Docket No: CA 160570
Date: 20000510

NOVA SCOTIA COURT OF APPEAL

[Cite as: Spencer v Mansour's Ltd., 2000 NSCA 59]

Chipman, Freeman, and Bateman, JJ.A.

BETWEEN:

MANSOUR'S LIMITED, CASEY REALTY LIMITED
and THE TOWN OF AMHERST

Appellants

- and -

ADAM JOHN SPENCER

Respondent

REASONS FOR JUDGMENT

Counsel:	Michael J. Messenger for the appellant, Mansour's Limited C. Patricia Mitchell for the appellant, Casey Reality Limited Mark S. Raftus for the respondent
Appeal Heard:	April 18, 2000
Judgment Delivered:	May 10, 2000
THE COURT:	Appeal is allowed, the judgment of the trial judge is set aside, the respondent's action is barred by s.20 of the former **Workers' Compensation Act** and costs are awarded to the appellants, fixed at $800 plus disbursements, as per reasons for judgment of Freeman, J.A.; Chipman and Bateman, JJ.A., concurring.

FREEMAN, J.A.:

[1] The respondent, Adam John Spencer, a resident of New Brunswick who works for a New-Brunswick based messenger service, has sued the appellants for damages he alleges he suffered in an accident April 6, 1995, while carrying out his employment duties in Nova Scotia. The issue in this appeal is whether his action against the appellants for damages is barred by workers' compensation legislation.

[2] He was making a delivery to the appellant, Mansour's Limited, the occupant of 27 Church Street in Amherst, N.S. , on behalf of his employer, Purolator Courier of Dieppe, New Brunswick, when he slipped and fell on the sidewalk. He alleges that the appellant, Casey Realty Limited, owned the premises at 27 Church Street and that the appellant, Town of Amherst, was responsible for maintaining the sidewalk. The appellants were all paid-up employers under the **Workers' Compensation Act** in Nova Scotia.

[3] Mr. Spencer received compensation from the New Brunswick Workplace Health, Safety and Compensation Commission, which assigned to him the right to bring legal action respecting the accident. The New Brunswick Board sought reimbursement from the Nova Scotia Workers' Compensation Board pursuant to the Interjurisdictional Agreement on Workers' Compensation, to which both provinces became parties in 1993. The Nova Scotia Board advised that Mr. Spencer was not recognized as a

worker in Nova Scotia because he did not meet residency requirements under the Nova Scotia **Act.**

[4] On an application to the Supreme Court of Nova Scotia, Justice Goodfellow found that the respondent's action was not statute barred under the **Act** because he lives and is employed outside the jurisdiction. The appellants have appealed that decision.

[5] The governing statute is the **Workers' Compensation Act**, R.S.N.S. 1989 c. 508 as amended, sometimes referred to as the former or the old **Act**. It was repealed by the **Workers' Compensation Act**, S.N.S. 1994-95 c. 10 as amended, sometimes referred to as the current, the present, or the new **Act**. It was decided by this court in **Goulden v. Taylor** (1999), 177 N.S.R. (2d) 382, that the old **Act** applied to determine the forum when the issues arose from an accident which occurred prior to February, 1996, when the new **Act** came into effect. Both **Acts** contain provisions barring actions against employers by injured workers, part of the historic trade-off of workers' rights of action against employers in return for access to no-fault compensation. Under the old **Act**, the determination is made by a judge of the Supreme Court of Nova Scotia, subject to the right of appeal which was considered to be a substantive right. Under the new **Act**, the determination is made by the Workers' Compensation Appeals Tribunal (WCAT) subject to the protection of a strong privative clause.

[6] Just as the Supreme Court is the proper forum, the old **Act** is the proper statute for determining whether the respondent's right of action against the appellants is barred. Such a right is a matter of substance and it cannot be modified, either retroactively or retrospectively, without clear language, setting out the legislative intention to do so. In any event, the two **Acts** have much in common on the issue in this appeal, the effect of residence outside the province on workplace accidents within the province. In my view, the result would not be different if the new **Act** were applied.

[7] Section 2(g)(i) of the old **Act** defines employer as:

> Every person having in his service under a contract of hiring or apprenticeship, written or oral, express or implied, any person engaged in any work in or about an industry within the scope of this Act.

[8] The broad definition of "worker" in s. 2(w) includes a person who works under a contract of employment, oral or written, express or implied; it does not refer to the place of residence. That definition of worker applies in all relevant sections of the **Act**, including s. 14 which deals with workers non-resident in the province as follows:

> 14 Where it appears that by the laws of any other province, country or jurisdiction a worker or his dependents, if resident in the Province, would be entitled in respect of death or injury in such province, country or jurisdiction to compensation, as distinguished from damages, the Board may order that payments of compensation under this **Act** may be made to persons resident in such province, country or jurisdiction in respect of any worker killed or injured in the Province, provided, however, that if the compensation payable under the laws of such other province, country or jurisdiction be less than the compensation payable under this Part, the Board may reduce the amount of compensation accordingly.

[9] Section 15 (1) permits the Board to grant leave to a worker resident in Nova Scotia to work outside the province without loss of benefits. Section 15(2) establishes ss. 14 and 15 as a code within the **Act** governing non-resident workers injured in Nova Scotia:

> 15 (2) Except as provided in Section 14 and in this section, nothing in this **Act** shall entitle any person not resident in the Province to compensation payments under this Part with respect to an accident happening within the Province.

[10] While s. 14 appears to be discretionary rather than mandatory, in that it provides that the Board "*may* order the payment of compensation under this **Act**," considerations of comity within Canada would appear to have raised the discretion to a duty, save in extraordinary circumstances. That comity is expressed in the Interjurisdictional Agreement on Workers' Compensation.

[11] The statement of principles in the Agreement includes the following:

> **1.2 The intent of this Agreement is as follows**:
>
> ...
>
> c) to ensure that employers are not responsible for the payment of assessments to more than one Board in respect of the earnings or some portion thereof of their employees who are employed in more than one jurisdiction.
>
> **1.3 The purposes of this Agreement are to ensure equity**:
>
> a) for workers whose employment is of such a nature as to require performance of their duties in more than one jurisdiction;
>
> b) in the adjudication of claims involving either injury, occupational disease, death or a combination of these, due to employment in more than one jurisdiction;

> c) for employers in relation to assessments of the earnings of their employees, whose employment is of such a nature as to occur in more than one jurisdiction;
>
> . . .
>
> 1.4 Each Board undertakes to ensure that through the provisions of this Agreement and mutual co-operation, no worker disabled as a result of injury or disease causally related to employment in Canada, is denied fair and equitable compensation.

[12] In Nova Scotia, these statements of principle find their statutory foundation in s. 14. While the issue of reimbursement between the Nova Scotia and New Brunswick Boards is not before us, it seems clear that if Mr. Spencer is a worker injured in Nova Scotia, s. 14 of the **Act** applies because he does not live in the province.

[13] Section 17 of the **Act** provides that a worker entitled to an action against some person other than his employer may elect to bring action against such person in lieu of claiming compensation. While a question may arise as to whether a "person other than his employer" can include other employers under Part 1 of the **Act**, this is not seriously in issue. The basic issue is Justice Goodfellow's finding that the respondent is not a worker.

[14] If he is a worker, his right of action must be considered in light of ss. 18 and 20 which provide as follows:

> 18. In any case within the provisions of subsection (1) of section 17, neither the worker nor his dependents nor the employer of such worker shall have any right of action in respect of such accident against an employer, his servants or agents, in an industry to which the Part applies, and in any such case where it appears to the satisfaction of the Board that a worker of an employer in any class is injured or killed owing to the negligence of an employer or of the worker of an

> employer in another class to which this Part applies, the Board may direct that the compensation awarded in such case shall be charged against the last mentioned class.
>
> . . .
>
> 20. The provisions of this Part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a worker or his dependents are or may be entitled against the employer of such worker for or by reason of any accident in respect of which compensation is payable hereunder or which arises in the course of the worker's employment in an industry to which this Part applies at the time of the accident, and no action in respect to such accident or any injury arising therefrom shall lie.

[15] In **Marchand v. Able Electric Ltd.** (1994), 125 N.S.R. (2d) 198 (N.S.S.C.T.D.) Justice Kelly cited **Sparling v. Kal's Ltd. et al.** (1959), 20 D.L.R. (2d) 141 (N.S.S.C.T.D.) in referring to the long history of Nova Scotia jurisprudence interpreting s. 18 and its predecessor provisions as banning actions against any employer to which Part 1 of the **Act** applied, not just the injured worker's own employer. He cautioned against expanding the words of s. 18, "particularly the words 'employee' and 'employer' beyond their clear meaning as used in that section. "

> ...To adopt a restrictive interpretation of 'employer' in s. 18, as urged by the applicant here, would be to make an unnecessary distinction that could lead to more litigation and limit the progressive purposes of the **Act**.

[16] In **Pasiechnyk v. Saskatchewan (W.C.B)** (1997), 149 D.L.R. 577, the Supreme Court of Canada found an equivalent provision in the Saskatchewan statute applied to all employers who met the definition requirement of being engaged in an industry. The barring of workers' actions for damages was considered broadly because of its fundamental importance to the historic tradeoff underlying workers' compensation schemes. In that case, a crane owned by a contractor, Procrane, fell over on six

employees of the Saskatchewan Power Corporation during a coffee break, killing two of them and injuring the others. The injured workers and the estates of the deceased workers brought action against the Power Corporation, the owner of the crane, and the Saskatchewan Government in its role as regulator of the worksite. The Saskatchewan Workers' Compensation Board found that all three actions were barred by the statute. The Court of Appeal allowed the action against the Saskatchewan Government to go ahead. The Supreme Court of Canada found that the government was engaged in the "industry" of regulating the worksite and restored the judgment of the Board.

[17] The historical sketch provided by Sopinka J., writing for the majority, is a useful aid to interpretation:

> In Canada the history of workers' compensation begins with the report of the Honourable Sir William Ralph Meredith, one-time Chief Justice of Ontario, who in 1910 was appointed to study systems of workers compensation around the world and recommend a scheme for Ontario. He proposed compensating injured workers through an accident fund collected from industry and under the management of the state. His proposal was adopted by Ontario in 1914. The other provinces soon followed suit. Saskatchewan enacted the **Workmen's Compensation Act**, 1929, S.S. 1928-29, c. 73, in 1929.
>
> Sir William Meredith also proposed what has since become known as the "historic trade-off" by which workers lost their cause of action against their employers but gained compensation that depends neither on the fault of the employer nor its ability to pay. Similarly, employers were forced to contribute to a mandatory insurance scheme, but gained freedom from potentially crippling liability. Initially in Ontario, only the employer of the worker who was injured was granted immunity from suit. The Act was amended one year after its passage to provide that injured Schedule I workers could not sue *any* Schedule I employer. This amendment was likely designed to account for the multi-worker workplace, where employees of several employers work together.

[18] Sopinka J. recognized the possibility that a worker might receive less under workers' compensation than as the result of an action as a negative feature of an otherwise positive plan.

> I would add that this so-called negative feature is a *necessary* feature. The bar to actions against employers is central to the workers' compensation scheme as Meredith conceived of it; it is the other half of the trade-off. It would be unfair to allow actions to proceed against employers where there was a chance of the injured worker's obtaining greater compensation, and yet still to force employers to contribute to a no-fault insurance scheme. (Emphasis in original.)

[19] In **McSween v. Marsh** (1995), 140 N.S.R. (2d) 374 (N.S.S.C.), Cacchione J reached a similar result, citing Terence G. Ison, Workers' Compensation in Canada (2nd. Ed. 1989), p. 163 as follows:

> No claim in respect of a compensable disability lies by court action against an employer of the injured worker, any worker of that employer, any other employer covered by the Act, or any worker of such other employer.

[20] In my view, taking into account the history and the scheme of the legislation, such cases as **Pasiechnyk**, **Marchand v. Able Electric** and **McSween v. Marsh**, and the Interjurisdictional Agreement, this citation reflects the correct interpretation of the Nova Scotia legislation. Section 20 of the old **Act** bars the actions of workers insured under Part 1 against employers including, not only the employer with whom they have a contract of employment, but all employers under Part 1. So far as this applies to workers resident in Nova Scotia, it is consistent with the conclusions of Justice Goodfellow.

[21] In **Pasiechnyk**, **supra,** Sopinka J. stated at p. 597 that the "appropriate questions" for determining whether an employee's action is barred are the following:

> 1. Was the plaintiff a worker within the meaning of the Act?
>
> 2. If so, was the injury sustained in the course of his or her employment?
>
> 3. Is the defendant an employer within the meaning of the Act?
>
> 4. If the defendant is an employer within the meaning of the Act, does the claim arise out of acts or defaults of the employer or the employer's employees while engaged in, about or in connection with the industry or employment in which the employer or worker of such employer causing the injury is engaged.

[22] If the respondent was a resident of Nova Scotia there can be no doubt that the answer to the first two questions would be "yes." As to the second two questions, Justice Goodfellow found that "all three defendants are acknowledged to be employers whose assessments to the WCB of Nova Scotia were paid as of April 6th, 1995". No issue has been raised as to whether they were engaged in an industry to which the **Act** applies, and I would assume this too was acknowledged to be so. Otherwise, they would not meet the definition of "employer".

[23] Therefore, the only question is whether the respondent's residence in New Brunswick disqualifies him from being considered a worker under the **Act**. Justice Goodfellow reaches the conclusion that he is not a worker as defined in the **Act**, and therefore not barred from pursuing his civil remedies against the appellants, after a careful analysis and review of the principles of statutory interpretation. With great respect, I consider this conclusion to be in error for the following reasons:

* The definition of worker under the **Act** is silent as to place of residence, which appears relevant only to ss. 14 and 15.

* Section 14 makes provision for workers such as the respondent who reside outside of Nova Scotia but suffer workplace injuries within the province, and who are thereby made subject to the **Act** - that is, “workers” within the meaning of the **Act**.

* A conclusion that a worker at a workplace within Nova Scotia is not covered by workers' compensation merely because he or she resides out of the province conflicts with considerations of comity among provinces and the expressions of principle in the Interjurisdictional Agreement.

* Given the mobility of workers among workplaces, the historic tradeoff would be seriously eroded by the strict application of residence requirements. Employers accepting out of province deliveries would be exposed to employee actions from which workers compensation schemes were intended to protect them. That would be particularly true for employers such as the appellants situated near provincial boundaries, where such deliveries might be a daily occurrence. The situation would be similar when out-of-province contractors send in teams of specialists.

[24] I would allow the appeal, set aside the judgment of the trial judge, and declare that the respondent’s action is barred by s. 20 of the former **Workers' Compensation Act, supra**. I would award costs to the appellants which I fix at $800 plus disbursements.

Freeman, J.A.

Concurred in:

Chipman, J.A.

Bateman, J.A.