Date: 19981014 Docket: C.A. 146677

# NOVA SCOTIA COURT OF APPEAL

Cite as: Imperial Oil Ltd. v. Parsons, 1998 NSCA 173

**Freeman, Bateman, Cromwell, JJ.A.**

**BETWEEN:**

IMPERIAL OIL LIMITED

Appellant

- and -

DONALD PARSONS

Respondent

John C. MacPherson, Q.C.
for the Appellant

Jason P. Gavras
for the Respondent

Appeal Heard:
September 22, 1998

Judgment Delivered:
October 14,1998

**THE COURT:** Appeal is dismissed with costs to the respondent fixed at $2,500.00 as per reasons of judgment of Freeman, J.A., Bateman and Cromwell, JJ.A., concurring.

**FREEMAN, J.A.:**

The respondent Parsons claims to have suffered permanent loss of use of his left arm in a workplace accident for which he was awarded Workers' Compensation. He also sought compensation under his private insurance scheme with Mutual of Omaha, which had been sponsored by his employer, Imperial Oil Limited.

Mutual refused to pay, asserting that Parsons' injuries did not qualify under the policy. Parsons claimed he had never been provided with a copy of the policy, but that his injuries fell within the coverage described in a booklet entitled "Imperial and You," provided by the employer. He says he relied on the booklet when he bought the coverage.

He sued Mutual of Omaha in the Supreme Court of Nova Scotia when it refused to pay and amended his pleadings to include Imperial as a defendant. He asserts that Imperial was the agent of Omaha and if it did not bind Omaha to the coverage described in the booklet, it assumed an obligation as principal and is liable on the contract. In the alternative, he pleads negligent misrepresentation.

On a reference to the Workers' Compensation Appeals Tribunal of Nova Scotia, which has exclusive jurisdiction to decide such matters, it was determined that the Supreme Court Action against Imperial was not barred by **s. 28** of the **Workers' Compensation Act**, S.N.S. 1994-5, c. 10, which provides:

**Compensation as exclusive right**

28 (1) The rights provided by this Part are in lieu of all rights and rights of action to which a worker, a worker's dependant or a worker's employer are or may be entitled against

(a) the worker's employer or that employer's servants or agents; and

(b) any other employer subject to this Part, or any of that employer's servants or agents,

as a result of any personal injury by accident

(c) in respect of which compensation is payable pursuant to this Part; or

(d) arising out of and in the course of the worker's employment in an industry to which this Part applies.

**Clause 1(b) does not apply**

(2) Clause (1)(b) does not apply where the injury results from the use or operation of a motor vehicle registered or required to be registered pursuant to the *Motor Vehicle Act*. 1994-95, c. 10, s. 28.

The Tribunal's jurisdiction to determine whether an action is barred under **s. 28** is contained in **s. 29**, as follows:

**Determination whether right of action is barred**

29 (1) Any party to an action may apply to the Chief Appeal Commissioner of the Appeals Tribunal for determination of whether the right of action is barred by this Part.

**Determination by Appeals Tribunal**

(2) An application made pursuant to subsection (1) shall be determined by the Appeals Tribunal constituted according to Section 238.

**Appeals Tribunal has exclusive jurisdiction**

> (3) The Appeals Tribunal has exclusive jurisdiction to make a determination of whether the right of action is removed by this Part.

**Decision of Appeals Tribunal is final**

> (4) 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, and if the Appeals Tribunal determines that the right of action is barred by this Part, the action is forever stayed. 1994-95, c. 10, s. 29.

These are provisions of the current **Act**, which came into effect on Feburary 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):

**Appeals to Court of Appeal**

> 256 (1) Any participant in a final order, ruling or decision of the Appeals Tribunal may appeal to the Nova Scotia Court of Appeal on any question as to the jurisdiction of the Appeals Tribunal but on no other question of law or fact.

**Sections 28** and **29** give effect to the historic trade-off of a workers' common law right to sue the employer against no-fault coverage, the principle underlying workers' compensation schemes. The Tribunal is exclusively entrusted with the

determination whether a worker's action is barred as a right against the employer arising **"as a result of any personal injury by accident"** in respect of which compensation is payable or arising out of and in the course of the worker's employment. The legislative intention that only the Tribunal should answer questions intimately related to the historic trade-off is emphasized by the inclusion of the specific privative clause in subsection (4) of **s. 29**.

The Supreme Court of Canada considered a privative clause having a similar effect in **Pasiechnyk v. Saskatchewan** (W.C.B.) (1997), 149 D.L.R. (4th) 577. The right of the Saskatchewan Board to make a "final and conclusive" determination whether a worker's action against an employer is barred by statute is protected by the following:

> 22(2) The decision and finding of the board under this Act upon all questions of fact and law are final and conclusive and no proceedings by or before the board shall be restrained by injunction, prohibition or other proceeding or removable by *certiorari* or otherwise in any court.

In my view both the Saskatchewan and Nova Scotia provisions are 'full" or "true" privative clauses as defined by Sopinka J. in **Pasiechnyk**:

> [17] A "full" or "true" privative clause is one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded.

Relevant decisions of the Nova Scotia Tribunal and the Saskatchewan Board are therefore subject to the same standard of review, which Sopinka J. expressed in **Pasiechynk** as follows:

> [16] To determine the standard of review, I must first decide whether the

> subject matter of the decision of the administrative tribunal was subject to a privative clause having full privative effect. If the conclusion is that a full privative clause applies, then the decision of the tribunal is only reviewable if it is patently unreasonable or the tribunal has made an error in the interpretation of a legislative provision limiting the tribunal's powers. In either circumstance the tribunal will have exceeded its jurisdiction. These principles are summarized in **U.E.S., Local 298 v. Bibeault**, [1998] 2 S.C.R. 1048, at p. 1086:
>
> > It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:
> >
> > 1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
> >
> > 2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

In **Pasiechnyk** a crane fell over at a construction site, killing two workers and injuring four others. The injured workers and the dependents of the deceased workers sued the owner of the crane, the owner of the work site, and the government for breach of statutory duties under the **Occupational Health and Safety Act** of Saskatchewan. The board found all defendants were "employers" within the meaning of the **Act**. The Saskatchewan Court of Appeal allowed the workers appeal with respect to the government only. The decision of the board was restored by the Supreme Court of Canada. The government was engaged in the industry of "regulating" and involved in a dual capacity. The board's decision was not patently unreasonable.

In the present appeal the Appeals Tribunal found:

> . . . [T]hat Parsons' action against Imperial stands alone notwithstanding his work accident and consequently cannot have been intended to be barred pursuant to **s. 28** of the Act. We do not believe it was the intention of the Legislature in this Province to shield the employer from a cause of action which can stand alone independent of the work accident simply because it arose simultaneously to the work accident itself.

The finding that the insurance action in question "stands alone" is a finding that it was not the "result of any personal injury by accident" in the workplace, which is squarely within the Tribunal's core jurisdiction under **ss. 28** and **29**. The action is to be barred only if it is found to have resulted from such an accident; we must defer to the Tribunal's finding unless that finding is patently unreasonable.

The facts on which Mr. Parson's insurance action is grounded existed independently of the accident and predated it. Those facts were discovered when Omaha refused Mr. Parsons' claim. But they came into existence when Imperial sold him the insurance, if, as he alleges, the risks covered do not correspond with the risks for which coverage was purchased. While a disabling accident was the event most likely to result in the discovery of the right of action, an accident was not essential to his action against Imperial. If Mr. Parsons had acquired a copy of the policy and compared it with the company booklet, he might have discovered the cause of action he asserts at any time. Even if the Tribunal's decision was wrong at law, and in my view it was not, it was not an irrational finding. It was not patently unreasonable.

I would dismiss the appeal with costs to the respondent which I would fix at

$2,500.

Freeman, J.A.

Concurred in:

Bateman, J.A.

Cromwell, J.A