NOVA SCOTIA COURT OF APPEAL

Citation: *Mime'j Seafoods Ltd. v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2007 NSCA 115

Date: 20071207
Docket: CA 277720
Registry: Halifax

Between:

Mime'j Seafoods Limited
(Claim No. 182485-11)

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal
and the Workers' Compensation Board of Nova Scotia

Respondents

Judges:	MacDonald, C.J.N.S.; Cromwell and Saunders, JJ.A.
Appeal Heard:	October 4, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of MacDonald, C.J.N.S.; Cromwell and Saunders, JJ.A. concurring.

Counsel: D. Bruce Clarke for the appellant
Alexander C. W. MacIntosh for the respondent, WCAT
David P. S. Farrar, Q.C. and Paula Arab for the respondent, WCB
Alexander Cameron for the respondent, AGNS

Reasons for judgment:

[1] This appeal raises just one issue. Is the appellant Mime'j Seafoods Limited ("Mime'j") an *employer* as defined in the **Workers' Compensation Act**, S.N.S. 1994-95, c. 10? Mime'j insists that it is not and therefore not subject to assessment under the **Act**. For the reasons that follow, I conclude otherwise.

BACKGROUND

The Aboriginal World View

[2] Mime'j places great emphasis on its affiliation with the Aboriginal community. It is a self-described *Aboriginal communal commercial fishing management entity*. It is owned by the Native Council of Nova Scotia, an incorporated society dedicated to protecting the rights of off-reserve Aboriginals living in Nova Scotia.

[3] Mime'j exists not as a business *per se*, but solely to accommodate the *Federal Department of Fisheries and Oceans'* requirement that fishing licenses be held by either a band or some other entity recognized in Canadian law. Thus, while Mime'j holds legal title to various fishing licenses, vessels and equipment, it does so not on its own behalf but on behalf of the off-reserve Aboriginal community. As such, Mime'j makes these assets available to off-reserve Aboriginals through a series of community-based joint venture agreements.

[4] Thus, in its factum, Mime'j emphasized how, for the Aboriginal community, fishing has never been an industry *per se* but a community activity based on sharing.

> ¶14 Mi'kmaq belief systems and worldview are inextricably interwoven in the operations of the Mi'kmaq off-reserve communal commercial fishery. The Mi'kmaq participants believe that they are engaged in a traditional communal activity that has its roots in ancient times and in the sacred Treaty relationship entered into between the Crown and the Mi'kmaq in the 18th Century. The Mi'kmaq fishers believe, as a result of the Marshall decision, that they have a Treaty right to engage in commercial fishing to attain a moderate livelihood. Mi'kmaq worldview is non-coercive and based on consensus. Despite the insertion of the legal construct of "Mime'j" into the mix, the Mi'kmaq seek to live out their culture within and for the benefit of their community. It is culturally inappropriate

> for one Mi'kmaq person to seek to control another Mi'kmaq person in the exercise of a traditional or rights-based activity.

[5] Despite the unique aspects of the Aboriginal fishery and its inherent incongruity with DFO regulations, it is important to note that, in seeking to avoid coverage under the **Act**, Mime'j does not rely on any Aboriginal or treaty right. Specifically, Mime'j acknowledges that if it meets the definition of *employer* under the **Act**, it will fall within its scheme and will therefore be obliged to pay the requisite premiums. Nonetheless, it insists that this Aboriginal experience informs the analysis by offering important context.

The Proceedings to Date

[6] In 2003, the respondent Workers' Compensation Board of Nova Scotia ("the Board") initially determined that Mime'j was not an *employer* and as such was not subject to mandatory coverage under the **Act**.

[7] However in October of 2005, following a claim to the Board by an injured Mime'j crew member, a field officer for the Board revisited its original decision and determined that Mime'j was indeed an *employer*. It was therefore ordered to register under the **Act** and to make commensurate payments. Mime'j appealed this finding to one of the Board's hearing officers. In June of 2006, Hearing Officer Rachel Henderson confirmed the field officer's assessment and dismissed the appeal. Mime'j appealed further to the Workers' Compensation Appeals Tribunal ("WCAT") which conducted its hearing on October of 2006.

[8] In January of this year, WCAT dismissed the appeal. In finding Mime'j to be an *employer* under the **Act**, WCAT reasoned:

> In any event, Mime'j is both the owner of the 12 vessels used in the aboriginal fishery and the holder of multiple licenses granted under the *Aboriginal Communal Fishing Licenses Regulations*. It leases vessels and licenses to Captains and Deckhands. Therefore, the panel finds that Mime'j is an employer under the *Act*, as the owner of vessels provided to workers employed in the fishing industry.
>
> Mime'j argues that there are no employers and no workers under the arrangements between Mime'j and the Captains and Mime'j and the Deckhands. It says that even if the crew are paid under a profit-sharing arrangement, they are not otherwise employees. Therefore, Mime'j as an owner of the vessels, is not an

> employer as the vessels are not provided to workers employed in the fishing industry.
>
> The panel finds to the contrary. The Deckhands as well as the Captains are workers employed in the fishing industry. They are hired by Mime'j directly under contracts called lease contracts. The contracts demonstrate the extent of control by Mime'j over every aspect of the fishing activity except for the actual fishing. Mime'j provides the vessels, gear, licenses; underwrites the operating expenses; and, Mime'j is in complete control of the disbursement of the proceeds of the landed catch value. The relationships reflect in reality more of an employer/employee relationship than lease arrangements or joint venture partnerships. The Captain of a larger crew acts more as a foreman, including training novice crew members, than as a business partner.
>
> The extent of control exercised by Mime'j distinguishes the facts in this appeal from those considered in *Decision 2000-254-AD*. In that decision, the Tribunal found that notwithstanding a "lease" arrangement, the vessel owner and license holder was in a joint venture or in partnership with the Captain, operator of the vessel. The panel notes that the Tribunal did not consider whether the crew were workers as there were only two other crew members. The Tribunal relied primarily on the fact that the all crew were paid by settlement of a share of the catch and referred to s. 5 of the *Partnership Act* to characterize the relationship.
>
> Section 2 (ae) of the *Act*, however, has specifically addressed the unique arrangements in the fishing industry by including in the definition of worker a person who becomes a member of the crew of a vessel under a profit-sharing arrangement. The panel notes that s. 2 (ae) was not considered in *Decision 2000-254-AD*. Mime'j as owner of the vessels is therefore an employer under the *Act.*

[9] In June of this year Mime'j sought, and by consent secured, leave to appeal to this court.

ANALYSIS

Standard of Review

[10] In reviewing this decision, I am of course directed by the Supreme Court of Canada's *pragmatic and functional approach* with its four contextual considerations, namely: (a) the presence or absence of a privative clause and the right to appeal the impugned decision; (b) the purpose of the **Act** generally and of the provision under review specifically; (c) WCAT's expertise compared to this

court's expertise; and (d) the nature of the question under review. By weighing these four factors, I am to select from a continuum three potential standards of review. The most exacting standard is *correctness* where, to be sustained, the decision under review must be correct. This is followed by the less exacting inquiry - Is the decision under review *reasonable*? Finally, the greatest deference is reserved for those decisions that will be interfered with only if seen to be *patently unreasonable*. I will now address the four considerations.

Privative Clause and Right of Appeal

[11] This appeal, dealing with an exercise of statutory interpretation, involves a question of law for which there is no privative clause. In fact, under s. 256 of the ***Act***, an appeal on a question of law or jurisdiction lies to this court, albeit with leave. That suggests less deference.

*The **Act**'s Purpose*

[12] The **Act**'s purpose has been discussed many times by this court. Recently Cromwell, J.A. in **Logan v. Nova Scotia (Workers' Compensation Appeals Tribunal),** [2006] N.S.J. No. 29; 2006 NSCA 88, highlighted two major aspects: (a) resolving workers' compensation issues outside the court system, and (b) doing so through a fact-finding quasi judicial exercise. The former suggests more deference; the latter suggests less:

> ¶19 The first is the overall purpose of workers' compensation legislation. It is to create a comprehensive scheme for resolving workers' compensation issues outside the court system and without resort to the principles of tort liability: **Nova Scotia (Workers' Compensation Board) v. Martin**, [2003] 2 S.C.R. 504 at para. 52. This tends to support a measure of deference lest "judicialization" of the scheme undermine this fundamental objective.
>
> ¶20 The second aspect of legislative purpose relates more specifically to WCAT's mandate. It is not, in general, a tribunal that is required to select from a range of remedial choices or administrative responses. Rather, it is a tribunal that in many respects has more in common with the "judicial paradigm involving a pure *lis inter partes* determined largely by the facts before the tribunal" than with tribunals that exercise a broad, policy-laden jurisdiction: **Dr. Q v. College of Physicians and Surgeons of British Columbia**, [2003] 1 S.C.R. 226 at para. 32. This aspect tends towards less rather than more deference: **Dr. Q** at para. 31.

[13] The specific provision under review involves the definition of *employer*. This definition is designed to identify those entities that, as employers, fall subject to the workers' compensation regime. This certainly touches on WCAT's day to day work and thereby attracts some deference.

WCAT's Expertise

[14] How does WCAT's expertise compare to this court's expertise when it comes to engaging in this exercise of statutory interpretation? As Cromwell, J.A. observed in **Logan**, *supra,* WCAT is a highly specialized tribunal that can demand some deference even when tackling certain issues of law; specifically those that form the core of its work:

> ¶31 We have recognized the expertise of the WCAT acquired by its ongoing highly specialized functions within the workers' compensation system. While WCAT does not have greater expertise relative to the Court with respect to legal questions arising under **WCA**, its specialized functions support a measure of deference with respect to certain types of legal questions falling squarely within them: **Puddicombe** at para. 18. When it comes to applying legal principles to the facts of the case, greater deference is due. WCAT's role is to make findings of fact and apply them to the relevant principles. By virtue of its role and specialized functions, it is somewhat better placed than the Court to do so.

[15] See also **Nova Scotia (Department of Transportation and Public Works v. Nova Scotia (Workers' Compensation Appeals Tribunal)(Puddicombe)** (2005), 231 N.S.R. (2d) 390; 2005 NSCA 62.

[16] Generally speaking, however, this court has as much if not more expertise when it comes to statutory interpretation. The question therefore becomes: Is a consideration of the definition of *employer* sufficiently close to WCAT's core work to justify some measure of deference? That question is intertwined with the fourth and final consideration involving the issue under review. I will therefore consider these questions in concert.

The Issue under Review

[17] The issue of whether Mime'j is an *employer* involves a pure question of law. The legal question is a very narrow one, turning on the interpretation of two express statutory inclusions within the definitions of the words "employer" and "worker". Interpretation of this express and precise statutory language does not engage to any significant extent the sort of expertise that WCAT acquires through its ongoing highly specialized functions within the workers' compensation system. Furthermore, there was no factual dispute about the nature of Mime'j's enterprise. Instead, as will become clear later in my judgment, the exercise essentially involves a consideration of the principles of statutory interpretation. Thus, WCAT's expertise in the context of this narrow issue does not attract deference.

Conclusion on the Standard of Review

[18] Weighing the four considerations, on balance I find *correctness* to be the appropriate standard of review. My conclusion is driven primarily by the nature of the issue. Fundamentally, I expect issues, such as this - coming to us by way of statutory appeal on a pure question of law - to generally draw a review on the *correctness* standard. That was Fichaud, J.A.'s observation in **John Ross & Sons Ltd. v. Nova Scotia (Workers' Compensation Appeals Tribunal),** 2005 NSCA 128:

> ¶18 Not every issue of law invokes the correctness standard. *But where, as here, there is a statutory appeal on a question of law or jurisdiction with no privative protection, a ground of appeal which turns on the interpretation of legislation* or the application of principles from judicial case law *generally* (but not invariably) *attracts appellate review based on correctness*. *MacDonald v. Workers' Compensation Board (N.S.),* 2000 NSCA 134 at ¶ 20; *Ferneyhough v. Workers' Compensation Board (N.S.),* 2000 NSCA 121 at ¶ 9-10; *Boyle v. Workers' Compensation Board (N.S.),* 2004 NSCA 88 at ¶ 11-14; *Dipersio v. Nova Scotia Workers' Compensation Appeals Tribunal,* 2004 NSCA 139 at ¶ 26. The WCAT's decision suggests that an employer's failure to (a) reasonably accommodate an employee's injury or (b) allow an employee a reasonable time to find alternate employment after dismissal may extend the period for which an employee may obtain temporary benefits under the *Act*. These are issues of law which attract the correctness standard on appeal.
>
> [Emphasis added.]

[19] Here, with WCAT's expertise not in play, and with no disputed facts, we are left with a pure question of law commanding the *correctness* standard of review. Therefore, WCAT had to be correct in its conclusion that Mime'j is an *employer* under the **Act**.

The Statutory Framework

[20] The **Act** does not define the term *employer* exhaustively, but lists a number of express inclusions within that term. We are concerned here with one of these express inclusions, the one set out in (n)(ix) which provides that the term employer includes "any person operating a boat, vessel, ship, dredge, tug, scow or other craft usually employed or intended to be employed in an industry ...". For ease of reference, I will set out all of the matters included in the term *employer*:

> (n) "employer" means an employer within the scope of Part I and includes
>
> > (i) every person having in the persons 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 Part I,
> >
> > (ii) the principal, contractor and subcontractor referred to in Sections 140 and 141,
> >
> > (iii) a receiver, liquidator, executor or administrator and any person appointed by a court, who has authority to carry on the business of an employer,
> >
> > (iv) a municipal corporation,
> >
> > (v) a public service commission,
> >
> > (vi) any person who authorizes or permits a learner to be in or about an industry for the purpose described in clause (q),
> >
> > (vii) Her Majesty in right of the Province,
> >
> > (viii) Her Majesty in right of Canada in so far as Her Majesty submits to the operation of Part I,

> (ix) *any person operating a boat, vessel, ship, dredge, tug, scow or other craft usually employed or intended to be employed in an industry to which Part I applies and, with respect to the industry of fishing, the owner or operator of a boat or vessel rented, chartered or otherwise provided to a worker employed in the fishing industry and used in or in connection with an industry carried on by the employer to which Part I applies, and*
>
> (x) in relation to a particular employer, the whole or any part of any establishment, undertaking, work, operation, trade or business within the scope of Part I;

[Emphasis added.]

[21] The inclusion as an employer of "any person operating a boat ... provided to a worker employed in the fishing industry" uses the term *worker*, which also has a list of express inclusions under the **Act**. One of them, set out in (ae)(vi), provides that in respect of the industry of fishing, a worker is a person who becomes a member of a vessel under any profit-sharing arrangement. For ease of reference, I will set out all of (ae):

> (ae) "worker" means a worker within the scope of Part I, and includes
>
> (i) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied,
>
> (ii) an officer, director or manager of an employer, where the person is actively engaged in the business and is carried on the payroll of the business at the person's actual earnings,
>
> (iii) a learner,
>
> (iv) a student admitted pursuant to Section 6,
>
> (v) a member of a municipal volunteer fire department admitted pursuant to Section 5,
>
> *(vi) in respect of the industry of fishing, a person who becomes a member of the crew of a vessel under any profit-sharing arrangement,*
>
> (vii) in respect of the industry of mining, a person while actually engaged in taking or attending a course of training or instruction in mine rescue

> work under the direction or with the approval, express or implied, of an employer in whose employment the person is employed as a worker in that industry,
>
> (viii) in respect of any industry, a person while actually engaged in rescuing or protecting or attempting to rescue or protect life or property in the case of an explosion, a fire or other emergency, that endangers either life or property in or about the industry in which the person is employed,
>
> (ix) any other person who, pursuant to Part I, the regulations or an order of the Board, is deemed to be a worker, and
>
> (x) in relation to compensation payable to a dependant, a dependant,
>
> but, subject to Section 4, does not include
>
> (xi) a receiver, liquidator or other person appointed by a court or a judge with power to manage or carry on the business of an employer for winding-up or other purposes,
>
> (xii) an employer, or
>
> (xiii) a member of the family of an employer or a member of the family of a director of a corporation who
>
> (A) is employed by the employer or the corporation, and
>
> (B) lives with the employer or director as a member of the employer's or director's household. 1994-95, c. 10, s. 2.
>
> [Emphasis added.]

[22] Focussing on the relevant passages from each definition, the question thus becomes: Is Mime'j *with respect to the industry of fishing, the owner... of a ... vessel ... provided to a worker [a member of the crew of a vessel under any profit-sharing arrangement] employed in the fishing industry*? Therefore, the issue before WCAT and now before us is whether Mime'j's operation falls within the express inclusions within the term e*mployer* as it is used in the **Act** and this turns in part on whether a crew member on Mime'j's vessels falls within the express inclusions within the term *worker* as it is used in the **Act**.

[23] To answer this question, I turn initially to the basic principles of statutory interpretation.

The Principles of Statutory Interpretation

[24] Let me begin with the relevant legislation. Nova Scotia's **Interpretation Act**, (1989) R.S.N.S., c. 235, deems all legislation to be remedial and to be interpreted so that its objects are attained:

> 9 (5) *Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters*
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.
>
> [Emphasis added.]

[25] Consistent with this focus on legislative intent, the Supreme Court of Canada had endorsed the *modern* approach to statutory interpretation as proposed by Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at page 87:

> ...the words of an Act are to be read in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See **Re Rizzo and Rizzo Shoes Ltd.,** [1998] 1 S.C.R. 27, at 41; **Canada (House of Commons) v. Vaid**, [2005] S.C.J. No. 28; and **Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada**, [2006] S.C.J. No. 46, 2006 SCC 46.

[26] As Ruth Sullivan subsequently explains in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at page 1, this *modern* approach involves an analysis of: (a) the statute's text (its grammatical and ordinary meaning); (b) the legislative intent; and (c) the entire context including the consideration of established legal norms. Professor Sullivan explains:

> The chief significance of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. The first dimension emphasized is textual meaning. Although texts issue from an author and a particular set of circumstances, once published they are detached from their origin and take on a life of their own - one over which the reader has substantial control. Recent research in psycholinguistics has shown that the way readers understand the words of a text depends on the expectations they bring to their reading. These expectations are rooted in linguistic competence and shared linguistic convention; they are also dependent on the wide-ranging knowledge, beliefs, values and experience that readers have stored in their brain. The content of a reader's memory constitutes the most important context in which a text is read and influences in particular his or her impression of ordinary meaning - what Driedger calls the grammatical and ordinary sense of the words.
>
> A second dimension endorsed by the modern principle is legislative intent. All texts, indeed all utterances, are made for a reason. Authors want to communicate their thoughts and they may further want their readers to adopt different views or adjust their conduct. A cooperative reader tries to discover what the author had in mind. In the case of legislation, the law-maker wants to communicate the law that it intended to enact because that law, as set out in the successive provisions of a statute or regulation, is the means chosen by the law-maker to achieve a set of desired goals. ...
>
> A third dimension of interpretation referred to in the modern principle is compliance with established legal norms. These norms are part of the "entire context" in which the words of an Act must be read. They are also an integral part of legislative intent, as that concept is explained by Driedger. ...

[27] Let me now consider the three noted dimensions in the context of this appeal.

The Grammatical and Ordinary Meaning

[28] For ease of reference, I repeat the salient provisions:

> Is Mime'j *with respect to the industry of fishing, the owner... of a ... vessel ... provided to a worker [a member of the crew of a vessel under any profit-sharing arrangement] employed in the fishing industry*?

[29] These words appear straightforward enough and their ordinary meaning supports WCAT's conclusion - i.e., Mime'j owns fishing vessels and provides them to Aboriginal captains and crew under a profit-sharing arrangement. Applying the grammatical and ordinary sense of these words, it appears difficult for Mime'j to escape the **Act**'s definition of *employer*.

The Legislative Intent

[30] I have already addressed the **Act**'s objects when considering the appropriate standard of review at paragraph 12, above. As Cromwell, J.A. observed in **Logan**, *supra*, the **Act** is designed to provide a mechanism to remove workers' compensation issues from our court system and its conventional fault-based tort system. This is accomplished through a comprehensive investigative process coupled with a specialized adjudicative regime and no-fault compensation funded through the accident fund.

[31] The intent of the specific provision also appears clear. It is designed to bring those who crew on fishing vessels into the regime. Initially, only *workmen involved in the fish curing and packing* industry were covered. See **Workmen's Compensation Act**, (1967) R.S.N.S. c. 343 s. 2. Then in 1968 the present definition of employer emerged obviously in the context of expanding the regime further into the shipping and fishing industry:

> 5 (1) Clause (g) of Section 1 of said Chapter 343, as that Section is enacted by this Act, is amended by adding thereto the following subclause:
>
> > (vii) any person operating a boat, vessel, ship, dredge, tug, scow or other craft usually employed or intended to be employed in an industry to which this Act applies and in respect to the industry of fishing also includes the

> owner or operator of a boat or vessel rented, chartered or otherwise provided to a workman employed in the fishing industry and used in or in connection with an industry carried on by the employer to which this Act applies.
>
> (2) Clause (w) of said Section 1, as enacted by this Act, is amended by adding immediately after the words "person is employed as a workman in that industry" the following words:
>
> "and in respect of the industry of fishing, includes a person who becomes a member of the crew of a vessel under an agreement to prosecute a fishing voyage in the capacity of a sharesman or is described in the Shipping Articles as a sharesman or agrees to accept in payment for his services a share or portion of the proceeds or profits of the venture, with or without other remuneration or is employed on a boat or vessel provided by the employer,"

[32] WCAT's interpretation appears to be completely consistent with the legislative intent.

The Entire Context

[33] In my view, the *entire context* also supports the view that Mime'j is an employer under the existing definition. As noted, it is clear that, back in 1968, the legislature chose to extend the workers' compensation scheme further into the shipping and fishing industry. This appears to be part of a trend towards expanded coverage. In short, the subject amendment deleted nothing from the definition of *employer* as it existed at that time. It simply expanded the regime by adding another category.

[34] To conclude on this issue, in my view, both the text and the legislative intent when viewed within the entire context appear to be in congruence. They tend to support WCAT's conclusion that Mime'j is an employer as defined in the **Act**.

The Appellant's Submission

[35] Of course, Mime'j maintains otherwise. It asserts that WCAT fell into error by placing too much reliance on the term *worker*, as it is referenced in the definition of *employer*. Indeed Mime'j acknowledges that its captains and crew meet the broad

definition of *worker* under the **Act.** However it hastens to assert that this concession does not necessarily make Mime'j an *employer*. Mime'j insists that its type of leasing arrangement allows it to engage *workers* (as defined in the **Act**) without necessarily becoming their *employers*. Furthermore, as Mime'j accurately maintains, this case ultimately is not about the definition of *worker*. Instead it is about the definition of *employer*. Mime'j asserts that WCAT erred by finding it an *employer* simply because its crew members were *workers* (as defined in the **Act**).

[36] In fact, Mime'j insists that the definition of *employer* in this context does not target *workers* as defined in the **Act**. Instead, says Mime'j, it targets another type of worker; that is, workers *employed in the fishing industry*. Thus Mime'j would place the following emphasis on the definition:

> 2(n) "employer" means an employer within the scope of Part I and includes …
>
> > (ix) any person operating a boat, vessel, ship, dredge, tug, scow or other craft usually employed or intended to be employed in an industry to which Part I applies and, with respect to the industry of fishing, the owner or operator of a boat or vessel rented, chartered or otherwise provided to a worker *employed in the fishing industry* and used in or in connection with an industry carried on by the employer to which Part I applies,

[37] In Mime'j's submission, the reference to *worker* in this phrase is therefore modified or limited by the five words that follow - *employed in the fishing industry*. It therefore cannot mean simply a *worker* as defined in the **Act**. If it did, then the phrase *employed in the fishing industry* would be superfluous. These extra five words, in Mime'j's submission, therefore must mean something.

[38] Then, asks Mime'j, what does *worker employed in the fishing industry* actually mean? This is important because it is not an *employer* unless its crew fit this description. The answer to this question, says Mime'j, lies in the very next word - *employed*. Thus such a *worker*, to fit the definition, must be *employed*. Because the **Act** provides no definition for the term *employed*, Mime'j suggests that we must inevitably turn to the common law. In its factum, Mime'j explains:

> ¶ 43 This case turns on the definition of "employer" under s. 2(n) Act. Under that definition, employer means [sic] a person having another person under a "**contract of hiring**" and includes "with respect to the industry of fishing, the owner or

> operator of a boat or vessel rented, chartered or otherwise provided to a worker **employed** in the fishing industry …" (emphasis added). Consequently, the Board can assess, as an employer, either the owner of the vessel or its operator if the vessel so described is provided to a worker "employed" – i.e. in a master-servant relationship – in the fishing industry. If the other elements of a master-servant relationship do not exist, then the person is not "employed" and the owner or operator is not deemed to be an employer simply because a form of profit sharing exists between the parties.

[39] Furthermore, Mime'j says that under a common law analysis, its crew would not be considered employees and it, therefore, would not be considered an employer. It is here, says Mime'j, that the Aboriginal world view finds its relevance:

> ¶ 71 The arrangement between Mime'j and the various captains and deckhands is not a master-servant relationship. The captains and crew themselves exercised a high degree of independent discretion, subject, of course, to DFO requirements. The various vessels and fisheries are not combined or integrated. The captain and crew on each vessel determine how, when and where the fishing was conducted, with no input from or consultation with Mime'j. The catch is not an asset of and does not ever belong to Mime'j. The fishers themselves decide who the catch is sold to and when the catch is "settled". The fishers consider themselves to be self-employed and are treated as self-employed by CRA. The captain and crew have the ability to add members to the crew at their own expense, with notice to be provided to Mime'j so that the proper contract could be prepared for that new crew member. The fishers are liable for any negligence claims and for any lost or damaged equipment. All participants in the Mime'j communal Treaty fishery consider themselves to be engaged in a traditional cultural practice, within which no person is to be the "master" of another. Having regard to the relevant case law, the communal nature of the Mi'kmaq fishery and Mi'kmaq worldview, we submit that the various fishers are engaged in a variety of separate joint venture operations. As a result, Mime'j is not an employer within the meaning of the Act of the captain or crew on any of the vessels.

Conclusion on this Issue

[40] This submission is interesting but it is one that I cannot accept in the face of what I view as an obvious legislative effort to classify vessel owners such as Mime'j as *employers*. In short, to conclude otherwise would have us meander

through a path of tortuous reasoning that in the end would defy the Legislature's clear objective. Let me elaborate.

[41] Mime'j is correct to suggest that all words in a statute are presumed to have meaning. The phrase *[worker] employed in the fishing industry* would be no exception. Professor Sullivan, *supra*, (at page 158) explains what has been referred to as the presumption against tautology:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. In *Hill v. William Hill (Park Lane) Ltd.*, Viscount Simons wrote:
>
> > [Al]though a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out.
>
> In *R. v. Proulx*, Lamer C.J. wrote:
>
> > It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.
>
> As these passages indicate, every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.

[42] Yet while this presumption against tautology remains valid, it is no more than that - a presumption. It is a presumption that can in appropriate circumstances be rebutted. Again, Professor Sullivan explains:

> ... Repetition is not an evil when it serves an intelligible purpose. When tautologous words are deliberately included in legislation for reasons such as

> these, the courts say they are added *ex abundanti cautela*, out of an abundance of caution, and the presumption against tautology is rebutted.
>
> In the *Chrysler* case, for example, McLachlin J. in her dissenting judgment conceded that the phrase “and any matters related thereto” appearing in the *Competition Tribunal Act* would be unnecessary if its only function were to confer ancillary powers on the Tribunal. However, in her view,
>
> > one must approach such general phrases against the background that they are commonly used in many statutes, not to confer unmentioned powers, but to ensure that the powers clearly given be exercised without undue restraint. It is true, as Gonthier J. points out, that ancillary powers can be inferred and need not be set out. Yet the reality is that statutes commonly do set them out, if only in the hope of avoiding arguments seeking to unduly restrict the effective exercise of expressly conferred powers. ... Given the relatively common use of phrases like "and all [or any] matters related thereto" in legislative drafting, I do not find [Mr. Justice Gonthier’s] argument persuasive.
>
> When there is reason to believe that the tautologous words were deliberately included in the legislation, the presumption is rebutted. [at page 162]

[43] In the context of this case, the presumption is easily rebutted. The words - *employed in the fishing industry* - cannot be seen, as Mime’j suggests, to have the concept of worker restricted to someone employed in the common law master-servant sense. Instead, when inserting this phrase, the legislators, I believe, had a goal that was far less ambitious. I believe that the legislators were responding to the **Act**’s definition of *worker* which is very broad and comprehensive. It reaches well beyond the fishing industry (as repeated here for ease of reference):

> (ae) "worker" means a worker within the scope of Part I, and includes
>
> > (i) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied,
> >
> > (ii) an officer, director or manager of an employer, where the person is actively engaged in the business and is carried on the payroll of the business at the person's actual earnings,
> >
> > (iii) a learner,

(iv) a student admitted pursuant to Section 6,

(v) a member of a municipal volunteer fire department admitted pursuant to Section 5,

(vi) in respect of the industry of fishing, a person who becomes a member of the crew of a vessel under any profit-sharing arrangement,

(vii) in respect of the industry of mining, a person while actually engaged in taking or attending a course of training or instruction in mine rescue work under the direction or with the approval, express or implied, of an employer in whose employment the person is employed as a worker in that industry,

(viii) in respect of any industry, a person while actually engaged in rescuing or protecting or attempting to rescue or protect life or property in the case of an explosion, a fire or other emergency, that endangers either life or property in or about the industry in which the person is employed,

(ix) any other person who, pursuant to Part I, the regulations or an order of the Board, is deemed to be a worker, and

(x) in relation to compensation payable to a dependant, a dependant,

but, subject to Section 4, does not include

(xi) a receiver, liquidator or other person appointed by a court or a judge with power to manage or carry on the business of an employer for winding-up or other purposes,

(xii) an employer, or

(xiii) a member of the family of an employer or a member of the family of a director of a corporation who

(A) is employed by the employer or the corporation, and

(B) lives with the employer or director as a member of the employer's or director's household. 1994-95, c. 10, s. 2.

[44] Given this expansive definition of worker, I suggest that, as an abundance of caution, the legislators added the words *employed in the fishing industry* simply to clarify their target - i.e., owners who provide vessels to workers engaged or involved in the fishing industry. In other words, I see the verb *employed* as being synonymous with *engaged* or *involved*. Again this is to clarify the legislative target - a *worker* not as broadly defined [i.e., a student or volunteer firefighter as in ss.(ae)(iv) and(v)] but as a worker *engaged* or *involved* in the fishing industry. The verbs "employed", "engaged" and "involved" have traditionally been used interchangeably in Canadian jurisprudence. For example, note the following definitions:

> **employed**. (1) Performing the duties of an office or employment. (2) Occupied or engaged." *Might v. Minister of National Revenue*, [1948] Ex. C.R. 382 at 389.
>
> **engaged**. (1) "Employed ... hired." *Knight v. Fairall* (1933), [1934] 1 W.W.R. 131 at 137-8. (2) "Being occupied." *Munn v. City Lumber Co.* (1950), 58 Man. R. 26 at 31.
>
> [Reference: The Dictionary of Canada Law, 3rd ed., (Toronto: Thomson Canada Limited, 2004)]
>
> **employ**. 1. To make use of. 2. To hire. ...
>
> **engage**. To employ or involve oneself; to take part in; to embark on.
>
> [Reference: Black's Law Dictionary, 8th ed., (St. Paul: Thomson, 2004)]

[45] To explore Mime'j's theory even further, one would have to assume that, in its submission, every reference in the **Act** to the two words - *worker employed*, would somehow refer to a person employed in the common law sense. These words are twinned several times in the **Act** and none support Mime'j's submission. In fact, most conflict with it. Let me refer to just one example. It is s. 129(1) which sets out an employer's duty to maintain certain records:

> 129 (1) Every employer shall keep a record of
>
> (a) the name of every *worker employed*;
>
> (b) the dates and times worked by the worker;
>
> (c) the earnings and the rate of earnings of the worker;

> (d) the amount of any bonus or other remuneration paid to the worker or to which the worker is entitled;
>
> (e) any allowance made to a worker for the use of the worker's motor vehicle; and
>
> (f) any other information the Board may by regulation require.

[46] Surely it would defy all logic to suggest that under 129(1)(a), an *employer* need only record the names of those workers who fit some common law definition while the obligations set out in the following subsections apply to workers as defined in the **Act**.

[47] In conclusion, considering this clear legislative intent, the text, and the entire context, the phrase *[worker] employed in the fishing industry* cannot reasonably be seen to exclude Mime'j as an *employer*. The result is inescapable. Mime'j is an employer under the **Act**.

[48] In light of this conclusion, it is not necessary to engage in a common law analysis. Mime'j has effectively acknowledged that one would resort to the common law only had the phrase *employed in the fishing industry* led us there. I have rejected this theory. Furthermore, the Aboriginal world view would become relevant only had such a common law analysis been required. Thus it is unnecessary to comment further on Mime'j's detailed submissions in this regard.

[49] I would dismiss the appeal.

MacDonald, C.J.N.S.

Concurred in:

Cromwell, J.A.

Saunders, J.A.