This firm is properly classified in the trucking industry EVEN IF ALL THE PHYSICAL MOVING IS CONTRACTED OUT TO ANOTHER FIRM. **Regardless of the exclusive administrative nature of the occupations directly employed by this firm, its business is still "moving" and must be coded as such.** Otherwise the administrative payroll of this firm would not be included with the administrative staff of other moving firms and would lead to an inequitable situation.(emphasis added)

[60] Viewed in the context of the philosophy enunciated by the Board for its approach to classification and its overriding goal of spreading the risk throughout the industry, there is much to commend the Tribunal's conclusion. As the Board's Assessment Guidelines put it, the major principle in classifying employers is to assign SIC numbers based on the industry of the employer and not by occupation. In my opinion, the interpretation given to the Board's policy is consistent with both that underlying philosophy and with the wording of the Policy.

[61] The submission of the appellant amounts to this. This Court should find that WCAT erred in the interpretation of the Board's policy even though all of the following are true:

1. The Board has an enormously broad statutory mandate to set up and

administer an assessment system for the purposes of maintaining an adequate accident fund;

2. The Board has a broad statutory mandate to make policies;

3. The Board interpreted its own policy in reaching the conclusion now challenged on appeal;

4. The interpretation adopted by the Board and upheld by WCAT is perfectly consistent with the Board's stated philosophy of industrial classification; and

5. The issue of interpretation is narrow and case-specific.

[62] As a strict matter of correct legal interpretation, when viewed in the context of the policies relating to assessment and the Board's philosophy of industrial classification, I am far from persuaded that WCAT erred in upholding the Board's interpretation. In any case, I am convinced that the interpretation given by the Board and upheld by the Tribunal was reasonable. I would not interfere with it on appeal.

[63] For these reasons, I would dismiss the appeal. The Board did not request costs in its factum and I would award none.

Cromwell, J.A.

Concurred in:

Hallett, J.A.

Roscoe, J.A.