FD:
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DT:D
DN: 927/89
STY:
PANEL: Strachan; McCombie; Jago
DDATE: 200792
ACT: *65(3)(a) [*71(3)(a) pre-1990], *65(3)(b) [*71(3)(b) pre-1990]
KEYW: Logging; Worker (deemed); Independent operator (logging); Jurisdiction, Board (policy or regulation); Board Directives and Guidelines (logging industry workers); Jurisdiction, Board (deemed worker); Discretion, Board (deemed worker) (fettering); Experience rating (NEER) (deemed worker); Jurisdiction, Tribunal (costs).
SUM: Three timber cutting companies appealed a decision of the Hearings Officer confirming the status of contractors working for them as workers, confirming that the employers were liable for NEER assessments based upon the experience of these deemed workers and denying an order awarding costs to the employers.

Board policy for the logging industry provided that a contractor under a contract for labour or substantially for labour, who does not employ workers, is deemed to be a worker of the principal. The employers submitted that this policy was invalid since it was an instrument of a legislative nature, which should comply with the Regulations Act.

Pursuant to s. 75(3)(a) and (b), the Board had power to establish policies and recommend regulations. The courts are reluctant to concede power to make substantive law under a board's authority to establish procedures. The deeming of workers creates substantive rights in favour of persons deemed to be workers. The employers would be adversely affected. However, these rights and obligations affected are specifically contemplated by the legislation. The Panel had to consider the degree to which rights are affected. Considering the Board policy in view of the overall intent of the Act, the Panel concluded that the policy was more properly characterized as quasi-judicial rather than legislative. Accordingly, the policy did not have to take the form of a regulation, although that may have been a safer course.

The policy was developed to protect persons working in the logging industry and to deal with changing work situations in that industry on a consistent basis. Such a policy did not necessarily fetter the discretion of the Board. The policy provides some initial protection for workers in woods operations. There is provision for a contractor to be found to be an independent operator at a subsequent proceeding if, for example, it were determined that the contract was not substantially for labour. As long as there is an opportunity to be heard, the policy can survive.

Since the deemed workers are workers for purposes of the Act, they should not be treated differently for purposes of a NEER assessment, even though this could cause financial hardship to employers in certain situations.

There was no jurisdiction to award costs.

The appeals were dismissed. [36 pages]

PDCON:
TYPE:
DIST:
DECON: Decision No. 503/87I (1987), 6 W.C.A.T.R. 144 refd to; Decision No. 701/87I refd to
BDG:Employer Assessment Policies Manual, Document no. 04-02-02
SCON: Courts of Justice Act, 1984, S.O. 1984, c.11, s. 141(1); Regulations Act, R.S.O. 1980 c. 446, s. 1(d)

CCON: British Oxygen Co. v. Board of Trade, [1971] A.C. 610 (H.L.) consd; Capital Cities Communications Inc. v. Canada (C.R.T.C.), 81 D.L.R. (3d) 609 (S.C.C.) consd; Franco v. Korantz (1982), 29 C.P.C. 38 (Ont. H.C.) consd; Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc. (1985), 51 O.R. (3d) 23 (Div. Ct.) consd; Jardine Transport Ltd. v. New Brunswick (Workers' Compensation Board) (1984), 13 D.L.R. (4th) 738 (C.A.) consd; Mac's Milk Ltd. v. Ontario (Workmen's Compenstion Board) (1977), 15 O.R. (2d) 508 (Div. Ct.) consd; M.N.R. v. Creative Shoes Ltd. (1972), 29 D.L.R. (3d) 89 consd; Ontario (Liquor Control Board) v. Ontario (Human Rights Commission), 9 C.H.R.R. D/4868 consd; Rose v. The Queen, [1960] O.R. 147 (C.A.) consd; Salco Footwear Ltd. v. M.N.R., 144 D.L.R. (3d) 203 (Fed. Ct. T.D.) consd; Western Forest Products Ltd. v. British Columbia (Workers Compensation Board) (1983), 8 Admin. L.R. 43 (S.C.)

consd; Winnipeg (City) v. Manitoba (Workers' Compensation Board) (1988), 48 D.L.R. (4th) 585 (Man. C.A.) consd
IDATE:
HDATE: 150190 170490 180490 190490 200490
TCO:
KEYPER: N. Campbell, a lawyer; D. Nelson, a lawyer; J. Keefe
XREF: Decisions No. 43/90, 287/90, 288/90, 289/90, 778/90
COMMENTS:
TEXT:

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 927/89

These appeals were heard on January 15 and April 17-20, 1990, by a Tribunal Panel consisting of:

I.J. Strachan: Vice-Chairman,
W.D. Jago : Member representative of employers,
N. McCombie : Member representative of workers.

THE APPEAL PROCEEDINGS

The employers, referred to in this decision as "Company C", "Company W" and "Company H", appeal the June 22, 1988, decisions of WCB Hearings Officer, G. Harrison. The decision for Company W:

1. denied the employer's objection concerning the status of contractors working alone or in partnership in woods operations;

2. denied the employer's objection with respect to NEER assessments;

3. denied the employer's request for solicitor and client costs;

4. allowed in part the employer's objection concerning the calculation of assessable earnings for deemed workers and contractors;

5. allowed in part the employer's request for relief under section 100 of the Workers' Compensation Act (the "Act") with respect to the retroactive nature of the assessments for officers;

6. denied the employer's request for relief under section 100 of the Act with respect to the retroactive nature of assessments for personnel other than officers; and

7. allowed in part the employer's objection concerning service charges for late payment.

Similar findings were made with respect to Company C and Company H.

The employers were represented by N. Campbell of the law firm Blake, Cassels & Graydon and by D. Nelson, Q.C., of the law firm Weiler, Maloney, Nelson. The WCB was represented by J. Keefe of the law firm Goodman and Goodman. S. Naylor and R. Cohen attended as observers. D. Kent and J. Halonen from the Office of the Worker Adviser made submissions on the Board's policy on the logging industry.

The following issues must be determined by the Panel:

1. Worker versus independent operator status - Can the contractors used by the employers be "workers" or "independent operators" within the meaning of the Act? This involves a consideration of the validity of the Board policy deeming persons working alone or in partnership in woods operations to be "workers" under the Act.

2. Are the employers liable to pay NEER assessments based upon the experience of "deemed workers"?

3. Are the employers entitled to solicitor and client costs or some other contribution towards expenses?

THE EVIDENCE

The Panel had before it Case Descriptions prepared by the Tribunal Counsel Office containing the various WCB decisions, memoranda and correspondence together with the Case Description Addenda and books of authorities filed by the parties. The Panel also had transcripts of the Hearings Officer proceedings. The Panel heard submissions from Mr. Campbell, Mr. Keefe, Mr. Halonen and Ms. Kent.

THE NATURE OF THE CASE

(i) Background

The background to this appeal includes a family trust and a number of corporations involved in the forest industry. For purposes of this appeal, they are referred to as follows:

1. **Company B**.

   Company B is something of a constant since it owns substantial assets, including equipment, relating to the forest industry and has carried on business for many years. All of its issued and outstanding shares are beneficially owned by B.

2. **B Family Trust**.

   This trust was established in 1980. Beneficiaries of the trust are the three adult children of B. The three adult children are described in this decision as S, G and K.

3. **Company W**.

   The issued and outstanding shares of Company W are owned by B Family Trust.

Company W began operations in 1981. It was a successor to the operations carried on by Company C. Company W cut timber on crown land. Generally, the timber cutting licence was issued to Company B which in turn licensed Company W to cut timber on certain lands. The timber produced by Company W was purchased by sawmills operated by various corporations. Most of these corporations were controlled directly or indirectly by B.

4. **Company C**.

Company C was a predecessor corporation to Company W and carried on similar operations. It ceased operations on December 31, 1980. Subsequently, it cut timber, utilizing cut and skid contractors, between October 12, 1985, and December 31, 1985. The successor corporation to the operations carried on by Company C and Company W was Company H.

The issued and outstanding shares of Company C were held by B Family Trust.

5. **Company H**.

Company H, as a successor to Company W and Company C, was also involved in the harvesting of timber. All of its issued and outstanding shares were held by S, G and K personally.

6. **Company A**.

Company A was incorporated as a transport company. It contracted with Company B to haul logs from the logging sites to the sawmills. It leased tractors and trailers from Company B. Company A was also involved in the repair and maintenance of this equipment and other equipment used by corporations which enjoyed a business relationship with Company B. Company A ceased operations on December 31, 1986. After that date, Company P carried on an operation for the repair and servicing of vehicles, equipment and machinery. The hauling operation, formerly carried on by Company A, was taken over by Company AT.

7. **Company G**.

Company G provided management services to different corporations which enjoyed a business relationship with Company B. The issued and outstanding shares of Company G were owned by S, G and K. An appeal by Company G with respect to a Hearings Officer decision was withdrawn at the commencement of this series of hearings.

As indicated above, Company B usually obtained a timber cutting licence in its own name or in the corporate name of a sawmill company controlled by B. Company B would enter into a contract to provide timber for the sawmill. Following execution of a contract with the sawmill, Company B then contracted, for example with Company W, to cut the timber on lands described in the timber cutting licence. Company W was obliged to cut and deliver the timber to the roadside. Company B would also contract with a corporation, such as Company A, to pick up the timber at the roadside and deliver it to the sawmill. The timber was usually delivered to sawmills controlled directly or indirectly by B.

Company W employed some workers on its payroll and also used contractors to harvest timber. Evidence indicates that most of the timber produced by Company W was through the use of contractors. Each contractor would sign a contract for service with Company W. The majority of contractors were employed to "cut and skid" timber - i.e., to cut the trees and then move the timber to the roadside. Many contractors owned their own skidders. Some contractors worked alone or in partnership, while others employed help. Contractors working alone or in partnership were considered by the Board to be "workers" of Company W under Board policy. Prior to 1985, Company W and its predecessor, Company C, employed contractors to cut and skid timber and reported their earnings to the WCB for assessment purposes.

In 1985, a Board auditor adjusted the assessable payrolls for the period 1982 through 1985. Company W received experience rating assessments under NEER. Company W, Company C and Company H have objected to the various Board policies which resulted in the issue of additional assessments.

Company W did not engage contractors for cutting and skidding timber after October 11, 1985. It continued to pay wages to some workers until the end of the calendar year 1985. Company C utilized the cut and skid contractors between October 12 and December 31, 1985. As stated earlier, Company H took over the cutting and skidding of timber after December 31, 1985. Subsequently in 1987, Company H operations were taken over by Company WA.

(ii) Combined appeals

Company C, Company W and Company H filed individual Notices of Appeal, appealing the decisions of the Hearings Officer dated June 22, 1988. The notices make clear that the first three issues in each appeal are identical.

The Notice of Appeal for Company C states that the company:

> appeals from the Decision of G. Harrison, Hearings Officer, dated June 22, 1988, upon the following, amongst other, grounds:
>
> 1. The Board exceeded its jurisdiction in deeming independent contractors to be the workers of the Company.
>
> 2. The so-called "policy" of the Board made in 1935 that a contractor not employing help in the logging industry was a worker, was irrelevant to the status of the contractors of the Company in 1985.
>
> 3. The Hearings Officer erred in finding that the so-called "policy" of the Board which specifically applied only to contractors "under a contract for labour or substantially for labour in woods operations" had application to the Company's contractors, and the Hearings Officer ignored the evidence that a very small proportion of the contracts with the Company's contractors related to labour.

The Notice of Appeal for Company W repeats the above three grounds and adds the following two additional grounds:

4. The Hearings Officer erred in finding that the Company was liable for NEER Assessments against, or relating to the claims experience of the Company's independent contractors and their workers, and the Company's independent operators.

5. The Assessment of the Company for the NEER Assessments of its independent contractors and independent operators was calculated in error and was grossly excessive.

The Notice of Appeal for Company H repeats the first three grounds set out in the Notices for Company C and Company W.

Because some of the grounds for appeal are identical, the appeals of Company C, Company W and Company H are all dealt with in this single decision.

Basically, the three employers dispute the Board's jurisdiction to charge any assessments based upon the earnings of persons who, according to the employers, are independent operators. At the heart of the dispute lies the Board's "deeming policy" which the Board has used in logging industry cases to deem certain persons to be "workers" under the Act. The three employers contend that, to the extent the Board purports to rely upon such a policy to justify the assessments, the Board is wrong in law because the policy contradicts the legislation, derogates from the intent of the legislation, and is otherwise legally invalid. The employers submit that the policy is essentially a 'regulation' and should comply with the provisions of the Regulations Act. The employers also submit, in the alternative, that even if the Tribunal upholds the Board policy, it is not applicable in fact to these three employers.

The employers also dispute the legality of the Board's NEER assessments which, they contend, have been based primarily upon the accident experience of each company's "independent operators". The employers submit that there is no authority in the Act or otherwise permitting NEER assessments based upon "deemed" relationships.

The Board contends that section 71(3)(a) of the Act gives the Board the power to establish assessment policies. In addition, the Board submits that section 75 gives the Board a broad general jurisdiction to examine and hear and determine all matters and questions arising under that part of the Act. As remedial legislation, the Act should receive an interpretation favouring workers. An interpretation favouring workers would require that the Board policy, which seeks to include some persons who might otherwise be classified as "independent operators", is a reasonable one designed to provide no fault benefits to a maximum number of persons operating in the logging industry. The Board submits that it has enacted a policy to establish guidelines for

its interpretation of the definition in the Act of "worker" and "independent operator" in the logging industry. The Board contends that it has a power to make that interpretation under section 75 of the Act. It submits that, as part of the Board's general jurisdiction, it had the authority to make a decision whether persons were workers or independent operators - a decision that was necessarily incidental to the Board's jurisdiction. The Board further submits that its policy is not the equivalent of a regulation; accordingly, it is not required to comply with the Regulations Act. In addition, the Board submits it has not fettered its discretion by adopting the policy because there is an opportunity for a subsequent hearing into whether or not the policy should apply in any specific case.

The Board also submitted that the NEER program is merely one form of a demerit assessment system and takes into account the costs associated with any "worker" under the Act, regardless of how such a person is found to be a worker.

THE PANEL'S REASON

(i) The Board's policy

At the core of the dispute between the employers and the WCB, lies the Board's "deeming policy" applied to the logging industry. According to the Board, this policy has remained basically unchanged since its inception in 1935. Employer Assessment Policy, Document #04-02-02, deals with special rules for determining assessable payroll in connection with construction and logging contractors. The first three paragraphs of that document provide:

> CONSTRUCTION AND LOGGING CONTRACTORS
>
> Many businesses make extensive use of contractors and sub-contractors in their operations. This is especially true in the construction and logging industries.
>
> The Board has ruled that all contractors in the construction trades who take contracts for labour only, or labour and materials and perform the work alone or in partnership are considered workers of the principal. The principal is the person or company who lets the contract.
>
> Similarly, in the logging industry, all piece-workers, shackers, contractors and jobbers who do cutting, peeling, skidding and other bush-work and work alone or in partnership are considered workers of the principal who lets the contract.

Document #01-001-03 provides in part:

> ASSESSMENT AND CLAIMS
>
> If the contractor employs workers, he himself is not covered unless Personal Coverage has been requested and signed for.

> A contractor, jobber, piece-worker or shacker not employing workers who works under a contract for labour or substantially for labour in woods operations whether payment is made on a time basis or piece basis is deemed a worker of the principal who employs him.

The Board's explanation of its policy and the basis for it was set out in a letter dated July 28, 1987, addressed to the employers' then counsel and signed by J. Carter of the Legal Services Branch. Pages 2 through 6 deal with the Board's explanation for its policy. Those pages read:

> The assessments of the objecting companies for the relevant period are based on the assessable earnings of the workers of those companies. The Board has exclusive jurisdiction to determine the status of persons as "workers" of an employer under the Act.
>
> Section 75 of the Workers' Compensation Act ("the Act") confers exclusive power on the Board to "examine into, hear and determine all matters and questions arising under Part 1 of the Act, and as to any matter or thing in respect to which any power, authority, or discretion is conferred on the Board". In relation to assessment matters, section 71(3)(a) confers specific statutory authority on the Board to establish assessment policies of the Board.
>
> Judicial authorities in Ontario, including Re Mac's Milk Ltd. v Workmens' Compensation Board of Ontario (1977) 15 O.R. (2nd) 508, have affirmed the authority of the Board to determine the status of persons as "workers" under the Act, such power being held to be implicit in the scheme of the Act, and necessarily incidental to the powers and functions conferred on the Board thereunder. Such authorities have clearly established that the status of "worker" under the Act is to be determined for the purposes of the specific workers' compensation legislation, and in the light of its particular objectives. Stated simply, the purpose of the Act is to establish a scheme for the payment of compensation to workers, without proof of fault, for injuries arising out of and in the course of their employment. The Act establishes the means of funding the compensation scheme through the assessment of employers within industries set out in the Act, and precludes workers from suing such employers in the courts in relation to employment-related injuries.
>
> The assessment of payroll of employers within Part I is a matter arising under that Part. That matter involves a determination of the incidents of

liability to assessment, including whether a person to be assessed is an employer within Part I, the identification of his workers and the amount of their payroll.

Prior to April, 1985, the statutory definition of "worker" was contained in section 1(1)(j) of the Act. In both its present and prior forms, the definition of "worker" is not exhaustive and specifically provides that worker "includes". Furthermore, the Act contemplates a broad spectrum of employment relationships, and the definition section contains no statutory criteria by which to determine the employment relationship. The flexibility inherent in the definition of "worker" enables the Board to determine the issue in a manner that best achieves the purposes and objectives of the legislation.

In respect of the logging industry, the Board has enacted a policy which specifies that persons working alone or in partnership in woods operations, who do not themselves employ labour, are to be considered workers of the principal for whom they work. The rationale underlying the Board's policy is explained below. The jurisdiction of the Board to enact such a policy derives from the jurisdiction of the Board to determine the status of persons as "workers", and is implicit within the scheme of the Act, and necessarily incidental to the power of the Board thereunder. The Board's policy in relation to persons working alone or in partnership in woods operations within the scope of the order has been applied to persons working under contract for [Companies C, W, H and A].

The definition of a "worker" contained in section 1(1)(j) of the Act was rationalized by the Workers' Compensation Act, 1984, c. 58, section 1(8), and in its present form is contained in section 1(1)(z) of the Act. The term "worker" is now defined to include "a person deemed to be a worker of an employer by a direction or order of the Board". The amendment was intended to consolidate and confirm the powers of the Board in relation to the definition of "worker" under the Act, and was not intended to effect a substantive change to those powers.

The definition of "employer" is contained in section 1(1)(k) of the Act. The definition is not exhaustive and provides that employer shall "include" certain specified persons and entities.

The definition of "independent operator" is contained in section 1(1)(m) of the Act. An independent operator is not specifically excluded from the definition of "worker" under the Act. The determination of the issue of who is an employer, and who is an independent operator is a matter which falls under Part I of the Act and is for the exclusive determination of the Board. Persons who are determined to be a) the employer of a worker or b) an independent operator are not covered under the Act unless they elect to be deemed to be a "worker" in accordance with the requirements of section 11 of the Act. However, persons determined to be workers by the Board are automatically covered under the Act.

Section 9(1) of the Act provides that workers of a contractor or sub-contractor executing work in, or for the purposes of, an industry under Part I are deemed to be the workers of the principal letting the contract, unless the sub-contractor or contractor is reporting directly to the Board. The purpose of the provision is to deem workers of one employer (be it a contractor or sub-contractor) to be the workers of the principal, in order to ensure coverage in all such cases. The power contained in section 9(1) to deem workers of a sub-contractor or contractor to be the workers of the principal should not be construed as derogating from the general power of the Board to determine persons to be workers. In this regard, it is relevant to note that the Supreme Court of Canada, in cases such as Theed v WCB (1940) S.C.R. 553 has held that the Act should be construed liberally in favour of workers.

2. Objection

The Board has assessed the companies upon the personal earnings of the companies' independent contractors notwithstanding that the said contractors were either "employers" or "independent operators" carrying on logging operations alone or in partnership within the definition of the Workers' Compensation Act, and notwithstanding that the Board has denied that such contractors are personally entitled to coverage under the Workers' Compensation Act.

As stated above, the Board has assessed the objecting companies on the assessable earnings of the workers of the respective companies, as determined by the Board. The determination of persons as "workers", "employers" or "independent operators" is within the exclusive jurisdiction of the Board.

In relation to woods operations, the Board has exercised its power to determine the status of workers for the purpose of the Act by determining to treat persons working in the woods industry, alone or in partnership, who do not employ workers, as workers of the principal for whom they work. That policy has remained substantially unchanged since its original enactment in 1935. The policy is currently stated in Document Number 04-02-02 of the Board's Employer Assessment Policy Manual, dated August 30, 1985, and in Document Number 04-04-06 of the same manual. The form of the policy contained in the above-noted documents continued the policy of the Board, stated in a Board Order, dated December 7, 1961. That Board Order provides as follows:

Order 1 "workman" includes:

(c) A contractor, jobber, piece- worker, shacker, not employing workmen who work under a contract for labour or substantially for labour in woods operations whether payment is made on a time spent or piece basis."

Copies of these documents are enclosed herewith.

The rationale underlying the policy of the Board in relation to persons working alone or in partnership in the woods industry is reasonable and in furtherance of the objectives and purposes of the Act. The basis of the policy lies in a recognition of the distinctive features of the logging industry. It is customary for companies, such as the objecting companies, to let out much of their work to contractors and sub-contractors. The work performed by such contractors and sub-contractors within the industry, in reality, forms part and parcel of the business of the principal company.

The special conditions operating in the logging industry have received judicial recognition by the Supreme Court of Canada in Royal Bank v WCB of Nova Scotia (1936) 4 D.L.R. 9 at 17.

The purpose underlying the Board's policy is to ensure industry-wide coverage for "workers" in the logging industry despite the widespread practice of letting contracts to individuals or partnerships, who do not, of themselves, employ workers. The policy helps to secure

a) fairness and consistency in the treatment of employment relations in the industry,

b) the adequacy of the Accident Fund so as to meet the compensation requirements of a high-risk, mobile industry and

c) the protection of the Act for persons who work in the industry, and who, as a matter of fact, are subject to the risks that the Act is intended to protect against.

For the Board to fail to give recognition to the reality of the structure of the logging industry would be to undermine the purpose of the Act, to facilitate its evasion, and thereby to deprive workers of the benefit of the Act.

The WCB has determined that persons working alone or in partnership, who do not themselves employ workers and who perform logging services under contract with [Companies C, W, H or A] within the scope of the order, are within the policy of the Board governing woods operations, and, therefore, are to be treated as workers of the respective companies.

It should be pointed out that a person determined by the Board to be an employer of a worker is not entitled to coverage under the Act unless he elects to be deemed a worker in accordance with the requirements of section 11 of the Act. The requirements include the specific condition that the employer must consent to the application. Details of the Board's policies governing personal coverage are contained in the Employer Assessment Policies Manual of the Board, Document 02-04-01. The above provisions clearly require that employer for whom personal coverage is requested must be made aware of their status under the Act and consent to the application. Unless those requirements are complied with, the employer is not himself covered under the Act, regardless of whether the payroll return is made by the contractor directly to the Board or on behalf of the contractor by the principal.

Section 11 has no applicability in the case of persons determined to be workers by the Board, pursuant to the Board order governing the logging industry. Such persons are automatically covered under the Act.

The above excerpt represents the Board's basic explanation for its policy - an explanation which was expanded upon by Mr. Keefe at the hearing. It was vigorously attacked by the counsel for the employers on a number of grounds.

(ii) Jurisdiction of the Board

Section 75 of the Act provides the Board with a broad and exclusive jurisdiction to "examine into, hear and determine all matters and questions arising under this Part...". Subsection 75(1) also provides the Board with the protection of a powerful privative clause. Subsection 71(3) confers on the Board a number of powers including those set out in clause (a) to:

> (a) establish the assessment policies of the Board;

and in clause (b):

> (b) review this Act and the regulations and recommend amendments or revisions thereof.

Clauses (a) and (b) of subsection (3) indicate that it is open for the Board to establish assessment policies by way of regulation. Obviously, the Board can recommend amendments to the regulations pursuant to clause (b) and, with the approval of the Lieutenant Governor in Council, as set out in section 69 of the Act, make such regulations as may be considered expedient for carrying out the provisions of Part I of the Act. However, clause (a) clearly indicates that the Board may also enact assessment policies other than by way of regulation. Its deeming policy with respect to the logging industry prima facie falls within this clause.

However, the Board's discretion when proceeding under clause (a) is not unlimited. It is, of course, subject to the specific wording of the statute and is also subject to the rule of law.

Counsel for the employers submitted that the Board had both exceeded its jurisdiction granted under the statute and also ignored the rule of law in favour of administrative convenience. In a 1985 text entitled Principles of Administrative Law by D.P. Jones and A.S. deVillars (Toronto: Carswell), the authors comment on the rule of law against fettering discretion at page 137 of the text:

> 6. The Abuse of Fettering Discretion
>
> Because Administrative Law generally requires a statutory power to be exercised by the very person upon whom it has been conferred, there must necessarily be some limit on the extent to which the exercise of a discretionary power can be fettered by the adoption of an inflexible policy, by contract, or by other means. After all, the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits. Anything, therefore, which requires a delegate to exercise his discretion in a particular

> way may illegally limit the ambit of his power. A delegate who thus fetters his discretion commits a jurisdictional error which is capable of judicial review.
>
> On the other hand, it would be incorrect to assert that a delegate cannot adopt a general policy. Any administrator faced with a large volume of discretionary decisions is practically bound to adopt rough rules of thumb. This practice is legally acceptable, provided each case is individually considered on its merits. As Bankes L.J. said in R. v. Port of London Authority; Ex parte Kynoch, Ltd. [[1919] 1 K.B. 176 at 184 (C.A.)]:
>
> > There are on the one hand cases where a Tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. ... [I]f the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.
>
> Similarly, a delegate does not necessarily commit an error by referring to the policy adopted by another governmental agency when deciding to exercise his own discretion. It is true that the principles of natural justice and fairness may in both cases require the delegate to disclose the existence of such policies so that a person affected thereby can intelligently make representations as to why the delegate should exercise his discretion differently in the particular case. Nevertheless, the legal issue boils down to whether the delegate in fact has exercised his discretion or fettered it. [Footnotes omitted.]

In a sense, that is the Board's dilemma in a nutshell. It must protect workers and deal with over 400,00 claims per year. It thus requires policies to ensure that similar claims are treated on a consistent basis. However, in establishing those policies, it runs the risk of fettering its discretion.

(iii) 'Policy' or 'Regulation'?

In the case before the Panel, we are urged to focus upon the true nature of the Board's policy. Counsel for the employer submits that sections 71 and 75 cannot be the source of a power to establish a policy whereby independent operators are deemed to be workers. Counsel submits that both sections 71 and 75 are essentially procedural and beg the question of whether or not the Board has created a policy rather than a piece of subordinate legislation. In his submission, the substance of the Board policy and subsequent order suggests that it is an instrument of a legislative nature. The classification is important because, if the Board has issued an order of a legislative nature, then it must comply with the provisions of the Regulations Act (Ontario). Subsection 1(d) of the Regulations Act defines the word "regulation" as follows:

> (d) "regulation" means a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the member of which are appointed by the Lieutenant Governor in Council, but does not include, ...
>
> (emphasis added)

While the Regulations Act does not contain any regulation making authority, it sets out the procedure for promulgating a regulation. Under section 2 of this Act all regulations must be filed with the Registrar of Regulations at which time the regulation normally comes into force. Until a regulation is filed, it has no effect. Counsel for the employers submits that the Board policy is essentially a regulation because it is an order of a legislative nature affecting substantive rights. Because it has not complied with filing requirements of the Regulations Act, it is of no force and effect. If the policy is of no force and effect, then the assessments, interest and penalties levied pursuant to the policy are also ineffective. A paper by Donald L. Revell, entitled "Rule-Making in Ontario" (a paper submitted to the standing committee on regulations and other statutory instruments of the Legislative Assembly of the Province of Ontario) describes the significance of the classification at page three of the paper. In the first paragraph the author comments:

> Of major importance is the fact that the Act applies only to statutory instruments of a legislative nature. This creates a problem of interpretation. Clearly, the Act does not apply to judicial or quasi-judicial orders or purely administrative orders. But as in all areas of administrative law, the classification game is not always an easy one to play and the problem of classification remains important to the rule-maker who must decide whether or not the Act applies to a proposed order and to the lawyer who is considering the effect of an unfiled

> statutory instrument. In some cases, it should be noted, the Legislature has provided that rules made under a particular authority shall be deemed to be of an administrative nature.[1]

Counsel for the employers cited the case of Rose v. The Queen [1960] O.R. 147 as an example of the situation where the Courts held an Order-in Council under the Highway Improvement Act to be legislative in its nature and ineffective under the Regulations Act. The Court held that the Order-in-Council reporting to vest title to part of a highway abandoned by the Department of Highways, in the municipality was essentially a statutory conveyance. At pages 155 & 156, the Court commented:

> The action of the Lieutenant-Governor in council, as set out in the order-in-council referred to, in our opinion, clearly is of a legislative nature as I have said. We think that to an extent generally applicable to the public or large segments thereof it alters rights and responsibilities and even the nature and extent of those responsibilities. Upon that ground alone we think sufficient has been said to indicate the legislative nature of the action taken by the Lieutenant-Governor in council as set out in the order in council referred to.

Counsel also referred to the case of Re: Salco Footwear Industries Ltd. and the Minister of National Revenue et al 144 D.L.R. (3d) 203. In that case, the Court concluded that a determination of the "normal value" of goods imported into Canada made by the Minister of National Revenue under subsection 9(7) of the Anti-dumping Act, R.S.C. 1970, C.A-15, was a statutory instrument made in the exercise of a legislative power, as defined by subsection 2(1)(d) of the Statutory Instruments Act, 1970-71-72 (CAN), c. 38. Consequently, the determination was a regulation which must be registered under section 6 of the Act, and, pursuant to section 9, it was without force until registered. Dube, J. of the Federal Court, at page 208 of the decision, referred to the decision of Re: Creative Shoes Ltd. et al and Minister of National Revenue (1972), 29 D.L.R. (3d) 89 dealing with the Anti-dumping Act, a case also referred to by counsel for the employers. At page 208 of the Salco decision, the Court commented:

> Like s. 9(7) of the Anti-dumping Act, these two sections provide that the fair market value "shall be determined in such manner as the Minister prescribes". The Court of Appeal held that the power vested in the Minister is legislative in nature, not judicial or quasi-judicial and accordingly that the Trial Division had no jurisdiction under s. 18 9 of the Federal Court Act, R.S.C. 1970,

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[1] Rose v. The Queen, [1960] O.R. 147, 22 D.L.R. (2nd) 633(C.A.). Following the Rose decision, the Regulations Act was amended and an order transferring jurisdiction of a highway is now exempted from the Act.

> c. 10 (2nd Supp.). Thurlow J. (as he then was) held that the phrase "as the Minister prescribes" is an apt one to confer a power to legislate. He said that the scheme of these provisions is to confer on the Deputy Minister administrative authority and responsibility, and to reserve to the Minister the power to supplement by prescriptions of a legislative nature the rules for determination of value contained in the provisions. In his view, the word "prescribes" differs from the words "determines" or "decides", and connotes the making of a rule to be followed: the Minister does not decide the value of the goods but provides the manner of determining such value when the method prescribed by the statute cannot be applied.
>
> This decision assists applicant in the sense that the learned judge regarded the direction by the Minister as the making of a rule to be followed, and thus a regulation; on the other hand, it establishes that the certiorari procedure is not admissible in connection with such a direction.
>
> 9 18. The Trial Division has exclusive original jurisdiction
>
> (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo wattanto, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Counsel also referred the Panel to the case of Re: City of Winnipeg and Workers' Compensation Board of Manitoba et al 48 D.L.R. (4th) 585.

In that case, the Manitoba Court of Appeal directed that the matter be remitted back to the Board for a re-hearing. A firefighter had died of renal cancer. Under section 4 of a regulation, where a firefighter suffers injury to his lungs, brain or kidneys, unless the contrary is shown, the injury shall be presumed to have arisen out of and in the course of his employment as a firefighter resulting from the inhalation of smoke, gases and fumes, or any of them. The claim was initially allowed and an appeal by the city was dismissed. On appeal, the trial judge set aside the decision as patently unreasonable. The Court found that, although subsection 55(5) of the Act gave the Board jurisdiction to make regulations as may be deemed expedient or requisite for

the due administration and carrying out of Part 1 of the Act and to meet cases not specially provided for by Part 1, the section did not confer upon the Board a regulatory power to extend the application of the Act in a substantive way as to deem all injuries sustained by a firefighter to his lungs, brain or kidneys to have arisen out of and in the course of his employment. The legislation did not authorize a regulation which would affect substantive rights. At pages 592-594, the Court discussed the substantive law-making aspect of the case as follows:

> The Board argued that s. 4 of the regulation was contemplated by s. 55(1) of the Act which gives the Board jurisdiction to make regulations in three categories:
>
> (a) as may be deemed expedient or requisite for the due administration and carrying out of Part 1 of the Act;
>
> (b) to meet cases not specially provided for by the said Part 1, and
>
> (c) to prescribe the form and use of payrolls, records, reports, certificates, declarations and documents as may be requisite.
>
> The Board argued that either of the first two categories authorized the regulation in question.
>
> With respect I cannot agree. The three categories set out in s. 55(1) are clearly administrative and procedural in nature. I see nothing in that section nor in any other section of the Act which confers upon the Board a regulatory power to extend the application of the Act in such a substantive way as to deem all injuries sustained by a fire-fighter to his lungs, brain or kidneys to hve arisen out of and in the course of his employment as a fire-fighter resulting from the inhalation of smoke, gases and fumes or any of them.
>
> Section 4 of Man. Reg. 24/77 also runs afoul of the regulatory restrictions described by Driedger in Construction of Statutes, 2nd ed. (1983), at p. 248:
>
> > Regulations of an administrative or procedural character could no doubt be made under such a general authority, but it is doubtful whether in the absence of a clear indication of intent in the statutes regulations affecting individual rights or creating rights and obligations could be made.

(My emphasis.) And further at p. 324:

> The courts are also reluctant to concede power to make substantive law under an authority to regulate procedure or administration. Thus in The King v. Henderson, [1898] A.C. 720m, under the New South Wales Bankruptcy Act an act of bankruptcy could be committed by non-compliance with a bankruptcy notice. The rules provided for setting aside the notice. Lord Watson [at p. 729] said "Now the only power which the Court has to frame rules is conferred by section 119 of the principal Act, and it is strictly limited to rules 'for the purpose of regulating any matter under this Act'."

(My emphasis.) See also Re Steve Dart Co. and D.J. Duer & Co. (1974), 46 D.L.R. (3d) 745 at p. 749, [1974] 2 F.C. 215 sub nom. Steve Dart Co. v. Board of Arbitration: "Delegated authority must be exercised strictly and within the strict limits of the statute."

Craies on Statute Law, 6th ed. (1963), expresses the same principle (p. 297):

> The courts therefore... in the absence of express statutory provision to the contrary, may inquire whether the rule-making power has been exercised in accordance with the provisions of the statute by which it is created, either with respect to the procedure adopted, the form or substance of the regulation, or the sanction, if any, attached to the regulation: and it follows that the court may reject as invalid and ultra vires a regulation which fails to comply with the statutory essentials.

See as well: MacCharles v. Jones, [1939] 1 D.L.R. 584, [1939] 1 W.W.R. 133, 46 Man. R. 402 (C.A.), and Re Gach and Director of Welfare (Brandon) (1973), 35 D.L.R. (3d) 152, [1973] 3 W.W.R. 558, 10 R.F.L. 333 (Man. C.A.).

The appellants also argued: (a) that the regulation was not inconsistent with the Act in that it merely extends the presumption contained within s. 4(5) so that certain injuries suffered by fire-fighters are presumed to have arisen out of and in the course of employment unless the contrary is shown; (b) that the regulation is not substantive in that it merely establishes an evidentiary presumption that the injury must have arisen out of and in the course of employment, a presumption which may be

overturned by evidence to the contrary, and (c) that ss. 16(1), 51(2)(k) and 55(1) were sufficient authority for the enactment of Man. Reg. 24/77. This argument was the basis of the finding of the learned trial judge on this issue.

Again, I disagree. The Board's regulatory jurisdiction "to meet cases not specially provided for by this Part..." does not either expressly or impliedly authorize a regulation such as s. 4 which does affect substantive rights. Section 51(2)(k) similarly confers no regulatory power on the Board.

In Frobisher Ltd. v. Oak (1956), 20 W.W.R. 345 (Sask. Q.B.), a dispute over vires was described at p. 347:

> It should first be observed, I think, that Reg. 124(4) purports to create a substantive right in law, namely, the right to claim and receive fixed compensation in certain circumstances. It is not regulatory nor can I see that it is reasonably necessary for the administration of the provisions of the Act or the regulations which form part of the Act.

And at pp. 348-9:

> Whatever the purpose of this regulation, as I have already stated, it is neither regulatory nor necessary for administrative purposes. Although the legislature could delegate to a Lieutenant Governor in Council its right to enact substantive law, I can find nothing in the Act which, in my opinion, can be construed as doing so. Reading the Act as a whole satisfies me that the legislature intended to and in fact did delegate only the right to make regulations for regulatory or administrative purposes as opposed to substantive law making. After all it is the duty of the legislature, which is directly responsible to the people, to formulate and enact substantive law and although that duty can be delegated it will not be lightly done, and I should think only in cases of extreme necessity. Provisions of a statute purporting to delegate authority should be construed in this light, and construed restrictively. In the absence of express language to the contrary it must not be assumed that the legislature intended to delegate more than the right to provide the machinery necessary to administer the Act.

(My emphasis.)

> I agree with the foregoing statement of the law. I believe that it expresses concisely the limitations on the regulatory power contained in the Act in the case at bar.

Counsel for the employers submitted that, to the extent that the Board relied upon an implied deeming power prior to 1985, it was relying upon an "extreme form of legislative nihilism". In his submission, if the Board did not have the power explicitly, how could such power be implicit? Any attempted use of such a power affected substantive rights and ought not to be recognized except as a regulation enacted in accordance with the Regulations Act.

Is the Board's deeming policy for the logging industry a regulation?

It is instructive to begin with a consideration of the purpose of the legislation. The Workers' Compensation Act is intended to provide a basic protection to workers in the Province of Ontario. True, it is not universal since not all workers are covered in Schedules 1 and 2 to the Act. However, workers in the logging industry are covered. Statistics indicate that the logging industry is a relatively high-risk industry and the unfunded liability alluded to by counsel for the Board is some evidence of this. Obviously, legislation intended to provide protection to workers for work-related injuries can be classified as remedial legislation. As such, it should:

> receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act according to its true intent, meaning and spirit.

as required by section 10 the the Ontario Interpretation Act.

Concern for the protection of workers can be gleaned from the inclusive definition of "worker" contained in the Act prior to 1985. That relatively broad definition was expanded through the addition of Clause (iii) to also include "a person deemed to be a worker of an employer by a direction or order of the Board,". In our opinion, that specific deeming provision appears to contemplate situations where the protection of workers in the province (which is the paramount concern of the legislation) will require that the Board deem a person to be a worker who would otherwise not fall within the definition. On its face, the expanded definition could include a person who might normally be characterized as an "independent operator" under the common law or the application of a business reality test. It appears to this Panel that the deeming contemplated by the paragraph would create substantive rights in favour of any person deemed to be a worker of an employer. The "employer" would be affected adversely, but this appears to be contemplated by the definition. The rights and obligations which are affected are rights and obligations specifically contemplated by the legislation, namely entitlement for workers to benefits for work-related injuries and a corresponding obligation on employers to pay the corresponding assessment. In our opinion, we must consider the degree to which rights are affected and the nature of those rights. This is not a situation where the provision has application to the general public or is peripheral or ancillary to the overall purpose of the legislation. The legislation is intended to create certain rights and corresponding obligations with respect to workers and employers. The Legislature has utilized a number of methods to achieve these goals.

In our view, one of the devices which the Legislature utilized to ensure attainment of the object of the Act - namely, the provision of no fault benefits for workers - was the provision of a relatively broad discretion to the Board. The Board can choose to exercise this discretion by way of regulation. Clause (b) of subsection 71(3), quoted earlier, provides for this process. However, clause (a) of the same subsection provides for an alternate process in the case of employer assessments. The WCB, through its corporate Board of Directors, may enact and publish assessment policies. It has done so in the case of the logging industry by publishing what is characterized as a "deeming policy" referred to earlier in this decision.

Chapter four of the Reid and David text entitled Administrative Law and Practice (second eddition), Canadian legal text series, Butterworth, discusses classification of function as legislative, judicial, quasi-judicial or administrative. At page 150 of the text, the authors cite examples of Compensation Boards, exercising non-legislative powers:

WORKERS' COMPENSATION BOARDS

> In considering an application for compensation a board was held to be exercising judicial powers.[2] Similarly characterized was the finding that a person was not an employer within the meaning of a statute;[3] and the reviewing of a previously determined question of pension entitlement in respect of a disability.[4]

The Alcyon case referred to in footnote 231 was a decision of the Supreme Court of Canada in which the court explicitly recognized the exclusive jurisdiction of the Workmen's Compensation Board (B.C.) to determine whether a person was an employee or an employer.

Implicit recognition of the Board jurisdiction under the Ontario Legislation and the effectiveness of a powerful privitive clause was recognized by the Divisional Court in the case of re Mac's Milk Ltd. and Workmen's Compensation Board of Ontario 15 O.R. (2d) 508. In that case,

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[2] Canadian Northern Ry. Co. v. Wilson et al. (1918), 29 Man. R. 193, 43 D.L.R. 412, [1918] v. W.W.R. 730(C.A.); Re Canadian Forest Products Ltd. (1960), 24 D.L.R.(2nd) 753, 32 W.W.R. 676 (B.C.).

[3] O'Krane v. Alcyon Shipping Co. Ltd. (1960), 24 D.L.R. (2nd) 119(B.C.C.A.); affd [1961] S.C.R. 299, 27 D.L.R. (2nd) 775.

[4] R. v. Workers' Compensation Board; ex p. Chenoweth (1964), 41 D.L.R. (2nd)360, at p. 365, 45 W.W.R. 364(B.C.).

a contract recited that one of the parties was an independent contractor. The Board determined that the terms of the contract were sufficiently restrictive of his rights and subjected him to the control of Mac's Milk to an extent that the person described as an "independent contractor" was in fact an employee.

In the case before this Panel, we concede that there is an argument to be made that the Board's policy or order is legislative in nature and the argument has been made skillfully by Mr. Campbell. However, in our view, the Board policy when considered in the light of the overall intent of the legislation, is more properly characterized as quasi-judicial. The power to enact a special policy for the logging industry is intra vires and need not take the form of a regulation, although that is certainly the safer course.

"Worker" v. "Independent Operator"

The employers submit that the Board policy has effectively written the term "independent operator" out of the legislation, at least with respect to the logging industry. A person working alone or in partnership is deemed to be a "worker". A person working in conjunction with one or more employees is classified as an "employer". Thus, they submit, it is impossible to have an individual independent operator working in the logging industry.

As counsel for the Board and the O.W.A. noted, the current definition of "worker" contained in the Act is an inclusive one. It now also contains the specific deeming provision referred to earlier, whereby the Board may deem a person to be a "worker" through a Board direction or order. In our view, the inclusive definition was a further legislative device which provided the Board with the flexibility to meet changing work situations, bearing in mind the primary purpose of the legislation - i.e. protection for injured workers. The specific deeming power is a further acknowledgment of a broad Board discretion.

In this respect, we agree with the conclusions of the Panel in WCAT Decision No. 701/87I which in turn expressed approval of WCAT Decision No. 503/87I. At page 11 of the former decision the Panel noted:

> The wording of the Act concerning the definition of "worker" is, in our view, quite purposely left open to permit an expanded view of what should be included in the definition. The WCB policy has been in force since 1935 and has been applied to a large number of cases since that time. In our view, there are no substantial reasons for interfering with this policy or adopting a more limited interpretation of the term "worker" as defined in the Act.
>
> The express power in section 1(1)(z)(iii) of post-April 1985 Act to deem persons "workers" does not change our conclusions concerning the WCB policy in force prior to this section. We have had particular regard to section 17 and 18 of the Ontario Interpretation Act which provide:
>
> > 17 The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

> 18 The amendment of an Act shall be deemed not to be or to involve a declaration that the law under the Act was or was considered by the Legislature to have been different from the law as it has become under the Act as so amended.

In short, these sections state that we cannot assume that the explicit inclusion of powers in the WCB to deem persons "workers" meant that the power was or was not there before. In our view, the Board's statutory interpretation of the term "worker" as reflected in the WCB policy in issue here was within its powers, with or without an explicit deeming power.

(iv) Application of the Board policy

Counsel for the employers submitted that, when the Board administrators applied the policy, they took the position that there could be no independent operators in the woods. Counsel submitted that, assuming the administrator is dealing with a "contractor", there are pre-conditions which must be satisfied before the policy applies. The major pre-condition is that the contract must be one for "labour or substantially for labour in woods operations". In his submission, the Board Administrators did not consider the labour component or more importantly the lack of a significant labour component in applying the Board policy. In counsel's submission, the order does not even specify an inquiry into whether a contractor is incorporated. He submitted that, if a corporation existed, the contractor could be an executive officer and, according to the terms of the Act, unless there was a special application such a person is specifically excluded from the definition of "worker". Counsel submitted that, because of administrative convenience, the Board turned a discretionary determination into a hard and fast rule that there are no independent operators in the woods. A discretionary order became a rule which effectively fettered the Board's discretion.

Counsel for the Board and the O.W.A. submitted that the Board's specialized jurisdiction allows it to establish policy or guidelines. There is nothing inherently bad about a policy. Counsel referred to the case of Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission et al. 81 D.L.R. (3d) 609, a decision of the Supreme Court of Canada. At pages 628 and 629 of the decision, Chief Justice Laskin commented:

> The issue that arises therefore is whether the Commission or its Executive Committee acting under its licensing authority, is entitled to exercise that authority by reference to policy statements or whether it is limited in the way it deals with licence applications or with applications to amend licences to conformity with regulations. I have no doubt that if regulations are in force which relate to the licensing function they would have to be followed even if there were policy statements

> that were at odds with the regulations. The regulations would prevail against any policy statements. However, absent any regulations, is the Commission obliged to act only ad hoc in respect of any application for a licence or an amendment thereto, and is it precluded from announcing policies upon which it may act when considering any such applications?
>
> Apart from the argument that the Commission's powers do not extend to cable distribution systems, an argument which I have rejected, it is not contended by the appellants that the policy statement, to which reference was made in the decision in this case, deals with matters going beyond the Commission's authority. ...
>
> ... The respondent's position on the foregoing contentions was that since the Commission held a hearing on the application of the Rogers companies, a hearing at which the appellants were heard as to the policy of the Commission and as to the merits of the application, the power of the Commission could not be challenged as having been exercised improperly. Reliance was also placed on what was said by Bankes, L.J., in The King v. Port of London Authority, Ex p. Kynoch, Ltd., [1919] 1 K.B. 176 at p. 184, and by the House of Lords in British Oxygen Co. Ltd. v. Board of Trade, [1971] A.C. 610 at p. 624.
>
> In my opinion, having regard to the embracive objects committed to the Commission under s. 15 of the Act, objects which extend to the supervision of "all aspect of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", it is eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the Broadcasting Act. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.

Counsel submitted that the latter paragraph was important because the key difference between a regulation and a policy is that a regulation has the force of law, whereas a policy is something that can be varied. To be valid as a policy, a Tribunal must leave it open for a person to come forward and say that the policy does not apply in a specific situation.

Counsel also made reference to the case of British Oxygen Co. v. Board of Trade a decision of the House of Lords found at [1971] A.C. 610. He referred to the comments of Lord Reid at pages 624 and 625 of the decision:

> It was argued on the authority of Rex v. Port of London Authority, Ex parte Kynoch Ltd. [1991] 1 K.B. 176 that the Minister is not entitled to make a rule for himself as to how he will in future exercise his discretion. In that case Kynoch owned land adjoining the Thames and wished to construct a deep water wharf. For this they had to get the permission of the authority. Permission was refused on the ground that Parliament had charged the authority with the duty of providing such facilities. It appeared that before reaching their decision the authority had fully considered the case on its merits and in relation to the public interest. So their decision was upheld.
>
> Bankes L.J. said, at p. 184:
>
> > "There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes."
>
> I see nothing wrong with that. But the circumstances in which discretions are exercised vary enormously and that passage cannot be applied literally in every case. The general rule is that anyone who has to exercise a statutory discretion must not "shut his ears to an application" (to adapt from Bankes L.J. on p. 183). I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called

> a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say - of course I do not mean to say that there need be an oral hearing.
>
> (emphasis added)

Counsel also referred the Panel to the decision of the British Columbia Supreme Court in Western Forest Products Ltd. v. Workers' Compensation Board 8 Admin. L.R. 43. In that case the British Columbia Workers' Compensation Board had established a policy on whether a successor corporation could assume the experience rating of the company that was purchased. The Board policy would not permit an assumption. The Board advised the purchaser of its policy and refused the purchaser authority to assume the experience rating. The company argued that the Board's policy was unlawful and also that it was exercised improperly. At the bottom of page 47 of the decision the court commented:

> Can it be argued that they misinterpreted a provision of the Act? Indeed the wording of the Act is general; it clearly allows for the board to establish an experience rating system and a restriction on transfer of that rating. There is nothing patently unreasonable in that interpretation.
>
> Finally, the petitioner argues that the board, basing its decision on the application of the general policy, has fettered its discretion. They rely on the case of H. Lavender & Son Ltd. v. Min. of Housing, [1970] 3 All E.R. 871, [1970] 1 W.L.R. 1231. In that case the Minister had fettered his discretion by allowing his decision to be contingent on the decision of another ministry. In the case at Bar, the board created its own policy which was established from vast experience in the field and they relied upon that after hearing all the relevant facts and reviewing their own policy. Section 39(2) gives the board, as I stated earlier, a wide scope in devising the assessment scheme and they were operating well within the scope.
>
> The petitioner cannot successfully argue that the board had established a pre-existing policy and that was enough to fetter their discretion. It is far more beneficial for a tribunal to develop policy guidelines for the sake of consistency rather than dealing on an ad hoc basis, providing the guidelines still allow flexibility and consideration of the merits. In the case at Bar, the board considered the merits.
>
> In conclusion, the board had the jurisdiction. The statute clearly gives thee board jurisdiction and the board did not exceed it by a misinterpretation of the statute nor did they fetter their discretion. This is not an appropriate case for the Courts to intervene.
>
> (emphasis added)

In the appeals before us, the Board has developed a basic policy for the sake of consistency rather than dealing with situations on an "ad hoc" basis. The policy is intended to protect persons working in the logging industry and to deal with changing work situations in that industry on a consistent basis. We agree with the comment of Chief Justice Laskin that there is merit in having such a policy known in advance. In our opinion, it is not necessarily a policy which fetters the discretion of the Board.

Counsel for the employers argued that the Board policy was essentially a policy introduced in 1935. The Panel heard considerable testimony on the evolution of logging practices and the increasing trend to mechanization. A videotape exhibit of various machines designed to harvest forest products confirmed the Panel's impression of a significant evolution in forest industry techniques. Evidence also indicated that there has also been a trend to contracting out - i.e. entering into contracts for service with individuals who own harvesting machinery.

(v) "Contract for labour"

It is apparent to anyone who reads a daily newspaper that the Canadian forest industry is under tremendous economic pressure as a result of international competition. To survive in an increasingly competitive international market, Canadian operators are forced to shave costs and seek increasingly efficient methods of production. Among the costs to come under scrutiny are premiums for social programs including the costs of Workers' Compensation assessments in the province of Ontario. To the extent that these costs can be passed on to independent contractors without a corresponding increase in contracting fees, there is obviously a saving to the principal company. While this pressure to pass on costs to contractors and sub-contractors could be alleviated by the inclusion in the timber licence fee of a compensation premium factor, this approach has not been followed to date. Although it would alleviate some collection problems for the Board, it would do nothing to improve the competitive position of the licence holders. We are left with the Board policy for the logging industry - a policy which obviously incorporates some anachronistic elements.

What is a contract "substantially for labour"?

Is it 95% as Mr. Campbell, at one point, suggested?

Is it one where labour is a significant component?

If so, what is "significant" in the context of the logging industry?

In our opinion, it is a question of fact whether any individual contract is one "substantially for labour". There can be substantial differences between contractors involved in woods operations. Contractor A may invest $300.00 in a chainsaw and sign a cutting agreement for the provision of cutting services with this chainsaw. Contractor B may invest $300,000.00 in a feller buncher, register a trade name, list his business in various trade publications and phone directories, and establish a head office for the

business operation. Where the investment component is $300.00 in a chainsaw, it would appear to this Panel that the contract is "substantially for labour". The capital investment is negligible. However, where the capital component is approximately $300,000.00 for a feller buncher to be operated by one individual, it is the labour component that appears relatively minor compared to the capital component. In our view, it is unlikely that this latter agreement is a contract "substantially for labour". The Board policy, as we interpret it, would initially treat contractor A and contractor B in an identical manner. It would deem both of them to be workers of the principal because they were working alone or in partnership in a woods operation. For the reasons enumerated earlier, we find that the Board is entitled to enact such a policy and initially treat both contractor A and contractor B as workers under the Act. We are of the view that, in so doing, the Board is recognizing the specialized circumstances which exist in the logging industry and utilizing an inherent discretion to give effect to the Act's primary purpose - namely the protection of workers in the province of Ontario. It also appears to this Panel that the Board's initial determination in any specific contract may be challenged by either the principal or the deemed worker on grounds set out in the policy. If the cutting agreement is one which is not "substantially for labour", this may be raised with the Board. It may ultimately be raised with the Appeals Tribunal. We agree with the comment of the B.C. Supreme Court in Western Forest Products that it is more beneficial for the Board to develop policy guidelines for the sake of consistency rather than dealing on an ad hoc basis, providing those guidelines allow flexibility and consideration of the merits of each case. In our view, the Board policy does not preclude a consideration of the merits of each case and accordingly, at this stage, has not been improperly applied. From the general evidence before this Panel, there may be some contractors who would fall outside the policy because the contract is not one that was substantially for labour. It was, after all, a policy developed when logs were pulled by horses and workers cut trees with axes and handsaws. Technology has evolved in the forest industry. Those contractors who are not substantially mechanized may fall within the Board policy. In either case, we hold that the Board has not, at this stage, fettered its discretion because there is a subsequent opportunity to be heard on the merits of the individual case. It is the opportunity to be heard that is important in our finding. The Board policy provides some initial protection for persons working in woods operations. There is provision in the Act, and in the policy, for any contractor to be found to be an independent operator at some subsequent proceeding dealing with the merits of that particular contract. As long as that opportunity exists, the policy can survive.

(vi) NEER Assessment

Counsel for the employers noted the potentially horrendous financial implications of NEER for any employer. In his submission, the provisions of the Act do not justify the NEER program and in particular do not justify an experience based assessment relying upon deemed workers. In his submission, NEER would require the most explicit form of grant in the language of the statute. Counsel also pointed out the disparity in treatment which can arise under the NEER program because a small employer can enjoy a cap on increased assessments whereas the larger employer is exposed to a much greater liability.

Counsel for the Board submitted that the Act allowed the Board to create a system of merit rating. Subsection 105(3) provided the Board with a discretion to implement a system of merit rating. In his submission, the inclusion of deemed workers can work a hardship but it should also put pressure upon the principals to hire persons with safe work habits. Under section 9 of the Act, the principal may collect a demerit penalty imposed from a subcontractor. There is, of course, the practical difficulty of locating that contractor in the event a business relationship has ended.

We find that subsection 105(3) of the Act clearly allows the Board to establish a system of merit rating. NEER is one such system established by the Board. It is, to most persons who have attempted to work through it, a minefield of complexities replete with time-delayed fuses which can subsequently trigger enormously adverse financial consequences. In an attempt to introduce an element of equity into the assessment system (i.e. by rewarding good safety records and penalizing poor records), NEER has introduced new inequities in cases of principals who have released hold backs or who cannot locate subcontractors to recover a subsequent NEER assessment for which that subcontractor is responsible. However, while the NEER system does include inequities and complexities, it has been implemented and refined with the consent and assistance of various employer associations. In our opinion, it comes within the Board discretion to implement a system of merit rating and the remedy lies in working through these associations to refine the system with the assistance of the Board, rather than challenging the jurisdiction of the Board to implement such a system.

We are in agreement with the general sentiments expressed by the New Brunswick Court of Appeal in Re Jardine Transport Ltd. and Workers' Compensation Board of New Brunswick 13 D.L.R. (4th) 738. At pages 744 & 745 of that decision, the Court concluded:

> If the workers are to be considered to be those of the principal, it would seem to follow that assessments are to be levied against the principal on that basis. That means that assessments are to be based on its payroll. This may seem hard on Jardine, but the alternative would be to allow persons to so organize an enterprise as to escape liability for these assessments and thereby deprive workers of the benefits of the Act. To encompass the situation, the Legislature has given the board discretion under s-s. 70(3) in essence to consider this kind of enterprise as a single industry. This is what the board did in this case, and that decision is one exclusively for the board to make and is not open to review by this court.
>
> It must also be remembered that Jardine is in no worse position than a person carrying on the same business through its own employees. In some respects it is better off. In the absence of a contractual term to the contrary, it is entitled to apportion the assessment against its contractors (or lessors). It is true, as counsel for

> Jardine argued, that it cannot directly control the work habits of its contractors and thereby serve one of the purposes of demerit assessments, i.e., to encourage better work habits. However, the apportioned parts of the demerit assessment the contractors are called upon to pay should put pressure on them to keep their employees up to the mark. It will also have a bearing on who Jardine hires and this too could have a consequence on work habits.
>
> Apart from this, the obvious benefits accruing to workers under the Act has led the courts to construe it liberally in their favour: see Workmen's Compensation Board v. Theed [1940] 3 D.L.R. 561 at p. 580 [1940] S.C.R. 553 at p. 574, per Kerwin J. The scheme envisaged by s-s. 70(3) brings within the ambit of the Act workers who would not otherwise be covered and should, therefore, be liberally construed. The fact that this may result in some inequities in particular cases is no ground to strain the words of the Act to bring in or to exclude particular cases: see Re Workers' Compensation Appeal Board and Penney (1980), 112 D.L.R. (3d) 95 at p. 97, 38 N.S.R. (2d) 623 at p. 627, per Jones J., citing 34 Hals., 2nd ed., p. 799. It must also be remembered that under s-s. 70(3) the board has a discretion to decide whether or not it will treat employees of a contractor as workers of his principal.
>
> Accordingly, my answer to the second question is that the demerit assessment against a principal for whom work is undertaken by the contractor should be calculated against the payroll of the principal when the board considers the workers to be those of the principal.
>
> **The meaning of assessment**
>
> In view of my answer to the second question, it is not in strictness necessary to respond to the question whether the expression "assessment" as used in s-s. 70(1) includes a demerit assessment. On thhe basis that s-s. 70(1) was the applicable provision, counsel for Jardine had argued that the expression did not include a demerit assessment since this could in certain circumstances work an injustice against Jardine and others in a similar position. But in view of my holding that the section is a mere collection device directed solely at assessments in respect of work done by the contractor, no such injustice can result. Moreover, I cannot believe the Legislature ever contemplated the anomalous situation whereby ordinary assessments would be collected from principals but demerit assessments would be collected from contractors. ...

Having found that the deemed workers are indeed "workers" for purposes of the Act, we will not treat them differently for purposes of a NEER assessment. There should be no distinct classes of "workers" under the Act.

(vii) Costs

Counsel for the employers requested that the Panel make an order awarding the employers a contribution towards their costs of the proceedings. He based his request on a broad interpretation of the Tribunal's jurisdiction under section 86g. Counsel for the Board submitted that the Panel lacked jurisdiction to grant costs to a party to an appeal. Tribunal Counsel also made submissions on the issue of costs, arguing that the Tribunal does not have the power to award costs in the absence of a specific statutory authority.

We find that the Appeals Tribunal does not have jurisdiction to award costs in this appeal. Jurisdiction to award costs is normally conferred by statute and no specific provision exists in the Act granting the Appeals Tribunal the power to award costs.

As counsel for the Board pointed out, the Courts of Justice Act 1984, chapter 11, section 141(1), while not granting any new power to award costs, provides that the award of costs is a matter for the discretion of the court. It does not extend the power to statutory tribunals such as the Appeals Tribunal. Furthermore, the discretion granted to the court in the matter of costs is also subject to the rules of civil procedure.

A basic tenet of administrative law is that creatures of statute, like the Appeals Tribunal, possess only those powers expressly conferred by the enabling legislation or such powers as may be reasonably incidental to the exercise of the specific powers granted under the statute. As indicated above, the Act does not contain a general power to award costs in an appeal. The power in section 81(c) applies only to disbursements. Nor, in the opinion of this Panel, is the administrative law doctrine of implied authority of any assistance in this situation. This doctrine is usually limited to situations of practical necessity to enable the exercise of a power which will allow the administrative body to attain the objects of its governing statute. In our opinion, the power to award costs is not essential to the attainment of the objects of the Act.

TCO noted that the jurisdiction of a statutory body to award cost was discussed by the Divisional Court in Liquor Control Board of Ontario v. Ontario Human Rights Commission (February 23, 1988), 9 C.H.R.R. 37628. The court reviewed cases indicating there was no inherent jurisdiction in a court or a statutory body to award costs. It then concluded that a Board of Inquiry created by the Ontario Human Rights Code, as a statutory body, could only have jurisdiction to award costs if it were expressly given to it by the Code or some other statute. The court observed that there was an express provision in the Code conferring authority to award costs to the person complained against. Applying a principle of statutory interpretation, the court went on to hold that by expressly providing the Board of Inquiry with the authority to award costs in one section, the Legislature had excluded jurisdiction to award costs in any other circumstances.

Costs were also sought in the case of Clark v. Annapolis County Family and Children's Services (1983), 37 R.F.L. (2nd) 171 (N.S.C.A.). In the Clark case, the Court of Appeal held that the Family Court was a statutory court of record. As such, it had jurisdiction in the substantive matter of costs only if such jurisdiction were expressly given to it by the statute. Since the Nova Scotia Family Court Act did not contain any express or implied authority to award costs, no such power existed.

In reference Re: National Energy Board Act (1986), 19 Admin. L.R. 301 (Federal Court of Appeal), leave to appeal to the Supreme Court of Canada denied 23 Admin. L.R., it was held that the National Energy Board ("NEB") did not have the jurisdiction to award costs to intervenors in connection with a public hearing. The decision was based upon three grounds:

1. the absence of an express provision in the enabling legislation which established the NEB as a "court of record" and conferred upon the NEB the powers of a "superior court of record";

2. the absence of any implied authority, since the NEB had functioned effectively for many years without such a power; and

3. express provisions in the statute conferring a restricted authority to award costs, which indicated that there was no unlimited discretion to award costs in all other cases.

Counsel referred to Re: Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc., (1985) 51 O.R. (3d) 23 and Re: Ontario Energy Board, (1985), 51 O.R. (3d) 333 (Divisional Court), leave to appeal the court of appeal refused (1985), 17 O.M.B.R. 511. In those cases, it was held that joint Boards established under the Consolidated Hearings Act and the Ontario Energy Board did not have the jurisdiction under their respective statutes to make an award of costs in advance of the hearing, i.e., intervenor funding. However, in both cases, the statutory bodies did possess an expressed power to award costs. Nevertheless, the court held that any general provision regarding costs could not be interpreted as granting any greater power than that of a court, in the absence of an expressed provision to such effect. A similar conclusion was reached in the case of Bell Canada v. Consumers' Association of Canada et al. 17 Admin. L.R. 205 (S.C.C.).

Section 86m of the Act makes section 81 applicable to the Appeals Tribunal. Subsections 81(a) and (c) provide:

> **81**(1) The Board has power,
>
> (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents or things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;

...

> (c) to allow to a worker, spouse, child or dependant of a deceased worker or his witnesses travelling and living expenses and other allowances and such expenses and allowances shall be paid out of the accident fund as part of the administrative expenses of the Board.

Section 81(a) allows the Appeals Tribunal to summon and force the attendance of witnesses. Section 81(c) authorizes the payment of costs in the form of disbursements to claimants and their witnesses. We find that section 81(a) cannot be interpreted as conferring a general power to award costs as possessed by the civil courts. The specific reference to the payment of disbursements in section 81(c) precludes the existence of any general power to award costs in other circumstances.

As Tribunal counsel noted, the WCB had the power to award costs to a successful party in a contested claim from 1914 to 1963. At that time, the section was amended to enlarge the Board's jurisdiction to award costs. An explanatory note from that period indicates that the section was re-enacted to enable the Board to award proper costs in a proceeding before it. However, section 74 was removed from the Act in 1974. The provision was essentially replaced by the current provisions of section 81. As noted above, section 81 does not include a specific power to award costs in an appeal.

The decision in Franco v. Kornatz et al. (1982), 29 C.P.C. 38 (Ontario High Court) at pages 39 and 40 contains a comment on the WCB power to award costs. In that case, one of the parties appealed the decision of the taxing officer to the High Court. Steele, J., concluded that there was no entitlement to taxation of costs for an application to the WCB under section 15 of the Workmen's Compensation Act. At page 39, he commented:

> I am advised that there are no reported decisions on the subject of the allowance of fees before the Board. Formerly the Board had the authority to allow costs before it. In 1974 that authority was removed.

He went on to comment at page 40:

> While the learned County Court Judge awarded costs on a party and party basis, he did not refer to the motion in question but, even if he had directed his attention to it, the scheme of the Act is such that all decisions of the Board are not subject to review in a court of law and the Board had no power to award costs. That being so, there was no power in the county court judge to have awarded costs on the motion even if he had deemed so to do.
>
> (emphasis added)

It is our finding that the case law supports a conclusion that the Appeals Tribunal cannot use its general power to adopt procedures encompassing a power to award costs. That is a power which, in our opinion, is too extensive to be included in general procedural powers. Accordingly, we decline to make an award of costs in this appeal.

(viii) Summary

In conclusion, we find that the Act provides the Board with a broad discretion in the area of assessments. While the Board policy respecting the logging industry may be antiquated (based upon a policy developed in 1935 which does not take into account the significant recent trend to mechanization), its function is not, in our view, legislative in nature. It is an antiquated policy which still strives to address the legislation's primary concern - namely protection for injured workers and specifically persons working in the logging industry. The logging policy, like any other policy, adversely affects employers' rights to a degree but this degree is not sufficient to hold that the Board's exercise of discretion must comply with the provisions of the Regulations Act. While the entire area of assessments in the logging industry may be in need of revision, that is not sufficient reason to find the existing policy invalid. Our reading of the policy is that any employer, subsequent to the Board's application of its 'deeming' policy, still has the opportunity to demonstrate to the Board that a particular contract is not one covered by the specific wording of the policy and, in particular, is not one that is "substantially for labour". Some contracts may be and some may not; however, it is up to the employer to demonstrate that the particular contract does not fall within the ambit of the Board policy once the Board has applied its policy. The resulting decisions may ultimately be appealed to the Tribunal.

We agree with the employers' submissions that the NEER program can work financial hardships upon employers in certain situations; however, it is a merit system developed in conjunction with various employers' associations and, in our view, the most appropriate recourse is modification of the program through those associations. We find that the application of the program in its present form does not contravene the provisions of the legislation.

For the reasons set out above, we find we do not have jurisdiction to order a contribution towards the employer's costs in these appeals.

THE DECISION

The appeals are denied.

DATED at Toronto, this 20th day of July, 1992.

SIGNED: I.J. Strachan, W.D. Jago, N. McCombie.