**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *MacDougall v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2010 NSCA 92

Date: 20101110
**Docket:** CA 312587
**Registry:** Halifax

**Between:**

Christina MacDougall

Appellant

- and -

Workers' Compensation Appeals Tribunal, Workers' Compensation Board, Attorney General of Nova Scotia, Rebecca Annie Getson, Holden William Slauenwhite Getson, Tammie Lee Slauenwhite, John Marvin Slauenwhite, Edson Marvin Slauenwhite and Christine Dorothy Slauenwhite, through the Estate of Richard John Edson Slauenwhite

Respondents

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| **Judges:** | MacDonald, C.J.N.S.; Saunders and Hamilton, JJ.A. |
| **Appeal Heard:** | September 23, 2010, in Halifax, Nova Scotia |
| **Held:** | Appeal dismissed per reasons for judgment of MacDonald, C.J.N.S.; Saunders and Hamilton, JJ.A. concurring. |
| **Counsel:** | Sara L. Scott and Melissa Grant, for the appellant<br>Alexander W. MacIntosh, for the respondent WCAT<br>Janet E. Curry, for the respondent WCB<br>Janus Siebrits, for the respondents Getson and Slauenwhite<br>Edward Gores, Q.C., for the respondent AGNS (not participating - not present) |

**Reasons for judgment**:

## OVERVIEW

[1] This case involves what has been termed the "historic trade off" between most Canadian employees and their employers. Simply put, workers receive guaranteed no-fault benefits in lieu of their right to sue for damages flowing from their work-related injuries. While this basic structure exists throughout Canada, the details may vary by province and territory. A subtle but important difference between the systems in Nova Scotia and Newfoundland and Labrador ("Newfoundland") is at the heart of this appeal.

[2] Under Nova Scotia's regime, employees are barred from suing not only their employers but also their co-workers. Yet this is not always so in Newfoundland because there a worker can opt to sue a co-worker for injuries that flow from a motor vehicle accident. In this appeal, a Nova Scotia based worker, on the job in Newfoundland, was killed while a passenger in a car operated by his colleague (the appellant). His survivors (the respondents) sued the colleague in tort in the Nova Scotia Supreme Court thereby prompting this question. Is this action governed by that aspect of the Nova Scotia regime which would see it barred, or is it governed by the Newfoundland regime which would allow it to proceed?

[3] The appellant asked the Nova Scotia Workers' Compensation Appeals Tribunal ("WCAT"), mandated to resolve such issues, to declare the action barred under Nova Scotia's regime. WCAT refused, prompting an appeal to this court. For the reasons that follow, I would dismiss the appeal.

## BACKGROUND

[4] The facts of this case are tragic. In June of 2007, a group of employees from RGIS Inventory Specialists of Canada ("RGIS"), including the appellant, Ms. Christina MacDougall, and the deceased, Richard John Edson Slauenwhite, left their homes in Halifax for Newfoundland in order to conduct inventory counts at the Newfoundland Wal-mart stores. RGIS rented two vans in Halifax for the employees to travel to and around Newfoundland.

[5] On the day in question, the employees were travelling back to their hotel in Clarenville after conducting an inventory at the Wal-mart in Marystown. Ms. MacDougall, who was driving one of the vans, apparently failed to negotiate a

curve in the road and the van went off the highway. Sadly, Mr. Slauenwhite and one Shane Jackson died in the accident.

[6] Mr. Slauenwhite left behind his common-law spouse and their son, together with other family members, all named as respondents in this appeal.

[7] Following the accident, the respondents faced two important decisions. Firstly, as I will describe in more detail below, they had a choice to either receive no-fault worker's compensation under Nova Scotia's regime or be "compensated according to ... the laws of ... [Newfoundland]". They chose Newfoundland. Secondly, and as I will also describe in more detail later, they faced a choice under the Newfoundland regime. They could either receive no-fault benefits under that Province's scheme or they could sue the appellant in tort. They chose the latter.

[8] However, they filed their claim not in Newfoundland, but in the Supreme Court of Nova Scotia. In any event and as noted, the appellant applied to WCAT for a declaration barring the action.

[9] In refusing this relief, WCAT essentially concluded that:

(a) the respondents could and did elect to be compensated according to the laws of Newfoundland;

(b) Newfoundland law permitted a tort action against the appellant, and

(c) this would therefore render inapplicable that aspect of Nova Scotia's regime barring the action.

ISSUES

[10] This court granted leave to appeal on the following grounds:

(a) Does the Nova Scotia Court of Appeal have jurisdiction to hear an appeal of a decision made pursuant to s. 29 of the *Workers' Compensation Act*?

(b) Did the Workers' Compensation Appeals Tribunal err in law by failing to apply the law of contract, being the law of Nova Scotia?

(c) Did the Workers' Compensation Appeals Tribunal err in law by failing to view the election provision in s. 27 of the *Workers' Compensation Act* as

> disjunctive from whether a legal action is statute-barred by the provisions in s. 28 of the *Workers' Compensation Act*?
>
> (d) Did the Workers' Compensation Appeals Tribunal err in law in finding that a worker's loss to a right of action was a matter of substantive law?

[11] I will now address these issues in order. In the course of covering the first issue, I will briefly discuss the appropriate standard upon which WCAT's decision should be reviewed.

## ANALYSIS

### *(a) Does the Nova Scotia Court of Appeal have jurisdiction to hear an appeal of a decision made pursuant to s. 29 of the **Workers' Compensation Act***?

[12] The respondents now concede our jurisdiction to entertain this appeal despite a strong privative clause suggesting that WCAT's decisions in such matters should be final. In making this concession, the respondents acknowledge this court's decision in **Queen Elizabeth ll Health Sciences Centre v. Nova Scotia (Workers' Compensation Appeals Tribunal***)*, 2001 NSCA 75, where Cromwell J.A. (as he then was) reconciled this privative clause with our corresponding general ability to hear appeals on questions of law and jurisdiction. In the process, he also offered insight into the appropriate standard upon which to review such decisions, calling for deference:

> ¶ 16 At first reading, the provisions of the ***Act*** dealing with this Court's jurisdiction appear to conflict. Section 29 entrusts to WCAT the determination of whether an action is barred by s. 28. It also appears to preclude appeal of its decision. Section 29(3) and (4) read as follows:
>
> > 29 (3) The Appeals Tribunal has <u>exclusive jurisdiction</u> to make a determination of whether the right of action is removed by this Part.
> >
> > (4) <u>The decision of the Appeals Tribunal pursuant to this Section is final and conclusive and not open to appeal, challenge or review in any court</u>, and if the Appeals Tribunal determines that the right of action is barred by this Part, the action is forever stayed.
> >
> > [emphasis by the author]

¶ 17 However, s. 256(1) provides for an appeal to this Court from "a final order, ruling or decision of the Appeals Tribunal ... on any question as to the jurisdiction of the Appeals Tribunal or on any question of law but on no question of fact." This is a general right of appeal and would appear to include an appeal from a finding of the Tribunal under s. 28. The threshold questions, therefore, are whether an appeal lies to this Court from the Tribunal's determination under s. 28 and, if so, what standard of judicial review applies to its decision.

. . .

¶ 27 In my view, the apparent inconsistency is easily explained by legislative oversight when the scope of appeals to this Court was expanded in 1999. The inconsistency became a practical problem only when appeals to this Court could address errors of law as well as jurisdiction. The apparent inconsistency is easily reconciled, however. Section 256 may be applied by affirming that there is an appeal to this Court from WCAT's s. 29 determinations. The privative clause in s. 29 may be given effect by applying a standard of review (as the Court did in **Parsons**) that permits judicial intervention only in the case of jurisdictional errors.

¶ 28 Jurisdictional error will occur when the tribunal errs in interpreting provisions limiting its jurisdiction or makes a patently unreasonable decision: see **Pasiechnyk v. Saskatchewan (Workers' Compensation Board)**, [1997] 2 S.C.R. 890 at 904. As determined in **Pasiechnyk**, provisions such as s. 28 are not, to use the traditional language, "jurisdiction limiting" provisions. In the face of a full privative clause, such as that in s. 29, judicial review should be limited to the patently unreasonable standard.

. . .

¶ 31 The distinction between questions of law and jurisdiction is, of course, relevant in the statutory appeal to this Court, the scope of which is defined in those terms by the legislation: see s. 256. As noted earlier, provisions such as s. 28 have been found not to be "jurisdiction limiting" provisions. The appropriate standard is, therefore, patent unreasonableness. In light of **Pasiechynk and Parsons**, the "functional or pragmatic" approach also strongly supports the conclusion that the appropriate standard of review of WCAT's decisions respecting the bar of civil actions is the patently unreasonable standard.

¶ 32 The selection of this standard also restores internal coherence to the statute. It is consistent with the privative clause in s. 29 because the application of the patently unreasonable standard of review effectively restricts the appeal on this issue to review for jurisdictional error. It also gives effect to the Legislature's

> intent, as expressed in s. 256, that there should be a general right of appeal, by leave, to this Court from all final decisions of WCAT under the **Act**.
>
> ¶ 33 I, therefore, conclude that the appeal is properly before the Court under s. 256 and that the standard of review is that of patent unreasonableness.

[13] Of course, Cromwell, J.A.'s call for a *patently unreasonable* standard of review would today represent a *reasonableness* standard in light of the Supreme Court of Canada's recent merging of the two. See **Dunsmuir v. New Brunswick**, [2008] S.C.J. No. 9. Therefore, the parties seem to agree that WCAT's decision should be accorded deference and be overturned only if found to be unreasonable. Yet the appellant qualifies her concession, suggesting that unless WCAT was correct in law, its decision would be deemed unreasonable. She explains it this way in her factum:

> ¶ 20 With respect to Issue 1, the Appellant will address the appropriate standard of review in Argument as the issue itself directly engages a discussion on standard of review. The Appellant submits that any decision of WCAT pursuant to s. 28 of the *Act* must be reviewed on a reasonableness standard; however, in the present appeal, each ground of appeal must first be reviewed on its own standard appropriate for that issue before a determination can be made as to whether the decision of WCAT was reasonable.
>
> ¶ 21 The Appellant submits that Issues 2 and 4 potentially attract both a correctness and a reasonableness standard, in that this Court must first ask whether WCAT was correct in its determination of the legal principles and, if so, ask whether WCAT reasonably applied those principles to the record before it. Under the reasonableness standard, the reviewing court examines the tribunal's decision, first to identify an intelligible line of reasoning to a conclusion, and second to determine whether that conclusion occupies the range of acceptable outcomes.
>
> ¶ 22 The Appellant submits that Issue 3 attracts the correctness standard as it involves pure questions of statutory interpretation. ...

[14] This is an interesting approach which, as will be seen, I need not resolve. This is because, in my view, WCAT's decision was the correct one and therefore beyond our intervention by either standard. Now to the remaining grounds of appeal.

*(b) Did the Workers' Compensation Appeals Tribunal err in law by failing to apply the law of contract, being the law of Nova Scotia?*

[15] The appellant in her factum explains the existence of a "statutory contract" this way:

> ¶ 48 The Appellant submits that the laws of Nova Scotia should be applied in this case. The Act is a statutory and binding contract between employers and employees (and their dependants), the enforcement of which bars the action commenced by the Respondents as such is prohibited by s. 28 of the *Act*.
>
> ¶ 49 The Appellant submits that WCAT erred in its determination that WCAT was not actually applying the law of Newfoundland, but, rather, was applying the law of Nova Scotia because of the Respondents' apparent ability to elect under the Nova Scotia law to be governed by the law of Newfoundland.
>
> ¶ 50 The Appellant submits that WCAT has blindly applied the *lex loci delicti* in error. The WCAT Decision ignores the comprehensive code intended to cover workplace accidents involving Nova Scotia workers regardless of where accidents occur.
>
> ¶ 51 The ability of a worker or dependants to obtain compensation is triggered by an accident. That triggering event merely engages the application of the statutory contract. Whether the accident that gave rise to a claim for compensation is one that could be considered a tort is immaterial to the scheme firmly grounded in and reliant upon the concept of "no-fault". By its very nature, a civil action for damages arising out of a motor vehicle accident must allege that the defendant has committed a tort, negligence, that caused the plaintiff injury and entitlement to damages. The current action ostensibly ignores the existence of a contract and governing provincial law that ultimately prohibits the Respondents from suing a worker's employer and fellow employees, regardless of whether the employer or the employees acted negligently.
>
> [emphasis by the author]

[16] Thus, says the appellant, the legislative scheme represents a "statutory contract" binding the parties to the historic trade off; namely, guaranteed compensation in lieu of the right to sue. In this light it should not matter that Nova Scotia participants to this "contract" were injured outside the Province.

[17] Respectfully, I decline the appellant's invitation to inject the law of contract into this analysis. I am not persuaded that principles of contract law are helpful in resolving this appeal. The simple fact is that this claim arises as a consequence of a motor vehicle accident that occurred in Newfoundland. Whether the appellant is

properly joined in an action commenced in Nova Scotia that relies upon the laws of Newfoundland is best decided on principles of statutory interpretation.

[18] This takes me to the appellant's third ground of appeal.

*(c) Did the Workers' Compensation Appeals Tribunal err in law by failing to view the election provision in s. 27 of the* ***Workers' Compensation Act*** *as disjunctive from whether a legal action is statute-barred by the provisions in s. 28 of the* ***Workers' Compensation Act****?*

[19] This ground of appeal essentially involves the proper interpretation of the two governing provisions in Nova Scotia's *Workers' Compensation Act*; namely *ss. 27* and *28*, which I will now discuss in reverse order.

[20] Section *28* is simple enough. It codifies the historic trade off discussed above. Note that it bars a worker's right to sue not just the employer, but also co-workers.

> Compensation as exclusive right
>
> 28 (1) The rights provided by this Part are in lieu of all rights and rights of action to which a worker, a worker's dependant or a worker's employer are or may be entitled against
>
> (a) the worker's employer *or that employer's servants or agents; and*
>
> (b) any other employer subject to this Part, or any of that employer's servants or agents, as a result of any personal injury by accident
>
> (c) in respect of which compensation is payable pursuant to this Part; or
>
> (d) arising out of and in the course of the worker's employment in an industry to which this Part applies.
>
> (2) Clause (1)(b) does not apply where the injury results from the use or operation of a motor vehicle registered or required to be registered pursuant to the Motor Vehicle Act. 1994-95, c. 10, s. 28.
>
> [Emphasis added.]

[21] Section *27*, on the other hand, contemplates a workplace accident occurring outside of the Province. It gives the injured worker (or, as in this case, his dependents) a choice to be "compensated" either under the Nova Scotia scheme or "according to ... the laws of the jurisdiction where the accident occurred":

> Election to claim compensation
>
> 27 (1) Where a worker is entitled to compensation pursuant to
>
> (a) the laws of the jurisdiction where the accident occurred; and
>
> (b) this Part,
>
> *the worker shall decide to be compensated according to either the laws of the jurisdiction where the accident occurred, or this Part.*
>
> (2) Notice in writing of a decision made pursuant to subsection (1) shall be given to the Board within six months of the occurrence of the accident.
>
> (3) Where, pursuant to subsection (1), a worker
>
> (a) decides to claim compensation in the jurisdiction where the accident occurred; or
>
> (b) fails to make an election,
>
> the worker may not claim compensation pursuant to this Part. 1994-95, c. 10, s. 27.
>
> [Emphasis added.]

[22] The parties are at complete odds when it comes to interpreting these two provisions.

[23] The respondents insist that *s. 28* has no application in this case because, under *s. 27*, they have opted out of the Nova Scotia scheme. In other words, the bar against suit is triggered only when "rights provided by this Part" are invoked. Therefore, by opting out of the entire scheme, the bar has no application.

[24] Yet the appellant says that *s. 28* trumps the respondents' election to seek compensation outside of the Nova Scotia scheme. She explains that *s. 28* involves

more than just an injured worker's rights. It also involves the rights of the employer (and by extension a fellow employee such as the appellant) who, having contributed and participated fully in the Nova Scotia scheme, deserve its benefits regardless of where the accident occurred. That benefit of course would be immunity from suit. Thus, says the appellant, the respondents' right to be "compensated" elsewhere includes only the right to the corresponding workers' compensation benefits available in the jurisdiction where the accident occurred. To rule otherwise would allow the respondents to do an "end run" around *s. 28.*

[25] For the following reasons, I cannot accept the appellant's interpretation of these provisions.

[26] I begin by noting that there is little dispute over the meaning of most of the operative statutory provisions. For example, and as noted, there is nothing controversial about Nova Scotia's *s. 28*. Its object is clear - but for the *s. 27* election, it would have served to bar this action. Nor are the applicable Newfoundland provisions controversial. Victims of this type of accident can prosecute tort claims in lieu of collecting workers' compensation benefits. In fact, the appellant acknowledges as much in her factum:

> ¶ 61 It is undisputed that s. 28 of the *Act* prohibits the Plaintiff from bringing a suit against the deceased's fellow employee. The current court action is brought because the Respondents have elected "to be compensated" in accordance with the laws of the jurisdiction where the accident occurred, being Newfoundland. It is also undisputed that ss. 44 and 44.1 of the *Newfoundland Act* allow the estate of the deceased to opt out of the compensation scheme and to bring a suit for damages against another employee of the same employer.
>
> [Emphasis added.]

Nor is it disputed that the respondents made timely elections under *s. 27* of the *Nova Scotia Act* and *s. 45* of the *Newfoundland Act*.

[27] So the issue really boils down to the true meaning of *s. 27 (1)(b)*. Specifically, what is the true import of the respondents' decision to be "compensated" under the laws of Newfoundland? The answer will emerge through an analysis of the appropriate principles of statutory interpretation.

***The Principles of Statutory Interpretation***

[28] The Supreme Court of Canada had endorsed the modern approach to statutory interpretation as proposed by Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at page 87:

> ... 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.

See **Re Rizzo and Rizzo Shoes Ltd.**, [1998] 1 S.C.R. 27, at 41; **Canada (House of Commons) v. Vaid**, [2005] 1 S.C.R. 667, [2005] S.C.J. No. 28; **Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada**, [2006] S.C.J. No. 46, 2006 SCC 46; and **Mime'j Seafoods Ltd. v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, 2007 NSCA 115.

[29] For the purpose of this appeal, this analysis is best conducted by, (a) a consideration of the grammatical and ordinary meaning of the impugned passage, and, (b) a consideration of whether this meaning works in harmony with the scheme and object of the *Act*.

*The Grammatical and Ordinary Sense of s. 27(1)(b)*

[30] In my view, there is nothing complicated about deciding to be "compensated according to ... the laws of ... [Newfoundland]". It is quite self-explanatory. The one word that may require some elaboration is "compensated" . In ordinary parlance it is a broad concept that would include, as the respondents suggest, damages in tort. For example, see:

a. *Merriam-Webster Online Dictionary*, 2010. Merriam-Webster (Online):

> COMPENSATE
>
> transitive verb
>
> 1: to be equivalent to : counterbalance
>
> 2: to make an appropriate and usually counterbalancing payment to <*compensate* the victims for their loss>
>
> 3a : to provide with means of counteracting variation

> b : to neutralize the effect of (variations)

[Emphasis added.]

b. *Canadian Oxford Dictionary*, 2d ed., (2004):

> Compensate ... *verb* (often foll. by *for*)- **1** *transitive* recompense (a person) (compensated her for her loss). **2** *Intransitive* make amends (*compensated for the insult*). **3** *transitive* counterbalance. **4** *transitive* Mech. provide (a pendulum etc.) with extra or less weight etc. to neutralize the effects of temperature etc. **5** *intransitive* Psych. offset a disability or frustration by development in another direction. *Compensator* noun *compensatory ... adjective* [Latin *compensare* (as COM-, pensare frequentative of *pendere pens-weight*)]

[Emphasis added.]

[31] Meanwhile legal definitions are equally broad. For example, *Black's Law Dictionary*, 7th Ed. (St. Paul, Minn: West Group, 1999) provides in part:

> compensate (kom-pan-sayt), vb. 1. To pay (another) for services rendered <the lawyer was fairly compensated for her time and effort>. 2. To make an amendatory payment to; to recompense (for an injury) <the court ordered the defendant to compensate the injured plaintiff> .

[Emphasis added.]

[32] In short, the grammatical and ordinary sense of this phrase supports the respondents' contention that they were entitled to whatever recovery the laws of Newfoundland would allow.

*The Scheme and Object of the Act*

[33] However, would such a broad view of "compensation" live harmoniously with the scheme and object of the *Act*? The appellant says no. She explains it this way in her factum:

> ¶ 67 The Appellant submits that, on the first point, the definition of "compensation" (and derivations thereof) does not include "damages". This interpretation is the only interpretation that makes sense on a contextual reading of the *Act* given that the historic compromise is the underlying principle behind the governing legislation: a worker gives up the right to sue in exchange for the right to compensation. Even if one has the right to sue for damages, one does not

> have the right to damages because, in the absence of negligence, a plaintiff would not recover. Thus, in a no-fault scheme the worker does not have to prove negligence in order to obtain "guaranteed" compensation, but, by participating in the no-fault scheme, loses the right to sue for damages where that particular right does not guarantee recovery of any funds. That bar to actions is not ancillary to the scheme but central to it.
>
> ¶ 68 Thus, by its very nature, "compensation" cannot and does not include "damages". A broad interpretation of "compensation" would be contrary to the intrinsic purpose of the *Act*. Moreover, WCAT erred in giving s. 27 a wide interpretation that it said accords with the accepted principle that a liberal interpretation be given to workers' compensation legislation. Such a finding flies in the face of the historic compromise and the fact that workers governed by the scheme have no right to sue their employer and fellow employees for damages.
>
> ¶ 69 The *Act* itself is called the *Workers' **Compensation** Act*: compensation is at the heart of the *Act* that has its roots in the historic trade-off. Although the *Act* does not define "compensation", Gruchy, J., in *Thompson v. Nova Scotia (Workers' Compensation Board)*, took "the ordinary meaning of compensation as a word which would encompass any part of the counter-balance to the loss suffered by the worker, including medical aid". However, the ordinary meaning of the word "compensation" in this *Act*, differs from the ordinary meaning in the context of other acts. For example, in the human rights context, the word "compensation" could encompass intangible or emotional damage where the complainant suffered humiliation or hurt to his or her dignity. Thus, any "ordinary meaning" must be interpreted harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of the legislature.

[34] This submission, in my respectful view, misses the mark for reasons that I will now detail.

[35] At the outset, let me say that I agree with the appellant that the main objective of Nova Scotia's *Act* is to remove work-related claims from the law of tort. For example, in **Mime'j Seafoods Ltd.v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, *supra*, we said this:

> ¶ 30 I have already addressed the *Act*'s objects when considering the appropriate standard of review at paragraph 12, above. As Cromwell, J.A. observed in **Logan**, *supra*, the *Act* is designed to provide a mechanism to remove workers' compensation issues from our court system and its conventional fault-based tort system. This is accomplished through a comprehensive investigative process coupled with a specialized adjudicative regime and no-fault compensation funded through the accident fund.

[36] However, in addition to this broad goal, the Legislature obviously intended to deal differently with accidents that occur outside the Province. The *Act,* in fact, deals with such accidents in two ways. First, of course, we have *s. 27*, which, in appropriate circumstances, gives the worker a choice to be compensated under the Nova Scotia plan or "according to ... the laws of the jurisdiction where the accident occurred". Then, *s. 22* sets out the circumstances that would allow such a choice. They essentially involve an adequate connection to the Province:

> Accident during temporary absence
>
> 22 Where
>
> (a) the residence of a worker is outside the Province;
>
> (b) the place where the worker usually works for the employer is within the Province;
>
> (c) the place of business or chief place of business of the employer is within the Province;
>
> (d) an accident occurs while the worker is outside the Province; and
>
> (e) at the time of the accident the worker was outside the Province merely for some temporary purpose connected with the worker's employment within the Province,
>
> the worker may claim compensation pursuant to this Part as if the accident had occurred in the Province. 1994-95, c. 10, s. 22.

[37] The second category of out-of-province accident disentitles the worker from claiming under the Nova Scotia regime. Here there is some connection to Nova Scotia but not enough to warrant coverage:

> Compensation where entitlement outside Province
>
> 23 Where
>
> (a) an accident occurs while a worker is outside the Province;
>
> (b) the place of business or chief place of business of the employer is outside the Province; and

> (c) *the worker is entitled to compensation pursuant to the law of the place where the accident occurred*,
>
> the worker may not claim compensation pursuant to this Part, whether the worker's residence is within or outside the Province, unless
>
> (d) the place where the worker usually works for the employer is within the Province; and
>
> (e) at the time of the accident the worker was outside the Province merely for some temporary purpose connected with the worker's employment within the Province. 1994-95, c. 10, s. 23.
>
> [Emphasis added.]

[38] Notice that *s. 23(c)* disqualifies the worker only when he or she would be otherwise "entitled to compensation pursuant to the law of the place where the accident occurred". The intent of this subsection is clear – a worker must be able to receive compensation somewhere. In other words, he or she must not fall between the jurisdictional cracks. It is interesting to compare the reference to "law" used in this subsection with the reference to "laws" in the operative portion to *s. 27(1)(b)* above. While it is difficult to know for sure, this may represent a subtle but important distinction. Specifically, compensation according to the *laws* of a jurisdiction connotes a much broader concept than compensation according to the *law* of a jurisdiction. In other words, it could be that the Legislature, by enacting *s. 23*, was content to exclude coverage, provided there was entitlement to compensation under an equivalent provision in the place where the accident occurred. This would make sense because, as noted, no injured worker is to be left without at least basic coverage.

[39] Yet when it comes to giving a worker a choice under *s. 27(1)*, notice the entitlement to be compensated not just under the [equivalent] "law" but under the "laws" of that jurisdiction. In this light, perhaps the Legislature chose the broader term "laws" so that "compensation" would be available not just under the "law" that corresponds with Nova Scotia's regime, but instead under Newfoundland's "laws" generally. In such a broader context, recovery under tort law would certainly be included.

[40] Regardless, even if I am reading too much into this subtle distinction, I still see my broad interpretation of "compensation" in *s.27(1)(b)* living harmoniously with the scheme and object of the *Act*. After all, this accident did not occur in Nova Scotia. This is an important exception to Nova Scotia's regime and one which, as noted, our legislation acknowledges. In other words, here we have an employer doing business in the Province of Newfoundland. Even if its business there is transient, one would expect it to be aware of the Newfoundland regime, including the right to sue colleagues in tort. In fact, had the employer's connection to Newfoundland been closer, Nova Scotia's regime would not even come into play (by virtue of *s. 23* above); this despite the fact that all the parties are Nova Scotians. Under this lens, it would be the appellant's narrow view of "compensation" that would lack harmony with the *Act*'s scheme and object. This view would see the rights of Nova Scotia workers vary depending upon where a business decided to have its head office. In my view, when Nova Scotians are injured abroad, it would make more sense to have their rights determined by the laws of the place where the accident occurred. A broad interpretation of "compensation" under *s.27(b)* allows just that. That, in my view, is what our legislators would have intended and reflects the reality of trans-provincial commerce and mobility for much of Canada's workforce.

[41] As well, this result is consistent with private international law which, in these circumstances, directs the governing law to be that of the forum where the accident occurred. See **Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon**, [1994] S.C.J. 110.

[42] Furthermore, it does not matter, in my view, that this Newfoundland action is being prosecuted in Nova Scotia. I say this because it remains a Newfoundland action which the respondents can prosecute in Nova Scotia simply because, (a) they live here, and, (b) the convenience of using Nova Scotia as the forum has, to date, not been challenged. See the *Court Jurisdiction and Proceedings Transfer Act*, 2003 (2nd Sess.), c. 2, s. 1. In other words, this is a Newfoundland action which was commenced in Nova Scotia for reasons of pure convenience. Placed in this context, this action does not represent an "end run" around *s. 28* as the appellant cautions.

[43] Nor does this interpretation jeopardize the future of the historic trade off as appellant's counsel vigorously cautioned against during oral argument. Instead the

historic trade off remains alive and well. Simply put, it is Newfoundland's as opposed to Nova Scotia's version of this trade off that applies in the special circumstances of this appeal.

[44] This takes me to the appellant's final ground of appeal.

*(d) Did the Workers' Compensation Appeals Tribunal err in law in finding that a worker's loss to a right of action was a matter of substantive law?*

[45] The appellant suggests the question facing WCAT was procedural in nature thereby making Nova Scotia law applicable. She does so by relying on a recent decision of this court, **Vogler v. Szendroi**, 2008 NSCA 18. She explains it this way in her factum:

> ¶ 84 The Appellant submits that WCAT erred in not applying the law of Nova Scotia, being the law of the forum, to its determination as to whether the action was statute barred.
>
> ¶ 85 In *Vogler v. Szendroi*, this Court considered a conflict of laws question and set out the approach to take when considering whether to apply procedural or substantive law. In that case the Court instructed that we must draw our attention to the true subject matter of the impugned provision. MacDonald, C.J.N.S., formulated the following three-step analysis:
>
> > 1. identify the exact subject matter covered by the impugned foreign provision;
> >
> > 2. determine whether, in the domestic forum (in this case Nova Scotia), this subject matter would be considered procedural or substantive; and,
> >
> > 3. if the subject matter would be characterized as substantive, then the foreign provision should be applied. On the other hand, if the subject matter is characterized as procedural, then the foreign provision should not be applied.
>
> ¶ 86 With respect to stage 1, the subject matter covered by the impugned foreign provision is that a worker (or dependents) entitled to compensation pursuant to the *Newfoundland Act* may elect out of that legislation to pursue a civil claim for damages.

> ¶ 87 With respect to stage 2, the assessment must begin with an explanation of the distinction between substantive and procedural law. The Court noted in *Vogler* that substantive law involves a litigant's rights or obligations and is the part of the law that creates, defines, and regulates the duties, and powers of parties; procedural law involves the process by which a litigant's rights or obligations are enforced or defended and is defined as the rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines specific rights or duties themselves. Thus, the two concepts are inextricably linked: the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other. This Court adopted Fichaud, J.A.'s determination that "procedural rules govern the mode of proceeding or machinery by which the [substantive] right is enforced".
>
> ¶ 88 Thus, with respect to the question as to whether, in Nova Scotia, the ability to make an election pursuant to the *Act* would be considered procedural or substantive, the Appellant submits that the subject matter is procedural. That is, the worker (or dependents) are entitled to compensation (substantive) and may elect the method in which that compensation is paid (procedural).
>
> ¶ 89 Consequently, on the stage 3 analysis, where the matter is characterized as procedural, the foreign (Newfoundland) law should not be applied. Thus, WCAT erred in the application of the correct legal principles by not applying the *lex fori*, being the law of Nova Scotia, and this Court need not move on to consider whether the WCAT decision on this point was reasonable, subject to the overall reasonableness requirements as discussed above.

[46] Respectfully, this submission misses the mark. WCAT applied Nova Scotia law to decide whether the action could proceed. Specifically, it applied *s. 27* which invoked the respondents' choice to be compensated under the laws of Newfoundland. This includes the right to commence a Newfoundland tort action. In this light, our decision in **Vogler** does not inform this analysis.

CONCLUSION

[47] By allowing this action to proceed, WCAT was correct in both its analysis and conclusion. I would therefore dismiss the appeal with costs to the respondents of $2,000, together with reasonable disbursements to be agreed upon or taxed.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Hamilton, J.A.