WCAT Workers' Compensation Appeal Tribunal

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WCAT Decision Number: **WCAT-2014-02070 - Supplemental**
WCAT Decision Date: **July 10, 2014**

Panel: Guy Riecken, Vice Chair

WCAT Reference Number: **112480-B**

Section 257 Determination
In the Supreme Court of British Columbia
New Westminster Registry No. S111826
Michael K. Fong v. Her Majesty the Queen in Right of British Columbia, the Minister of Public Safety and Solicitor General of British Columbia

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Applicant: Michael K. Fong
(the "plaintiff")

Respondents: Her Majesty the Queen in Right of British Columbia, the Minister of Public Safety and Solicitor General of British Columbia
(the "defendants")

Representatives:

For Applicant: Paul Kent-Snowsell
Lindsay Kenney LLP

For Respondents: Ori J. Kowarsky
Kowarsky Ritson LLP

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Introduction

[1] The plaintiff, Michael K. Fong, has requested determinations supplemental to *WCAT-2013-01310* of the Workers' Compensation Appeal Tribunal (WCAT), dated May 14, 2013, under section 257 of the *Workers Compensation Act* (Act). *WCAT-2013-01310* included determinations respecting the status of the parties to a legal action in which the plaintiff alleges he was injured on March 11, 2006 as a result of assault and battery by some Royal Canadian Mounted Police (RCMP) members, and as a result of slipping on ice and falling while in the custody of the RCMP members.

[2] In letters to WCAT dated December 3 and 5, 2013, the plaintiff requested supplemental determinations as to whether:

a) the Government of British Columbia (BC) was an employer of the RCMP members;
b) any conduct or action of the Government of BC rose out of and in the course of employment within the scope of Part 1 of the Act;
c) the RCMP members were workers within the meaning of Part 1 of the Act;
d) the RCMP members were servants or 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 trial of the legal action is scheduled to commence on October 19, 2015.

[4] Written submissions have been provided on behalf of the applicant plaintiff and on behalf of the defendants Government of British Columbia, and the Minister of Public Safety and Solicitor General of British Columbia.

Issue(s)

[5] 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

[6] Section 257(1) 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."

[7] Subsection 257(2) provides that:

> (2) For the purposes of subsection (1), the appeal tribunal may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act, including determining whether
>
> > (a) a person was, at the time the cause of action arose, a worker,
> >
> > (b) the injury, disability or death of a worker arose out of, and in the course of, the worker's employment,
> >
> > (c) an employer or the employer's servant or agent was, at the time the cause of action arose, employed by another employer, or
> >
> > (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of Part 1.

[8] The Board's jurisdiction is set out in subsection 96(1) of the Act.

[9] Subsection 257(3) provides that 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)).

[10] 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)).

[11] 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 and Evidence

[12] The background and evidence respecting the alleged cause of action and the parties' status are set out in *WCAT-2013-01310*. I will not repeat all of those details here. It is sufficient for present purposes to note that on March 11, 2006 the worker was employed by a company, 0724193 BC LTD, as the general manager of the Oasis Hotel. In the early hours of March 11, 2006 some RCMP members attended at the hotel and requested the plaintiff to bring them the liquor license for the pub located in the hotel. A dispute and verbal altercation arose between the plaintiff and some RCMP members about whether he would bring them the original liquor license out of the hotel and whether he would show them his identification. There was also a physical altercation and the worker was injured. In his legal action the plaintiff alleges that he was injured as a result of assault and battery by the RCMP members and that they also allowed him to slip and fall on ice while he was in their custody.

[13] In the legal action the plaintiff has named Her Majesty the Queen in Right of British Columbia, and the Minister of Public Safety and Solicitor General of British Columbia (Minister) as defendants. In the statement of claim the plaintiff asserts that Her Majesty the Queen is a required party to the action under the *Crown Proceeding Act* for any wrongs committed by servants of the Government of BC. The plaintiff also asserts that under section 11 of the *Police Act* the Minister is jointly and severally liable for torts committed by provincial constables, and that under section 14 of the *Police Act,* the RCMP members covered by a joint federal/provincial policing agreement are deemed to be provincial constables. The individual RCMP members are not named as defendants in the legal action.

[1] As set out in the WCAT *Manual of Rules of Practice and Procedure* (MRPP) 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.

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[14] In *WCAT-2013-01310* (at paragraph 3) I noted that on October 25, 2011 WCAT received an application from the plaintiff for a determination with respect to the status of Her Majesty the Queen in Right of British Columbia. On July 24, 2012 WCAT received a letter from the defendants requesting determinations of the status of the plaintiff and each of the named defendants. At paragraph 57 I noted that the plaintiff also sought a determination as to the status of the RCMP members who the plaintiff alleges caused his injuries.

[15] In *WCAT-2013-01310* I determined that, at the time the cause of action arose on March 11, 2006:

a) the plaintiff, Michael K. Fong, was a worker within the meaning of Part 1 of the Act;

(b) the injuries suffered by the plaintiff, Michael Fong, arose out of and in the course of his employment within the scope of Part 1 of the Act;

(c) the Government of British Columbia, which is synonymous with Her Majesty the Queen in Right of the Province of British Columbia, was an employer within the meaning of Part 1 of Act; and

(d) the defendant, Minister of Public Safety and Solicitor General of British Columbia, was not a worker or an employer engaged in an industry within the meaning of Part 1 of the Act.

[16] For reasons set out *WCAT-2013-01310* I did not make a determination as to the status of the individual RCMP members involved in the March 11, 2006 incident. I stated that if a certification of the status of the members is required, the parties may request a supplemental determination.

Preliminary Matters

[17] In his written submissions counsel for the defendants objects to the way in which the plaintiff's application for a supplemental determination has proceeded. He notes that WCAT accepted the plaintiff's December 3 and 5, 2013 letters as an application for a supplemental determination even though they contained no facts or law as to the basis for the determinations sought. I do not consider this to be a defect in the plaintiff's application.

[18] Although not determinative of the matter, I note that at the time he wrote to WCAT on December 3 and 5, 2013, the plaintiff was not represented by legal counsel (his current legal counsel began to represent him after that). More importantly, neither section 257 nor WCAT's rules of procedure and practices for section 257 applications (which are set out in Chapter 18 of WCAT's MRPP) require an applicant to set out in the application the facts and law on which it is based. The MRPP explains the process

generally followed respecting the receipt of evidence and submissions after the application is received.

[19] Since the plaintiff is the applicant, the general procedure would be for the plaintiff (or his legal counsel) to provide submissions first, with a reply from the defendants/respondents, and a final rebuttal from the plaintiff/applicant. The defendants' counsel notes, however, that on January 9, 2014 he received a letter from WCAT (which was addressed to both counsel) stating that counsel for the plaintiff had advised that he did not request an opportunity to make supplementary submissions at that time, but would respond to the submissions of the defendants. The letter stated that WCAT looked forward to receiving submissions from the defendants' counsel, following which submissions would be invited from the plaintiff's counsel.

[20] On January 20, 2014 WCAT received submissions on behalf of the defendants in reply to the plaintiff's application for a supplemental determination. WCAT invited rebuttal submissions from counsel for the applicant/plaintiff. WCAT received them on March 21, 2014. As the defendants' counsel notes in his sur-rebuttal submissions, the plaintiff's submissions were extensive and addressed matters not addressed in the defendants' reply submissions. Accordingly, by way of a letter dated March 21, 2014 WCAT provided defendants' counsel an opportunity to respond.

[21] On March 25, 2014 WCAT received a letter from counsel for the defendants objecting to the inclusion of completely new arguments and evidence in the plaintiff's reply submissions. The defendants' counsel asked that WCAT either strike the plaintiff's reply ("rebuttal") in its entirety, or allow the defendants to provide a sur-rebuttal in reply to the plaintiff's rebuttal.

[22] On March 26, 2014 WCAT received a letter from counsel for the plaintiff disagreeing with the motion that his rebuttal be struck, and agreeing with the suggestion that the defendants be given an opportunity to provide a sur-rebuttal.

[23] By letters of March 31 and April 30, 2014 WCAT extended the time for the defendant's to provide a sur-rebuttal. WCAT received the defendants' sur-rebuttal on May 20, 2014.

[24] On May 21, 2014 WCAT wrote to the parties to advise them that the submissions were considered complete and the plaintiff's request for a supplemental determination would be referred for a panel for consideration.

[25] In his sur-rebuttal the defendants' counsel renews his objection to the plaintiff's rebuttal submissions. He submits that at law it is generally understood that rebuttal evidence and rebuttal submissions must confine themselves solely to countering the

respondent's evidence and submissions. New evidence and new submissions on other subjects may not be brought in rebuttal. He submits that the plaintiff's rebuttal is made up entirely of new submissions, and constitutes an attempt to completely start Mr. Fong's applications from scratch. He argues, in part, that the plaintiff's rebuttal should be struck and the matter decided purely upon the contents of the plaintiff's December 3 and 5, 2013 letters and the defendants' reply to them.

[26] I agree with the defendants' argument that it is generally understood that a party's rebuttal submissions (whether from an appellant or an applicant) are limited to matters raised in the respondent's reply submissions. An applicant or appellant is not generally permitted to raise new matters in a rebuttal to a respondent's reply, or to provide new evidence.

[27] Section 246(1) provides that, subject to any rules, practices, or procedures established by the chair, WCAT may conduct an appeal in the manner it considers necessary, including conducting hearings in writing. As noted in MRPP item #18.2, WCAT will follow its usual processes for considering appeals as set out in the MRPP insofar as they are applicable to section 257 applications. The general practice respecting the order and timing of written submissions is set out in the practice directive beginning at MRPP item #13.1. As explained in item #1.2 of the MRPP, section 13 of the *Administrative Tribunals Act* allows WCAT to issue practice directives, but also states that practice directives are not binding.

[28] WCAT is not bound by technical rules of evidence and procedure that might apply in a court of law. I consider the objection by the defendants respecting the contents of the plaintiff's rebuttal, and his argument that it should be struck and not considered, to involve matters of natural justice and procedural fairness. In my view, the real procedural fairness issues underlying the defendants' objections to the order, content, and timing of the written submissions are whether the defendants' had notice of the case they have to meet and whether they had a fair opportunity to respond[2]. I note that in his March 25, 2014 letter the defendants' counsel proposed, in the alternative, that if WCAT did not strike the plaintiff's rebuttal for containing new matters not raised by the defendants' in their reply submission, that the defendants be given an opportunity to respond. WCAT agreed to that option.

[29] To the extent that the defendants may have been prejudiced earlier in the proceedings by the plaintiff's raising matters in his rebuttal not addressed by the defendants in their reply, I consider that this has been adequately addressed by giving the defendants an opportunity to respond to the plaintiff's rebuttal by way of a sur-rebuttal. In these

[2] See *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at paragraph 65.

circumstances I find that the requirements of natural justice and procedural fairness do not make it necessary to strike the plaintiff's rebuttal or to disregard it in deciding the application.

Status of the RCMP Members

[30] In *WCAT-2013-01310* I noted that plaintiff sought a determination as to the status of the RCMP members who he alleged caused his injuries in the March 11, 2006 incident. The defendants' position was that because the members have not been named as parties in the legal action, their status is irrelevant, and the status of the named defendants exists independent of whatever law enforcement official engages in activity which produces a claim under section 11 of the *Police Act*.

[31] In their submissions respecting the plaintiff's application for a supplementary determination, the defendants continue to argue that a determination of the status of the individual RCMP members is irrelevant in the circumstances of the civil action as none of them are named as defendants. The defendants note that the plaintiff's claim is against the Government of BC vicariously for the conduct of its employees, agents, or servants who, in this case, were provincial constables acting in the performance of their duties. The defendants argue that through the *Crown Proceeding Act* and section 11 and 21(4) of the *Police Act*, the Province has placed itself in the same position as other employers with respect to the operation of the provincial police force and its vicarious liability for the conduct of the provincial constables. The defendants argue that to ensure the workers' compensation scheme applies in a consistent manner, the status of the Government of BC as an employer cannot turn on the type of law enforcement officer is involved in a particular case. The defendants also argue that it is neither necessary, nor appropriate, for WCAT in the circumstances of the civil action, to make a determination as to whether individual RCMP members are employees, servants, or agents of the Government of British Columbia. This is a matter for the court, and it is already clear from the express deeming provisions of section 14 of the *Police Act*, which makes RCMP members "provincial constables" and members of the provincial police force.

[32] In *WCAT-2013-01310* I stated that I did not agree with the defendants' argument about the irrelevance of the status of the individual RCMP members. As I did not make a determination of the status of the individual RCMP members in *WCAT-2013-01310,* my comments there about the relevance of the status of the RCMP members, and about the general position of RCMP members under the provincial workers' compensation scheme, can be considered *obiter dicta*, and I am able to reach a different conclusion in the present application.

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[33] Having considered the parties' arguments respecting the supplemental application, I am of the same view as in *WCAT-2013-01310*. 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.

[34] 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]

[35] The "action or conduct" which is relevant to the legal action for the purposes of the section 257 determination is the action or conduct which caused the alleged breach of duty of care.

[36] The plaintiff's statement of claim alleges assault and battery by the RCMP members involved in the March 11, 2006 incident. It does not allege assault or battery by the Government of BC or the Minister. As the defendants have stated in their submissions, the claim against the Government of BC and the Minister is one of vicarious liability under the *Police Act*.

[37] If some action or conduct by the Government of BC or the Minister was in issue, it would be entitled to certification regarding that action or conduct. It does not appear, however, that any breach is alleged on the part of the Government of BC or its agents or servants, other than the breach resulting from the alleged conduct of the RCMP members.

[38] In these circumstances I find that the status of the RCMP members is relevant to the legal action even though they are not parties to the action, and that determination of their status is necessary.

[39] In *2013-01310*, at paragraphs 60 to 63 I explained that although the status of the individual RCMP members was relevant, I did not consider it appropriate to make a determination concerning their status. Essentially this was because the individual members had not been notified of the application for a determination of their status, and had not been given an opportunity to participate in the application as interested persons.

[40] In the present application for a supplemental determination, the situation respecting notice to the individual members remains the same. The parties have not provided contact information for the individual RCMP members, and they have not been notified of the application. However, while MRPP item #18.3.1 provides that WCAT will normally provide that persons, other than the named parties to the action, who might be directly and adversely affected by a section 257 determination may be given standing to participate in the section 257 proceeding, it does not require such persons to be given standing to participate.

[41] Subsection 21(2) of the *Police Act* provides that:

> (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.

[42] Section 21(3)) provides that subsection 23(2) does not provide a defence in certain circumstances. In *WCAT-2013-01310* I noted, at paragraph 69, that it does not appear from the statement of claim that the plaintiff is pursuing a claim against the individual officers under subsection 21(3) of the Police Act.

[43] I note that in *WCAT-2013-03191-Supplemental* (*Chan v. Ministry of Public* Safety) the panel made a determination as to the status of the individual RCMP members who were not named as parties in the action, and the panel did not indicate that the individual RCMP members had been notified, or given an opportunity to participate as interested parties. It appears that this may not have been unnecessary in light of the provisions of subsection 21(3) *Police Act* that provide immunity from civil liability to police officers, and section 11 which makes the minister, on behalf of the government, jointly and severally liable for torts committed by provincial constables. It is not disputed that under the terms of the *Police Act* and the *Province of British Columbia Provincial Police Service Agreement* (Agreement), dated April 1, 1992, that RCMP members in BC who are covered by the Agreement are provincial constables, and have the benefit of the immunity under section 21 of the *Police Act*.

[44] In their submissions respecting both the original section 257 application, and the current supplemental application, the parties have not addressed the issue of whether the individual RCMP officers should be notified and given an opportunity to participate as interested persons.

[45] Having considered the matter, including the immunity afforded by section 21 of the *Police Act*, and the approach of the panel in *WCAT-2013-03191-Supplemental*, I find that it is not necessary to notify the individual RCMP members of the application, or to invite them to participate as interested persons before determining their status.

[46] Turning to the issue of the status of the individual RCMP members involved the March 11, 2006 incident, the defendants argue that the RCMP members were acting in accordance with their duties at the time of the incident. The defendants argue specifically that they were acting in accordance with their duties to enforce a provincial law, the *Liquor Control and Licensing Act*, [RSBC 1996], Chapter 267, and the *Liquor Control and Licensing Regulation*, B.C. Regulation 244/2002 (O.I.C. 792/2002). The defendants have provided copies of the following: *Liquor Primary Terms and Conditions, A Guide For Liquor Licensees in British Columbia* (updated October 2013); and, *Compliance and Enforcement Policy and Procedures Reference Manual* (updated October 2013), both of which are publications of the Liquor Control and Licensing Branch of the BC Government.

[47] The defendants have also provided a copy of part of an RCMP "E" Division *Operational Manual* (Operations Manual) that addresses investigation and enforcement of the BC *Liquor Control and Licensing Act* and *Regulations*. The portion of the *Operations Manual* that addresses licensed premises checks makes reference to the BC Liquor Control and Licensing Branch policies.

[48] The defendants submit that in attending at the Oasis Hotel pub on March 11, 2006 and (among other things) demanding that the plaintiff produce the liquor license, the RCMP members were, on the face of it, acting in accordance with their duties as peace officers to monitor and enforce a "solely Provincial statute." The defendants argue that their duties at the time were not pursuant to the enforcement of the *Criminal Code* or of any federal law, but only involved enforcement of the BC liquor control and licensing laws. The defendants argue that in carrying out those duties, the RCMP members were servants or agents of the Government of BC.

[49] The defendants argue that in the absence of an agency relationship the Government of BC would not utilize the services of the RCMP to ensure compliance with provincial liquor laws, and that the RCMP members would have no authority to enforce a provincial statute if they were not servants or agents of the Government of BC.

[50] Aside from the issue of whether the RCMP members are servants or agents of the Government of BC, the plaintiff does not appear to dispute that the RCMP members who had been dispatched to the Oasis Hotel pub at the relevant time were acting in the course of their duties as RCMP members authorized to act as provincial constables under the *Police Act* and the Agreement.

[51] Putting aside for the moment the question of whether they were acting as agents or servants of the Government of BC, I accept that the RCMP members who attended at the Oasis Hotel on March 11, 2006 and became involved in the incident were acting in the course of their duties as RCMP members. I do not consider it necessary to determine whether the scope of their duties as RCMP members at the relevant time involved the enforcement solely of BC laws, or whether they were also engaged the enforcement of federal law, including the *Criminal Code*. I do not consider that issue to be determinative of the question of whether the RCMP members are workers within the meaning of Part 1 of the Act, or whether their alleged conduct arose out of and in the course of employment within the scope of Part 1.

[52] While relevant, the fact that an individual is engaged in the performance of some aspect of his or her usual work duties at a particular time is not, in itself, determinative of whether the individual is a worker under Part 1 of the Act, or whether the particular actions arose out of and in the course of employment within the scope of Part 1. While I have accepted that, on the face of it, the RCMP members were performing their duties at the relevant time, under binding Board policy other factors are also considered.

[53] Section 1 of the Act provides that:

> "employer" includes every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry ...
>
> [and]
>
> "worker" includes
>
> (a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise; ....

[54] Binding policies respecting whether an individual is a worker within the meaning of Part 1 of the Act, and whether an individual's action or conduct arose out of and in the

course of employment, are found in Chapters 2 and 3 of the RSCM II, and the *Assessment Manual*. These include:

- RSCM II policy item #8.10 (Federal Employees), which provides that the *Government Employees Compensation Act* (GECA) grants "employees" of the federal government usually employed in the province the same rights to compensation as non-federal employees. The definition of "employee" includes "any person in the service of Her Majesty [in right of Canada] who is paid a direct wage or salary by or on behalf of Her Majesty"; and, any "member, officer or employee of any department ... or agency established to perform a function or duty on behalf of the Government of Canada ...."
- RSCM II policy item #C3-12.10 (Federal Government Employees), which recognizes that subsection 3(1) of the GECA provides that the GECA does not apply to any person who is a member of the regular force of the RCMP.
- *Assessment Manual* item #AP-97-1 (Coverage under Federal Statutes or Agreements Between the Provincial and Federal Governments), which provides, in part, that "Members of the Federal Police Force (RCMP) ... are not covered by the Board but by the Federal Government directly."

[55] In *WCAT-2013-01310*, at paragraphs 64 to 78, I set out the general legislative and policy framework relevant to RCMP members who act as police constables in BC, and how they are generally treated in the provincial workers' compensation system. Although in that decision I declined to determine the status of the RCMP members involved in the March 11, 2006 incident, I noted at paragraph 79 that, as a general matter, RCMP members are not workers under Part 1 of the Act, whether or not they are eligible for compensation under the federal GECA.

[56] While I have considered the defendants' arguments related to the RCMP members enforcement of provincial liquor laws, I reach the same conclusion in the context of the present supplemental application. For the reasons set out in paragraphs 64 to 78 of *WCAT-2013-01310*, which I adopt here, I find that the individual RCMP members who were involved in the March 11, 2011 incident were not workers within the meaning of Part 1 of the Act. Without repeating the summary of the legislative framework, the essence of the matter is that regular RCMP members are employees of the federal government. In the alternative, as the plaintiff has argued in the supplemental application, they are federal appointees to an office. Whether they are considered federal employees, or federal appointees to an office, they are not employees of an employer within the meaning of Part 1 of the Act even though they are deemed to have the status of provincial constables under the *Police Act*.

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[57] The issue of the status of individual RCMP members in BC was also addressed by the panel in *WCAT-2013-03191-Supplemental*. After summarizing affidavit evidence from an RCMP officer, the panel reasoned as follows:

> [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]

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[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] The panel in *WCAT-2013-03191-Supplemental* concluded that the individual RCMP members involved in the incident that was the subject of the relevant legal action were not workers within the meaning of Part 1 of the Act.

[59] I agree with the analysis of the panel in *WCAT-2013-03191-Supplemental* respecting the status of RCMP members carrying out duties in BC under the Agreement.

[60] I conclude that the individual RCMP members involved in March 11, 2006 incident were not workers within the meaning of Part 1 of the Act.

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[61] The next issue is whether, at the time of the March 11, 2006 incident, the action or conduct of the RCMP members which caused the alleged breach of duty of care arose out of and in the course of employment.

[62] The defendants refer to the following definition of "employment" in section 1 of the Act:

> **"employment"**, when used in Part 1, means and refers to all or part of an establishment, undertaking, trade or business within the scope of that Part, and in the case of an industry not as a whole within the scope of Part 1 includes a department or part of that industry that would if carried on separately be within the scope of Part 1".

[63] The defendants refer to my determination in *WCAT-2013-01310* that the Government of BC is an employer within the meaning of Part 1 of the Act. The defendants submit that as an employer the BC Government is engaged in an "establishment, undertaking, trade or business" within the scope of Part 1, of which liquor control and licensing forms part. As I understand the defendants' argument, they submit that in the March 11, 2006 incident the RCMP members were in the same position as any other peace officers or BC officials or employees tasked with the enforcement of the BC liquor control and licensing regime. The defendants argue that under the *Liquor Control and Licensing Act,* a class of officials, comprised of the general manager of the BC Liquor Control and Licensing Branch (Branch), an employee of the Branch, or a peace officer (which includes both an RCMP member and a member of an independent police force of a municipality), are given administrative powers and duties. The defendants cite sections 7, 7.2, 22(3), 34, 57 and 70 of the *Liquor Control and Licensing Act.*

[64] I do not consider the fact that the RCMP members were enforcing provincial liquor laws to distinguish this case from *WCAT-2013-03191-Supplemental.* While part of their duties may engage them in the enforcement of provincial laws, as distinct from federal criminal law, given the clear statement in policy item #AP1-97-1, that RCMP members are not covered by the Act, and my finding that they are not workers within the meaning of Part 1 of the Act, I do not consider their involvement in enforcing provincial laws is sufficient to conclude that their activities are related to employment within the scope of Part 1 of the Act.

[65] Like the panel in *WCAT-2013-03191-Supplemental* I consider prior WCAT decisions (such as *WCAT-2007-03857*, *WCAT-2008-03632*, and *WCAT-2010-03266*), that 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, to be distinguishable on the basis that they did not concern members of the RCMP.

[66] I find that the action or conduct of the RCMP members in the March 11, 2016 incident, 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?

[67] The defendants argue that it is neither necessary nor appropriate for WCAT to decide whether the RCMP members were servants or agents of the Government of BC. The defendants submit that this is a matter of law for the court based on the operation of the *Police Act* and Agreement. In the alternative the defendants argue that I should find that the RCMP members are servants or agents of the Government of British Columbia, by operation of the *Police Act* and the Agreement. The defendants further argue that as the RCMP members were engaged in their duties as provincial constables enforcing the provincial liquor control and licensing law, they were agents of the provincial government.

[68] The plaintiff's position is that RCMP members are neither employees nor agents of the provincial government, but appointees of the federal government who act autonomously in carrying out their duties. The plaintiff has provided extensive submissions respecting the autonomy of the RCMP members carrying out their duties, and the plaintiff argues that the autonomy is inconsistent with a characterization of them as servants or agents of the Government of BC.

[69] I have already found that the individual RCMP members were not workers within the meaning of Part 1 of the Act, and that their action or conduct on March 11, 2006, 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, I find that even if the RCMP members could be characterized as agents of the Government of BC as the defendants contend, there would be 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 in this decision to address the meaning of the phrase "the employer's servant or agent."

[70] Nevertheless, like the panel in *WCAT-2013-03191-Supplemental*, at paragraphs 61 to 63, I note with interest the comments in *A.G. Alberta v. Putnam*, [1981] 2 S.C.R. 267, and *Flanagan v. Canada (Attorney General)*, 2013 BCSC 1205 concerning the status of RCMP members in relation to provincial laws.

[71] I consider those judgments consistent with the view that while the Government of BC has contracted with the Government of Canada for the provision of policing services by RCMP members, and although such members are deemed to be provincial constables, in providing police services in BC the RCMP carries on a separate enterprise which is independent of the Government of BC. The independent or autonomous role of the RCMP appears to be inconsistent with the RCMP members involved in the March 11, 2006 incident acting as servants or agents of the Province of BC, whether they were engaged solely in the enforcement of provincial laws, or were also partly engaged in the enforcement of federal criminal law.

[72] In any event I have already determined that they were not acting in the course of employment within the scope of Part 1 of Act, and that it appears unnecessary to determine if they were acting as servants or agents of the Government of B.C.

[73] The plaintiff has also requested certification that the contractual obligations of the RCMP pursuant to the Agreement do not qualify as being engaged in an industry within the meaning of Part 1 of the Act. I consider that to the extent this question needs to be addressed, my finding that the RCMP members involved in the March 11, 2006 incident were not workers within the meaning of Part 1 of Act is sufficient.

Action or Conduct of the Government of British Columbia

[74] Aside from arguing that the RCMP members are servants or agents of the Government of BC, the defendants argue that in past determinations respecting civil actions based on the alleged misconduct of RCMP members, WCAT has found that any action or conduct of the Government of BC, 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. The defendants (in the alternative) seek that determination in this case.

[75] The defendants cite, for example, *WCAT-2008-01353* (*Cranston v. Dunsmore et al.*), in which WCAT was asked to make status determinations in relation to a civil claim brought by a citizen volunteer auxiliary constable who was a passenger in an RCMP vehicle operated by the defendant RCMP constable, against whom negligence was alleged. The defendants also cite the status determinations in *WCAT-2008-01834* (*Aitken v. Bethel et al.*), and *WCAT-2011-01083* and *01804* (*Findlay v. Jansen et al.*), both of which involved civil actions respecting motor vehicle accidents in which negligence was alleged against RCMP members. The defendants argue that consistency in WCAT decision-making should lead to the same result in the present case where the action or conduct resulting in the alleged breach of duty of care arose from the RCMP members carrying out their duties to enforce the provincial liquor control and licensing law.

[76] The defendants are correct that in those WCAT decisions the WCAT panels determined that the Government of BC was an employer within the meaning of Part 1 of the Act, and that any action or conduct of the Government of BC, 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.

[77] However, in those decisions the panels did not determine the status of the RCMP members who were involved. In *WCAT-2008-01834* (*Aitken v. Bethell et al.*), the panel determined the status of the defendant Theresa Braid, a civilian employed as a dispatcher at the RCMP detachment. The evidence, summarized at page 17 of the decision, was that she was employed by the City of Nanaimo, and that the City of Nanaimo was registered with the Board as an employer. The panel determined that she was a worker at the time of the accident, and that any action or conduct by her which caused the alleged breach of a duty of care arose out and in the course of employment within the scope of Part 1 of the Act. The panel did not determine the status of the RCMP officers involved in the motor vehicle accident.

[78] In *WCAT-2008-01353* (*Cranston v. Dunsmore et al.*), the panel determined the status of the plaintiff Cranston who was a "citizen volunteer" auxiliary constable who was a passenger in a motor vehicle driven by the defendant Dunsmore, an RCMP constable. In determining the status of Cranston, at pages 10 and 11 of the decision, the panel referred to evidence that Cranston was not an employee of the federal government, and that the BC Reserve / Auxiliary Police Program, a division of the BC Public Service Agency of the Government of BC was registered with the Board. The panel referred to subsection 3(5) of the Act, and to a 1982 Board document that deemed individuals participating in the Reserve / Auxiliary Police Program in BC to be workers of the Crown in right of the province and workers within the scope of Part 1 of the Act. The panel determined that Cranston was a worker and that his injuries arose out of and in the course of employment within the scope of Part 1. Again, the panel did not determine the status of the RCMP constable who was driving the motor vehicle.

[79] In *WCAT-2011-01083 /01084* (*Findlay et al. v. Jansen et al.*) the plaintiffs claimed in two civil actions that Constable Jensen, in the course of a police pursuit, was negligent in respect of a fatal motor vehicle accident. The panel did not determine the status of Constable Jensen.

[80] 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. Nonetheless, the reasoning in prior decisions may provide useful guidance. In addition, as the defendants, have submitted, consistency in WCAT's decision-making is valued.

[81] Aside from not determining the status of the respective RCMP members, those decisions contained no express reference to the RCMP members in connection to the determinations regarding the action or conduct of the Government of BC. The reasons of the respective panels did not expressly relate the Government of BC to the conduct or actions of the RCMP members, other than through the vicarious liability under the *Police Act*. The reasons in those decisions did not provide any analysis which expressly addressed the meaning of the "action or conduct of the Government of BC" in relation to the actions or conduct of the RCMP members. I do not consider the WCAT decisions cited by the defendants to be of significant persuasive value with respect to the status of the Government of BC.

[82] The defendants also cite the BC Court of Appeal (BCCA) decision in *Aitken v. Minister of Public Safety and Solicitor General*, 2013 BCCA 291. In that decision the court referred to the following certified determinations of the panel in *WCAT-2008-01834* (*Aitken v. Bethell et al.*):

> 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*.
>
> ...
>
> 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*.

[83] As I have noted, the reasons of the WCAT panel contained no express reference to the RCMP members, in connection with the finding regarding the action or conduct of the Government of BC.

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[84] 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]

[85] 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]

[86] I emphasize that in addressing the "action or conduct," I am doing 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.

[87] The plaintiff's statement of claim alleges assault and battery on the part of the RCMP members involved in the March 11, 2006 incident. It does not allege assault and battery or other misconduct on the part of Government of BC.

[88] If some action or conduct by the Government of BC was in issue, it would be entitled to certification regarding that action or conduct. 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 my decision to address the action or conduct of the Government of BC.

[89] In the circumstances, I refrain from certifying on the issue of the action or conduct of the Government of BC.

[90] 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 I have already addressed).

Conclusion

[91] I find that at the time the cause of action arose, March 11, 2006:

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

b) 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.

[92] 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.

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[93] In view of my conclusion 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.

Guy Riecken
Vice Chair

GR:gw