

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HARRY SEETON, ROBERT KOSTA, HAROLD DAVID, MARC  
DANIS, BILL SCHRAM, JAMES MAGER, CONRAD LISOWAY,  
WAYNE CAMPBELL, SYLVAIN AMYOTTE and EDMUND SAVAGE  
Applicants

- and -

THE WORKERS' COMPENSATION BOARD OF THE  
NORTHWEST TERRITORIES, SHEILA FULLOWKA, DOREEN  
SHAUNA HOURIE, TRACEY NEILL, JUDIT PANDEV, ELLA MAY  
CAROL RIGGS, DOREEN VODNOSKI and JAMES O'NEIL  
Respondents

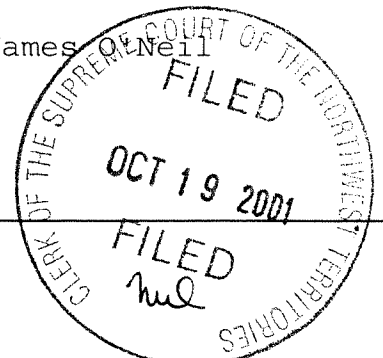
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Transcript of the Oral Reasons for Judgment on Judicial  
Review Application by The Honourable Justice E.P. MacCallum,  
at Yellowknife, in the Northwest Territories, on October  
17th, A.D. 2001.

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APPEARANCES:

A. Marshall, Esq.,	Counsel for the Applicants
G.A. McKinnon, Esq.,	Counsel for The Workers' Compensation Board of the Northwest Territories
P.J. Warner, Q.C.,	Counsel for the Fullowka Action Respondents
J. Redmond, Esq.,	Counsel for James O'Neil



1 THE COURT: The following are my reasons for  
2 decision in the matter of the application brought on  
3 Monday of this week for judicial review.

4 This is an application for judicial review of a  
5 decision of the Corporate Board of the Workers'  
6 Compensation Board of the Northwest Territories (the  
7 Board). There are 10 Applicants, all of whom have  
8 agreed to be bound by the result in the case of Seeton,  
9 one of their number. Named as Respondents are the  
10 Board, James O'Neil and six individuals described as  
11 the Fullowka Respondents.

12 Both O'Neil and the Fullowka Respondents adopt the  
13 statement of facts set out in the Board's brief,  
14 paragraphs 1 to 20 inclusive. The Applicant's brief  
15 recites the facts, as well, in a manner not  
16 inconsistent with the Board's brief. So for the  
17 purposes of this memorandum I direct that paragraphs 1  
18 to 20 inclusive of the Board's brief be attached as  
19 schedule 1. The Board's decision is to be found under  
20 tab 52 of the return, and I direct that pages 4 to 17  
21 inclusive shall form schedule 2 to this memorandum.

22 The Respondents, except for the Board, are some of  
23 the Plaintiffs in actions for damages naming numerous  
24 Defendants, some of whom are Applicants in this  
25 proceeding.

26 These Applicants sought a ruling from the Board  
27 that they were immune from suit under section 12 of The

1            Workers' Compensation Act, R.S.N.W.T. 1988 c.W-6 (the  
2            "Act"). Sections 7 and 12 are reproduced as schedule  
3            3. The board decided that they were not immune from  
4            suit.

5            At page 15 of schedule 2 it stated the issues:

6                    1. Were the Defendant Union  
7                    Members workers of Royal Oak for  
8                    the purposes of the Act?

9                    2. Are the immunity to suit  
10                   provisions intended to protect  
11                   only workers who were acting in  
12                   the course of their employment?

13                   3. If the answer to question #2  
14                   is positive, were the Defendant  
15                   Union Members acting within the  
16                   course of their employment?

17            The board decided at page 16:

18                   Issue #1 - David is not a worker  
19                   of Royal Oak for the purposes of  
20                   the Act. It is not necessary to  
21                   determine whether the other  
22                   Defendant Union Members were  
23                   workers of Royal Oak.

24                   Issue #2 - The immunity to suit  
25                   provisions only protect workers  
26                   against causes of action that  
27                   arise in relation to the conduct  
28                   of their employment with Royal  
29                   Oak.

30                   Issue #3 - The claims against the  
31                   Defendant Union Members did not  
32                   arise out of acts or omissions in  
33                   relation to their employment with  
34                   Royal Oak.

35            The Applicants ask me to decide:

36                   (a) whether the Board declined  
37                   jurisdiction when it elected not  
38                   to decide whether the Applicants  
39                   were workers;

40                   (b) whether the Board lost

1 jurisdiction when it decided the  
2 immunity provisions only protected  
3 workers in the course of their  
4 employment;

5 (c) whether the Board erred in law  
6 in its decision; and

7 (d) whether the Board erred in  
8 concluding that the causes of  
9 action are unrelated to acts or  
10 omissions committed in connection  
11 with the Applicants' capacity as  
12 workers.

13 p.6 - Applicants' Brief.

14 My answer to (a), (b) and (d) is no. As for (c),  
15 I need say only that the Board did not err in law in  
16 any patently unreasonable way.

17 This result arises from consideration of what is  
18 the appropriate standard of review and whether the  
19 Board's decision met that standard. I am of the view  
20 that patent unreasonableness is the standard and that  
21 the Board's decision did not fall short of that.

22 It is conceded by all parties that the Applicant  
23 Harold David is not a worker and it follows that the  
24 provisions of section 12(2) do not apply to him.

25 Mr. Marshall for the Applicants argued, firstly,  
26 that under section 12 the concept of worker is  
27 essential to a decision on the immunity issue; it was  
incumbent on the Board to find whether each Applicant  
was a worker to whom immunity attached under section  
12(2); in declining to make such a finding the Board  
declined to exercise its jurisdiction.

1           The Respondents reply that in the view taken by  
2           the Board the Applicants were not acting in the scope  
3           and course of their employment and that immunity on a  
4           proper construction of section 12 only attaches to  
5           persons so acting. Accordingly, the question of  
6           whether they were workers was moot. Even if they were  
7           workers, they would not be immune. I make reference  
8           here to A.C.T.R.A. v. CBC (1995) 1 S.C.R. 157.

9           Immunity was the essential question, as Mr.  
10          Marshall himself made clear in his letter to the Board  
11          of March the 17th, 1997, which is found under tab 3 of  
12          the Return. I agree with Mr. McKinnon for the Board  
13          when he says that the Board answered that question in  
14          its own way, finding that it was not necessary to deal  
15          with a possible component, the worker question.

16          Secondly, Mr. Marshall says that the Board  
17          exceeded its jurisdiction in construing section 12 to  
18          include the requirement that the alleged tort-feasor  
19          Applicants must have been acting in the course of their  
20          employment. To that the Respondents reply that the  
21          construction of the section by the Board was at the  
22          very least not patently unreasonable; in deciding the  
23          matter as it did, the Board was acting under its own  
24          Act to decide a question within its exclusive  
25          jurisdiction.

26          I will move now to a consideration of some of the  
27          authorities referred to in argument. Mr. Marshall for

1 the Applicants emphasized that the situation of his  
2 clients while on strike made them employees under the  
3 Canada Labour Code, so that they must have been workers  
4 under The Workers' Compensation Act of the Northwest  
5 Territories.

6 The Board considered it unnecessary to rule on the  
7 point, and so do I. Even if they were workers within  
8 the meaning of the Act, the subversive behaviour  
9 alleged against them was patently outside the scope and  
10 course of their employment, a concept found by the  
11 Board to be essential to immunity. The extent to which  
12 I am at liberty to review that finding of the Board  
13 depends upon the standard of review flowing from the  
14 privative clause in section 7 of the Act (Schedule 3).

15 In Pasiechnyk v. Saskatchewan Workers'  
16 Compensation Board, 149 D.L.R. (4th) 577 at 588,  
17 Justice Sopinka said:

18 A full or true privative clause is  
19 one that declares that the  
20 decisions of the tribunal are  
21 final and conclusive, from which  
22 no appeal lies and all forms of  
23 judicial review are excluded.

24 And later:

25 The presence of a privative clause  
26 does not preclude review on the  
27 basis of an error of law if the  
28 provision under review is one that  
29 limits jurisdiction. The test as  
30 to whether the provision in  
31 question is one that limits  
32 jurisdiction is: Was the question  
33 which the provision raises one  
34 that was intended by the

1 legislators to be left to the  
2 exclusive decision of the board?  
3 In applying the test, a functional  
4 and pragmatic approach is to be  
5 taken. (See Canada Attorney  
6 General v. P.S.A.C. (1991) 1  
7 S.C.R. 614 S.C.C. 628-29).  
8 Factors such as the purpose of the  
9 statute creating a tribunal, the  
10 reasons for its existence, the  
11 area of expertise and the nature  
12 of the problem are all relevant in  
13 arriving at the intent of the  
14 Legislature.

15 At first glance, the privative clause in our case  
16 might seem less than full given the words:

17 ...except when there has been a  
18 denial of natural justice or an  
19 excess of jurisdiction exercised  
20 by the board...

21 But when one reflects that these are common law  
22 exceptions to any privative clause, ours might be  
23 considered full, a point which was considered, but not  
24 decided, by the Northwest Territories Court of Appeal  
25 in Fallowka v. White (1999) N.W.T.J. 134, paragraphs 54  
26 to 64. The Court held, however, that the standard of  
27 patent unreasonableness should apply on the issue of  
whether an action is barred, following Pasiechnyk at  
page 596.

28 So to analyze the matter in light of the above,  
29 the provision in question is section 12(2) (Schedule  
30 3). The question it raises is immunity. That is not  
31 one of the questions enumerated in subsection (2) of  
32 section 7 as being within the exclusive jurisdiction of

1 the Board, but in general under subsection (1):

2 The Board has exclusive  
3 jurisdiction to examine, inquire  
4 into, hear and determine all  
5 matters and questions arising  
6 under this Act.

7 The question of immunity clearly does arise under  
8 section 12(2). So it follows that it is one which was  
9 intended by the Legislature to be left to the exclusive  
10 decision of the Board. That was essentially Mr.  
11 Redmond's submission, as I understood it, based upon a  
12 reading of the Act.

13 In both Witte and Pasiechnyk supra the Courts  
14 justified their finding of a standard of reasonableness  
15 as opposed to correctness by the pragmatic and  
16 functional approach referred to in P.S.A.C. supra. I  
17 need not repeat what they said. On their authority the  
18 Board's decision regarding immunity in the case at bar  
19 is unassailable on review unless patently unreasonable,  
20 which is to say clearly irrational.

21 In that respect I refer to Canada Attorney General  
22 v. P.S.A.C. 2 (1993) 101, D.L.R. (4th), 673 at 690.  
23 What the Board explained (see Schedule 2 at page 16) in  
24 support of their decision was:

25 ...the panel notes that the intent  
26 of the Act is to provide a system  
27 of compensation for workers or  
their dependants for loss of  
earnings or loss of support  
arising out of industrial  
accidents in industries carried on  
in the Territories. In the  
panel's view, it is not the  
intention of the Act to grant



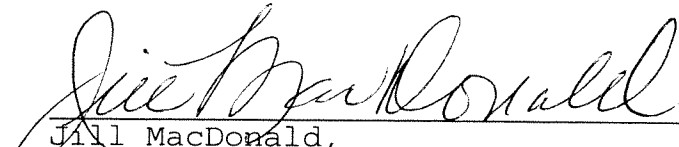
1 immunity from suit to the injured  
2 worker's employer or his or her  
3 co-workers for negligent acts or  
4 omissions having no relation to  
5 the industry in which the employer  
6 is engaged. This would deprive an  
7 injured worker and his dependants  
8 of any right of action arising out  
9 of acts or omissions which are  
10 unrelated to the employer's  
11 industry. If this was the  
12 intention of the Legislature, the  
13 clearest of language would be  
14 necessary.

15 It is my place to pass judgment on such reasoning  
16 only to the extent of saying that it is not clearly  
17 irrational. On its face it is not, and when one  
18 considers that practically identical language appears  
19 in The Workers' Compensation Board et al v. Greer, 34  
20 D.L.R. (3d) 103 at 106 and 107, it would be a  
21 considerable affront to the New Brunswick Court of  
22 Appeal of 1972 to say that it was.

23 The decision of the Board was not patently  
24 unreasonable and, accordingly, this application for  
25 judicial review must be dismissed. Costs may be spoken  
26 to.

27 (AT WHICH TIME THE ORAL REASONS FOR JUDGMENT CONCLUDED)

Certified pursuant to Rule 723  
of the Supreme Court Rules.

  
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Jill MacDonald,  
Court Reporter