WCAT Workers' Compensation Appeal Tribunal

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WCAT Decision Number: **WCAT-2013-03191-Supplemental**
WCAT Decision Date: **November 19, 2013**

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

WCAT Reference Number: 111669-B

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

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

Interested Persons: Government of British Columbia
Ming Pao Newspapers (Canada) Ltd.

Representatives:

For Applicant and for the Interested Person, Government of British Columbia	Paul Singh Department of Justice Canada Public Safety, Defence and Immigration BC Region
For Respondent:	Paul G. Kent-Snowsell LINDSAY KENNEY LLP
For Interested Person Ming Pao Newspapers (Canada) Ltd.:	Ray Amyot Employers' Advisers Office

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Introduction

[1] This decision concerns a request for a supplemental determination to decision *WCAT-2012-02738* of the Workers' Compensation Appeal Tribunal (WCAT), dated October 24, 2012, under section 257 of the *Workers Compensation Act* (Act). A request for a supplemental determination was made by the defendant on July 3, 2013, concerning the status of the Government of British Columbia (BC). The defendant requests determinations that at the time of the alleged misconduct by Royal Canadian Mounted Police (RCMP) members on February 27, 2008:

(a) the Government of BC was an employer engaged in an industry within the meaning of Part 1 of the Act; and,

(b) any action or conduct of the Government of BC, or its servants or agents, 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.

[2] The plaintiff requests that WCAT provide determinations as to whether:

(a) the Government of BC was an employer of the RCMP officers;

(b) the RCMP members were workers;

(c) the RCMP members were servants of the Government of BC;

(d) the RCMP members were agents of the Government of BC; and,

(e) the contractual obligations of the RCMP pursuant to their Provincial-Federal contract qualify as being engaged in an industry within the meaning of Part 1.

[3] The legal action is scheduled for trial commencing on April 7, 2015.

[4] Section 257 of the Act provides that where an action is commenced based on a disability caused by a personal injury, "the court or a party to the action may request the appeal tribunal to make a determination under subsection (2) and to certify that determination to the court." Accordingly, either party, or both, may bring an application under section 257. While this application for a supplemental certificate was initiated by the defendant, we find that we also have jurisdiction to address the additional issues raised by the plaintiff.

[5] Written submissions have been provided on behalf of the applicant Minister and Government of British Columbia, and on behalf of the plaintiff. By letter dated July 26, 2013, the employers' adviser notified WCAT that Ming Pao Newspapers (Canada) Ltd. did not wish to provide a submission in this application.

[6] The WCAT chair appointed a three-member (non-precedent) panel under section 238(5) of the Act to hear both the original application and this request for a supplemental determination. The background facts are not in dispute. We find that this application for a supplemental determination involves legal questions which can be properly addressed on the basis of written submissions without an oral hearing.

Issue(s)

[7] Determinations are requested concerning the status of the Government of BC, and the RCMP members, at the time of the February 27, 2008 incident.

Jurisdiction

[8] 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 of directors of the Workers' Compensation Board, operating as WorkSafeBC (Board), 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)).

[9] The court determines the effect of the certificate on the legal action. The applicability of the bar to a legal action under section 10 of the Act is an issue reserved to the courts, which is not within WCAT's jurisdiction (see *WCAT-2007-02502*, noteworthy[1], and *Clapp v. Macro Industries Inc.*, 2007 BCSC 840).

Background

[10] As set out in *WCAT-2012-02738*, 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, BC, 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 RCMP were in attendance to ensure that the public and media did not enter the cemetery.

[11] 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 by the RCMP members to leave the grounds of the cemetery. After 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.

[12] *WCAT-2012-02738* provided determinations that, at the time the cause of action arose on 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*.

[1] As set out in the WCAT *Manual of Rules of Practice and Procedure* item #19.3, noteworthy decisions may provide significant commentary or interpretive guidance regarding workers' compensation law or policy, comment on important issues related to WCAT procedure, or serve as general examples of the application of provisions of the Act, policies, or adjudicative principles. Noteworthy decisions are not binding on WCAT. Although they may be cited and followed by WCAT panels, they are not necessarily intended to be leading decisions.

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*.

[all quotations are reproduced as written, except as noted]

[13] No determination was made in *WCAT-2012-02738* concerning the status of the Government of BC, or concerning the status of the RCMP members involved in the February 27, 2008 incident.

Preliminary

[14] The plaintiff has submitted an affidavit by Dr. John Hogarth sworn on August 22, 2013. The defendant requests that this affidavit be ruled inadmissible by the WCAT or, in the alternative, that it be accorded little or no weight. The defendant submits that this affidavit is neither necessary nor relevant to these proceedings.

[15] Dr. Hogarth advises that he wrote the first *Police Act* in 1974, and he became the first chair of the Police Commission later that same year. He states that at the time the *Police Act* was first drafted, he was aware of a number of cases from Ontario where plaintiffs obtained substantial judgments against police officers but were unable to collect any money from either the officers concerned or the local police board. In order to avoid similar "dry" judgments in BC, it was decided that the Attorney General for BC (AGBC) should be made a joint and several tortfeasor.

[16] Dr. Hogarth notes that inconsistent consequences flow from a finding that the work of the provincial police force involves employment within the scope of Part 1 of the Act. Some individuals, such as the unemployed, retired, or self-employed, could still seek full compensation from the Minister, while a worker could not. There is no good policy reason for this distinction.

[17] We accept Dr. Hogarth's affidavit as admissible. However, to the extent it concerns the application of the bar under section 10 of the Act, this involves an issue which is outside our jurisdiction. Our jurisdiction is limited to addressing issues of status under the Act. We consider that the background information provided by Dr. Hogarth is of interest, but we do not need to rely on it in reaching our decision.

Status of the Government of British Columbia

[18] The Government of BC is not a party to the legal action. However, section 257 of the Act provides that WCAT "may determine any matter that is relevant to the action and

within the Board's jurisdiction under this Act." We find that the request for a determination of the status of the Government of BC concerns an issue which is relevant to the legal action and which is within our jurisdiction. We find that this issue is appropriately addressed by way of a supplemental determination.

[19] The plaintiff submits that while the Government of BC may be an employer engaged in an industry within the meaning of Part 1 of the Act, that is not so in the case of RCMP members providing policing services within the Province. We have addressed the status of the Government of BC first, as a separate issue from the question regarding the status of the RCMP members.

[20] Section 37 of the Act provides:

> **37** (1) The following classes are established for the purpose of assessment in order to maintain the accident fund:
>
> …
>
> Class 11: British Columbia Assessment Authority, British Columbia Emergency Health Services, British Columbia Ferry Corporation, British Columbia Railway Company, **Government of British Columbia**, Workers' Compensation Board of British Columbia.
>
> [emphasis added]

[21] By memorandum dated July 9, 2013, a research and evaluation analyst, Audit and Assessment Department of the Board, advised that while there was no record of a registration in the name "Government of British Columbia," the following would apply:

- Section 29 of the *Interpretation Act*, RSBC 1996, c. 238, provides the following definitions:

  > *"**government**" or "**government of British Columbia**" means Her Majesty in right of British Columbia; and*
  >
  > *"**Province**" means the Province of British Columbia or Her Majesty in right of British Columbia as the context requires*

- It would appear that the "government of British Columbia" is simply another name for *Her Majesty in right of British Columbia*.

- Section 7 of the *Crown Proceeding Act*, RSBC 1996, c. 89, provides:

  > *In proceedings under this Act, the government must be designated "Her Majesty the Queen in right of the Province of British Columbia".*

- Thus, the status of the "Government of British Columbia" is the same as the status for the "Province of British Columbia".
- Account 004000 is registered to the "Provincial Government", and was registered at the time of the **February 27, 2008** incident.

[emphasis in original]

[22] It is clear from section 37 of the Act that the Government of BC is an employer engaged in an industry within the meaning of Part 1 of the Act. The Provincial Government / Government of BC was in fact registered with the Board as an employer at the time of the February 27, 2008 incident.

[23] We find that at the time of the February 27, 2008 incident, the Government of BC was an employer engaged in an industry within the meaning of Part 1 of the Act.

Action or Conduct of the Government of British Columbia

[24] The defendant cites the BC Court of Appeal (BCCA) decision in *Aitken v. Minister of Public Safety and Solicitor General*, 2013 BCCA 291, in support of its application[2]. The underlying facts in that case are as follows. On November 8, 2004, Bethell abducted his daughter from her school, and there was concern that he might harm her. The RCMP were dispatched to the school to intercept him. When the police arrived, Bethell was in the process of placing his daughter in his van. The police attempted to block the van's exit from the parking lot, but Bethell evaded them and the police engaged in a pursuit. Aitken was working as a landscaper that day, and was eating his lunch in a truck belonging to his employer that was parked on the side of the road. A collision occurred between Bethell's van and another vehicle, and one or both of the vehicles then struck the truck in which Aitken was sitting, causing him serious injury. Aitken brought a legal action against Bethell's estate, two RCMP officers, a Nanaimo police dispatcher, and the Minister. *WCAT-2008-01834* provided the following determinations under section 257 of the Act:

1. The Plaintiff, STEVEN AITKEN, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, STEVEN AITKEN, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

…

[2] The defendant advises that no application was filed for leave to appeal the *Aitken* decision to the Supreme Court of Canada, and the time for filing such an application has expired.

7. The Defendant, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, was not an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

8. The GOVERNMENT OF BRITISH COLUMBIA was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

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*.

[25] *WCAT-2008-01834* contained the following reasoning in relation to the certification regarding the action or conduct of the Government of BC (at page 28):

> 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.
>
> [emphasis added]

[26] Those reasons contained no express reference to the RCMP members, in connection with the finding regarding the action or conduct of the Government of BC.

[27] Section 250(1) of the Act provides that WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. Accordingly, WCAT is not bound to follow the reasoning set out in prior decisions. However, the reasoning in prior decisions may provide useful guidance. Consistency in decision-making is also valued.

[28] The finding in *WCAT-2008-01834* regarding the action or conduct of the government was critiqued in a BC Supreme Court (BCSC) decision as follows (*Aitken v. Bethell*, 2012 BCSC 260):

> [60] In its certificate of findings, the appeal tribunal found that the Minister was not an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*, but found that the Government of British Columbia was such an employer. This latter finding, together with the wording of s. 11(1) of the *Police Act*, was the foundation of Mr. Kwan's argument.
>
> [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**….
>
> [emphasis added]

[29] In *Aitken*, the BCCA addressed the issue as to whether the statutory bar under section 10 of the Act applied in relation to the legal action brought against the Minister. The BCCA reasoned:

> [36] The issue before us – that of whether s. 10(1) of the *Workers Compensation Act* bars the action against the Minister – turns on the identity of the true defendant in the action. In my view, the statute's interposition of the Minister as a nominal defendant does not alter the fundamental nature of the claim – it is the Crown that is vicariously liable for the torts of members of the provincial police force. As the Crown is an "employer", s. 10(1) serves to bar an action under s. 11 of the *Police Act* where the injured party is a worker.
>
> [37] The certified findings of the WCAT establish the facts necessary for the Court to determine that the claim under s. 11 is barred by s. 10(1) of the *Workers Compensation Act*: The plaintiff was a worker under Part 1 of the *Workers Compensation Act*; his injuries arose out of and in the course of his employment; the Crown was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*; **and any conduct of the Crown or the RCMP constable (the Crown's agent), which caused the alleged breach of duty of care arose out of and in the course of employment.**
>
> [emphasis added]

[30] As noted above, *WCAT-2008-01834* did not provide reasoning which expressly addressed the meaning of the reference to the action or conduct of the Government of BC. Accordingly, we consider that *WCAT-2008-01834* has little persuasive value in that regard.

[31] Section 10 of the Act provides:

> 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]

[32] We consider it important to note that in addressing the "action or conduct," we do so only in relation to the action or conduct which caused the alleged breach of duty of care. This is the issue on which certification is required pursuant to section 10 of the Act. If some action or conduct on the part of the Government of BC, or its servant or agent, within the scope of Part 1 of the Act, was alleged to have caused the breach of duty of care, certification could be provided regarding the status of such action or conduct.

[33] 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, 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. This involves a claim of vicarious liability, rather than an allegation of a breath of duty of care by the defendant Ministry of Public Safety and Solicitor General for BC.

[34] The plaintiff's statement of claim alleges negligence on the part of the RCMP members involved in the February 27, 2008 incident. It does not allege negligence on the part of Government of BC.

[35] If some action or conduct by the Government of BC was in issue, it would be entitled to certification regarding that action or conduct. It does not appear, however, for reasons set out further below, that any breach is alleged on the part of some worker of the Provincial Government.

[36] It remains necessary, however, to also consider the status (and action or conduct) of the RCMP members involved in the February 27, 2008 incident, as to whether this might have involved a breach of duty of care of the employer, or the employer's servant or agent, which arose out of and in the course of employment within the scope of Part 1 of the Act.

[37] In summary, it does not appear that any breach has been alleged on the part of a worker of the Provincial Government, separate from the breach(es) alleged in relation to the RCMP members. In the circumstances, we refrain from certifying on this issue. However, it remains open to the parties to request a further supplemental certificate, if in fact some breach is alleged on the part of the Provincial Government or its servant or agent (which is separate from the action and conduct of the RCMP members, which is addressed below).

Status of RCMP members

[38] As noted in our initial decision, the RCMP members involved in the February 27, 2008 incident are not parties to the legal action. The plaintiff explained 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).

[39] The plaintiff requests an express determination of the status of the individual RCMP members involved in the February 27, 2008 incident. While identified by name in the evidence, these RCMP members have not been named in the legal action and have not been invited to participate in this application. Nevertheless, we accept that their status is relevant to the legal action. For the purposes of our decision, we consider that it suffices to refer to them as the RCMP members involved in the February 27, 2008 incident. We accept that an express determination regarding the status of the RCMP members is necessary to the legal action.

[40] In *WCAT-2012-02738*, we reasoned:

> [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.
>
> [emphasis added]

[41] Paragraph 96 was in the nature of *obiter dicta*, as comments which were not necessary to our decision. Accordingly, we consider that we are not bound by that reasoning, and may now determine this issue.

[42] An affidavit has been provided by RCMP Staff Sergeant David Eidet, sworn on July 15, 2013. He advises that on February 28, 2008, he was an RCMP Staff Sergeant with the Burnaby Detachment in the position of District Commander of the Southwest Community Police Office. Prior to the funeral in question, the funeral manager advised that the funeral was expected to attract large crowds of fans and media. The funeral manager requested that the RCMP assist in keeping the peace and in providing a safe environment for patrons to attend the funeral service.

[43] A threat assessment was performed, the results of which were summarized by Corporal Gary Law in a memorandum dated February 26, 2008. The threat assessment for this funeral was considered to be low to moderate. Eidet provided a copy of the February 26, 2008 memorandum, which noted:

> The funeral home management, [the deceased's] family and the organizer of this event would like police presence on site to keep the peace and crow[d] control in partnership with the security guards on site. They requested to have six members on site and agreed to pay their overtime.

[44] Eidet described the February 27, 2008 incident involving the plaintiff and stated:

> 11. As at February 27, 2008, the Burnaby RCMP detachment operated as a provincial policing unit pursuant to an agreement between the governments of British Columbia and Canada authorizing the RCMP to act as a provincial police force pursuant to section 14(1) of the *Police Act* R.S.B.C. 1996, Ch. 367 (the "*Police Act*") and section 20(1) of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, Ch. R-10.
>
> …
>
> 12. All RCMP officers attending the Funeral Service, including Constables Lee and MacLeod who effected Ms. Chan's arrest, were acting within the course and scope of their duties as provincial constables.

[45] Eidet attached a copy of the *Province of British Columbia Provincial Police Agreement* (the *Agreement*) dated April 1, 1992. Article 3.1(a) of the *Agreement* provided that the internal management of the Provincial Police Service, including its administration and the determination and application of professional police procedures, shall remain under the control of Canada. Article 10.7 of the *Agreement* further provided:

> In the event that any Member employed in the Provincial Police Service 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 claims.

[46] 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**, …
>
> [emphasis added]

[47] 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 investigators and enforcement officers appointed on behalf of a ministry, **if the tort is committed in the performance of their duties**, …
>
> [emphasis added]

[48] 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 in the performance of their duties.

[49] As set out above, 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. A question arises as to the legal effect of these statutory "deeming" provisions.

[50] The RCMP is created by federal legislation. Absent the deeming provision, it is evident that a member of the RCMP would not be a worker within the meaning of Part 1 of the Act.

[51] Prior WCAT decisions (such as *WCAT-2007-03857*, *WCAT-2008-03632*, and *WCAT-2010-03266*) have found that members of the Vancouver Police Department were workers within the meaning of Part 1 of the Act, and their injuries, or action or conduct, arose out of and in the course of their employment. However, those decisions are distinguishable on the basis that they did not concern members of the RCMP.

[52] The *Police Act* provides that where the Minister, on behalf of the Provincial Government, has entered into an agreement with the Government of Canada to authorize the RCMP to carry out powers and duties of the provincial police force, the RCMP is deemed to be a provincial police force and RCMP members are deemed to be provincial constables. The vicarious liability provision of the *Police Act* may be seen as going hand-in-hand with the deeming of the RCMP as a provincial police force. It may be argued, therefore, that the logical effect of these provisions is that the work of the provincial constables is deemed to be employment within the scope of Part 1 of the Act, at least for the purposes of the *Police Act* and its provision for vicarious liability.

[53] It is evident that the RCMP members were not acting as servants or agents of the Government of BC, in any direct sense. However, for the purposes of the *Police Act*, they are deemed to be provincial constables pursuant to the Agreement between the Government of Canada and the Government of the Province of BC dated April 1, 1992 (which was effective from April 1, 1992 until March 31, 2012 pursuant to article 19.1). Arguably, there is no necessary contradiction between the provincial police force acting under the control of Canada, yet being agents or servants of the Province as deemed provincial constables.

[54] We recognize that determinations of status under the Act are only for the purposes of the Act. Policy in the *Assessment Manual* at item #AP1-1-3, "Coverage under Act – Distinguishing Between Employment Relationships and Relationships Between Independent Firms," provided:

> The Board, for the purposes of the Act, has the exclusive power under section 96(1) to determine status. **The Board's jurisdiction cannot be excluded by private agreement between two parties, whether the agreement does this expressly, or indirectly** by labelling the parties as independent operators (who would therefore be independent firms). The Board makes its own judgment of their status, having regard to the terms

> of the contract and the operational routines of the relationship. **However, decisions made by the Board are for workers' compensation purposes only and have no binding authority under other statutes**.
>
> [emphasis added]

[55] Prior to 2003, policy at item #20:10:30 (Subject: Definition of "Worker" and "Employer") of the former *Assessment Policy Manual* stated that the RCMP do not have coverage through the Board:

> **PEP [Provincial Emergency Program] and Federal Workers**
>
> The Board also 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 (see Section 40:30:70 – Deposit Accounts). **Members of the Federal Police Force (RCMP), Armed Forces and Coast Guard are not covered by this Board but by the Federal Government directly.**
>
> [emphasis added]

[56] As noted in paragraph 57 of *WCAT-2012-02738*, on February 27, 2008 policy in the *Assessment Manual* at item #AP1-97-1, "Coverage under Federal Statutes or Agreements Between the Provincial and Federal Governments," 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]

[57] The policy refers to members of the RCMP in a categorical fashion. We interpret this policy as applying to members of the RCMP working as provincial constables. To the extent any ambiguity is created by the wording of the *Police Act*, in respect of its characterization of certain RCMP members as "provincial constables," we consider that for the purposes of Part 1 of the Act this is resolved by the policy at item #AP1-97-1 of the *Assessment Manual*. The statement that members of the RCMP are not covered by the Act necessarily means that members of the RCMP are not workers within the meaning of Part 1 of the Act. We find that this policy is applicable, and is binding on our consideration. We do not consider that this policy is patently unreasonable so as to warrant a referral of the policy to the WCAT chair under section 251 of the Act.

[58] *WCAT-2013-01310*, *Fong v. Her Majesty the Queen in Right of British Columbia et al.*, reasoned at paragraph 79:

> For the reasons given earlier, I am not certifying as to the status of the individual officers identified by the plaintiff as involved in the March 11, 2006 incident. **As a general matter, however, it is evident that within the foregoing legislative framework, RCMP members are not workers under Part 1 of the Act, whether or not they are eligible for compensation under the GECA [*Government Employees Compensation Act*].**
>
> [emphasis added]

[59] Upon consideration of the foregoing, we find that the RCMP members involved in the February 27, 2008 incident were not workers within the meaning of Part 1 of the Act. It necessarily follows that their action or conduct on February 27, 2008, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

Were the RCMP members servants or agents of the Government of British Columbia?

[60] We have already found that the RCMP members were not workers within the meaning of Part 1 of the Act, and that their action or conduct on February 27, 2008, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the Act. In this context, even if the RCMP members could be characterized as agents or servants of the Government of BC, there is no basis on which it could be concluded that their action or conduct, 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. Accordingly, it is not necessary to our decision to address the meaning of the phrase "the employer's servant or agent."

[61] Nevertheless, we note with interest the court decision cited by the plaintiff concerning this issue. In *A.G. Alberta v. Putnam*, [1981] 2 S.C.R. 267, the Supreme Court of Canada (SCC) reasoned (in relation to an Alberta case):

> The basic contention of the appellants was that *The Police Act, 1973,* and particularly s. 33 thereof, drew a distinction between investigation of a complaint and discipline as a result of the investigation, and that although the province had no authority over the disciplining of officers of the R.C.M.P., it was entitled to authorize inquiry into a citizen's complaint against R.C.M.P. officers who were in the province pursuant to contract. This position was supported by all the provincial Attorneys General intervenants, save the Attorney General of British Columbia on whose behalf it was contended that it was as fully open to the province to provide

for discipline under its legislation as it was to provide merely for investigation.

The Attorney General of British Columbia carried his submission even farther by contending that officers of the R.C.M.P. had no independent legal right to be in Alberta to enforce federal criminal law, and that in so far as they were there, pursuant to an agreement with the province or with any municipality, it was still necessary for them to be sworn in as peace officers pursuant to Alberta authorization as a condition of exercising their functions. It was not shown that they were so sworn. However, s. 37 of *The Police Act, 1973* absolves them from taking the usual oath required of local police. Moreover, members of the R.C.M.P. may be made peace officers under s. 7(4) of the *Royal Canadian Mounted Police Act,* R.S.C. 1970, c. R-9, and thereupon are such in every part of Canada under s. 17(3).

What the foregoing submission amounts to is an attack on the validity of the constituent Act of the R.C.M.P. It runs counter to what this Court said in *Attorney General of the Province of Quebec and Keable v. Attorney General of Canada et al.* [[1979] 1 S.C.R. 218] and, in my opinion, it is completely untenable. **This Court decided in the *Keable* case that it was beyond the competence of a province to authorize a provincial board of inquiry, concerned with looking into allegations of illegal or reprehensible acts by various police forces, including the R.C.M.P., to extend its inquiry into the administration and management of that police force**. In giving the unanimous opinion of the Court on this matter, Pigeon J. said this (at p. 242):

> Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned**. It is therefore clear that no provincial authority may intrude into its management.** While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force.
>
> …

Moreover, I would not agree that this appeal falls to be decided on a narrow fact situation arising from the circumstance that the complaint against the respondents was connected with an investigation under the federal *Narcotic Control Act,* being an activity excluded from the definition of "municipal police services". **The position would be no different, so far as the constitutional question is concerned, if the R.C.M.P.**

> **detachment were concerned with the enforcement of the criminal law or of provincial law or municipal by-laws. It does not appear to me to be possible or practical to separate the law enforcement duties of the R.C.M.P. detachment for the purpose of determining whether in some respects they are subject to the procedures of *The Police Act, 1973* and in others not. The R.C.M.P. code of discipline is applicable to officers of that force, whatever be their duties, and the fact that policing contracts are authorized with a province or a municipality does not, as article 2 of the contract in this case expressly specifies, remove them from federal disciplinary control.**
>
> I should like to say, before disposing of this appeal, that I recognize that there is a provincial interest in policing arrangements under this or any other contract between the Province and the R.C.M.P. **The Province, by this contract, has simply made an *en bloc* arrangement for the provision of policing services by the engagement of the federal force rather than establishing its own force directly or through a municipal institution. The performance of the parties under the agreement of their respective roles is, of course, a matter of continuing interest to the parties if for no other reason than the constant contemplation of renewal negotiations**. The Province of Alberta, for example, must have a valid concern in the efficacy of the arrangement, not only from an economic or efficiency viewpoint, but also from the point of view of the relationship between the Government of Alberta through its policing arrangements and the community which is the beneficiary of those police service arrangements. **This, however, is a far cry from the right of one contracting party to invade the organization adopted by the other contracting party in the delivery of the services contracted for under the arrangement. This is so apart altogether from any constitutional impediment so clearly raised here as it was in *Keable*, supra.** I say this not so as to narrow the impact of the observations on the issue directly raised in this appeal, but to contrast the position of the R.C.M.P. as a federal institution with the provincial interest in the provision of policing services throughout the Province. Here there can be no suggestion of finding a root in that provincial interest for the various subsections of s. 33 to which I have already adverted.
>
> [emphasis added]

[62] In *Flanagan v. Canada (Attorney General)*, 2013 BCSC 1205, a decision which concerned a provincial constable in BC, the BCSC reasoned at paragraphs 60 to 65:

> [60] In *R. v. Campbell*, [1999] 1 S.C.R. 565 [*Campbell*], Mr. Justice Binnie noted at para. 29 that the Court was "...concerned only with the status of an RCMP officer in the course

of a criminal investigation, and in that regard the police are independent of the control of the executive government". In *Campbell*, the Court emphasised the independent nature of the office of a police officer in the context of the necessity for that independence when the officer is conducting a criminal investigation. Mr. Justice Binnie noted in para. 27:

> **...A police officer investigating a crime is not acting as a government functionary or as an agent of anybody**. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes. In the case of the RCMP, one of the relevant statutes is now the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10.

[61] I note that Mr. Justice Binnie added at para. 36:

> Parenthetically, it should be noted that Parliament has provided in the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50, s. 36, that:
>
> > 36. For the purposes of determining liability in any proceedings by or against the Crown, a person who was at any time a member of the Canadian Forces or of the Royal Canadian Mounted Police shall be deemed to have been at that time a servant of the Crown.
> >
> > [Emphasis in Original]
>
> **A "deeming" section would not be necessary if it were the case that, at law, an RCMP officer was in any event a Crown servant for all purposes.**

[62] In *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), the House of Lords overturned the decision of the Brighton Watch Committee to dismiss a chief constable for misconduct, finding that the decision was a nullity. That is, the chief constable was not the servant of the respondents and they could dismiss him only on grounds stated in the governing legislation. They had failed to observe the principles of natural justice by failing to inform the chief constable of the charges against him and failing to give him an opportunity to be heard.

[63] Undoubtedly, the historical reason for the independence of the office of a police officer was the necessity for that officer to exercise his powers under original (not delegated) authority by virtue of his office. That is, the exercise of his powers was not the responsibility

of anyone but himself (see the reference to *Enever v. The King* (1906), 3 C.L.R. 969 at para 30 of *Campbell*). But is the "office" of police officer the same for a member of the RCMP in the context of his or her conduct of a criminal investigation (as in *Campbell*) as it is in respect of his or her employment relationship with the RCMP? Does the fact that that relationship is defined by the *RCMP Act,* its regulations and Commissioner's standing orders mean that a member's "employment" relationship cannot be interpreted based in contract as discussed in *Wells*?

[64] I conclude that the weight of authority is against the existence of a contract law-based employment relationship between the RCMP and its members. The Crown has chosen to define that relationship in statute through the *RCMP Act.* It has, within the body of the legislative administrative scheme applicable to members of the RCMP, provided procedures for the resolution of employment disputes by grievance or discipline.

…

[67] The RCMP was described to me in argument by the defence as being, in nature, a paramilitary organization. From my review of its governing legislation, that would appear to be a not unreasonable description. **That is, it is fair to say that members of the RCMP are sufficiently different from the types of civil servants that are the subject of the decision in *Wells* that I conclude that the general law of contract does not apply to the relationship between the RCMP and its members.** I say that notwithstanding the "*indicia*" of employment pressed upon me by counsel for the plaintiff in para. 44 above. In the case of RCMP members, the general law is specifically superseded by the explicit terms of the *RCMP Act,* its regulations and the Commissioner's standing orders made pursuant to his authority under the *RCMP Act.* The *RCMP Act,* its regulations and orders issued by the Commissioner provide a complete code with respect to the relationship between a member and the RCMP with respect to matters that would be classified, in other situations, as part of a contract of employment. Members confirm that when they sign the documents by which they enlist or re-engage in RCMP service.

[68] Thus, it is not open to Flanagan to bring an action for breach of contract of employment against the defendants.

[emphasis added]

[63] In *Flanagan*, the action was dismissed against the defendants (which included the Minister of Public Safety and Solicitor General for the Province of BC).

[64] The plaintiff cites the decision of the SCC in *British Columbia (Attorney General) v. Insurance Corporation of British Columbia*, 2008 SCC 3. The facts in that case were that a 14 year old, TB, stole a car. An RCMP constable gave chase. TB hit a car, killing the woman driver. The woman's family sued TB and the AGBC. TB was an uninsured driver. At trial, the court found TB 90% at fault, and the RSCMP constable 10% at fault. The SCC found that the woman was entitled to claim full compensation from the AGBC, on the basis that the officer would have been jointly and severally liable with the other tortfeasor, the officer was exempted from liability, and the liability was transferred to the AGBC. The SCC reasoned:

> [8] The AGBC addressed the scope of his liability. In brief, he argued that it is limited and does not exceed the proportion of the damages attributed to the fault of the police officer.
>
> [9] In my opinion, Levine J.A. correctly defined the scope and effect of the vicarious liability imposed on the AGBC for torts committed by police officers. She stated, at paras. 21 and 22, that the AGBC's liability was the liability that would have been imposed on the officer were it not for the immunity granted in s. 21.
>
> [10] Section 21 grants immunity to the police officer. But s. 11 protects the victim by transferring the tortfeasor's liability to the AGBC. The AGBC takes the officer's place. The victim retains his or her rights, but against a different debtor. If the officer would have been jointly and severally liable with another tortfeasor but for the statutory immunity, the AGBC will also be so liable.
>
> [11] Under the *Police Act*, the imposition of vicarious liability requires fault on the officer's part and damages. Section 21 exempts the officer from liability, and the liability arising from his fault is transferred to the AGBC. As the damages are deemed to be indivisible, the police officer and T.B. would normally be jointly and severally liable under s. 4(2) of the *Negligence Act*. Because s. 21(2) of the *Police Act* exempts the officer from liability while s. 11 deems the AGBC to be liable, the victim is entitled to claim full compensation from the AGBC.

[65] That decision did not, however, involve any issue concerning section 10 of the Act. There was no allegation that the woman who was killed was working at the time of the accident. The defendant correctly notes that there were no issues relating to a section 257 determination by WCAT or a bar under section 10 of the Act in that case. Accordingly, that decision is not relevant to our determination.

[66] We consider it clear that while the Provincial Government had contracted with the Government of Canada for the provision of policing services, the provision of such services was not within the control of the Provincial Government. Although funded by the Provincial Government, the RCMP were carrying on a separate enterprise which was independent of the Provincial Government. Having regard to the authorities cited above, we do not consider that the RCMP members involved in the February 27, 2008 incident were acting as servants or agents of the Provincial Government. In any event, they were not acting in the course of employment within the scope of Part 1 of the Act.

[67] The plaintiff also requests certification that the contractual obligations of the RCMP pursuant to the Provincial-Federal contract (the *Agreement*) do not qualify as being engaged in an industry within the meaning of Part 1 of the Act. We consider that to the extent this question needs to be addressed, our finding that the RCMP members involved in the February 27, 2008 incident were not workers within the meaning of Part 1 of the Act, is sufficient.

[68] 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 BC to be workers within the scope of Part 1 of the Act. Accordingly, the finding concerning the plaintiff in that case is distinguishable on this basis.

[69] Upon consideration of the foregoing, we find that the RCMP members involved in the February 27, 2008 incident were not workers within the meaning of Part 1 of the Act. It necessarily follows that their action or conduct on February 27, 2008, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

Conclusion

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

(a) the Government of British Columbia was an employer engaged in an industry within the meaning of Part 1 of the Act;

(b) the RCMP members were not workers within the meaning of Part 1 of the Act; and,

(c) any action or conduct of the RCMP members, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

[71] Apart from the action or conduct of the RCMP members, it does not appear that any assertion has been made that any action or conduct of the Minister, or of the Government of BC, or of any of their servants or agents, which caused a breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Act. Accordingly, it does not appear necessary to our decision to address the action or conduct of the Government of BC.

[72] In view of our conclusions on the issues set out above, it does not appear that any additional certification is necessary. However, in the event that additional certification is required for the purposes of the legal action, a further request for a supplemental certificate may be made.

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

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants, MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL FOR BRITISH COLUMBIA, in this action for a supplemental 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 GOVERNMENT OF BRITISH COLUMBIA was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

2. The RCMP members were not workers within the meaning of Part 1 of the *Workers Compensation Act*.

3. Any action or conduct of the RCMP members, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act.*

CERTIFIED this day of November, 2013.

_____

Herb Morton
Vice Chair

_____

Guy Riecken
Vice Chair

_____

Andrew Waldichuk
Vice Chair

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

DEFENDANTS

SECTION 257 CERTIFICATE

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