Date: 20020116
Docket: CA 173469

NOVA SCOTIA COURT OF APPEAL
[Cite as: Bell v. Canada (Attorney General), 2002 NSCA 8]

Cromwell, Hallett and Saunders, JJ.A.

BETWEEN:

PEARL WINNIFRED BELL and ROBERT WILLIAM BELL on their own behalf and on behalf of KAREN LISA SANGSTER, ALLAN WAYNE BELL, WILLIAM L. BELL and DONALD ROBERT BELL; KELLY-ANN BENOIT on her own behalf; LISA MARIE BENOIT-MURRIN on her own belalf; SHIRLEY ANN BENOIT on her own behalf and on behalf of NADINE CHERYL BENOIT; DARLENE PAMELA DOLLIMONT on her own behalf and on behalf of CHEREE ALYI TERESA DOLLIMONT; MARIE ANITA DOYLE and A. MARSHALL DOYLE on their own behalf and on the behalf of R. ALLAN DOYLE, JAMES A. DOYLE and DONALD P. DOYLE; G. ISABEL GILLIS on ber own behalf and on half of CHRISTOPHER GILLIS, ASHLEY ANNE GILLIS and DANIEL A. GILLIS, EILEEN GILLIS and JOE GILLIS on their own behalf; GENESTA AGATHA HALLORAN on her own behalf and on behalf of TREVOR LAWRENCE HALLORAN and NICHOLE MARGARET HALLORAN; BONNIE ATKINGS on her own behalf and on behalf of JESSIE DAVID ATKINGS and KRISTY ERIN JAHN; RETA JAHN on her own hehalf and on behalf of LARRY JAHN, FAYE GIBOS, MARVIN JAHN, NORMA BARE, CHERYLE TROTTER, DANA CHODYKA, BEVERLY TOPPIN and TRACY JAHN; ELEANOR C. LILLEY on her own behalf and on the behalf of SIMON P. LILLEY; DARREN C. LILLEY on his own behalf and STEPHEN P. LILLEY on his own behalf; CHRISTOPHER CORY McISAAC and JAMES ERIC McISAAC by their Guardian ad Litem CHERYL LEBLANC; BEVERLY MacKAY on her own behalf and on behalf of SARA MacKAY and JANELLE MacKAY; MARGUERITE MacNEIL on her own behalf and on the behalf of CHRISTOPHER LEE MACDONALD, LISA MARIE MacNEIL and SHAWN ANGUS MacNEIL; LISA POPLAR on her own behalf, VERONICA POPLAR on her own behalf; EVA POPLAR on her own behalf and on the behalf of RANDY ROBERT POPLAR and NANCY LEE McKEIGAN; SHEILA MAE DYKSTRA on her own behalf and on the behalf of LORI SHALENE DYKSTRA; SHELLE ALANNA McCALLUM on her own behalf and on the behalf of ANTHONY DARREN McCALLUM and KIMBERLY LESLIE McCALLUM; SHIRLEY ANNE CONWAY on her own behalf and on the behalf of TAMMY CONWAY, SHARI CONWAY, and SCOTT CONWAY; CAROLYNE ANN DEWAN on her own behalf and on the behalf of JENNIFER AMANDA DEWAN and TREVOR JAMES DEWAN

Appellants

- and -

THE ATTORNEY GENERAL OF CANADA and THE ATTORNEY GENERAL OF NOVA SCOTIA representing Her Majesty the Queen in right of the PROVINCE OF NOVA SCOTIA

Respondents

REASONS FOR JUDGMENT

Counsel: W. Dale Dunlop and Raymond F. Wagner for the appellants

Respondent Attorney General of Canada not appearing
Edward A. Gores and Genevieve S. Harvey for the respondent Attorney General of Nova Scotia

Appeal Heard:	December 11, 2001
Judgment Delivered:	January 16, 2002
THE COURT:	Appeal dismissed subject to a variation of the order of the chambers judge per reasons for judgment of Cromwell, J.A.; Hallett and Saunders, JJ.A. concurring.

CROMWELL, J.A.:

I. Introduction:

[1] The main question on this appeal is whether dependants of workers who were covered by workers' compensation in 1992 can sue the Province for claims arising out of workplace injuries.

[2] The case arises out of the tragic death of 26 men in the explosion at the Westray Coal Mine on May 9th, 1992. Relatives of 16 of those men have sued the Province of Nova Scotia and Canada. I will refer to these relatives as the "plaintiffs" or the "appellants". In essence, they claim that the Province acted negligently and/or in breach of statutory or fiduciary duty in providing financial support to the Westray Coal Mine project, in certifying and monitoring the qualifications of the personnel working at the mine, in issuing the mining licenses and permits required for the operation of the mine, in approving and monitoring the mine plans and in the regulation of mine safety.

[3] Section 18 of the **Workers' Compensation Act** as it stood in May of 1992 contains what is commonly referred to as a "bar" of civil proceedings. It provides, in essence, that civil suits concerning injuries to workers who are covered by workers' compensation are barred as against employers in

industries to which the workers' compensation legislation applies. The Province, being of the view that this bar applies to the appellants' action against it, applied to Davison, J. in Supreme Court chambers for the determination of a preliminary point of law. Specifically, the Province sought a ruling that any of the plaintiffs in the action who are dependants within the meaning of the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508, have no right of action against the Province by virtue of the provisions of s. 18 of that **Act**. The parties submitted an agreed statement of facts to the judge as the basis upon which the determination of this point of law was to be made.

[4] Davison, J. decided that the claims were barred by s. 18 of the **Workers' Compensation Act** and dismissed the action. The plaintiffs appeal that decision to this Court, raising two main points.

[5] First, they say that their civil action is not barred because the bar only applies to actions against employers in an industry which is subject to the **Workers' Compensation Act** and that the Province is not such an employer. Second, the appellants say that the bar only applies to actions against the Province as an employer and that their action is against the

Province in its capacity as a regulator, not as an employer. This is known as the "dual capacity" theory.

[6] For reasons which I will set out at length, I cannot accept either of these submissions. With respect to the first main point raised by the appellants, I have concluded that the Province in May of 1992 was an employer in an industry to which Part I of the **Act** applied. On the interpretation most favourable to the appellants, the **Act**, as it stood in 1992, permitted the Province's employees to be covered by workers' compensation if the Province submitted to the **Act** and was admitted as an industry to which Part I of the **Act** applied. In my view, the record is clear that the Province did submit to the **Act** and was admitted as an industry to which Part I of the **Act** applied. As for the second point, the so-called "dual capacity" theory, the Supreme Court of Canada rejected that approach in 1997 and it is not now open to this Court to accept it.

II. The Question Before the Court:

[7] In order to understand the issue presented to the chambers judge, and now to this Court, it is necessary to review some of the agreed facts and the relevant legislation in more detail.

[8] It is common ground that the legislation applicable to this case is the **Workers' Compensation Act** as it stood in May of 1992, that is, the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508.

[9] As is well known, the fundamental purpose of workers' compensation legislation is to provide prompt and secure compensation to injured workers without requiring them to establish liability against anyone in a court of law. This is achieved by having "no-fault" compensation benefits for injured workers which are funded by employers. Workers obtain these benefits without having to prove in court that anyone was at fault in causing the injuries. But they lose the right to sue employers in court. Employers fund the compensation benefits but obtain the protection of not being liable to court action. In other words, employers obtain the benefit of the so-called bar of civil proceedings.

[10] This case is concerned with this bar of civil proceedings — the protection of employers from civil suits by injured employees. The bar is a basic feature of workers' compensation legislation. It has been considered by the Supreme Court of Canada in **Pasiechnyk v. Saskatchewan (Workers' Compensation Board)**, [1997] 2 S.C.R. 890. Sopinka, J., in that case, described the bar as "central" to the workers' compensation scheme: at para.

27. Simply put, without the bar, employers would be funding (either through assessments or through self-insurance) an insurance system that would not provide them with insurance: at para. 27. As Sopinka, J. put it, "[i]ndividual immunity [of employers from civil suits] is the necessary corollary to collective liability": at para. 42.

[11] Generally speaking, the bar applies to block actions by workers who are covered by workers' compensation which arise from work-related injuries where the actions are against either their own employer or any other employer who is within the workers' compensation system. The **Workers' Compensation Act**, of course, defines the circumstances in which the bar applies in much more detail than the very general statement which I have made. It is, therefore, necessary to look more closely at the legislation.

[12] Section 18 of the **Workers' Compensation Act** is the main section which, in this case, provides for the bar of civil actions by injured workers against employers . Section 18 provides that, where an accident happens to a worker in the course of his employment in circumstances that would entitle the worker or the worker's dependants to an action against some person other than the worker's employer, neither the worker nor his dependants have any right of action against an employer in an industry to which Part I

of the **Workers' Compensation Act** applies. (In fact, s. 18 incorporates aspects of s. 17 by reference. What I have just stated is an attempt to put in simpler language the combined effect of those two sections as they relate to the issue in this appeal.) For ease of reference, I will reproduce the relevant part of s. 17 and s. 18 here:

> 17 (1) Where an accident happens to a worker in the course of his employment in such circumstances as entitle him or his dependants to an action against some person other than his employer, the worker or his dependants if entitled to compensation under this Part may claim such compensation or may bring such action, provided a written notice of election to bring such action or to claim compensation shall be made to the Board within six months from the date of the accident.
>
> 18. In any case within the provisions of subsection (1) of Section 17, neither the worker nor his dependants nor the employer of such worker shall have any right of action in respect of such accident against an employer, his servants or agents, in an industry to which this Part applies, and in any such case where it appears to the satisfaction of the Board that a worker of an employer in any class is injured or killed owing to the negligence of an employer or of the worker of an employer in another class to which this Part applies, the Board may direct that the compensation awarded in such case shall be charged against the last mentioned class.
>
> (emphasis added)

[13] Certain aspects of the application of s. 18 to this case raise no difficulty. It is agreed, for example, that the 16 deceased miners were employees of Curragh Inc. which was an employer covered by the **Workers' Compensation Act**. Each was a worker as defined in s. 2(w) of the **Act** and

each died as a result of personal injury by accident arising out of and in the course of employment. It is further agreed that some or all of the respondents are "dependants" of the deceased miners as defined in s. 2(f) of the **Act** and that the dependants claimed compensation under Part I of the **Act** as a result of the deaths caused by the explosion. The dependants received workers' compensation benefits in accordance with the **Act**. It is not part of the court's function in resolving the preliminary point of law to determine who among the plaintiffs is, in fact, a dependant.

[14] For the purposes of applying the statutory bar of civil actions in s. 18 of the **Act**, it is clear, therefore, that those of the plaintiffs who are dependants are subject to the bar in s. 18 if their action is against an employer in an industry to which Part I of the **Workers' Compensation Act** applies. The issue, then, is whether the Province is an employer in an industry to which Part I of the **Act** applies.

III. Analysis:

[15] To resolve this issue, the Court must answer two questions. The first is whether the Province is an employer within the meaning of the **Workers' Compensation Act**. If it is, the second question is whether it was an

employer in an industry subject to Part I of the **Act**. I will address each question in turn.

(a) Was the Province an employer within the meaning of the **Act**?

[16] The **Act** provides an inclusive (although not exhaustive) definition of "employer". As it is brief and central to the case, I will set out the relevant part of that definition in full:

> 2. In this Act, unless the context otherwise requires: ...
>
> (g) "employer" includes ...
>
> (vi) the Crown in the right of Nova Scotia, and in the right of Canada in so far as it submits to the operation of this Act; ...

[17] The position of the Province before Davison, J. and in this Court is that the Province fits exactly within s. 2(g)(vi) because it is specifically referred to — that is, the Province is "the Crown in right of Nova Scotia". The position of the appellants is that the Province is only an employer within the meaning of the **Act** insofar as it submits to the operation of the **Act**. In

other words, the phrase "insofar as it submits to the operation of this **Act**" modifies both the Crown in right of Nova Scotia and in right of Canada.

[18] In my opinion, the Province clearly falls within the definition of employer set out in s. 2(g)(vi). If it were necessary to do so, I would agree with the conclusion reached by the chambers judge that the phrase "insofar as it submits to the operation of this **Act**" modifies only the Crown in right of Canada so that it is not necessary to show that the Crown in right of Nova Scotia has submitted to the **Act**. However, on the factual record before the Court, it is not necessary to base the conclusion that the Province is an employer within the meaning of the **Act** on that narrow ground. The only reasonable conclusion one could reach from the record before the Court is that the Province submitted to the operation of the **Act**. I note that there is no disagreement between the parties that the Court should draw reasonable inferences from the agreed facts although they disagree about what those inferences should be.

[19] The agreed facts include the following. As of May 1992 (the month of the explosion) the Province had approximately 17,000 employees all of whom had workers' compensation coverage. The majority of those employees were provided with that coverage on the basis of self-insurance by the

Province. The Province was responsible for the full cost of workers' compensation benefits in respect of its employees and, in addition, paid an administration fee to compensate the Workers' Compensation Board's accident fund for the cost of claims administration.

[20] For civil servants (who comprised approximately 11,500 of the Province's 17,000 employees), highway workers and adult correctional institutional workers, the Workers' Compensation Board would determine whether an employee had a compensable injury and then the Province would continue to pay the employee at an amount equivalent to his or her full salary. The Workers' Compensation Board would then issue a tax form indicating the amount of workers' compensation awarded to the employees. The Workers' Compensation Board would bill the Province for any other claim expenses such as medical aid and rehabilitation costs.

[21] For the other employees of the Province, the Board would similarly determine whether there had been a compensable injury and workers' compensation benefits would be paid directly to the employee by the Board. It is clear from the agreed statement of facts that all of the Province's employees at the relevant time had workers' compensation coverage and received workers' compensation benefits for compensable injuries as

determined by the Board pursuant to the **Workers' Compensation Act**. It is difficult for me to understand what more the Province would be required to do to submit to the **Workers' Compensation Act** than to provide all of its 17,000 employees with workers' compensation coverage.

[22] The appellants, faced with what appears to me to be the irresistible conclusion that the Province had submitted to the **Act**, argued that the Province had not so submitted because, on two occasions since the workers' compensation scheme came into force in 1915, the Legislature had enacted statutes directly affecting the operation of the workers' compensation system in particular cases. With great respect, this argument has no merit. In order to submit to the provisions of the **Workers' Compensation Act,** the Province does not have to surrender its legislative authority in relation to workers' compensation. It is clear from the agreed statement of facts that, for all provincial employees in 1992, it was the Board which determined whether or not such employees had suffered a compensable injury and which set the level of workers' compensation benefits available under the **Act**.

[23] To find, as the appellants submit we should, that the Province is not an employer within the meaning of the **Act** would require the Court to

conclude that workers' compensation coverage had been extended to 17,000 provincial employees without there being any statutory authority for this to be done. It is a well settled principle of administrative law that an administrative tribunal, such as the Workers' Compensation Board, is restricted to the powers conferred on it by legislation. There is clear statutory authority for the Province to submit to the provisions of the **Act** and it is clear from the agreed statement of facts that it did so. I cannot accept the appellants' submission which, in effect, is that the Board, for more than 30 years, had been engaging in activities for which there was no lawful authority.

[24] I conclude then that the Province is an employer within the meaning of s. 2(g)(vi) of the **Workers' Compensation Act** as it stood in May of 1992.

(b) Is the Province an employer "in an industry to which [Part I of the **Workers' Compensation Act**] applies?

[25] As noted earlier, the bar of civil actions in s. 18 of the **Workers' Compensation Act** applies to claims by workers or their dependants against an employer "in an industry to which this Part applies."

[26] It was submitted on behalf of the Province, and apparently accepted by Davison, J., that once the Province was found to be an employer within the meaning of the **Act**, the bar of civil actions in s. 18 applied. I respectfully disagree with this position.

[27] In my view, there is a two-part test which must be satisfied before an employer is afforded protection from civil liability. The employer must be an employer within the meaning of the **Act** and, in addition, must be an employer "in an industry to which [Part I of the **Act**] applies." There is, thus, a distinction between an "employer" and an employer "in an industry to which this Part [i.e., Part I of the **Workers' Compensation Act**] applies."

[28] The concept of employment in an industry to which Part I of the **Act** applies is fundamental to the scheme of the **Act**. I will illustrate this point with some examples. Section 4 states that Part I of the Act applies to "... employers and workers in or about the industries ..." that are listed in section 4 or in Schedule B to the **Act**. The concept of employment in an industry to which the Part I of the **Act** applies is central to eligibility for compensation. Section 9, the main compensation section, provides for compensation where personal injury by accident arising out of or in the course of employment is caused to a worker "in any industry to which this Part applies." The assessment scheme of the **Act** set out in s. 95 and following is premised on employers being classified according to various classes of industry which are subject to the **Act**. The duties of employers concerning payroll reporting, for example, apply when the employer has commenced operations in "an industry to which this Part applies.": see s. 114. The **Act** also distinguishes between employers generally and employers carrying on an industry to which this Part applies in other sections such as s. 121.

[29] In my respectful view, there is no merit to the Province's submission that once the Province is found to be an employer within the provisions of s. 2(g)(vi) of the **Act**, the application of the bar of civil proceedings set out in s. 18 applies. For the bar to apply, the employer must be, as section 18 states, "... in an industry to which this Part applies." I also reject the Province's submission that the appellants made a concession before Davison, J. which acknowledged the correctness of the Province's position on this point. While there were, perhaps, some comments made during the oral argument before Davison, J. that may have led him to that conclusion, I do not think it would be fair to find that there had been any concession to this effect. In any case, even if the concession had been made, it is clearly wrong given the wording of s. 18 which requires the employer to be one engaged in an industry to which Part I of the **Act** applies. I, therefore, turn

to the question of whether the Province is an employer in an industry to which Part I of the **Act** applies.

[30] The appellants' position is that the Province is not covered by any of the industries listed in the **Act**. Under s. 2(j), "industry" includes any ... undertaking ... included in Schedule "B" to the **Act** or otherwise coming within the scope of the **Act**". Section 4 states that Part I of the **Act** is to apply to employers and workers in or about a certain number of listed industries. I accept the appellants' submission that the overall nature of the Province's activity in its entirety is not captured by any one of these listed industries.

[31] The Province submits that it has workers who are employed in various of the listed industries such as, for example, bridge building, transportation, street cleaning, operation of hospital, highway, bridge and overpass construction, etc. It follows, says the Province, that it is, therefore, an employer in industries to which Part I of the **Act** applies. I have serious doubts as to the soundness of this submission. I am inclined to the view that, for the purposes of determining whether Part I of the **Act** applies, one must characterize the overall operation of the employer in light of the listed industries. The fact that the employer has some employees engaged in activities which are described in the list of industries does not necessarily result in a finding that the overall operation of the employer is in that particular industry. In other words, a bank that employs a cleaner is not necessarily in the cleaning industry.

[32] However, in my view it is not necessary to reach any final conclusion on that point. The **Workers' Compensation Act** provides, in s. 6(1), that any industry to which Part I of the **Act** does not apply, by virtue of either Schedule "B" or s. 4, may be admitted by the Board as being within the scope of that Part. The full text of s. 6(1) follows:

> 6 (1) Any industry or worker to which this Part does not apply by virtue of Section 4 and Schedule B to this Act may, on the application of the employer, be admitted by the Board as being within the scope of this Part on such terms and conditions and for such period and from time to time as the Board may prescribe, and from and after such admission and during the period of such admission such industry or worker shall be deemed to be within the scope of this Part.

[33] In my respectful view, the only reasonable inference that can be drawn from the agreed statement of facts is that the Board admitted the Province as an industry pursuant to what was in 1992, s. 6(1) of the **Act**. While the

numbering of the section changed over the years, this provision in substance was the same at all times relevant to the appeal. As noted, it is an agreed fact that as of May, 1992, all 17,000 of the Province's employees had workers' compensation coverage. When one examines the correspondence in Appendix A of the agreed statement of facts, it is clear that the Province requested, and that the Board agreed, to authorize and establish coverage for classified civil servants, admitting the Province as an industry on a self-insurer basis. While I agree with the appellants that the process by which this occurred is surprisingly lacking in formality and detailed documentation, there is, in my opinion, no other statutory basis upon which the Board could have extended this coverage as it undoubtedly did. In light of the statutory framework, the agreed statement of facts and the correspondence attached to it as Appendix A, the only reasonable inference is that the Province was admitted as an industry under the legislative equivalent of s. 6(1) of the **Workers' Compensation Act**.

[34] I would conclude, therefore, that the Province was both an "employer" and "an employer in an industry" to which Part I of the **Act** applies.

[35] The appellants submit, however, that even if this is so, the bar does not apply to them because it only applies to law suits against the Province as an employer, not to suits against the Province as a regulator. This is known as the "dual capacity" theory.

[36] With great respect to the contrary view expressed by the appellants, it is my opinion that this "dual capacity" theory was flatly rejected by the Supreme Court of Canada in the **Pasiechynk** case. Although it was only necessary for the Court in that case to decide whether the Saskatchewan Board had been reasonable in rejecting the "dual capacity" theory, the Court, in my opinion, clearly went beyond that issue and held that the dual capacity theory was wrong in law: see Sopinka, J. at paras. 49 and 51. This Court is bound by that decision and it is not open to us to consider afresh the merit or otherwise of the "dual capacity" theory.

[37] I conclude, therefore, that in May of 1992, the Province was an employer in an industry to which Part I of the **Workers' Compensation Act** applied. It follows that the action by the plaintiffs who are dependants as defined in the **Workers' Compensation Act** is barred by s. 18 of the **Act**.

[38] The appellants submit that the chambers judge erred in stating at paragraph 57 of his reasons that their action against the Provine should be dismissed. With this submission, I agree. The chambers judge, by way of the

Province's application to determine a point of law pursuant to **Civil Procedure Rule 25**, was asked to find that "any plaintiff who is a dependant within the meaning of the **Workers' Compensation Act** has no right of action against [the Province] by virtue of the provisions of that **Act** and particularly s. 18 thereof." It was stipulated in the agreed statement of facts that the parties were not asking the judge to determine who amongst the respondents was, in fact, a dependant. Although there may have been some comments made in the course of oral argument which led the judge to conclude that the parties wished him to take on a broader mandate, I think the judge should have confined himself to the issue as framed in the Province's application. It is true, as the Province submits, that the determination of a point of law under **Civil Procedure Rule 25** may substantially dispose of the issues between the parties. However, it does not follow that, in addition to determining that point of law, the judge should go on and make an order to give effect to that determination, unless, of course, the parties clearly request the judge to do so.

[39] The appellants submit that the chambers judge's resort to grammar texts and to Hansard was improper. I do not find it necessary to comment on this submission. The appellants made it clear in their submissions to this Court that what they want is a clear answer on the point of substance raised on this appeal, namely, whether the action against the Province by those appellants who are dependants is barred by s. 18 of the **Workers' Compensation Act**. Having resolved that issue, nothing would be served by addressing these other essentially procedural arguments arising out of the chambers judge's decision.

[40] In the result, I would uphold the chambers judge's conclusion that any plaintiff in the within action who is a dependant within the meaning of the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508 has no right of action against the Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia by virtue of s. 18 of that **Act**, but I would not uphold his conclusion that the action should be dismissed.

IV. Disposition:

[41] Subject to the reservation that the judge ought not to have dismissed the action, I would dismiss the appeal, without costs. No formal order of the chambers judge is in the record. I would ask counsel to draw up and submit

to this Court a draft order giving effect to these reasons. The draft order should be filed within ten days.

Cromwell, J.A.

Concurred in:
Hallett, J.A.
Saunders, J.A.