WCAT Workers' Compensation Appeal Tribunal

150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
Telephone: (604) 664-7800
Toll Free: 1-800-663-2782
Fax: (604) 664-7898
Website: www.wcat.bc.ca

WCAT Decision Number: **WCAT-2012-02738**
WCAT Decision Date: **October 24, 2012**

Panel: Herb Morton, Vice Chair
Guy Riecken, Vice Chair
Andrew Waldichuk, Vice Chair

WCAT Reference Number: 111669-A

Section 257 Determination
In the Supreme Court of British Columbia
Vancouver Registry No. S083389
Po Yee Chan also known as Nicole Chan v. Ministry of Public Safety and Solicitor General for British Columbia

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Applicant: Po Yee Chan also known as Nicole Chan
(the "plaintiff")

Respondent: Ministry of Public Safety and Solicitor General for British Columbia
(the "defendant")

Interested Person: Ming Pao Newspapers (Canada) Ltd.

Representatives:

For Applicant: Paul G. Kent-Snowsell
Lindsay Kenney LLP

For Respondent: Paul Singh
Department of Justice Canada
Public Safety, Defence and Immigration
BC Region

For Interested Person: Ray Amyot
Employers' Advisers Office

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Introduction

[1] The plaintiff, Po Yee Chan also known as Nicole Chan, was employed as a reporter by Ming Pao Newspapers (Canada) Ltd. (Ming Pao). On February 27, 2008, a funeral was held at a cemetery in Burnaby, British Columbia (B.C.), for a well-known actress and comedienne. The public and media were excluded as the funeral was a private event. Members of the public and media assembled outside the gates of the cemetery. Uniformed members of the Burnaby detachment of the Royal Canadian Mounted Police (RCMP) were in attendance to ensure that the public and media did not enter the cemetery.

[2] The plaintiff drove two persons to attend the funeral. While the funeral was in progress, she waited outside. Near the end of the funeral, she returned to the car. At that time, she used her cell phone to take photographs of the RCMP members. After being observed taking photographs, she was directed to leave the grounds of the cemetery. When she refused to leave, two RCMP members attempted to remove her and eventually took her to the ground and handcuffed her. She was then moved some distance. The plaintiff suffered a fractured left leg in this incident.

[3] Pursuant to section 257 of the *Workers Compensation Act* (Act), the Workers' Compensation Appeal Tribunal (WCAT) may be asked by a party or the court to make determinations and certify to the court concerning actions based on a disability caused by occupational disease, a personal injury, or death. This application was initiated by counsel for the plaintiff on July 18, 2011. The plaintiff requested determinations of her status, of the Ministry of Public Safety (Ministry), and of the Solicitor General for B.C. The defendant(s) requested determinations regarding the status of Ming Pao, and of both the Ministry and the Minister of Public Safety and Solicitor General of B.C. (Minister).

[4] The plaintiff's statement of claim used the singular term "Defendant" in referring to the Ministry of Public Safety and the Solicitor General for B.C. However, the plaintiff's July 18, 2011 application requested separate determinations of the status of the Ministry and of the Solicitor General for B.C. Accordingly, there is some ambiguity whether the plaintiff's action is against one or two defendants. Depending on the context, we refer at times in this decision to the defendant or to the defendants. We do not consider this distinction to be important. For reasons set out further below, we have chosen to certify the status of the Minister.

[5] In paragraph 2 of the plaintiff's statement of claim, she claims that the defendant operated a municipal police force in the City of Burnaby, B.C., under section 20(1)(a) of the *Police Act*, RSBC 1996, c. 366, and as such is liable for torts committed by any of the RCMP's municipal constables. That section provided:

> **20** (1) Subject to an agreement under section 18 (1) or 23 (2),
>
> (a) a municipality is jointly and severally liable for a tort that is committed by any of its municipal constables, special municipal constables, designated constables, enforcement officers, bylaw enforcement officers or employees of its municipal police board, if any, if the tort is committed in the performance of that person's duties, …

[6] In paragraph 29 of the Amended Statement of Defence filed on December 1, 2008, the defendant admits that he was the minister responsible for policing in B.C. The plaintiff notes that the RCMP members involved in the February 27, 2008 incident are not parties to the legal action. The plaintiff explains that it was not appropriate to name the police officers as parties, given the protection provided to them under section 21 of the *Police Act* (absent some narrow exceptions).

[7] The plaintiff commenced a provisional claim with the Workers' Compensation Board, operating as WorkSafeBC (Board), with respect to the accident. Certain evidence from her claim file was disclosed to the parties to the legal action. We will consider the evidence anew for the purposes of this application, and any prior Board decisions are not binding on us.

[8] Transcripts have been provided of the examinations for discovery of the plaintiff on March 3, 2009, and of Constable Stanley Lee on February 17, 2011. Written submissions have been provided by the parties to the legal action. Ming Pao completed a notice of participation as an interested person, but declined to provide a submission.

[9] The WCAT chair appointed a three-member (non-precedent) panel under section 238(5) of the Act to hear this application. The background facts are not in dispute, and this application does not involve any significant issue of credibility. We find that this application can be properly considered on the basis of the written evidence and submissions, without an oral hearing.

Issue(s)

[10] Determinations are requested concerning the status of the plaintiff, Ming Pao, the Ministry, and the Minister, at the time of the February 27, 2008 incident.

Jurisdiction

[11] Part 4 of the Act applies to proceedings under section 257, except that no time frame applies to the making of the WCAT decision (section 257(3)). WCAT is not bound by legal precedent (section 250(1)). 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's board of directors that is applicable (section 250(2)). Section 254(c) provides that WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under Part 4 of the Act, including all matters that WCAT is requested to determine under section 257. The WCAT decision is final and conclusive and is not open to question or review in any court (section 255(1)). The court determines the effect of the certificate on the legal action: *Clapp v. Macro Industries Inc.*, 2007 BCSC 840.

Status of the Plaintiff, Po Yee Chan also known as Nicole Chan, and of Ming Pao Newspapers (Canada) Ltd.

[12] By memorandum dated July 26, 2011, the research and evaluation analyst advised that Ming Pao, account #627259, had been registered with the Board since April 1, 1999 and was registered at the time of the February 27, 2008 incident.

[13] We consider that a determination of the status of Ming Pao is relevant to the legal action, as being necessarily incidental to a determination of the plaintiff's status. We find that Ming Pao was an employer within the meaning of Part 1 of the Act.

[14] Following the February 27, 2008 incident, Ming Pao submitted an employer's report of injury to the Board. This report was signed on February 27, 2008 and submitted to the Board on February 28, 2008. Ming Pao advised that the plaintiff was employed by it as a reporter, and had been so employed in excess of 12 months.

[15] The plaintiff underwent surgery on February 28, 2008, for an open reduction internal fixation bicondylar tibial plateau fracture of her left leg.

[16] We find that the plaintiff was a worker within the meaning of Part 1 of the Act. A contested issue is whether her injury in the February 27, 2008 incident arose out of and in the course of her employment.

[17] Ming Pao described the incident as having occurred when the plaintiff was being pushed, and she fell to the ground. Ming Pao responded "yes" to the questions in its report to the Board concerning whether the worker's actions at the time of injury were for the purposes of its business, whether the incident occurred during her normal shift, and whether the worker was performing her regular duties at the time of the incident. Ming Pao advised that it had no objection to the plaintiff's claim being accepted for workers' compensation benefits.

[18] In a telephone memorandum dated March 4, 2008, a client service representative of the Board noted that she had spoken with the plaintiff in Cantonese. She recorded the plaintiff's account of the February 27, 2008 incident as follows:

> A Hong Kong famous actress passed away recently. A funeral was held at Forrest Lawn Memorial Park (cemetery) on Feb 27. She arrived at Forrest Lawn at 9:15 am. She tried to get in the funeral but she was not admitted because she was not in the invitation list. She was at the parking lot. She waited over an hour for a guest (in the funeral). She took a few pictures of RCMP in front of the a hall's entrance. RCMP asked her what she was doing. She was asked her to leave. She told him she was waiting for a guest. She was leaving when he pushed her to the ground.…
>
> [all quotations are reproduced as written, except as marked]

[19] Nearly one year later, the plaintiff submitted a provisional application for workers' compensation benefits dated February 6, 2009 in relation to the injuries she suffered in the February 27, 2008 incident. She advised that she was pursuing a legal action. In her application, she stated that her actions at the time of injury were for her employer's business (Q 20). However, she also advised that the incident did not occur during her normal shift, and that she was not performing her regular work duties at the time of the incident (Q 22 and 23).

[20] The plaintiff gave evidence at an examination for discovery on March 3, 2009. On February 27, 2008, she was giving a ride to a husband and wife to the Forest Lawn cemetery. She was giving them a ride because they did not know where the cemetery was located (Q 11). She stated (Q 11):

> At that time, I know that – I knew that I cannot get in because they have a list, so I wait at the car, and then I wait from 9:30 until 11:15.

[21] Around 11:15 a.m. she saw people coming out and went back to the car. She was waiting near the gate of the hall (Q 11). She noticed several RCMP members grouping by the gate of the hall. She stated (Q 11):

> …in my mind, I was shocked because in Hong Kong, a private – a private funeral have so many RCMP to attend that – that – because of that and so I start to use my cell phone to took (sic) the picture about the RCMP attending to the funeral.
>
> Then an RCMP notice that I was filming with my cell phone and he came to me. He ask me am I taking picture and because at that time [the] coffin was came out – coffin vehicle [hearse] was came out from there, then he thought that I took -- filming that coffin vehicle come out and I said, "No,…."

[22] The plaintiff stated that she showed an RCMP member her cell phone and after examining it he returned it to her. A second RCMP member then told her she had to leave, saying that she could not stay there anymore. He refused to allow her to take her car (Q 11). Ultimately, an RCMP member stated they were going to handcuff her. She was dragged to the grass and handcuffed. The plaintiff's evidence is that her left leg was injured in this process (Q 11).

[23] With respect to her reasons for taking the photos, the plaintiff explained at Q 163 to 165:

> A I mean with a Hong Kongnese actress funeral to have so many RCMP to attend, that is --- that is a big, big issue. That's my nature reaction. I found that it was shock and that's why I act.
> Q As you just said, you thought people would be interested in seeing that?
> A No. What I mean is everyone – if they come to the scene and they see that kind of scene, they would act – they would have the same act.
> Q But then why do you need to videotape it?
> A **First of all, it was my nature reaction. Second, I'd like to take pictures myself, and the third, I was also working as a reporter at the newspaper**, but I would say the pictures I took with the cell phone, it cannot be used in the newspaper because the – the grain is too low.
>
> [emphasis added]

[24] Ming Pao did not use the photos the plaintiff took (Q 169 to 170). The plaintiff wrote an article about the deceased actress, but she wrote this two weeks earlier (Q 172). A work colleague, Daniel, drove her to the hospital following the February 27, 2008 incident. They were both working for the Ming Pao Weekly Magazine (Q 177). The

plaintiff had worked there since May 1, 2001 (Q 178). She was paid on a monthly salary basis, with a paycheque every half month (Q 179). Daniel was outside the gate to the cemetery at the time of the incident (Q 262). The plaintiff described his role as follows (Q 269 to 270):

> Q Was Daniel there on – for the weekly magazine? Was he covering the story?
> A In fact, we know we cannot do anything then because as a weekly magazine, we are not fast. We were not as quick as the newspaper.
> Q Do you know why Daniel was at the funeral?
> A To my understanding, he went there to see what happen and have a look at the environment, how it was the environment, but we knew ahead already we cannot do anything.

[25] An affidavit has been provided by Kar Fai Joseph Koo sworn on August 24, 2011 (Tab 11 of the plaintiff's Book of Authorities). He advised that he was retired. The plaintiff volunteered to drive Mr. Koo and his wife to the funeral on February 27, 2008. They were not familiar with Burnaby and did not know how to get to the cemetery from their home. The plaintiff stated she could take them to the funeral, drop them off, and pick them up afterwards. Mr. Koo was a very well-known pop song composer from Hong Kong. He had known the deceased actress very well from working with her in the past in the entertainment industry in Hong Kong. The plaintiff was a family friend, as well as a good friend of his sister. Their vehicle was stopped at the gates of the funeral home, but one of the gatekeepers recognized Mr. Koo and they were allowed to drive in to attend the service. To the best of his knowledge, the plaintiff was at the funeral to drive him and his wife, and was not working that day.

[26] Stanley Lee testified as follows during his examination for discovery on February 17, 2011. He was employed as a peace officer with the RCMP, in the rank of Constable (Q 8 and 12). He received his paycheques from the federal Government of Canada (Q 31 and 35). He had never received a paycheque from the Government of B.C. or the Municipality of Burnaby (Q 32 to 34). On February 27, 2008, Constable Lee was working, in uniform, to conduct scene security for the funeral at the Forest Lawn cemetery (Q 5). The incident occurred on a Wednesday, which was a regular workday for him (Q 48 and 49). Lee stated that he was informed by his bosses that no media persons were to be allowed inside the Forest Lawn area, based on an agreement between the family and the manager of Forest Lawn (Q 92). They did not want any photographs being taken while the procession was occurring, before or after (Q 94). Lee explained that the deceased had many fans around the world. There was a huge population of fans, including media, that would follow her around (Q 98). Lee further

commented that there were several fans and media representatives renting out other private premises to try to scope out the funeral procession (Q 178). He stated (Q 178):

> So that's their private property. But we can see people with cameras everywhere.

[27] There were video camera crews outside the cemetery staked out at various angles or vantage points. The RCMP left those people alone, as they were on private property outside the cemetery (Q 181 to 182). There were about a dozen RCMP officers at the cemetery as well as 6 to 12 private security people (Q 187 to 188).

[28] Constable Lee's supervisor or boss was Staff Sergeant Dave Eidet (Q 6). Eidet told Lee that the plaintiff needed to leave the place because she was taking photos or video with her cell phone towards the area of the funeral home (Q 376). He requested that Lee and a second RCMP constable escort the plaintiff to the gate on Royal Oak (Q 378 to 381). Lee concluded that the plaintiff's refusal to comply involved a breach of the peace (Q 465 to 466). The plaintiff refused to put her hands behind her back when requested to do so and attempted to walk away (Q 467 to 474). Lee administered a foot sweep to place the plaintiff on the ground (Q 500, 515). Lee and a second RMCP member then placed the plaintiff in handcuffs with her hands behind her back (Q 500).

[29] There is conflicting evidence regarding whether the plaintiff was working at the time of the February 27, 2008 incident. We accept the evidence provided by Mr. Koo as accurately setting out his understanding as to the basis on which the plaintiff offered her services in driving them to the funeral. That evidence identifies a personal or social basis for the plaintiff's presence at the funeral, which was unrelated to the plaintiff's employment.

[30] The plaintiff submitted that reporters do not take photographs with cell phones if they are covering a story. They either take a camera person with them or a photographer with camera equipment capable of taking high resolution photographs suitable for publication. The defendants submit that little weight should be given to this evidence, in the context of the situation on February 27, 2008 in which the media were not allowed on the premises. With respect to the evidence provided by Mr. Koo, the defendants note that it is still possible for the plaintiff to have driven him and his wife to the funeral as described, and to have also been working as a reporter.

[31] We consider that there is evidence supporting a conclusion that the plaintiff's actions at the time of the incident were connected to her employment. Firstly, the plaintiff had written an article concerning the deceased actress approximately two weeks earlier. Accordingly, the funeral of the actress related to her previous work for Ming Pao. Secondly, it is evident that the actress was a celebrity, and her funeral was a significant media event. In fact, the newspaper had one of the plaintiff's colleagues, Daniel,

stationed outside the gate to the cemetery. By providing a ride to her friends, the plaintiff had access to the cemetery grounds, which were supposed to be closed to the media or public. Thirdly, the plaintiff's explanation as to why she used her cell phone to take photos included an express reference to the fact that she was a reporter. As well, her explanation that it was a shock to her to see so many RCMP members at the funeral, and that it was her natural reaction to take a photo because this was shocking to her and this was "a big, big issue" suggests that she saw this angle as potentially being of interest to the public as a possible news story. Fourthly, Ming Pao reported to the Board almost immediately after the February 27, 2008 incident that the plaintiff's actions at the time of the incident were for the purposes of its business. The plaintiff similarly advised the Board, in her provisional application, that her actions at the time of the incident were for the purposes of her employer's business.

[32] At the time of the incident on February 27, 2008, the policies in Chapter 3 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) included the following[1]:

> **#14.00 ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT**
>
> Before a worker becomes entitled to compensation for injury under the *Act*, the injury must arise out of and in the course of employment.
>
> Confusion often occurs between the term "work" and the term "employment". Whereas the statutory requirement is that the injury arise out of and in the course of employment, it is often urged that a claim should be disallowed because the injury is not work related or did not occur in the course of productive activity. There are, however, activities within the employment relationship which would not normally be considered as work or in any way productive. For example, there is the worker's drawing of pay. An injury in the course of such activity is compensable in the same way as an injury in the course of productive work.
>
> Lack of control of a situation by the employer is not a reason for barring a claim otherwise acceptable. Control by an employer is an indicator that a situation is covered under the *Act* at a particular time, but if that control does not exist there may be other factors which demonstrate an employment connection.

[1] In this decision, we have applied the policies in effect at the time of the February 27, 2008 incident. While the board of directors of the Board has approved a revision to Chapter 3, "Re Personal Injury" of the RSCM II, the policies in the new Chapter 3 only apply to injuries or accidents that occur on or after July 1, 2010.

No single criterion can be regarded as conclusive for deciding whether an injury should be classified as one arising out of and in the course of employment. Various indicators can be and are commonly used for guidance. These include:

(a) whether the injury occurred on the premises of the employer;

(b) whether it occurred in the process of doing something for the benefit of the employer;

(c) whether it occurred in the course of action taken in response to instructions from the employer;

(d) whether it occurred in the course of using equipment or materials supplied by the employer;

(e) whether it occurred in the course of receiving payment or other consideration from the employer;

(f) whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;

(g) whether the injury occurred during a time period for which the employee was being paid;

(h) whether the injury was caused by some activity of the employer or of a fellow employee;

(i) whether the injury occurred while the worker was performing activities that were part of the regular job duties; and

(j) whether the injury occurred while the worker was being supervised by the employer.

This list is by no means exhaustive. All of these factors can be considered in making a judgement, but no one of them can be used as an exclusive test.

[33] For the purposes of determining the plaintiff's status at the time the cause of action arose, we consider it appropriate to focus in particular on the plaintiff's actions from the time she took a photo using her cell phone until she suffered her left leg injury (while at the same time bearing in mind the evidence regarding the larger context with respect to her other activities earlier that day).

[34] Detailed information has not been provided concerning the nature of the plaintiff's employment as a reporter, and the extent to which she had the freedom to seek out information and pursue leads for stories on her own. Evidence has not been provided as to whether the employer paid any of the expenses in relation to the plaintiff's use of her vehicle and cell phone. However, the information submitted to the Board by Ming Pao shortly after the incident indicated that the plaintiff's activities on February 27, 2008 were for the purposes of its business, that the incident occurred on "an authorized worksite" during her normal shift, and that she was performing her regular duties at the time of her injury. The employer further advised that the plaintiff normally worked eight hours a day, from Monday to Friday, that she worked four hours on the last day worked, that she was paid for eight hours on her last day worked, and that she did not work past the date of injury. (We note, however, that the employer erred in referring to the date of injury as February 26, 2008.)

[35] On the basis of the limited information before us, we consider that several of the factors contained in RSCM II item #14.00 may be considered to favour workers' compensation coverage. While the circumstances that occurred on February 27, 2008 may have been unique, we consider that factors (b) and (g), and possibly (c) and (i), may be viewed as favouring coverage.

[36] Policy at RSCM II item #21.00 provided:

> **#21.00 PERSONAL ACTS**
>
> **There is a dilemma that is always inherent in workers' compensation. The difficulty, of course, is that the activities of workers are not neatly divisible into two clear categories, their employment functions and their personal lives. There is a broad area of intersection and overlap between work and personal affairs, and somewhere in that broad area the perimeter of workers' compensation must be mapped.** An incidental intrusion of personal activity into the process of work will not require a claim, otherwise valid, to be denied. For example, it has long been accepted that compensation is not limited to injuries occurring in course of production. Where persons are injured while at work in the broader sense of that term, claims will not be denied on the ground that at the precise moment of injury they were blowing their noses, using the toilets or having their coffee break. Similarly it has long been accepted that when a truck driver stops for a meal in the course of a long journey and is injured while crossing the road the driver is just as much entitled to compensation as a factory worker injured on the way to the works canteen. **Conversely, the intrusion of some aspect of work into the personal life of an employee at the moment an injury is suffered will not entitle the employee to compensation.** For example, if someone slips in the living room at home and is injured, that person is not entitled to

> compensation simply on the ground that at the crucial moment the person was reading a book related to work. **In the marginal cases, it is impossible to do better than weigh the employment features of the situation in balance with the personal features and reach a conclusion (which can never be devoid of intuitive judgment) about which should be treated as predominant.**
>
> [emphasis added]

[37] Even if the plaintiff's travel to the cemetery involved personal reasons, we consider that her decision to take photographs was employment related. It was her actions in taking photographs which resulted in the involvement of the RCMP, and led to the incident in which she suffered an injury. Upon weighing the employment features of the situation in balance with the personal features, we consider that the employment features were predominant in relation to the circumstances which gave rise to the plaintiff's injury.

[38] Section 5(4) of the Act provided:

> In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out of the employment.

[39] Policy at RSCM II item #14.10 provided, in part:

> Thus for injuries resulting from an accident, evidence is only needed in the first instance to show either that the injury arose out of the employment or that it arose in the course of employment. The balance is presumed, unless there is evidence to the contrary. Generally speaking, "out of the employment" concerns the cause of injury and "in the course of the employment" its time and place.

[40] Section 1 of the Act provides the following definition of the term "accident":

> **"accident"** includes a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause;

[41] We find that the circumstances in which the plaintiff was injured come within the terms of the definition of accident. The actions by the RCMP members were wilful and intentional, in terms of the steps taken to arrest the plaintiff, including the manner in which she was put on the ground, handcuffed, and subsequently moved in the direction of the gate on Royal Oak.

[42] We consider that the plaintiff's actions in taking the photos were based on her employment as a reporter, and occurred in the course of her employment. A rebuttable presumption thus arises that her injury by accident arose out of her employment. We find that this presumption has not been rebutted by the evidence in this case on a balance of probabilities. We find that her injuries arose out of and in the course of her employment.

[43] Section 5(3) of the Act provides:

> Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or serious or permanent disablement.

[44] Policy at RSCM II item #16.60 provided:

> Before section 5(3) can be considered, it must have been determined under section 5(1) that the injury arose out of and in the course of the employment.

[45] Even if the plaintiff's conduct was viewed as involving serious and wilful misconduct within the terms of this provision, this would not affect the determination of her status in respect of the question as to whether her injuries arose out of and in the course of her employment. We interpret section 5(3) of the Act as only being concerned with whether compensation is payable, and not with the question as to whether section 5(1) of the Act is satisfied. Accordingly, we need not consider section 5(3) of the Act for the purpose of determining whether the plaintiff's injuries arose out of and in the course of her employment.

[46] In summary, we find that Ming Pao was an employer within the meaning of Part 1 of the Act. We find that the plaintiff was a worker within the meaning of Part 1 of the Act, and that her injuries in the incident on February 27, 2008 arose out of and in the course of her employment.

Status of the defendant, Ministry of Public Safety and Solicitor General for British Columbia

[47] The defendants seek determinations that the Ministry and the Minister were employers engaged in an industry within the meaning of Part 1 of the Act.

[48] The defendants submit that the Minister is the appropriate name by which to sue the Government of B.C. in this action. The defendants seek the following determinations:

> The Ministry of Public Safety and Solicitor General of BC and the Minister of Public Safety and Solicitor General of BC were employers engaged in an industry within the meaning of Part 1 of the Act.

[49] The defendants have requested that WCAT also certify regarding the status of the Minister, even though the plaintiff's action is against the Ministry.

[50] Under section 257 of the Act, WCAT may determine any matter that is relevant to the legal action. Accordingly, WCAT may certify regarding the status of a person even if that person is not a party to the legal action if the matter is relevant to the legal action.

[51] In an Amended Statement of Defence filed in the legal action on December 1, 2008, the defendants pled section 10 of the Act. The defendants stated:

> 27. At all material times there was an agreement between the governments of British Columbia and Canada pursuant to section 14(1) of the *Police Act*, R.S.B.C. 1996, c. 367 (the "*Police Act*") and section 20 of the *RCMP Act*, whereby the RCMP was authorized to carry out the powers and duties of a provincial police force.
>
> 28. At all material times the RCMP Officers were deemed to be provincial police constables pursuant to section 14(2) of the *Police Act*.
>
> 29. The Defendant admits that as of February 27, 2008 he was the minister responsible for policing in British Columbia pursuant to Order in Council 938 dated October 26, 2001.

[52] Paragraph 30(f) of the defendant's Amended Statement of Defence also states:

> the Minister of Public Safety and Solicitor General for British Columbia is named as a defendant on behalf of the Government of British Columbia pursuant to section 11 of the *Police Act*;

[53] At this juncture, we consider it necessary to set out a general framework of the interplay between the RCMP (providing services as provincial police officers), the Ministry, and the Minister. This includes the statutory and common law authority as to why a cause of action does not lie against a member of the RCMP, as well as what parties are properly named as defendants when a plaintiff commences a legal action relating to the conduct of a member of the RCMP.

[54] Section 14 of the *Police Act* provides that the minister, on behalf of the provincial government, may enter into an agreement with the Government of Canada to authorize the RCMP to carry out powers and duties of the provincial police force, in which case the RCMP is deemed to be a provincial police force (and RCMP members are deemed to be provincial constables):

> **14** (1) Subject to the approval of the Lieutenant Governor in Council, the minister, on behalf of the government, may enter into, execute and carry out agreements with Canada, or with a department, agency or person on its behalf, authorizing the Royal Canadian Mounted Police to carry out powers and duties of the provincial police force specified in the agreement.
>
> (2) If an agreement is entered into under subsection (1),
>
> (a) the Royal Canadian Mounted Police is, subject to the agreement, deemed to be a provincial police force,
>
> (b) every member of the Royal Canadian Mounted Police is, subject to the agreement, deemed to be a provincial constable, …

[55] Section 11 of the *Police Act* provides, in part:

> **11** (1) **The minister, on behalf of the government, is jointly and severally liable for torts committed by**
>
> (a) **provincial constables**, auxiliary constables, special provincial constables, IIO [independent investigation office] investigators and enforcement officers appointed on behalf of a ministry, if the tort is committed in the performance of their duties, …
>
> [emphasis added]

[56] Under section 11 of the *Police Act*, the Minister, on behalf of the government, is jointly and severally liable for torts committed by provincial constables. We find that a central issue in this application concerns the status of the Minister. In these circumstances, we consider it appropriate to provide a certificate regarding the status of the Minister (rather than the Ministry). The naming of the Ministry rather than the Minister appears to have been in error (possibly a typographical error), given the Minister's liability under section 11 of the *Police Act*.

[57] At the time of the incident on February 27, 2008, policy at item AP1-97-1 of the *Assessment Manual* provided:

> The Board administers coverage for Provincial Emergency Program and Federal Government workers on behalf of the Provincial and Federal Governments, who are assessed on a cost plus administration basis.
>
> **Members of the Federal Police Force (RCMP) and Armed Forces are not covered by this Board but by the Federal Government directly.**
>
> [emphasis added]

[58] Policy at RSCM II item #3.00 provided:

> **The *Act* does not apply to workers of the Federal Government of Canada.** However, by section 4(2) of the *Government Employees Compensation Act*, an "employee" who is usually employed in this province is given the same rights to compensation as workers under the provincial *Act*. The persons considered "employees" are dealt with in this chapter.
>
> [emphasis added]

[59] Policy at RSCM II item #111.50 provided:

> **#111.50 Federal Government Employees**
>
> **The provisions discussed in policy items #111.00 – #111.30** ["Meaning of 'Worker' and 'Employer' under Section 10" of the Act] **above have no application to employees entitled under the *Government Employees Compensation Act*.**
>
> Rules similar to those set out in policy items #111.00 – #111.30 are set out in section 9 of that *Act*. In general, the claimant is precluded from suing the government in respect of an employment accident, but must claim compensation. Where the circumstances of the accident give rise to a right of action against someone other than the government, the claimant must elect either to sue that other person or claim compensation. If the claimant does the latter, the government is subrogated to the right of action. These subrogated actions are administered by the Federal Government directly. The Board is not concerned in them.
>
> [emphasis added]

[60] The *Royal Canadian Mounted Police Act*, RSC 1985, c. R-10, provided:

> **3.** There shall continue to be a police force for Canada, which shall consist of officers and other members and be known as the Royal Canadian Mounted Police.
>
> **4.** The Force may be employed in such places within or outside Canada as the Governor in Council prescribes.

[61] Section 3(1) of the *Government Employees Compensation Act* (GECA), RSC 1985, c. G-5, provides:

> This Act does not apply to any person who is a member of the regular force of the Canadian Forces or of the Royal Canadian Mounted Police.

[62] However, section 34(1) of the *Royal Canadian Mounted Police Superannuation Act* (RCMPSA), RSC 1985, c. R-11 states:

> Notwithstanding subsection 3(1) of the *Government Employees Compensation Act*, that Act applies to every member of the Force, as defined in subsection 2(1) of the *Royal Canadian Mounted Police Act*, except a person or member described in section 32 or 32.1 of this Act.

[63] Section 32 of the RCMPSA provides:

> **32.** Subject to this Part and the regulations, an award in accordance with the *Pension Act* shall be granted to or in respect of the following persons if the injury or disease — or the aggravation of the injury or disease — resulting in the disability or death in respect of which the application for the award is made arose out of, or was directly connected with, the person's service in the Force:
>
> (*a*) any person to whom Part VI of the former Act applied at any time before April 1, 1960 who, either before or after that time, has suffered a disability or has died; and
>
> (*b*) any person who served in the Force at any time after March 31, 1960 as a contributor under Part I of this Act and who has suffered a disability, either before or after that time, or has died.

[64] In *Sultz v. Attorney General of Canada et al*., 2006 BCSC 99, the British Columbia Supreme Court (BCSC) concluded at paragraph 104:

> It is clear that s. 34(1) of the *RCMPSA* now allows members of the RCMP to avail themselves of compensation under the *GECA,* subject to the exception provided for in s. 32….

[65] For the purposes of our decision, we need not determine the status of the RCMP members involved in the February 27, 2008 incident. It is evident, however, that RCMP members are not workers under Part 1 of the Act, whether or not they are eligible for compensation under the GECA.

[66] The *Crown Proceeding Act*, RSBC 1996, c. 89, includes the following definitions in section 1:

> **"Crown"** means Her Majesty the Queen in right of British Columbia;
>
> **"officer of the government"** includes a minister of the government and an employee of the government;

[67] Sections 2 and 3 of the *Crown Proceeding Act* provide, in part:

> **2** Subject to this Act,
>
> …
>
> (c) the government is subject to all the liabilities to which it would be liable if it were a person, and
>
> **3** (1) This Act is subject to the *Workers Compensation Act* and does not apply to any of the following:
>
> (a) proceedings under
>
> (i) the *Income Tax Act*,
>
> (ii) the *Corporation Capital Tax Act*, or
>
> (iii) the *Logging Tax Act*;
>
> (b) assurance fund proceedings under land title legislation;
>
> (c) proceedings to which the *Federal Courts Jurisdiction Act* applies.

(2) Nothing in section 2 does any of the following:

…

(e) authorizes proceedings against the government for anything done in the proper enforcement of the criminal law or the penal provisions of an Act;

(f) subjects the government, in its capacity as a highway authority, to any greater liability than that to which a municipal corporation is subject in that capacity.

[68] The Government of B.C. is not being sued in this action under the *Crown Proceeding Act*. In *Roy v. Canada (Attorney General)*, 2005 BCCA 88, the British Columbia Court of Appeal (BCCA) noted at paragraph 7 that at common law, vicarious liability was not fixed on the employer of a peace officer. In *Roy*, the vicarious liability of the Attorney General of B.C. was found to be "a pure creature" of section 11 of the *Police Act* (at paragraph 7). The defendants in *Roy* included several police constables, as well as Her Majesty in Right of Canada and the Attorney General for Canada. The BCCA found, in paragraph 9, that as against all defendants save the Attorney General for B.C., the action ought to have been struck out and their names ought not to have appeared in the reasons for judgment.

[69] Sections 5 and 6 of the *Police Act* provide, in part:

5 The provincial police force is continued.

6 (1) The *Public Service Act* does not apply to the provincial police force, a provincial constable, an auxiliary constable, a special provincial constable, a designated constable or an employee of the provincial police force.

[70] In *Rosario v. Constable Chris Gladney and the City of Richmond*, April 9, 1998, the BCSC found as follows:

[26] Section 20 of the Police Act makes the municipality liable for torts of municipal constables but not provincial constables. There is no reason not to treat the definition of "municipal constable" in s. 1 as exhaustive. In fact, there are good policy reasons to have a municipality made liable for municipal constables because of the much more direct role that they play in the establishment and administration of a municipal police force.

---

[27] **It is my conclusion that the R.C.M.P. constables serving in a municipal police unit remain provincial constables**. They do not become municipal constables by either the provisions of the Police Act or the Municipal Police Unit Agreement made between the province and the municipality. A municipality is not vicariously liable for constables who are not municipal constables.

[28] For these reasons I find that the City of Richmond is entitled to an order that the action against it be dismissed.

[emphasis added]

[71] The defendant has furnished a copy of the *Province of British Columbia Provincial Police Service Agreement* (*Agreement*), dated April 1, 1992, between the Government of Canada and the Government of the Province of B.C. Article 10.0, "Basis of Payment," included the following:

> 10.2 Subject to any other terms of this Agreement, in respect of each Fiscal Year the Province shall pay to Canada 70 per cent of the cost of the Provincial Police Forces as determined in accordance with this Article.
>
> 10.3 The cost referred to in subarticle 10.2 shall include the following expenditures made by Canada in each Fiscal Year:
>
> (a) the direct cost of the Provincial Police Service in the Province, including:
>
> i) all operations and maintenance costs such as salaries and wages….

[72] Subarticle 10.7 of the *Agreement* further provided:

> a) In the event that any Member employed in the Provincial Police Services receives the benefit of any statutory defence, such as that provided by the Police Act (British Columbia), to any claim or action and in connection therewith the Province may be or may become liable for any of the payments contemplated by subparagraph 10.3(c)(iii), Canada shall indemnify and hold harmless the Province with respect to any such claims or actions; Canada shall assume the conduct and the carriage of any proceeding relating to such claim.

[73] Section 21 of the *Police Act* provides:

> **21** (1) In this section, **"police officer"** means either of the following:
>
> (a) a person holding an appointment as a constable under this Act;
>
> (b) an IIO investigator.
>
> (2) **No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.**
>
> (3) **Subsection (2) does not provide a defence if**
>
> **(a) the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct**, or
>
> (b) the cause of action is libel or slander.
>
> (4) Subsection (2) does not absolve any of the following, if they would have been liable had this section not been in force, from vicarious liability arising out of a tort committed by the police officer or other person referred to in that subsection:
>
> (a) a municipality, in the case of a tort committed by any of its municipal constables, special municipal constables, designated constables, enforcement officers, bylaw enforcement officers or an employee of its municipal police board, if any;
>
> (b) a regional district, government corporation or prescribed entity, in the case of a tort committed by any of its designated constables or enforcement officers;
>
> **(c) the minister, in a case to which section 11 applies.**
>
> [emphasis added]

[74] As noted at the outset, the plaintiff is not pursuing a claim against any individual RCMP member under section 21(3) of the *Police Act*.

[75] The defendant submits that paragraph 11(1)(a) of the *Police Act* creates a cause of action against the provincial Government. Since the Government is not a legal person, it was necessary for the Legislature to designate a person to represent the Government. That person was the Minister. The defendant cites, in this regard, the decision in *Hill v. Hurst*, 2001 BCSC 1191. In *Hill*, the BCSC reasoned:

> **47** Although I have found that Hurst was negligent, it does not follow that he is liable. This is because he is entitled to the statutory protection afforded to provincial constables for torts committed in the course of their duties pursuant to s. 21(2) of the Police Act, R.S.B.C. 1996, c. 367. Subject to certain statutory exceptions, none of which arise here, the relevant portions of the section provide:
>
> > No action for damages lies against a police officer ... for anything said or done ... or omitted to be ... done by him ... in the performance ... of his ... duty ... or for any alleged neglect ... in the performance ... of his ... duty ... .
>
> During the trial, counsel agreed that, at the material time, Hurst was a member of the RCMP and deemed to be a provincial constable pursuant to s. 14 of the Police Act. This obviously flowed from an agreement between the provincial government and the RCMP as outlined in the section. In the statement of defence, Hurst specifically raised s. 21(2) as a bar to the claim against him personally.
>
> **48** Although Hill never discontinued against Hurst, his counsel effectively acknowledged in final submissions that Hurst could not be found liable personally due to s. 21(2). I accept the defence contention that Hurst is not personally liable as he is entitled to the protection of the section.
>
> **49** Who then may be found vicariously liable for the negligent acts of Hurst? Hill also named both the Attorney General of Canada and Her Majesty the Queen in Right of the Province of British Columbia as defendants at the outset of the litigation.
>
> **50** Dealing first with the cause of action against the Attorney General of Canada, any liability in the present circumstances must be predicated upon the personal liability of Hurst. See Crown Liability and Proceedings Act R.S.C. 1985, c. C-50, ss. 3, 4, 10 and 11. As Hurst cannot be found personally liable, no vicarious liability attaches to the Attorney General of Canada.

> **51** The question of whether Her Majesty the Queen in Right of the Province can be found vicariously liable requires a consideration of s. 11 of the Police Act and ss. 1-3 of the Crown Proceeding Act, R.S.B.C. 1996, c. 89. …

[76] At paragraph 52 in *Hill*, the BCSC found that the minister referred to in section 11 of the *Police Act* means the Attorney General for B.C.:

> **52** It is common ground that the minister referred to in s. 11 of the Police Act is the Attorney General for the province. See: Hodgkin v. Port Alberni (City) (1996), 23 B.C.L.R. (3d) 234 (C.A.) and Chambers v. Lyons, [2000] B.C.J. No. 1288 (S.C.).

[77] In *Hill*, Her Majesty the Queen in Right of the Province of B.C., rather than the Attorney General of B.C., had been named as a defendant. The BCSC found as follows:

> **69** While I accept that I must give effect to s. 21 [of the *Police Act*] whether or not it is pleaded, Hodgkin never addressed the potential liability of the Crown provincial as opposed to the Attorney General under s. 11. In that regard, I consider it significant that s. 11 imposes liability on the minister "on behalf of the government". This strongly suggests that the legislature intended that the minister be a nominal, or representative, defendant, in effect the agent of government.
>
> **70** Counsel for the defendants also relied on Chambers, a decision of a Master, in which an application by the plaintiff to add a claim pursuant to s. 11 against the Crown provincial, who was already a defendant on other claims, failed. The Master, relying in part on the dissent of Southin J.A. in Hodgkin, held that only the minister, namely the Attorney General of British Columbia, could be held liable under the section and dismissed the particular application before her. The Master did not address the reference in the section to "on behalf of the government" that I have referred to above. With the greatest of respect, I do not find the reasoning in Chambers persuasive on this point and decline to apply it.
>
> **71** The wording of s. 11 is broad enough, in my view, to found a claim against the Crown not just the minister. Nothing in the Crown Proceeding Act leads me to a different conclusion. That Act provides that the Crown means Her Majesty the Queen in right of British Columbia and that an officer of government includes a minister. Although some tax statutes and particular types of proceedings are specifically exempted from the application of the Act, the Police Act is not included in the list of statutes exempted.

72 Procedurally, there is no real difference whether a plaintiff proceeds under the Crown Proceeding Act naming the Crown provincial or under the Police Act naming the Attorney General. Under the Crown Proceeding Act, any pleadings must be served on government by serving the Attorney General at the Ministry of the Attorney General. So here, the Attorney General knew of the claim by Hill from the outset even though he was not named as a defendant. As his role under the Police Act is limited in any event to that of a nominal defendant, on behalf of the government, I can see no bar to a plaintiff naming one or both the minister or the government as defendants when advancing a claim under s. 11. Nor can I see any prejudice in the circumstances of this case if I were to grant the alternative application to amend by adding the Attorney General for the province as a defendant.

73 As pointed out in Hodgkin, the court may add a party at any stage of the proceedings. Of particular concern here is the need to ensure that any person who "ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon" be added (Rule 15(5)(a)(ii)). Absent demonstrable prejudice to the Attorney General, to not allow the application to amend would reward the government for its failure to properly plead s. 11. Counsel, acting throughout for all defendants, did not point to any prejudice nor can I see any in the circumstances.

74 But for my findings regarding the tenability of an action against the Crown provincial alone, a refusal to amend would lead as well, in my view, to allowing technical considerations to defeat the legislative purpose of the Police Act, the very thing Southin J.A. sought to avoid in Hodgkin. The purpose is to allow a remedy against the government, upon appropriate notice to the Attorney General, for those suffering damages as a result of a tort committed by a police officer in the line of duty for which the officer cannot be held personally liable.

75 While I recognize that the two year limitation period ordinarily applicable to a tort claim against the Attorney General has long past, that does not necessarily preclude adding him as a defendant so long as a balancing of the interests of justice and convenience favour doing so. Here the interrelationship between the Attorney General for the province and the government is both substantive and procedural. The delay in applying to join the Attorney General was occasioned largely by the inadequate defence pleadings. Clearly, the liability of the Attorney General under s. 11 should be decided in the present proceedings.

> **76** In the result, I allow the application to join the Attorney General of the province as a defendant and find both the Attorney General, on behalf of government, and Her Majesty the Queen in right of the Province of British Columbia jointly and severally liable for the degree of fault that I have imposed upon Hurst.

[78] It would seem that the defendant is arguing that the Ministry and the Minister are employers on the basis that both of them should be equated with the Government of B.C., which is an employer.

[79] Two prior WCAT decisions have taken the approach of providing certification to the courts regarding the status of the Government of B.C. as an employer, and of holding that particular ministers were not workers or employers.

[80] In *WCAT-2008-01353*, *Cranston v. Dunsmore et al.*, the plaintiff, a "citizen volunteer" auxiliary constable, was riding as a passenger with an RCMP constable when they were involved in a collision. The plaintiff was found to be a worker within the meaning of Part 1 of the Act. However, that finding was based on a Board Minute dated May 30, 1982, by which the Board exercised its authority under section 3(5) of the Act to deem individuals participating in the Reserve/Auxiliary Police Program in B.C. to be workers within the scope of Part 1 of the Act. Accordingly, the finding concerning the plaintiff is distinguishable on that basis. With respect to the defendants in that case, however, *WCAT-2008-01353* further found:

> I find that at the time of the August 7, 2004 accident, the Provincial Government of British Columbia was an employer engaged in an industry within the meaning of Part 1 of the Act. I further find that any action or conduct of the Provincial Government of British Columbia, or its servant or agent, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Act.
>
> At the time of the August 7, 2004 accident, policy in the *Assessment Manual* provided, at item AP1-1-4:
>
> > However, elected officials in provincial/municipal government, school or library boards, and similar agencies are not considered workers or employers and are therefore not covered under the *Act* in their capacity as elected officials. Personal Optional Protection is not available to these individuals.

Policy at AP1-1-5 further provided:

> **(d) Order-in-Council appointments**
>
> Order-in-Council appointments are generally to positions which operate autonomously and without the standard employer/worker relationship such as judges and the members of the Board of Directors of the Board. These persons are not workers and Personal Optional Protection is not available.
>
> Some Order-in-Council appointments are for positions where there is a strong element of direction and control such as a secretary to a Provincial Government Minister. In these situations, the individual is considered a worker.

I find that these policies are relevant to the determination of status of provincial cabinet ministers. I find that such persons are neither workers nor employers within the meaning of Part 1 of the Act.

Accordingly, I find that The Minister of Public Safety and Solicitor General of the Province of British Columbia was neither a worker nor an employer within the meaning of Part 1 of the Act. I similarly find that the Attorney General of British Columbia was neither a worker nor an employer within the meaning of Part 1 of the Act.

[81] *WCAT-2008-01834*, *Aitken v. Bethell et al.*, similarly reasoned as follows in relation to the status of the Minister:

> Counsel for the Minister does not argue that the Minister is an employer (or a worker), in his own right. Rather, the argument is that the Government is an employer. Accordingly, the Minister should similarly be accorded the status of an employer, so that the Minister can claim the protection of the section 10 bar to a legal action. It seems to me that the submissions of counsel for the Minister are concerned with the effect of the WCAT certification for the legal action, rather than being restricted to questions as to the status of the parties. For the reasons set out above in *WCAT Decision #2007-02502* and *Appeal Division Decision #97-1701*, I consider that WCAT must be mindful of the limits of its jurisdiction under the Act, and to refrain from addressing questions which may be reserved to the courts.

> On the question as to whether the Minister is an employer in his or her own right, my determination is in the negative. Evidence has not been provided to show that the Minister is an employer, as that term is defined in law and policy. For similar reasons to those provided in *WCAT Decision #2008-01353*, I find that the Minister was not an employer within the meaning of Part 1 of the Act.
>
> Counsel for the Minister requests, in the alternative, certification as to the status of the Government. No dispute has been raised concerning the status of the Government. I find that at the time of the November 8, 2004 accident, the Government was an employer engaged in an industry within the meaning of Part 1 of the Act. I further find that any action or conduct of the Government, or its servant or agent, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Act.
>
> I would comment, by way of *obiter dicta* which is not necessary to my decision, that it appears that the thrust of the argument by counsel for the Minister is that the Minister should be equated with the Government. It appears to me that such an argument is more properly considered by the court than by WCAT, given the limitations on WCAT's jurisdiction. I appreciate that an ambiguity arises in relation to the finding that any action or conduct of the Government, or its servant or agent, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Act. Obviously, this finding can only refer to action or conduct of the employer, or a worker, in connection with a relationship of employment within the scope of Part 1 of the Act, and the Minister is neither a worker nor an employer in his own right. In relation to the question as to the role of the Minister as a putative agent of the Government, this would appear to get back to the question as to whether the Minister should be equated with the Government for the purpose of considering the effect of the section 10 bar to a legal action. It seems to me that this issue is one which would be within the jurisdiction of the court to address.

[82] Following the issuance of *WCAT-2008-01834*, the matter was considered by the BCSC in *Aitken v. Bethell*, 2012 BCSC 260. With respect to the comments provided in *obiter dicta* in the final paragraph quoted above, the BCSC found that this reasoning was in error. The BCSC concluded at paragraph 58 and 59 that only WCAT, and not the court, had jurisdiction to decide whether any person or legal entity is an employer within the meaning of the Act.

[83] In *Hill*, the BCSC concluded that it did not matter whether the action was brought against the Minister or the Government of B.C., as the wording of section 11 of the *Police Act* was broad enough to found a claim against the Crown, not just the Minister. The defendants submit that given the decision in *Hill*, *WCAT-2008-01353* creates an inconsistency in the application of the workers' compensation scheme in B.C. The decision permits persons in identical situations to be treated differently based on which Government designate they choose to name as a defendant. If a worker named Her Majesty the Queen in right of B.C. alleging vicarious liability for a provincial constable, their right of recovery would be limited to the workers' compensation scheme. However, if the same person named the Minister, the workers' compensation legislation would not bar recovery in a legal action. The decision in *Hill* permits either government designate to be named but, as a result of *WCAT-2008-01353*, a worker can avoid the effect of section 10 of the Act. This result undermines the purpose of the Act.

[84] However, in *Sulz v. British Columbia (Minister of Public Safety and Solicitor General)*, 2006 BCCA 582, the BCCA found at paragraph 5:

> The Province also claims that the trial judge erred in finding the Province liable, when the person responsible for the actions of police constables under the ***Police Act*** is the Minister of Safety and Solicitor General. The relief the Province seeks for this error is an order substituting the Minister in place of the Province. I would make that order, effective with these reasons for judgment. For convenience, I will refer to the Minister in these reasons as the "Province".

[85] At paragraph 70 of *Sultz*, the BCCA found:

> I would order that the style of cause be amended to substitute the "Minister of Safety and Solicitor General" for "Her Majesty the Queen in Right of the Province of British Columbia".

[86] In *Aitken*, Mr. Justice Halfyard of the BCSC noted the defendant's argument that the judgment of the BCCA in *Sulz* defeated the argument based on *Hill*, and commented in paragraph 78: "I think [this] argument has merit." In *Aitken*, the BCSC reasoned:

> **80** It seems to me that the Court of Appeal is saying, by necessary implication, that the province cannot be vicariously liable under s. 11 of the *Police Act*, and that only the Minister can be. If that is so, then on hindsight, it would appear that Mr. Justice Macaulay should not have granted judgment against both the government and the Minister, but should only have found the Minister to be vicariously liable. To my mind, that result cancels out the argument of the applicants based on *Hill v. Hurst*.

> **81** If the plaintiff had sued the Government of British Columbia (which would have to be named as "Her Majesty the Queen in Right of the Province of British Columbia": s. 7 of the *Crown Proceedings Act*), the finding of WCAT that the government was an employer within the meaning of the *Workers Compensation Act* could have the legal effect of entitling the government to the statutory bar in s. 10 of the Act (but only if the conduct of the government, or its servant or agent, was a cause of the injury, and that conduct "arose out of and in the course of employment"). **But the plaintiff has not sued the government, nor could he have sued the government, in my opinion. I am not persuaded that the Minister should be accorded the status of an employer for the purpose of s. 10(1) of the Act, simply because the government is an employer and because the Minister is the designate, or is the agent of, the government for the purposes of the *Police Act*.**
>
> [emphasis added]

[87] In considering whether a distinction should be drawn between the Minister and the Government, we have also taken into account the following. Under the *Constitution Act*, RSBC 1996, c. 66, appointments of ministers are vested in the Lieutenant Governor alone, and such officials remain in office at pleasure:

> **4** (1) The appointment to public office under the government of British Columbia, whether vacant or created and whether salaried or not, is vested in the Lieutenant Governor, with the advice of the Executive Council, with the exception of the appointment
>
> (a) of the officials who are also appointed members of the Executive Council, which appointments are vested in the Lieutenant Governor alone, or
>
> (b) for which other provision is expressly made by an Act.
>
> (2) All officers appointed by the Lieutenant Governor, whether by commission or otherwise, remain in office during pleasure only.
> …
>
> **9** (1) The Executive Council is composed of the persons the Lieutenant Governor appoints, including the Premier of British Columbia, who is president of the Executive Council.
>
> (2) The Lieutenant Governor in Council must from among those persons appointed under subsection (1) designate

> (a) those officials with portfolio and must designate the portfolio for each official, and
>
> (b) those officials without portfolio.

[88] In *Constitutional Law of Canada*, 5th Edition Supplemented, Thomson Carswell 2011, Peter W. Hogg discusses the appointments of federal ministers at 9.4(a), page 9-9, as follows:

> When the Prime Minister has been appointed, he selects the other ministers, and advises the Governor General to appoint them. With respect to these appointments, the Governor General reverts to his or her normal non-discretionary role and is obliged by convention to make the appointments advised by the Prime Minister. If the Prime Minister later wishes to make changes in the ministry, as by moving a minister from one portfolio to another, or by appointing a new minister, or by removing a minister, then the Governor General will take whatever action is advised by the Prime Minister, including if necessary the dismissal of a minister who has refused the Prime Minister's request to resign.
>
> It is basic to the system of responsible government that the Prime Minister and all the other ministers be members of Parliament. Occasionally a person who is not a member of Parliament is appointed as a minister, but then the minister must quickly be elected to the House of Commons or appointed to the Senate….

[89] We consider that this description would generally apply in the provincial context, with necessary changes in wording to refer to the Premier, the Lieutenant Governor, and the Legislature.

[90] For the most part, a minister is an elected official. Further, the position of a minister is, like that of a provincial judge, one which operates autonomously and without the standard employer/worker relationship. Section 6 of the *Provincial Court Act*, RSBC 1996, c. 379, provides as follows concerning the appointment of judges of the Provincial Court of British Columbia:

> **6** (1) On the recommendation of the council, the Lieutenant Governor in Council, by Commission under the Great Seal, may
>
> (a) appoint judges of the court as the Lieutenant Governor in Council considers necessary,…

[91] We consider it reasonable to conclude that the status of individual ministers is analogous to that of an elected official or an Order-in-Council appointment such as a

judge. While the position of a minister is not expressly addressed by the Board's policies at AP1-1-4 concerning elected officials, and at AP1-1-5 concerning Order-in-Council appointments, we nevertheless consider that these policies provide relevant guidance.

[92] We are also guided by the BCCA decision in *Sulz*, and the recent BCSC decision in *Aitken*, which distinguished between the Government of B.C. and the Minister's vicarious liability on behalf of the Government for torts committed by RCMP members.

[93] In *Aitken*, the BCSC also critiqued the finding in *WCAT-2008-01834* concerning the action or conduct of the Government of B.C. as follows:

> **61.** It seemed to be accepted by all parties that at the time of the accident, the defendant RCMP officers were not "workers," the Government of British Columbia was not their employer and they were not acting in the course of employment, within the meaning of the *Workers Compensation Act.* Counsel informed the court that RCMP officers are employees of the Federal Government. It must follow that the defendant RCMP officers are not employees of the Minister.
>
> **62** Notwithstanding these apparently accepted facts, counsel for the Minister requested a determination from WCAT as to whether the government of British Columbia was an employer. WCAT found not only that the government was an employer but further found that
>
> > 9. Any action or conduct of the Government of British Columbia, or its servant or agent, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.
>
> **63** Since WCAT also found that the Minister was not a "worker" or an "employer," and since the plaintiff was not alleging a cause of action against the government of British Columbia or an employee of the government, I am unable to see the relevance of such a finding to the facts of this case.

[94] We agree with the BCSC's reasoning in this regard. A finding regarding action or conduct should be with reference to action or conduct alleged in the plaintiff's statement of claim.

[95] In *Aitken*, the application for an order dismissing the action as against the defendant Minister was dismissed by the BCSC. The defendant advises that an appeal has been filed of the BCSC decision in *Aitken*.

[96] The plaintiff submits that regular RCMP members are not employees of the Minister or of the Government of B.C. Under Article 10 of the *Agreement*, the Province is required to reimburse Canada 70 per cent of the cost of the Provincial Police Force. Liability for such reimbursement does not make the RCMP members workers or agents of the Government of B.C. They remain federal employees. In addition, although the Minister is vicariously liable under section 11 of the *Police Act*, subarticle 10.7 of the *Agreement* provides that Canada will indemnify and hold harmless the Province.

[97] It is not within WCAT's jurisdiction to determine the effect of our findings for the legal action, pursuant to section 10 of the Act. We consider it appropriate, however, to have regard to the general effect of section 10 of the Act, which provides:

> **10** (1) The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. **This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.**
>
> [emphasis added]

[98] It is evident that section 10 is intended to protect workers and employers under Part 1 of the Act from a legal action, in respect of a claim for personal injury, disablement, or death arising out of and in the course of employment within the scope of Part 1 of the Act. This bar does not relate to actions involving federal workers or employers as either plaintiffs or defendants, as they are by definition not workers or employers within the meaning of Part 1 of the provincial Act. Members of the RCMP fall within that category.

[99] To illustrate, WCAT-2006-01356**,** *Attorney General of Canada v. Saskatchewan Wheat Pool and The Vancouver Port Authority*, concluded:

> The evidence is clear that Fleet was employed by a federal agency, and was not a provincial worker within the scope of the provincial workers' compensation legislation. Accordingly, I find that at the time the cause of action arose, Fleet was not a worker within the meaning of Part 1 of the WCA [*Workers Compensation Act*]. It therefore follows that her injuries on August 17, 2001, did not arise out of and in the course of employment within the scope of Part 1 of the WCA.

[100] Given that the wording of section 10 is only concerned with action or conduct in the scope of employment under Part 1 of the Act, it would seem incongruous were it to be applied to limit an action against a member of the federal RCMP simply because the Minister was subject to vicarious liability under section 11 of the *Police Act*.

[101] By memorandum dated July 26, 2011, a research and evaluation analyst, Audit & Assessment Department of the Board, advised that the Provincial Government was registered with the Board under account #4000. We accept that the Provincial Government was an employer at the time the plaintiff's cause of action arose. We also accept that the Ministry has employees of the Government of B.C. working within it. However, as noted above, we are not proceeding with certification regarding the status of the Ministry given that the plaintiff's claim is more precisely framed against the Minister pursuant to section 11 of the *Police Act*.

[102] We appreciate that the liability of the Minister under section 11 of the *Police Act* is stated to be "on behalf of the government." However, we do not consider that the vicarious liability of the Minister, on behalf of the government, has the effect of making the Minister a worker or an employer under the Act. We do not view the Minister as being equivalent to the Government of B.C., for the purposes of the legal action. While the Government of B.C. is an employer, we do not consider that this has the effect of making the Minister an employer in the context of the Minister's vicarious liability under section 11 of the *Police Act*.

[103] We agree with the conclusions in *WCAT-2008-01353* and *WCAT-2008-01834*, in finding that the Minister was not a worker or employer under the Act. As found in *Roy*, the vicarious liability of the Minister is "a pure creature" of section 11 of the *Police Act*.

[104] Upon consideration of the foregoing, we consider that there is a meaningful distinction to be drawn between the roles of the Government of B.C., as an employer, and the role of the Minister in respect of the Minister's vicarious liability under section 11 of the *Police Act* for the actions of federal RCMP members working in B.C. We find that at the time the plaintiff's cause of action arose, February 27, 2008, the Minister was not a worker or an employer engaged in an industry within the meaning of Part 1 of the Act. In view of our conclusion on this basis, and as the claim against the Minister is one of vicarious liability and does not concern any action or conduct by the Minister or his servant or agent, we need not proceed to address the status of any action or conduct by the Minister.

[105] For the reasons set out above, we have also not certified the status of the Ministry. In the event that any further determination is required for the legal action, a request may be made for a supplemental certificate.

Conclusion

[106] We find that at the time the cause of action arose, February 27, 2008:

(a) the plaintiff, Po Yee Chan also known as Nicole Chan, was a worker within the meaning of Part 1 of the Act;

(b) the injuries suffered by the plaintiff, Po Yee Chan also known as Nicole Chan, arose out of and in the course of her employment within the scope of Part 1 of the Act;

(c) the plaintiff's employer, Ming Pao Newspapers (Canada) Ltd., was an employer engaged in an industry within the meaning of Part 1 of the Act;

(d) the Minister of Public Safety and Solicitor General of British Columbia was not a worker within the meaning of Part 1 of the Act; and,

(e) the Minister of Public Safety and Solicitor General of British Columbia was not an employer engaged in an industry within the meaning of Part 1 of the Act.

Herb Morton
Vice Chair

Guy Riecken
Vice Chair

Andrew Waldichuk
Vice Chair

HM:gw

NO. S083389
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492, AS AMENDED

BETWEEN:

PO YEE CHAN also known as NICOLE CHAN

PLAINTIFF

AND:

MINISTRY OF PUBLIC SAFETY AND
SOLICITOR GENERAL FOR BRITISH COLUMBIA

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, PO YEE CHAN also known as NICOLE CHAN, in this action for a determination pursuant to section 257 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action and other interested persons of the matters relevant to this action and within the jurisdiction of the Workers' Compensation Appeal Tribunal;

AND AFTER an opportunity having been provided to all parties and other interested persons to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of action arose, February 27, 2008:

1. The Plaintiff, Po Yee Chan also known as Nicole Chan, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The injuries suffered by the Plaintiff, Po Yee Chan also known as Nicole Chan, arose out of and in the course of her employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The Plaintiff's employer, Ming Pao Newspapers (Canada) Ltd., was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

4. The Minister of Public Safety and Solicitor General for British Columbia was not a worker within the meaning of Part 1 of the *Workers Compensation Act*.

5. The Minister of Public Safety and Solicitor General for British Columbia was not an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

CERTIFIED this day of October, 2012.

_____

Herb Morton
Vice Chair

_____

Guy Riecken
Vice Chair

_____

Andrew Waldichuk
Vice Chair

NO. S083389
VANCOUVER REGISTRY

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AND:

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL FOR BRITISH COLUMBIA

DEFENDANT

SECTION 257 CERTIFICATE

WORKERS' COMPENSATION APPEAL TRIBUNAL
150-4600 Jacombs Road
Richmond, BC V6V 3B1
FAX (604) 664-7898
TELEPHONE (604) 664-7800

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