

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

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THE COURT:

THE HONOURABLE MR. JUSTICE CÔTÉ  
THE HONOURABLE MADAM JUSTICE PICARD  
THE HONOURABLE MADAM JUSTICE HUNT

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION  
OF THE CORPORATE BOARD OF THE WORKERS' COMPENSATION BOARD OF  
THE NORTHWEST TERRITORIES ON MOTION #98/04-28, DATED APRIL 21, 1998;

BETWEEN:

SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY NEILL,  
JUDIT PANDEV, ELLA MAY CAROL RIGGS and DOREEN VODNOSKI,

Appellants  
(Respondents)

- and -

MARGARET K. WITTE

Respondent  
(Applicant)

- and -

THE WORKERS' COMPENSATION BOARD OF THE NORTHWEST TERRITORIES  
and THE CORPORATE BOARD OF THE WORKERS' COMPENSATION BOARD OF  
THE NORTHWEST TERRITORIES and JAMES O'NEIL

(Respondents)

AND BETWEEN:

THE WORKERS' COMPENSATION BOARD OF THE NORTHWEST TERRITORIES  
and THE CORPORATE BOARD OF THE WORKERS' COMPENSATION BOARD OF  
THE NORTHWEST TERRITORIES,

Appellants  
(Respondents)

- and -

MARGARET K. WITTE

Respondent  
(Applicant)

- and -

JAMES O'NEIL, SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY  
NEILL, JUDIT PANDEV, ELLA MAY CAROL RIGGS and DOREEN VODNOSKI,

(Respondents)

AND BETWEEN:

JAMES O'NEIL

Appellant  
(Respondent)

- and -

MARGARET K. WITTE

Respondent  
(Applicant)

- and -

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

(Respondents)

APPEAL FROM THE JUDGMENT OF  
THE HONOURABLE MADAM JUSTICE VEIT  
Dated September 15, 1998

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**MEMORANDUM OF JUDGMENT**

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**COUNSEL:**

J. P. Warner, Q.C.

For the Appellants Fullowka et al

G. A. McKinnon

For the Appellant Workers' Compensation Board

J. E. Redmond, Q.C.

For the Appellant O'Neil

K. F. Bailey, Q.C.

For the Respondent Witte

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## MEMORANDUM OF JUDGMENT

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### **HUNT J.A. (PICARD J.A. concurring):**

[1] In September 1992, a bomb exploded at the Giant Mine in Yellowknife, killing nine workers. This appeal, which relates to a decision of the Workers' Compensation Board of the Northwest Territories (the "Board"), is but one small part of the resulting litigation. Is the Respondent Margaret Witte ("Witte"), chief executive officer of the owner of the mine, immune from a damages suit launched by the dependants of the deceased miners, given that the miners were employed by the corporation that she headed? The Board decided she was not immune. The chambers judge quashed the Board's decision.

[2] In my view, the Board's decision is subject to review according to the standard of patent unreasonableness and its decision did not breach that standard. Accordingly, I would allow the appeal and restore the Board's decision.

### **BRIEF STATEMENT OF FACTS**

[3] The Appellants Fullowka *et al.* (the "Dependants") are dependants of six deceased employees of Royal Oak Mines Inc. ("Royal Oak"), the owner of the Giant Mine. The Appellant O'Neil ("O'Neil"), also employed by Royal Oak, crossed the picket line during an acrimonious labour dispute and claims to have suffered post-traumatic stress disorder as a result of the explosion.

[4] The Board accepted and paid the compensation claims of the Dependants, determining that the six miners were workers of Royal Oak. In 1994, the Dependants launched a claim for damages against various parties including Witte, but excluding Royal Oak. In a separate action commenced in 1997, O'Neil sought damages from various parties, including Witte. As discussed below, the Board has taken an active role in the Dependant's lawsuit as a subrogated party. There is no evidence that it has been involved in O'Neil's litigation.

[5] In 1996, Witte (who was the chief executive officer of Royal Oak at all relevant times) asked for a determination by the Board as to whether she was a "worker" for the purposes of the legislation and therefore immune from the Dependants' suit. An investigator of the Board (the "Assessment Officer") determined that she was not immune. She appealed his decision to the Board.

[6] The Board decided that Witte was not a "worker" under the legislation and therefore was not immune from suit. When Witte sought judicial review of the Board's decision in the Supreme Court of the Northwest Territories, O'Neil and the Dependants were added as parties.

[7] The chambers judge concluded that the Board's decision was incorrect, quashed it and directed the Board to reconsider, taking her reasons into account. The Board, the Dependants and O'Neil contest the chambers decision, although counsel for the Board takes no position as to the correctness of the Board's decision. Witte seeks to vary the chambers judge's determination that the Board's decision was not patently unreasonable.

[8] While the facts giving rise to the appeal are relatively simple, the governing legal principles are not. Before turning to the legal issues, it is necessary to review the applicable legislation and examine more closely the impugned decisions.

### **APPLICABLE LEGISLATION**

[9] Section 1 of the *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6, as am. ("the Act"), contains the following definition:

'worker' means a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes

- (a) any person engaged in training for mine or other rescue work or who with the knowledge and consent of the management or the person in charge of an authorized mine or other rescue crew, is performing rescue or recovery work after an explosion, accident or catastrophe,
- (b) where a contractor enters into a contract with a person engaged in any industry for the performance of operations for such other person, any employee of the contractor who performs the operations and the contractor himself or herself while actually performing these operations,
- (c) a member of a fire brigade, an ambulance driver, and any other person engaged in rescue work on a part-time basis, and whether working with or without remuneration, but only while so engaged,
- (d) a learner, and
- (e) any other person who, under the provisions of this Act or the regulations or under an order of the Board, is deemed to be a worker;

[10] The sole regulation passed by the Board relative to the definition of "worker" concerns offenders participating under a fine option program. *Workers' Compensation General Regulations*, R.R. N.W.T. 1990, c. W-21.

[11] The previously established Board is continued pursuant to s. 2 of the *Act*. It is to consist of not more than seven members appointed by the Minister. Section 3(2) provides that three members are a quorum and that the Board may act by a decision of a quorum. Section 5(2) states that the Board is to conduct its proceedings in the manner that it considers the most satisfactory. Section 6(3) authorizes it to delegate its power to staff members.

[12] The Board's general privative clause is found in s. 7(1):

Subject to section 7.3 [which is not relevant to this appeal], the Board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act, and the action or decision of the Board on them is final and conclusive and is not open to question or review in any court and, except where there has been a denial of natural justice or an excess of jurisdiction exercised by the Board, no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceedings in any court or be removable by *certiorari* or otherwise into any court, nor shall any action be maintained or brought against the Board in respect of any act or decision done or made by the Board in the honest belief that it was within the Board's jurisdiction.

[13] Section 7(2)(j) states that, without restricting the generality of 7(1), the Board's exclusive jurisdiction includes "whether a person is a worker within the meaning of this Act".

[14] Section 7.1 provides for an appeals tribunal. That body is pertinent to this appeal only because its privative clause is worded as follows:

7.9. (1) Subject to sections 7.7 and 7.8, a decision of the appeals tribunal on an appeal is final and conclusive.

(2) A decision of the appeals tribunal on an appeal may not be questioned or reviewed in any court.

[15] There is also a privative clause found in s. 12(3), which authorizes the Board to determine a plaintiff's right to compensation. The Board's determination in that regard is "final and conclusive".

[16] Section 8(1) states:

This Act applies to all employers and workers in all industries carried on in the Territories except the employers, workers or industries designated as exempt under the regulations or excluded under section 9.  
[emphasis added]

[17] Section 9 provides in part:

(1) The following persons shall not be considered to be workers for the purpose of receiving compensation under this Act:

- (a) an executive officer of a corporation who is in a position to guide or control the policies and purposes of the corporation;
- (b) a person who is in business on his or her own account or in partnership with other persons and is practising as a member of the legal, medical, accounting, actuarial, dental, pharmaceutical, architectural, engineering or other similar profession;
- (c) an employer or independent operator;
- (d) a member of the family of any person mentioned in paragraphs (a) to (c) who is employed by such person and living with him or her.

(2) Notwithstanding subsection (1), the Board may deem a person mentioned in subsection (1) to be a worker for the purpose of receiving compensation under this Act if the person is specifically named in the application and the actual rate of remuneration is set out in the application or the Board is satisfied that the actual rate of remuneration exceeds the Year's Maximum Insurable Remuneration for the year to which the application relates and the appropriate assessment is paid to the Board.

...

(4) The approval of an application under subsection (2) is effective until December 31 next following but the Board may at any time revoke its approval of an application under this section, and upon that the persons referred to in the order of revocation cease to be workers to whom this Act applies as at the effective date of the revocation.

[emphasis added]

[18] Sections 12 and 13 deal with the Board's right of subrogation. Section 12(2) provides:

This Act and the regulations are in place of all rights and causes of action, statutory or otherwise, to which a worker or his or her legal personal representative or dependants are or might become entitled against

- (a) the employer by whom he or she was employed at the time of the accident, or
  - (b) any worker in the employ of such employer
- by reason of personal injury to or the death of the worker caused by an accident to the worker that arises out of and in the course of his or her employment, and no action in respect of such personal injury or death lies against any employer or worker mentioned in paragraph (a) or (b).

[19] When the Board pays compensation to an injured worker, s. 12(4) subrogates the Board to the worker's cause of action. Section 13 deals with the effect of subrogation. Among other things, s. 13(1) prevents a worker from settling a claim without the consent of the Board; permits a worker to take an action with the Board's consent or the Board to take the action in the worker's name without the worker's consent; and permits the Board to settle the action. Section 13(4) contains a scheme for distribution of money received as a result of subrogation.

[20] Sections 62 to 77 deal with assessments. Section 66(2) provides:

Every person rendering service to a corporation, wherever and however incorporated or constituted, under a contract of service, written or oral, express or implied, whether that person is or is not a member, officer or executive of the corporation, and whether or not the corporation is or is not under legal obligation to pay such person any remuneration, shall be deemed to be a worker employed by the corporation and shall be included on the payroll of the corporation, and in every case, where the person is not being paid any remuneration or is being paid a nominal or token remuneration, the Board shall, for the purposes of assessment, fix such sum as in its opinion represents a reasonable remuneration for the service rendered by the person, having regard to the nature of the employment, but not exceeding in any year the Year's Maximum Insurable Remuneration and the Board shall, for the purpose of its assessment, add the sum so fixed by it to the amount of the payroll of the corporation.

[emphasis added]

[21] This section is related to the requirement, found in s. 66(1), that every employer annually provide the Board with a statement of the remuneration it has paid during the past year and the remuneration it estimates to be payable in the current year. Section 67(5) entitles the Board to examine employers' books in order to ascertain whether the *Act* applies to "any person". Witte was not included on Royal Oak's payroll statement. Nor did she apply for coverage under s. 9(2). (AB 169, 192)

[22] It should be noted that the *Act* differs somewhat from other like statutes in Canada. For example, it extends benefits to persons engaged in hunting, trapping or fishing (s. 10). It is apparently the only statute in Canada that permits an injured worker to sue an employer other than his own employer, even when that other employer is covered by the *Act* (s. 12(2)). And, as discussed below, its privative clause contains unusual language.

### **PROCEEDINGS BEFORE THE BOARD**

[23] As already mentioned, in May 1996 counsel for Witte wrote to the Board requesting it to exercise its jurisdiction under s. 7(1) and (2)(j) of the *Act* and “inquire into, hear and determine whether Ms. Witte is a worker, within the meaning of the *Act*, of Royal Oak Mines, for purposes set out in section 12(2) of the *Act*” (AB 56). Witte’s counsel included a copy of her employment contract with Royal Oak.

[24] In September 1996, the Board retained separate counsel to advise it on procedural or legal matters relating to Witte’s application. That counsel advised affected parties that other counsel (Warner) would continue to represent the Board “in its capacity as subrogated plaintiff” (AB 73). (Pursuant to s. 12(4), mentioned above and discussed in more detail later, having paid the claims of the Dependants the Board had become a subrogated plaintiff in their civil action against Witte and others). That counsel invited various parties to make submissions to the Board’s Assessment Officer concerning possible immunity from suit, and advised that, in accordance with the usual practice of the Board, an appeal would lie from a decision of the Assessment Officer to the Board’s Appeal Commission. Although nothing turns on this, the Board later determined that an appeal would lie rather to its Corporate Board, and so advised the parties.

### **THE REPORT OF THE ASSESSMENT OFFICER**

[25] Following his investigation, the Assessment Officer submitted his report to the Board (AB 164-70). He addressed several issues. He concluded that the six miners were employed by Royal Oak and that all the allegations against Witte in the action of the Dependants related to her activities as an officer and/or director of Royal Oak.

[26] He considered whether she was a “worker” in the employ of Royal Oak and immune from suit because her alleged activities related to her capacity as an officer or director of Royal Oak. He noted that she appeared to be a “worker” under s. 66(2) for assessment purposes. He also noted that s. 66(2) appeared to conflict with s. 8(1) combined with s. 9(1), which excluded executive officers from the *Act* for the purpose of receiving compensation. He sought a way of interpreting these provisions so as to avoid contradiction.

[27] He observed that s. 66(2) was designed to prevent a corporation from avoiding assessments by designating workers as officers of the corporation. He said that s. 66(2) had been traditionally interpreted “to provide coverage to members, officers or executives of a corporation who also perform worker functions and are exposed to the hazards of the industry” (AB 168), but that there was no suggestion that Witte had worked in the mine. He added:

The Board has always taken the position that there must be symmetry between compensation paid and assessment received. When section 9 is read in its entirety it would appear that the intention of the Act is to exclude executive officers from the application of the Act unless they make a specific application pursuant to subsection 9(2).

...

Under the Act Witte had the option as per subsection 9(2) to apply for coverage. Had she done so ... then she would have been deemed to be a worker and would then have been entitled to immunity from suit.  
(AB 168-69)

[28] He concluded that she was not a “worker” of Royal Oak and thus not immune from suit. Witte appealed to the Corporate Board.

### **THE DECISION OF THE CORPORATE BOARD**

[29] At the beginning of its *de novo* hearing of her appeal in October 1997, the Board made it clear that, in its administrative capacity, it had retained counsel, Mr. Warner, “to pursue the present civil action” (i.e. the Dependants’ action against Witte) and had met with and given instructions to that counsel (AB 221). The record is unclear at exactly what point or in what way the Board had become involved in the lawsuit. It is apparent, however, that by September 1996, when the Board retained a different counsel to advise it on procedural and legal matters pertaining to Witte’s application, Mr. Warner was already representing the Board “in its capacity as subrogated plaintiff” (AB 73). Notwithstanding the above disclosure, no objection was taken to the Board’s composition or proposed hearing procedure.

[30] In its written reasons (AB 248-64) following the appeal hearing, the Board concluded that ss. 8(1), 9(1) and 66(2) could be reconciled. It noted that s. 66(2) was found in a part of the *Act* entitled “ASSESSMENTS”. It observed that part of the purpose of that portion of the *Act* was to permit the Board to determine the appropriate payroll for assessment purposes. After the disclosure of appropriate records pursuant to these provisions, it was for the Board to determine whether the *Act* applied to persons mentioned in the records.

[31] To determine whether or not the *Act* applied to a person, it was necessary to look at Part II of the *Act*, where ss. 8 and 9 are found. The Board opined that s. 9(1) excluded, among others, executive officers for the purpose of receiving compensation, unless they applied for and paid assessments under s. 9(2). Witte had not done so. Because she was not, therefore, a “worker” under s. 9(1), she was a worker excluded under section 9, and thus, according to s. 8(1), the *Act* would not apply to her.

[32] On this reasoning, the Board concluded that Witte was a worker in the employ of Royal Oak for assessment purposes, “but she was not a worker to whom the *Act* applies” (AB 264). As such, she was not immune from the suit. The Board found it unnecessary to decide whether the activities set out in the civil claim related to her activities as a worker or as an officer or director.

### **THE CHAMBERS DECISION**

[33] In summary, the chambers judge stated that the usual standard of review for a decision by the Board as to who is a “worker” is patent unreasonableness. In this case, however, the Board was in a conflict of interest because it had hired a lawyer to sue Witte. Normally, when there is a conflict of interest, a board is prevented from acting. But here, only the Board had the jurisdiction to decide the issue. “In order to reduce, as much as possible, the sting of the conflict”, she determined that the Board’s decision had to be correct (AB 267). In her view, it was not correct, although it was not patently unreasonable.

[34] It is necessary to analyse the reasoning of the chambers judge. At AB 271, she referred to the Board’s policy that executive officers are excluded from compensation coverage by virtue of s. 9(1) and must apply for personal optional coverage if they are to obtain coverage. She also mentioned the Board’s policy that executive officers were not to be included on the corporation’s annual payroll report. These were not matters included in the Board’s decision, although they were discussed in the Assessment Officer’s report.

[35] The chambers judge noted that, while workers’ compensation boards typically make decisions that impact on their Accident Funds, such decisions are almost exclusively about whether the Fund has to compensate an injured worker. There is no reasonable apprehension of bias in such a situation because the board is finding against itself. (AB 273)

[36] In this case, in contrast, the Board had become an active litigant against Witte in “an attempt to produce the fall of some money into its lap. The Board’s action in finding and hiring and paying a lawyer to represent the dependants of the six miners, and privately discussing legal strategy with that lawyer, has created a real, serious, material, direct conflict between the Board and Ms. Witte” (AB 273). This resulted in a breach of natural justice.

[37] The chambers judge rejected Witte's argument that the Board's privative clause (s. 7) only protects decisions untainted by breaches of natural justice. Rather, in her view, that section is a codification of the common law and does not give greater judicial authority to interfere with a Board decision than would have been the case absent a specific reference to natural justice. She pointed out that the courts always have the authority to interfere with decisions when there has been a breach of natural justice.

[38] She opined that a correctness standard should apply when the Board is in a serious conflict of interest. This would both respect the doctrine of necessity and impose the least interference with the independence of tribunals.

[39] She next determined that the Board's decision was incorrect. She concluded that Witte fell within the definition of "worker" in the *Act*. Under s. 9(1), she was not a worker for the purposes of receiving compensation. But for all other purposes, including immunity from suit, she was a worker under the *Act*.

[40] At AB 275, she gave these reasons for concluding that the legislation did not support the Board's view:

- the words used by the legislator include "receiving" in reference to compensation. This is a very specific aspect of compensation and exhibits a degree of specificity that was obviously chosen, not inexorable;
- although s. 9(4) does include a reference to "workers to whom this Act applies" rather than "workers for the purpose of receiving compensation", it is a principle of statutory interpretation that the specific prevails over the general. Therefore, the specific wording of s. 9(1) prevails over the general wording of s. 9(4);
- Part II of the Act which includes ss. 8, 9, and 12, is divided into two groupings of sections. The first grouping is headed "Application of Act" and the second is headed "Rights of Action and Subrogation". Obviously, therefore, the legislator has treated these two groups of issues separately.

[41] In the event that she was wrong in determining that the correctness standard applied, she expressed the view that the Board's decision was not clearly irrational and thus did not breach the patently unreasonable standard. She ordered the Board to rehear Witte's application, taking account of her decision.

## ISSUES

[42] The following issues are raised by this appeal:

1. **What is the standard of review to be applied to the Board's decision?**
2. **Depending on the answer to the first issue, is the Board's decision incorrect or patently unreasonable?**

## STANDARD OF REVIEW

[43] The weight of precedent suggests that the appropriate standard of review in this case is patent unreasonableness. This was the view of the chambers judge, save for her opinion that the Board was in a conflict of interest that could only be resolved by the imposition of a standard of correctness.

[44] The most recent decision of the Supreme Court of Canada to consider the standard of review relative to a workers' compensation board concludes that the patently unreasonable test applies. In *Pasiechnyk v. Saskatchewan (W.C.B.)* (1997), 149 D.L.R. (4th) 577, the question before the board was whether a civil suit by injured workers could proceed against the Government of Saskatchewan. It also concerned whether, when it acts as a regulator, the Government is an "employer" within the meaning of the Saskatchewan Act. The board's decision that the action against the Government was barred by the legislation was upheld by the Supreme Court as not being patently unreasonable.

[45] Writing for the majority, Sopinka J. first considered the Saskatchewan board's privative clause. That clause is similar to s. 7(1) in the Act, except that the latter contains additional words beginning "except where there has been a denial of natural justice or an excess of jurisdiction exercised by the Board". I will return to the effect of those additional words.

[46] Noting at 588 that a full privative clause is one that "declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded", he characterized the provision in the Saskatchewan Act as having full privative effect. He concluded that the question before the board was one that the legislators intended to be left to the exclusive decision of the board.

[47] He tested his conclusion by reference to other factors involved in the functional and pragmatic approach adopted by the Court in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048. At 590, Sopinka J. underscored the history and purpose of the workers' compensation scheme, noting that it embodied a "historic trade off" by which workers lost their cause of

action against their employers but gained compensation that depends neither on the fault of the employer nor its ability to pay”. He pointed out that courts have consistently held that workers’ compensation boards have the final authority to determine whether a lawsuit is barred. See e.g. **The Dominion Cannery v. Costanza**, [1923] S.C.R. 46; **O’Krane v. Alcyon Shipping Co. Ltd.**, [1961] 34 W.W.R. 615 (S.C.C.); **Mack Trucks Mfg. Co. Ltd. v. Forget** (1973), 41 D.L.R. (3d) 421 (S.C.C.).

[48] He noted the central role played by such boards in the administration of workers’ compensation schemes, observing that boards have a role to play in regard to the three main parts of these systems (compensation and rehabilitation of injured workers; bars to actions; and the injury fund). He also emphasized the expertise that such boards bring to their work, stating that it would undermine the overall scheme if courts were to assume jurisdiction over the question of whether or not a civil suit was barred (at 596).

[49] Since the decision in **Pasiechnyk**, the Supreme Court has offered further refinements to judicial review rules. **Pushpanathan v. Canada (M.C.I.)** (1998), 160 D.L.R. (4th) 193. At 209, Bastarache J. adopted the language of Sopinka J. in **Pasiechnyk**, saying that the central inquiry in determining the standard of review is “the legislative intent of the statute creating the tribunal whose decision is being reviewed.” More particularly, was the question which the provision raises one that the legislators intended to be left to the exclusive jurisdiction of the tribunal?

[50] Bastarache J. re-iterated the pragmatic and functional approach described in **Bibeault**. He outlined four factors to be taken into account in determining the appropriate standard of review: privative clauses; expertise; the purpose of the *Act* as a whole and the provision in particular; and whether the issue at hand is a question of law or a question of fact.

[51] Briefly, according to Bastarache J., the presence of a full privative clause suggests a high level of deference. A high degree of expertise on the tribunal also suggests a high level of deference. The purpose of the *Act* and the provision in question are often related to the expertise of the tribunal. The appropriateness of court supervision diminishes as the purpose of the statute is more related to a delicate balancing between different constituencies rather than the establishment of rights between parties.

[52] Bastarache J. made specific reference to **Pasiechnyk**, noting at 213 that courts should be less deferential when the contentious issue is a question of law, unless “other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention, as this Court found to be the case in **Pasiechnyk**.” At 214, he said that, in **Pasiechnyk**, it had been confirmed that “the broad expertise of the Workers’ Compensation Board to determine all aspects of ‘eligibility’ under that system was considered sufficiently broad to include the

determination that the term ‘employer’ included claims against the government for its alleged negligence in regulating the works of two companies which had led to workers’ injuries”.

[53] Given that the principles of *Pasiechnyk* have been reinforced by *Pushpanathan*, and given the many other cases that have stressed the importance of deference to decisions of workers’ compensation boards, the conclusion that the Board’s decision is reviewable on an unreasonableness standard is overwhelming, unless, applying the analysis of *Pushpanathan*, this case can be distinguished from *Pasiechnyk* and its predecessor cases. The answer to this inquiry requires a deeper analysis of the Board’s privative clause, s. 7(1).

### THE EFFECT OF THE PRIVATIVE CLAUSE

[54] Briefly, the Respondent argues that s. 7, enacted by the Northwest Territories Legislature in 1974, is not a “full” privative clause. Rather, it specifically invites judicial review if there is a breach of natural justice or an excess of jurisdiction. Effect must be given to the additional language mentioned above, which did not appear in the previous version of the *Act*. According to the Respondent, if the decision is not protected by the privative clause, it must be assessed on a standard of correctness. *C.I.B.C. v. Alberta Assessment Appeal Board* (1992), 89 D.L.R. (4th) 20 (Alta. C.A.); *Alberta Industrial Relations Bd. v. Stedelbauer Chev. Olds. Ltd.*, (1968) 1 D.L.R. (3d) 81 (S.C.C.); *Yellow Cab Ltd. and Board of Industrial Relations (Re)* (1980), 114 D.L.R. (3d) 427 (S.C.C.).

[55] Here, it is said, there has been a breach of natural justice because of non-compliance with the principle *nemo iudex in causa sua debet esse* (no one shall be a judge in his own cause). Having instructed the counsel who is pursuing the subrogated action against the Respondent, the Board cannot also judge whether that action is barred by the legislation. The Board has an obvious financial interest in the outcome of its decision.

[56] The Appellants assert that s. 7 is a full privative clause. It merely codifies the law, according to which not even a privative clause can oust the jurisdiction of the courts to review breaches of natural justice or excesses of jurisdiction: *C.U.P.E., Local 963 v. N.B. Liquor Corp.* (1979), 97 D.L.R. (3d) 417 at 425 (S.C.C.) per Dickson J.

[57] Counsel have been unable to find any cases that have interpreted a privative clause that is similar to s. 7. The arguments on both sides have some merit. It may be significant that the more recently-enacted privative clause (s. 7.9), pertaining to the appeals tribunal, contains language that seems more evidently intended to be a “full” privative clause. As well, s. 12(3), which concerns the Board’s authority to decide if anyone is entitled to compensation, states that such a decision is “final and conclusive”. The wording of these two provisions enhances the Respondent’s argument that s. 7(1) is not a full privative clause.

[58] I will assume, without deciding the point, that s. 7 is not a full or true privative clause. But I am not persuaded that, as a result, the Board's decision in this matter is subject to a standard of correctness. There are two reasons for my view.

[59] First, even if the privative clause is not "full", the reviewing court must still take a "pragmatic and functional" approach to the question of the standard of judicial review, applying the four factors outlined in **Pushpanathan**. I acknowledge that **Pushpanathan** specifically anticipates that different decisions of the same tribunal may be subject to different standards of review. I also acknowledge that the privative clause in this case differs from those found in other decisions concerning workers' compensation boards and that those authorities may not be conclusive. I remain unconvinced, however, that an application of the **Pushpanathan** factors leads to the conclusion reached by the chambers judge concerning standard of review.

[60] The central inquiry must be the legislative intent of the drafters of the statute. Did they intend that the matter at issue would be determined by the Board? In this case, even if the privative clause is not "full", it nevertheless reveals a legislative intention that decisions by the Board will be final and conclusive and subject to review by the courts only in limited circumstances. The expertise of such boards has been noted in many cases, most recently in **Pasiechnyk** at 595:

The composition, tenure, and powers of the Board demonstrate that it has very considerable expertise in dealing with all aspects of the workers' compensation system. Not only does the Board have day-to-day expertise in handling claims for compensation, in setting assessment rates and promoting workplace safety; but it also has expertise in ensuring that the purposes of the Act are not defeated. As Wakeling J.A. commented at p. 301 in his dissenting reasons:

[The Board members] are well equipped to draw on a background of experience to determine how the Act will best function so as to assure a continued consistent development of the intended purposes of the Act. I have no reason to doubt they are well qualified to decide the various issues the legislation is designed to present them.

[61] The purpose of this kind of legislation was also reviewed in **Pasiechnyk** at 590 *et seq.*, leading to the conclusion that such boards are especially well-placed to "decide the question of whether the statutory bar applies, because this question is intimately related to one side of the historic trade-off embodied in the system". The Court noted at 592 that courts have consistently held that the question of whether the statutory bar applied to an action was finally committed to the board.

[62] I accept the Respondent's argument that the issue here involves statutory interpretation and that, as a question of law, it would normally engage a correctness test. **Pasiechnyk**, however, involved the same kind of question. Nevertheless, a standard of unreasonableness was applied. In part, Sopinka J. explained why at 596:

There can be no question that the question of eligibility for compensation is one that is within the Board's exclusive jurisdiction. It is also clear upon examination that the issue of whether an action is barred is equally within the Board's exclusive jurisdiction. It would undermine the purposes of the scheme for the courts to assume jurisdiction over that question. It could lead to one of the problems that workers' compensation was created to solve, namely, the problem of employers becoming insolvent as a result of high damage awards. The system of collective liability was created to prevent that, and thus to ensure security of compensation to the workers. Individual immunity is the necessary corollary to collective liability. The interposition of the courts could also lead to uncertainty about recovery. Anglin J. recognized this in *Dominion Cannery*, where he suggested that the purpose of the Act reserving to the Board exclusive jurisdiction over the question of whether an action was barred was to avoid a worker's being completely denied recovery should the Board determine that he or she was not entitled to compensation but the court determine that he was.

[63] In **Pushpanathan**, Bastarache J. observed that **Pasiechnyk** was one of the unusual cases where, notwithstanding that a question of law was involved, the other factors compelled the conclusion that the correctness standard should not apply. He stated at 214 that "[t]he creation of a legislative 'scheme' combined with the creation of a highly specialized administrative decision-maker, as well as the presence of a strong privative clause, was sufficient to grant an expansive deference even over extremely general questions of law".

[64] Thus, whether or not the privative clause is considered "full", in light of the law recently enunciated by the Supreme Court I am unable to conclude that this is a case where correctness applies.

[65] Second, even assuming that the privative clause is not "full", in the circumstances of this case it would nevertheless protect the Board's decision, unless it could be established that there had been a breach of natural justice. Although the *nemo iudex* principle is a fundamental part of natural justice (R. Dussault & L. Borgeat, *Administrative Law, A Treatise*, 2nd ed., vol. 4, (Toronto: Carswell, 1990)), it is subject to exceptions. Specifically, there can be no breach of the *nemo iudex* principle if the legislature has authorized the Board's overlapping functions. This exception was described by L'Heureux-Dubé J. in **Brosseau v. Alta. Securities Comm.**, [1989] 3 W.W.R. 456 at 464 (S.C.C.):

Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body. ... In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of “reasonable apprehension of bias” per se.

[66] In this case, I think the legislation authorizes the overlapping functions. Section 7(2)(j) gives the Board the jurisdiction to decide if someone is a “worker” within the meaning of the *Act*. Section 12(2)(b) prohibits an action by an injured worker against another “worker” in the employ of an employer at the time that the injured worker was injured. Thus, the Board has been authorized to determine if a suit against a party is prohibited by the *Act*.

[67] At the same time, s. 12(4) of the *Act* states that, in circumstances that are here applicable, the Board is “subrogated to the cause of action of the [injured] worker ...”. Reference has already been made to the elements of the subrogated right set out in s. 13. In brief, the *Act* permits the worker to take an action in his name with the consent of the Board and permits the Board to take an action in the name of the worker, without the worker’s consent.

[68] It is true that the *Act* does not specifically authorize the Board to give instructions to counsel in the subrogated action. But it is hard to imagine such circumstances not having been contemplated by the Legislature. In a case where the Board has taken an action in the worker’s name without the worker’s consent, who but the Board would be able to give such instructions? Moreover, s. 13(1)(d) permits the Board to “effect a settlement of the claim” when the action has been taken by the Board or by the worker. Again, by implication, this provision authorizes the Board to give instructions to counsel.

[69] It is my view that this situation falls within an exception to the *nemo iudex* principle. Thus, there has been no breach of natural justice.

[70] In this context, it is notable that there are two Supreme Court decisions where a workers’ compensation board had taken a subrogated action and also decided whether that action was barred by the legislation. ***O’Krane, supra***; ***Mack Trucks, supra***. In neither case was it held that the Board lacked the exclusive jurisdiction to decide the immunity issue.

[71] In *O'Krane* at 620, Judson J. explicitly rejected the argument that, because of the board's apparent interest in the outcome, the courts rather than the board should decide the issue of immunity to suit.

The shipping company questions the application of the *Costanza* case on the ground that the board has an interest in its own decision when it is asserting the rights of a workman against a third party by way of subrogation under sec. 11(3) of the Act. Such a situation, it is urged, should suggest to the court a limitation of the board's powers of exclusive decision to those cases where it has no interest – and this as a matter of interpretation and not by way of attack on the constitutional validity of the legislation. I question whether the board's assertion of a workman's common-law rights in an action such as this can be characterized as an invalidating interest in any decision which the board may make in the performance of its statutory duties, but interest or no interest, this is expressly what the board is authorized to do by the plain terms of the Act and no such limitation can be imposed on the plain meaning of the Act.

[72] Some 12 years later, a similar point arose in *Mack Trucks*. A board's subrogated action was dismissed by a trial judge on the sole ground that the action was barred by the legislation. The Court of Appeal then referred to the board the issue of whether the right of action existed, expressing the view that this was a matter within the board's exclusive jurisdiction. After the board decided that a right of action existed, the Court of Appeal reversed the trial decision. The Supreme Court, per Judson J., agreed with the Court of Appeal, stating at 424:

There are three decisions of this Court which conclusively hold that it is within the exclusive jurisdiction of the Board to determine whether or not the plaintiff's right of recovery and right of action are taken away by the provisions of the statute. These cases are: *Dominion Cannery Ltd. v. Costanza*, [1923] 1 D.L.R. 551, [1923] S.C.R. 46, 23 O.W.N. 409; *Alcyon Shipping Co. Ltd. v. O'Krane* (1961), 27 D.L.R. (2d) 775, [1961] S.C.R. 299, 34 W.W.R. 615; *Farrell et al. v. Workmen's Compensation Board and A.-G. B.C.* (1961), 31 D.L.R. (2d) 177, [1962] S.C.R. 48, 37 W.W.R. 39.

The Court of Appeal, therefore, was right on the hearing of the appeal to stay the action pending an application to the Workmen's Compensation Board for its decision. This was done on September 15, 1970. On December 1, 1970, the Board, after hearing both parties, decided that the right to bring the action had not been taken away in this case. On April 19, 1971, the Court of Appeal gave its final decision. It found that the Board had determined the only remaining issue in the action. It reversed the judgment under appeal and directed judgment in favour of the plaintiff for the damages which had been agreed upon.

In my opinion, the Court of Appeal was right in following this course. I would affirm its judgment ...  
[emphasis added]

[73] The Supreme Court was clearly aware of the identity of the plaintiff in the lawsuit, since Judson J.'s decision began at 422 with these words: "The real plaintiff in this action is the Workmen's Compensation Board suing in the name of ... a workman injured in a motor-car accident ... . The issue is the Board's right to sue Mack Trucks Manufacturing Co. of Canada Ltd." Not only did an apparent conflict pose no concern to the courts: if anything, they aided the conflict by referring to the board the very question of whether it had a right of action.

[74] I am thus forced to conclude that the standard of review in this case is patent unreasonableness.

#### **WAS THE BOARD'S DECISION PATENTLY UNREASONABLE?**

[75] As noted earlier, the chambers judge expressed the view that, if the correctness standard did not apply, she could not say that the Board's decision breached the standard of patent unreasonableness, since it was not "clearly irrational". The Respondent seeks to vary that finding.

[76] I agree that the Board's decision does not breach the standard of patent unreasonableness. The Supreme Court has described the test for that standard as follows:

It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons.

Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational... . Not acting in accordance with reason or good sense".

Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test. [emphasis added]

**(Canada (A.G.) v. PSAC**, [1993] 1 S.C.R. 941 at 963-64)

[77] The Supreme Court has also said that an interpretation is not patently unreasonable in circumstances where there is an undoubted ambiguity in the legislation and no single

interpretation that can be said to be right: per Dickson J. in *C.U.P.E., supra*, at 426. This is especially so when the interpretation of the provision lies logically at the specialized jurisdiction confided to a board: *op. cit.* at 424.

[78] In this case, the Board observed at AB 262 that the wording of the *Act* was “less than ideal” but that its provisions could be interpreted so as not to give rise to a contradiction. The Board’s rationale was that s. 66(2) (which deems a person under a contract of service to be a worker “employed by the corporation”) exists for the purpose of disclosure, in order to enable the Board to determine the corporation’s appropriate payroll for assessment purposes. After examining the records, the Board has the power, under s. 67(5) to decide whether “the *Act* applies to a person referenced in those documents” (AB 262). In order to determine whether the *Act* applies to a person, ss. 8 to 11 of the *Act* must be examined. Section 8 makes the *Act* inapplicable to workers exempted under s. 9. Section 9 exempts executive officers “for the purpose of receiving compensation”. Since Witte did not apply under s. 9(2) to be deemed a worker for the purpose of receiving compensation, she was excluded under s. 9(1) and thus, according to s. 8(1), the *Act* would not apply to her.

[79] As the chambers judge noted, there was at least one other way of interpreting these provisions, namely, that s. 9(1) exempts executive officers for the purpose of compensation but not for other purposes such as immunity from suit. I agree that such an interpretation is preferable, for several reasons.

[80] First, on its face, the definition of “worker” in the *Act* includes Witte because she was employed under a contract of service. Second, s. 8 would make the *Act* applicable to her unless she was exempted by the *Regulations* or excluded under s. 9. She could have, but had not, been excluded under the *Regulations*. As for her exclusion under s. 9, subsection (1) contains the specific limitation “for the purpose of receiving compensation”. Thus, on its clear wording, s. 9(1) does not exclude her from the *Act* for other purposes, such as immunity from suit. Third, such an interpretation seems to accord with the overall purpose of the *Act*: an employer that pays assessments, and its workers, are immune from suit, presumably on the theory that the injured worker will receive the necessary compensation through the Accident Fund. It is less easy to fathom how the overall purpose of the *Act* is served when the employer’s chief executive officer is liable to suit by a worker or his dependants.

[81] Nevertheless, I cannot say that the interpretation settled upon by the Board was clearly irrational. It was a possible way of reconciling troublesome provisions, even if it is not the way that I would have reconciled them.

[82] I reject Witte’s argument that the Board’s interpretation is absurd because it would mean that “‘employers’ who are **mentioned** in section 9(1)(c), would also be persons to whom the *Act* does not apply under section 8 because they are excluded under section 9” (Respondent’s

factum para. 57). On the contrary, it is possible to interpret s. 9(1)(c) as referring to employers when they are in a capacity other than that of an employer.

[83] For the above reasons, it is my view that the appeal must be allowed, the cross-appeal dismissed, and the Board's decision re-instated.

APPEAL HEARD on SEPTEMBER 8 and 9, 1999

MEMORANDUM FILED at YELLOWKNIFE, NWT,  
this 16th day of DECEMBER, 1999

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HUNT J.A.

I concur: 

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PICARD J.A.

**CÔTÉ J.A., concurring in the result:**

[84] I have read the judgment of Hunt J.A. in draft form. Many of the authorities which she cites are binding upon this Court, and so I am obliged to concur. However, I share the hesitations which she delicately conveys in several places in her judgment.

[85] Indeed, speaking only for myself, I wish to express feelings stronger than hesitation. (These feelings do not, of course, imply any criticism of Hunt J.A., who is as much bound by precedent as am I.) The Board was acting as the judge in a very important issue in its own lawsuit, and was setting a precedent for future lawsuits by itself. It found in favour of itself on a question of interpretation of a public statute, and (in my respectful view) was probably wrong in that interpretation. Yet current Canadian case law directs me to accord the widest possible deference to that decision, a deference sometimes greater than that which the courts often accord to legislative bodies or to other courts. A citizen who loses a contest with such a board under such circumstances may well feel that though the scales were heaped with social engineering, justice was not weighed at all.

APPEAL HEARD on September 8 and 9, 1999

MEMORANDUM FILED at YELLOWKNIFE, NWT,  
this 16th day of December, 1999

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CÔTÉ J.A.

APPEAL #CA 00788/789/792

A.D. 1999

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IN THE COURT OF APPEAL OF  
THE NORTHWEST TERRITORIES

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION OF THE  
CORPORATE BOARD OF THE WORKERS' COMPENSATION BOARD OF THE NORTHWEST  
TERRITORIES ON MOTION #98/04-28,  
DATED APRIL 21, 1998;

BETWEEN:

SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY NEILL, JUDIT PANDEV, ELLA  
MAY CAROL RIGGS and DOREEN VODNOSKI,

Appellants  
(Respondents)

- and -

MARGARET K. WITTE

Respondent  
(Applicant)

- and -

THE WORKERS' COMPENSATION BOARD OF THE NORTHWEST TERRITORIES and THE  
CORPORATE BOARD OF THE WORKERS' COMPENSATION BOARD OF THE NORTHWEST  
TERRITORIES  
and JAMES O'NEIL

(Respondents)

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**MEMORANDUM OF JUDGMENT OF THE COURT**

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