

1997

S. H. No. 145324

**IN THE SUPREME COURT OF NOVA SCOTIA
(IN CHAMBERS)**

Cite as: Spencer v. Mansour's Ltd., 1999 NSSC 96

BETWEEN:

ADAM JOHN SPENCER

PLAINTIFF

- and -

**MANSOUR'S LIMITED, a body corporate, CASEY REALTY
LIMITED, a body corporate and THE TOWN OF AMHERST,
a body corporate**

DEFENDANTS

D E C I S I O N

HEARD BEFORE: The Honourable Justice Walter R. E. Goodfellow in the
Supreme Court of Nova Scotia (Chambers) on November
3rd, 1999

DECISION: November 12th, 1999

COUNSEL: Mark S. Raftus, Solicitor for the Plaintiff
Jocelyn M. Campbell and Michael J. Messenger,
Solicitors for Defendant, Mansour's Limited
C. Patricia Mitchell, Solicitor for Defendant, Casey
Realty Limited
Jean McKenna, Solicitor for Defendant, The Town of
Amherst (Chose not to attend)

GOODFELLOW, J.:

1. BACKGROUND

Adam John Spencer issued an Originating Notice and Statement of Claim February the 18th, 1998 alleging a slip and fall on ice outside civic address, 27 Church Street, Amherst, Nova Scotia on the 6th of April, 1995. He further alleges that the Defendant, Mansour's, was the occupier of 27 Church Street and that the Defendant, Casey Realty Limited, was an owner-occupier of 27 Church Street and further, that The Town of Amherst, pursuant to **The Town's Act**, was an owner and occupier responsible for the maintenance and care of the sidewalk area located near the entranceway to 27 Church Street. The Defendants have filed defences denying liability, however, they have agreed on an Agreed Statement of Facts and for a Civil Procedure Rule 25 Application to the Nova Scotia Supreme Court as the appropriate mechanism to determine the issues in this case. Mr. Spencer is in receipt of benefits from the Workplace Health Safety and Compensation Commission of New Brunswick and seeks in addition to continue his action in Nova Scotia for general damages.

The filing of this decision has been held until the Court received confirmation from the WHSCC of New Brunswick and WCB of Nova Scotia and that they do not wish to participate in this Application.

2. AGREED STATEMENT OF FACTS

1. Mr. Adam Joseph John Spencer was born on October 14, 1964.
2. Mr. Spencer currently resides at 663 Gauvin Road in Dieppe, New Brunswick and has resided at this address since December, 1993.
3. Mr. Spencer has lived in New Brunswick all his life and has never resided outside this Province.

4. Mr. Spencer had worked for Purolator Courier Ltd. since 1986 at the Purolator Courier Ltd. location associated with the address 692 Thibodeau Street, Dieppe Industrial Park, Dieppe, New Brunswick. The business location has relocated to 1833 Champlain Street in Dieppe, New Brunswick as of 1997.
5. The chief place of business of the Purolator Courier Limited business which employs Mr. Spencer is located at the address noted in paragraph 4.
6. On April 6, 1995, Mr. Spencer was employed with Purolator Courier Limited, doing business out of the location noted in paragraph 4.
7. In the course of his employment duties for Purolator, Mr. Spencer completed various dropoffs/deliveries and pick-ups from businesses in the Amherst, Nova Scotia area as well as in New Brunswick.
8. Mr. Spencer's main run at the time of the slip and fall was to Amherst, Nova Scotia but he began and ended his shift in Dieppe, New Brunswick each day bringing deliveries back to the depot.
9. Mr. Spencer's employment duties with Purolator Courier Ltd. were required to be performed both within and outside New Brunswick.
10. On April 6, 1995, Mr. Spencer slipped and fell on the sidewalk outside of the front entranceway to Mansour's Limited located at 27 Church Street in Amherst, Nova Scotia.
11. Mr. Spencer was in the course of making a Purolator Courier delivery to Mansour's Limited at the time of this slip and fall on April 6, 1995.

12. On April 23, 1997, the New Brunswick Workplace Health Safety and Compensation Commission granted an assignment of the Rights to any law suit stemming out of this incident to Mr. Spencer.
13. An Action was commenced against the Defendant parties on February 18, 1998, by the filing of the Statement of Claim and Originating Notice.
14. The Statement of Claim was served on each Defendant on February 25, 1998.
15. The Defendant Town of Amherst Ltd. filed a Defence on March 11, 1998.
16. The Defendant Mansour's Limited filed a Defence and cross-Claim against Defendant Casey Realty Ltd. on March 17, 1998.
17. The Defendant Casey Realty Ltd. filed a Defence and Cross-Claim of the Defendant Mansour's Limited on April 14, 1998.
18. The Defendant Casey Realty Ltd. filed a Defence to the Cross-Claim of the Defendant Mansour's Limited on April 14, 1998.
19. The Defendant Mansour's Limited filed a Defence to the Cross-Claim of Defendant Casey Realty Limited on April 17, 1998.
20. The three Defendant parties to the Action were assessed by the Workers' Compensation Board of Nova Scotia with all assessments due having been paid as at the April 5, 1995 date of the slip and fall.
21. Mr. Richard Tingley, general counsel for the Workplace Health, Safety and Compensation Commission of New Brunswick attempted to enforce

provisions of the Interjurisdictional Agreement on Workers' Compensation respecting reimbursement of funds paid to Mr. Spencer by the WHSCC from the jurisdiction where the accident happened. By way of letter to Ms. Nancy McCready-Williams of the Nova Scotia Workers' Compensation Board dated August 10, 1998, Mr. Tingley made this request.

22. By way of letter dated September 21, 1998, Mr. Tingley was advised by Ms. McCready-Williams that Mr. Spencer was not categorized as a worker in Nova Scotia as he did not meet the residency requirements of the Nova Scotia Workers' Compensation Act as Mr. Spencer usually worked for his employer in New Brunswick and Mr. Spencer's residence was in New Brunswick.
23. By way of correspondence dated September 1, 1998, an application was made on Mr. Spencer's behalf to Judith Ferguson of the Nova Scotia Workers' Compensation Board for the purpose of determining his ability to either proceed with his action against the Defendants or be statute barred via the provisions of the Nova Scotia Workers' Compensation Legislation.
24. By way of correspondence dated September 21, 1998, Katherine Carrigan of the Nova Scotia Workers' Compensation Appeals Tribunal (WCAT) advised that the matter was appropriate for determination by the WCAT and asked that an Agreed Statement of Facts be submitted with certain facts to be addressed following which written submissions would be received from the parties.
25. A Statement of Facts was agreed to by counsel for all parties and forwarded to Ms. Carrigan on December 11, 1998.

26. By way of correspondence dated December 22, 1998, Alison Hickey, Appeal Commissioner of the WCAT, advised that a paper review was the appropriate method of determination of the issues. Ms. Hickey set deadlines for submissions by the parties which were all met in a timely fashion.

27. By way of correspondence dated April 9, 1999, Ms. Hickey advised that a case involving jurisdictional issues respecting the WCAT was currently being decided which could effect Mr. Spencer's claim. The WCAT decision involved determining the jurisdiction of the WCAT in a civil action involving the statutory bar issue respecting the pre 1996 Nova Scotia Workers' Compensation Act. This case had been appealed to the Nova Scotia Court of Appeal for determination. In light of this Appeal, the WCAT held off on providing a ruling on Mr. Spencer's application until the Nova Scotia Court of Appeal provided its ruling.

28. By way of correspondence dated May 31, 1999, Ms. Hickey advised that the Nova Scotia Court of Appeal (NSCA) released its decision in the case referred to in paragraph 27 (**Milne Goulden, et al v. W.C.A.T., et al** CA 154213). The NSCA held that the WCAT did not have jurisdiction to decide the Application before it. The Court ruled that the pre-February 1, 1996 Nova Scotia Workers' Compensation Act allowed an Applicant the right to appeal to the Nova Scotia Court of Appeal whereas no such right existed in the post-February 1, 1996 Workers' Compensation Act. Hence, substantive rights were affected precluding the WCAT from assuming jurisdiction.

29. In the present case, Counsel agree that a Civil Procedure Rule 25 application made to the Nova Scotia Supreme Court is the appropriate mechanism to determine the issues in Mr. Spencer's case.

3. CIVIL PROCEDURE RULE 25

ORDERS: PRE-TRIAL OR PRE-HEARING

“Preliminary determination of questions of law, etc.

25.01. (1) The court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,

- (a) determine any relevant question or issue of law or fact, or both;
- (b) determine any question as to the admissibility of any evidence;
- (c) order discovery or inspection to be delayed until the determination of any question or issue;
- (d) give directions as to the procedure to govern the future course of any proceeding, which directions shall govern the proceeding notwithstanding the provision of any rule to the contrary;
- (e) where the pleadings do not sufficiently define the issues of fact, direct the parties to define the issues or itself settle the issues to be tried, and give directions for the trial or hearing thereof;
- (f) order different questions or issues to be tried by different modes and at different places or times.

(2) Where in the opinion of the court, the determination of any question or issue under paragraph (1) substantially disposes of the whole proceeding, or any cause of action, ground of defence, counterclaim or reply, the court may thereupon grant such judgment or make such order, as is just.

(3) Unless the court otherwise orders, a trial or hearing shall not be stayed pending an appeal from an order under Rule 25.”

4. ISSUES

1. Whether the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508 ("*Former Act*") or **Workers' Compensation Act**, S.N.S. 1994-1995, c. 10 ("*Current Act*") applies in this case.
2. Whether the Plaintiff is a "worker" within the meaning of the **Workers' Compensation Act**.
3. Whether the Defendants are "employers" within the meaning of the **Workers' Compensation Act**.
4. Whether the Plaintiff suffered a personal injury by way of accident arising out of and in the course of his employment in an industry to which Part I of *the Current Act* applies.
5. Whether the Plaintiff's action against the Defendant is barred by virtue of Section 18 of *the Former Act* or Section 28 of the *Act*.

5. LEGISLATION

"WORKER"

Section 2(w) of *the Former Act*:

(w) "worker" includes a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, including an officer, director or manager, and in respect of the industry of mining, includes a person while he is 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 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, and in respect of any industry includes a learner and also a person while he is actually engaged in rescuing or protecting or attempting to rescue or protect life or property in the case of an explosion, a fire, or

an accident, which endangers either life or property in or about the industry in which such person is employed and should such person meet with an accident while so engaged such accident shall be deemed to arise out of and in the course of such person's employment, but does not include a receiver, liquidator or other person appointed by the court or a judge with power to manage or carry on the business of a company for winding up or other purposes. 1968, c. 65, ss. 1, 5; 1969, c.85, s. 1; 1975, c.43, s. 1; 1978-79, c.38, ss. 1,2."

“Non-resident worker in Province

14 Where it appears that by the laws of any other province, country or jurisdiction a worker or his dependants, if resident in the Province, would be entitled in respect of death or injury in such province, country or jurisdiction to compensation, as distinguished from damages, the Board may order that payments of compensation under this Act may be made to persons resident in such province, country or jurisdiction in respect of any worker killed or injured in the Province, provided, however, that if the compensation payable under the laws of such other province, country or jurisdiction be less than the compensation payable under this Part, the Board may reduce the amount of compensation accordingly. 1968, c. 65, s. 1; 1978-79, c. 38, s. 1.

The Old Act provides that when an accident happens while a “worker” is employed out of the province for some purpose connected with his employment in the province, compensation is payable unless compensation is available in the place where the accident happens and except as provided in this Section, Section 16(3) provides:

“No compensation for accident out of Province

(3) Except as provided in this Section, no compensation shall be payable under this Part where the accident to the worker happens while he is employed elsewhere than in the Province.” 1968, c.65, s. 1; 1970-71, c. 66, s. 1; 1978-79, c. 38, s. 1.

“WORKER”

Section 2(ae) The New Act:

(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 an 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, ...”

“Residency Rules

19 Subject to Sections 20 and 27 and Section 166, no compensation is payable to a worker pursuant to this Part unless

(a) the place where the worker usually works for the employer is in the Province; and

(b) the accident occurs in the Province.” 1994-95, c. 10, s. 19.

6. ISSUE 1 - WHETHER THE WORKERS’ COMPENSATION ACT, R.S.N.S. 1989, c. 508 (“CURRENT ACT”) OR WORKERS’ COMPENSATION ACT, S.N.S. 1994-1995, c. 10 (“FORMER ACT”) APPLIES IN THIS CASE.

The relevant portions of *the current Act* did not come into force until February the 1st, 1996.

The Nova Scotia Court of Appeal recently considered this issue in **Goulden v. Taylor**, [1999] N.S.J. No. 175, May 26th, 1999. Under (*the old Act*) whether an action was barred was determined in the Supreme Court of Nova Scotia. Under (*the new Act*) the Workers' Compensation Appeals Tribunal is given jurisdiction to make that ruling and provides the decision of the Appeals Tribunal is final and conclusive and not open to appeal, challenge, or review in any court and when the determination is made that the action is barred, it is forever stayed.

As noted in the Plaintiff's brief, both (*the old Act*), s. 18 and (*the current Act*), s. 28 bar a "worker" from suing "an employer" to which the *Act* applies. Freeman, J.A. at para. 7 delivered the judgment of the Court of Appeal determining the right to have a judge make the determination was substantive because there was an appeal from the judge to the Court of Appeal while the commissioner's decision was protected by a strong privative clause and the new provision in (*the new Act*) could not be adapted without depriving the appellant of a substantive right vested in him at the time of the accident. As to when the rights of the parties crystallized, Freeman, J.A. in para. 6 said:-

6 "It is reasonable to accept that the rights of the parties crystallized at the time of the accident. At the moment he was injured, Mr. Goulden had a common law right of action against Mr. Taylor. This right of action was subject to ss. 18 and 19 of the old Act; the determination whether it was barred would have been made by a Supreme Court Judge. He also had a right to seek workers' compensation benefits. It was the circumstances of the accident and the statutory provisions, and not Mr. Goulden's election to accept workers' compensation benefits, that made his action subject to be barred. Subrogation of the Board was provided for by statute."

The Agreed Statement of Facts discloses that Mr. Spencer in the course of his employment duties for Purolator completed various dropoffs/deliveries and pickups from businesses in Amherst, Nova Scotia, as well as in New Brunswick, and his territory included Amherst. The slip and fall occurred while he was in the course of making a

Purolator Courier delivery to Mansour's Limited on the 6th of April, 1995. Mr. Spencer commenced receipt of compensation from the WHSCC of New Brunswick prior to the enactment of *the New Act* in Nova Scotia. His employer, Purolator of New Brunswick, paid premiums to the WHSCC of New Brunswick.

Additionally, there is a general rule of statutory interpretation that a Statute does not apply retroactively, unless the Legislature does so in clear language. *The current Act* provides no express provision to indicate it is to apply retroactively.

The circumstances of the accident as detailed in the Agreed Statement of Facts gave rise to Mr. Spencer's cause of action. Mr. Spencer, whose duties included delivery and pickups from businesses in Nova Scotia, as well as in New Brunswick, commenced his daily employment from his employers premises in New Brunswick and ended his shift at the end of the day in New Brunswick at his employers depot. On the day of the accident, April the 6th, 1995 he was carrying out his duties in the normal routine manner when he fell on the sidewalk outside the property, 27 Church Street, Amherst, Nova Scotia. These circumstances arose prior in time to *the new Act*.

I answer the first issue that the *Act* that applies is the **Workers' Compensation Act**, R.S.N.S 1989, c. 508, *the former Act*.

I agree with counsel that the issue of possible reimbursement to New Brunswick by Nova Scotia is a separate issue not before me.

7. ISSUE 2 - WHETHER THE PLAINTIFF IS A "WORKER" WITHIN THE MEANING OF THE WORKERS' COMPENSATION ACT R.S.N.S. 1989, c. 508.

This is the crucial issue. If Mr. Spencer is a "worker" within s. 18 of the *Act*, then he has no right of action against an employer in an industry to which this part of the *Act* applies.

All three Defendants are acknowledged to be employers whose assessments to the WCB of Nova Scotia were paid as of April the 6th, 1995.

The history and philosophy of Workers' Compensation Legislation has been clearly stated in the Judgment of Sopinka, J. in **Pasiechynk v. Saskatchewan** (1997), 149 D.L.R. (4th) 577 at p. 590:

“In Canada, the history of workers' compensation begins with the report of the Honourable Sir William Ralph Meredith, one-time Chief Justice of Ontario, who in 1910 was appointed to study systems of workers' compensation around the world and recommend a scheme for Ontario. He proposed compensating injured workers through an accident fund collected from industry and under the management of the state. His proposal was adopted by Ontario in 1914. The other provinces soon followed suit.”

and further:

“Sir William Meredith also proposed what has since become known as the “historic trade off” by which workers lost their cause of action against their employers but gained compensation that depends neither on the fault of the employer nor its ability to pay. Similarly, employers were forced to contribute to a mandatory insurance scheme, but gained freedom from potentially crippling liability.”

Initially, the Legislation related only to the employees employer but shortly thereafter Legislation across Canada was amended so that workers could not sue any employer in an industry to which the *Act* applied.

Sopinka, J. went on to state at p. 591:

“The importance of the historic trade-off has been recognized by the courts. In Reference re: **Workers' Compensation Act**, 1983 (Nfld.). ss. 32, 34 (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.), Goodridge C.J. compared the advantages of workers' compensation against its principal

disadvantage: benefits that are paid immediately, whether or not the employer is solvent, and without the costs and uncertainties inherent in the tort system; however, there may be come who would recover more from a tort action than they would under the Act. Goodridge C.J. concluded at p. 524:

While there may be those who would receive less under the Act than otherwise, when the structure is viewed in total, this is but a negative feature of an otherwise positive plan and does not warrant the condemnation of the legislation that makes it possible.

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

Mr. Spencer's counsel invites the Court to take what it labels a technical approach and places reliance upon "Workers' Compensation of Canada, 2nd Edition, Butterworths, 1989 by Professor Terence G. Ison at p. 297:

"Where a tort claim is brought against an employer or worker who carries on business or is usually employed in a different jurisdiction from the plaintiff's place of employment, the position is more complex. If the law of the plaintiff's place of employment and the law of the defendant's place of business or employment would each bar the claim but for the foreign element, there may be no divergence of policy between them. Also the place of injury may not be significant. It would be consistent with the general principles of the Acts and with comity among jurisdictions to ignore the foreign element and bar the claim. It is, however open to the Board or court of the forum to take a more technical approach, saying that the claim is not barred by the Act or the plaintiff's place of employment because the defendant is not an employer or worker under that Act, and that it is not barred by the Act of the defendant's place of business or employment because the plaintiff is not a worker under that

Act. On that view, the claim is not barred at all. To reach that conclusion, however, would probably defeat the statutory policy of all jurisdictions concerned.

In some jurisdictions, where a claim is made against a local employer by a worker who was injured while visiting the jurisdiction in the course of employment, the claim might be barred by concluding that the visitor was a “worker” under the local Act.”

The argument advanced is that the technical approach should follow the law as it is written and that policy is not law.

Mr. Spencer’s counsel suggests the issue has been addressed in **Rowan Companies Inc. v. DiPersio** (1990), 96 N.S.R. (2nd) 181. However, I conclude to the contrary by virtue of the remarks of Jones, J.A. at p. 194:

[28] “That statement is consistent with the decision in **Workmen’s Compensation v. C.P.R.** (1919), 48 D.L.R. 218, as quoted in the **British Airways** decision, supra. The **Nova Scotia Workers’ Compensation Act** is perfectly consistent with that principle. Section 16 takes away the right of action in Nova Scotia where a worker is entitled to compensation under the **Act**. It does not purport to take away a right of action in another jurisdiction. It may very well be that the appellant having taken compensation under the **Act** would be estopped from raising the issue in Nova Scotia. It is unnecessary to decide that issue as there is no action pending in Nova Scotia. It should be noted that under ss. 58 and 159L the Board may review a decision at any time. Insofar as any contractual defence is concerned as I have already stated the evidence does not establish the terms of the contractual arrangement between the parties. Whether the **Act** or the contract gives rise to a defence in Texas is a matter for the Texas courts to determine.

[29] To allow the action to proceed in Texas does not undermine the principles of the **Act**, because the **Act** does not provide a defence to a foreign action where the accident is not related to employment within the province.”

The Defendants take the view no where in the definition of “worker” is there a requirement or prerequisite that that person be someone resident in the province or work for an “employer” in the province and points to the former s. 14 which provides for compensation to “non-resident workers”. It should be noted that payments to a “non-resident worker” are not mandatory and Mr. Spencer has not received any benefits under the **Nova Scotia Worker’s Compensation Act**. In addition, the Defendants take the view that s. 166 dealing with the inter-jurisdictional agreements contemplates workers working in more than one jurisdiction and how the various Boards will deal with the issue of workers that are employed in more than one province. And further, that s. 166 supports the proposition that one can be a worker under the **Act** without any residence in the province.

I agree with counsel for the Defendants that the bar to actions contained in the **Workers’ Compensation Act** is not ancillary to the scheme but central to it. It is essential for the integrity of the system for an employer in an industry, to which the **Act** applies, who pays assessments thereby avoids as does the worker the uncertainty and expense of litigation whereby the worker receives compensation without regard to fault. The injured worker has a certainty of payment even if his employer should, for example, be insolvent and the determination of the compensation is made by an independent commission which provides, particularly with the passage of time, expertise and more consistency of determination. The Defendants distinguish **Rowan Companies Inc. v. DiPersio** above and say that the Court here is being asked to decide whether the **Nova Scotia Act** bars an action against a Nova Scotia employer commenced in a Nova Scotia Court for an accident which occurred in Nova Scotia and to which it says the Nova Scotia law applies.

I have given very careful consideration to the arguments of counsel that I have mentioned and that are further elaborated on and expanded upon in their extensive briefs.

On the one hand, there is a merit in having the historical trade-off policy applied where the Defendants have paid their premiums for protection and Mr. Spencer, as he

is entitled to, has taken advantage of the New Brunswick scheme and secured benefits in New Brunswick relating to his accident.

It seems to me that the determination should be made on fundamentals; namely, the Defendants are employers and they have the benefit of the bar against workers in Nova Scotia taking action. Mr. Spencer is not a “worker” in Nova Scotia and his claim is outside that for which the Defendants paid for and are entitled to the protection of the scheme. Mr. Spencer has not claimed or derived any benefit from the Nova Scotia scheme.

Mr. Spencer is a “worker” in New Brunswick and in that sense a party to the scheme in the Province of New Brunswick and what he has given up has provided him with the historical trade-off of compensation benefits in New Brunswick.

I conclude that Mr. Spencer is not a “worker” in the Province of Nova Scotia and it would be wrong to extinguish his fundamental right to sue at common-law for damages without express legislative authority removing such right. It should be noted that the cases recited by Defendants’ counsel are, for example, like the **Pasiechynk** relating to an **intra** provincial situation and when a “worker” is a party to a scheme, the tradeoff policy should be fully applied because its purpose and intent is to remove from the “worker”, who has status as such, the ability to sue for which he receives compensation. To do otherwise would defeat the bargain that the scheme incorporates relative to “employers” and “workers” to which it applies.

There may be situations where the policy should prevail inter-provincial, particularly where the “worker” and “employer” derive a benefit, but I conclude it is not so in this situation.

I agree with counsel that it is odd, this particular issue has not arisen before and that means to me that it is all the more important to return to fundamentals where you are dealing with an inter-provincial situation and on finding Mr. Spencer not a “worker”

in Nova Scotia, he has an entitlement to sue at common-law, that he must not be deprived of lightly and without express authority.

I find some assistance in the comments of Jones, J.A. in **Rowan** at p. 191 when he said:

[23] “There is no power in the province to affect causes of action in other jurisdictions and our **Act** does not purport to do so. It only extends to the right to bring an action in Nova Scotia.”

[24] “In **Desharnais v. C.P.R.**, [1942] 4 D.L.R. 605, the plaintiffs sued in Saskatchewan for injuries which occurred in that province while employed with the railway. The Workmen’s Compensation Board of Alberta held that the plaintiffs were entitled to compensation under the Alberta statute. It was argued that this deprived the plaintiffs of the right to bring an action in Saskatchewan. The Saskatchewan Court of Appeal rejected this argument. Mackenzie, J.A., stated at p. 608:

In the absence of proof of any personal contractual obligation on the part of the plaintiffs to forego all claims for compensation save such as might arise under the Alberta **Act**, I fail to see how the rights of action afforded them by the Saskatchewan **Act** arising out of accidents which actually took place in the latter province can validly be held to be barred by the legislative enactment of another province. To hold otherwise, it seems to me, would be to sanction the proposition that the Legislature of that province had power to legislate in derogation of civil rights beyond its physical boundaries and thereby to violate the historic construction placed by our highest tribunal upon the powers vested in the Provinces under s. 92 of the **B.N.A. Act**.”

See also the decision of the late Morrison, J. in **Grim v. Quebec** (1981), 50 N.S.R. (2nd) 462.

I conclude that Mr. Spencer is not a “worker” within the **Nova Scotia Act**, not being a party to the scheme for which the Defendants have paid their assessments. Absent clear legislative language extinguishing his common-law right to sue, he is entitled in law to maintain this action.

8. REMAINING ISSUES

In view of my determination on issue number 2, it is not necessary to deal with the remaining issues and I simply comment that the Defendants are “employers” within the meaning of the **Nova Scotia Act** and that their assessments are current. The protection and benefit they receive is where a “worker” is subject to the provisions of the **Nova Scotia Act**. Mr. Spencer received personal injuries arising out of and in the course of his employment in an industry to which the WHSCC of New Brunswick applies and he would be barred from an action in New Brunswick, but not in these circumstances in Nova Scotia.

9. COSTS

If counsel are unable to resolve the issue of costs and disbursements, they may present their written representations to the Court and exchange them preferably no later than November 30th, 1999.

