

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Petro-Canada v. British Columbia (Workers' Compensation Board)*,
2009 BCCA 396

Date: 20090916
Docket: CA036345

Between:

Petro-Canada

Respondent

(Petitioner)

And

Workers' Compensation Board of British Columbia

Appellant

(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Groberman

On appeal from Supreme Court of British Columbia, July 18, 2008, *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2008 BCSC 841, S075162

Counsel for the Appellant:

Scott A. Nielsen
Laurel M. Courtenay

Counsel for the Respondent:

David A. Gooderham
Eileen E. Vanderburgh

Place and Date of Hearing:

Vancouver, British Columbia
February 26, 2009

Place and Date of Judgment:

Vancouver, British Columbia
September 16, 2009

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] Following inspections of two service stations, the Workers' Compensation Board made orders against Petro-Canada under s. 115(1) of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492, and provisions of the *Occupational Health and Safety Regulation*, B.C. Reg. 296/97.

[2] Petro-Canada sought a review of four of the orders, arguing that the service stations were operated by franchisees, and that it was not an "employer" in respect of those stations for the purposes of the *Act* and the *Regulation*. In responding to the review application, the Compliance Section of the W.C.B. conceded that three of the orders were invalid, and accepted that those orders should be rescinded or cancelled. Notwithstanding the concession, the W.C.B. Review Officer confirmed all four orders.

[3] Petro-Canada sought judicial review, contending that the Review Officer misconstrued the *Act* by adopting an unreasonable definition of "employer". It also alleged that it had been denied procedural fairness on the Review, because it had been lulled into thinking that it did not have to present argument in respect of the three orders that the Compliance Section had conceded were invalid.

[4] In a decision indexed as 2008 BCSC 841, the Supreme Court granted judicial review, finding the Board's characterization of Petro-Canada as an employer in respect of the two service stations to be unreasonable. The chambers judge quashed all four orders, and remitted them to the Review Officer for reconsideration. He found it unnecessary, in the circumstances, to address the procedural fairness issue.

[5] The Workers' Compensation Board appeals from the quashing of the orders. Both the reasonableness of the Review Officer's decision and the procedural fairness issue are before the Court.

The Board Orders

[6] In February 2005, a robbery occurred at a Petro-Canada service station in Langley. The perpetrator gained access to the area behind the service counter by kicking down a small swinging door that was the only barrier to entry. He was then able to hold a worker at knifepoint.

[7] On July 5, 2006, a W.C.B. Prevention Officer conducted an inspection of the premises. She determined that some corrective action had been taken – a pay window had been installed, and lighting had been increased – but that no action had been taken to improve the layout and design of the sales register counter to prevent future violent incidents. The Officer noted that better layouts and designs were used in newer Petro-Canada stations.

[8] She made four orders. The first order declared that Petro-Canada had contravened s. 115(1)(a)(ii) of the *Workers Compensation Act*. Section 115 provides as follows:

General duties of employers

115(1) Every employer must

- (a) ensure the health and safety of
 - (i) all workers working for that employer, and
 - (ii) any other workers present at a workplace at which that employer's work is being carried out, and
- (b) comply with this Part, the regulations and any applicable orders.

(2) Without limiting subsection (1), an employer must

- (a) remedy any workplace conditions that are hazardous to the health or safety of the employer's workers,
- (b) ensure that the employer's workers
 - (i) are made aware of all known or reasonably foreseeable health or safety hazards to which they are likely to be exposed by their work,
 - (ii) comply with this Part, the regulations and any applicable orders, and
 - (iii) are made aware of their rights and duties under this Part and the regulations,
- (c) establish occupational health and safety policies and programs in accordance with the regulations,
- (d) provide and maintain in good condition protective equipment, devices and clothing as required by regulation and ensure that these are used by the employer's workers,
- (e) provide to the employer's workers the information, instruction, training and supervision necessary to ensure the health and safety of those workers in carrying out their work and to ensure the health and safety of other workers at the workplace,
- (f) make a copy of this Act and the regulations readily available for review by the employer's workers and, at each workplace where workers of the employer are regularly employed, post and keep posted a notice advising where the copy is available for review,

(g) consult and cooperate with the joint committees and worker health and safety representatives for workplaces of the employer, and

(h) cooperate with the Board, officers of the Board and any other person carrying out a duty under this Part or the regulations.

[9] The second order declared that Petro-Canada had failed to meet the requirements of ss. 4.28 and 4.29 of the *Occupational Health and Safety Regulation*, and thereby contravened s. 115(1)(b) of the *Act*. The relevant provisions of the *Regulation* are as follows:

Definition

4.27 In sections 4.28 to 4.31, “violence” means the attempted or actual exercise by a person, other than a worker, of any physical force so as to cause injury to a worker, and includes any threatening statement or behaviour which gives a worker reasonable cause to believe that he or she is at risk of injury.

Risk assessment

4.28(1) A risk assessment must be performed in any workplace in which a risk of injury to workers from violence arising out of their employment may be present.

(2) The risk assessment must include the consideration of

- (a) previous experience in that workplace,
- (b) occupational experience in similar workplaces, and
- (c) the location and circumstances in which work will take place.

Procedures and policies

4.29 If a risk of injury to workers from violence is identified by an assessment performed under section 4.28 the employer must

- (a) establish procedures, policies and work environment arrangements to eliminate the risk to workers from violence, and
- (b) if elimination of the risk to workers is not possible, establish procedures, policies and work environment arrangements to minimize the risk to workers.

[10] The third order declared that Petro-Canada, having been made aware of previous violent incidents at the service station, failed to meet the requirements of s. 3.10 of the *Regulation*. The relevant section of the *Regulation* is as follows:

Reporting unsafe conditions

3.10 Whenever a person observes what appears to be an unsafe or harmful condition or act the person must report it as soon as possible to a supervisor or to the employer, and the person receiving the report must investigate the reported unsafe condition or act and must ensure that any necessary corrective action is taken without delay.

[11] Finally, the inspector issued an order under s. 179(3)(g) of the *Act* directing Petro-Canada to provide the Board with copies of certain incident investigation reports relating to violent incidents at the service station in 2004 and 2005.

[12] On May 8, 2006, a violent incident occurred at a Petro-Canada station in Surrey. A driver filled his vehicle with gasoline, and started to drive away without paying. An attendant attempted to stop him, and was struck by the vehicle.

[13] On May 30, 2006, a W.C.B. Prevention Officer attended at the service station and issued an order declaring Petro-Canada to have contravened s. 115(1)(a)(ii) of the *Workers Compensation Act* by failing to conduct a site-specific risk assessment of the station where there was a risk of injury to workers from violence arising out of their employment. While no provisions of the *Occupational Health and Safety Regulation* were cited in the order, the Prevention Officer evidently had ss. 4.28 and 4.29 of the *Regulation* in mind when he issued the order.

The Review Process

[14] Section 96.2(1)(c) of the *Act* gave Petro-Canada the right to request a review of the Prevention Officers' orders. It requested reviews of all four orders in respect of the Langley service station, though it eventually abandoned the request with respect to the order for disclosure of investigation reports. It contended that the other orders were invalid because Petro-Canada was not an employer to which s. 115(1) applied in respect of service stations operated by franchisees.

[15] The review process was a formal one, in which Petro-Canada and the Compliance Section of the W.C.B.'s Investigations Division (represented by a Case Officer) were each invited to file affidavits and written submissions. After receiving a copy of Petro-Canada's request for a review of the orders in respect of the Langley service station, the Case Officer agreed that the second and third orders should not have been made. In her submissions, she stated:

A review of sections 4.28 and 4.29 of the *Regulation* indicates that while the obligations imposed under these sections definitely apply to the direct employer, namely, the Licensee, they do not apply to Petro-Canada. This is largely based on the fact that the obligation imposed under 4.29 is on "the employer" and not "an" or "every" employer.

...

For [this reason, the Prevention Officer] is content that Order 2 be rescinded ...

...

[Section 3.10] like section 4.29 imposes an obligation on “the employer”. [The Prevention Officer] admits that while section 3.10 imposes a duty on the Licensee, as they are the direct employer of the Service Station workers, it may not impose a duty on Petro-Canada. [The Prevention Officer] is therefore content that Order 3 be rescinded. That being said, Petro-Canada still has an obligation under section 115(1)(a)(ii) to ensure the health and safety of the Service Station workers.

[16] Petro-Canada filed its detailed written submissions after receiving the submissions of the Case Officer. It noted that the review was now concerned only with the first order in respect of the Langley service station:

A total of four Orders were issued against Petro-Canada under Inspection Report #IR2006130260134. Orders number 2 and 3 have since been rescinded by the Prevention Officer. Order number 4 was an order to produce records pursuant to s. 179(3). Petro-Canada has produced the records sought by Order number 4 and ... is no longer challenging that Order...

...

Given Petro-Canada’s understanding that Orders No. 2 and 3 have been rescinded we will not specifically address the propriety of those Orders in the following submissions. Suffice it to say that Petro-Canada agrees that the Orders were not properly made against Petro-Canada and were appropriately rescinded.

[17] Petro-Canada also sought a review of the order with respect to the Surrey service station. Initially, the Case Officer argued that the order should be upheld. After receiving Petro-Canada’s detailed submissions, however, the Case Officer agreed that the order should be cancelled:

[The Prevention Officer] has reviewed Petro-Canada’s December 8, 2006 submissions along with the wording of [the order] and is content that Review Division cancel this Order. It should be noted that the decision to agree to cancel [the order] should not be taken as an acceptance of Petro-Canada’s submissions regarding the interpretation and applicability of s. 115(1)(a)(ii) to employers such as Petro-Canada. The decision to agree to the Order being cancelled was based largely on the wording of the Order, namely, that it was based on Petro-Canada failing to ensure the health and safety of the service station workers by failing to conduct a risk assessment. [The Prevention Officer] agrees that the obligation to conduct a risk assessment pursuant to s. 4.28 [of the Regulation] is not an obligation of Petro-Canada but of the direct employer of the service station workers, namely [the franchisee].

[18] The final submissions of the Case Officer and of Petro-Canada confirm that they considered the only issue on the reviews to be the validity of the first order in respect of the Langley service station. The Case Officer's last submission in respect of that review opens with the following paragraph:

The Case Officer's submissions of November 2, 2006 and the Employer's submissions of December 8, 2006 suggest that although Orders 1, 2, 3 and 4 are the subject of this review only Order 1 remains at issue. This is the result of [the Prevention Officer] agreeing to Review Division rescinding Orders 2 and 3, and of Petro-Canada no longer challenging the validity of Order 4.

[19] Petro-Canada sent its final responsive submissions to the Review Officer on March 2, 2007. The parts of the submissions dealing with the Langley service station deal only with Order 1. In respect of the Surrey order, the submissions state:

As the Prevention Officer has now recommended that the sole Order under consideration in this Review Application be cancelled, Petro-Canada will not comment further on the merits of this Order.

[20] In short, the submissions of both Petro-Canada and of the W.C.B. Case Officer clearly indicate that they understood only the first order in respect of the Langley service station to be in issue on the review.

The Review Officer's Decision

[21] The Review Officer provided his decision on May 29, 2007 (Review Decision #R0069701 and #R0071089). He characterized the issue as follows:

Both of these reviews ... deal with the extent that the employer is responsible for ensuring the safety of the licensees' employees from the threat of violence. There can be no doubt that the individual licensees are responsible for ensuring the safety of their own employees. The question before me is whether the *Act* and Board policy impose parallel safety obligations upon this employer, as well, even though it does not actually have a presence in the day-to-day activities of the individual service stations.

[22] In interpreting s. 115(1) of the *Act*, the Review Officer began by considering the proper definition of "employer". The term is defined in Part 3 of the *Act* (which deals with occupational health and safety, and includes s. 115) as follows:

Definitions

106 In this Part and in the regulations under this Part:

...

“employer” means

- (a) an employer as defined in section 1,
- (b) a person who is deemed to be an employer under Part 1 or the regulations under that Part, and
- (c) the owner and the master of a fishing vessel for which there is crew to whom Part 1 applies as if the crew were workers,

but does not include a person exempted from the application of this Part by order of the Board;

[23] The definition of “employer” in s. 1 of the *Act* is as follows:

Definitions

1 In this Act:

...

“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;

[24] On the face of it, the question of whether Petro-Canada comes within the definition of “employer” is a straightforward one. It has many employees under contract in British Columbia, and has been registered as an employer with the Workers’ Compensation Board for decades. As is conceded by Petro-Canada, the company is an “employer” under s. 1 of the *Act*.

[25] The Review Officer appears to have considered the issue of whether Petro-Canada is an “employer” to be more complex. He noted that the definition in s. 1 of the *Act* is an inclusive rather than an exhaustive one. He took the view that s. 1 merely provides an example of the type of party that may be considered an employer for the purposes of the *Act*. He then noted that s. 106 expands the definition of “employer” for the purposes of Part 3 of the *Act*. He concluded that the intent of the statute is to provide a “flexible and expansive concept of ‘employer’”. He summarized his view thus:

It is clear, therefore, that Part 3 of the *Act* takes an expansive view of occupational health and safety by implicating a wide constituency into the process. When all of these provisions are read together, there can be no doubt that the legislature contemplated the imposition of responsibilities upon parties whose relationship may not conform to the legally strict employer/employee relationship. It is clear that Part 3 of the *Act* is remedial legislation whose goal is foster a culture of safety in the workplace. Therefore, any party that may have a role in affecting the condition of safety is contemplated by Part 3 of the *Act*.

[26] While he acknowledged that Part 3 of the *Act* imposes specific obligations on persons other than employers – other provisions in Part 3 impose obligations on suppliers, supervisors, owners, prime contractors and workers – the Review Officer considered that the purposes of the statute are best achieved by interpreting the word “employer” broadly. In doing so, he considered s. 107 of the *Act*, which sets out the purposes of Part 3:

Purposes of Part

107(1) The purpose of this Part is to benefit all citizens of British Columbia by promoting occupational health and safety and protecting workers and other persons present at workplaces from work related risks to their health and safety.

(2) Without limiting subsection (1), the specific purposes of this Part are

- (a) to promote a culture of commitment on the part of employers and workers to a high standard of occupational health and safety,
- (b) to prevent work related accidents, injuries and illnesses,
- (c) to encourage the education of employers, workers and others regarding occupational health and safety,
- (d) to ensure an occupational environment that provides for the health and safety of workers and others,
- (e) to ensure that employers, workers and others who are in a position to affect the occupational health and safety of workers share that responsibility to the extent of each party’s authority and ability to do so,
- (f) to foster cooperative and consultative relationships between employers, workers and others regarding occupational health and safety, and to promote worker participation in occupational health and safety programs and occupational health and safety processes, and
- (g) to minimize the social and economic costs of work related accidents, injuries and illnesses, in order to enhance the quality of life for British Columbians and the competitiveness of British Columbia in the Canadian and world economies.

[27] Relying particularly on s. 107(2)(e), the Review Officer stated:

I conclude that Part 3 of the *Act* will impose safety obligations upon parties that are in the best position to oversee and deal with particular safety concerns that arise. These parties can be employers, workers, owners, prime contractors or others. The goal is to ensure that all relevant parties have responsibilities for occupational health and safety. A corollary is that the definition of employer should be viewed expansively.

[28] The Review Officer then focussed on the question of whether Petro-Canada was sufficiently connected to the operations of service stations operated by franchisees to be considered an “employer” for the purposes of s. 115. He found that it was:

The employer denies that it has much power or authority in the day-to-day running of the service stations. I have considered the evidence before me, and do not entirely agree.

First, the Retail License Agreement makes it clear that the licensee is simply an agent of the employer, for the purposes of sales. All title to the petroleum products remains with the employer until the point of sale. In addition, the employer dictates the type and quality of product that the licensee must sell and provides it. The employer also dictates the price and the manner of payment, which may include coupons. The licensee holds all monies earned from sales transactions in trust for the employer, who then pays the licensee a commission. In addition, the employer dictates the hours of operation, and retains the right to authorize others to access or use the control room containing the console.

Second, it is clear that the employer has specifically retained the right to inspect the service stations for safety concerns and the right to dictate safety policy, to a certain extent. Both the Retail License Agreement and the Site Operating Procedure discuss the employer’s expectations in the realm of safety and empower the employer with the authority to conduct inspections and demand remedies if deficiencies are found.

Overall, I have found the relationship between this employer and its licensees to be sufficiently close that it would not be unreasonable to conclude that the licensee is simply an agent of the employer. Indeed, this is what the contract between the parties states.

[29] Having found Petro-Canada to be an “employer” for the purposes of s. 115, the Review Officer turned to Petro-Canada’s primary argument, which was that s. 115(1)(a)(ii) is applicable only in respect of workers who are present at a workplace where the employer’s own workers are also present. I reproduce s. 115(1)(a) of the *Act*, again, for convenience of reference:

General duties of employers

115(1) Every employer must

- (a) ensure the health and safety of
 - (i) all workers working for that employer, and
 - (ii) any other workers present at a workplace at which that employer’s work is being carried out...

[30] The Review Officer rejected Petro-Canada’s interpretation:

... In light of the fact that the *Act* views the definition of employer expansively, and in light of the clear wording of section 115(1)(a)(ii), which states “any other workers

present at a workplace at which that employer's work is being carried out", it seems that the *Act* intended this obligation to arise as long as *some workers* carried out the employer's work, regardless of whether the employer's own employees were also present. I can see no indication that the legislature specifically rejected this interpretation and it flows logically and organically from the scheme and text of the *Act* as a whole.

[31] The Review Officer completed his interpretation of s. 115 by considering whether Petro-Canada's "work" was being carried out at the service stations, and concluded that it was:

The next question is whether the retail sale of petroleum products is the employer's "work", for the purposes of section 115(1)(a)(ii) of the *Act*. The employer denies that it is directly involved in the retail sale of petroleum products. It denies that the activities of the service station employees may be characterized as its "work". I am not convinced by this argument. It requires an overly narrow and technical understanding of the concept of "work". The truth is that this employer owns the premises, owns the products sold, chooses, dictates, supplies and prices the products, requires exclusivity on the part of the licensee and requires the licensee to hold all monies in trust until it receives them and pays the licensee a commission. It even labels the licensee as its agent, for the purpose of sales transactions. Therefore, in the circumstances, there can be no doubt that in operating the service stations, the licensee and its employees are carrying out the employer's "work" in an overall sense.

[32] The Review Officer next considered the individual Board orders. Early in his reasons, he had noted the concessions made by the Case Officer to the effect that all but one of the orders should be rescinded or cancelled:

The Compliance Department appears to concede that some of the orders under review may not have been properly issued. With regard to the order of May 30, 2006, the Compliance Department maintains that the employer has obligations under section 115 of the *Act* to ensure the health and safety of workers at that individual service station. However, the Compliance Department concedes that the order under review may not have been justified on the merits. The facts cited to justify the order involve the apparent failure of the employer to conduct a site-specific assessment of the risk of violence. It now appears to concede that "the obligation to conduct a risk assessment pursuant to s. 4.28 [of the *Regulation*] is not an obligation of [this employer] but of the direct employer of the service station workers."

Similarly, with regard to the Inspection Report of July 6, 2006, the Compliance Department appears to concede that orders number 2 and 3 may not have been validly issued. It reiterates that the obligations under sections 4.28 and 4.29 of the *Regulation* apply to the direct employer of the subject workers only. It also suggests that the obligation to take corrective action under section 3.10 of the *Regulation* apply to the direct employer only.

[Words in brackets in the above quotation are bracketed in the Review Officer's Decision.]

[33] The Review Officer rejected the concessions, finding that Petro-Canada's role with respect to the two service stations brought it within the contemplation of the phrase "the employer" in ss. 3.10 and 4.29 of the *Regulation*.

Judgment on Judicial Review

[34] Petro-Canada sought judicial review of the Review Officer's decision. The chambers judge commenced his analysis by considering the standard upon which the Review Officer's decision should be reviewed, carefully considering the factors enunciated by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. He noted that s. 113(1) of the *Act* is a strong privative clause that protects decisions of Review Officers from review:

Board jurisdiction under this Part

113(1) ... [T]he Board has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined under this Part, and the action or decision of the Board is final and conclusive and is not open to question or review in any court.

[35] Next, the chambers judge considered the purpose of Part 3 of the *Act*, making reference to *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, and *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, 46 B.C.L.R. (4th) 77. He concluded, at para. 30, that Part 3 of the *Act* involved a balancing of public interests, a factor favouring a posture of deference toward the Board:

Petro-Canada argues that the specific statutory provision at issue, s. 115, does not involve balancing multiple interests; its sole purpose is to promote a safe workplace. In my opinion, that is too narrow a view. Decisions made under Part 3 of the *Act*, and s. 115 in particular, have an impact on numerous parties representing a variety of interests, including workers, supervisors, employers and owners. These considerations are taken into account generally within Part 3 of the *Act*. Accordingly, in my view, the purpose of the enabling legislation favours a standard of reasonableness.

[36] Turning to the nature of the questions in issue, the chambers judge accepted that the issues determined by the Review Officer were questions of law and of mixed law and fact. At para. 32, citing from para. 56 of *Dunsmuir*, he noted that "there is nothing unprincipled about the fact that some questions of law will be decided on the basis of reasonableness."

[37] The final factor considered by the chambers judge with respect to standard of review was the expertise of the Workers' Compensation Board. Referring to *Pasiechnyk*, he concluded that the Board has considerable expertise in the regulation of occupational health and safety.

[38] The chambers judge concluded that the Review Officer's decision should be reviewed on a standard of reasonableness. At para. 36, he referred to para. 47 of *Dunsmuir*, describing the appropriate role of the court when reviewing an administrative decision on a standard of reasonableness:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[39] Like the Review Officer, the chambers judge approached the matter by considering how the word "employer" should be defined for the purpose of s. 115 of the *Act*. However, he found the Review Officer's reasoning to be flawed (at para. 38):

The Review Officer's interpretation of the scope of the definition of "employer" under Part 3 of the *Act*, and as applicable to s. 115, appears to be critical to his finding that the orders in Inspection Report #1 and Inspection Report #2 should not be rescinded. In my view, the Review Officer's interpretation that the definition of "employer" under Part 3 has been defined "loosely and expansively", and that there is a "flexible and expansive concept of employer for the purposes of occupational health and safety" is based on a multitude of obvious errors in his interpretation of the provisions within Part 3 of the *Act*.

[40] In particular, the chambers judge found that the Review Officer erred by overemphasizing the inclusive nature of the definition of employer in s. 1 and by considering the expanded definition in s. 106 to amount to an invitation to further expand the scope of the term. At paras. 49, 50 and 52, he concluded that the Review Officer's interpretation was unreasonable:

49. The Review Officer's interpretation of the scope of "employer" within the meaning of Part 3 is, in my view, evidently not in accordance with reason. His interpretation that an "employer" should essentially encompass anyone with the ability to affect the occupational health and safety of a worker ignores the plain meaning of the definitions set out in s. 106 and the subsequent sections within Part 3, which allocate responsibility for health and safety among a variety of parties. There is simply no

convincing rationale for the notion that the definition of “employer” in Part 3 should be given the scope as set out by the Review Officer. Overall, I find that the Review Officer’s interpretation of the scope of “employer” under Part 3 clearly does not follow the plain and ordinary meaning in the *Act*.

50. Accordingly, it follows that it was unreasonable for the Review Officer to conclude that Petro-Canada is an “employer” with respect to the two service stations for the purposes of s. 115(1)(a)(ii) of the *Act*. The relationship of Petro-Canada to the service station workers does not fall within the definition of “employer” set out in s. 1, nor within any conceivable common meaning of the word “employer”. There was no evidence of any contract between Petro-Canada and any of the workers at the [Surrey] Service Station or between Petro-Canada and any of the workers at the Langley Service Station. In fact, while the Review Officer relies on the Retail Licensee Agreement with respect to the Langley Service Station at p. 8 of his decision to bolster his finding that that operator is merely an agent of Petro-Canada, he simply dismisses the fact that the contract stipulates that the operator undertakes to take all responsibility for its own employees.

...

52. The clear contractual wording that Petro-Canada is not an “employer” of the service station workers should not have been glossed over in the absence of clear evidence to the contrary. When the Review Officer reviewed the contractual terms to analyze the allocation of responsibilities between Petro-Canada and the service station operators, he had an obligation to give full consideration to the very clear terms in the contracts where the allocation of responsibilities were set out. Given these clear contractual terms, using the contract to determine that Petro-Canada is an “employer” of the service stations’ employees for the purposes of Part 3 was unreasonable.

[41] The chambers judge quashed the Review Officer’s decision, and remitted the review back to the W.C.B. Review Division, with instructions to interpret “employer” in accordance with his judgment. In effect, this amounted to a direction to cancel the orders.

The Concentration on the Word “Employer”

[42] On this appeal, Petro-Canada concedes that the appropriate standard of review on the judicial review was reasonableness. For substantially the reasons given by the chambers judge, I agree that the Review Officer’s decisions were properly reviewed on a standard of reasonableness.

[43] It is unfortunate, in my view, that both the Review Officer and the chambers judge fixed as much attention as they did on the definition of the word “employer” in s. 115 of the *Act*. This led the Review Officer to the conclusion that it was open to him to expand the definition in a manner not limited by the language of the statutory definition itself. On the other hand, the chambers judge appears to have decided that the word

“employer” for the purposes of s. 115, should be defined in a strictly contractual manner, so that a party would be an “employer” for the purposes of the section only if it had direct contractual obligations to the workers that the section requires be protected. In my view, both approaches to the definition of “employer” are inconsistent with the clear wording of the statute, and ignore the key elements of s. 115.

[44] The word “employer” is defined in ss. 1 and 106 of the *Act*. It was not open to the Review Officer to take those definitions as mere jumping off points from which he could adopt a more expansive scope for the term. On the other hand, the chambers judge erred in treating the word “employer” as if it had a special definition applicable to s. 115. The chambers judge’s view that the employer must be the employer of workers at the worksite is inconsistent with the wording of s. 115(1)(a)(ii), which specifically fixes an employer with responsibilities for the safety of employees at a worksite who are not its own workers.

[45] As the Board has argued on this appeal, the statute uses the word “employer” in a consistent manner. Petro-Canada, as a company that has numerous workers under contract in British Columbia, obviously meets the definition of “employer” in s. 1 of the *Act*. Nothing in s. 115 compels the adoption of a narrower definition of “employer” than that dictated by ss. 1 and 106.

[46] In saying this, I do not ignore Petro-Canada’s argument that interpreting “employer” broadly for the purposes of s. 115 may result in a level of redundancy in the *Act*, in that a single entity will often have responsibilities both as an “employer” and as an “owner” under Part 3. I do not find this notion troubling. Indeed, s. 123 of the *Act* specifically allows for the fact that an entity may have multiple functions, and therefore responsibilities, under Part 3 of the statute:

Persons may be subject to obligations in relation to more than one role

123(1) In this section, “function” means the function of employer, supplier, supervisor, owner, prime contractor or worker.

(2) If a person has 2 or more functions under this Part in respect of one workplace, the person must meet the obligations of each function.

[47] I am also untroubled by Petro-Canada’s assertion that a broad definition of “employer” will open floodgates, and fix entities that have limited control over a workplace with obligations that they cannot reasonably fulfill. As I read s. 115, the “floodgates” are controlled not by the use of the word “employer” but by the requirement that the employer’s work be carried on at the workplace, and by the appropriate interpretation of what it means to “ensure the health and safety of workers”. While the interpretation of this latter phrase is primarily one for the Board rather than for the Court, it is my tentative view that the degree to which an employer can “ensure” health and safety will, of necessity, be dependent on the degree of control that the employer has over the workplace.

[48] The difficult question for the purposes of s. 115, then, is not whether Petro-Canada is an “employer” – it clearly is. Rather, the Review Officer had to consider whether the service stations operated by franchisees were workplaces at which Petro-Canada’s work was being carried out. He also had to consider what Petro-Canada could reasonably do to “ensure the health and safety of workers” in the context of its control over the service station premises.

Was the Decision Unreasonable?

[49] I do not disagree with the chambers judge’s finding that the Review Officer’s discussion of the scope of the word “employer” contained several errors. I would even go so far as to agree with him that the Review Officer’s discussion of the meaning of the word ignored well-established principles of statutory interpretation to such an extent that it might be characterized as unreasonable. That alone, however, does not mean that the decision must be quashed as unreasonable. Not every error in a tribunal’s chain of reasoning will compel the quashing of its decision. The role of the error in the decision is critical.

[50] The Board argues that the Court should not focus on whether the reasons given by the Review Officer were reasonable, but rather on whether the result that he reached could be supported by a chain of reasoning that is reasonable. Indeed, counsel goes so far as to suggest that the Court can look to other decisions by Review Officers that reach a similar result through different chains of reasoning – in particular, we have been referred to Review Decision #R0082711, another decision concerned with service stations. While that Review Decision does appear to offer a less controversial path to the result reached by the Review Officer in this case, I do not find it helpful in determining whether the decision under review here was unreasonable. I note, too, that Review Officers are not bound by decisions of other Review Officers (see s. 99 of the *Act*).

[51] The proposition that the Court should focus on the result reached by the tribunal rather than on its reasons in assessing reasonableness enjoys some support in the case law. In *Kovach, Re* (1998), 52 B.C.L.R. (3d) 98 (C.A.) at para. 26, Donald J.A. (dissenting) stated:

[The majority judgment] identified serious flaws in the Board’s reasoning but I think that the review test must be applied to the result not to the reasons leading to the result. In other words, if a rational basis can be found for the decision it should not be disturbed simply because of defects in the tribunal’s reasoning.

[52] The Supreme Court of Canada allowed the appeal from this Court’s decision “substantially for the reasons of Donald J.A.”: *Kovach v. British Columbia (Workers’ Compensation Board)*, 2000 SCC 3, [2000] 1 S.C.R. 55.

[53] The Board also relies on a quotation from David Dyzenhaus to the effect that deference requires “respectful attention to the reasons offered or which could be offered in support of a decision”: “The Politics of Deference: Judicial Review and Democracy”,

in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at p. 286. The quotation has been cited by the Supreme Court of Canada with approval in several cases, most recently in *Dunsmuir*, at para. 48.

[54] The idea that the Court should review a decision based on the reasonableness of the result as opposed to the chain of reasoning leading to the result must be applied with considerable caution, in my opinion. A court cannot properly be said to defer to a tribunal when it ignores the tribunal's reasons and fashions its own rationale for the result that the tribunal reached. It should also be kept in mind that both this Court's judgment in *Kovach* and the quotation from Professor Dyzenhaus' article pre-date the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the case which clearly established the duty of tribunals to provide reasons for their decisions. It would make little sense to impose on a tribunal a duty to give reasons if those reasons could be ignored on judicial review. The Supreme Court of Canada has recently adverted to the problems inherent in over-emphasizing deference to reasons which could have been, but were not, given by the tribunal. In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 63, the Court noted:

Although the *Dunsmuir* majority refers with approval to the proposition that an appropriate degree of deference "requires of the courts 'not submission but a respectful attention to the reasons offered or which could be offered in support of a decision'" (para. 48 (emphasis added)), I do not think the reference to reasons which "could be offered" (but were not) should be taken as diluting the importance of giving proper reasons for an administrative decision, as stated in *Baker* at para. 43.

[55] The correct approach to the matter was articulated by the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 56:

[The fact that the reviewing court must look to the reasons given by the tribunal to determine reasonableness] does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

[56] A court assessing an administrative tribunal's decision on a standard of reasonableness owes the tribunal a margin of appreciation. The court should not closely parse the tribunal's chain of analysis and then examine the weakest link in isolation from the reasons as a whole. It should not place undue emphasis on the precise articulation of the decision if the underlying logic is sound. On the other hand, a court does not have *carte blanche* to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result.

[57] On this appeal, the Review Officer's discussion of the definition of the word "employer" was unsound. On the other hand, the error was harmless, because it is obvious that Petro-Canada is, indeed, an employer for the purposes of s. 115. While Petro-Canada argues that the Review Officer's concentration on the appropriate definition of "employer" permeated the balance of his decision, I am unable to agree. The Review Officer proceeded through his reasons methodically, and his misstep with respect to the definition of "employer" cannot fairly be said to have affected the balance of his reasons.

[58] As I have indicated, the real issues for the Review Officer were whether Petro-Canada's work was being carried out at the service station, and whether, in the context of the case, Petro-Canada's degree of control over the workplace permitted a finding that it had failed to ensure the safety of workers.

[59] The Review Officer considered the question of whether Petro-Canada's work was being carried out at the service station carefully, and determined that it was. I cannot say that the Review Officer's reasons for that determination were unreasonable.

[60] Petro-Canada strongly asserts that the phrase "a workplace at which that employer's work is being carried out" requires a closer connection between the employer's operations and the workplace than was present in these cases, and cites a number of dictionary definitions in support of its argument. Such an argument might have been persuasive had the standard of review been one of correctness. I am not convinced, however, that the fact that the section might be interpreted more narrowly than the Review Officer interpreted it shows that his interpretation was unreasonable.

[61] The Review Officer did not specifically connect the phrase "ensure the health and safety" of workers to the concept of the employer's control over the workplace, but his decision did carefully consider the level of control exercised by Petro-Canada. The reasons are, in my view, sufficient to show that the Review Officer considered Petro-Canada's control over the workplace to have been such as to show that it failed to take appropriate steps within its means to ensure worker safety.

[62] In the result, I cannot agree with the chambers judge's finding that the Review Officer's decision was unreasonable. It ought not to have been quashed on that basis.

Procedural Fairness

[63] Because the chambers judge found the Review Officer's decision to be unreasonable, he found it unnecessary to consider Petro-Canada's argument that it had been denied procedural fairness. We do not, therefore, have the benefit of his analysis on the point.

[64] Petro-Canada does not suggest that the Review Officer was required, as a result of the Case Officer's concessions, to cancel or rescind the Prevention Officers' orders. It says, however, that the manner in which the review proceeded left it with an inadequate

opportunity to make full submissions with respect to the second and third orders relating to the Langley service station, and with respect to the order relating to the Surrey service station. It says that in the face of the concessions, and of the obvious understanding of Petro-Canada that it was unnecessary to address the validity of those orders, the Review Officer ought to have sought additional submissions from the parties before determining that the orders were valid.

[65] Procedural fairness requirements in administrative law are not technical, but rather functional in nature. The question is whether, in the circumstances of a given case, the party that contends it was denied procedural fairness was given an adequate opportunity to know the case against it and to respond to it. In some circumstances, a tribunal's decision to address an issue not raised by the parties may constitute a denial of procedural fairness – see, for example, *MacNeil v. Nova Scotia (Workers' Compensation Board)*, 2001 NSCA 3, 189 N.S.R. (2d) 310.

[66] I am not persuaded, in this case, that Petro-Canada was denied a full opportunity to present its case in respect of the order concerning the Surrey service station. While it is true that the Case Officer conceded that the order should be cancelled, she did so only after Petro-Canada had presented complete submissions on the issue to the Review Officer. While Petro-Canada may have been surprised by the Review Officer's decision in light of the Case Officer's concession, it did not suffer any procedural unfairness in the manner in which matters unfolded.

[67] The same cannot be said with respect to the review of the second and third orders concerning the Langley service station. In respect of that review, the Case Officer's concession occurred before Petro-Canada provided its submissions to the Review Officer. Petro-Canada's submissions made it clear that it was refraining from addressing the two orders because it understood that they were no longer at issue. In the circumstances, I am persuaded that it was inappropriate for the Review Officer to decide the issue without correcting Petro-Canada's understandable impression that there was no need for it to make submissions.

[68] I note, as well, that it is not clear that submissions from Petro-Canada would have been futile. The regulatory provisions in issue in orders 2 and 3 used the expression "the employer" rather than the expressions "every employer" and "an employer" which are present in s. 115 of the *Act*.

[69] Counsel for the Board argues that Petro-Canada ought to have raised the issue of procedural fairness prior to the judicial review proceedings, and ought to have sought a reconsideration by the Board under s. 96.5 of the *Act*:

96.5(1) The chief review officer may direct a review officer to reconsider a decision under section 96.4(8) in either of the following circumstances:

- (a) on the chief review officer's own initiative;

(b) on application from a party to a completed review of a decision that may not be appealed to the appeal tribunal, if the chief review officer is satisfied that new evidence has become available or been discovered that

- (i) is substantial and material to the decision, and
- (ii) did not exist at the time of the review or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

(2) Each party to a completed review may apply for reconsideration of a decision under subsection (1)(b) on one occasion only.

(3) Despite subsection (1), a review officer must not reconsider a decision

- (a) more than 23 days after the decision was made, if a direction to reconsider was given under subsection (1)(a), or
- (b) if the decision has been appealed under section 239.

[70] It is not apparent to me that s. 96.5 contemplates a party seeking a reconsideration based on an alleged denial of procedural fairness. It is at least arguable that the only remedy available to an aggrieved party is judicial review. Even if a reconsideration might have been requested, however, I would not accede to the argument that a failure to make the request, in the context of this legislative scheme and this case, should be seen as amounting to a waiver of the breach by Petro-Canada.

Conclusion

[71] I conclude that the chambers judge erred in quashing the Review Officer's decision on the basis that it was unreasonable. I am, however, of the view that Petro-Canada was denied procedural fairness in respect of the review of orders 2 and 3 relating to the Langley service station.

[72] I would, therefore, allow the appeal and reinstate the Review Officer's decision to confirm the order relating to the Surrey Service Station (Review Reference #R0069701). I would also reinstate the Review Officer's decision to confirm the first order relating to the Langley service station (Review Reference #R0071089). I would remit the review of the second and third orders relating to the Langley service station (Review Reference #R0071089) to the Review Division to conduct a review after giving Petro-Canada and the Case Officer an opportunity to make submissions.

“The Honourable Mr. Justice Groberman”

I agree:

“The Honourable Madam Justice Newbury”

I agree:

“The Honourable Mr. Justice Frankel”