Noteworthy Decision Summary

Decision: WCAT-2005-01542 **Panel**: Herb Morton **Decision Date:** March 29, 2005

Jurisdiction of Board to Determine Employee Status - Federal Government Employees Compensation Act (GECA) – Section 4(2) of GECA – Section 2 of GECA – Agreement between Board and Federal Government

The Board has jurisdiction to determine whether a person is an "employee" pursuant to the federal *Government Employees Compensation Act* (GECA). Also, persons performing work for the federal government should be given access to the same avenues of review and appeal provided under the *Workers Compensation Act* (Act) as provincial workers on issues relating to the nature and extent of compensation payable. The employer applied for judicial review of WCAT's decision and was denied (see *Canadian Broadcasting v. Luo*, 2007 BCSC 971). The B.C. Court of Appeal upheld the B.C. Supreme Court's decision (see *Canadian Broadcasting v. Luo*, 2009 BCCA 318).

In this case, a man died as a result of a motor vehicle accident. At the time of the accident the man was performing paid work for a federal crown corporation. The federal employer notified the federal government of the accident and argued that the man was not an employee but an independent contractor. The federal government determined that the man was not an employee under GECA. The man's widow advised the provincial Workers' Compensation Board (Board) of the accident and the Board requested information from the federal employer in order to determine whether the man was an employee. The federal employer refused to provide any additional information on the basis that the federal government had already made a determination. The Board proceeded to adjudicate the claim in the absence of information from the employer and accepted the widow's claim for compensation.

The employer requested a review and the Review Division found that the Board had no jurisdiction under GECA to determine whether an individual is an "employee" under GECA. The Review Division concluded that the determination of employee status under GECA is a matter that must be determined by the federal government rather than the Board. The Review Division found that the federal government's determination was binding on the Board. The widow appealed to WCAT. At the request of the widow, WCAT restricted the appeal to the jurisdiction question and did not consider whether the man was an employee under GECA (in the event that the Board had jurisdiction to determine employee status).

The issue of who has jurisdiction to determine employee status under GECA is not expressly addressed in GECA, its Regulations, or the contract dated June 7, 1996 between the federal government and the Board under which the Board adjudicates claims for compensation by employees under GECA for the federal government (Agreement). The WCAT panel undertook an interpretative analysis of these materials as well as a review of court decisions that have considered interpretative issues arising out of GECA. The WCAT panel concluded that the Board has the jurisdiction to determine employee status for the following reasons:

- Section 4(2) of GECA provides that an employee is entitled to "receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed". The right to receive compensation

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"at the same rate and under the same conditions" as are provided under the law of the province is capable of differing interpretations. Recent court decisions, which were not concerned with the status of parties to legal actions, have interpreted the phrase "at the same rate and under the same conditions" in a broad or liberal fashion, to afford persons working for the federal government benefits or advantages conferred under the provincial workers' compensation legislation.

- Item #1.2 of Appendix "A" to the Agreement requires the Board to request "information" on employee status from the federal government before adjudicating a claim not forwarded to the Board by the federal government. Although this provision might have been intended to exclude or remove the Board's jurisdiction to adjudicate the issue of employee status, the WCAT panel found that the word "information" is more in keeping with an attempt to ensure that the Board did not proceed with an adjudication, prior to affording the federal government the opportunity to provide input to assist the Board in its adjudication. The word "information" is a somewhat neutral term, comparable to the term "evidence".

  If the federal government had intended to exclude the Board's jurisdiction, it could have used a stronger term such as "decision" or "determination". Having regard to the imperative language utilized in item #1.3 of the Agreement, which provides that "The Board shall take no action on any claim for compensation that has been stamped "election form required" by the [federal government]", the federal government could also have included a prohibition on the Board considering a claim without a determination from the federal government that the individual was an employee. The wording of the Agreement appears to leave it open to the Board to adjudicate issues of employee status.

- While it would be important for Board officers to appreciate that a determination of status under GECA involves an application of the definition of employee contained in section 2 of GECA, rather than the definition of worker from section 1 of the Act, the Board nevertheless has some expertise in addressing such issues.

- While the current administrative practice of the federal government cannot be determinative, the WCAT panel noted that the regional manager for the federal government department administering GECA considered that the federal government's determinations of status would be appealable. Indeed, the expectation that the affected individuals would have a right of appeal under the Act permits the federal government to proceed with making its determinations based on the information within its possession, without the need to obtain input from the affected person or to establish other mechanisms for addressing objections to the determinations (to accord with the requirements of natural justice).

- Recent court decisions support a purposive and liberal interpretation of provisions aimed at ensuring equality of treatment for individuals claiming compensation under GECA. It would seem unfair were the widow's application for compensation to be denied on the basis of a determination that her husband was not an employee, with no opportunity for input from her, and no mechanism for seeking review or appeal of the determination apart for an application for judicial review. The provisions of GECA and the Agreement

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do not require such a result. Such a situation could not be equated with a right of persons working for the federal government to receive compensation "at the same rate and under the same conditions" as workers in the province.

On the issue of the rights of review and appeal provided to persons under GECA, the WCAT panel found that the rights of review and appeal which are afforded provincial workers under the Act in connection with determinations of their status and eligibility for compensation, are reasonably seen as "incidental to a condition governing compensation" under the law of the province. Thus, persons who may or may not be employees under GECA are entitled to review and appeal as set out in the Act. This interpretation is not otherwise in conflict with GECA. Therefore the WCAT panel found that it was within the Review Division's jurisdiction to determine whether or not the man was, at the time of his death, an employee under GECA.

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This decision has been the subject of a BC Court of Appeal Decision. See 2009 BCCA 318.

This decision has been the subject of a BC Supreme Court decision. See 2007 BCSC 971.

WCAT Decision Number: WCAT-2005-01542
WCAT Decision Date: March 29, 2005
Panel: Herb Morton, Vice Chair

Introduction

The deceased, Z, died as a result of a motor vehicle accident on August 20, 2002. At the time of the accident, Z was performing paid work for a federal crown corporation (CC). His widow appeals *Review Decisions #2971* and *#3072* dated October 30, 2003.

By decisions dated February 17 and 20, 2003, case managers in the sensitive claims section of the Workers' Compensation Board (Board) advised the widow that her application for compensation was accepted and that her spousal pension would be paid for life. The employer requested review by the Board's internal Review Division. The Review Division found that the Board had no jurisdiction under the *Government Employees Compensation Act* (GECA) to determine whether an individual is an "employee" under GECA. The Review Division concluded that the determination of employee status under GECA is a matter that is determined by the Federal Government rather than the Board. The Review Division found that the Federal Government had ruled that Z was an independent contractor, and not an employee under *GECA* at the time of his death, and that determination is binding on the Board.

Z's widow has appealed the Review Division decisions to the Workers' Compensation Appeal Tribunal (WCAT). On behalf of the widow, the workers' adviser requested that WCAT restrict its decision to the issue as to whether the Board had jurisdiction to determine whether Z was an employee under GECA, and not proceed to address Z's status under GECA. In a final submission dated March 3, 2005, a second workers' adviser confirmed this request.

Abbreviations used in this decision include:

Act	*Workers Compensation* Act, R.S.B.C. 1996, ch. 492, as amended
Agreement	The contract dated June 7, 1996 between the FG and the Board, under which the Board adjudicates claims for compensation by employees under GECA
CC	federal Crown Corporation, for which Z was working at the time of his death
FG	Federal Government (Canada)

GECA	*Government Employees Compensation Ac*t, R.S. 1985, c. G-5
HRDC	Human Resources Development Canada
L	a Health and Safety Officer at HRDC, Labour Program
S	the Regional Manager, Injury Compensation, BC/Yukon and Alberta Regions, Labour Program, HRDC
WCB	Workers' Compensation Board (of British Columbia)
Z	the deceased

WCAT decisions are publicly accessible on WCAT's website. WCAT's guidelines concerning the use of identifiers are set out at item 21.00 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP). Pursuant to the practice directive at item 21.22, coded initials will be used to refer to the identities of the deceased and the crown corporation for whom he was working at the time of his death. I will, however, refer to both the FG and HRDC in this decision, as their involvement is necessarily evident from the fact this decision is being made under GECA. In this decision, I will avoid using the term "worker" (the term used in the provincial workers' compensation legislation). Any references to the CC as the employer are not intended to have any significance regarding the status of the deceased (as to whether he was an employee or independent contractor).

The widow's appeal was initiated by telephone call on November 30, 2003. By letter of December 2, 2003, she was granted 21 days to provide a written notice of appeal and this was received on December 22, 2003. The CC initially expressed an objection regarding the timeliness of her appeal. By letter of March 3, 2004, the appeals coordination officer advised the CC of item 3.40 of the MRPP, which permits an appeal to be initiated by telephone within the 30 day time limit provided a written notice of appeal is provided within 21 days. I find that the widow's appeal was initiated in time. The widow requested her appeal be considered on a "read and review" basis. I agree that the jurisdictional issue raised in this appeal is a legal issue which may properly be addressed on the basis of written submissions, without an oral hearing.

Written submissions have been provided on behalf of the widow by her son, and by a workers' adviser. Written submissions have also been provided by senior legal counsel for the CC. 45 day extensions of time for submissions were granted to both parties under section 253(5)(b), (6) and (7) of the Act. As well, I obtained approval from the WCAT chair for additional time for the making of this decision under section 253(5)(a) of the Act, due to the complexity of both the proceedings and the subject matter under appeal.

In order to comply with the deadline for submissions, the workers' adviser provided a summary of information obtained from two witnesses. She subsequently provided confirmation by the two witnesses of their statements, with amendments as required. This additional evidence was disclosed to the employer, who provided further evidence in response. Both parties had the opportunity to respond to the late new evidence

provided by the other. Given the complexity and significance of the jurisdictional issue raised by this appeal (and the fact that both parties were diligent in attempting to comply with the deadlines set for submissions), I found it appropriate to receive into consideration all the late evidence and submissions which were provided pursuant to the discretion under MRPP item 10.20. In response to my memo of inquiry dated January 13, 2005, additional submissions were provided by the parties on January 28, 2005 and March 3, 2005.

Issue(s)

Does the Board have jurisdiction to determine the status of an individual working for a federal crown corporation, as to whether the individual is an employee under GECA or an independent contractor? Does a person working for a federal body have a right to request review or appeal under the Act of an adverse decision regarding whether he or she is an employee under GECA?

Jurisdiction

Under section 239(1) of the Act, a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to WCAT. WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254 of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors that is applicable (section 250(2) of the Act).

Effective December 3, 2004, pursuant to section 44 of the *Administrative Tribunals Act*, WCAT has no jurisdiction over constitutional questions. This statutory constraint applies to all applications made before, on or after December 3, 2004. I do not consider, however, that section 44 precludes consideration of the jurisdictional issue raised in this appeal. There is no issue regarding the validity of legislation, or the effect of the *Charter*, raised in this appeal. I agree with the reasoning expressed in *Decision No. 485/90,* 17 W.C.A.T.R. 173, [1991] O.W.C.A.T.D. No. 14, of the Ontario Workers' Compensation Appeal Tribunal (Tab 5 of the CC's book of authorities):

> We have been asked to consider whether the jurisdiction conferred upon the Tribunal by section 4 of the GECA includes the jurisdiction defined by section 15 of the provincial Act. In making this decision, we must interpret the relevant sections.
>
> 13 We do not see that in carrying out this exercise, we are doing anything which differs from our usual responsibility and practice when we are required to decide how two pieces of legislation can be read together. We are not being asked to find any legislation ultra vires, or otherwise

inapplicable. We are not being asked to determine the competence of the Provincial Legislature, or the Parliament, to legislate in the field. The present application raises questions of jurisdiction which arise from time to time in the course of adjudication under any legislation. It happens that the two acts in question were enacted within different jurisdictions. However, for our purposes, nothing turns on that difference. We are satisfied, therefore, that the issue before us is one of jurisdiction, which does not raise questions of constitutional law.

Background

- Z was killed in a motor vehicle accident on August 20, 2002;
- By letter dated August 23, 2002, the CC notified HRDC that there had been an fatal accident involving Z, but advised that in its view Z was not the CC's employee;
- By letter dated August 26, 2002, L, a Health and Safety Officer at HRDC (BC/Yukon and Alberta Regions), requested the CC to provide further particulars to assist in determining whether Z was a contract employee or a casual employee of the CC;
- By letter dated August 29, 2002, the CC provided L with further particulars of Z's work history with the CC;
- By letter dated October 3, 2002, L wrote to the CC and advised:

> Based on the information you provided to me, it appears that [Z] is a contractor and not a casual employee of [the CC]. Areas that were considered for this determination were: his work is not controlled by [the CC], he could contract out his services to other companies and he owned the tools (in this case his car) for the work to be performed. Based on this information, this file has been closed.
>
> In future, it is highly recommended that all contracts with contractors should be in writing. The written contract may include the nature of the work to be performed, the terms of employment, method of payment and who hired the contractor.

- Z's son contacted the Board on August 29, 2002 to advise of Z's death;
- By letter dated August 30, 2002, a Board case manager wrote to Z's widow requesting that she provide an election as to whether she was claiming compensation;
- By letter dated October 31, 2002, a Board case manager wrote to the CC to obtain information and relevant documents relating to employment status for the purposes of determining the work relationship. The case manager enclosed a Form 7 (*Employer's Report of Injury*) for completion;

- On November 5, 2002, L faxed to the case manager the previous correspondence between herself and the CC, including her October 3, 2002 decision letter;
- On November 8, 2002, a Human Resources manager for the CC wrote to the case manager and advised that it had provided HRDC all necessary information, that HRDC had determined Z was not an employee, and that the CC would therefore not be filing a Form 7;
- On November 8, 2002, a claims analyst for the assessment department of the Board advised the case manager that the Board does not make determinations with regard to the employee/employer relationships between individuals and the FG, and recommended that this claim be rejected as the CC/FG had advised that Z was not its worker;
- On November 13, 2002, the case manager wrote to the CC, stating that she had discussed this claim with S, the Regional Manager of the GECA. The case manager noted she understood the CC had provided details of the accident to the Health and Safety Officer. The case manager requested that the CC provide the necessary information to S;
- On November 18, 2003, the CC wrote to the case manager stating that the CC had reported the matter to the appropriate authority at HRDC, and that HRDC had advised that Z was not an employee of the CC and the matter was therefore closed;
- On November 21, 2002, the case manager made a formal request to S at HRDC, pursuant to item #1.2 of the Agreement, for information on Z's employment status;
- On November 29, 2002, a senior manager with the CC wrote to the case manager stating it was the position of the CC that all reporting requirements regarding Z's death had been met. Accordingly, the CC would not complete the Board's Form 7;
- On December 4, 2002, the Board case manager wrote to S again, stating this was a "formal request for information regarding the status of [Z]". She further stated:

> I require the "Minister's Representative" to provide a ruling regarding [Z's] status at the time of his death. Was he considered an "employee" for the purposes of the Government Employees Compensation Act?

- On February 17, 2003, the Board case manager wrote to the CC to advise that the claim by Z's widow had been accepted by the Board;
- On February 19, 2003, the supervisor service centre team, Assessment Department, noted:

> It is my understanding that the Federal Government makes the final decision on an individuals employment status. Section #8.10 of the Compensation Services Rehabilitation Manual indicates the criteria used in making this decision is outlined in Section 2 of the [GECA] and that we administer this Act on their behalf.
> Based on the Federal Governments letter dated Nov 08/02 it appears the deceased was a paid contractor and not an employee of the Federal Government and as such would not be considered a worker of theirs and not covered under their account.
>
> [reproduced as written]

- On February 20, 2003, the case manager wrote to S and advised that as L was not charged with the administration of the GECA, the case manager had requested information from S regarding Z's status. As this was not provided, the case manager proceeded to make a determination that Z was a "worker" and that his injuries arose out of and in the course of his employment. She advised that her decision could be appealed within 90 days;
- On March 3, 2003, the workers' compensation appeal structures were amended pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), replacing the former Workers' Compensation Review Board and Appeal Division with the internal Review Division and external WCAT;
- On May 15, 2003, the employer's requests for review of the case manager's decisions of February 17 and 20, 2003 were received by the Review Division;
- On July 29, 2003, the manager, operations division, Workplace Safety and Insurance Board of Ontario, wrote to the CC and advised:

> According to Human Resources Development Canada (HRDC) Injury Compensation Program, the administration of the Government Employees Compensation Act [GECA] rests with HRDC. The GECA is the governing legislation that provides workers' compensation benefits to federal government employees who suffer a work-related injury or disease. Employees of the Federal Government are not insured under the terms of *the Workplace Safety and Insurance Act (the Act)*. It is only through GECA that the WSIB adjudicates HRDC approved claims for work-related injuries or diseases on behalf of HRDC.
>
> HRDC reviews and processes claims for employees who are injured in Ontario and outside Canada. HRDC verifies the contents of the accident/injury report and affixes a counter-signature to indicate to the WSIB that the claims [sic] is a federal claim and the WSIB can proceed with the adjudication of the claim. If the counter-signature is absent, the claim cannot be adjudicated by the

> WSIB. This counter-signature distinguishes the claim as a federal claim.
>
> This means that if HRDC does not consider a person a federal government employee and does not counter sign the accident/injury report, the WSIB will not receive the claim and the WSIB is not involved. HRDC has the final say if the person is a federal government employee eligible to claim benefits from the WSIB. HRDC determines who is a worker for WSIB purposes, not the WSIB. The WSIB cannot over-rule HRDC's decision.

- By submission dated August 19, 2003, Z's son wrote to the Review Division. In paragraph 8, page 3, he cited the April 22, 2003 legal opinion by the Board's associate general counsel, submitting: "We ask the panel to recognize the WCB General Counsel as an expert in the field and to accept his opinion." This opinion stated, in part:

> The Government Employees Compensation Act is a Federal Statute providing for the equivalent of workers' compensation benefits to employees of the Federal Government. Section 4 of that Act directs the employee to the local Provincial or Territorial WCB to have their entitlement adjudicated and paid. The BC Board administers these claims pursuant to an agreement between the Crown as represented by the Minister of Labour and the WCB. That administration is authorized by S. 97 of the BC Workers Compensation Act and the provisions of GECA.
>
> S. 4 of GECA entitles "employees" as defined. The benefits are paid at the same rate and under the same conditions as provided in the applicable Provincial statute. The definitions of "employee" in GECA and "worker" in the WCA do not fully coincide. The WCA defines "worker" inclusively and refers to a "contract of service". GECA defines "employee" exhaustively and refers to "in the service of Her Majesty who is paid a direct wage or salary". The exact parameters of "employee" and "worker" do not coincide but the core requirement of a master/servant relationship signaled by the references to "service" in both statutes do appear to coincide.
>
> This claim is complicated by the nature of the communications on the file. The [CC] apparently relies on the written statement of a health and safety functionary that [Z] was not an employee. No rationale for that conclusion is offered though it was requested. The [CC] has declined to provide any further information or

analysis. The Minister of Labour has been unable to obtain or provide further information or analysis.

The common law describes the tests to be applied and factors to be considered in deciding whether a master/servant or employment relationship as opposed to an independent relationship exists between two parties. Those factors are listed and discussed in the former RSCM as it existed in June 1991 (attached). This document is not published policy of the Board but in a summary fashion does provide a useful description of the factors taken into account by the law in deciding the relationship. The application of these principles to a situation is fact specific and the emphasis will change depending upon the circumstances.

The Board must determine whether or not the applicant is an employee within the meaning of GECA. The Federal Government or agency is a primary source of information for purposes of making that decision. The Federal agency or functionary of it does not have the unilateral authority to declare the result even though the Board's decision will depend significantly on their input.

Your question has two dimensions to it.

Firstly, in light of the assertion by the [CC] that this person is not their employee and their minimalist response to requests for more information, are you disabled from proceeding with an adjudication? The answer is "No". The [CC] is entitled to participate in the decision making process. The WCB is obliged to make a decision. Provided that the [CC] is afforded notice of the fact that a decision will be made and its implications and a reasonable opportunity to submit evidence and argument, they cannot forestall the process by declining to be responsive.

Secondly, Do you have any authority to adjudicate the employment relationship? The answer is "Yes". To determine whether or not an individual is entitled to benefits requires a decision as to whether or not at the time of injury that person was an employee within the meaning of GECA. The only adjudicating body identified in the GECA for these purposes is the Board (See S. 4(3)(a)).

- *Review Decisions #2971 and 3072* dated October 30, 2003 (accessible at http://www.worksafebc.com/review_search/advanced_search.asp) concluded:

- The GECA has a very detailed and specific definition of "employee". If Parliament had intended the Board to use its expertise in the preliminary step of determining employee status, it would have referentially incorporated the respective provincial definition (i.e. "worker"). However, it appears that instead, Parliament left that decision to a single consistent decision-maker, the HRDC.

- Overall, I am of the view that the detailed definition of "employee" in the *GECA*, as well as the creation of an administrative framework requiring this issue is determined by HRDC, demonstrate that "employee" status is an issue that the Federal Government intended to reserve to their exclusive jurisdiction. I am therefore of the view that if the Board purported to determine "employee" status, this action would be in direct conflict with the *GECA*.

- The determination of employee status under the *GECA* is therefore a matter that is determined by the Federal Government rather than the Board. In this case, a ruling has been made that [Z] was an independent contactor and not an employee under the *GECA* at the time of the fatality and that determination is binding on the Board.

- The widow has appealed the Review Division decisions to WCAT.

New Evidence

By letter dated March 3, 2004, L (the health and safety officer employed by HRDC who provided the October 3, 2002 letter stating that Z was a contractor and not an employee of the CC), advised as follows:

> . . . I am a Health & Safety Officer with HRDC-Labour Program and I ensure compliance with the Canada Labour Code Part II. The determination of employment status of [Z] in my correspondence with the [CC] in August 2002 and October 2002 was to determine if he was an employee under the Canada Labour Code Part II.
>
> Any further questions relating to the Government Employees' Compensation Act should be directed to HRDC-Labour Program, Injury Compensation. Please call [S] at …….

In a letter dated May 7, 2004 addressed to Z's son, S responded to a number of questions posed by him as follows:

1. Is the Injury Compensation Program the only branch of the HRDC that is charged with the administration of the GECA?

   - **Yes. The Injury Compensation Department is the only branch of HRDC that administers the Government Employee's Compensation Act (GECA).**

2. I understand that [the CC] did not submit an Employer's Report of Injury to the Injury Compensation Program, despite several requests by you and the WCB case manager. In the absence of that report, you were unable to provide a written ruling on [Z's] employee status under the GECA. Does that mean the determination of [Z's] employee status falls under GECA back to the Labour Operations program, or any other program under the HRDC?

   - **No. Under no situation would employee status under GECA fall back to the Labour Operations Program, which administers the Canada Labour Code, or any other program of HRDC.**

3. A health and safety officer from the Labour Operations Program ruled that [Z] was not an employee under the Canada Labour Code Part II. Does the Canada Labour Code have any correlations with the GECA? Is the Labour Operations Program in any way related to the Injury Compensation Program?

   - **The Canada Labour Code has absolutely no correlation to the GECA, in fact Subsection 144(5) of Part II of the Canada Labour Code indicates that such reports are to be used only for the purposes of that Part or for prosecution.**

     Section 144(5) No person shall, except for the purposes of this Part or for the purposes of a prosecution under this Part, publish or disclose the results of an analysis, examination, testing, inquiry, investigation or sampling made or taken by or at the request of an appeals officer or a health and safety officer under section 141.

     Copies of Section 144(5) and Section 141 have been attached for your reference.

4. Since [the CC] did not submit an Employer's Report of Injury, you were unable to provide a ruling on [Z's] status under the GECA. In the

absence of this ruling, does WCB then have the sole authority to adjudicate [Z's] employee status under the GECA?

- **Yes. The Board is the only adjudicating body identified in the GECA to determine if an individual is entitled to benefits. The Board is required to make a decision whether or not at the time of the injury that person was an employee within the meaning of GECA.**

[emphasis in original]

The workers' adviser contacted S for additional information regarding the operation of the federal Injury Compensation section of HRDC. In a statement initialled by S, with handwritten notations or corrections as necessary, the worker's adviser notes:

[S] told me:

1. The employer sends us, GECA, completed F7. If we need further info regarding employee status we contact employer. If employee is GECA we countersign F7 & forward to WCB. If not GECA, we do not countersign F7, we send letter advising not GECA.

2. [S] said she always forwards the completed Form 7 to the WCB.

   (a) If she determines the person is an employee, she countersigns the Form 7. This authorizes WCB to adjudicate what benefits the employee is entitled to receive.

   (b) If she determines the person is not an employee, she does not countersign the form, and informs the WCB by letter that the person is not an employee.

3. I asked [S] if she obtained any information or forms from the injured person. She said she did not. Her determination as to employee status was made entirely on the basis of information from the employer. I asked her how a person could appeal her finding, if he or she disagreed with it. She said the person could appeal by using the WCB appeal process.

4. [S] told me she made no determination as to whether the late [Z] was an employee. She said she could not do so, because she did not receive a Form 7 from the Employer.

The workers' adviser further provides a statement on behalf of a case manager, sensitive claims (signed by the case manager), in which he advised:

1. When the WCB receives a counter-signed Form 7 from the Minister's Representative at HRDC, this is its (the WCB's) authorization to proceed to adjudicate the employee's entitlement.

2. The WCB does not, according to the usual procedure, make any adjudication as to whether or not the injured person is an employee as defined by GECA; it relies on the finding by the Minister's Representative.

3. If the WCB receives a Form 7 which is not countersigned, the WCB sends a letter to the person stating it has been determined he or she is not eligible for compensation because he or she is not an employee as defined by GECA. This letter contains the usual clause stating that the decision may be appealed.

The CC wrote to HRDC to obtain confirmation regarding the status of the comments attributed to S. By letter dated October 19, 2004, the Director General, National Labour Operations Directorate, advised the CC:

> In your letter, you specifically ask:
>
> **1. Was [S] correct in her letter dated 7 May 2004 wherein she stated that the Workers' Compensation Board of BC is required to make a decision whether or not at the time of the injury the person was an employee within the meaning of GECA.**
>
> ***Response***: As you are aware, this is the very issue before the Workers' Compensation Appeal Tribunal (WCAT) and involves not only questions of practice but of law. It would be inappropriate for me, or another representative of the Labour Program, to comment on it at this time. As we have stated to you before, it has been our practice to intervene only rarely in litigation, and almost never before administrative tribunals.
>
> **2. Confirmation that [S] was speaking on behalf of Human Resources Skills Development Canada, when she made that statement.**
>
> ***Response***: [S] was speaking in a professional capacity when she made this statement. However, she was not proffered by the Labour Program as its spokesperson or witness on this litigation. Therefore, as stated in my response of October 18th, [S] was providing information related to her understanding of the GECA policies and procedures and

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> actual practice. At no time was [S] purporting to take a position on the legal issue before the WCAT.
>
> I trust that the above clarifies our position on this issue. We will be following this case with interest.
>
> [emphasis in original]

Submissions

Detailed submissions have been provided by both parties, which were of assistance in considering the complex jurisdictional issue raised by this appeal. I will refer here only to certain key points from the submissions.

By submission of May 7, 2004, the appellant submits that HRDC is divided into many branches and sub-branches, and that the Injury Compensation Program has no relationship to the Labour Operations Program (other than the fact they both fall under the umbrella of "Labour Directorate"). These programs administer different statutes. The appellant submits the Review Division erred in accepting the determination by a health and safety officer, that Z was not an employee, as determinative of his status under GECA. The appellant relies on the legal opinion provided by the Board's associate general counsel.

By submission of July 9, 2004, counsel for the CC submits that the jurisdiction of a provincial workers' compensation tribunal in administering GECA is defined in section 4(3) of GECA, which provides that compensation shall be determined by the provincial board. He submits that the provincial board's jurisdiction is restricted to making determinations regarding the amount and conditions of entitlement to compensation under section 4 of GECA. There is no express authority for such provincial boards to make determinations regarding "employee" status under section 2 of GECA. The question of whether one is an employee within the meaning of GECA is a fundamental preliminary issue that must first be resolved before entitlement to compensation can be considered. That fundamental preliminary issue is to be determined by HRDC alone. Such a determination cannot be said to be reasonably incidental to a rate or condition, covering compensation. Counsel for the CC submits that the Board has no authority to make determinations on who falls under the definition of "employee" in GECA. He states that to date, no provincial workers' compensation board or tribunal in Canada has ruled that a provincial board has jurisdiction to determine who is an "employee" under GECA. He submits that if this appeal is allowed, "it would be a precedent setting case which would effectively shift the decision making power of the federal government regarding who is an 'employee' under GECA over to the provincial workers compensation tribunals." GECA has a very detailed and specific definition of "employee". If the federal Parliament had intended for provincial boards to determine employee status under section 2 of GECA, it could have expressly said so. The clear meaning of the statute and the case law is that "employee" status was a matter the

federal government intended to keep within its exclusive jurisdiction. Counsel for the CC submits the Board has no authority to overturn HRDC's determination that Z was not an "employee".

In a response dated August 13, 2004, the workers' adviser submits that none of the court decisions deal with the issue as to who has authority to determine whether a person is an employee under GECA. She argues that the determination of employee status is reasonably incidental — in fact, central — to a condition governing compensation under the law of the province, and is not otherwise in conflict with GECA. She submits that HRDC has not established any procedure which would allow an employee to have any input into its decision-making process, nor has HRDC established any mechanism for appeal. She argues that it is essential that the Board's appeal procedures be available. She submits that the Board and HRDC have a concurrent jurisdiction to determine employee status.

Both parties have also provided submissions concerning Z's status. However, the workers' adviser requests that WCAT not address this issue, as that would have the effect of truncating the two step procedure for review and appeal provided under the Act.

Analysis

Section 2 of GECA defines "employee" as follows:

> "employee" means
>
> (a) any person in the service of Her Majesty who is paid a direct wage or salary by or on behalf of Her Majesty,
> (b) any member, officer or employee of any department, company, corporation, commission, board or agency established to perform a function or duty on behalf of the Government of Canada who is declared by the Minister with the approval of the Governor in Council to be an employee for the purposes of this Act,
> (c) any person who, for the purpose of obtaining employment in any department, company, corporation, commission, board or agency established to perform a function or duty on behalf of the Government of Canada, is taking a training course that is approved by the Minister for that person,
> (d) any person employed by any department, company, corporation, commission, board or agency established to perform a function or duty on behalf of the Government of Canada, who is on leave of absence without pay and, for the purpose of increasing his skills used in the performance of his

duties, is taking a training course that is approved by the Minister for that purpose, and

(e) any officer or employee of the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer or office of the Ethics Commissioner;

"Her Majesty" is defined as meaning “Her Majesty in right of Canada”, and "Minister" is defined as meaning the federal Minister of Labour.

The question as to Z’s status is one which must be determined with reference to the definition in section 2 of GECA, rather than the definition of worker provided in Part 1 of the provincial Act. I read clause (a) of the definition of “employee” as concerning individuals employed directly for the federal crown as opposed to a person employed by a crown corporation. The federal legislation creating the CC specifies that the CC may employ such officers and employees as it considers necessary for the conduct of its business, but such officers and employees “are not officers or servants of Her Majesty.”

As Z was performing work for a crown corporation, I consider that his status must be addressed under clause (b) of the definition of “employee”. This definition refers to “any member, officer or employee of any . . . corporation . . . who is declared by the Minister with the approval of the Governor in Council to be an employee for the purposes of this Act”.

I have considered, first of all, whether this definition is determinative of the jurisdictional issue raised in this appeal (as to whether the Board has jurisdiction to determine Z’s status). In other words, does section 2(b) of GECA require a determination from the federal Minister of Labour regarding every claim for compensation under GECA by a person working for a federal crown corporation? In response to my January 25, 2005 memo, by letter of January 28, 2005, counsel for the CC furnished copies of two documents. The first, approved by the Governor General in Council on September 29, 1960 (P.C. 1960-11/1322), conferred authority on the federal Minister of Labour to declare the officers and employees of the CC to be employees for the purposes of GECA, effective November 10, 1958. The second, dated October 20, 1960, is a declaration by the Minister of Labour that the officers and employees of the CC were employees for the purposes of GECA effective November 10, 1958. Counsel for the CC submits that that these documents clearly demonstrate that the officers and employees of the CC are employees within the meaning of section 2(b) of GECA. I accept this submission.

Section 4 of GECA further provides:

4. (1) Subject to this Act, compensation shall be paid to
(a) an employee who

(i) is caused personal injury by an accident arising out of and in the course of his employment, or
(ii) is disabled by reason of an industrial disease due to the nature of the employment; and

(b) the dependants of an employee whose death results from such an accident or industrial disease.

(2) The employee or the dependants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by persons other than Her Majesty, who

(a) are caused personal injuries in that province by accidents arising out of and in the course of their employment; or
(b) are disabled in that province by reason of industrial diseases due to the nature of their employment.

(3) Compensation under subsection (1) shall be determined by

(a) the same board, officers or authority as is or are established by the law of the province for determining compensation for workmen and dependants of deceased workmen employed by persons other than Her Majesty; or
(b) such other board, officers or authority, or such court, as the Governor in Council may direct.

The right to receive compensation "at the same rate and under the same conditions" as are provided under the law of the province is capable of differing interpretations. On a literal interpretation, this may be read as referring simply to the determination of compensation entitlement after eligibility has been established.

The GECA, its Regulations, and the contractual Agreement with the provincial Workers' Compensation Board are all short in length. The wording of section 4 of the current GECA is similar to that contained in section 1 of the initial federal legislation in 1918 (*An Act to provide Compensation where Employees of His Majesty are killed or suffer injuries while performing their duties*). The lack of detail in these materials has given rise to a number of complex interpretive issues regarding the interplay between the provisions of GECA and the provincial workers' compensation legislation (in various provinces). I have not located any prior appellate tribunal decision or court decision dealing with the jurisdictional issue raised in this appeal, as to whether a provincial Board or appeal body has jurisdiction to determine whether an individual is an employee under GECA or whether this issue is within the sole jurisdiction of the FG.

In *Canada (Attorney General) v. Ahenakew (c.o.b. Ahenakew Trenching)* [1984] S.J. No. 293, [1984] 3 W.W.R. 442, (1984) 32 Sask.R. 161, the Saskatchewan Court of Queen's Bench found that the federal crown was not an employer within the meaning of the provincial workers' compensation legislation, and was thus not subject to the bar to legal actions which applied to workers and employers in the Province. The court reasoned:

> 33 I agree that one legislative body may adopt the legislation of another such body. See Attorney-General for Ontario v. Scott (1956) 1 D.L.R. (2d) 433 and Coughlin v. The Ontario Highway Transport Board (1968) S.C.R. 569. However, I do not agree that Parliament has adopted the legislation contained in The Workers' Compensation Act, 1979. Rather, the provisions contained in The Government Employees Compensation Act and the terms contained in the written agreement relate to and are solely for the purpose of administering the federal plan which is separate and distinct from the provincial plan. Parliament has merely chosen to base the amount of the compensation awards upon those paid in the respective provinces, undoubtedly in an attempt to achieve uniformity within each province. Secondly, Parliament has merely hired the provincial board to administer the federal plan. This conduct by Parliament cannot be construed as adopting the provincial legislation in total. As well, this conduct by Parliament cannot be construed as the Crown "submitting to the operation of the Act", i.e. the provincial Act.

In *Ahenakew*, the Saskatchewan Court of Queen's Bench followed the 1943 decision of the Supreme Court of Canada in *Ching v. The Canadian Pacific Railway Company* [1943] S.C.R. 451, [1943] 3 D.L.R. 737. In *Ching*, the Supreme Court of Canada reasoned:

> It is next contended that there has been a submission by the Dominion Crown under section 2(h) by the effect of the Dominion enactment itself. What the latter does is to make full provision for the creation of rights in, and the payment of compensation to, Dominion Government employees. For the purpose of administration, either the existing machinery under the compensation laws of the various provinces, or new machinery set up under the Dominion Act itself, may be used; and if the questions arising in this case are examined in the light of an administration by a Dominion body or officer rather than by the Provincial Board, most of the difficulties encountered disappear. The authority given by the Dominion Act to the Provincial Board is strictly limited and, under the language of the principal section, the right to compensation is unencumbered by a referential incorporation of provisions of the Provincial Act dealing with consequential matters.
>
> . . .

> The important words are: "And the liability for and the amount of such compensation shall be determined ... in the same manner and by the same board." It is the liability of the Dominion Government to pay and the amount of the compensation, the right to which is given earlier in the section, which are to be determined; not the resulting effects upon collateral rights against third parties. To suggest, therefore, that the enactment of a special code of provisions with the powers of carrying them into administration without reference to the Provincial Board, is a submission in any sense of the term to a Provincial Act constituting another code, is to disregard the precise and individual character of the Dominion enactment.

The decision in *Ching* was cited with approval by the Supreme Court of Canada in *R. v. Bender* [1947] S.C.R. 172, [1947] 2 D.L.R. 161.

More recent court decisions, which were not concerned with the status of parties to legal actions, have interpreted the phrase “at the same rate and under the same conditions” in a broad or liberal fashion, to afford persons working for the FG benefits or advantages conferred under the provincial workers’ compensation legislation. A compelling illustration of this is provided by decisions of the Nova Scotia Court of Appeal, which in 2003 reversed a position it had taken in another case in 2000.

In *Salloum* v. *Nova Scotia (Workers’ Compensation Appeal Tribunal)* [2000] N.S.J. No. 415, 2000 NSCA 148, (2000) 190 N.S.R. (2d) 77, the Nova Scotia Court of Appeal considered whether the Nova Scotia WCAT erred in not applying section 187 of the provincial legislation to the employee’s claim. That section concerned the standard of proof to be applied on a claim for compensation, and whether the employee was required to establish her claim on the civil standard. The Court of Appeal declined to address this issue, finding that the right of appeal to the court under the Nova Scotia legislation did not extend to federal employees. The Court of Appeal reviewed a number of prior court decisions and reasoned:

> 58 The analysis in the foregoing authorities focuses upon the scope of the reference to provincial law in s. 4(2) of GECA or its predecessor. They support the conclusion that the reference is limited to the subject of compensation, which is to be at the same rate and under the same conditions as are provided by the law of the province where the employee is usually employed, respecting compensation for workers and their dependants. These authorities, in the main, also establish that the provincial tribunal applying GECA must apply the standards of entitlement set out therein, and not the standards of entitlement in provincial legislation, except to the extent that they clearly fall within the scope of benefits at the rate and conditions of compensation provided to workers under provincial law. . . .

> 60 I have considered a number of decisions of the Tribunal and of workers' compensation boards and tribunals in other provinces of Canada. It is apparent, from them and from the cases I have reviewed, that the thinking on the extent of what provincial law incorporated in or referred by GECA is not unanimous.
>
> 61 In Ontario the test for determining whether a specific provision in provincial law should be applied has been expressed in terms of whether it is reasonably incidental to the provincial law respecting compensation and the rate and conditions provided as opposed to being merely collateral thereto. See Canada Post v. Smith, supra, [paragraph] 26, 27, 42 and 49.
>
> 62 The approach of the Quebec Court of Appeal appears to be to include a provincial provision only as long as it comes clearly under GECA's definition of compensation and as long as there are no corresponding provisions in GECA with which it is inconsistent. The reference includes the compensation system itself and the procedures directly related to it. The reference is not, however, "aimed at incorporating all the sometimes complex mechanisms governing labour relations...". See Lamy, supra, p. 15.
>
> 63 As well, the case law reveals different theories or philosophies respecting the nature of the reference in GECA to provincial laws. According to some it is comprehensive, while according to others it is narrow. According to some it is evolving in nature, whereas others consider it static, referring only to provincial laws existing at the precise moment at which the federal legislation was enacted. See Rivard, supra p. 6 et seq.
>
> 64 None of the authorities discussed above addresses the gateway issue which is at the heart of the reasoning of the Tribunal. They address s. 4(2) of GECA. They are helpful only to the extent that, with varying degrees of emphasis, they support the conclusion that the right to compensation is referred, and that the "board, officers or authority" acting under GECA derives jurisdiction from that statute and not the provincial law by which they may be established.

The Nova Scotia Court of Appeal concluded:

> 69 This court is not, to my mind, an integral component of the decision-making authority established by the WCA, or that it falls within the expression in GECA "the same board, officers or authority as are established by the law of the province" for determining compensation for workmen. The jurisdiction of this court is to hear appeals and carry out

> judicial review as is conferred upon it by various statutes. It is not a tribunal charged with fixing the rate or the conditions provided under workers' compensation law for the benefit of workers.
>
> 70 It is essential to keep in mind as Grant J. so aptly put it in Johnson, supra that eligibility flows from GECA, not from the WCA. This conclusion is supported, as well, by the reasoning of Baynton J., in Canada Post v. Saskatchewan, supra. Accordingly, one must look to GECA to determine what, if any, judicial review is made available or prohibited by way of a privative clause. GECA is silent in this respect. In such a case judicial review by way of certiorari or other appropriate prerogative remedy is available. In Johnson, supra and Saskatchewan, supra the court emphasized that the privative clauses in the provincial legislation had no application. The same, I think, can be fairly said with respect to the appeal provision in s. 256(1) of WCA. It is simply not applicable. I am satisfied that such appeal machinery is not appropriate, because the appellant's claim does not flow from that Act. It flows from GECA.
>
> 71 I also do not accept the submission that by the expression "compensation at the same rate and under the same conditions" GECA incorporated by reference the provision of WCA providing for an appeal to this Court. Such an appeal provision is not a condition under which compensation is provided, but an external provision allowing for access to the courts by way of an appeal on a question of law or jurisdiction. The case law to which I have made reference supports this conclusion, whatever theory or philosophy respecting the extent of the reference in GECA one chooses to adopt.

The Court of Appeal concluded that the right of appeal under section 256(1) of the provincial Act was an additional right not provided for in the federal legislation.

By judgment dated May 1, 2002 in *Thompson* v. *Nova Scotia (WCAT),* [2002] N.S.J. No. 207, 2002 NSCA 58, (2002) 205 N.S.R. (2d) 55, the Nova Scotia Court of Appeal agreed to reconsider the earlier decision in *Salloum*. In its subsequent judgment dated January 28, 2003 in *Thompson* v. *Nova Scotia (WCAT),* [2003] N.S.J. No. 39 , 2003 NSCA 14, (2003) 223 D.L.R. (4th) 193, (2003) 212 N.S.R. (2d) 81, the Nova Scotia Court of Appeal reached the opposite conclusion as had been provided in *Salloum*. It reviewed the legislative history of GECA, and debates recorded in *Hansard*, and found:

> 33 Taking all of this material into account, which was not before the Court in Salloum, we would conclude that it provides important context and clarifies the purpose of the legislation. Understood in this context, it is clear that the interpretation of GECA in favour of the incorporation of appeals to this Court is the most appropriate interpretation of the statute. This interpretation is plausible in the sense that it complies with the admittedly general and broadly phrased text of the Act. It is efficacious in the sense that it promotes the clear legislative purpose and it is acceptable in the sense that the outcome of having employees under both provincial and federal jurisdiction on the same footing as regards the right to appeal in workers' compensation matters is reasonable and just.
>
> 34 That being the case, should Salloum nonetheless continue to be followed? In our view, it should not for a number of reasons. First, and as just discussed, the contextual material relating to legislative purpose is particularly compelling. Had it been before the Court in Salloum, it is unlikely that the decision would have been the same. Second, the issue is one of the Court's jurisdiction, that is, it relates to authority which, if conferred by the statu[t]e, it is the Court's duty to exercise. Third, Salloum is a very recent decision and, so far as the material before us discloses, there is little risk that any litigant has suffered irremediable prejudice by relying on it. Finally, Salloum itself marked a significant change in what had been the practice long prior to that decision. This Court has heard and decided appeals in GECA cases, without its jurisdiction to do so being questioned, for at least 25 years. Of course, a practice, even a venerable one, cannot confer jurisdiction where there is none. However, the existence of such practice is relevant to the question of how to balance the competing values of stability and adaptability in the law. In the circumstances here, it may be suggested with some justification that stability would be better served by not following Salloum than by following it. These factors, in combination, constitute exceptional and compelling circumstances making it appropriate not to continue to follow Salloum.

In *Morrison (Estate)* v. *Cape Breton Development Corp*., [2003] N.S.J. No. 353, 2003 NSCA 103, (2003) 218 N.S.R. (2d) 53, (2003) 28 C.C.E.L. (3d) 155, application for leave to appeal to the Supreme Court of Canada denied, [2003] S.C.C.A. No. 525, the Nova Scotia Court of Appeal addressed the issue which had initially been raised in *Salloum*. This concerned the applicability of section 187 of the provincial legislation. Section 187 (which is similar to sections 99(3) and 250(4) of the current British Columbia Act) provided:

> Notwithstanding anything contained in this Act, on any application for compensation an applicant is entitled to the benefit of the doubt which means that, where there is doubt on an issue respecting the application and the disputed possibilities are evenly balanced, the issues shall be resolved in the worker's favour.

In *Morrison*, the question was whether section 187 only applied after a federal employee's claim was accepted by the Board, or whether this "benefit of the doubt" provision was applicable to the initial adjudication of the claim. The Court of Appeal reasoned:

> 45 In considering the interrelationship of GECA and the Nova Scotia Workers' Compensation Act, I can find no basis for finding any real distinction in this province between entitlement as expressed in GECA and the entitlement provisions of the Nova Scotia legislation. That is, I see no conflict between GECA and the provincial provisions under review. In my view the language in s. 4(1) of GECA is sufficiently broad and inclusive to embrace the language creating entitlement in the Nova Scotia Act; thus a worker entitled under GECA to claim compensation in Nova Scotia is by necessary implication also entitled to the benefits, and is bound by any restrictions contained in the provisions of the Nova Scotia Workers' Compensation Act. That is, the language of GECA does not support an interpretation which would exclude federal workers who require the assistance of s. 187 to be entitled to workers compensation in Nova Scotia. It has not been shown to my satisfaction, that Parliament intended to create an exclusionary distinction that would deflect the intention expressed in the Hansard reports that federal employees should have the same entitlement to workers' compensation as their provincial counterparts. In my view an interpretation supporting such a distinction would create a conflict between GECA and the provincial Act where none exists.

The Court of Appeal rejected the argument that the benefit of the doubt provision created by section 187 of the Act could not help federal workers establish entitlement:

> 53 The appellant has described, and relies upon, the problematic GECA "gateway", or "threshold", which in my view is an erroneous concept. It assumes that s. 4(1) of GECA was intended by Parliament to create a "gateway" or "threshold" through which federal employees must pass before they can redeem the ministerial promise of equal treatment with their provincial counterparts under the workers' compensation laws of the

province in which they are employed. While I agree that for federal employees access to the Nova Scotia Workers Compensation Acts must be through GECA, I do not agree that the entry point should be arbitrarily placed somewhere within s. 4, either between s. 4(1) and 4(2) or between 4(1)(a) and 4(1)(b) or perhaps both. The appellant offers no authority for this proposition, and in my view that is contrary to the scheme of GECA. The Nova Scotia legislation must be engaged much earlier in the process, and not in the midst of the key section which brings federal workers under the Nova Scotia Act.

54 While the point of entry in the statute might be between s. 3 and s. 4, after GECA has defined the federal employees to which it applies, the process really begins when the claim is filed.

In *Morrison*, the Court of Appeal further quoted with approval the brief provided by the Attorney General of Canada:

> In my view the interaction of GECA with provincial workers' compensation legislation was concisely expressed by the Attorney General for Canada as follows:
>
> > The Attorney General submits that the interplay between GECA and the WCA ought to be interpreted as follows:
> >
> > The provincial workers' compensation scheme governs claims submitted under GECA provided that:
> >
> > (a) The provision in issue is reasonably incidental to a "rate" or "condition" governing compensation under the law of the province, and
> > (b) The provision is not otherwise in conflict with GECA.
>
> 69 This approach appears to be consistent with the case law, and I adopt it. Whether "reasonably incidental" in (a) is referred to as "integral" (Smith) or "sufficiently linked or connected to compensation" (Bergeron [1997] A.Q. No. 811), the concept is common in the jurisprudence. There must be a close nexus between the provincial provision sought to be invoked and compensation. Section 187 of the Nova Scotia Act is intended to correct the imbalance of resources between the resources of the Workers' Compensation Board and the individual worker seeking compensation.

In *Morrison*, the Court of Appeal further reasoned:

> 59 I am unable to accept the appellant's argument for a number of other reasons. Firstly it is too subtle; Workers compensation enactments, particularly concurrent ones like GECA and the provincial Acts, are robust legislation subject to robust rules of interpretation aimed at bringing benefits home to the workers for whom they are intended. GECA, like the provincial Acts, has been evolving since 1918. If the words used in s. 4(1) of GECA were intended to mean something different from the same words when used in the provincial legislation, Parliament has missed numerous opportunities over the years to add a warning signal by a simple amendment.

The Court of Appeal concluded:

> 67 In my view the concept of the GECA gateway, on a proper interpretation of the statutes, is wrong at law. It should be permanently laid to rest. It is not deeply embedded in the jurisprudence, where it has been raised in a number of Board and Tribunal decisions essentially in a tentative manner and not as an established principle to be followed. It is an artificial and unnecessary construct, capable of creating confusion and injustice, and betrays the expectations created in the federal workers of Canada by ministerial statements in House of Commons.

In *Morrison*, the Court of Appeal expressed agreement with the reasoning provided by the Ontario Court of Appeal in *Canada Post Corp*. v. *Smith* (1998), [1998] O.J. No. 1850, (1998) 40 O.R. (3d) 97, (1998) 159 D.L.R. (4th) 283, (1998) 109 O.A.C. 117, application for leave to appeal to the Supreme Court denied, [1998] S.C.C.A. No. 329. In that case, the Ontario Court of Appeal considered whether the right of an injured worker to be re-hired accorded by section 54 of the Ontario Act, and a penalty imposed on an employer which breached section 54, constituted “compensation” within the meaning of section 4(2) of GECA. The Ontario Court of Appeal found that the right to reinstatement was a "benefit" within the definition of "compensation". Abella, J.A. stated at paragraph 18:

> This result, in my view, is neither inequitable nor inconsistent with the principles of federalism. Making different administrative arrangements with different provinces is not unconstitutional. Rather than leaving injured or disabled federal workers with no recourse, the federal government

> passed the GECA so that every federal employee had the right to whatever compensation other injured workers in the same province could claim. What the federal government has ensured is uniformity in compensation between injured employees in any given province, whether federally or provincially employed.

She stated further in paragraph 47:

> 47. The various provincial laws, not the GECA, set out the relevant boundaries of the compensation schemes for injured workers. The GECA is merely the statutory vehicle for transferring authority over these issues to the appropriate provincial bodies (s. 4(3)), thereby inferentially absorbing all compensation-related rights and benefits provisions in provincial statutes (s. 4(2)). As the expert body and designated interpreter of this legislation in Ontario, the Tribunal's decisions in this regard are entitled to curial deference absent clear irrationality.

In *Morrison*, the Nova Scotia Court of Appeal stated: "I agree with Abella's statements which in my view go to the heart of the interrelationship of GECA and the provincial legislation."

In summary, appellate courts have found that federal employees claiming workers' compensation benefits are entitled:

- to the benefit of statutory presumptions which affect the initial adjudication of the employee's eligibility as well as statutory provisions concerning the amount of compensation,
- to the same rights of appeal afforded provincial workers, and,
- to non-monetary forms of compensation,

Leave to appeal to the Supreme Court of Canada was denied, in relation to the decision of the Nova Scotia Court of Appeal in *Morrison* (on April 29, 2004), and in relation to the decision of the Ontario Court of Appeal in *Canada Post Corp*. v. *Smith* (on December 10, 1998).

Key provisions of the Agreement between the FG and the Board are contained in items 1.1 to 1.3 of Appendix "A", which sets out the respective responsibilities of the Board and the Minister's Representative. These provide as follows:

1.1 The Board shall adjudicate claims from employees and pay and provide compensation.
1.2 Before adjudicating a claim not forwarded to the Board by the Minister's Representative, the Board shall forward to the Minister's Representative a request, in writing, for information on employee status.
1.3 The Board shall take no action on any claim for compensation that has been stamped "election form required" by the Minister's Representative.

Item #1.2 requires the Board to request "information" on employee status from the Minister's Representative, before adjudicating a claim not forwarded to the Board by the Minister's Representative. This provision might have been intended to exclude or remove the Board's jurisdiction to adjudicate the issue of employee status. Alternatively, it may simply have been intended to ensure that the Board did not proceed with an adjudication, prior to affording the Minister's Representative the opportunity to provide input to assist the Board in its adjudication.

In my view, the word "information" is more in keeping with this latter interpretation. The word "information" is a somewhat neutral term, comparable to the term "evidence". If the FG had intended to exclude the Board's jurisdiction, it could have used a stronger term such as "decision" or "determination". Having regard to the imperative language utilized in item #1.3, the FG could also have included a prohibition on the Board considering a claim without a determination from the Minister's Representative that the individual was an employee. The wording of the Agreement appears to leave it open to the Board to adjudicate issues of employee status.

The review officer found that GECA has a very detailed and specific definition of "employee". The review officer concluded that if Parliament had intended the Board to use its expertise in the preliminary step of determining employee status, it would have referentially incorporated the respective provincial definition (i.e. "worker"). However, I am not persuaded that this is the case. The definition provided in GECA of the term "employee" does not include criteria which would assist in distinguishing between an employee and an independent contractor. While it would be important for Board officers to appreciate that a determination of status under GECA involves an application of the definition of employee contained in section 2 of GECA, rather than the definition of worker from section 1 of the Act, I consider that the Board nevertheless has some expertise in addressing such issues. I note, in this regard, the detailed policy guidance provided in item AP1-1-3 of the *Assessment Manual*, which sets out general principles for determining whether a contract to perform work creates an employment relationship or a relationship between independent firms. The policy provides, in part:

In distinguishing an employment relationship from one between independent firms, there is no single test that can be consistently applied. The factors considered include:

- whether the services to be performed are essentially services of labour;
- the degree of control exercised over the individual doing the work by the person or entity for whom the work is done;
- whether the individual doing the work might make a profit or loss;
- whether the individual doing the work or the person or entity for whom the work is done provides the major equipment;
- if the business enterprise is subject to regulatory licensing, who is the licensee;
- whether the terms of the contract are normal or expected for a contract between independent contractors;
- who is best able to fulfill the prevention and other obligations of an employer under the *Act*;
- whether the individual doing the work engages continually and indefinitely for one person or works intermittently and for different persons; and
- whether the individual doing the work is able or required to hire other persons.

The major test, which largely encompasses these factors, is whether the individual doing the work exists as a business enterprise independently of the person or entity for whom the work is done.

No business organization is completely independent of all others. It is a question of degree whether a party to a contract has a sufficient amount of independence to warrant registration as an employer. Many small parties may only contract with one or two large firms over a period of time. Yet they are often independent of the person with whom they are contracting in significant respects. For example, they must seek out and bid for their own contracts, keep their own books and records, make income tax, unemployment insurance and Canada Pension Plan deductions. They

> also retain the right to hire and fire their own workers and exercise control over the work performed by their workers. These factors must be considered.

While caution would be required in applying policies developed under Part 1 of the Act to the federal context, I consider that the Board's expertise in this area would also be relevant to determining an individual's status under section 2 of GECA. Similar issues as to whether an individual is an independent operator or a worker often arise in the context of claim or assessment appeals, or in the context of providing a certificate regarding the status of parties to a legal action (under the former section 11, or current section 257 of the Act).

The review officer found that the determination provided by L was binding on the Board. However, subsequent to the Review Division decision, by letter dated March 3, 2004, L clarified that her determination was provided under Part II of the *Canada Labour Code*, R.S. 1985, ch. L-2. Her determination was provided for the purpose of considering whether she had authority to investigate the circumstances of Z's death, as a health and safety issue under Part II of the *Canada Labour Code*. This determination was provided for the purposes of a separate statute. L did not purport to address Z's status for the purposes of GECA. With the benefit of the new evidence which was not available to the Review Division, I find that the Review Division erred in concluding that L's determination of Z's status was binding for the purposes of GECA.

As stated by the Director General, National Labour Operations Directorate (in his letter of October 19, 2004), S was (in her letter of May 7, 2004) providing information related to her understanding of the GECA policies and procedures and actual practice. In that sense, the FG has not formally taken a position on the legal issue before WCAT in this appeal. While the CC for which Z was working at the time of his death submits that WCAT has no jurisdiction to address Z's status, the FG has remained neutral on the interpretive issue.

Counsel for the CC points out that information on HRDC's website indicates:

> HRDC determines whether the injured person is an employee for the purposes of the "*Government Employees Compensation Act*."

I do not attach weight to the general information provided on the HRDC's website. In terms of HRDC's practice, I consider the detailed information provided by S as being more informative. In any event, the interpretive legal issue regarding the Board's jurisdiction must be based on a review of the relevant statutory provisions and related materials, including Court decisions. Although provided in a different context, I adopt the statement of the Court in *Salloum* that "a practice, even a venerable one, cannot confer jurisdiction where there is none."

Policy of the former governors, and of the current board of directors, contained at #8.10 of the *Rehabilitation Services and Claims Manual*, *Volumes I* and *II*, concerns federal government employees. The policy provides, in part:

> The Government Employees Compensation Act grants "employees" of the Federal Government usually employed in the province the same rights to compensation as non- Federal employees. The definition of "employee" is given in Section 2 of this Act and takes the form of five alternative definitions which are as follows:
>
> [GECA section 2 definition of “employee” quoted in full]
>
> This definition is wide enough to cover most Federal employees, whether employed directly by the Government or by some statutory body. For example, it covers post office workers. The definition also includes certain persons taking training courses relating to their employment with the Government.
>
> By Section 3(1) of the Act, members of the regular force of the Canadian Forces or of the Royal Canadian Mounted Police are excluded from coverage.
>
> Any person appointed by authority of the Chief Electoral Officer and the Canada Election Act to prepare for and hold a Federal election is considered as an employee of the Federal Government for the purposes of the Government Employees Compensation Act. This definition includes Returning Officers, Election Clerks, Enumerators, Stenographers, Typists, Poll Clerks and a Constable.
>
> Effective November 10, 1976, employees of the Bank of Canada are considered employees under the Government Employees Compensation Act.

It would be peculiar for the policy of the board of directors to reproduce in full the wording of the definition of employee under section 2 of GECA, if the Board had no authority to consider whether or not a person came within this definition. While it is possible that these provisions might have been included in the policy simply for information purposes, the more likely inference from the policy of the board of directors is that this involves a subject within the Board’s adjudicative authority.

The review officer also referred to *Appeal Division Decision #93-0502*, “Federal Workers”, 9 WCR 721, April 15, 1993, and *Appeal Division Decision #93-1759*. (The reasoning in the published decision was also followed in *Appeal Division Decision*

#97-1026 dated July 31, 1997). In *Appeal Division Decision #93-0502*, the panel reasoned:

> Section 11 of the B.C. Act is not part of the rate or conditions under which a worker receives compensation. It concerns the determination of status under the Act for purposes of a legal action. An injured worker cannot apply for compensation benefits under section 11, nor is section 11 part of the appeal process. It provides a procedure by which parties who wish to sue, or who are being sued, can determine if there is a legal impediment to the action. I find that section is not reasonably incidental, nor necessary, to the determination of the rate and conditions of compensation for an injured worker. The GECA sets up its own scheme for prohibiting legal action in sections 9 to 12. The administration of those sections was not delegated to the province. I can find no authority for the B.C. Board to make determinations on the substantive provisions found in sections 9 to 12 of the GECA. Similarly, the provisions in section 10 of the B.C. Act, which restrict common law rights of action, are not incorporated into the GECA. It is difficult to see how the procedural provisions in section 11, which go with the substantive provisions in section 10 of the B.C. Act, can be seen to have been incorporated into the GECA to go with the different substantive provisions in sections 9 to 12 of the GECA.

In my view, the jurisdictional issue raised in this appeal involves a separate question from that addressed in *Appeal Division Decision #93-0502*. Without determining the matter, I do not consider that there is any obvious or necessary inconsistency between the Board having jurisdiction to determine employee status under GECA, but not having jurisdiction to provide a certificate for a court action on the basis that this involves a matter for which separate and different provisions are contained in GECA. That raises a separate question which is not necessary to this decision. I also note, in any event, that the Appeal Division decisions regarding this issue did not consider the recent Court decisions cited above. WCAT is not bound by legal precedent or prior Appeal Division decisions, or WCAT decisions apart from those issued under section 238(6) of the Act. (Pursuant to section 250(3) of the Act, WCAT is bound by precedent panel decisions made by a panel appointed under section 238(6) of the Act, subject to a policy relied upon in the decision being repealed, replaced or revised). Should the issue arise in a future case, it may be useful to review the analysis in *Appeal Division Decision #93-0502* in light of the guidance provided by subsequent Court decisions. I further note, in this regard, that *Appeal Division Decision #93-0502* followed the analysis provided in Ontario *WCAT Decision No. 485/90* (cited above). A significant difference between the British Columbia and Ontario workers' compensation legislation is that in British Columbia, neither the Board nor WCAT has authority to consider whether a cause of action is barred. In British Columbia, the authority to certify regarding the status of the parties to a legal action (under the former section 11, and current

section 257) is limited to the issue of the parties' status, without determining the effect of this certification on the cause of action.

At the outset of this decision, I set out in detail the background to this claim and the evidence provided by various persons regarding current practice in relation to the administration of GECA. In making my decision, I consider it useful to be aware of this background information while not treating it as determinative. Current practice cannot be determinative, as it is subject to being changed if it is found to be inconsistent with the Act. It is interesting to note, however, that the regional manager (S) for the federal Injury Compensation program, considered that HRDC's determinations of status would be appealable. Indeed, the expectation that the affected individuals would have a right of appeal under the Act permits the FG to proceed with making its determinations based on the information within its possession, without the need to obtain input from the affected person or to establish other mechanisms for addressing objections to the determinations (to accord with the requirements of natural justice). A determination of an individual's status might require information regarding the individual's work for other employers, and such information would not necessarily be within the possession of the representative of the FG in making the initial finding regarding the individual's status. For example, it may be necessary to obtain the individual's tax returns for several years, to identify all of the individual's sources of earnings.

In *Morrison*, the Nova Scotia Court of Appeal reasoned (in paragraph 54):

> Workers made eligible by the GECA definitions in s. 2, and not excluded by s. 3, who have, or consider that they have, suffered accidents or illness, or the dependents of such workers, are entitled to file claims for compensation. The filing of the claim engages the provincial legislation. The administrative agreement makes it clear that all claims are to be investigated and reviewed for eligibility by the Workers' Compensation Board. That is, the Workers' Compensation Board is clothed with jurisdiction over the federal worker from the moment the claim is filed. The Board of course is a creature of provincial statute. Its powers of investigation and review, like all the other powers it exercises, must be found within, and only within, the provisions of the provincial enactment. Once the provincial legislation is engaged, in my view it is engaged for all purposes of GECA and the Workers' Compensation Acts.

While the Court of Appeal was addressing a different issue, I find this reasoning similarly supports a conclusion that the Board has jurisdiction to inquire into and

adjudicate a claim by an individual claiming to be an employee under section 2 of GECA. I find no compelling reasons as to why the authority of the various levels of decision-making within the provincial workers' compensation system should not extend to this issue.

I am reminded, in this regard, of the wording of the former section 90 of the Act, which provided a worker with a right of appeal to the independent Workers' Compensation Review Board, where the Board had made "a decision under this Act with respect to a worker". While a literal reading of that provision might have suggested that a person found to be an independent contractor rather than a worker would not have a right of appeal, such an interpretation would have had absurd results. Review Board practice was to exercise its jurisdiction to consider appeals where the question in issue was whether the individual was a worker. Similarly, under section 241 of the Act, workers have a right of appeal to WCAT. An individual found by the Board or the Review Division to be an independent contractor, rather than a worker, does not thereby lose the right to pursue an appeal for the purpose of seeking to establish that he or she is indeed a worker. The right of persons to receive compensation "at the same rate and under the same conditions as are provided under the law of the province", may reasonably be viewed as affording a similar opportunity to pursue a request for review or appeal in relation to an adverse determination regarding an individual's status. I find persuasive the argument by the workers' adviser, that the determination of employee status is reasonably incidental to a condition governing compensation under the law of the province, and is not otherwise in conflict with GECA.

It is not necessary to my decision that I address the question regarding the manner in which the Board makes its initial decision, as to whether this involves its own separate adjudication or whether the Board officer may simply adopt the advice of the authorized representative for the FG's Injury Compensation Program (where this has been provided, which was not the case here). Once the Board's decision has been issued, I find that the Review Division has jurisdiction to consider a request for review of the decision, and the Review Division decision is appealable to WCAT.

In this case, no determination was provided by the Minister's Representative regarding employee status, despite a request for information regarding employee status from the Board. The Minister's Representative was afforded the opportunity to provide such information. In any event, even if the Minister's Representative had advised that Z was not an employee, and the Board case manager had simply adopted that information for the purposes of the initial adjudication of the claim, I consider that the same rights of review and appeal should be available to the applicant under the Act regarding the merits of this determination. Accordingly, I disagree with the decision by the Review

Division, which found that a determination of employee status was within the exclusive jurisdiction of the FG and was insulated from review by the Review Division.

It is evident from the Court decisions set out above that similar issues have been the subject of considerable dispute. I take guidance from the recent Court decisions cited above, which support a purposive and liberal interpretation of the relevant statutory and contractual provisions aimed at ensuring equality of treatment for individuals claiming compensation under GECA. To my mind, it would seem unfair were the widow's application for compensation to be denied on the basis of a determination that Z was not an employee, with no opportunity for input from her, and no mechanism for seeking review or appeal of the determination apart for an application for judicial review. I am not persuaded that the provisions of GECA and the Agreement require such a result. I do not consider that such a situation could be equated with a right of persons working for the FG to receive compensation "at the same rate and under the same conditions" as workers in the Province. Adopting a purposive interpretation of this wording, I find that persons performing work for the federal government should be given access to the same avenues of review and appeal provided under the Act, on issues relating to the nature and extent of compensation payable. I find this includes issues relating to initial eligibility for compensation, as well as the question as to whether the person is an employee within the meaning of section 2 of GECA. To the extent this decision involves an expansion of the meaning of the phrase "entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed", as set out in section 4(2) of GECA, I find this is in keeping with the analysis provided in the recent Court decisions cited above. This interpretation is also supported by section 12 of the federal *Interpretation Act*, R.S. 1985, c. 1-21, which provides:

> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

A similar provision is contained in section 8 of the provincial *Interpretation Act*, R.S.B.C. 1996, ch. 238.

I find that the rights of review and appeal, which are afforded provincial workers under the Act in connection with determinations of their status and eligibility for compensation, are reasonably seen as incidental to a condition governing compensation under the law of the province. I further find this interpretation is not otherwise in conflict with GECA. Accordingly, I find that it was within the Review Division's jurisdiction to determine whether or not Z was, at the time of his death, an employee under GECA. I agree, in this regard, with the opinions provided by the Regional Manager for the federal Injury

Compensation program, and by the Board's associate general counsel. The widow's appeal is allowed on this jurisdictional issue.

The workers' adviser expressly requested that WCAT refrain from proceeding to address Z's status, if the widow's appeal were successful. She noted that the Act provides for two levels of review and appeal, and the issue of Z's status has not yet been addressed by the Review Division in view of its conclusion on the jurisdictional issue. This position was confirmed in the further submissions by a workers' adviser on March 3, 2005. Accordingly, I consider it appropriate to restrict my decision to this jurisdictional issue (even if it is within WCAT's jurisdiction to proceed to address the merits). No request has been made for reimbursement of expenses in this appeal and none are awarded.

Conclusion

The Review Division decisions are varied pursuant to section 253(1) of the Act. The employer's requests for review of the February 17 and 20, 2003 decisions by the case managers are returned to the Review Division for consideration on the merits. The issue as to whether Z was, at the time of his death, an employee under GECA, is an issue which the Review Division has jurisdiction to determine. It was not necessary that I determine whether Board officers are obliged to make their own initial adjudication on status, or whether they may simply adopt the advice of the authorized representative for the FG's Injury Compensation Program.

Herb Morton
Vice Chair

HM/cd