DATE: September 3, 1998
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COURT OF APPEAL FOR ONTARIO

OSBORNE and LABROSSE JJ.A. and BLAIR J. (*ad hoc*)

IN THE MATTER OF the *Judicial Review Procedure Act*
R.S.O. 1990, c. J.1

AND IN THE MATTER OF the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31

AND IN THE MATTER OF order P-373 (Appeals P-910306, P-910307, P-910308, P-910309 and P-910310) of the Assistant Information and Privacy Commissioner (Ontario), dated November 24, 1992

B E T W E E N:	
WORKERS' COMPENSATION BOARD Applicant (Respondent in Appeal)	William S. Challis and David S. Goodis, for the Appellant
- and -	J. Thomas Curry and Tacho M. J. Manson, for the Interveners, Employers' Advocacy Council, Canadian Manufacturers' Association and Council of Ontario Construction Associations
TOM MITCHINSON, ASSISTANT INFORMATION AND PRIVACY COMMISSIONER (ONTARIO) Respondent (Appellant)	Leslie M. McIntosh, for the Intervener, Attorney-General of Ontario
- and -	Jeff G. Gowan, for the Respondent, Workers' Compensations Board
ATTORNEY-GENERAL OF ONTARIO Intervener	**Heard: April 15 and 16, 1998**

LABROSSE J.A.:

[1] The appellant, the Assistant Information and Privacy Commissioner (the "Commissioner") appeals, with leave, from the decision of the Divisional Court quashing the Commissioner's order

directing the Workers' Compensation Board (the "WCB") to release certain records pursuant to a request made under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "Act").

[2] The WCB cross-appeals the part of the decision of the Divisional Court dealing with s. 17 (2) of the Act.

[3] The Attorney General of Ontario was granted status as an intervener in the appeal. The other interveners are associations of employers with special interests in matters relating to the WCB and they support the position of the WCB.

[4] It is convenient at the outset to quote the relevant provisions of the Act:

> 10.(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.
>
> 17.(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> . . .
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> ....
>
> (2) A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.
>
> 23. An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

THE FACTS

[5] The facts have been fully stated in the reasons of the Divisional Court (23 O.R. (3d) 31). A brief summary of the relevant facts is sufficient for the purpose of this appeal.

[6] A consultant (the "requester") requested extensive information from the WCB with respect to employers having the highest penalty ratings based on their accident experiences. The WCB denied access to the information and the refusal was appealed to the Commissioner. As a result of mediation (s. 51), the request was narrowed down to the fifty most penalized firms participating in five programs operated by the WCB which were designed to reduce industrial accident rates and severity. The records for the five programs (the "records") are essentially the same in that they list the names and addresses of the top fifty employers participating in each program in descending order according to the amount of penalty surcharge. The only difference is that records 1, 2 and 3 contain the actual amounts of surcharge while records 4 and 5 do not.

[7] The Commissioner's Notice of Inquiry (s.52(1)) raised the issues of the application of the exemptions claimed by the WCB under ss. 17 (1) and (2) and the application of the public interest override provision in s. 23 of the Act. In response the Commissioner received written representations from the WCB, and numerous employers and employers' associations.

[8] The Commissioner concluded that the statutory exemptions in the Act did not apply and ordered the release of the information. An application for judicial review was granted by the Divisional Court and the order of the Commissioner was quashed on the basis that it was patently unreasonable.

THE STANDARD OF REVIEW

[9] The threshold and most important issue in this case is the appropriate standard of review which is to be applied to the Commissioner's decision when he is interpreting his enabling statute.

[10] The Divisional Court has consistently held that the Commissioner's decisions on questions within his jurisdiction are entitled to a high degree of curial deference; in some cases, the Divisional Court applied the standard of review of patent unreasonableness. See generally: *Right to Life Assn. of Toronto and Area v. Toronto District Health Council* (1991), 86 D.L.R. (4th) 441 at 444 (Ont. Div. Ct.); *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 at 776-83 (Div. Ct.); *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 at 200-01, leave to appeal refused 12 September 1994; *Corporation of the City of Toronto v. Donald Hale, Inquiry Officer* (25 October 1994) Toronto Doc. 665/93 (Ont. Div. Ct.); *Toronto (City) v. Information and Privacy Commissioner (Ont.)*, (1995) 86 O.A.C. 368 at 370-371 (Div. Ct.); *Ministry of Consumer and Commercial Relations v. Anita Fineberg, Inquiry Officer, et al.* (21 December 1995) Toronto Doc. 220/95 at pp. 1-2 (Ont. Div. Ct.), leave to appeal refused 28 May 1996; *Toronto Board of Education v. Burk, et al.* (6 March 1996) Toronto Doc. 213/95, at p. 5; *Ontario Hydro v. John Higgins, Inquiry Officer, et al.* (9 May 1996), Toronto Doc. 828/94 at p. 2 (Ont. Div. Ct.), leave to appeal refused 11 September 1996.

[11] In the present case, the Divisional Court did not conduct an analysis of the appropriate standard of review, although it used deferential language characteristic of the patently unreasonable test. The issue of the appropriate standard of review must be determined on the basis of the recent decisions of the Supreme Court of Canada in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 and *Canada (Director of Investigation and Research, Competition Act) v.*

Southam Inc., [1997] 1 S.C.R. 748, where the Court recognized a third standard situated between correctness and patent unreasonableness. Both *Pezim* and *Southam* involved statutory appeals concerning questions of statutory interpretation by specialized tribunals. However, the application of those decisions is not limited to those situations as Iacobucci J., speaking for a unanimous court in both cases, in considering the standard of review, spoke generally of the principles of judicial review. (It would not be logical to speak of a privative clause if the standard of review were only intended to apply to statutory appeals.) Moreover, the authorities Iacobucci J. relied on are not limited to statutory appeals. It is not necessary for the purpose of this appeal to review the facts of those two decisions.

[12] In *Pezim*, Iacobucci J. stated at pp. 589-91:

> B. *Principles of Judicial Review*
>
> From the outset, it is important to set forth certain principles of judicial review. There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.
>
> Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal. See *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1089 (*Bibeault*), and *Domtar Inc. v. Quebec (Commission d'appel en matiere de lesions professionnelles)*, [1993] 2 S.C.R. 756.
>
> At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of

> appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights. See for example *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, and *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.

In *Pezim*, Iacobucci J. concluded that the proper standard of review fell between the two extremes (p.591). However he added at p. 598:

> In summary, having regard to the nature of the securities industry, the Commission's specialization of duties and policy development role as well as the nature of the problem before the court, considerable deference is warranted in the present case notwithstanding the fact that there is a statutory right of appeal and there is no privative clause.

[13] In *Southam*, Iacobucci J. again addressed the need for a third standard. At p. 765, he said:

> In *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, a decision which, like this one, concerned a decision of an expert tribunal that was subject to a statutory right of appeal, the Court declared that the standard of review is a function of many factors. Depending on how the factors play out in a particular instance, the standard may fall somewhere between correctness, at the more exacting end of the spectrum, and patently unreasonable, at the more deferential end. See pp. 589-90.

And at pp. 776-77:

> I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary 'patently', an adverb, is defined as 'openly, evidently, clearly'". This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. See *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1370, per Gonthier J.; see also *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 47, per Cory J. But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

And further at 778-79:

> The standard of reasonableness *simpliciter* is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In *Stein v. "Kathy K" (The Ship)*, [1976] 2 S.C.R. 802, at p. 806, Ritchie J. described the standard in the following terms:
>
> > ... the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability. [Emphasis is Iacobucci J.'s.]
>
> Even as a matter of semantics, the closeness of the "clearly wrong" test to the standard of reasonableness *simpliciter* is obvious. It is true that many things are wrong that are not unreasonable; but when "clearly" is added to "wrong", the meaning is brought much nearer to that of "unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not go so far as the standard of patent unreasonableness. For if many things are wrong that are not unreasonable, then many things are clearly wrong that are not patently unreasonable (on the assumption that "clearly" and

> "patently" are close synonyms). It follows, then, that the clearly wrong test, like the standard of reasonableness *simpliciter*, falls on the *continuum* between correctness and the standard of patent unreasonableness. Because the clearly wrong test is familiar to Canadian judges, it may serve as a guide to them in applying the standard of reasonableness *simpliciter*.

In that case, Iacobucci J. applied the standard of reasonableness *simpliciter*.

[14] It is in light of these directions that the appropriate standard of deference must be considered in the present case. To perform the necessary "pragmatic and functional" analysis there must be a balancing of the factors for and against the two extremes of correctness, which warrants the least degree of deference, and patent unreasonableness, which demands the highest degree of deference.

[15] On the limited deference side of the coin, there is no privative or finality clause to assist in determining the legislature's intention. In addition, the practice of the Commissioner (as was done in this case) is to request and review written submissions, without affidavits or sworn evidence. (A forty-day hearing involving fifty witnesses and a review and evaluation of the evidence was an important consideration in the balancing act in *Southam*.) In these circumstances, the role of the tribunal with respect to fact finding and weighing of evidence is reduced. In addition, the Commissioner does not exercise a policy-making function: his function is to apply the statutory provisions to the material before him (see *Pezim* at p. 596). These factors indicate that the decision of the Commissioner was not intended to be final and as such attracts less deference.

[16] On the greater deference side of the coin, there are factors that point in the direction of deference. There is no statutory right of appeal. The purpose of the Act is to provide access to information under the control of government institutions, in accordance with the principles that information should be available to the public, that necessary exemptions should be limited and specific, and that decisions on disclosure of government information should be reviewed independently from government. The Commissioner, an officer of the legislature, is required to administer the Act and to provide independent review of government decisions on access to information. He is also required to determine if any of the statutory exemptions apply.

[17] In *United Brotherhood of Carpenters and Joiners of America Local 579 v. Bradco Construction Limited*, [1993] 2 S.C.R. 316 at p. 335, Sopinka J. emphasized that "the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause". In *John Doe v. Ontario (Information and Privacy Commissioner)*, Campbell J,. speaking for the majority of the Divisional Court, commented on the expertise of the Commissioner. At pp. 782-83, he stated:

> Accordingly, the commissioner is required to develop and apply expertise in the management of many kinds of government information, thereby acquiring a unique range of expertise not shared by the courts. The wide range of the commissioner's mandate is

> beyond areas typically associated with the court's expertise. To paraphrase the language used by Dickson C.J.C., as he then was, in *New Brunswick Liquor Corp. v. Canadian Union of Public Employees, Local 963, supra*, the commission is a specialized agency which administers a comprehensive statute regulating the release and retention of government information. In the administration of that regime, the commissioner is called upon not only to find facts and decide questions of law, but also to exercise an understanding of the body of specialized expertise that is beginning to develop around systems for access to government information and the protection of personal data. The statute calls for a delicate balance between the need to provide access to government records and the right to the protection of personal privacy. Sensitivity and expertise on the part of the commissioner is all the more required if the twin purposes of the legislation are to be met.
>
> The commission has issued over 500 orders in the five years since its creation [now 2,000], resulting in an expertise acquired on a daily basis in the management of government information.

[18] Considering all these factors, it is my view that the present case falls between the two extremes of "correctness" and "patent unreasonableness". It calls for a standard more deferential than correctness but less deferential than patent unreasonableness. This is the third standard articulated by Iacobucci J. in *Pezim* and *Southam*: reasonabless *simpliciter*, which still results in considerable deference being given to the tribunal's decision. Unlike *Walmsley v. A.G. Ont.* (1997), 34 O.R. (3d) 611 (Ont. C.A.), this case concerns sections of the Act which are not jurisdiction limiting. Sections 17(1) and (2) apply to documents that otherwise come within the scope of the legislation and which but for these exemptions would be disclosable. In determining whether these documents come within these exemptions the Commissioner is applying his expertise in balancing the need for access and the right to protection of privacy. While this might otherwise suggest that maximum deference apply to his findings, there is no privative clause protecting those findings. Moreover, the procedure used by the Commissioner lacks the validation provided by examination and cross-examination under oath. Finally, the Commissioner's task of interpreting and applying the exemptions is simply statutory interpretation which does not require policy-making from the decision maker. These factors have led me to conclude that the somewhat less deferential standard of simple reasonableness is appropriate in this case.

APPLICATION OF THE STANDARD TO S. 17(1)

[19] The relevant portions of s. 17(1) are repeated here for convenience:

> 17.(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> . . .
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> ....

[20] Did the Commissioner act unreasonably when he concluded that the exemptions in s. 17(1) of the Act did not apply and ordered the WCB to release the records related to the five workplace health and safety programs? In my view, he did not act unreasonably.

[21] The circumstances of this case are most unusual. After the request for information, the requester did not make any submissions to the Commissioner, and did not appear before the Divisional Court or before this court. The request only involves 1990 information, which is probably no longer relevant. The absence of the requester in the early stage of the application may suggest that he was not serious about his application. The requester's absence may explain why there was no material supporting the release of the records. However, that does not mean that the uncontradicted evidence opposing the release of the records had to be accepted. The Commissioner was still required to decide whether or not the exemptions applied. The legislature intended that fact finding and the weighing of the contents of the written submissions be dealt with by the Commissioner.

[22] The Commissioner stated (the Divisional Court agreed and the test was not attacked during this appeal) that in order to determine if the exemptions in ss. 17(1)(a) and (c) of the Act applied, the following three-part test had to be satisfied:

> (1) the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> (2) the information must have been supplied to the Board in confidence, either implicitly or explicitly; and
>
> (3) the prospect of disclosure must give rise to a reasonable expectation that one of the types of injuries specified in subsections 17(1)(a) and/or (c) will occur.

Failure to satisfy the requirements of any part of this test will render the s. 17(1) claim for exemption invalid.

[23] The Commissioner found that records 1, 2 and 3 contained financial information that satisfied Part 1 of the test. However, with respect to records 3 and 4, he found that as they contained only the names and addresses of employers, they did not satisfy the first part of the test. With respect to Part

2, the Commissioner found that the records did not meet the test for exemption on the basis of confidentiality because the surcharge amounts were not "supplied" to the WCB but rather were calculated by the WCB. He further found that, as the names and addresses of the listed employers were required by the legislation, they could not be said to have been supplied in confidence. Lastly, with respect to Part 3, the Commissioner stated that, in light of his conclusions on Parts 1 and 2, he did not need to decide whether this part of the test had been satisfied. However, he went on to conclude that, in any event, the test had not been met because "they have failed to bridge the evidentiary gap necessary to establish that disclosure of the records at issue in these appeals would reveal this type of information". Thus, he concluded that there was only speculation about possible harm and the third part of the exemption test had not been met.

[24] The Divisional Court found that the Commissioner's decision was patently unreasonable. It concluded that the Commissioner patently erred with respect to Part 1 of the test. As the records were arranged in descending order with respect to amounts of surcharge imposed on the listed employers, they disclosed information of the type referred to in Part 1 of the test. The Divisional Court also concluded that the Commissioner had patently erred with respect to Part 2 of the test because the registration forms were headed with the words "all information is strictly confidential" and the records came within Part 2 of the test. As to Part 3, once again, the Divisional Court found that the Commissioner had patently erred because he applied too stringent a test, i.e. a test requiring "detailed and convincing" evidence. The Divisional Court noted that the onus was on the WCB to show reasonable expectation of harm. It concluded that, in any event, the evidence of harm was overwhelming.

[25] Was the decision of the Commissioner unreasonable? The decision need not be correct as long as it was not unreasonable. At the outset, it is essential to recall the meaning of the word "unreasonable" in order to determine the appropriate degree of deference. In *Canada (Attorney General) v. Public Service Alliance of Canada, supra* Cory J., in the context of discussing the meaning of "patent unreasonableness", provided a definition of the word "unreasonable". At p. 963, he stated:

> "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational. ... Not acting in accordance with reason or good sense".

Hence, to conclude that a decision is unreasonable the court must find that it is irrational or not in accordance with reason. It need not find that the decision is clearly irrational or patently unreasonable.

[26] With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meanings. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "detailed and convincing" do not modify

the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again, it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm.

[27] The Commissioner was dealing with the provisions of s. 17 of the Act, provisions that he deals with on a regular basis. The reasons of the Commissioner are detailed, reasoned and logical. The Divisional Court disagreed with the decision of the Commissioner. Deferential language was used but not applied. In my opinion, the Divisional Court substituted its own view of the interpretation and application of the statute and of the evidence before the Commissioner and thus applied the wrong standard of review.

[28] Since the Commissioner found that no exemption from disclosure had been established, he did not consider that it was necessary to deal with the public interest override in s. 23 of the Act. I see no obligation, in these circumstances, that required the Commissioner to deal with s. 23.

SECTION 17(2) OF THE ACT

[29] The Commissioner also found that the records were not exempt under s. 17 (2) of the Act. Section 17(2) is repeated here for convenience:

> (2) A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

[30] On this issue, the Divisional Court stated that the "badges of taxation were present"; however, it deferred to the Commissioner and did not interfere with his decision on this issue "based on the *Massey-Ferguson* decision" [*Massey-Ferguson Industries Ltd. v. Saskatchewan*, [1981] 2 S.C.R. 413]. The WCB cross-appeals this part of the decision of the Divisional Court. The intervener, the Attorney General, takes no position with respect to the cross-appeal. The other interveners support the position of the WCB.

[31] The primary issue is whether or not the WCB assessments or levies are a "tax". In my view, the Commissioner reached a reasonable conclusion in determining that the assessments are not a tax.

[32] There are three cases which are directly relevant to the cross-appeal. They are: *Workmen's Compensation Board v. C.P.R. Co.* (1919), 48 D.L.R. 218 (P.C.), *Royal Bank v. Workmans' Compensation Bd. of N.S.*, [1936] 4 D.L.R. 9 (S.C.C.) and *Massey-Ferguson, supra*. Broadly speaking, the first two cases are said to stand for the proposition that levies or assessments are a "tax", whereas the last case comes to the opposite conclusion.

[33] In *C.P.R.*, the Privy Council dealt with the question whether the payment of compensation under the *Workmen's Compensation Act* of British Columbia was *ultra vires* of the province. Lord Viscount Haldane stated at p. 221:

> Nor can it be successfully contended that the Province had not a general power to impose direct taxation in this form on the respondents if for Provincial purposes.

Viscount Haldane did not explain why workers' compensation assessments were taxes. He did not specifically conclude that the assessments were taxes, he merely referred to them as such.

[34] In *Royal Bank*, the Supreme Court of Canada considered the issue of priorities under the provisions of the *Bank Act*, R.S.C. 1927, c. 12, s. 88, between an assessment due under the *Workmen's Compensation Act*, R.S.N.S. 1923, c. 129, s. 79 and a bank's instrument. The issue whether the asssessment amounted to a "tax" was not argued. The majority accepted the appellant's admission that a workers' compensation assessment was a tax and added that it had no doubt that it was a tax. In a concurring judgment, it was assumed, without deciding, that the workers' compensation assessment was a tax. Once again, there was no legal analysis as to why the assessment should be characterized as a tax.

[35] The Supreme Court of Canada in *Massey-Ferguson* dealt with levies, under the *Saskatchewan Agricultural Implement Act*, 1968 (Sask.), c. 1, s. 6F, imposed on the sale of farm implements to provide compensation to farmers for losses suffered. Laskin C.J.C., speaking for the court, described the compensation scheme as follows (p. 430):

> It is the Board which assesses under s. 6F in order to create a fund which will satisfy existing and anticipated compensation awards and Board expenses for investigating and hearing claims. The assessment upon the distributors is annual and is upon "such percentage of their gross sales or other rates ..." as the Board considers sufficient for the above-mentioned purposes. Under s. 6G, distributors may be classified and different rates may be assessed for any class or classes of them.

In its factum (para. 3), the WCB described its compensation scheme in these words:

> Assessments are based directly on payroll. The WCB issued a Notice of Assessment based on the information supplied on that statement. The WCB could increase an employer's assessment based on experience rating, payroll adjustments, industry classification changes and merit/demerit rating systems. Any adjustments (surcharges or rebates) are also based on payroll information provided by the employer. An employer's assessment could be adjusted on the basis of the employer's accident record.

The similarities between workers' compensation assessments and the Saskatchewan compensation scheme are substantial: the similar policies of the *Agricultural Implements Act* and the WCB to relate the assessments to compensation awards and to administrative expenses; both schemes are designed to provide a limited form of insurance; neither scheme involves the consolidated revenue fund; and both schemes are intended to compensate a defined group. While the five incentive programs established by the WCB in the present case add an element to the scheme that is not present in *Massey-Ferguson*, it does not change the fact that the two schemes are essentially indistinguishable for the purpose of determining the nature of the assessments.

[36] In *Massey-Ferguson*, Laskin C.J.C. concluded with respect to the farm implements compensation fund as follows (at pp.432-33):

> I am not persuaded that the assessments to create and maintain a compensation fund should be characterized as taxes within s. 92(2) of the *British North America Act*. The levies, as monetary exactions, are liquidating premiums to satisfy farmers' claims under s. 6D and the policy of the Act is to relate the assessments to the compensation awards and to administrative expenses. They are designed to support a limited form of insurance for the benefit of farmers who purchase agricultural implements, related to their use of such implements. There is here no collection of money to go into a consolidated revenue fund which is then chargeable with satisfying awards of compensation. Although the scheme is a public one, created under a public statute, its beneficiaries and obligors are circumscribed by the particular activity or enterprise in which they are engaged.
> . . .
>
> Although the levy here is intended to meet administrative expenses of the Board, its chief purpose is, as I have already said, to create a limited insurance fund. The distributors who are subject to the levy are under an additional cost of doing business in Saskatchewan, but this does not mean that they are being taxed in a constitutional sense.

[37] When this strong conclusion is compared to the less direct pronouncements in the other two decisions there can be no doubt that *Massey-Ferguson*, a more recent pronouncement of the Court, is the most authoritative on the question whether an assessment towards a compensation fund constitutes a tax. Laskin C.J.C.'s conclusion is direct and forceful compared to the less direct assertions made in the other two cases. Laskin C.J.C. referred to both *C.P.R.* and *Royal Bank* and did not expressly overrule them. However, in light of the similarities between the two schemes and the strong conclusion in *Massey-Ferguson*, I conclude that Laskin C.J.C.'s conclusion is to be preferred.

[38] The WCB also relies on the decision of this court in *Ontario Cancer Treatment and Research Foundation v. Ottawa (City)* (1998), 38 O.R. (3d) 224. The charges in that case were not collected

for the purpose of maintaining a compensation fund to support a form of insurance as in *Massey-Ferguson* and the present case. It does not advance the WCB argument.

[39] While there may be difficulties in determining the meaning of s. 17(2) of the Act and the intention of the legislature, it is not necessary to address those issues in view of my conclusion that the WCB assessments are not a tax. Section 17(2) clearly does not apply to this case. In these circumstances it is not necessary to consider whether or not a different standard of review would apply to the decision of the Commissioner on this issue. The decision would survive even on a correctness review.

CONCLUSION

[40] In conclusion, I would allow the appeal, set aside the judgment of the Divisional Court and restore the order of the Commissioner. The cross-appeal is dismissed. The Commissioner has not asked for costs and I would make no order as to costs.

LABROSSE J.A.
I agree. — OSBORNE J.A.
I agree. — BLAIR J. (*ad hoc*)

RELEASED: September 3, 1998