

NOVA SCOTIA COURT OF APPEAL

Citation: Nova Scotia (Workers' Compensation Board) v. Boyle Estate,
2004 NSCA 88

Date: 20040625

Docket: CA 194961

Registry: Halifax

Between:

Workers' Compensation Board of Nova Scotia

Appellant

v.

Workers' Compensation Appeals Tribunal of Nova Scotia
and Estate of James R. Boyle (deceased worker) and
Sydney Steel Corporation

Respondent

Judge(s):

Glube, C.J.; Oland and Fichaud, JJ.A.

Appeal Heard:

May 13, 2004, in Halifax, Nova Scotia

Held:

Appeal allowed and disposition of the Hearing Officer which denied interest is reinstated, without costs per reasons for judgment of Fichaud, J.A.; Glube, C.J. and Oland, J.A. concurring.

Counsel:

David Farrar, for the appellant
Louanne Labelle, for the respondent WCAT
William Burchell, for the respondent (Boyle Estate)

Reasons for judgment:

[1] In 1988, James Boyle, while at work, suffered a heart attack which left him totally incapacitated until his death in 1994. His claim for workers' compensation was denied in 1989. After 11 years of litigation, in March 2000 the Workers' Compensation Appeals Tribunal ("WCAT") decided that the heart attack was compensable. Mr. Boyle's estate and widow received payment in June 2000. The issue is whether the Workers' Compensation Board ("WCB") must also pay interest to compensate for the delay.

Background

[2] When Mr. Boyle suffered his heart attack on August 16, 1988, he was 46 years of age. A Report of Accident dated February 10, 1989 was filed with the WCB. That July a Case Manager with the WCB decided that the injury did not arise in the course of employment, and denied Mr. Boyle's claim.

[3] On December 21, 1989 Mr. Boyle filed a notice of appeal with the former Workers' Compensation Appeal Board. The Appeal Board did not consider the appeal.

[4] Because of the brain damage resulting from the heart attack, Mr. Boyle required constant care. He remained hospitalized until his death, but his infirmity occupied his family for most of six years. Mrs. Boyle missed time from employment and then reduced her hours of employment so she could tend to her husband. The family incurred medical expense for his care, and struggled to keep Mr. Boyle in a hospital nearby. The family assisted with much of his care in the hospital. They took turns feeding Mr. Boyle and putting him to bed. The WCAT found that, because of the delay in payment from the WCB, the family made financial sacrifices and suffered emotional and social hardship. Prompt payment of the workers' compensation benefits likely would have helped to ease Mr. Boyle's remaining years and his family's struggle.

[5] Mr. Boyle died on February 14, 1994, survived by his wife and two children.

[6] The claim was returned to the WCB in June of 1995. In January of 1997, a Hearing Officer confirmed the WCB's earlier position that the heart attack had not arisen in the course of employment. Mrs. Boyle appealed to the WCAT which upheld the denial of benefits (WCAT decision 97-287-TAD dated December 29, 1998). On further appeal, the Nova Scotia Court of Appeal, by consent order in 1999, remitted the matter to the WCAT. After an oral hearing in February of 2000, the WCAT issued a decision which

recognized that the 1988 heart attack was a compensable personal injury. (WCAT decision 97-287-CA dated March 24, 2000).

[7] In June, 2000 Mrs. Boyle received a retroactive permanent impairment benefit based on a 100% permanent medical impairment rating for the period August 16, 1988 to Mr. Boyle's death on February 1994. Mrs. Boyle also received retroactive medical aid benefits and survivor benefits.

[8] Mr. Boyle's estate then claimed costs of the litigation, and interest for the delay. On October 15, 2001 a Hearing Officer denied these claims. The estate appealed to the WCAT. The WCAT then referred the interest issue to the Deputy Chairman of the WCB further to s. 247 of the *Worker's Compensation Act*, S.N.S. 1994-95, c. 10 ("Act"). Sections 247-50, with s. 183, state that when an appeal is referred, the WCB's Board of Directors may issue a "policy" and return the matter to the WCAT. The Deputy Chair of the Board advised the WCAT by a letter of July 17, 2002, stating that the Board's position remained the same, namely not to pay interest:

The Board of Directors confirmed its earlier position to maintain the status quo approach to interest payment, which is to continue not to pay interest.

[9] The WCAT then considered the estate's claim for interest and legal fees. The WCAT dismissed the claim for legal fees, which is not under appeal to this Court and allowed the estate's claim for interest, which is appealed. I will discuss the WCAT's reasoning on the interest issue later in these reasons.

Issue

[10] The issue is whether the WCB must pay interest to compensate for the delay in payment from 1988 to 2000. The facts are not in dispute. The interest issue is a question of law under s. 256(1) of the *Act*. Leave has been granted.

Standard of Review

[11] The "pragmatic and functional" approach to determining the standard of review involves consideration of (i) the presence, absence and wording of any privative clause; (ii) the expertise of the decision-maker; (iii) the purpose of the provision in particular and of the *Act* as a whole; and (iv) the nature of the issue, particularly whether it involves determinations of law or fact. Based on the cumulative analysis of these factors, the court chooses either correctness, reasonableness or patent unreasonableness as the standard of review: *Baker v. Canada (Minister of Citizenship and*

Immigration), [1999] 2 S.C.R 817 at paras. 55 - 62. This Court in the past has performed an analysis for the WCAT's functions which are similar to those under review here. Whether the WCAT was entitled to order that the WCB pay interest depends on the interpretation of the *Act* and the principles drawn from the case law. These issues usually invoke the correctness standard of review.

[12] In *Ferneyhough v. Nova Scotia Workers' Compensation Board*, 2000 NSCA 121, Justice Cromwell stated:

III. Standard of Review:

9 The interpretation of *Penney* is a question of law. The Tribunal's interpretation of *Penney* may appear in its statements describing the holding of the case or may be apparent, although not expressly stated, from the Tribunal's application of those principles. In either situation, the question of law is whether the Tribunal properly interpreted *Penney*.

10 Of course, not every question of law which the Tribunal must decide necessarily attracts the correctness standard of review on appeal to this Court. The nature of the particular question and its relationship to the purpose of the legislative scheme and the expertise of the Tribunal must be assessed in each case: see generally, *Halifax Employers Association v. Workers Compensation Board*, 2000 NSCA 86. Here, the question of law is whether the Tribunal has erred in interpreting a decision of this Court. In interpreting decisions of this Court, the Tribunal is not ".. acting as experts in a sensitive area with which this court is not familiar..." : see Chipman J.A. in *Doward v. Workers' Compensation Board* (1997), 160 N.S.R. (2d) 22 (C.A.) at [paragraph] 89. Consideration of the various factors relevant to ascertaining the appropriate standard of review as outlined in such authorities as *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 and *Baker v. Canada*, [1999] 2 S.C.R. 817 does not suggest that the Court should defer to the Tribunal as to how the Court's decisions ought to be interpreted. I agree with the submissions on behalf of the appellant and the respondent Cape Breton Development Corporation that correctness is the appropriate standard of review on the appeal to this Court with respect to this question.

[13] In *MacDonald v. WCB (N.S.)*, 2000 NSCA 134, Justice Hallett stated:

20 I am satisfied that a question of law is raised on this appeal. The question the Tribunal considered was whether Policy 8.1.7R1 is inconsistent with the *Act* and, in particular, s. 185(2). This involved the interpretation of the Policy but also the interpretation and application of the *Act* including the scope of the Directors' power to make policy. To answer the question raised by the Tribunal, general principles of statutory interpretation were engaged. The Tribunal is not entitled to any degree of deference on this question as, in dealing with the question, the Tribunal was not acting as an expert in a sensitive area unfamiliar to the Court. Correctness is the standard of review to be applied by this Court to the Tribunal's decision, particularly those that relate to the Board's jurisdiction.

- [14] I will apply the correctness standard of review to determine whether the WCAT may order that the WCB pay interest.

Effect of Reference to Board of Directors

- [15] Sections 247(1), 248(1), 249 and 250 of the *Act* state:

247 (1) Where the Chief Appeal Commissioner or the presiding appeal commissioner is of the opinion that an appeal raises an issue of law and general policy that should be reviewed by the Board of Directors pursuant to Section 183, the Chief Appeal Commissioner or the presiding appeal commissioner shall postpone or adjourn the appeal and refer the appeal to the Chair.

248 (1) Where an appeal is brought pursuant to Section 243, the Chair may postpone or adjourn the appeal at any time before a decision is rendered by the Appeals Tribunal, and direct that the appeal be reviewed by the Board of Directors, where the Chair is of the opinion that an appeal raises an issue of law and general policy that should be reviewed by the Board of Directors pursuant to Section 183.

249 (1) The Board of Directors may adopt and issue a policy pursuant to Section 183 in consequence of any determination made pursuant to Sections 247 or 248.

- (2) A policy adopted pursuant to subsection (1) is
- (a) effective immediately; and
 - (b) applicable to appeals that have already been commenced, including any appeal adjourned pursuant to Section 247 or 248. 1994-95, c. 10, s. 249.

250 Where an appeal has been postponed or adjourned pursuant to Sections 245, 247 or 248, the postponement or adjournment shall not last longer than the earliest of

- (a) three months or, where the Board determines that exceptional circumstances exist, not longer than twelve months;
- (b) the day the Board issues a policy pursuant to Section 249; or
- (c) the day the Board of Directors notifies the Appeals Tribunal that the Board will not be issuing a policy pursuant to Section 249. 1994-95, c. 10, s. 250

[16] Section 183 defines the “policies” to be adopted by the Board of Directors, which are cited in ss. 247-50:

183 (1) For the purpose of this Act, "policy" means a written statement of policy adopted by the Board of Directors and designated by the Board of Directors in writing as a statement of policy, and "policies" has a like meaning.

(2) The Board of Directors may adopt policies consistent with this Part and the regulations to be followed in the application of this Part or the regulations.

...

(5) Until a different policy is adopted, every policy adopted by the Board of Directors pursuant to subsection (2) is binding on the Board itself, the Chair, every officer and employee of the Board and on the Appeals Tribunal.

(5A) Notwithstanding subsection (5), a policy adopted by the Board is only binding on the Appeals Tribunal where the policy is consistent with this Part or the regulations.

[17] On June 19, 2002, before hearing this appeal, the WCAT wrote to the Deputy Chair of the WCB, referring this appeal and stating:

I am referring the above-noted appeal to you pursuant to s. 247 of the *Act* because I believe the appeal raises issues of law and general policy that should be reviewed by the Board of Directors. In accordance with s. 250 of the *Act* the appeal has been adjourned.

After recounting a brief history of the Boyle litigation the letter stated:

... it is unlikely that there will be explicit statutory authority regarding when interest would be payable, I believe the payment of interest in situations of delayed payment, such as the situation now on appeal to the Tribunal, raises issues of law and general policy which should be considered by the Board of Directors pursuant to s. 183 of the *Act*.

[18] The Deputy Chair of the WCB replied to the WCAT with a letter of July 17, 2002:

The Board of Directors has considered the issue of paying interest on several occasions. In January 1997 the Board of Directors determined that a retroactive transitional interest would be paid to workers who were affected by the Board's November 1992 decision to suspend new awards for Permanent Benefits. The Board of Directors approved policy 3.9.10 to allow for the payment of interest in that particular fact situation.

In 2000, as a result of a request from counsel for the Remarried Survivors group, the Board of Directors again revisited the issue of paying interest. The Board of Directors confirmed that there would be no change to the current practice and position of the WCB with regard to the payment of interest.

The issue of paying interest was again fully discussed in March 2001. Again the Board of Directors confirmed there would be no change to the current practice with regard to the payment of interest.

In light of your letter of July 19, 2002 I again brought the issue of paying interest to the Board of Director's attention at the meeting held on July 16, 2002. The Board of Directors confirmed its earlier position to maintain the status quo approach to interest payment, which is to continue not to pay interest.

[19] After this exchange, the WCAT proceeded with the Boyle appeal in the normal manner and issued a decision that, based on the WCAT's interpretation of the *Act*, the WCB should pay interest to Mrs. Boyle.

[20] On this appeal, counsel for the WCB states that "the WCAT has no authority to sit in judgment of the Board of Directors." The WCB says that the WCAT had no jurisdiction to consider the interest issue after the Board of Directors declined to issue a policy.

[21] I disagree with the WCB's submission on this point.

[22] The Board of Directors did not issue a "policy" within the meaning of ss. 183 and 247-50.

- [23] Section 183(1) defines “policy” as “a written statement of policy adopted by the Board of Directors and designated by the Board of Directors in writing as a statement of policy.”
- [24] There was no such instrument here. The Board of Directors declined to issue a policy. The letter of July 17, 2002 from the Deputy Chair of the WCB to the WCAT stated that the Board of Directors confirmed its earlier position “to maintain the status quo approach to interest payment, which is to continue not to pay interest”. Although this no doubt stated the views of the Board of Directors, this letter is not “a written statement of policy adopted by the Board of Directors and designated by the Board of Directors in writing as a statement of policy” within s. 183(1).
- [25] The WCB has a manual containing its formally designated “policies” under s. 183. In *MacDonald v. WCB (N.S.)* this Court considered an example of a “policy” within s. 183(1), namely, “Policy # 8.1.7 R1”, formally adopted by the Board of Directors and designated expressly as a “policy”. Another example is “Policy # 3.9.10” entitled “Payment of Interest on Transitional Benefits” which begins with the heading “Policy Statement”. A letter stating the Board of Directors’ reasons for not adopting a formal policy, is not a “policy”. Maintenance of the status quo, that there is no “policy” on interest, is not a “policy” that there is “no interest”.
- [26] As stated by s. 250(c), when the WCAT received the Deputy Chair’s letter of July 17th, the adjournment of the Boyle appeal ended. The WCAT then had the responsibility under ss. 243-6 to adjudicate the appeal in the normal manner. In *N.S. (WCB) v. Martin*, 2003 SCC 54, at paras. 59-60, the Supreme Court of Canada confirmed that, absent a “policy”, the Board of Directors’ powers under ss. 183 and 247-50 do not diminish WCAT’s power to adjudicate an appeal.
- [27] The views of the WCB’s Board of Directors, not recorded in a “policy”, had no legal import. The WCAT did not “sit in judgment of the Board of Directors”. The WCAT performed its statutory adjudicative function by determining an appeal from the Hearing Officer.

WCAT’s Interpretation of s. 10(1)

- [28] Section 10(1) of the *Act* states:
- 10 (1) Where, in an industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the Board *shall pay compensation to the worker as provided by this Part.* [emphasis added]

- [29] The issue is whether “compensation ... as provided by this Part” includes interest.
- [30] The interpretation section of the *Act* does not define “compensation”. Part I of the *Act*, entitled “Workers Compensation” and which contains s. 10(1), sets out a number of benefits, and either specifies or authorizes regulations and policies to specify formulae for calculating the benefits. Part I does not expressly include interest.
- [31] Sections 69-70 prescribe indexing of compensation benefits by an annual adjustment equal to 50% of the percentage change in the consumer price index for the preceding year. Although this may partially compensate for inflation as benefits are paid, this does not compensate a worker such as Mr. Boyle, or his estate and spouse, for the substantial delay in making the payments.
- [32] The WCAT’s reasoning can be summarized as follows:

(a) The WCAT noted that the word “compensation” was not defined by the *Act*.

(b) The WCAT referred to decisions of several courts which have interpreted the compensatory function of interest, to preserve the real value of money over time, and to compensate for opportunity cost and risk resulting from delay and payment: eg. *Thomson v. Workers’ Compensation Board*, 1996 N.S.J. No. 44 (S.C.); *Tilley v. Newfoundland and Labrador (Workers’ Compensation Commission)*, [1995] 85 Nfld & P.E.I.R. 358 (T.D.); *Bush v. Air Canada* (1992) 109 N.S.R. (2d) 91; and *Bank of American Canada v. Clarica Trust Company*, 2002 SCC 43.

(c) The WCAT’s decision stated:

It is common ground between the participants that there is authority to pay interest flowing from the Board’s general authority to pay compensation.

The WCAT noted that the hearing officer in the decision under appeal stated that:

The Board has traditionally taken the position that it has the discretion to pay interest on delayed benefit payments if it is deemed appropriate.

The WCAT noted that the Board of Directors had approved policy 3.9.10 to permit interest for transitional claims resulting from an earlier change in the calculation of permanent benefits.

(d) From this the WCAT concluded that the word “compensation” in s. 10(1) gave to the WCB discretionary power to award interest to compensate for delay in payment.

(e) The Hearing Officer had declined to award interest because there was no express statement in the *Act* or regulations or in a policy under s. 183 stating that interest was payable. The WCAT ruled that, by declining to exercise the WCB’s discretion for these reasons, the Hearing Officer erred.

(f) The WCAT then undertook the analysis which, in its view, should have been exercised by the Hearing Officer. The WCAT listed six factors which should govern the exercise of discretion to determine whether interest is payable:

1. whether the worker or the worker’s dependants received full value for their compensation benefits;
2. the length of time benefit payment was delayed;
3. any responsibility that the party requesting interest payments may have had in the delayed payment of benefits;
4. whether the Board had information upon which it could have made a decision in favour of awarding benefits at the time benefits were sought, but failed to do so;
5. any financial hardship caused by the delay in paying benefits; and
6. any emotional or social repercussions caused by the denial of benefits and the subsequent delay in paying them.

Based on these factors, the WCAT decided that interest should have been awarded for the period starting on the date when the benefit should have been paid, to the date of payment. The WCAT remitted the matter to the WCB to determine the appropriate interest rate and to calculate the interest.

[33] Any entitlement to interest comes from the words in s. 10(1) “... the Board shall pay compensation to the worker as provided by this Part”. The WCAT

thoroughly analysed the meaning of “compensation” in s. 10(1). The WCAT’s reasons, however, failed to analyse the effect of the words “as provided by this Part”. In short, does the *Act* restrict what otherwise would be “compensation” to only those benefits authorized by Part I of the *Act*? In my view, as I will discuss, the WCAT erred in law by failing to address this issue.

Principles of Interpretation

- [34] In *R. v. Sharpe*, [2001] 1 S.C.R. 45, Chief Justice McLachlin stated:
33. ... However, E. A. Driedger in *Construction of Statutes* (2nd ed. 1983) best captures the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, Driedger states: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Recent cases which have cited the above passage with approval include: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 144; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at para. 30; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550, at para. 22; *Friesen v. Canada*, [1995] 3 S.C.R. 103, at para. 10.
- [35] This Court has applied *Driedger’s* formulation to the interpretation of the *Worker’s Compensation Act: Thomson v. Nova Scotia (Workers’ Compensation Appeals Tribunal)* (2003), 212 N.S.R. (2d) 81 (C.A.) at para. 16; *Cape Breton Development Corporation v. Estate of James Morrison*, 2003 NSCA 103 at paras. 35 - 36.
- [36] In *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees’ Union Local 324*, 2003 S.C.J. 42 at paras. 41-54, the Supreme Court again applied Driedger’s “one principle” of contextual statutory interpretation, analyzing first the “plain and ordinary meaning” of the words followed by the “scheme of the act,” then “policy considerations.” I will consider these three steps in turn.
- First Step - Plain and Ordinary Meaning***
- [37] The plain meaning of “compensation” clearly includes interest.

[38] In *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601, Justice Major, discussing whether a trial judge had jurisdiction to award compound pre-judgment interest, stated:

(1) The Time - Value of Money

21 The value of money decreases with the passage of time. A dollar today is worth more than the same dollar tomorrow. Three factors account for the depreciation of the value of money: (i) opportunity cost (ii) risk, and (iii) inflation.

22 The first factor, opportunity cost, reflects the uses of the dollar which are foregone while waiting for it. The value of the dollar is reduced because the opportunity to use it is absent. The second factor, risk, reflects the uncertainty inherent in delaying possession. Possession of a dollar today is certain but the expectation of the same dollar in the future involves uncertainty. Perhaps the future dollar will never be paid. The third factor, inflation, reflects the fluctuation in price levels. With inflation, a dollar will not buy as much goods or services tomorrow as it does today (G. H. Sorter, M. J. Ingberman and H. M. Maximon, *Financial Accounting: An Events and Cash Flow Approach* (1990), at p. 14). The time-value of money is common knowledge and is one of the cornerstones of all banking and financial systems.

...

(4) Interest as Compensation

36 In *The Law of Interest in Canada* (1992), at pp. 127-28, M. A. Waldron explained that the initial theory underpinning an award of judgment interest was that the defendant's conduct was such that he or she deserved additional punishment. The modern theory is that judgment interest is more appropriately used to compensate rather than punish. At pp. 127-28, she wrote:

Compensation is one of the chief aims of the law of damages, but a plaintiff who is successful in his action and is awarded a sum for damages assessed perhaps years before but now payable in less valuable dollars finds it quite obvious that he has been shortchanged. Equally obviously, payment of interest on his damage award from some relevant date is one way of redressing this problem.

The overwhelming opinion today of Law Reform Commissions and the academic community is that interest on a claim prior to judgment is properly part of the compensatory process. [Citations omitted.]

37 After acknowledging that historically compound interest was not available at common law, Waddams, *supra*, at p. 437, concludes that an award of compound interest should be available to courts so as to allow them to award full compensation to a plaintiff.

[T]here seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff would have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token the defendant will have had the benefit of compound interest.

38 Although not historically available, compound interest is well suited to compensate a plaintiff for the interval between when damages initially arise and when they are finally paid.

- [39] To similar effect: *Bush v. Air Canada* (1992) 109 N.S.R. (2d) 91 (C.A.), at paras. 55 - 62.
- [40] Even when a statute does not expressly authorize an order for payment of interest, that power may be implicit if the statute authorizes a tribunal to issue a compensatory remedy: *NSPSC v. NSGEU*, 2004 NSCA 55, at paras. 30-32, 37-42 and cases there cited.
- [41] The WCAT has jurisdiction to apply common law principles, which are consistent with the *Act*: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] S.C.J. No. 54, at para. 52.
- [42] If s. 10(1) simply authorized the WCB and, on appeal, the WCAT to order “compensation”, then in my view this would include the power to award interest.
- [43] But s. 10(1) does not stop with the word “compensation”. The WCB and WCAT are not given the full remedial power of a court in a civil action. Section 10(1) states that the Board “shall pay compensation to the worker *as provided by this Part*”. The last five words qualify the power to order “compensation”.
- [44] What is the nature of that qualification? One possibility is that any compensation must be in a category expressly permitted elsewhere in Part I of the *Act*. Another possibility is that the unfettered power to award

“compensation” is to be determined according to the procedures, ie. the filings and hearings and appeals, specified in Part I.

- [45] An analysis of the scheme and context of the *Act* points to the former option.

Second Step - Scheme and Context of Act

- [46] Part 1 of the *Act* specifies the individual benefits included in “workers’ compensation”. These include earnings replacement benefits under ss. 37-48, permanent impairment benefits under ss. 10 E and 34, medical aid and personal care expenses under ss. 10 G and 102-11, annuities under ss. 50-58, and survivors’ benefits under ss. 59-68.
- [47] Section 183, quoted earlier, permits the Board of Directors to adopt “policies”, not inconsistent with the *Act*, which flesh out the statutory benefits. The Board of Directors has adopted many policies which add specifics to the statutory benefits.
- [48] Section 184(2)(b) permits the WCB, with approval of the Governor-in-Council, to make regulations “defining or further defining any word or expression not otherwise defined in this Part.” “Compensation” is not in the definitions included in the interpretation section of the statute.
- [49] Section 10(7) states:
The Board may, by regulation, include any type or class of personal injury or occupational disease, on terms or conditions, including rates, types and durations of compensation other than those specified in this Part, that the Board may prescribe.

This provision contemplates that the Board may, by regulation, extend the ambit of the benefits which are specified in the statute. It is noteworthy that s. 10(1) uses the words “as provided by this Part” while s. 10(7) permits regulations expanding the benefits “specified in this Part”. This indicates that “compensation” in s. 10(1) includes both the benefits specified in Part I, and expanded benefits specified in regulations for which authorization is provided by Part I of the *Act*.

- [50] Part I of the *Act* specifies the core benefits in the statute but provides for refinements to benefits which may be specified by regulation or policy. If a policy or regulation authorized by Part I specified interest, then interest would be “compensation as provided by this Part” in s. 10(1).

[51] The *Act* contemplates that the WCB, through the regulation or policy-making process, maintains some control over the expansion or refinement of specified benefits. There is a reason for this.

[52] Section 10(2) states:

The compensation payable pursuant to subsection (1) shall be paid out of the Accident Fund.

Section 114 states:

The compensation and other expenditures provided for in this Part shall be paid out of a fund to be called the Accident Fund.

The Board assesses employers, based on risk assessment and experience rating, and the assessments are the source of revenues for the Fund: ss. 119-145.

[53] Section 116(2) states:

It is the duty of the Board at all times to maintain the Accident Fund so that with the reserves, exclusive of any special reserve, it will be sufficient to meet all the payments to be made out of the Accident Fund in respect of compensation as they become payable and so as not to unduly or unfairly burden the employers in any class in future years with payments that are to be made in those years in respect of injuries that have happened previously.

Section 116(4) states:

Where in any year there is an annual operating deficit in respect of that year, it is the duty of the Board to ensure that, by the end of the third year following the year in which the annual operating deficit occurred, the deficit is eliminated.

[54] Because the WCB has a duty to maintain the Fund's ability to satisfy benefits, the *Act* gives the WCB leverage over the expansion and refinement of benefits formulae beyond those specified in the *Act*. If a Hearing Officer or the WCAT could award compensation based simply on common law principles, as might be applied by a court in a civil action, it could be exceedingly difficult to rate the risk, calculate the assessments, and predictably maintain the Fund's solvency. Because the *Act* directs that the Fund be solvent, the *Act* controls the benefits payable from the Fund.

- [55] This supports the conclusion that “compensation ... as provided by this Part” in s. 10(1) refers to compensation either specified in Part I or specified in regulations or policies authorized by Part I.
- [56] The result may be less than what would otherwise be full compensation. The indexing provided by ss. 69-70 is an example. Section 70(1) states:
Commencing January 1, 2000, the Board shall, as of the first day of January in each year, determine an indexing factor based on one half of the percentage change in the consumer price index for the preceding year.

Section 70(2) indexes benefits by that 50% factor. The *Act* contemplates that indexed benefits do not fully account for changes in the real value of money. This result is inconsistent with the rationale of compensatory interest at common law stated in *Bank of America*; but this result is nonetheless the Legislature’s chosen premise for the Fund’s operation.

- [57] Several provisions in Part I of the *Act* refer to amounts due in situations of late payment.
- [58] Sections 145 and 217 expressly permit assessment and collection of “interest” on late payments of assessments due from employers. Section 220, on the other hand, states that when a person receives an amount in excess of the compensation to which he was entitled, the Board may recover the excess; but s. 220 does not state that the Board may recover interest on the excess. One must assume that the Legislature intended that there be no interest recovery on overpayments.
- [59] Section 79 states:
Where any worker
 (a) is entitled to compensation pursuant to this Part; and
 (b) dies before any compensation accrued payable at the time of the worker's death has been paid,
the Board may pay the compensation to any dependant of the worker or to any person who cared for the worker prior to the death of the worker.
- [60] Nothing in s. 79 suggests that the amount payable at the later date (after the worker’s death) is adjusted upward (eg. by interest) from the “compensation” which was initially payable to the worker. The same “compensation” is payable at both dates. The Legislature chose not to augment “compensation” because of the reduced time - value of money.

[61] In my view, the scheme and context of the *Act* point to the conclusion that “as provided by this Part” in s. 10(1) qualifies the word “compensation” in s. 10(1) by restricting the “compensation” to those categories which are specified either in the *Act* or in regulations or policies authorized by the *Act*. Unfortunately for persons in Mrs. Boyle’s situation, there is no policy or regulation which authorizes interest.

Third Step - Policy Considerations and Objectives of Act

[62] In *Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at para. 52 the Supreme Court of Canada, citing the *Nova Scotia Workers’ Compensation Act*, referred to “the legislature’s clear intent to create a comprehensive scheme for resolving the workers’ compensation disputes”.

[63] In *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*, [1997] 2 S.C.R. 890, at paras. 23-35, the Court reviewed the purpose of the *Workers’ Compensation Act* and the role of the Workers’ Compensation Board. Justice Sopinka for the majority (para. 27) stated:

27 Montgomery J. also commented on the purposes of workers’ compensation in *Medwid v. Ontario* (1988), 48 D.L.R. (4th) 272 (Ont. H.C.). He stated at p. 279 that the scheme is based on four fundamental principles:

- (a) compensation paid to injured workers without regard to fault;
- (b) injured workers should enjoy security of payment;
- (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
- (d) compensation to injured workers provided quickly without court proceedings.

I would note that these four principles are interconnected. For instance, security of payment is assured by the existence of an injury fund that is maintained through contributions from employers and administered by an independent commission, the Workers’ Compensation Board. The principle of quick compensation without the need for court proceedings similarly depends upon the fund and the adjudication of claims by the Board. The principle of no-fault recovery assists the goal of speedy compensation by reducing the number of issues that must be adjudicated. The bar to actions is not

ancillary to this scheme but central to it. If there were no bar, then the integrity of the system would be compromised as employers sought to have their industries exempted from the requirement of paying premiums toward an insurance system that did not, in fact, provide them with any insurance.

[64] Justice Sopinka (paras. 25-26) referred to the “historic trade-off” by which workers relinquished their right of action against employers in return for access to the no-fault workers’ compensation system.

[65] Justice Sopinka (para. 28) referred to the statement of Duff, J., as he then was, in *Dominion Cannery Limited v. Costanza*, [1923] S.C.R. 46 at 54:

The autonomy of the board is, I think, one of the central features of the system set up by the Workmen's Compensation Act. One at least of the more obvious advantages of this very practical method of dealing with the subject of compensation for industrial accidents is that the waste of energy and expense in legal proceedings and a canon of interpretation governed in its application by refinement upon refinement leading to uncertainty and perplexity in the application of the Act are avoided.

[66] Justice Sopinka (paras. 32-35) discussed the role of the Workers’ Compensation Board:

32 The Board occupies the central position in the workers' compensation system. The system has three main aspects: (1) compensation and rehabilitation of injured workers, (2) the bar to actions, and (3) the injury fund. As seen above, all three are essential to the system as it was conceived by Meredith and implemented by each provincial legislature. The Board has a role in respect of each of these aspects. Thus the Board has exclusive jurisdiction to determine whether an injury arose out of or in the course of employment. ...

33 The Board also sets the level of compensation. It is directed to establish a rating schedule for permanent functional impairments (s. 67(1)). The Board determines what earnings a worker has lost and awards compensation on that basis (s. 68) ...

34 The second aspect of the system, the bar to actions, is at issue in this case. Section 168 clearly grants the Board jurisdiction to determine when the bar applies.

35 The third aspect of the system, the injury fund, also comes under the authority of the Board. The Board has the responsibility to maintain the fund and collect assessments from employers. It establishes classes of industries (s. 121(1)), and can subdivide those classes according to the hazard they present (s. 121(2)). The Board then assesses employers in each class a percentage of their pay-roll that it considers sufficient to pay for injuries to workers in industries in that class (s. 135(1)).

...

42 There can be no question that the question of eligibility for compensation is one that is within the Board's exclusive jurisdiction. It is also clear upon examination that the issue of whether an action is barred is equally within the Board's exclusive jurisdiction. It would undermine the purposes of the scheme for the courts to assume jurisdiction over that question. It could lead to one of the problems that workers' compensation was created to solve, namely, the problem of employers becoming insolvent as a result of high damage awards. The system of collective liability was created to prevent that, and thus to ensure security of compensation to the workers. ...

- [67] Nova Scotia's *Act* has provisions equivalent to those in the Saskatchewan statute considered by Justice Sopinka in *Pasiechnyk*.
- [68] As stated in *Martin*, the *Workers' Compensation Act* is a "comprehensive scheme." It is a complete code with a self-financing system of no-fault insurance. The *Act* specifies certain benefits, and authorizes the Board to expand or refine those benefits by stating formulae in regulations or policies. The self-contained financing through assessments paid to the Fund has meant that the expenses of the Fund are those specified in the *Act* or in regulations or policies authorized by the *Act*.
- [69] In *Re Windsor Roman Catholic Separate School Board and City of Windsor* (1988), 49 D.L.R. (4th) 576 (O.C.A.) leave to appeal denied (1988), 50 D.L.R. (4th) vii (Note)(S.C.C.), the Ontario Court of Appeal ruled that interest was not payable on a refund of overpaid taxes, because (pp. 579):
- In my opinion, s. 215(2) creates a complete code governing the obligation of the City to the Board to pay and account for taxes which it has collected on the Board's behalf. ...
- ... It is not open to this court to read into such a complete statutory scheme the provision that interest should be paid by the City

to the Board on taxes which it has collected but not yet paid over:
[citing authority]

[70] In *Re Zaidan Group Limited and City of London* (1990), 64 D.L.R. (4th) 514 (Ont. C.A.), a taxpayer claimed interest on a refund of an overpayment of property taxes. The *Act* authorized the Municipality to pass a by-law for the payment of interest on refunds. No such by-law was enacted. The Ontario Court of Appeal dismissed the claim for interest, stating (p. 519):

... There is no question of a gap being left in the legislation for the common law to fill. The taxes are a statutory creation and the conditions surrounding their payment and repayment must be in the statutes associated with their creation. The common law cannot characterize competent legislation as unjust, and it would be doing so if it imposed an additional duty to pay interest on a statutory duty to levy and to refund a specific amount of money.

Austin J., relying upon this court's decision in *Windsor Roman Catholic Separate School Board v. Windsor (City)* (1988), 64 O.R. (2d) 241, 49 D.L.R. (4th) 576, 37 M.P.L.R. 70, characterized the relevant statutory provisions as a complete statutory code which excludes the common law. I am saying much the same thing but putting it in terms of the ambit of the principle of unjust enrichment so as to identify a clear distinction from the reasoning in the *Air Canada* case where the province had reached beyond its jurisdiction and had no statutory protection against the allegation of unfairness.

The Supreme Court of Canada affirmed the decision of the Ontario Court of Appeal in a one-paragraph judgment: *The Zaidan Group Limited v. The City of London*, [1991] 3 S.C.R. 593.

[71] In *Reference re: Goods and Services Tax*, [1992] 2 S.C.R. 445 Chief Justice Lamer for the plurality stated (p. 477):

50 It follows from all this that any right to remuneration for the time and trouble involved in collecting the GST would have to flow from the statute itself, which plainly lacks any such general provisions. ... Even if the Attorney General for Alberta were correct to suggest that a more generous right to compensation exists at common law, in my view Parliament decided to substitute for that right its own view of the socially appropriate level of compensation for compliance costs. As this Court recently decided in *Zaidan Group*

Ltd. v. London (City), [1991] 3 S.C.R. 593, aff'g (1990), 71 O.R. (3d) 65 (C.A.), where a statute establishes a scheme providing for compensation, common law rights which might have operated but for the statute cannot be relied upon.

- [72] In my view, these principles apply to Nova Scotia's *Workers' Compensation Act*. Any entitlement to interest must be found in the *Act* or in regulations and policies authorized by the *Act*. Absent such a provision, interest is not "compensation ... as provided by this Part" within s. 10(1).
- [73] I acknowledge that in *Tilley v. Newfoundland (Workers' Compensation Commission)*, [1990] N.J. No. 278 the Newfoundland Supreme Court - Trial Division came to a different conclusion under the Newfoundland statute. The Ontario Workers' Compensation Appeals Tribunal has ruled that, under the Ontario legislation, there is a discretion to award interest even in exceptional cases outside the written Board policy: e.g. Decision No. 549/90 21 WCAT 25, [1991] OWATD No. 957 at paras. 59-79. Similarly in *Whitlock v. Prince Edward Island (Workers' Compensation Board)*, [2000] PEIJ No. 106, the majority of the Prince Edward Island Supreme Court - Appeal Division ruled that the Workers' Compensation Board had the discretion to award interest outside the terms of the Board's standard policy.
- [74] I am not commenting on the differently worded Workers' Compensation legislation of other provinces. Under Nova Scotia's *Act*, the compensation is only payable "as provided by this Part". The WCB's discretion under the Nova Scotia *Act*, is to choose whether or not to enact a regulation or adopt a policy under the enabling provisions of the *Act* to authorize interest. There is no "discretion" in the WCB or in WCAT to order interest which has not been specified in the *Act*, a regulation or policy.

Conclusion

- [75] In my respectful view, the WCAT erred in law. I would allow the appeal and reinstate the disposition of the Hearing Officer which denied interest, without costs.

Fichaud, J.A.

Concurring:

Glube, C.J.

Oland, J.A.