Beaudril Limited v. WCB, 2001 NWTSC 49

Date: 2001 06 29
Docket: CV07949

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BEAUDRIL LIMITED

Applicant

AND:

THE WORKERS' COMPENSATION BOARD OF THE NORTHWEST TERRITORIES
and THE CORPORATE BOARD OF THE WORKERS' COMPENSATION BOARD
OF THE NORTHWEST TERRITORIES and
DEAN DOUGLAS McAVOY

Respondents

Application for judicial review of decision of the Corporate Board under the *Workers' Compensation Ordinance.*

Heard at Yellowknife, NT, on June 2, 1999 with further submissions on October 16, October 25, November 2, November 3 and November 23, 2000

Reasons filed: July 05 , 2001

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE J.B. VEIT

Counsel for the Applicant: Murray H.Dale, Q.C.

Counsel for the Workers' Compensation Board: Gordon A. McKinnon

Counsel for the Respondent, Dean McAvoy: Adrian C. Wright

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

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- and -

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REASONS FOR JUDGMENT

Summary

[1] Beaudril asks the court to quash the decision of the Workers' Compensation Board of the Northwest Territories declaring that Beaudril is not an "employer", and therefore not entitled to the immunity provided by the *Workers' Compensation Ordinance*. Beaudril claims that, in coming to its decision, the Board breached certain principles of natural justice, thereby losing jurisdiction to make a decision in the matter: it was in a serious conflict with Beaudril because, in the same proceedings, the Board was itself in the process of suing Beaudril for $1.5 million dollars and the issue of whether Beaudril was McAvoy's employer was critical to the continuation of the Board's suit in those proceedings; and, the Board based its decision, in substantial part, on an alleged "consistent" and "longstanding" practice/policy which was never disclosed to Beaudril, and which Beaudril therefore never had the opportunity of testing.

[2] Dean McAvoy was seriously injured in an accident on the Kulluk Rig in the Beaufort Sea in 1984. Eventually, the Board sued Beaudril for the $1.5 million dollars in compensation that it paid to McAvoy as payments under the workers' compensation scheme. Beaudril asked the Board, in its

capacity as Board rather than in its capacity as litigant, for a ruling that the Board's action against Beaudril was barred by s. 12 of the *Workers' Compensation Ordinance*. Beaudril contended that it was the real employer of Mr. McAvoy: it provided the funds to pay Mr. McAvoy, it had the final say over whether Mr. McAvoy could stay on the rig, the final say about the work that Mr. McAvoy would do, the final say about alterations to the rig, and the final say about safety. Beaudril argued that Kenting Drilling, with which it had a labour supply agreement, was only its administrative assistant: it arranged for the payment of salaries, for all the paperwork relating to the various employees, and for the reporting to the various governmental agencies. The Board concluded that Beaudril was not entitled to the immunity of the workers' compensation legislative scheme; one consequence of the Board's decision was to allow the Board to continue its own lawsuit against Beaudril. In coming to its decision, the Board indicated that it was relying on a "consistent" and "longstanding" practice/policy which Beaudril claims was not previously identified.

[3] Beaudril asks for review of the Board's decision concerning Beaudril's status as an employer.

[4] The application for judicial review is denied.

[5] Despite the fact that the Board is in a position of conflict with Beaudril in relation to the civil lawsuit, the standard of review of the Board's decision is patent unreasonableness, rather than correctness: ***Fullowka v. Witte***. The Board's decision that Beaudril was not McAvoy's employer is not patently unreasonable or clearly irrational.

[6] The Board did not commit such other breaches of natural justice as would deprive it of its jurisdiction to make determinations about who is an employer. Its reference to Board policy and practice was an awkward reference to the legislation; far from being denied an opportunity to comment on the issue dealt with in the legislation, the Board specifically asked Beaudril for its position on the issue. In addition, the Board did not consider itself to be fettered by Board policy.

[7] The essence of Beaudril's remaining complaints against the Board is that it failed to consider certain matters, not that it employed unfair practices. Those complaints relate to the substance of the Board's decision; those complaints come within the protection granted by the privative clause.

Cases and authorities cited by the parties:

[8] **By the Applicant:** Sections 2, 8 and 12 of the *Workers' Compensation Ordinance*, O.N.W.T. 1977, c.7; ***Service Employees' International Union Local No. 33 v. Nipawin District Staff Nurses Association***, [1975] 1 S.C.R. 382; ***Kanda v. Government of Malaya***, [1962] A.C. 322 (P.C.); ***Kane v. Board of Governors of the University of British Columbia***, [1980] 1 S.C.R. 1105; D.P. Jones and A.S. de Villars, *Principles of Administrative Law*, 2nd ed. (Toronto: Carswell, 1994); ***Witte v. Northwest Territories (Workers' Compensation Board)*** (1998), 166 D.L.R. (4th) 550 (N.W.T.S.C.); ***Jahnke v. Wylie*** (1994), 26 Alta. L.R. (3d) 46 (C.A.);

Pasiechnyk v. Saskatchewan (Workers' Compensation Board [1997] 2 S.C.R. 890; *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476; ***Slaight Communications Inc. v. Davidson***, [1989] 1 S.C.R. 1038; ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982; ***Canada (Director of Investigaiton and Researchv. Southam Inc.,*** [1997] 1 S.C.R. 748; ***Canada Safeway Ltd. v. RWDSU, Local 454***, [1998] 1 S.C.R. 1079; ***Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*** [1948] 1 K.B. 223; Operational Policy Reference No. 20-01-05; ***Dale Corporation v. Rent Review Commission*** (1983), 2 Admin. L.R. 260 (N.S.C.A.); ***Burnaby/New Westminster Assessor, Area No. 10 v. Carter*** (1996), 29 B.C.L.R. (3d) 205 (S.C.); Policy 00.05; ***City of Ottawa et al v. O'Connor***, Decision No. 1153/87; ***Strenja v. Bennetts and Comox Taxi Ltd.*** (1981), 2 C.H.R.R. D/585; ***Hastings v. Le Roi No. 2, Limited***, (1903) 10 B.C.R. 9 (B.C.C.A.), affirmed (1903-1904) 34 S.C.R. 177; ***Re Pannu*** (1986), 47 Alta. L.R. (2d) 56 (C.A.).

[9] **By the Respondent McAvoy:** *Workers' Compensation Ordinance*, O.N.W.T. 1977, c.7; ***Snell v. WCB*** (1988), 17 B.C.L.R. (2d) 238 (S.C.); ***Ont. Human Rights Comm. v. Simpson Sears Ltd.*** (1985), 23 D.L.R. (4th) 321 (S.C.C.);

[10] **By the Respondent Workers' Compensation Board:** Excerpts from the *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6; ***Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*** (1979), 97 D.L.R. (3d) 417 (S.C.C.); ***Farrell et al v. Workers Compensation Board and A.G. of B.C.*** (1961) , 31 D.L.R. 177; [1962] S.C.R. 48, 37 W.W.R. 39; ***Pasiechnyk v. Saskatchewan (Workers Compensation Board)***, [1997] 149 D.L.R. (4th) 437 (S.C.C.); ***Paccar of Canada Limited v. C.A.I.M.A.W., Local 14*** (1989), 62 D.L.R. (4th) 577; ***Unions de employes de services, Local 298 v. Bibeault***, [1988] 2 S.C.R. 1048; ***Bouchard v. The Workers Compensation Board of Manitoba*** (1997), 144 D.L.R. (4th) 760 (Man. C.A.); ***Dominion Canners Ltd. v. Costanza***, [1923] 1 D.L.R. 551, [1923] S.C.R. 46, 23 O.W.N. 409; ***Alcyon Shipping Co. Ltd. v. O'Krane*** (1961), 27 D.L.R. (2d) 775, [1961] S.C.R. 299, 34 W.W.R. 615; ***Mack Trucks Manufacturing Co. of Canda Ltd. v. Forget et al***, [1973] 41 D.L.R. (3d) 421; ***King v. University of Saskatchewan***, [1969] S.C.R. 678; ***Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation***, [1947] 2 All E.R. 680 @ 685 (C.A.); ***McDonald v. North Norfolk (Rural Municipality***) (1992), 83 Man. R. (2nd) 44 (C.A.).

[11] **By the court:** ***Fullowka v Witte*** [1999] N.W.T.J. No. 134 (C.A.), leave to appeal to the S.C.C. denied September 21, 2000; ***Medicine Hat(City) v Wilson*** [2000] A.J. No. 1098 (C.A.); ***Thimer v Alberta (Workers' Compensation Board, and Appeals Commission*** [2000] A.J. No. 1212 (Q.B.)

1. Background

[12] In 1983 and 1984, Beaudril Limited required drilling crews to operate the Kulluk Rig in the Beaufort Sea. Kenting had the sole and exclusive right to assign drilling crews and other support

personnel to Beaudril for the complete Beaufort Sea operating season. McAvoy began work on the Kulluk Rig in August of 1983 and was working on the rig as a derrickman on the date of the accident, September 3, 1984.

[13] Beginning in 1982, and at the time of the accident, Beaudril and Kenting were parties to a labour supply agreement. Pursuant to Clause 2.1 of the Agreement, Kenting had the "sole and exclusive right" to provide "competent drilling crews and other support personnel" for Beaudril, as directed by Beaudril during the term of the agreement. Beaudril only had the right to make up any deficiency if Kenting failed to provide a "full and competent . . . crew". If Beaudril exercised this right, such personnel became part of "Kenting's personnel" for the rest of the agreement. Clause 2.3(a) of the Agreement affirmed Beaudril's power to control crew qualifications, to require workers to attend training programs arranged by Beaudril and to designate specific personnel to be hired for Beaudril's drilling operations. Clause 2.3(b) of the agreement specified that "arctic clothing" must be provided either by Kenting or its employees. Clause 2.5 of the Agreement stated that the ". . . selection, replacement, hours of labour and remuneration of Kenting's personnel are established by Kenting not Beaudril. Such employees shall be the employees solely of Kenting. Kenting has the responsibility to enforce discipline and order amongst its employees." Pursuant to the terms of Clause 2.6, upon termination of the Agreement, Beaudril had the right to hire any or all the personnel provided by Kenting.

[14] Under Clause 4.1 of the Agreement, Beaudril required all time sheets to be signed by its on-board supervisor. The wage scale to be paid the workers was established by an exhibit to the Agreement. Kenting was to invoice Beaudril for the workers' wages every 14 days. Clause 4.1(b) of the agreement stated that, in addition to the amount to be paid to Kenting as wages for its employees, Kenting was paid an additional "burden" (18.4 percent of wages) and a fee (35 percent of wages and burden).

[15] Clause 5.1 of the Agreement contemplated Beaudril paying the workers a bonus. Kenting was responsible for record keeping, government filings and providing various insurance coverages, including workers' compensation coverage. In addition to paying the workers' wages, Beaudril paid Kenting a burden which compensated Kenging for these and other costs.

[16] Clause 7 of the Labour Supply Agreement recognized Beaudril's rights to refuse any personnel without reason and to release any personnel from its Beaufort Sea operations without reason.

[17] Clause 10.1 of the Agreement provided that Kenting was an independent contractor and had no " . . . authority to hire any persons on behalf of Beaudril and any and all persons who Kenting may employ shall be deemed to be solely the employees of Kenting."

[18] At the time of the accident, Beaudril's supervisor was on board and in charge of the Rig, but was off-duty and asleep. Beaudril's tool push was in charge of the drilling operations in the absence of

the supervisor. The tool push determined such things as how much pipe to lay and how fast to lay it. The driller reported directly to the tool push. The driller had authority to discipline the workers on the rig, but was subject to being overruled on discipline matters by the tool push who, in turn, could be overruled by the supervisor.

[19] Beaudril determined how the Kulluk Rig was to be manned both in terms of number and types of employees. Beaudril gave Kenting a list of guidelines of the type of people Beaudril would like to see on the rig. Beaudril could reject any employee offered by Kenting. Even after a worker was on the Kulluk Rig, Beaudril had the power to reject them.

[20] Beaudril determined both the number of hours to be worked by any particular employee in a day and the number of hours to be worked in a stretch before there were days off.

[21] Beaudril administered the safety program on board the rig. The tools used on the rig were provided by Beaudril. Adjustments or alterations to the equipment on board the Kulluk Rig might be recommended by employees but Beaudril's senior personnel would make the ultimate decision about any such alterations.

[22] Beaudril determined the rates of pay for the workers of the Kulluk Rig based on the going rates on international off-shore operations and land operations in the south. The money to pay the workers on the Fulluk rig came from Beaudril, but the workers were on Kenting's payroll.

[23] The Worker's Report of Accident completed by McAvoy on September 20, 1984, indicated that the accident was reported to Al Shaw, Beaudril's supervisor, and that the accident happened on the employer's premises but listed Kenting Drilling under the heading "Employer's Full Name". The Employer's Report of Accident, completed by Kenting, indicated that no person not in Kenting's employment was to blame for, or involved in, the accident and listed Kenting under the heading "Employer's Full Name". McAvoy's claim for compensation was accepted by the Board and benefits were paid to McAvoy.

[24] McAvoy also obtained disability benefits pursuant to an insurance policy with the Aetna Life Insurance Company which was provided as a group insurance benefit by Kenting.

[25] Both Beaudril and Kenting were employers registered with the Workers' Compensation Board in 1984. Beaudril's Payroll Statement for 1984 and Estimate for 1985 which was submitted to the Board listed Kenting as a Beaudril labour subcontractor with a 1984 expenditure of $5,600,000.00. Beaudril's total payroll was listed as $13,722,181.09 with an assessable payroll of $7,215,315.75.

[26] Under section 12(4) of the *Ordinance*, the Board became subrogated to any cause of action which McAvoy may have been entitled to bring against any person other than McAvoy's employer or any worker in the employ of such worker. On September 2, 1986, the Board commenced a

subrogated action in the name of McAvoy naming, among others, both Beaudril and Kenting as defendants and claiming damages of over $1.5 million. The statement of claim stated that the accident occurred ". . . while [McAvoy], in the course of his employment with Kenting and Beaudril was working on the Kulluk Rig . . . ". (Emphasis added) Mr. Wright was retained by the Board to pursue the civil action.

[27] When the Board issued its Statement of Claim against Beaudril in 1986, it had named Kenting Drilling as a party defendant; Beaudril notes that this appears to be at variance with the comments made by the Board's Supervisor in relation to a determination about employment status having been made in 1984. In addition, the Statement of Claim itself stated that the accident occurred " . . . while [McAvoy], in the course of his employment with Kenting and Beaudril was working on the Kulluk Rig . . . "

[28] The Board discontinued the action as against Kenting in July 1996.

[29] In September 1996, counsel for Beaudril forwarded a submission to the Board seeking a ruling that the action against Beaudril was barred by section 12 of the *Workers' Compensation Ordinance*. A Supervisor in the employ of the Board replied as follows:

> For the purposes of the *Workers' Compensation Act*, it is determined that Kenting Drilling Co. Ltd. was the sole employer of Dean McAvoy at the time of his accident. This determination was made in 1984 and was never disputed by Kenting or Beaudril until receipt of your submission.
>
> (Emphasis added)

[30] On October 22, 1996, the Board's Supervisor, Revenue Services, concluded that Beaudril was not McAvoy's employer at the time of the accident.

[31] On December 2, 1996, Beaudril requested a review of the decision of the Board's Supervisor.

[32] On August 7, 1997, Beaudril's request for a review was referred to the Board of Directors.

[33] In March and April, 1998, written submissions were filed and an oral hearing held.

[34] In its decision of October 6, 1998 which concluded that McAvoy was not a Beaudril worker, the Board gave, among other reasons, the following:

> The panel notes that in the north, labour supply agreements are not uncommon. It has been this Board's consistent practice over many years to consider the labour supply contractor to be the employer of the person who performs the work. In the panel's opinion, there is nothing in the relationship between Beaudril and Kenting that would cause the Board to vary its longstanding practice in this regard.

(Emphasis added)

[35] As to the fact that the Board, as litigant, had named Kenting as a defendant in its Statement of Claim issued in 1986 when it stated that a determination about McAvoy's status had been made in 1984 which excluded Kenting, the Board stated:

> It is not clear why Kenting was named as a defendant in the civil action since Kenting was McAvoy's employer at the time of the accident and is immune from suit under section 12(2) of the Ordinance. Counsel for the parties advised that the claim against Kenting has been discontinued.

[36] The decision of the Board is silent on why the statement of claim stated that the accident occurred " . . . while [McAvoy], in the course of his employment with Kenting and Beaudril was working on the Kulluk Rig . . . ."

[37] At one point in time, the Board applied Operational Policy Reference No. 20-01-05 which included the following provision:

> Where a contractor enters into a contract with a person engaged in any industry for the performance of operations for such other person, any employee of the contractor who performs the operations and the contractor him/herself while actually performing the operations are deemed to be the workers of the principal who lets the contract.

[38] Beaudril alleges that it had no notice of the "Board's consistent practice", its rationale, or when the practice began and therefore had no opportunity to cross-examine, call contrary evidence or to even make submissions with respect to why the practice should not be followed in this case.

[39] The Board's current Policy 00.05 states that: "The employment relationship . . . may be deemed to exist, depending on the surrounding circumstances".

[40] The accident which prompted these proceedings occurred in 1984. The *Workers' Compensation Ordinance* was in effect at that time. It contained the following privative clause:

> 8(1) The Board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Ordinance, and the action or decision of the Board thereon is final and conclusive and is not open to question or review in any court and, <u>except where there has been a denial of natural justice or an excess of jurisdiction exercised by the Board</u>, no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceedings in any court or be removable by *certiorari* or otherwise into any court, nor shall any action be maintained or brought

> against the Board in respect of any act or decision done or made by the Board in the honest belief that the same was within the Board's jurisdiction.
>
> (Emphasis added)
>
> 8(2) Without restricting the generality of subsection (1), the exclusive jurisdiction of the Board extends to examining, inquiring into, hearing and determining
>
> . . .
>
> (i) whether any person or aggregation of persons is an employer within the meaning of this Ordinance;
>
> . . .

[41] However, the immunity from suit application was heard by the Board in 1998. At that time, the *Workers' Compensation Act* R.S.N.W.T. 1988 c.W-6 was in effect. Accordingly, the Ordinance defines the substantive law for the purposes of determining immunity to suit, and the Act governs the procedural aspects of the hearing.

[42] After submissions were made in this hearing, it was decided that we would await the decision of the Supreme Court of Canada on the ***Witte*** proceedings which involved the same conflict situation as arose in these proceedings. On September 21, 2000, the Supreme Court of Canada denied leave to appeal in the ***Witte*** proceedings. The parties than made supplemental submissions in these proceedings.

2. What is the standard of review of the Board's decision?

[43] Decisions about who is an employer and who is a worker are deep within the home territory of the Board. Even though determinations of employment relationships involve questions of law, the privative clause which protects the decisions of the Board, the expertise of the Board, and the purposive interpretation of the relevant legislation can lead only to the conclusion that the legislator intended to leave these questions to the exclusive jurisdiction of the tribunal: ***Pushpanathan; Pasiechnyk***. As the Territorial Court of Appeal put it in ***Medicine Hat***:

> The Supreme Court of Canada has often been at pains to emphasize (the breadth of the privative clauses protecting the broad statutory grant of jurisdiction to the Boards) and to encourage Canadian courts to give Workers' Compensation Boards wide powers and immunities.

[44] On matters within its jurisdiction, the Board's decisions will only be quashed if they are patently unreasonable or clearly irrational.

[45] If the Board committed breaches of natural justice, it could, however, lose its jurisdiction to make decisions, even those decisions which are clearly within its expertise.

3. Was the Board's decision patently unreasonable?

[46] It would be wrong to conclude that the Board's decision is patently unreasonable.

[47] Different conclusions from the one made by the Board could have been drawn on the basis of the evidence presented to the Board. However, the Board's conclusion was not clearly irrational. The conclusion was based on evidence, including evidence that Kenting: paid the assessments on behalf of McAvoy; filed the Accident Report on behalf of McAvoy; directly paid all of McAvoy's wages and benefits; hired McAvoy; assigned McAvoy to his place of employment; directly supervised McAvoy; was an independent contractor relative to Beaudril; and was a labour supply contractor with other clients in the drilling industry to which they concurrently supplied workers.

4. Does the fact that the Board is in a conflict of interest with Beaudril as a result of its lawsuit against Beaudril affect the standard of review?

[48] The fact that the Board is in a conflict of interest with Beaudril does not change the standard of review: ***Fullowka***. This case is, indeed, similar in many ways to ***Fullowka*** at least with respect to the conflict of interest issue: the same legal result applies to each on that issue. The Territorial Court of Appeal held in ***Fullowka*** there was no breach of natural justice in this conflict situation because the legislature gave the Board exclusive jurisdiction to determine questions such as who is an employer for purposes of the Ordinance and at the same time recognized that the Board may act in a subrogated capacity. At para. 65 of its decision, the court stated:

> Although the *nemo judex* principle is a fundamental part of natural justice (R. Dussault & L. Borgeat, *Adminstrative Law, A Treatise*, 2nd ed., vol. 4 (Toronto: Carswell 1990)), it is subject to exceptions. Specifically, there can be no breach of *nemo judex* principle if the legislature has authorized the Board's overlapping functions.

5. Did the Board lose jurisdiction to decide whether Beaudril was an "employer" as a result of breaches of natural justice other than the conflict of interest situation?

[49] Although the applicant claims that the Board committed a series of breaches of natural justice, the only claimed breach which is borne out by the record is the one relating to the conflict of interest; the latter breach does not, for the reasons already cited, affect the Board's decision.

[50] The other major allegation of breach of natural justice alleged by the applicant is the reliance by the Board on an alleged practice of which Beaudril had no notice.

[51] The practice to which the Board made reference merely reflected the provisions of s. 11(1)(a) of the *Workers' Compensation Ordinance* which reads as follows:

> s. 11(1) Where a person does any work in an industry for a person engaged in that industry (in this section called "the principal"), the person doing the work shall, unless the Board otherwise orders, be deemed for the purposes of this Ordinance to be a worker of the principal except where the person doing the work
>
> (a) is himself an employer or the worker of an employer in an industry, or . . .
>
> (Emphasis added)

[52] The application of the section would normally result in a decision that the person doing the work (McAvoy) shall be deemed to be the worker of a principal (Beaudril) except where the person doing the work (McAvoy) is a worker of another employer (Kenting) in the industry. There is, of course, a statutory option for the Board to come to a different conclusion: the Board may otherwise order. However, the normal situation would be for the determination to follow the language of the statute. Even though there was no specific reference to s. 11 of the Ordinance, when the Board wrote of its longstanding practice, it was thus merely making an awkward reference to the provisions of s. 11(1) of the Ordinance.

[53] The existence of s. 11(1)(a) of the Ordinance was, of course, well known to the applicant. In the pre-hearing process, Beaudril could have obtained information from the Board concerning its interpretation and implementation of that section. The Board did not rely on any written guidelines, memoranda or reports that were not disclosed to the parties. The section contains within itself a reference to the fact that the Board could, despite the terms of the section, come to a different conclusion than the conclusion which would be drawn from a plain reading of the section. Fairness did not require that the Board call the attention of Beaudril to the provisions of the Ordinance. In any event, however, the Board did specifically ask Beaudril for its comments on that provision of the Ordinance, so that Beaudril's attention was, in the result, specifically drawn to that issue before the Board issued its decision.

[54] Moreover, the Board's current policy on contractors was adopted in 1993. The Board was thus entitled to disregard the policy in relation to determinations about relationships that occurred prior to that date. In any event, I agree with the Board's comment that the policy itself is open to interpretation and does not necessarily contradict the determination made by the Board in this particular case. The specific point which may be open to interpretation is the definition of "contractor" and the potential distinction to be drawn between labour supply contractors and other contractors.

[55] Nor is this a case in which a Board considered itself bound by any policy concerning labour suppliers, thereby wrongly fettering its discretion. On the contrary, in its decision, the Board acknowledged that it could deviate from its policy and practice; it merely concluded that it would not

do so on the facts of this particular case. Therefore, this is not a situation in which a decision was pre-determined by an existing policy.

[56] In the result, there has been no practice of the Board which has breached Beaudril's rights to natural justice; the Board did not lose jurisdiction to make a decision concerning Beaudril's status as an employer.

[57] The remaining specific concerns of the applicant are complaints relating to the content of the Board's decision rather than to the fairness of the Board's procedure. In particular:

- the fact that the Board named Kenting in its Statement of Claim may be due to mere oversight and is not determinative of an assessment contrary to the conclusion drawn by the Board in this case. In particular, the filing of the Statement of Claim is not, itself, a "decision" of the Board; indeed, a statement of claim is not even evidence, but merely a pleading. The fact that the Board's action against Kenting was not discontinued until 1996 should be treated in the same way as its inclusion in the Statement of Claim: it is merely one factor which this court must take into account in deciding whether the Board's decision was clearly irrational. For the reasons set out above, the Board's decision was not clearly irrational;

- the "determination" in 1984 was merely the Board's acceptance of the McAvoy claim. The Board was merely acknowledging a claim that an accident occurred arising out, of and in the course of, employment and that compensation for the injured worker was therefore required. When it subsequently became apparent that there may be legal consequences to the determination, a process was set in motion to deal with those consequences. It is true that although both the Board's Revenue Services Supervisor and the corporate secretary apparently relied upon a review of the Kenting 1984 assessment file, that file could not apparently be located and was not made available to Beaudril. While a failure to make adequate disclosure to a party may amount to a breach of the principles of natural justice, there is no application of that principle here because the hearing before the Board allowed Beaudril a full opportunity of presenting evidence and argument concerning Beaudril's relationship with both McAvoy and Kenting. In that sense, any "determination" made in 1984 was merely irrelevant; the findings included in that determination were not the basis of any findings before the Board, that determination did not impose any particular burden on Beaudril at the hearing before the Board, any the determination in 1984 did not have any effect on either the cost or the timing of Beaudril's application before the Board. Therefore, in the circumstances of this case, any defect in disclosure relative to the 1984 "determination" was cured by the hearing before the Board.

[58] Although these latter two issues must be addressed in relation to the claim that the Board's procedure was unfair, in essence, these issues relate to the content of the Board's decision rather than to the quality of the Board's process; therefore, these issues must be determined according to the

standard of patent unreasonableness. For the reasons given above, the substantive decision of the Board on the issue of whether Beaudril was an employer was not clearly irrational and is therefore not reviewable.

6. Costs

[59] If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

Dated at Yellowknife, NT this 29th
day of June, 2001.

____

D.J.S.C.N.T.

CV 07949

IN THE SUPREME COURT OF THE
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