

**NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL**

Applicant:                    [\*]

Respondents:                [\*] et al and  
**The Workers' Compensation Board of Nova Scotia**

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**SECTION 29 APPLICATION - PRELIMINARY DECISION**

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Representatives:            James L. Chipman and Sara L. Scott, for the Applicant  
                                  Jamie MacGillivray and Janus Siebrits, for the Respondents  
                                  Stephen Lawlor, for the Workers' Compensation Board

Action:                        S.H. No. 289114

WCB Claim No.:             N/A

Date of Decision:            January 12, 2009

Decision Summary:         The Tribunal has jurisdiction to hear the within application pursuant to s.29 of the *Act* according to the reasons of Chief Appeal Commissioner Louanne Labelle.

**BACKGROUND TO THE APPLICATION:**

This application was made to the Tribunal on June 25, 2008 by CM under s. 29 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 as amended [*Act*].

[CM] is the defendant in an action brought on behalf of several plaintiffs who are the survivors of RS tragically killed in a motor vehicle accident on June 5, 2007. CM is seeking a ruling that the action against her by the plaintiffs/respondents in this application [hereinafter referred to as "G"] is barred by operation of s.28 of the *Act*.

By letter dated July 11, 2008, the solicitors for G raised an objection to the Tribunal's jurisdiction to hear the application under s.29 of the *Act*.

The parties to this application agreed that the Tribunal would adjudicate the jurisdictional issue raised by G as a preliminary issue prior to dealing with the merits of the application. The parties filed an agreed statement of facts on October 1, 2008. Counsel for G filed pre-hearing submissions on October 14, 2008. Counsel for CM filed pre-hearing submissions on November 6, 2008. Counsel for the Board filed pre-hearing submissions on November 27, 2008.

**ISSUE AND OUTCOME:**

*Does this Tribunal have jurisdiction to hear the application made by CM under s.29 of the Act?*

Yes. For the reasons set out below, the Tribunal has jurisdiction to hear the application and to decide whether the action against CM is barred by s.28 of the *Act*.

**ANALYSIS:**

Section 29 of the *Act* gives exclusive jurisdiction to the Workers' Compensation Appeals Tribunal [the "Tribunal"] to determine whether an action is barred by operation of the *Act*.

G et al have begun an action against CM who has, in turn, applied to this Tribunal for determination as to whether the action is barred by operation of s.28 of the *Act*.

Section 28 reads as follows:

**28 (1)** The rights provided by this Part are in lieu of all rights and rights of action to which a worker, a worker's dependant or a worker's employer are or may be entitled against

- (a) the worker's employer or that employer's servants or agents; and
  - (b) any other employer subject to this Part, or any of that employer's servants or agents,  
as a result of any personal injury by accident
  - (c) in respect of which compensation is payable pursuant to this Part; or
  - (d) arising out of and in the course of the worker's employment in an industry to which this Part applies.
- (2)** Clause (1)(b) does not apply where the injury results from the use or operation of a motor vehicle registered or required to be registered pursuant to the *Motor Vehicle Act*. 1994-95, c. 10, s. 28.

G has objected to the Tribunal's jurisdiction to determine whether the action is statute barred under s.28 of the *Act*.

Section 29 of the *Act* sets out the Tribunal's jurisdiction and it reads as follows:

- 29 (1)** Any party to an action may apply to the Chief Appeal Commissioner of the Appeals Tribunal for determination of whether the right of action is barred by this Part.
- (2)** An application made pursuant to subsection (1) shall be determined by the Appeals Tribunal constituted according to Section 238.
- (3)** The Appeals Tribunal has exclusive jurisdiction to make a determination of whether the right of action is removed by this Part.
- (4)** The decision of the Appeals Tribunal pursuant to this Section is final and conclusive and not open to appeal, challenge or review in any court, and if the Appeals Tribunal determines that the right of action is barred by this Part, the action is forever stayed. 1994-95, c. 10, s. 29.

The parties in this matter have filed an agreed statement of facts. The facts are not in dispute. I will briefly summarize the more relevant facts pertaining to the determination of this preliminary issue relating to the Tribunal's jurisdiction.

A motor vehicle accident occurred on June 5, 2007 in Marystown, Newfoundland. RS was one of two people killed in the accident. RS's estate has commenced a legal action in the Supreme Court of Nova Scotia against the applicant in this matter, CM, who was the driver of the vehicle in which RS was travelling.

At the time of the accident, CM and RS were employees of RGIS Inventory Specialists of Canada, ULC, ["RGIS"] a body corporate registered to carry on business in Nova Scotia. They were both residents of Nova Scotia working on assignment in Newfoundland for RGIS.

Following the accident, Counsel for G advised the Workers' Compensation Board of Nova Scotia, the Workplace Health Safety & Compensation Commission of Newfoundland and Labrador and RGIS that RS's survivors were exercising their rights under s.27 of the *Act* to receive workers' compensation benefits according to the laws of Newfoundland.

At the request of the Newfoundland and Labrador Commission, G completed an election to claim compensation (extra-jurisdictional) dated July 15, 2007. The election indicated that G chose to claim compensation (or damages) under the law of Newfoundland and Labrador where the fatality occurred. G subsequently elected to opt out of claiming compensation under the *Workplace Health, Safety and Compensation Act*, RSNL 1990 C. W-11, as amended [the *Newfoundland Act*], choosing rather to make a claim in damages before the courts.

G elected to proceed with the action for damages pursuant to the Newfoundland *Fatal Accidents Act*, in the Supreme Court of Nova Scotia as is evidenced by the pleadings, particularly the Originating Notice (Action) and Statement of Claim filed in S.H. No. 289114.

CM filed a defence to the action claiming that the action was statute barred pursuant to the *Act*.

There is no dispute that CM and RS were co-workers both employed by RGIS, a covered employer in Nova Scotia at the time of the accident.

### Argument

Counsel for G articulated the issues in this preliminary matter as follows:

Was the election in terms of s.27 of the *Act* properly made? and  
Were the respondents entitled to start an action under the laws of the Province of Newfoundland and Labrador for common-law damages?

These issues may be decided by the Tribunal on the hearing of the merits of the application but they are not necessarily the issues that the Tribunal must answer in dealing with the preliminary jurisdictional issue.

Counsel for G argues on this preliminary issue and presumably will argue on the merits of the application that, because of the election under s.27 of the *Act*, and because of the provisions of Newfoundland legislation, G was entitled to sue CM in Nova Scotia under the

laws of Newfoundland and Labrador.

I will not address whether the election was properly made; suffice to say, for the purposes of this preliminary decision, that G opted under s.27 of the *Act* to claim compensation under the laws of the province where the accident occurred. I interpret compensation as meaning compensation under the Workers' Compensation system of Newfoundland.

Counsel for G points out that, once the election has been made, under s.27(3) of the *Act*, G no longer has a claim for compensation pursuant to Part 1 of the *Act*. He argues further that, following the election, G was entitled to start an action under the laws of Newfoundland and Labrador for common-law damages under s.45 of the *Newfoundland Act*.

In fact, the Newfoundland WHSCC on August 24, 2007 advised G of the option to either claim compensation benefits or take an action in the courts. G had three months to file the election. G filed an election form under s.45(2) of the *Newfoundland Act* and then proceeded to sue CM in the Nova Scotia courts.

The Supreme Court of Nova Scotia was, therefore, chosen as a forum of convenience because of the residency of the parties.

Counsel for G, therefore, argues that G's action is not statute barred and that the application made under s.29 be dismissed.

Counsel for CM argues that an election under s.27 does not open the door to legal action where no right of action exists.

I reiterate that the issue to be dealt with on this preliminary matter is the Tribunal's jurisdiction to make that determination.

Counsel for CM argues that G has failed to put forward any argument as to why the election under s.27 would preclude the Tribunal from having jurisdiction over this application. I agree.

### Finding

*Prima facie*, CM has the right to make an application under s. 29 of the *Act* for a determination as to whether the action taken by G is statute barred.

CM is a party to an action in the Supreme Court of Nova Scotia. She is a worker covered by the *Act*. Her employer is a covered employer under the *Act*.

The Tribunal is asked in this application to rule on the effect of an election made under s.27 of the *Act*. Can G avoid the bar at s.28 of the *Act* by opting to claim compensation

under Newfoundland legislation where a similar bar may not apply.

This issue is central to this application and it is one that is fully within the Tribunal's jurisdiction to decide.

The fact that G has elected not to claim compensation under Part 1 of the *Act* does not necessarily negate the Tribunal's jurisdiction. There is likely no dispute that, leaving aside s.27, the action would be statute barred as it is an action taken by the dependants of a worker against the employer's servants or agents. The question arises whether a s.27 election allows a worker's dependants to avoid this provision.

Moreover, the mere fact that compensation is no longer payable under Part 1 of the *Act* (s. 28(1)(c) of the *Act*) is not necessarily determinative, as an action can be barred if it "[arises] out of and in the course of the worker's employment in an industry to which this Part applies" (s.28 (1) (d)). So, a s.27 election does not oust the Tribunal's jurisdiction.

Counsel for CM refers to the historic compromise which is the underlying principle behind workers' compensation legislation. Section 28 of the *Act* sets out the historic trade-off in the Nova Scotia legislation. As pointed out by the Court of Appeal in *Lanteigne vs. Workers' Compensation Board (Nova Scotia)* 2002, NSCA 156 at paragraph 40, consideration of the definition and scope of the bar of civil actions is an essential feature of the workers' compensation system.

The Legislature has given this Tribunal the exclusive jurisdiction to determine whether civil actions are barred by the *Act*. Nothing has ousted the jurisdiction of this Tribunal. In fact, G has chosen to submit to the jurisdiction of this Tribunal by initiating the action in the Supreme Court of Nova Scotia. CM as a party to the action has the right to apply to the Tribunal for a determination.

I agree with counsel for CM who argues that the Tribunal is not precluded from making such a determination by a party's choosing to elect compensation in another jurisdiction.

I note, for the record, that the Board's position is that the Tribunal has jurisdiction to hear the application.

I dealt with a similar argument in *Decision 2000-285-TPA* where an application was made under s.29 for a determination that a right of action was barred pursuant to s.30 of the *Act*. In that decision, the jurisdiction of the Tribunal to make such a finding was challenged. I found that the interpretation of s.30 in force at the time of the applicant's accident would determine whether the applicant's right of action and/or right to bring the action against the defendant without the consent of the Board had been barred. I concluded that it was within the jurisdiction of the Tribunal to determine whether or not the action was barred pursuant to s.30 and the issue was properly the subject matter of a s.29 application to the Tribunal.

Similarly, the effect of an election under s.27 on G's right of action against CM is properly the subject matter of a s.29 application to the Tribunal and properly within the jurisdiction of the Tribunal to determine.

**CONCLUSION:**

The Tribunal has jurisdiction to make a determination as to whether the action commenced by G in the Supreme Court of Nova Scotia is statute barred pursuant to s. 28 of the *Act*.

DATED AT HALIFAX, NOVA SCOTIA, this 12th day of January, 2009.

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Louanne Labelle  
Chief Appeal Commissioner