NOVA SCOTIA COURT OF APPEAL

Citation: *Cape Breton Development Corporation v. Morrison Estate*, 2003 NSCA 103

Date: 20031002
Docket: CA 192454
Registry: Halifax

Between: Cape Breton Development Corporation (Workers' Compensation Board Claim No. 921658)

Appellant

v.

Estate of James Morrison and The Workers' Compensation Appeals Tribunal and the Workers' Compensation Board of Nova Scotia

Respondents

Judges: Bateman, Freeman and Hamilton, JJ.A.

Appeal Heard: September 15, 2003, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Freeman, J.A.; Bateman and Hamilton, JJ.A. concurring.

Counsel: Jane O'Neill and John Rice, for the appellant
Kenny LeBlanc and Anne Clark, for the respondent Estate
Louanne Labelle, for the respondent Workers' Compensation Appeals Tribunal
Paula Arab, for the respondent Workers' Compensation Board
Scott E. McCrossin, for the Attorney General of Canada

Reasons for judgment:

[1] The Cape Breton Development Corporation (Devco) has appealed, with leave of this court, a decision by the Workers' Compensation Appeals Tribunal (WCAT) granting survivor benefits to the widow of James Morrison, a former coal miner who died January 14, 2002, at the age of 82 while in receipt of a 70 per cent permanent medical impairment (PMI) allowance for lung dysfunction.

Background

[2] Mr. Morrison had worked as an underground miner on the coal face of Devco's mines for about 21 years, from 1948 to 1969. He was found entitled to a 60 per cent permanent partial disability award effective June 24, 1981. This was increased to 70 per cent effective October, 1985. These awards were made under s. 12 of the former Nova Scotia workers' compensation statute, the so-called "automatic assumption" provision, which provides that any coal miner who has worked at the face of a mine or in similar conditions for twenty years or more and who suffers from a loss of lung function will be compensated according to his disability. To qualify for his 60% and 70 % awards it would have been necessary for Mr. Morrison to have proven loss of lung function in accordance and to a degree consistent with standards established by the Board. But having proven his disability, by virtue of his 20 years in the mines, he was excused by s. 12 of the need for proving that his lung disease was a work related occupational disease. Following his death the claim by his estate for survivor benefits on his widow's behalf required proof of causation, that is, proof that industrial disease was a material causative factor in his death.

[3] Mr. Morrison's compensation awards were made under the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508, referred to as the "old" or "former" **Act**, which was replaced by the **Workers' Compensation Act** S.N.S. 1994-95, c. 10, referred to as the "new", the "present", or the "current" **Act**. Section 35 of the new **Act** is the equivalent section to s. 12 of the former **Act**. The present **Act** is the applicable statute with respect to survivor benefits for Mr. Morrison's estate.

[4] It provides in s. 60 that <u>where a worker dies as the result of an injury</u> (which can include an occupational disease) a death benefit and a survivor pension are payable. That is, while it was not disputed in the hearing before the Tribunal that Mr. Morrison suffered from an occupational disease, for survivor benefits to be

paid to Mrs. Morrison, a causal connection must be established between the occupational disease and his death. It is not automatically assumed that the compensable occupational disease recognized under s. 12 or s. 35 is the cause of death. (See **Nova Scotia (Workers' Compensation Board) v. McGean,** [1998] N.S.J. No. 144 (N.S.C.A.).) The burden falls on the deceased miner's estate to prove that death resulted from an accident at work or compensable occupational illness and not some other cause. The standard for proving causation was stated by Cromwell, J.A. in **Ferneyhough v. Nova Scotia (Workers' Compensation Board),** [2000] N.S.J. No. 342 at p. 6 (N.S.C.A.) as follows:

> The correct standard by which to assess whether the required causal link has been established is that the occupational disease must be a contributing cause in the sense that, "but for" the occupational disease, death would not have occurred when it did or, that the occupational disease contributed to the death in a material degree. The term "material degree" should be understood, as it was in **McGhee (McGhee v. National Coal Board,** [1972] 3 All E.R. 1008 (H.L.) and **Athey (Athey v. Leonati,** [1996] 3 S.C.R. 458), to mean something beyond the *de minimus* range, that is, something that is not negligible.

Medical Evidence and the Standard of Proof

[5] The evidentiary issue before the Tribunal therefore was not whether Mr. Morrison's lung problem was an occupational disease, which was acknowledged, but whether it contributed in a material way to the cause of his death. The evidence on this question was not well developed. The death certificate signed by Dr. Gordon Spencer showed the immediate cause of death to be dysrhythmia and shows "chronic obstructive lung disease" to be an antecedent cause "giving rise to the immediate cause of death." Dysrhythmia, which is defined as a disturbance of rhythm, could merely be a way of saying his heart stopped beating. Despite the significance of the antecedent cause noted by Dr. Spencer, there was no other medical evidence explaining whether stress imposed on the heart by significant loss of lung function over a period of years could have contributed to the heart problem which was the immediate cause of death.

[6] The Tribunal pointed out the unsatisfactory state of the medical evidence. Dr. Merv Shaw, Administrator of Medical Services at the Workers Compensation Board, considered that Mr. Morrison had no compensable condition. Dr. John C. Acres, Respirology and General Internal Medicine, thought the cause of death was "respiratory failure from obstructive lung disease, " an opinion which, if accepted

by the Tribunal, appeared favourable to the claim of the estate. Dr. Janigan, the pathologist who examined the lungs in Halifax, like Dr. Acres, did not have a copy of the death certificate.

[7] WCAT found the evidence for and against the estate's claim to be equally balanced, that is, not proven to the civil standard, which requires proof to a preponderance of probabilities. By the civil standard the Tribunal found the claim would not have been made out. I will accept as a finding of fact the Tribunal's view that the evidence was equally balanced, although considering the significance of the death certificate in light of the other medical evidence, including the opinion of Dr. Acres, I might not have reached the same conclusion.

[8] In deciding in favour of the estate and thus for the widow, the Tribunal applied s. 187 of the new **Workers' Compensation Act**, which entitles a worker to the benefit of the doubt when the evidence for and against the claim is equally balanced.

[9] Section 187 provides:

> 187. Notwithstanding anything contained in this Act, on any application for compensation an applicant is entitled to the benefit of the doubt which means that, where there is doubt on an issue respecting the application and the disputed possibilities are evenly balanced, the issues shall be resolved in the worker's favour.

[10] In light of the quality of the available medical evidence the comment of this court on the purpose of s. 187 in **Nova Scotia (Workers' Compensation Board) v. Johnstone**, (1999) NSCA 164, 181 N.S.R. (2d) 247 at para. 19 seems pertinent:

> The Board has resources, investigative powers and expertise which may not be available to the worker. Section 187 of the new **Act** appears intended to offset this imbalance by relieving the worker of the requirement of proving his or her claim beyond the balance of probabilities.

The Appeal

[11] Devco's appeal raises the issue of whether WCAT erred at law in applying s. 187. Devco is a federal Crown corporation. The Morrison Estate's entitlement to survivor benefits therefore originates under the federal **Government Employees Compensation Act**, R.S.C. 1985, c. G-8. This is not in dispute. Once federal employees establish eligibility under **GECA, GECA** provides that they are entitled to the same compensation benefits under the same conditions as their provincial counterparts are under the Nova Scotia **Workers' Compensation Act** 1994-1995. Devco argues that while the benefits may be the same, there are provisions such as s. 187 that may not apply to the determination of the entitlement of federal employees. Although Mr. Morrison, while living, benefitted from s.12, the automatic assumption provision, that is irrelevant to the claim for survivor benefits. His estate must prove causation. Under s. 60 of the **Workers Compensation Act** it must prove he died as a result of industrial disease. The position of the appellant is that his estate after his death could not rely on s. 187 to modify the civil standard of proof to assist it in establishing causation pursuant to s. 60.

[12] The narrow issue therefore is whether s. 187 of the **Workers' Compensation Act** can be relied on to give the benefit of the doubt, to which employees of Nova Scotia employers are entitled, to federal workers whose access to the Nova Scotia **Act** is created by **GECA**, in the determination of their compensation claims. This involves consideration of whether Parliament intended that **GECA** confer on federal employees the same rights, or conditions, as their Nova Scotia counterparts. These issues have not been previously decided by this court.

GECA and WC Act

[13] Federal employees entitled to workers' compensation under **GECA** are defined in s. 2 of **GECA** as follows:

> "Employee" means
>
> (a) any person in the service of Her Majesty who is paid a direct wage or salary by or on behalf of Her Majesty,

(b) any member, officer or employee of any department, company, corporation, commission, board or agency established to perform a function or duty on behalf of the Government of Canada who is declared by the Minister with the approval of the Governor in Council to be an employee for the purposes of this Act.

(c) any person who, for the purpose of obtaining employment in any department, company, corporation, commission, board or agency established to perform a function or duty on behalf of the Government of Canada, is taking a training course that is approved by the Minister for that person.

(d) any person employed by any department, company, corporation, commission, board or agency established to perform a function or duty on behalf of the Government of Canada, who is on leave of absence without pay and, for the purpose of increasing his skills used in the performance of his duties, is taking a training course that is approved by the Minister for that purpose, and

(e) any officer or employee of the Senate, the House of Commons or the Library of Parliament.

Section 3(1) of **GECA** provides:

3 (1) This Act does not apply to any person who is a member of the regular force of the Canadian Forces or of the Royal Canadian Mounted Police.

The right to compensation is established by ss. 4(1) and 4(2) of **GECA**:

4 (1) Subject to this Act, compensation shall be paid to

(a) an employee who

(i) is caused personal injury by an accident arising out of and in the course of his employment, or

(ii) is disabled by reason of an industrial disease due to the nature of the employment; and

...

> (b) the dependents of an employee whose death results from such an accident or industrial disease.
>
> (2) The employee or the dependents referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependents of deceased workmen, employed by persons other than Her Majesty, who
>
> (a) are caused personal injuries in that province by accidents arising out of and in the course of their employment, or
>
> (b) are disabled in that province by reason of industrial diseases due to the nature of their employment.

[14] The language of **GECA** is intended to be general and inclusive because its purpose is to provide federal employees with workers' compensation benefits in accordance with the particular wording of the workers' compensation acts of various provinces. The Parliamentary objective of making one federal act mesh with many provincial ones would be more difficult to achieve if **GECA** were to be read more narrowly than its natural meaning might support. Like other workers compensation legislation it is to be construed liberally and in favour of all workers within its purview. (See **Workmen's Compensation Board v. Theed**, [1940] S.C.R. 553.)

[15] The language creating entitlement in s. 4(1) of **GECA**, to repeat, is that "compensation shall be paid to an employee who is caused personal injury by an accident arising out of and in the course of his employment" and extends to occupational diseases and dependents. In my view this creates no conflict between the two acts; the language of **GECA** is virtually identical with, comprehensive of, and indistinguishable from the general entitlement provision in the Nova Scotia statute. Section 9 (1) of the old **Act** states:

> 9(1) Where, in any industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, compensation as hereinafter provided shall be paid to such worker, or his dependents, as the case may be . . . . (Emphasis added)

[16] The equivalent provision of the new **Act** is s. 10, which states:

> 10 (1) Where, in an industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the Board shall pay compensation to the worker as provided by this Part. (Emphasis added)

[17] Under s. 2(a)(iii) of the new **Act** "accident" includes disablement, including occupational disease, arising out of and in the course of employment, but does not include stress other than an acute reaction to a traumatic event.

[18] The only basis for distinguishing the concept of accident in the two acts in the appellant's submission was that the provincial provision may be read in light of the benefit of the doubt provision in s. 187, while the term "accident" in **GECA** means accident proved to the civil standard.

[19] Section 10(4) of the new **Act** (s. 10 (1) of the old **Act)** provides:

> 10 (4) Where the accident arose out of employment, unless the contrary is shown, it shall be presumed that it occurred in the course of employment, and where the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.

The Administrative Agreement

[20] While the issues must be determined according to the interaction of the provisions of the two statutes, **GECA** and the Nova Scotia **WCA**, some light is shed on their interpretation by an administrative agreement between the federal and provincial governments, dated December 12, 1996 and renewable annually, to determine responsibilities of the Workers Compensation Board of Nova Scotia and the Minister's authorized representative in determining compensation under **GECA**.

[21] The agreement recites that

> Whereas subsection 2 of section 4 of the said Act (GECA) provides for the entitlement to compensation of eligible employees and their dependents at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed.

Under Clause 3

> The Board shall determine compensation for employees involved in an accident or affected by an industrial disease.

[22] The Board is also responsible for investigating all claims for compensation and for reviewing the eligibility of each claim.

The Parliamentary Debates

[23] While any conclusions as to the intention of Parliament must finally be discerned from the language of the enactment, and the frailties of Parliamentary debates as a guide to discovering that intention have been frequently noted, there is a consistency to the expectations expressed in the House of Commons or in committee by the various ministers responsible for **GECA** over a period of decades that is difficult to ignore.

[24] **GECA** was introduced to the House on April 11, 1918, by Hon. J.D. Reid, Minister of Railways and Canals, as a resolution that began:

> Resolved, That it is expedient to provide that an employee in the service of His Majesty who is injured, and the dependents of any such employee who is killed, shall be entitled to the same compensation as the employee, or as the dependent of a deceased employee, of a person other than His Majesty would, under similar circumstances, be entitled to receive under the law of the province in which the accident occurred, and the liability for and the amount of such compensation shall be determined in the same manner and by the same Board, officers or authority . . .

[25] Mr. Reid stated that the bill to follow the resolution would place

> . . . all employees in the Government service under the same laws as other railway employees are under in so far as compensation for injury or loss of life is concerned. The Bill will provide that the compensation is to be the same as under the law of the province where the accident occurred.

[26] On the same occasion Sir Robert Borden stated:

> ... And in giving the right to compensation, it has been thought desirable, for the present at least, to follow the same lines which have been established under the laws of the several provinces.

[27] Mr. Reid affirmed in debate in the House several days later that

> In case of accident, injury or death, any liabilities will be paid in accordance with the amount the employees would be entitled to in any province.

[28] In 1931 Hon T. A. Crerar, Minister of Railways, moved a resolution for an amendment that would "extend the interpretation of the term compensation to include any benefits, expenses or allowances that are provided for under the provincial compensation acts."

[29] In a debate involving extending the concept of industrial diseases to include tuberculosis, Hon. Lionel Chevrier, Minister of Transport, told the House in 1947:

> . . . If we are to accept the decisions of the provincial boards of what is an accident and what is an industrial disease we have no alternative but to do as we are doing here. If we do not do that; if we were to set up a new and entirely separate body, as was suggested this afternoon, I presume that we could cover cases such as those to which my hon. friend has referred. But in order to save a great deal of expense we have decided to use the machinery already set up in the provinces, . . .

[30] In a debate later that year he explained that:

> . . . Claims arising from accidents or otherwise are handled differently according to the provinces. I think it is safe to say that in all provinces except Quebec the application is made directly to the workmen's compensation board of the province in which the accident or death occurred.

[31] In explaining amendments to **GECA** following Prince Edward Island's passage of its own **Workers' Compensation Act**, Mr. Chevrier stated in 1949:

> . . . [I]t will mean when an accident occurs or death follows or an industrial disease exists involving employees of the government in the province of Prince Edward Island, by virtue of section 3 the law applicable will be that which is in existence at the time in the province of Prince Edward Island. . . .

> Mr. McLure: This covers compensation for injuries to all government employees in Prince Edward Island, and it will now be the same as the rest of the provinces? Is that right?
>
> Mr. Chevrier: The first part of the hon. member's question should be answered yes, and the second part no. The law applicable in the case of Prince Edward Island will be that which was enacted on the 23rd of March, 1949, but it is somewhat different in that province from what it is in other provinces.

[32] In 1952 Hon. Milton F. Gregg, then Minister of Labour, told the house:

> The right to compensation and the amount of it in each case are decided by the provincial workmen's compensation board under the statute of the province concerned.

[33] In 1955 **GECA** was amended to add "same conditions" in s. 4(2), thus adopting the present language entitling federal employees to "compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed." Mr. Gregg told the House on February 28, 1955

> . . . It is considered that this change will bring the application of the legislation more closely in line with provincial workmen's compensation legislation . . . It is considered that the change will make for a more equitable and beneficial application of the legislation for the employees making claims under the **Act**.

[34] In 1955 Mr. Gregg summarized the **GECA** scheme, and related it back to its 1918 origins, as follows:

> The provision for payment of compensation to workers for injury or death sustained in the course of and arising out of the workman's employment is essentially a matter of civil rights and as such falls within the legislative jurisdiction of the provinces. All provinces have enacted workmen's compensation laws. These are not applicable, however, to the crown in right of Canada and its employees.
>
> The purpose of the Government Employees Compensation Act was to afford to employees of the crown a measure of protection similar to that provided to employees of private employers under provincial workmen's compensation laws. Thus the resolution introducing the original government employees compensation act in 1918 reads as follows:

> That an employee in the service of His Majesty who is injured, and the dependents of any such employee who is killed, shall be entitled to the same compensation as the employee, or as the dependents of a deceased employee, of a person other than His Majesty would, under similar circumstances, be entitled to receive under the law of the province in which the accident occurred.

The provisions of the present act accordingly provide for this intention. Pursuant to these provisions the provincial workmen's compensation boards have by arrangement handled the adjudication of claims of employees under the federal act as the agent of the federal government.

The Attorney General of Canada

[35] In an able brief submitted at the request of this court on behalf of the Attorney General of Canada the federal position was stated as follows:

> The Attorney General submits that the interplay between GECA and the WCA ought to be interpreted as follows:
>
> The provincial workers' compensation scheme governs claims submitted under GECA provided that
>
> > (a) the provision in issue is reasonably incidental to a "rate" or "condition" governing compensation under the law of the province, and
> >
> > (b) the provision is not otherwise in conflict with GECA.
>
> It is also the Attorney General's submission that the definitions of "accident" and "industrial disease" in s. 2 of GECA do not mandate different approaches to interpretation with respect to eligibility for compensation.
>
> The relevant principles of statutory interpretation were summarized by this Court in **Thomson v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, [(2003) 212 N.S.R. (2d) 81 (N.S.C.A.)], which also dealt with the interplay between GECA and the WCA:
>
> As in any case of statutory interpretation, the Court must strive to give the statute its most appropriate interpretation. The appropriate interpretation is to be arrived at by taking account of the statute's total context having regard to its purpose, the consequences of proposed interpretations and presumptions and special rules of interpretation. The appropriate interpretation is one which is

> plausible in the sense that it complies with the text of the statute, which is efficacious in the sense that it promotes the legislative purpose and that is acceptable, in the sense that the outcome is reasonable and just. – *Ruth Sullivan (ed.) Driedger on the Constrtuction of Statutes* (3rd, 1994) at 131.
>
> The application of these principles leads to the conclusion that GECA must be interpreted as incorporating the benefits of the doubt clause found in s. 187 of the WCA.

Principles of Statutory Interpretation

[36] The Attorney General of Canada's brief contains a further helpful discussion of principles of statutory interpretation in the context of workers' compensation legislation.

> The interpretation of s. 187 as a "condition" within the meaning of s. 4(2) of GECA is also demanded by the requirement to interpret workers' compensation legislation broadly and generously in order to give effect to its overwhelmingly remedial purpose.
>
> That such an approach is required was made clear by the Supreme Court of Canada in **New Brunswick (Workers Compensation Board) v. Theed:**
>
> > The history of the Act shows that the statute should be construed liberally in favour of all workmen within its purview.
>
> That liberal interpretation is also reflected by this Court's decision in **Workers' Compensation Appeal Board v. Penney** [(1980), 38 N.S.R. (2d) 623 (S.C.A.D.) at para 7, in which the following passage from *Halsbury's Laws of England* was quoted with approval:
>
> > The [Worker's Compensation] **Acts** are so clearly remedial measures that the courts will be slow to cut down the remedy given either by reference to the schedule of the compensation or by adopting an interpretation which will introduce exceptions not made by the legislature.
>
> . . .
>
> The governing principle is summarized in **Driedger on the Construction of Statutes** [3rd ed. P. 376].
>
> . . .

> Social welfare legislation is to be liberally construed so as to advance the benevolent purpose of the legislation. Where reasonable doubts or ambiguities arise, they are to be resolved in favour of the claimant. The courts' primary concern is ensuring that the legislative benefits reach the person for whom they were designed.

. . .

A liberal reading of GECA is also in accordance with the requirements of s. 12 of the federal **Interpretation Act**, which directs:

> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

. . .

Finally, the principle that cross-jurisdictional statutes are also to be read in a complementary manner is also applicable to the interplay between GECA and the WCA:

> Where statutes enacted by different jurisdictions are similar in purpose and structure, and particularly where they respond to similar pressures for social reform, the courts may presume that despite minor differences the statutes all express the same policies and implement the same solutions. This impulse toward uniformity is particularly strong in certain areas such as labour law, human rights legislation and matrimonial property law. In these areas, in the absence of a striking difference in wording, the legislation of all Canadian jurisdictions is presumed to be more or less the same.
>
> ***Ruth Sullivan, ed, Driedger on the Construction of Statutes****, 3rd ed. (Toronto; Butterworths, 1994) at 284 [footnotes omitted]*

The special rules of interpretation that govern workers' compensation legislation therefore demand a liberal and purposive reading of GECA in order to ensure the attainment of its intended effect, and the incorporation of s. 187 of the WCA is in keeping with these rules.

Relevant Jurisprudence

[37] It was illustrated in **Salloum v. Nova Scotia (Workers Compensation Appeals Tribunal)** [2000] N.S.J. No 415, 2000 NSCA 148 as considered in **Thomson** that in interpreting **GECA** its purpose must be held to prevail over the literal meaning of the words it employs. The court considered in **Salloum** that the language in **GECA** might not appear to be consistent with an intention to give federal employees a right of appeal to this court under s. 256 of the N.S. **W.C.A.**. This view was based in part on the Quebec Court of Appeal decision in **Canada Post Corporation v. Lamy et al.** J.Q. No. 1083**;** application for leave to appeal to the Supreme Court of Canada dismissed, [1999] C.S.C.R. No. 255. **Canada Post v. Lamy** is the case principally relied on by the appellant in this appeal. **Salloum** held that the right of appeal to this Court under s. 256(1) of the **W.C.A.** is an additional right not provided for in the federal legislation.

[38] However **Salloum** is no longer to be followed. In **Thomson** this Court was presented with substantial evidence in the form of Hansard reports of relevant Parliamentary debates since 1918, including statements of intention by the ministers involved, together with the legislative history of **GECA**. The judgment of the unanimous five-judge court, including two of the three judges on the original **Salloum** panel, made the following statement:

> Taking all of this material into account, which was not before the Court in Salloum, we would conclude that it provides important context and clarifies the purpose of the legislation. Understood in this context, it is clear that the interpretation of GECA in favour of the incorporation of appeals to this Court is the most appropriate interpretation of the statute. This interpretation is plausible in the sense that it complies with the admittedly general and broadly phrased text of the Act. It is efficacious in the sense that it promotes the clear legislative purpose and it is acceptable in the sense that the outcome of having employees under both provincial and federal jurisdiction on the same footing as regards the right to appeal in workers' compensation matters is reasonable and just.
>
> That being the case, should **Salloum** nonetheless continue to be followed? In our view, it should not for a number of reasons. First, and as just discussed, the contextual material relating to legislative purpose is particularly compelling. Had it been before the court in **Salloum**, it is unlikely that the decision would have been the same. Second, the issue is one of the Court's jurisdiction, that is, it relates to authority which, if conferred by the statute, it is the Court's duty to exercise. Third, Salloum is a very recent decision and, so far as the material before us discloses, there is little risk that any litigant has suffered irremediable

> prejudice by relying on it . Finally, Salloum itself marked a significant change in what had been the practice long prior to that decision. This Court has heard and decided appeals in GECA cases, without its jurisdiction to do so being questioned, for at least 25 years. Of course, a practice, even a venerable one, cannot confer jurisdiction where there is none. However, the existence of such practice is relevant to the question of how to balance the competing values of stability and adaptability in the law. In the circumstances here, it may be suggested with some justification that stability would be better served by not following **Salloum** than by following it. These factors, in combination, constitute exceptional and compelling circumstances making it appropriate not to continue to follow **Salloum**.

[39] In **Canada Post Corp. v. Smith** (1998), 159 D.L.R. (4th) 283 (Ont. C.A.), application for leave to appeal to the Supreme Court denied; [1998] S.C.C.A. No. 329, the Ontario Court of Appeal considered whether the right of an injured worker to be re-hired accorded by s. 54 of the Ontario **Act**, and a penalty imposed on an employer which breached s. 54, was a compensation claim within the meaning of s. 4(2) of **GECA**. The right to reinstatement was found to be a "benefit" within the definition of "compensation" and the decision of the Ontario Tribunal was upheld. Abella, J.A. stated at paragraph 18:

> This result, in my view, is neither inequitable nor inconsistent with the principles of federalism. Making different administrative arrangements with different provinces is not unconstitutional. Rather than leaving injured or disabled federal workers with no recourse, the federal government passed the GECA so that every federal employee had the right to whatever compensation other injured workers in the same province could claim. What the federal government has ensured is uniformity in compensation between injured employees in any given province, whether federally or provincially employed.

[40] She stated further in paragraph 47:

> 47. The various provincial laws, not the GECA, set out the relevant boundaries of the compensation schemes for injured workers. The GECA is merely the statutory vehicle for transferring authority over these issues to the appropriate provincial bodies (s. 4(3)), thereby inferentially absorbing all compensation-related rights and benefits provisions in provincial statutes (s. 4(2)). As the expert body and designated interpreter of this legislation in Ontario, the Tribunal's decisions in this regard are entitled to curial deference absent clear irrationality.

[41] While the disciplinary question at issue in **Smith** is not relevant to the present appeal, I agree with Abella's statements which in my view go to the heart of the interrelationship of GECA and the provincial legislation.

[42] In **Lamy**, however, LeBel J.A., as he then was, concluded that s. 28 of the Quebec workers' compensation legislation, the **Industrial Accidents Act**, could not be applied to determine entitlement under GECA. The provision creates a presumption that an accident that happens at the workplace while the worker is at work is presumed to be an employment injury. LeBel conducted a careful analysis of the federal and Quebec legislation and concluded that,

> Seized with an application for compensation submitted by an employee of Canada Post Corporation, with the law as it stood at the time of the accident, the CALP (the Quebec workers' compensation appeals tribunal) could not take the presumption into account in evaluating the evidence. In doing so, it used a provision that was not relevant . . . .

[43] He continued:

> . . . [I]t must therefore be concluded here that the reference made in the Compensation Act is limited to questions of compensation, and does not alter the conditions of eligibility defined fundamentally by the concept of accident and occupational disease found in the federal legislation.

[44] The conclusion in **Lamy** is that s. 28 of the Quebec legislation, for the reasons expressed by LeBel, J.A., is in conflict with **GECA**. An inquiry of this kind is necessary whenever the interrelationship of **GECA** with provincial legislation is in issue. The conclusion may vary in accordance with the provincial provision under consideration. In this light Lamy in is not incompatible with the views adopted by the Ontario Court of Appeal in **Smith** nor with the conclusions reached by this court in **Thomson**. It appears to be specific to the Quebec law "as it stood at the time of the accident." LeBel, J.A. had to interpret **GECA** and the Quebec legislation in the context of the jurisdictional relationship of the two governments with respect to workers' compensation matters.

[45] In considering the interrelationship of **GECA** and the Nova Scotia **Workers' Compensation Act**, I can find no basis for finding any real distinction in this province between entitlement as expressed in **GECA** and the entitlement provisions of the Nova Scotia legislation. That is, I see no conflict between **GECA**

and the provincial provisions under review. In my view the language in s. 4(1) of **GECA** is sufficiently broad and inclusive to embrace the language creating entitlement in the Nova Scotia **Act**; thus a worker entitled under **GECA** to claim compensation in Nova Scotia is by necessary implication also entitled to the benefits, and is bound by any restrictions contained in the provisions of the Nova Scotia **Workers' Compensation Act**. That is, the language of **GECA** does not support an interpretation which would exclude federal workers who require the assistance of s. 187 to be entitled to workers compensation in Nova Scotia. It has not been shown to my satisfaction, that Parliament intended to create an exclusionary distinction that would deflect the intention expressed in the Hansard reports that federal employees should have the same entitlement to workers' compensation as their provincial counterparts. In my view an interpretation supporting such a distinction would create a conflict between **GECA** and the provincial **Act** where none exists.

[46] With the greatest respect, I would note that the conditions of eligibility found in the Nova Scotia legislation are also, like those in the federal legislation, in the words of LeBel J.A., "defined fundamentally by the concept of accident and occupational disease . . ." In this province, in my view, this fundamental concept accords with the application of s. 187 by the Board in determining workers compensation claims by employees under **GECA**.

[47] The approach taken by the Quebec Court of Appeal may reflect the civil law origins of the Quebec statute, while **GECA** and the workers' compensation statutes of the other provinces reflects a British common law background. I agree with the conclusion reached in the analysis provided by the Attorney General of Canada:

> In **Lamy** the Quebec Court of Appeal continued with the approach followed in its previous decisions, but for reasons that are unique to Quebec. The Court's decision in that case was based on the significant differences between the fundamental conditions of entitlement in GECA with the conjunction "and" in s. 4(1) and Quebec's **Act respecting Industrial Accidents and Occupational Diseases ("Industrial Accidents Act")** with the conjunction "or" in its corresponding provision:
>
> (Per the Quebec Court of Appeal:)

> The 1918 federal legislation, which is said to have been inspired by British law, contains conjunctive conditions, i.e. the event had to be considered as "arising out of and in the course of employment". English law believed this formula imposed a dual condition for the employer's liability for an industrial accident . . .

The Quebec Court of Appeal emphasized that the routes of the different conjunctions of "and" versus "or" lay in the different origins of the **Industrial Accidents Act**, which had been inspired by the French laws, and GECA, which had been inspired by the British common law.

. . .

The Quebec Court of Appeal then emphasized that the s. 28 presumption was inextricably linked to the conditions of entitlement in the **Industrial Accidents Act**, which were fundamentally different from those in GECA because of the different conjunctions. Additionally, the s. 28 presumption applied only to a concept ("employment injury") that is fundamental to the Quebec law's "complex and coherent" regime, but is nowhere envisaged in GECA:

> We could elaborate at length on the nature of the presumption created by section 28. . . .
>
> Because the definitions in the federal legislation are different, the CALP's (the Quebec workers compensation appeals tribunal's) application of section 28 of the **Industrial Accidents Act** in this case brought the presumption into play to achieve an aim for which it was not designed.

. . .

The Attorney General submits that the Quebec Court of Appeal did not purport to set a precedent for other jurisdictions, such as Nova Scotia, whose workers' compensation legislation was founded on the British common law and, like GECA, contains the same fundamental conditions of entitlement.

. . .

Lamy should not be extended beyond the proposition that s. 28 of the **Industrial Accidents Act** cannot be imported into GECA because to do so would conflict with GECA.

. . .

The Other Presumptions

[48] The Attorney General of Canada submits that presumptions such as s. 187 form an integral part of workers' compensation law, "recognizing as they do the difficulty workers face in proving some matters on a civil standard."

> . . . [G]iven the "[d]ifficult questions of causation" that arise in the field of workers' compensation claims, it has been noted that:
>
> > The claimant is assisted through some of these difficulties by various statutory provisions.
>
> ***Christie et al., Employment Law in Canada,*** *vol. 1 3rd ed. (Toronto: Butterworths, 1998) at p. 9.38 (paras. 9.36-9.37 (paras. 9.97-9.103).*

Presumptions that have been included in the WCA since its inception in 1915–and which formed part of the provincial law when GECA was passed in 1918–include:

- s. 10(4), which creates a rebuttable presumption that where an accident arose out of employment, it also occurred in the course of employment, and *vice versa*. This presumption is important because s. 4(1) of GECA, like s. 10(1) of the WCA, requires an accident to have arisen "out of **and** in the course of employment";

- s. 10(3)(b), which incorporates a schedule of certain diseases which, if contracted by a worker involved in a specified industrial process, "shall be deemed to have been due to the nature of that employment unless the contrary is proved";

Other important presumptions which are now integral to the WCA have been added since its inception in 1915:

- s. 11, which creates a rebuttable presumption that any worker found dead in the underground workings of a coal mine is presumed to have died as a result of his work;

- s. 35, the so-called "automatic assumption" provision, which creates a **non-rebuttable** presumption in favour of coal miners who have worked at

> the face of the mine for twenty years and who suffered permanent impairment to their lung functions;
>
> • S. 36 which creates a rebuttable presumption that a worker who has a permanent impairment under the legislation rated at 100% and who dies is presumed to have died as a result of the corresponding injury;
>
> • S. 10E, which creates an automatic entitlement to benefits for certain workers who suffered chronic pain in a specified time period.
>
> All of these presumptions, including s. 187 of the WCA, are integral to the workers' compensation scheme. To find that they are excluded under GECA could result in federal employees being deprived of compensation available to their provincial counterparts. It could also require Parliament to constitute a system of federal patchworks to supplement the various provincial systems. Both consequences are contrary to the very purpose of GECA as reflected by the statute and its legislative history.

[49] The section references to the presumptions listed above are from the present **Act**. While the Attorney General's submissions are persuasive, it is not necessary to finally decide the issue of the availability, to Federal workers, of the other presumptions contained in the **Act**. This appeal focuses upon the s. 187 presumption.

The Appellant's Position

[50] The appellant submitted that despite the similarity in the language of entitlement in s. 4(1) of **GECA** and in the provincial legislation, the words "caused personal injury by an accident arising out of and in the course of his employment" have a different meaning in s. 4(1) of **GECA** than they have in s. 9(1) of the old, or s. 10(1) of the new Nova Scotia **Workers' Compensation Act**. That is because the conventional civil standard of proof applies to the federal **Act** and the modified civil standard, giving the worker the benefit of the doubt pursuant to s. 187 applies to the provincial **Act.** The provisions of the provincial **Act** are made by **GECA** to apply to federal employees only after entitlement has been established by the civil standard under s. 4(1). To import the standard of s. 187 into the federal **Act** for the purpose of determining entitlement under s. 4(1), in the same manner that it is used under the provincial **Act** to determine entitlement, would require specific language, that is, an amendment of **GECA**. The absence of language adopting the

modified standard is too important an omission to be attributed to a mere inadvertence, nor overcome by liberal statutory interpretation.

[51] Thus in the appellant's submission s. 4 of **GECA** governs two separate concepts, entitlement pursuant to s. 4(1) and compensation pursuant to s. 4(2). Entitlement must be established under 4(1) by **GECA** alone before the **Workers Compensation Act** comes into play. The benefit of the doubt provision created by s. 187 of the **Act** cannot help federal workers establish entitlement, because the provincial **Act** does not apply until the federal worker has proven "accident" pursuant to s. 4(1), that is, to the civil standard. The federal statute, which alone would apply to determining "accident", contains no provision modifying the standard of proof. Once entitlement is established under s. 4(1), without resort to a modified burden of proof, s. 187 could be applied to other issues involving the rate and condition of compensation under s. 4(2).

[52] The Appellant states in its factum:

> Absent a delegation of legislative or administrative authority from the Federal Government, the Legislature of the Province of Nova Scotia would be without jurisdiction to enact Workers' Compensation legislation which covers employees of federal works and undertakings. As this Court and others have observed, an employee in federal jurisdiction has no direct access to the provisions of the provincial **Act**–he or she must instead pass through the "gateway" established by **GECA**. Entitlement to benefits must be established pursuant to **GECA**–once the entitlement has been established, the administrative and procedural aspects of the claim are governed by the provincial **Act**. However, he claimant has no access to the provisions of the provincial **Act** until he or she has passed through the **GECA** gateway.
>
> Section (4)(1) controls eligibility under **GECA**, and is divided into two subsections, one for workers, and one for the dependents of a deceased worker who has died by reason of an accident or an industrial disease, as defined above. A worker's eligibility comes through s. 4(1)(a), and the eligibility for dependents of workers comes through s. 4(1)(b). For our purpose, the essential point is that there are **separate** "gateways" within **GECA** for workers and for the dependents of deceased workers:
>
> **The GECA Gateway**

[53] The appellant has described, and relies upon, the problematic **GECA** "gateway", or "threshold", which in my view is an erroneous concept. It assumes that s. 4(1) of **GECA** was intended by Parliament to create a "gateway" or "threshold" through which federal employees must pass before they can redeem the ministerial promise of equal treatment with their provincial counterparts under the workers' compensation laws of the province in which they are employed. While I agree that for federal employees access to the Nova Scotia **Workers Compensation Acts** must be through **GECA**, I do not agree that the entry point should be arbitrarily placed somewhere within s. 4, either between s. 4(1) and 4(2) or between 4(1)(a) and 4(1)(b) or perhaps both. The appellant offers no authority for this proposition, and in my view that is contrary to the scheme of **GECA**. The Nova Scotia legislation must be engaged much earlier in the process, and not in the midst of the key section which brings federal workers under the Nova Scotia **Act**.

[54] While the point of entry in the statute might be between s. 3 and s. 4, after **GECA** has defined the federal employees to which it applies, the process really begins when the claim is filed. Workers made eligible by the **GECA** definitions in s. 2, and not excluded by s. 3, who have, or consider that they have, suffered accidents or illness, or the dependents of such workers, are entitled to file claims for compensation. The filing of the claim engages the provincial legislation. The administrative agreement makes it clear that all claims are to be investigated and reviewed for eligibility by the Workers' Compensation Board. That is, the Workers' Compensation Board is clothed with jurisdiction over the federal worker from the moment the claim is filed. The Board of course is a creature of provincial statute. Its powers of investigation and review, like all the other powers it exercises, must be found within, and only within, the provisions of the provincial enactment. Once the provincial legislation is engaged, in my view it is engaged for all purposes of **GECA** and the **Workers' Compensation Acts**. It applies to the federal worker who has made the claim. In order to investigate the claim, as it is required to do, the Board must apply its own statute. In my view there is no basis for excluding an evidentiary presumption such as that in s. 187 from the process for evaluating claims made under s. 4 of **GECA**.

[55] In evaluating the claim the Board must first of all determine whether the federal worker has suffered an accident pursuant to s. 4(1) of **GECA**. The clear intention of the concurrent legislation is that the term as used in the federal statute must be interpreted by a provincial Board applying provincial law. It can be considered no coincidence that Parliament adopted the same language to describe the kind of accident that will qualify a worker for compensation as that which was

used in the provincial **Act**, and which refers to the kind of accident that a workers' compensation board can be expected to recognize. If it had been the intention of Parliament to create a barrier to the entitlement of certain federal workers based on evidentiary presumptions in the provincial **Act**, the provincial language of entitlement, "personal injury by an accident arising out of and in the course of his employment," would hardly have been adopted in **GECA** in s. 4(1).

[56] **GECA** seems clear. Couching the language of entitlement in s. 4(1) in the same words as the language of entitlement in the provincial **Acts** was surely intended to clear away obstacles, rather than to create them. It would have appeared that the requirement, common to both the federal and provincial acts, of "an accident arising out of and in the course of his employment" would have been a link wedding the two statutes in a common key concept. The link created by industrial disease may be even stronger, for it is defined in **GECA** as "any disease for which compensation is payable under the law of the province."

[57] Provincial workers, and federal workers defined in **GECA**, trigger the workers compensation process by filing a claim for compensation with the Workers' Compensation Board. The claim must be based on injury by accident or industrial disease. Dependents of deceased workers have a similar right. The Workers' Compensation Board processes the claim under the legislation of the province which applies equally to federal and provincial workers, for under s. 4(2) of **GECA** federal employees are "entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province . . . ."

[58] Thus in a province where a condition of entitlement to workers' compensation is proof of key elements to an equal balance of probabilities, as contrasted with the civil standard of a preponderance of probabilities, as in Nova Scotia pursuant to s. 187, it does not follow that in order to receive compensation for a similar accident or industrial disease at the same rate a federal worker subject to **GECA** must prove the same key elements to the civil standard.

[59] I am unable to accept the appellant's argument for a number of other reasons. Firstly it is too subtle; Workers compensation enactments, particularly concurrent ones like **GECA** and the provincial **Acts**, are robust legislation subject to robust rules of interpretation aimed at bringing benefits home to the workers for whom they are intended. **GECA**, like the provincial **Acts**, has been evolving since 1918. If the words used in s. 4(1) of **GECA** were intended to mean something different from the same words when used in the provincial legislation, Parliament

has missed numerous opportunities over the years to add a warning signal by a simple amendment.

[60] Secondly, as the respondent's counsel pointed out, s. 4 of **GECA** is about compensation, not about two discrete concepts of entitlement and compensation. It begins: "4(1) Subject to this **Act,** compensation shall be paid to (a) an employee who is caused personal injury . . ." It should be read as a whole.

[61] Thirdly, the interpretation urged by the appellant would create, for no practical reason, a class of disentitled federal workers injured in similar circumstances to their provincial counterparts who receive compensation. This would be contrary to the often expressed ministerial intention that federal employees should be subject to the **Workers' Compensation Acts** of the provinces in which they worked. It is inconceivable that Parliament, enacting legislation in response to the clear ministerial requests, should have attempted to renege on the promise by resorting to artful draughtsmanship.

[62] Fourthly, the interpretation in **Salloum** denying a right of appeal to federal employees governed by **GECA** was persuasive until the entire legislative and parliamentary background was placed before the court in **Thomson**. The interpretation urged by the appellant, that s. 4 of **GECA** must be split into one subsection governed by the civil standard and one by s. 187, does not rest on an equally defensible logical foundation. I am aware of no interpretation equally persuasive with that in **Salloum** that would deny federal employees the interpretation of s. 187 relied on by the Tribunal to decide the present appeal in favour of Mr. Morrison's widow. There is no provision in **GECA** which would blunt the broadly expressed intention of Parliament in Hansard, or in the legislative history, or in the language of s. 4(2).

[63] Fifthly, federal workers have no better access to adequate medical or other expert evidence than their provincial counterparts in the workers' compensation process, and stand equally in need of statutory assistance. Nowhere in **GECA** nor in the debates was it suggested they should be deprived of it.

[64] To paraphrase **Thomson**, the interpretation that s. 187, like other provisions of the **Workers' Compensation Act**, applies to **GECA** employees, is plausible in the sense that it complies with the admittedly general and broadly phrased text of the **Act.** It is efficacious in the sense that it promotes the clear legislative purpose and it is acceptable in the sense that the outcome of having employees under both

provincial and federal jurisdiction on the same footing as regards the burden of proof in workers' compensation matters is reasonable and just.

[65] It could hardly be argued that it would be more plausible, efficacious and acceptable if the dependents of a deceased worker who had long since proven entitlement to the benefits of the Nova Scotia **Act**, were confronted with the necessity of establishing for a second time, to the civil standard, that the worker was entitled under s. 4(1) of **GECA. McGean** governs the use to be made of the automatic assumption but the other provisions of the **Act** must apply.

[66] I agree with the statement in the brief of the Attorney General of Canada:

> The Nova Scotia Supreme Court's decision in **Canada Post Corporation v. Johnson** [(1993), 127 N.S.R. (2d) 207 (S.C.)] has been cited on some occasions for the argument that s. 4(1) creates a "gateway" through which an employee under GECA must pass before the employee is entitled to the provisions contained in s. 4(2) of the **Act**.
>
> . . .
>
> However, **Johnson** was primarily a case about the jurisdiction of the Board to entertain the employee's claim, and did not squarely put in issue the question of the employee's entitlement to the "conditions" prescribed by the provincial law. It also appears that the Court did not have the benefit of full argument on this important question, which would have included reference to such materials as legislative history and debates. The Court's holding that "eligibility flows from GECA" therefore should not be extended to mean that conditions such as that found in s. 187 of the WCA cannot be applied to determinations of eligibility under GECA.

[67] In my view the concept of the **GECA** gateway , on a proper interpretation of the statutes, is wrong at law. It should be permanently laid to rest. It is not deeply embedded in the jurisprudence, where it has been raised in a number of Board and Tribunal decisions essentially in a tentative manner and not as an established principle to be followed. It is an artificial and unnecessary construct, capable of creating confusion and injustice, and betrays the expectations created in the federal workers of Canada by ministerial statements in House of Commons.

Analysis

[68] In my view the interaction of **GECA** with provincial workers' compensation legislation was concisely expressed by the Attorney General for Canada as follows:

> The Attorney General submits that the interplay between GECA and the WCA ought to be interpreted as follows:
>
> The provincial workers' compensation scheme governs claims submitted under GECA provided that:
>
> (a) the provision in issue is reasonably incidental to a "rate" or "condition" governing compensation under the law of the province, and
>
> (b) the provision is not otherwise in conflict with GECA.

[69] This approach appears to be consistent with the case law, and I adopt it. Whether "reasonably incidental" in (a) is referred to as "integral" (**Smith**) or "sufficiently linked or connected to compensation" (**Bergeron** [1997] A.Q. No. 811), the concept is common in the jurisprudence. There must be a close nexus between the provincial provision sought to be invoked and compensation. Section 187 of the Nova Scotia **Act** is intended to correct the imbalance of resources between the resources of the Workers' Compensation Board and the individual worker seeking compensation.

[70] As discussed above, no conflict as referred to in (b) is apparent between the application of s. 187 and **GECA**.

[71] Mr. Morrison had been found entitled under **GECA** to the benefits provided by the N.S. **Workers' Compensation Act** when he was initially awarded his permanent partial disability award in 1981, and when that was increased in 1985. Those decisions are not under appeal. Section 35 of the new **Act** and s. 12 of the old **Act** , the automatic assumption provisions, involve an evidentiary presumption under the Nova Scotia law as surely as does s. 187. In the former **Act** the equivalent section to s. 187 is s. 24. Under **McGean**, Mrs. Morrison had to prove the lung dysfunction giving rise to the permanent medical impairment award as a cause of death. She was required to bring a fresh claim as a dependent under **GECA** to seek compensation under the Nova Scotia **Act**, but it could not be denied, based on the history of her husband's claims, that his lung dysfunction was an industrial disease. Because of the inadequate medical evidence s. 187 was necessary to take her the additional final step to proving it was material to his death

Conclusion

[72] In my view there is no basis for excluding s. 187 with respect to determining the eligibility for compensation of the dependents of a deceased federal employee in Nova Scotia. The Tribunal was within its jurisdiction and met the standard of correctness at law in applying s. 187 to break the perceived deadlock created by the inadequacies in the medical evidence. In the absence of legal error the resulting findings of fact that Mr. Morrison's occupational disease was a causative factor in his death, and that his widow is therefore entitled to survivor benefits, not being patently unreasonable, are matters of fact beyond the jurisdiction of this court pursuant to s. 256 of the Nova Scotia **Workers' Compensation Act**, the provision under which this appeal is brought. I would dismiss the appeal.

Freeman, J.A.

Concurred in:

Bateman, J.A.

Hamilton, J.A.