Date:20001228
Docket: CA157021

NOVA SCOTIA COURT OF APPEAL

[Cite as: ***Salloum v. Nova Scotia (Workers' Compensation Appeals Tribunal) ,*** 2000 NSCA 148]

Chipman, Bateman and Oland**, JJ.A.**

BETWEEN:

HAIFA SALLOUM, **Workers' Compensation Claimant** (Claim No. 1638605)

Appellant

- and -

The Nova Scotia Workers' Compensation Appeals Tribunal and **The Workers' Compensation Board of Nova Scotia**

Respondent

REASONS FOR JUDGMENT

Counsel:	Gail Gatchalian and Raymond Larkin for the appellant Sarah Bradfield for WCAT Paula Arab O'Leary and Madelaine Hearns for WCB
Appeal Heard:	October 10, 2000
Judgment Delivered:	December 28, 2000
THE COURT:	The appeal is dismissed, per reasons for judgment of Chipman, J.A.; Bateman and Oland, JJ.A., concurring.

CHIPMAN, J.A.:

[1] The appellant takes an appeal to this court pursuant to s. 256(1) of the **Workers' Compensation Act** from a decision of the Workers' Compensation Appeals Tribunal (Tribunal) dismissing her appeal from the decision of a hearing officer. The hearing officer held that she had not established that she suffered a personal injury caused by an accident arising out of and in the course of her employment, having not, on a balance of probabilities, established the presence of a chemical agent or physical condition in her workplace linked to the condition of environmental illness from which she claimed to suffer.

[2] The appellant was at all material times an employee of Revenue Canada and as such was an "employee" within the meaning of the Government Employees Compensation Act, R.S.C. 1985, c.G-5 (GECA) as amended. She claimed that due to her environmental illness she experienced an earnings loss, and that environmental illness was a personal injury caused by accident arising out of and in the course of her employment.

[3] Employees of the federal government are covered by GECA with respect to workplace injuries. They are defined *inter alia* in s. 2 of the Act:

> 2. In this Act,

. . .

"Employee" means

Any person in the service of Her Majesty who is paid a direct wage or salary by or on behalf of Her Majesty.

[4] The conditions under which such an employee may claim compensation are set out in s. 4(1)(a) 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

(e) the dependants of an employee whose death results from such an accident or industrial disease.

(2) The employee or the dependants referred to in subsection (1) are, notwithstanding the nature of 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 dependants 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

(Emphasis added)

[5] The Workers' Compensation Board (the Board), established under the **Workers' Compensation Act**, (WCA) is given jurisdiction by GECA to adjudicate such claims by virtue of s. 4(3) thereof:

> 4(3) Compensation under subsection (1) shall be determined by
>
> (a) the same board, officers or authority as is or are established by the laws of the province for determining compensation for workmen and dependants of deceased workmen employed by persons other than Her Majesty; or
>
> (b) such other board, officers or authority, or such court, as the Governor in Council may direct.
>
> (Emphasis added)

[6] Compensation is defined in s. 2 of GECA:

> 2. In this act
>
> . . .
>
> "Compensation" includes medical and hospital expenses and *any other benefits*, expenses or allowances that are authorized by the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen;
>
> (Emphasis added)

[7] Thus, a claimant under GECA must show: (1) that he or she is an employee within the meaning of s. 4(1) thereof; and (2) that the provision of provincial law that the claimant seeks to access falls within the terms "compensation at the same rate and under the same conditions as are provided by the laws of the province..." as expressed in s. 4(2) of GECA.

[8] The appellant commenced working in December of 1994, and worked throughout her employment at the Sir John Thompson Building in Halifax. In a Report of Accident dated February 10, 1997, she applied to the Board for benefits. Her claim was denied by the case manager of the Board in a summary report and decision dated June 19, 1997, and further denied by the Board's adjudicator in a reconsideration decision dated October 24, 1997. She then appealed to a hearing officer.

[9] The issues before the hearing officer were: whether the appellant (1) suffered a personal injury by accident arising out of or in the course of employment; (2) was entitled to temporary earnings replacement benefits (TERB); and (3) was entitled to be compensated for medical aid. In a decision dated February 11, 1998, the hearing officer denied the appeal on the basis that the appellant did not suffer a personal injury by accident arising out of and in the course of employment.

[10] The appellant then filed an application for leave to appeal from the decision of the hearing officer to the Workers' Compensation Appeal Tribunal, which granted a notice of leave on January 12, 1999. The appeal was heard by the Tribunal on a paper review, with submissions in writing by the appellant. Extensive material dealing with the environmental conditions at the

appellant's workplace and their effect upon the appellant was produced. The Tribunal's decision dismissing the appeal was dated March 29, 1999.

[11] The Tribunal found that the hearing officer, in adjudicating the claim, erred in failing to apply GECA insofar as it modified the application of the WCA. The Tribunal then stated that before a worker could reach the provisions of WCA it was necessary to show that the worker was eligible to do so by virtue of the provisions of GECA. Unlike WCA, which contains a provision relating to the burden of proof, GECA is silent on this issue. Therefore the burden of proving an accident arising out of and in the course of employment or an industrial disease due to the nature of employment rested upon the worker. The burden of proof was the civil standard of proof on a balance of probabilities, and until this was surmounted, the worker had not satisfied the conditions prescribed by GECA for access to the benefits of the WCA. As the Tribunal put it:

> As noted above, the Act and the Board's policies are not applicable unless and until the Appellant is able to successfully pass through the s.4(1) GECA gateway. Therefore, in order to be entitled to benefits, the Appellant must establish, on a balance of probabilities, the presence of a chemical, agent or physical condition in her workplace and evidence linking that to her condition. . . .

[12] The Tribunal conducted a review of the extensive material filed on the appellant's behalf. It concluded that she had not established on a balance of probabilities the presence of a chemical agent or physical condition in her workplace and evidence which linked that to her condition.

[13] An appeal to this court under WCA, effective April 16, 1999, is governed by s. 256(1) thereof:

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

[14] On this appeal the appellant contends that the Tribunal erred in law in its interpretation of s. 4(1) of GECA by failing to apply s. 187 of WCA to aid the plaintiff in her proof instead of requiring proof on a balance of probabilities. This, it is submitted, is a technical and rigid interpretation depriving the appellant of the benefits of the burden of proof provisions in the WCA and an interpretation which did not favour workers. Her Majesty in right of Canada did not, although given a specific opportunity to do so, appoint counsel to appear on the hearing of the appeal. Thus this court was handicapped in not having an opportunity to hear both sides of the argument, having only the benefit of the appellant's submissions.

[15] During the course of the argument the court raised the issue whether the appellant's challenge should have been asserted by *certiorari* in the Supreme Court, there being no provision in GECA for appeal to a court from a decision made by the "board, officers or authority" upon which it conferred jurisdiction by way of s. 4(3). In other words, does s. 256(1) of the WCA provide a right of appeal from a decision of the Tribunal made pursuant to GECA? Submissions were filed on this issue by the appellant and by the Board, urging this court to conclude that the proper avenue of appeal from a decision of the Tribunal pursuant to the jurisdiction conferred upon it by GECA was by way of s. 256(1) of the WCA. Again, this court did not have the benefit of a contrary submission.

[16] There are thus two questions before us:

(1) whether an appeal from the Tribunal acting pursuant to the jurisdiction conferred upon it by GECA lies to this court by way of s. 256(1) of WCA;

(2) if the answer to the first question is in the affirmative, whether in showing that an injury arose out of or in the course of employment as required by s. 4(1) of GECA an employee has the benefit of the

burden of proof provision in s. 187 of WCA and if not, what is the standard of proof;

[17] Before turning specifically to the two questions raised, I will review the appellant's submissions and the materials that have come to our attention.

[18] I accept the appellant's submission that if s. 256(1) of WCA is applicable, a standard of correctness should be applied on appeal in testing the Tribunal's interpretation of s. 4(1)(a) of GECA. Although the Tribunal held that the appellant suffered, at the time of her lay-off, from multiple chemical sensitivity/environmental illness, it held that she did not establish on a balance of probabilities the presence of a chemical agent or physical condition in her workplace and evidence linking such to her condition. The burden imposed on the appellant by the Tribunal was the usual standard of proof by way of a balance of probabilities required of a plaintiff in a civil action.

[19] Section 187 of the current WCA 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 issue shall be resolved in the worker's favour.

[20] If s.187 of WCA is applicable, its impact would be significant. In **Nova Scotia Workers' Compensation Board v. Johnstone et al**., [1999] N.S.J. No. 454, Freeman, J.A., speaking for the court, said at §19:

> ...The worker has the primary burden of proof but, in the case of occupational illnesses as opposed to accidents, his or her own knowledge is likely limited to the fact of the employment and the fact of the sickness. His or her physician may not have the specialized knowledge to offer an expert opinion as to a causative link between the workplace and the malady. 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. . . .

And at §25:

> ...When there is no evidence raising a doubt, or if the evidence disputing the possibility is no stronger than the evidence in support of it, the decision must go to the worker. While s. 187 relieves the worker of proving the possibility to the civil standard of a preponderance of probabilities, there is no such relief in s. 187 for those opposing the worker's claim, who must meet the civil standard.

[21] This reduced standard of proof, or one similar to it, is not unusual in modern workers' compensation legislation in Canada. The predecessor to s. 187 in the WCA is s. 24 of the former WCA, R.S.. c508, in which form it had appeared in the legislation for many years.

[22] The appellant's position simply is that the Tribunal erred in law and in jurisdiction when it held that s. 187 of WCA did not apply to a determination whether a federal employee such as she is caused personal injury by accident

arising out of and in the course of employment within the meaning of s. 4(1)(a)(i) of GECA.

[23] The Tribunal's reasoning appears clearly from the following passage in its decision:

> (1) Did the Hearing Officer err in her decision as set out in the Notice of Leave?
>
> It is not necessary to consider the grounds of appeal as set out in the Notice of Leave because a more preliminary error was made by the Hearing Officer. Since the Appellant is an "employee" as defined in s. 2 of the *Government Employees Compensation Act*, R.S.C. 1985, c. G-8 [G.E.C.A.], G.E.C.A. is applicable insofar as it modifies the application of the *Workers' Compensation Act,* S.N.S. 1994-5, c. 10 [the "*Act*"] (Tribunal *Decision No. 98-380-AD* (January 26, 1999). The Hearing Officer failed to apply G.E.C.A. , and erred in not doing so.
>
> (2) If the Hearing Officer did err, is the Appellant entitled to the benefits sought?
>
> I have read and agree with the reasoning in Tribunal *Decision No. 98-380-AD* (January 26, 1999). The Appeal Commissioner in that decision stated as follows:
>
> One way to think about *G.E.C.A.* is that it is a gateway into the *Act*. Subject to the proviso that Section 4(3) gives the Board and Tribunal jurisdiction to make G.E.C.A. determinations, until it is found under Section 4(1) of G.E.C.A. that the injury meets the section 4(1) test, G.E.C.A. is the sole source of jurisdiction concerning the claim. I note one further exception - The definition of "industrial disease" in section 2 of G.E.C.A. incorporates by reference "any disease in respect of which compensation is payable under the law of the province where the employee is usually employed. . . .
>
> Before this eligibility gateway is crossed no reference can be made to definitions nor statutory provisions contained in the *Act*, with the notable exception of the definition of "industrial disease". For instance G.E.C.A. is silent on the issue of burden of proof. Therefore the burden of proof is the civil standard of balance of probabilities and the worker does not have the advantage of section 187 of the *Act* in a G.E.C.A. section 4(1) analysis.

> Consequently, the appellant must meet the requirement under s. 4(1) of G.E.C.A. by establishing, on a balance of probabilities, that she has been caused personal injury by an accident arising out of and in the course of her employment. ... (Emphasis added)

[24] On the jurisdiction issue the appellant submits that as a participant in the final order, ruling or decision of the Appeals Tribunal, she falls within the provisions of s. 256(1) of WCA. She submits that this court is an integral component of the decision-making authority established by the WCA, which authority is granted jurisdiction to make determinations respecting compensation by virtue of s. 4(3) of GECA. She submits that pursuant to s. 4(2) of GECA, the determination of entitlement under s. 4(1) of that Act is made under the same conditions as provided under the WCA. These conditions, it is said, include the decision-making structure which, in turn, includes the right of appeal to the Court of Appeal. An interpretation of the legislation that entitles the appellant to appeal to this court is the only interpretation that attains and furthers the purpose of GECA, in the appellant's submission. A contrary interpretation would, it is said, completely defeat the purpose of GECA as federal employees in Nova Scotia would then be entitled to a fundamentally different compensation scheme from their provincial counterparts, in that they would be denied the same right of appeal available to the latter.

[25] If the appellant's submission is not accepted, the question arises as to how a worker making a claim pursuant to GECA would proceed after receiving an adverse decision from the Board. Would the worker appeal to the Tribunal? If so, can a dissatisfied worker then appeal to this court, which is the very issue before us?

[26] Although the question is not directly before us, in a case to which GECA applies, it appears that a worker could appeal from the Board to the Tribunal. The Tribunal, to my mind, falls within the expression in GECA "the same board, officers or authority as is or are established by the law of the province in determining compensation for workers". Thus, a federal employee dissatisfied with a decision of the Board has an appeal to the Tribunal pursuant to WCA because such an appeal is a part of the process of determining compensation pursuant to s. 4(3) of GECA.

[27] GECA was enacted in its original form in 1918, sub nom "An Act to provide for Compensation where Employees of His Majesty are killed or suffer injuries while performing their duties", S.C. 1918, c.15. The appellant refers to House of Commons debates April 16, 1918, at pp. 810-829. Emphasis was placed on the following remarks of Hon. J. D. Reid, Minister of Railways and Canals, who introduced the legislation:

> The intention of this Bill is to bring not only the railways but all Government employees on public works under a compensation Act. . . . I am introducing this Bill and placing all the employees in *exactly the same position* as the employees on a private railway. . . . 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.
>
> . . . This now puts the Government in the *same position* in that province as the Canadian Pacific would be. In case of injury, an employee of the Government railway will be in *exactly the same position* in regard to compensation as would the employee of a railway company.
>
> . . .
>
> I am giving them my word that this Bill is intended to *dovetail in with the provincial laws* throughout the Dominion . . .

[28] Thus, in support of her argument on both questions, the appellant emphasizes that the purpose of GECA is to bring federal employees within the compensation scheme of the province in which they work, such that federal employees are placed in exactly the same position as other employees in the provincial work force entitled to Workers' Compensation benefits.

[29] GECA did not create its own tribunal for the purpose of determining claims by federal employees for compensation benefits. It provided for such benefits to be determined by "the same board, officers or authority" as is established in the Province or such other board, officers or authority, or such court, as the Governor in Council may direct. Our attention has not been

drawn to any direction by the Governor in Council establishing any other tribunal or court.

[30] Thus Parliament has chosen to create a limited compensation scheme with reference to the legislation in each province and the administrators of the schemes set up thereunder. The scope of the reference in the federal legislation to at least a portion of the law in each province with respect to workers' compensation has raised difficult problems, as appears from the case law.

[31] In addition to the basic provisions for eligibility contained in s. 4(1), GECA has its own definitions of the terms "accident", "compensation" and "industrial disease":

> **2.** In this Act**,**
>
> "accident"
>
> "accident" includes a wilful and an intentional act, not being the act of the employee, and a fortuitous event occasioned by a physical or natural cause.
>
> "compensation"
>
> "Compensation" includes medical and hospital expenses and *any other benefits*, expenses or allowances that are authorized by the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen;
> (Emphasis added)
>
> . . .

"industrial disease"

"industrial disease" means any disease in respect of which compensation is payable under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen;

[32] The WCA has relevant definitions and its own basic provision for eligibility:

2 In this Act,

"accident" includes

(i) a wilful and intentional act, not being the act of the worker claiming compensation

(ii) a chance event occasioned by a physical or natural cause, or

(iii) 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.

(p) "injury" means personal injury, but does not include any type or class of personal injury excluded by regulation pursuant to Section 10;

. . .

(v) "occupational disease" means a disease arising out of and in the course of employment and resulting from causes or conditions

(i) peculiar to or characteristic of a particular trade or occupation, or

(ii) peculiar to the particular employment, and includes silicosis and pneumonoconiosis;

> 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.

[33] The concept of a workplace accident as expressed in WCA is in general similar to that found in GECA, but the term “accident” is broader in that it explicitly includes “disablement”, and possibly narrower with the partial exclusion of “stress”. In any event, it is clear that Parliament, in enacting GECA, has taken pains to provide its own definition of a workplace accident which gives rise to compensation rather than incorporate, as it did in the case of industrial disease, the meaning of that term used in provincial legislation.

[34] In **Ching v. Canadian Pacific Railway Company**, [1943] S.C.R. 451 the Supreme Court of Canada dealt with a contention that a postal worker injured in the course of his duties in Alberta was barred from suing the wrongdoer by reason of the fact that under the Alberta workers compensation legislation in force at the time such causes of action were barred. The postal worker’s claim arose under GECA but was administered by the appropriate authority in Alberta. The provisions of GECA were not in substance different from the present s. 4. In giving judgment for the court, Rand, J. said at p. 457-458:

> . . .The authority given by the Dominion Act to the Provincial Board is strictly limited and, under the language of the principal section, the right to compensation is unencumbered by a referential incorporation of provisions of the Provincial Act dealing with consequential matters.
>
> . . .
>
> The important words [of the predecessor of s. 4 of GECA] are: "And the liability in the amount of such compensation shall be determined . . . in the same manner and by the same Board ". It is the liability of the Dominion Government to pay the amount of the compensation, the right to which is given earlier in the section, which are to be determined; not the resulting effects upon collateral rights against third parties. To suggest, therefore, that the enactment of a special code of the provisions with the powers of carrying them into administration without reference to the Provincial Board, is a submission in any sense of the term to a Provincial Act constituting another code, is to disregard the precise and individual character of the Dominion enactment.

[35] While not directly on point, this case makes it clear that not all of the provincial legislation dealing with Workers' Compensation is incorporated by s. 4(2) of GECA, and it is necessary to examine the circumstances carefully to determine whether any given provision is incorporated.

[36] In **The King v. Bender**, [1947] S.C.R. 172, the Supreme Court adopted a similar position. It held that an employee of the Federal Crown who had received compensation from the workers' compensation authority of Quebec pursuant to GECA, as it was then enacted, retained the right to pursue a claim against the Federal Crown under s. 19(c) of the **Exchequer Court Act** (R.S.C. 1927, c. 34) for damages for the injury giving rise to the compensation. The prohibition against suing the employer under the

provincial legislation did not come into play, since it was not contemplated by the reference provided for in the predecessor of s. 4(2) of GECA. Kerwin, J., speaking for the court, said at p. 179, after referring to **Ching, supra**:

> It is pointed out at page 458 that the important words of subsection 1 of section 3 of the Dominion Act are "and the liability for and the amount of such compensation shall be determined *** in the same manner and by the same board" and it is stated that "it is the liability of the Dominion Government to pay and the amount of the compensation, the right to which is given earlier in the section, which are to be determined; not the resulting effects upon collateral rights against third parties."
>
> In the present case, where, for the purpose of the present appeal, the right claimed is against the same party, it should also be held that what was determined by the Quebec Workmen's Compensation Board was the amount of the compensation the right to which is given earlier in subsection 1 of section 3 of the Government Employees Compensation Act, and not the resulting effects upon other rights against the Crown given by a different Dominion statute. Section 15 of the Quebec Act is not incorporated in the Dominion Government Employees Compensation Act.

[37] In a concurring opinion, Kellock, J., speaking of the worker, said at p. 183:

> ... He is not entitled to "workmen's compensation" under the provincial law but under the Dominion statute and, for the reasons already given, the provisions of the provincial legislation which would bar a workman claiming compensation thereunder do not apply.

[38] The appellant refers to **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 (SCCA No. 329). There an employee of Canada Post was injured at the

workplace. A claim was made to the Ontario Workers' Compensation Board, pursuant to s. 4(2) of GECA. The Ontario Workers' Compensation Act, by s. 54, required an employer to offer to re-employ an injured employee who had been employed continuously for at least one year prior to the accident. The employee was not re-employed, and a reinstatement officer found the employer to be in breach of s. 54 and levied a penalty. The employer appealed to the Workers' Compensation Appeals Tribunal which upheld the decision, holding that the word "compensation" in GECA included as a "benefit" the duty to re-employ, and that re-employment rights were integral to the entire compensation scheme. An application to the Divisional Court for judicial review was dismissed, and a further appeal to the Ontario Court of Appeal was dismissed. Abella, J.A., speaking for the court, referred to s. 4(2) of GECA and the definition of "compensation". She concluded that the Appeals Tribunal had not erred either in a patently unreasonable way or at all in concluding that the reinstatement benefits available under s. 54 of the Ontario **Workers' Compensation Act** were within the definition of "compensation" in GECA, (which includes "medical and hospital expenses and any other benefits...") which was to be given "at the same rate and under the same conditions" as were provided under the law of the province. Canada

Post's submission that "compensation "as used in GECA includes only monetary compensation was rejected. Clearly the right to reinstatement was a "benefit" within the definition of "compensation" in GECA. See §6, supra. This result is not, in my view, surprising. Abella, J. A. said at §18:

> 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 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.
> (Emphasis added)

[39] Abella, J.A. also said at §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.
> (Emphasis added)

[40] The appellant relies heavily on these passages in support of her position, but it must be recognized that the case is distinguishable because clearly s. 54 of the **Ontario Workers' Compensation Act** provided a benefit to which by GECA the federal employee was expressly entitled as being under the same

conditions as provided for other employees in the province covered by compensation. See §24, **Smith, supra**. The question arises to what extent the passages quoted assist the appellant.

[41] The questions raised are whether the absorption of compensation-related rights and benefits provisions in the provincial statutes, as referred to by Abella, J.A., extends to an interpretation of s. 4(2) of GECA so as to confer upon the employee (1) the benefit of the doubt provision in s. 187 in establishing - as the employee must at the threshold - that there was personal injury by an accident arising out of and in the course of employment, and (2) the right of appeal to this court conferred by WCA upon claimants under the provincial scheme.

[42] In **Canada Post v. Johnson** (1993), 127 N.S.R. (2nd) 207 (S.C.) a postal worker went on stress leave. The worker claimed compensation under GECA for personal injury by accident arising in the workplace. The Workers' Compensation Board assumed jurisdiction and held that the worker did not qualify for compensation. The worker applied to the Supreme Court for an Order in the nature of *certiorari* to quash and set aside this decision. Grant, J. dismissed the application. He observed that the privative clause in WCA did not extend to protect the determination of a claimant's eligibility for

compensation under GECA. He concluded, however, that the Board correctly assumed jurisdiction over the claim and he affirmed the Board's decision. In the course of his reasons, Grant, J. said:

> [13] The respondents submit the dicta of Freeman, J.A., in **Hubley v. Workers' Compensation Board (N.S.)** (1992), 111 N.S.R. (2d) 295 (C.A.), where at p. 297, he quotes from the trial decision of Glube, C.J.T.D.: [Referring to the privative clause contained in s. 150 of the **Workers' Compensation Act**, R.S.N.S. 1989 c.508] . . .
>
> [14] However, in my opinion, the controlling statute is **G.E.C.A.** and not the **Nova Scotia Workers' Compensation Act** (supra).
>
> [15] The controlling statute, **G.E.C.A.**, is silent as to any privative or finality clause. That is there is no such section or like section in the **G.E.C.A.** .
>
> [16] The respondents have cited a great number of cases where there are privative clauses and comments and rulings made relating thereto.
>
> [17] However, in my opinion, when the board sits in a reference from **G.E.C.A.**, as in this case, it sits without the benefit of a privative clause.
>
> [18] The board, in my opinion, thus has less protection from judicial scrutiny than it would have in determining a matter arising from its own statutory jurisdiction.
>
> [19] This, I find, relates not only to the standard of review but also extends to the definition of accident and the wording of **G.E.C.A.** where it varies from its own.

. . .

[21] Section 4(2)of **G.E.C.A.** uses the phrase

"... at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed..."

[22] I interpret that section to deal with the compensation. I do not think that phrase imports the wording of the provincial statute to determine eligibility. I find eligibility flows from **G.E.C.A.**
(Emphasis added)

[43] Grant, J., after referring to the definition of "accident" in GECA, continued,

[67] In the provincial legislation "accident" has in its definition the phrase "and disablement arising out of and in the course of employment". That is absent from **G.E.C.A.**

[68] The Board dealt with the theory of "process" as used in **Workmen's Compensation Board v. Theed**, [1940] 3 D.L.R. 561(S.C.C.) and extended from time to time since then. However, the Board felt it did not have enough information to make a ruling on the time and place of "incidents" for the resulting injuries to be compensable.

[69] I agree with the Board that the provisions in **G.E.C.A.** should be given a liberal interpretation.

[70] I do not agree with counsel for the respondents that "accident" as used in **G.E.C.A.** must be given the extended meaning in the definition in the Board's own legislation. I agree that it should be given a liberal interpretation within its own definition under **G.E.C.A.**.

[44] Grant, J. has recognized that when the Board deals with a claim by a federal employee, its jurisdiction is derived from GECA and the provisions of GECA are the source of the claimant's eligibility. As he said, "eligibility flows from GECA".

[45] **Canada Post Corporation v. Lamy et al.**, (1999) J.Q. No. 1083; application for leave to appeal to the Supreme Court of Canada dismissed, (1999) C.S.C.R. No. 255, is a decision of the Quebec Court of Appeal. The opinion of the court was delivered by LeBel, J.A., as he then was. A Canada Post employee suffered back problems following bending down at work to pick up some envelopes. The question was whether he had sustained personal injury by an accident arising out of and in the course of his employment. GECA, as applicable to the case was that resulting from amendments in 1955, and incorporated in the 1970 Revised Statutes of Canada. It did not, for our purposes, materially differ from the current GECA. The Quebec workers' compensation legislation, **The Industrial Accidents Act**, R.S.Q. C. A-3.001 contained in s. 28 a presumption designed to facilitate proof of workers' claims:

> 28. An injury that happens at the workplace while the worker is at work is presumed to be an employment injury.

[46] The Quebec workers' compensation appeal tribunal, CALP, applied this section in the worker's favour. This decision was affirmed in the Quebec Superior Court on a motion for judicial review but was reversed by the Quebec Court of Appeal on the ground that GECA did not incorporate the presumption contained in s. 28 of the Quebec legislation.

[47] LeBel, J.A. reviewed the nature of the statutory scheme established by GECA and the cases of **Ching, supra** and **Bender, supra**. LeBel, J.A. then noted the definitions in GECA of the terms "accident", "compensation" and "industrial disease" and somewhat differing definitions in the Quebec legislation of the terms "industrial accident", "occupational disease" and "employment injury". One difference between the federal legislation and that of the province was the requirement in the former that accidents arise out of and in the course of employment, whereas in the Quebec legislation the injury or disease need only arise out of or in the course of the employee's work.

[48] LeBel, J.A. referred to the decision of the Quebec Court of Appeal in **Canada Post Corporation et al. v. Rochon et al.,** [1996] 136 D.L.R. (4th) 187; There the court held that a provision of Quebec legislation giving jurisdiction to the Workers' Compensation Tribunal to be seized of a complaint concerning an illegal disciplinary measure was not incorporated in

the reference made by GECA. Nuss, J.A., speaking for the court, said at p.195-196:

> 20. It is to be noted that in the federal statute no specific provincial law is mentioned or incorporated by reference. It is the compensation at the same rate and under the same conditions as for workmen provided by provincial law which is incorporated. These items may be in one or more provincial statutes and conversely the statutes which provide these matters may deal with a variety of subjects which do not come within the scope of "compensation at the same rate and under the same conditions". The federal statute only incorporates as federal law by reference those provision of the provincial law which deal with the receipt of compensation as defined by the federal statute at the same rate and under the same conditions as in the provincial law. Of course Parliament may amend or even repeal the measures that it has legislated by way of reference.
> (Emphasis added)

[49] LeBel, J.A. noted the observation of Nuss, J.A. that the reference was not aimed at incorporating all of the sometimes complex mechanisms governing labour relations in the event of accidents and occupational diseases. It was a question rather of delegating the administration of a compensation system and the procedures directly related to it.

[50] LeBel, J.A. referred also to **Syndicat des postiers du Canada v. Canada Post**, [1997] R.J.Q. 1183 (Q.C.A.) approving the reasoning of Nuss, J.A. in **Rochon, supra.** LeBel, J.A. concluded that according to these decisions, as well as the decisions of the Supreme Court in **Ching** and **Bender**, the administrative powers transferred to provincial authorities under the GECA

by legislative reference are limited, by the very terms of GECA, to providing an employee who was caused personal injury by an accident arising out of and in the course of employment with entitlement 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.

[51] In considering that section 28 of **The Industrial Accidents Act** was not included in the GECA reference, LeBel, J.A. continued at p. 18:

> We could elaborate at length on the nature of the presumption created by section 28. Is it a matter of procedure or of substantial law? This question need not be answered here. Rather the solution is found in a comparison of federal and provincial laws, as they existed at the time of Lamy's accident. These laws did not contain similar notions of industrial accident. Under the federal legislation an industrial accident occurred at and because of work. For the Quebec legislator, an employment injury was likely to arise at or in the course of work.
>
> The presumption in section 28 revolves wholly around the Quebec concept of employment injury and the specific content that the legislation attributes to it. This provision establishes a simple presumption in order to make it easier for a person who is the victim of an accident or contracts a disease to prove that he has sustained an employment injury within the meaning of the Quebec legislation. It was not designed to govern another substantial rule of eligibility for compensation. It cannot be added on to the definition in the federal legislation without directly altering the very content of this legislation.
>
> The workmen's compensation system created by the Industrial Accidents Act is complex and coherent. The presumption in section 28 is a crucial element of it, but it is itself dependent on the fundamental concept of application of the Quebec legislation, i.e. the nature of the employment injury. Hence, it is difficult to dissociate the manner of proof in section 28 from its object, which is an employment injury within the meaning of the Industrial Accidents Act. The aim of this mechanism is not solely to define a procedure for filing a claim. Rather it is to allow the demonstration of compensation eligibility conditions for victims of industrial accidents, as identified in the Quebec legislation.

> Because the definitions in the federal legislation are different, the CALP'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 designated. 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 could not take the presumption into account in evaluating the evidence. In doing so, it used a provision that was not relevant, ...
> (Emphasis added)

[52] LeBel, J.A., went on to point out that the Court of Appeal of Ontario in **Canada Post v. Smith, supra**, adopted a position differing from that of the Quebec court in regard to the content of the reference and the applicable standard of review. The Ontario court, he said, considered that the reference was designed to give the employees contemplated broader rights than those of simple compensation. It will be recalled, however, that Abella, J.A. in **Smith, supra**, stressed that the reference in GECA not only included compensation "at the same rate" but also "and under the same conditions as are provided under the law of the province."

[53] LeBel, J.A. continued:

> ...it 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.

[54] The appellant submits that **Lamy** is distinguishable because the presumption contained in s. 28 of the Quebec legislation was referable to the term "industrial accident", which happens arising out of or in the course of work and resulting in an employment injury. As we have seen in GECA, accidents must be shown to arise out of and in the course of employment. I have quoted extensively from the reasons of LeBel, J.A. in order to illustrate this point. The eligibility provisions in GECA and WCA are, as I have noted, largely similar in that it must be shown in each case that the injury was caused by an accident arising out of and in the course of employment, but there are differences. There is no doubt that LeBel, J.A. emphasized the distinction between the different nature of a workplace accident contemplated in the Quebec legislation on the one hand, and GECA on the other. This distinction was noted by Pelletier, J. of the Quebec Superior Court in **Canada Post Corporation v. Rivard et al.**, (1999) J.Q. No. 5476, where the court had occasion to address a case of an industrial disease. In such a case, of course, industrial disease is defined in GECA as meaning any disease in respect of which compensation is payable under the law of the province where the employee is usually employed. In that sense, the circumstances in **Rivard** were clearly distinguishable from those in **Lamy**.

[55] **Lamy** is authority for the proposition that a claim under GECA must be assessed in the specific framework of the federal legislation, that provincial legislation is by no means referred in its entirety and that only such provincial legislation as is clearly referred by GECA is applicable in evaluating a claim under GECA. **Lamy**, however, does not directly address the questions raised in this appeal.

[56] It is important to keep in mind that while the concept of a workplace accident is generally similar in both GECA and WCA, Parliament in enacting GECA did not, with the notable exception of industrial disease, import into federal law the provincial law relating to initial qualification for compensation, but chose to maintain its own criteria and definitions.

[57] In **Canada Post Corporation v. Saskatchewan (Workers' Compensation Board) and Blomander**, [1998] 174 Sask. R. 285, Baynton, J., of the Saskatchewan Court of Queen's Bench, allowed an application by Canada Post for judicial review of, and quashed the decision of, the Saskatchewan Workers' Compensation Board, awarding benefits to an employee of Canada Post with respect to alleged workplace harassment. The decision of the Board was set aside because the court concluded that it erred in applying the provincial standard of entitlement to compensation, rather than the federal

standard established by GECA. After contrasting the difference between the provisions of GECA and the Saskatchewan **Workers' Compensation Act**, Baynton, J. observed in §10 that entitlement under the provincial plan, which was the standard adopted by the Board in dealing with the claim, is not only different but significantly broader than that under GECA. Baynton, J. also observed that the privative clause in the Saskatchewan Workers' Compensation Act was not applicable because it only protected a decision of the Board made under that Act, and not a decision of the Board made under GECA. A review of the Saskatchewan legislation, quoted by Baynton, J., indicates that it is similar to the WCA, but not identical to it. Baynton, J. concluded at §20:

> 20. It is not necessary that I comment at any length on the jurisdictional error issue. The law is clear that the Board erred in applying the provincial standard of entitlement to compensation rather than the federal one. I disagree with counsel for the Board that the definitions of injury in the two statutes are similar. The federal standard is much narrower than the provincial one. Had the Board considered the proper standard, it may have concluded on the basis of its own findings, as to the nature of John Blomander's injury, that he was not entitled to compensation under the federal standard.

[58] The analysis in the foregoing authorities focuses upon the scope of the reference to provincial law in s. 4(2) of GECA or its predecessor. They support the conclusion that the reference is limited to the subject of

compensation, which is to be at the same rate and under the same conditions as are provided by the law of the province where the employee is usually employed, respecting compensation for workers and their dependants. These authorities, in the main, also establish that the provincial tribunal applying GECA must apply the standards of entitlement set out therein, and not the standards of entitlement in provincial legislation, except to the extent that they clearly fall within the scope of benefits at the rate and conditions of compensation provided to workers under provincial law. **Canada Post v. Johnson, supra** and **Canada Post v. Saskatchewan, supra** also establish that a provincial tribunal applying GECA does not enjoy the benefit of a privitive clause in the provincial statute by which it was constituted and pursuant to which it administered the provincial workers' compensation scheme. Where it acts pursuant to GECA, the latter is the governing statute.

[59] WCA was extensively revised in 1994 and came into effect in the most part on February 1, 1996. It is a comprehensive code dealing with many aspects of compensation for workplace injuries and various consequential results that flow therefrom. It deals with a variety of subjects and contains a myriad of provisions that do not come within the scope of "compensation at the same rate and under the same conditions".

[60] I have considered a number of decisions of the Tribunal and of workers' compensation boards and tribunals in other provinces of Canada. It is apparent, from them and from the cases I have reviewed, that the thinking on the extent of what provincial law incorporated in or referred by GECA is not unanimous.

[61] In Ontario the test for determining whether a specific provision in provincial law should be applied has been expressed in terms of whether it is reasonably incidental to the provincial law respecting compensation and the rate and conditions provided as opposed to being merely collateral thereto. See **Canada Post v. Smith, supra,** §26, 27, 42 and 49.

[62] The approach of the Quebec Court of Appeal appears to be to include a provincial provision only as long as it comes clearly under GECA's definition of compensation and as long as there are no corresponding provisions in GECA with which it is inconsistent. The reference includes the compensation system itself and the procedures directly related to it. The reference is not, however, "aimed at incorporating all the sometimes complex mechanisms governing labour relations. . .". See **Lamy, supra**, p. 15.

[63] As well, the case law reveals different theories or philosophies respecting the nature of the reference in GECA to provincial laws. According to some it is

comprehensive, while according to others it is narrow. According to some it is evolving in nature, whereas others consider it static, referring only to provincial laws existing at the precise moment at which the federal legislation was enacted. See **Rivard, supra** p. 6 *et seq.*

[64] None of the authorities discussed above addresses the gateway issue which is at the heart of the reasoning of the Tribunal. They address s. 4(2) of GECA. They are helpful only to the extent that, with varying degrees of emphasis, they support the conclusion that the right to compensation is referred, and that the "board, officers or authority" acting under GECA derives jurisdiction from that statute and not the provincial law by which they may be established.

[65] In **Syndicat des postiers du Canada v. Canada Post, supra**, referred to by LeBel, J. in **Lamy** and Pelletier, J. in **Rivard**, there is an oblique reference to the threshold requirement in the following passage from the judgment of Mailhot, J.A., speaking for the majority of the court at §52:

Translation

52. The GECA stipulates that, in order to be entitled to compensation under the AIAOD, the employee must have suffered an employment injury. Of course, it is left to the competent provincial authority to rule on the occurrence of this injury. But, when the provincial authority determines that no employment injury has occurred, I feel that the employee is not entitled, under the GECA, to

compensation under the provincial law, because he is not the victim of an industrial accident or an industrial disease (s. 41(1) of the current GECA).

[66] Our attention was drawn to the fact that the Tribunal has reached a number of conflicting decisions on whether, in addressing a claim under GECA, the Board should apply s. 187 of the WCA. Recently, in one of these decisions the Tribunal, in concluding that s. 187 should be applied, referred to and relied upon the passage contained in §18 of the decision of Abella, J.A. in **Canada Post v. Smith**, to which I have already referred.

[67] The passages contained in §18 and 47 of the decision of Abella, J.A. in **Canada Post** must be read in the context of that case, the language of GECA, and the other case law to which I have referred. The compensation-related rights and benefits provisions of provincial statutes, which are absorbed into federal law by s. 4(2) of GECA, do not necessarily extend to the matters provided for in provincial legislation which are not expressly or by implication provided for in GECA.

[68] I will now address the first question - whether s. 256(1) of WCA confers jurisdiction on this court to hear an appeal from a decision of the Tribunal in the exercise of the jurisdiction conferred upon it by GECA.

[69] This court is not, to my mind, an integral component of the decision-making authority established by the WCA, or that it falls within the expression in GECA "the same board, officers or authority as are established by the law of the province" for determining compensation for workmen. The jurisdiction of this court is to hear appeals and carry out judicial review as is conferred upon it by various statutes. It is not a tribunal charged with fixing the rate or the conditions provided under workers' compensation law for the benefit of workers.

[70] It is essential to keep in mind as Grant, J. so aptly put it in **Johnson**, **supra** that eligibility flows from GECA, not from the WCA**.** This conclusion is supported, as well, by the reasoning of Baynton, J., in **Canada Post v. Saskatchewan, supra.** Accordingly, one must look to GECA to determine what, if any, judicial review is made available or prohibited by way of a privative clause. GECA is silent in this respect. In such a case judicial review by way of *certiorari* or other appropriate prerogative remedy is available. In **Johnson, supra** and **Saskatchewan, supra** the court emphasized that the privative clauses in the provincial legislation had no application. The same, I think, can be fairly said with respect to the appeal provision in s. 256(1) of WCA. It is simply not applicable. I am satisfied that such appeal machinery

is not appropriate, because the appellant's claim does not flow from that Act. It flows from GECA.

[71] I also do not accept the submission that by the expression "compensation at the same rate and under the same conditions" GECA incorporated by reference the provision of WCA providing for an appeal to this Court. Such an appeal provision is not a condition under which compensation is provided, but an external provision allowing for access to the courts by way of an appeal on a question of law or jurisdiction. The case law to which I have made reference supports this conclusion, whatever theory or philosophy respecting the extent of the reference in GECA one chooses to adopt.

[72] I return to the decision of the Quebec Court of Appeal in **Lamy**, **supra**. At p. 14 LeBel, J.A. stated:

> . . . the conclusion to be derived from the most recent decisions of our Court is that this reference primarily contemplates compensation *per se* and its rate. It is not intended to give employees substantial additional rights not provided for in the federal legislation.

[73] In my opinion, the right of appeal under s. 256(1) of the WCA is an additional right not provided for in the federal legislation. GECA confers no jurisdiction on this court to review decisions by way of s. 256(1) of WCA of

the “board, officers or authority” to which it has referred claims for compensation.

[74] In view of the conclusion I have reached regarding the court’s jurisdiction, it is neither necessary nor desirable to address the second question. Accordingly, I would dismiss the appeal.

[75] I wish to take this opportunity to commend counsel for the appellant for her well researched and balanced submissions which have assisted me greatly in dealing with this appeal.

Chipman, J.A.

Concurred in:

Bateman, J. A.

Oland, J. A.