# NOVA SCOTIA COURT OF APPEAL

**Citation:** *Baker v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2017 NSCA 83

**Date:** 20171128
**Docket:** CA 453768
**Registry:** Halifax

**Between:**

Jeffrey Baker

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal, Workers' Compensation Board of Nova Scotia, Attorney General for the Province of Nova Scotia, and Nova Scotia Department of Justice – Correctional Services

Respondents

v.

Office of the Employer Advisor Nova Scotia Society

Intervenor

| | |
|---|---|
| **Judges:** | Fichaud, Oland and Bryson, JJ.A. |
| **Appeal Heard:** | October 10, 2017, in Halifax, Nova Scotia |
| **Held:** | Appeal allowed per reasons for judgment of Fichaud, J.A., Oland and Bryson, JJ.A concurring |
| **Counsel:** | David McCluskey, Vanessa Nicholson and (factum) Kenneth LeBlanc and for the Appellant<br>Sarah Bradfield for the Respondent Department of Justice – Correctional Services<br>Paula Arab for the Respondent Workers' Compensation Board of Nova Scotia<br>Alison Hickey for the Respondent Nova Scotia Workers' Compensation Appeals Tribunal<br>Bradley D. J. Proctor for the Intervenor |

**Reasons for judgment:**

[1] This workers' compensation appeal does not involve the merits of a claim for compensation. It addresses the Workers' Compensation Appeals Tribunal's test for pre-hearing disclosure to an Employer of the documents possessed by the Workers' Compensation Board.

[2] Should the Employer receive only the documents that are relevant to the issues? That was the test stated in the Tribunal's Practice Manual when this matter came before the Tribunal. Yet, the Tribunal declined to follow its Manual. It saw "relevance" as an unworkable standard that "breaks down" in practice. Instead, the Tribunal said everything in the Board's file for a worker must be disclosed to the Employer, without regard to the relevance of any document. This, despite the Tribunal's acknowledgement that these documents may include highly confidential material which is irrelevant to the proceeding. The Tribunal said that procedural fairness mandated the outcome.

[3] The Worker, Mr. Baker, appeals. He says that procedural fairness does not require the production of irrelevant confidential material. He submits it is the Tribunal's responsibility to assess relevance as best it can.

[4] The Workers' Compensation Board generally supports Mr. Baker's view. The Employer, the Department of Justice, emphasizes that, under any test for disclosure, the documents it seeks are relevant to its submissions on the merits of Mr. Baker's compensation claim. The Intervenor endorses the Tribunal's ruling.

[5] The undisclosed material in the Board's file is not before this Court. So the Court is not in a position to rule on the relevance or irrelevance of any undisclosed document. Our reasons focus on the Tribunal's approach to disclosure.

## ***Background***

[6] Mr. Baker is a Youth Worker employed by the Nova Scotia Department of Justice – Correctional Services ("Employer"). He works at the Nova Scotia Youth Facility in Waterville ("Facility").

[7] On November 13, 2014, Mr. Baker filed an injury report with the Workers' Compensation Board ("Board"), further to the *Workers' Compensation Act*, S.N.S.

1994-95, c. 10, as amended ("*Act*"). The report cited a knee injury from a workplace assault by a youth at the Facility. Mr. Baker also claimed compensation for work-related psychological stress. From the outset, the Employer disputed Mr. Baker's entitlement to compensation for psychological stress. The Employer's position throughout has been that friction with youths at the Facility is an expected incident of Mr. Baker's job, Mr. Baker was trained to handle it, and it is not a stressor for a PTSD claim.

[8] A key issue on this appeal is whether the Workers' Compensation Appeals Tribunal is able to assess the relevance of documents in the Board's file, to determine the ambit of appropriate disclosure to the Employer. I will address the issue later (para. 74). To assist that analysis, it will be helpful to identify here (1) the points that the parties and decision-makers, before the matter reached Tribunal, treated as critical, and (2) the documents that the parties and decision-makers cited as relevant on those points. That is the purpose of the following passages respecting the decisions of the Claims Manager and Hearing Officer.

[9] **Case Manager:** On February 26, 2015, the Board's Case Manager issued a decision, copied to the Employer, that cited the results of Mr. Baker's medical and psychological examinations:

> On November 17, 2014 you were assessed by physiotherapy and diagnosed with a right knee strain.
>
> You were evaluated by your family doctor on December 1, 2014 and diagnosed with a right knee strain and anxiety. You were referred to a Psychologist to treat your anxiety.
>
> On January 13, 2015 you were diagnosed with Post Traumatic Stress Disorder by Bryanne Harris, a Psychologist (Candidate Register). She reported that your condition developed as a result of the November 13, 2014 incident at work.
>
> On January 15, 2015 you were cleared to physically return to work as your right knee strain had resolved. However, you were not cleared to return to work psychologically.

[10] The Case Manager's letter noted the Employer's objections:

> Your employer does not agree that the incident you were involved in at work on November 13, 2014 met the criteria of a stress related injury.
>
> Your employer does not agree that you are eligible for earnings replacement benefits for lost time from work due to that condition.

[11] The Case Manager then rejected the Employer's objections. The letter cited the provisions of the *Act* and the Board's written Policy 1.3.9, that govern stress claims. The letter said "I have considered the following evidence and have used it to make my decision" and then summarized nine items of evidence. Next, under the heading "Reasoning", the Case Manager explained why, in her view, the evidence supported her conclusions that Mr. Baker met the criteria for stress related injury:

> There is evidence that you were involved in two assault events in a one year time frame and that the cumulative effect of those assaults resulted in PTSD according to a qualified Psychologist. I have decided that this can be characterized as a traumatic event whereby you were confronted with an event that involved actual serious injury or a threat to your physical integrity.
>
> There is evidence that you were provided with anti-anxiety medication by your family doctor prior to the November 2014 event which shows that you were having anxiety at work after the first "take down" event but that it had not yet risen to the level of disability.
>
> I find it reasonable to accept that your underlying anxiety prior to November 2014 coupled with the new stressful event in November 2014 led to a diagnosis of PTSD.
>
> While I recognize that you work in correctional facility and those types of work-related events are experienced by any average worker in any correctional facility, I find that the two stressful "take down" events were unusual and excessive since they both happened in one year.
>
> I also accept that there are labour relations issues at your workplace and that investigations are ongoing. However, there is no evidence that these issues played a role or had any impact in the traumatic event you experienced on November 13, 2014.
>
> PTSD, the diagnosis of injury, is a mental condition that is described in the DSM IV.
>
> Your Psychologist says that your PTSD resulted from cumulative work related stressors.
>
> For those reasons, I have decided that you meet the criteria set out in Policy 1.3.9.

[12] The Case Manager's letter concluded that "[s]ince I have decided that you have work related stress, you are entitled to earnings loss benefits if you are losing earnings as a result of that condition", and cited s. 37 of the *Act* and Board policy as support.

[13] **Hearing Officer:** On March 26, 2015, the Employer appealed to a Hearing Officer.

[14] Section 193 of the *Act* governs disclosure of documents and records, possessed by the Board, on an appeal to a Hearing Officer:

> 193(1) Any worker may receive a copy of any document or record in the Board's possession respecting the claim of the worker.
>
> (2) Where the Board has determined that a document or record contains medical information that would be harmful to the worker if released to the worker, the Board may
>
> (a) release the document or record to the worker's physician, and
>
> (b) inform the worker that it has released the document or record to the worker's physician.
>
> (3) **An employer**, who is a participant in
>
> …
>
> (b) an appeal to a hearing officer,
>
> **may**, subject to any procedure that may be adopted by the Board, **receive a copy of any document or record in the Board's possession that the Board considers relevant to the appeal**.
>
> (4) No decision, order or ruling of the Board on an issue in which the employer has a direct interest shall be based on any document or record to which the employer has been denied access pursuant to this Section.
>
> …
>
> [emphasis added]

[15] On April 14, 2015, the Board provided to the Employer documents from the Board's file for Mr. Baker. The 57 page package included (1) Mr. Baker's WCB Injury Report and related documents, (2) medical and hospital assessments and reports by the psychologist, Ms. Harris, whose views were accepted by the Case Manager's letter of February 26, 2015, and (3) Contact Sheets reciting the contents of conversations with Board personnel regarding the claim. The disclosed documents redacted (1) the contents of the "next of kin name/address" on a medical record, (2) the "allergies" and "medications" from the "past medical history" box on a surgical referral form, and (3) two lines from one of Ms. Harris' letters that appeared under the heading "Summary of Therapy for this Period".

[16] On April 27, 2015, the Employer's solicitor provided a 13 page letter to the Hearing Officer. The letter clearly states the Employer's submission:

> Section 2(a) of the *Act* mandates a very specific situation for eligibility on the basis of stress, that of an acute reaction to a traumatic event. A traumatic event is to be sudden, frightening or shocking. It does not include day to day stressors and must be unusual and excessive in the context of the events typically experienced by those in the same occupation.
>
> It is the position of the Employer that the interaction between the Worker and the young person on November 13, 2014 was not an event which was unexpected, extreme, sudden, frightening, shocking, unusual or excessive. …

The Employer's letter elaborated by citing incident reports relating to the events of November 13, 2014 at the Facility, and attaching documents describing both earlier incidents involving Mr. Baker and Mr. Baker's training as a Youth Worker. The Employer's submission then summarized:

> It should be abundantly clear from the above that the Case Manager failed to properly consider the context of the Worker's daily job duties and the unique workplace environment. Unfortunately, threats of varying degrees and assaults of various natures are part and parcel of the custodial work engaged in by Youth Workers. The Case Manager did not properly consider the exceptional work environment of the Youth Facility. …

[17] The Employer's submission also addressed the topic of missing documentation. The letter:

- said the "[t]he Case Manager did not have sufficient medical information to assess stressors leading to the Worker's impairment";
- noted the absence of chart notes from either Mr. Baker's family physician or the psychologist Ms. Harris, and the absence of any document from Mr. Baker's treating psychiatrist, or from Drs. Mishra or Veasy, who were noted for referral on one of the Board Contact Sheets;
- said no document supports the Case Manager's apparent assumption that Mr. Baker was prescribed anti-anxiety medication as a result of an earlier incident at the Facility;

- after noting that Ms. Harris' report indicated that other factors exacerbated Mr. Baker's symptoms, stated "[n]o details are provided as to what those factors were and whether they pre-existed the injury";

- stated "[t]he Employer's copy of the AVDHA Emergency Record is incomplete as the left side is cut off";

- concluded with:

> As a final note, the Employer objects to the redaction completed by WCB on the disclosure provided April 14, 2015.

[18] On June 24, 2015, the Hearing Officer issued a Decision that denied the Employer's appeal. The Hearing Officer quoted the *Act*'s definition of "accident" and the Board's Policy 1.3.9 that governs the entitlement for a psychological injury. Her reasons cited physician's reports dated December 1 and 18, 2014 and January 13, 2015 by Dr. Targett, recording Dr. Targett's diagnosis that Mr. Baker had PTSD, and continued:

> In a telephone conversation between the Employer and the Case Manager, the Employer advised that Dr. Targett placed the Worker off work due to anxiety.

The Hearing Officer referred to Dr. Targett's chart note history, to the records of the psychologist, Ms. Harris, and Ms. Harris' diagnosis of PTSD. The Decision recited at length the Employer's submissions from the letter of April 27, 2015, and the Worker's reply. The Hearing Officer referred to Disciplinary and Information Reports from the time of the incident, November 13, 2014, and to Subject-Behaviour-Officer Response forms prepared by Mr. Baker and other officers at the Facility concerning that incident.

[19] The Hearing Officer's Decision concluded:

> Policy 1.3.9 concerns psychological injuries and states that claims for compensation will be considered when the stress suffered by a worker is a reaction to one or more traumatic events. Policy 1.3.9 provides that the traumatic event must be assessed using an objective standard. The Policy explains the objective standard used is the reasonable person test, in other words, whether an objective person assessing the event would consider it traumatic.
>
> …
>
> Having reviewed the evidence on file, and on consideration of the appeal submissions, I find the [*sic*] sufficient to support the November 13, 2014 incident

> satisfies the Board's definition of a "Traumatic Event", outlined in Policy 1.3.9. Specifically a "Traumatic Event" is defined as a direct personal experience of an event, in that an event was they [*sic*] was sudden; frightening or shocking; had a specific time and place, and involved actual or threatened death or serious injury to oneself or others, and involved a threat to one's physical integrity. I find that such a categorization of this event as "traumatic" is in keeping with an objective legal standard based on the conduct and perceptions external to a particular person, and that any hypothetical person with sound attention, knowledge, intelligence and judgement, would agree that the events in question were traumatic in nature.
>
> My review of the evidence confirms that this Worker satisfies all of the criteria necessary for an acceptable claim for traumatic onset stress. First, there was a traumatic event as defined herein. Second, the traumatic events did arise out of and in the course of the Worker's employment. Third, the response to the traumatic event caused the Worker to suffer from a mental or physical condition that is described in the DSM. Finally, the Worker's condition has been diagnosed by a clinically trained psychologist in accordance with the DSM IV. Psychologist Harris, in a Report dated January 14, 2015 diagnosed the Worker with PTSD which she attributed to the workplace incident of November 13, 2014.
>
> …

[20] **Workers' Compensation Appeals Tribunal:** On July 13, 2015, the Employer appealed to the Tribunal. The form of Notice of Appeal asks the appellant to identify the "issues you are appealing", to which the Employer stated "Employer does not agree with outcome of decision."

[21] Sections 238 to 255A of the *Act* set out the Tribunal's powers. Included are:

> **Procedure**
>
> 240(1) The Appeals Tribunal **shall determine its own procedures** and may make rules governing the making and hearing of appeals.
>
> …
>
> **Decision on appeal**
>
> 246(1) The Appeals Tribunal shall decide an appeal according to the provisions of this Act, the regulations and policies of the Board, and
>
> (a) documentary evidence previously submitted to or collected by the Board;
>
> (b) subject to Section 251, any additional evidence the participants present;
>
> (c) the decision under appeal;

(d) the submissions of the participants; and

(e) any other evidence the Appeals Tribunal may request or obtain.

…

[emphasis added]

[22] Under its rule-making power in s. 240(1), the Tribunal adopted the Workers' Compensation Appeals Tribunal Practice Manual ("Practice Manual"). The Practice Manual, as it existed at the time of the Tribunal's decision under appeal, included:

> **5.20 Access to Documents**
>
> All participants to an appeal before the Tribunal are entitled to receive a copy of all evidence and submissions, both oral and written, filed directly with the Tribunal as well as **all relevant portions of the Board claim files**.
>
> The Board is responsible for providing a copy of relevant claim files to workers.
>
> The Tribunal is responsible for providing copies of relevant claim files to employers. The Tribunal will also provide an update of the relevant claim files to employers if the claim file has been disclosed by the Internal Appeals Department of the Board. **The Tribunal will only disclose relevant documents and relevant portions of documents** and may make any other appropriate ruling regarding the disclosure of documents.
>
> Prior to receiving copies of documents from the Tribunal, the employer must agree, in writing, not to use or disclose the documents for any purpose other than pursuing or responding to the appeal before the Tribunal. The employer must also agree to keep the documents confidential and secure.
>
> The Tribunal is required to comply with the *Freedom of Information and Protection of Privacy Act* ["FOIPOP"]. Disclosure of personal information is presumed by FOIPOP to be an unreasonable invasion of privacy if the personal information relates to medical, dental, psychiatric or psychological conditions. However, disclosure of personal information is not an unreasonable invasion of privacy if there is written consent to the disclosure. Otherwise, material can only be released to employers where it is necessary to ensure a fair hearing.
>
> [emphasis added]

[23] Further to article 5.20 of the Practice Manual, on July 24, 2015 the Tribunal provided to the Employer 361 pages of material from the Board's files. On August 12, 2015, the Tribunal copied Mr. Baker's counsel with the same material. On September 30, 2015, after further review, the Tribunal provided the Employer with 33 additional pages, copied to Mr. Baker's counsel on October 14, 2015. There were some redactions in the disclosed documents. Pages had been vetted from a

medical report by Dr. Mishra, and from three progress reports by the psychologist, Ms. Harris.

[24] By a letter of October 13, 2015, the Employer objected to the redactions in principle, and specifically requested production of the vetted pages from (1) Dr. Mishra's report, (2) Ms. Harris' progress reports, (3) a Workers' Compensation Board Summary Report, and (4) a Referral Form for Centralized Surgical Services Program.

[25] The Tribunal decided to consider the Employer's objection as a stand-alone preliminary issue, and invited written submissions.

[26] The Employer's submission, dated January 11, 2016, stated the Employer's position:

> The Employer seeks only the information relevant to the claim and appeal, to be used solely for the purposes of this matter. Without full disclosure of the relevant information, the Employer's right to participate is limited. The Employer's position is that the event of November 13, 2014 was not outside the normal experience of a youth worker at the Waterville facility. It was not one that would be objectively viewed by youth workers as traumatic in nature. Given this reality, it is the further position of the Employer that the incident did not cause the illness/injury of the Worker. Accordingly, there are other factors contributing to his illness and the Employer is entitled to access the information relevant to that position. This necessarily includes the Worker's medical history.

[27] The Employer's submission cited examples of deficient disclosure. The Hearing Officer's Decision had cited Dr. Targett's chart notes, and had commented:

> The chart note history revealed anxiety prescribed medication, investigations for chest pain, anger outbursts, acute increase in agitation, changing of medication and a referral to the psychologist in July 2011.

The Employer's submission said these chart notes had not been disclosed to the Employer. The submission also cited a passage from the Case Worker's decision that referred to evidence of Mr. Baker's medical history which the Employer said had not been disclosed.

[28] The Employer's submission concluded:

> The Employer, through counsel, is entitled to full disclosure in this psychological injury claim. It remains the position of the Employer that the information sought is logically connected to the matters at issue in this appeal. …

[29] By a "Preliminary Appeal Decision" dated June 20, 2016 (WCAT #2015-416-PAD), the Tribunal ruled on the Employer's objection. The Tribunal concluded:

> Yes, the Employer is entitled to full access to the Worker's claim file materials. Limiting the Employer's access to a portion of the claim file, while the Tribunal and Worker have full unrestricted access, offends principles of natural justice and procedural fairness.
>
> …
>
> The Panel will not apply those sections of the Tribunal Practice Manual which pertain to the vetting and redaction of claim file information based on relevance to the appeal, as they offend the Employer's right to notice, and impede its opportunity to fully present its case.

[30] Later I will review the Tribunal's reasoning.

[31] **Court of Appeal:** On July 21, 2016, Mr. Baker applied to the Court of Appeal for leave to appeal from the Tribunal's Preliminary Appeal Decision. Section 256(1) of the *Act* permits an appeal to this Court, with leave, on any question of law or jurisdiction. On March 22, 2017, this Court granted leave to appeal.

## ***Issues***

[32] Mr. Baker's grounds of appeal are that the Tribunal erred or made an unreasonable decision on questions of law:

> (1) in the Tribunal's interpretation and application of s. 193 of the *Act*, WCB Policy 10.3.5, and s. 4(3) of the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, as amended, and
>
> (2) in its interpretation and application of the common law principles of natural justice and procedural fairness.

### *Standard of Review*

[33] This Court has often said that Tribunal's interpretation and application of the *Workers' Compensation Act* is reviewed for reasonableness: *e.g. Halifax (Regional Municipality) v. Hoelke*, 2011 NSCA 96, paras. 11-18 and *Messom v. Nova Scotia (Workers' Compensation Board)*, 2017 NSCA 14, para. 23.

[34] This appeal involves the Tribunal's authority in s. 240(1) of the *Act* to "determine its own procedures", and whether the Tribunal's chosen procedure for disclosure is consistent with the intent of the *Act*. Those functions attract a reasonableness standard of review.

[35] Mr. Baker submits that his second ground involves procedural fairness and should be assessed for correctness. Mr. Baker cites *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43, para. 90, leave to appeal refused [2012] S.C.C.A. No. 237.

[36] I respectfully disagree with Mr. Baker's interpretation of this Court's ruling in *T.G.* In *Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd.*, 2016 NSCA 40, leave to appeal refused [2016] S.C.C.A. No. 358, this Court said:

> [46] In *T.G.*, this Court said:
>
> > [90] A court that considers whether a decision maker violated its duty of procedural fairness does not apply a standard of review to the tribunal. ***The judge is not reviewing the substance of the tribunal's decision.*** Rather the judge, at first instance, assesses the tribunal's process, a topic that lies outside standard of review analysis: …. [citations omitted]
>
> [47] The reason there is no "standard of review" for a matter of procedural fairness is that no tribunal decision is under review. The court is examining how the tribunal acted, not the end product. If, on the other hand, the applicant asks the court to overturn a tribunal's decision – including one that discusses procedure – a standard of review analysis is needed. The reviewing court must decide whether to apply correctness or reasonableness to the tribunal's decision. …
>
> [emphasis in *Labourers* decision]

The *Labourers'* decision then quoted from authorities in the Supreme Court of Canada and in this Court that supported the proposition (paras. 48-51). The Labour Board had issued a preliminary decision with written reasons to determine the procedural issue. This Court applied reasonableness (paras. 52-53).

[37] Similarly, in Mr. Baker's case, the Tribunal issued a written Decision with reasons for its ruling on the procedure for disclosure. The Decision applied the Tribunal's procedural authority under s. 240(1) of the *Act*, which the Tribunal interpreted to incorporate principles of procedural fairness. The Decision should be reviewed for reasonableness.

[38] In *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, Justice Moldaver for the majority clearly explained reasonableness:

> [20] … However, the analysis that follows is based on this Court's existing jurisprudence – and it is designed to bring a measure of predictability and clarity to the framework.
>
> …
>
> [32] In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations. … The question that arises, then, is *who gets to decide among these competing reasonable interpretations?*
>
> [33] The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in the administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired the *administrative decision maker* – not the courts – to make. …
>
> [38] … Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance….
>
> [Justice Moldaver's emphasis]

## ***Analysis***

[39] I will track the Tribunal's reasoning.

[40] The reasons explained the vetting procedure that precedes disclosure to an employer:

> Tribunal Vetting Practice
>
> At the Board level, vetting for employers is performed by staff members of the Internal Appeals Department. At the Tribunal, vetting is generally done first by administrative personnel, followed by further review by an Appeal

> Commissioner; generally, this is not the same Appeal Commissioner assigned to decide the merits of the appeal. Once an appeal is assigned to an Appeal Commissioner for a decision, the vetting determinations made by the Board and Tribunal are subject to review by that Appeal Commissioner as part of the decision-making process.

[41] The Tribunal accepted that (1) the file may contain highly sensitive documents that are both confidential to the employee and irrelevant to the appeal, and (2) it was "obvious" an employer does not require access to irrelevant material:

> Information in a worker's claim file may be highly sensitive, often containing very personal and private details that the worker might not want to be disclosed to an employer. If the information is related to a compensation claim, the worker's right to privacy over that information would likely be superseded by the employer's right to know the case it has to meet in the appeal. If the information is not relevant to the appeal, a worker's right to privacy would likely defeat an employer's right to access to that information.
>
> It is self-evident that a participating employer should have access to all the evidence before the Tribunal which is relevant to the appeal. It is equally obvious that an employer would not require access to evidence that is irrelevant to the appeal.

[42] Nonetheless, the Tribunal said that disclosure based on relevance is unworkable:

> The theory of disclosure based on relevance to the proceeding is a just one, as it appears to balance a worker's right of privacy against an employer's right to know the case it has to meet. Once the theory is put into practice, however, the disclosure process breaks down, as detailed below.

[43] The Tribunal cited several reasons for its conclusion that a relevance test is faulty.

[44] The Tribunal said the vetting process was time consuming and required "too many administrative resources":

> The Tribunal recently agreed to a pilot project with the Board, where the Board will perform the initial vetting function to employers participating in appeals at the Tribunal level. This task was previously performed by the Tribunal. The pilot project was initiated primarily because the vetting work was becoming too time consuming for the Tribunal, requiring too many administrative resources, and creating procedural delays due to the lengthening timeframes needed to perform

> the review. This pilot project was not in effect at the time the vetting decisions were made in this appeal.

[45] The Tribunal said that "[a]n issue may newly arise at the hearing, such as the credibility of a witness or participant". Further, "the weight given to certain pieces of evidence [may] change based on the ebb and flow of a hearing", meaning "[t]estimony may elevate the importance of certain evidence not previously thought to be relevant".

[46] The Tribunal noted "[t]here is no definition of relevance in the *Act*, Board Policy, or in the Tribunal's Practice Manual to guide the vetting process". Consequently, "there is potential for error, inconsistency and arbitrariness in the disclosure determinations".

[47] The Tribunal held the view that vetting before disclosure was inherently unfair to the employer:

> The effect of removing a document or record from an employer's purview diminishes that employer's ability to challenge the vetting decision. If the evidence were truly not relevant on any reasonable test, then perhaps the vetting would be just and proper. If, however, an argument could be made by an employer that established the evidence's relevance, the effect of it not being disclosed deprives the employer of an opportunity to challenge the vetting decision.
>
> …
>
> Limiting an employer to a portion of a worker's full claim file means that it does not know what evidence has not been disclosed. It has not been told the nature of that evidence or the reasons why it was not disclosed. This places an employer in an impossible situation: the relevance or weight of information not disclosed cannot be argued. The present disclosure practice allows no meaningful opportunity for participation in determining what information in a claim is relevant.

[48] For those reasons, the Tribunal concluded that disclosure based on "relevance" of the document infringed principles of procedural fairness:

> We find that the present disclosure practice does not accord with principles of natural justice and procedural fairness.

[49] As a result, the Tribunal ruled that article 5.12 in its Manual, prescribing vetting based on "relevance" of the document, was inoperative:

> The Panel will not apply those sections of the Tribunal Practice Manual which pertain to the vetting and redaction of claim information based on relevance to the appeal, as they offend the Employer's right to notice, and impede its opportunity to fully present its case.

[50] In my respectful view, the Tribunal's ruling offends the reasonableness standard of review.

[51] I begin by noting that the Employer's factum says it seeks only "relevant" documents:

> 43. … Nor does the Employer seek irrelevant information. ...
>
> 49. The Employer seeks information relevant to the claim recognition appeal, to be used solely for the purposes of this matter. Without full disclosure of the relevant information, the Employer's right to participation is limited. …
>
> …
>
> 63. … It remains the position of the Employer that the information sought is logically connected to the matter in issue. The Employer is not engaging in a fishing expedition or other inappropriate exercise. …

[52] In summary, there is no principle of procedural fairness – and neither the Tribunal's Decision nor any party cites authority to the effect – that a litigant who requests disclosure is entitled to see every document it requests, regardless of relevance and without a relevance ruling by an impartial arbiter. If such a principle existed, a disclosure motion would be pointless. The ambit of disclosure would be determined by the requesting litigant, not an impartial decision-maker.

[53] **Judicial model:** In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, paras. 23-28, Justice L'Heureux-Dubé cited the criteria that fashion the content of the duty of procedural fairness. She began globally by saying the more closely the tribunal's process resembles judicial decision-making, "the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness" (para. 23). From that perspective, in Mr. Baker's case the Employer's factum cites the *Civil Procedure Rules* as the gold standard:

> 37. The Employer submits that in the context of a Tribunal appeal, full and appropriate disclosure should be the goal for all the parties. Certainly the Nova Scotia judicial system, via Civil Procedure Rule 14.08, has specifically recognized that full disclosure is presumed to be necessary for justice in a proceeding.

[54] In my view, the Tribunal's ruling finds no support in the *Civil Procedure Rules*. Rule 14.08(1) says:

> 14.08(1) Making full disclosure of ***relevant documents***, electronic information, and other things is presumed to be necessary for justice in a proceeding.
>
> [emphasis added]

[55] Rule 14.08 and the following Rules prescribe the procedures to apply the relevance standard. These include affidavits of relevant documents. The other party may demand production of further documents and, if the demand is rejected, may apply to a judge for a ruling. The judge may order production. Usually the judge's ruling turns on relevance. Conversely, under Rule 14.08(3), a party who asks a judge to modify its basic obligation to disclose must address "the likely probative value of the evidence" and "the importance of the issues" – *i.e.* relevance-based criteria. Sometimes, for instance on issues of privilege, the judge may privately inspect the documents before making a ruling.

[56] Nowhere do the *Civil Procedure Rules* require disclosure of irrelevant material or say the ambit of disclosure is tailored by the requesting litigant. The *Rules* expect an impartial judge to resolve disagreements by ruling on relevance.

[57] **Administrative model:** The factum of the Intervenor, the Office of the Employer Advisor Nova Scotia Society, offers the comments of Sara Blake's *Administrative Law in Canada*, 5th ed. (Markham: LexisNexis, 2011), pp. 37-38, pertaining to disclosure in administrative proceedings. The text says that, even at the "far end" of the disclosure spectrum, relevance is necessary:

> The extent of disclosure varies along a spectrum. At one end is simply a requirement that the person be told verbally the gist of the factual subject and the nature of the decision to be made. Further along the spectrum is the requirement to give advance written notice of the nature of the decision to be made and the key facts upon which it will be based. To that requirement may be added the requirement to disclose the evidence to be presented to the decision maker. ***At the far end*** of the spectrum, the party may be entitled to review all ***relevant*** information (except privileged material) including material which will not be submitted to the decision maker.
>
> ***Relevance is the essential criterion***. Irrelevant information need not be disclosed.
>
> …
>
> [emphasis added]

[58] **Workers' compensation precedent:** The Employer's factum cites *Workers' Compensation Board of Nova Scotia v. Cape Breton Development Corporation* (1984), 62 N.S.R. (2d) 127 (C.A.), [1984] N.S.J. No. 307. Justice Morrison (paras. 36 and 39) for the Court held that the employer was entitled to disclosure of medical information "to allow the respondent and its counsel to examine the medical evidence upon which the claimant based his case" and affirmed the trial judge's ruling that "the Corporation can only make representations if it has the essentials of the evidence on the principal issue, namely the medical information available to it."

[59] Justice Morrison's ruling contemplated that the medical information was relevant to the "principal issue" on which the claimant "based his case".

[60] **Statutory context:** The scheme and intent of the *Workers' Compensation Act* channels both the interpretation of the Tribunal's procedural authority under s. 240(1) and the standard of procedural fairness: *Baker*, para. 24; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, para. 103.

[61] Earlier (para. 14) I quoted s. 193 of the *Act*. Section 193(3)(b) entitles an employer to a copy of every document that "the Board considers relevant to the appeal". Section 193 applies to the Board, and the *Act* does not expressly prescribe the ambit of disclosure on an appeal to the Tribunal. Nonetheless, s. 193 contextually reflects the Legislature's expectation that a fair hearing will follow disclosure of relevant documents with relevance determined by an impartial arbiter. The Tribunal's ruling would mean that s. 193(3)(b)'s approach offends procedural fairness.

[62] The consequence of the Tribunal's ruling is a two-tiered system of disclosure. At the Board level, relevance governs. On appeal to the Tribunal, relevance exits the stage, rendering s. 193(3)(b) futile.

[63] The *Act* contemplates that disclosure of the Worker's information should accommodate the Worker's privacy subject to the Employer's right to fully participate in a fair hearing before the Board and Tribunal. This equilibrium is reflected in s. 193. Similarly, s. 178(1)(b) says that members of the Tribunal have the powers of a commissioner under the *Public Inquiries Act*, R.S.N.S. 1989, c. 372, to require the production "of any document or thing the … Appeals Tribunal considers necessary for the full investigation and consideration of any matter" – *i.e.* a relevance standard.

[64] Section 192 of the *Act* similarly reflects a balance of privacy and disclosure:

> 192 No person who is
>
> …
>
> (c) a member or employee of the Appeal Tribunal
>
> …
>
> shall release any information obtained by virtue of the person's office or employment except in accordance with the *Freedom of Information and Protection of Privacy Act* [S.N.S. 1993, c. 5], unless the information is released
>
> (d) in the performance of the person's office or employment;
>
> (e) with the approval of the Board of Directors or the Chief Appeal Commissioner; or
>
> (f) pursuant to this Part.

[65] The Tribunal's Practice Manual, as it existed at the time of the decision under appeal, respected the privacy/disclosure equilibrium by saying "[t]he Tribunal is required to comply with the *Freedom of Information and Protection of Privacy Act*", and deducing that the worker's personal information "can only be released to employers where it is necessary to ensure a fair hearing" (above, para. 22).

[66] The Tribunal's Decision said an impartial arbiter's ruling that a document is not relevant, when the Employer has not seen the document, was unfair to the Employer. Yet the Tribunal's ruling would disclose documents without the Worker having the opportunity to submit that they contain highly confidential material which is irrelevant and unnecessary to ensure a fair hearing.

[67] In *Baker*, paras. 25-26, Justice L'Heureux-Dubé said the importance of the decision to the individuals affected and the legitimate expectations of the parties pertain to the standard of procedural fairness.

[68] To ensure the fair hearing while otherwise respecting privacy as the *Act* contemplates, to reflect the importance of the decision to the parties and satisfy their legitimate expectations under *Baker*'s criteria, I can do no better than adopt the Tribunal's cogent phrasing from the Decision under appeal:

> It is self-evident that a participating employer should have access to all the evidence before the Tribunal which is relevant to the appeal. It is equally obvious

> that an employer would not require access to evidence that is irrelevant to the appeal.

[69] I will address the Tribunal's other bases for its ruling.

[70] **Resources:** For a number of years, the Tribunal has vetted for relevance. The Tribunal said that vetting now takes excessive time and consumes "too many administrative resources".

[71] With respect, this circumstance does not infuse the standard of procedural fairness or affect the interpretation of the Tribunal's statutory authority. If the Tribunal lacks the resources to conduct the fair hearing that the *Act* contemplates, then either the Province should allocate more resources or the *Act* should be amended to provide that the insufficiency of government resources justifies the infringement of workers' privacy rights. In the latter case, the Government would squarely face the consequences of its policy decision to prioritize cost over privacy. Nothing in the *Act* as currently written suggests that the Legislature has rationed resources to infringe the Worker's privacy.

[72] **Ebb and flow:** Next, the Tribunal said that issues such as credibility or weight of evidence may arise during the ebb and flow of a hearing, and necessitate further disclosure, perhaps causing delay.

[73] In my respectful view, this does not support the Tribunal's ruling that a relevance standard infringes principles of procedural fairness. Credibility assessments, fluctuating weight of evidence and the fluid significance of factual and legal issues are standard fare in hearings before courts and tribunals. Judges, administrative panels and the litigants manage as best they can. Yet disclosure flows from the wellspring of relevance.

[74] The Workers' Compensation Appeals Tribunal is well positioned to navigate the ebb and flow:

1. The Tribunal has a written record of the proceedings with rulings of the Case Manager and Hearing Officer, from which the appeal is taken to the Tribunal. Earlier (paras. 7-19), I summarized and extracted the submissions and rulings of the Case Manager and Hearing Officer in Mr. Baker's matter. The Employer's position has been clear and consistent: *i.e.* occasional conflicts with a youth are an expected feature of Mr. Baker's job, for which he was trained, not a stressor for a workers' compensation claim, and Mr. Baker's mental

condition was occasioned by other factors. An officer of the Tribunal who vets the file for relevance will have no difficulty understanding the Employer's submission on Mr. Baker's claim.

2. The material has been vetted once, at the Board level. The Tribunal has the advantage of reviewing that disclosure and correcting any errors of under-disclosure, such as those that became apparent in Mr. Baker's case.

3. On the disclosure motion, the Tribunal is assisted by written submissions from the parties that identify the issues and categories of relevant material for disclosure (above, paras. 24-28).

[75] **Meaning of "relevance":** Last is the Tribunal's concern that, as "relevance" is not defined, its application may vary case to case. With respect, the authorities have defined relevance. For instance, in *R. v. White*, [2011] 1 S.C.R. 433, Justice Rothstein said:

> (a) Relevance
>
> 36. … In order for evidence to satisfy the standard of relevance, it must have "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence" …. [citations omitted]

[76] In Mr. Baker's case, the Tribunal was concerned that apparently relevant documents had not been not disclosed at the Board level. The reason for the omissions is unclear. It may have been tempting to assess material as pertaining to the expected outcome, rather than the submissions. The person who vets for relevance must keep in mind that material should be disclosed for its connection to the "proposition[s] being advanced" by the parties, to borrow Justice Rothstein's phrase, and not merely to justify an anticipated conclusion on the merits of those propositions. The vetting official may not be able to foretell precisely how the evidence will be martialed. So the ambit of disclosure should allow the parties some elbow room to strategize for the engagement.

[77] In short – Does a document have some tendency, in logic or human experience, to support or refute either the Employer's propositions or Mr. Baker's propositions on the issues before the Tribunal? If so, it should be disclosed.

[78] **Summary:** In my view, the Tribunal's rejection of the relevance test for disclosure unreasonably interpreted both the principles of procedural fairness and the Tribunal's procedural authority under s. 240(1) of the *Act*.

## *Conclusion*

[79] I would allow the appeal, and remit the matter to the Tribunal to assess disclosure based on the relevance of the documents. There will be no costs award.

Fichaud, J.A.

Concurred: Oland, J.A.

Bryson, J.A.