NEED TO KNOW

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The lack of conclusive scientific evidence is not necessarily a fatal bar to proving causation in relation to an occupational disease, according to the Supreme Court of Canada

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Last June 24th, the Supreme Court of Canada (the "Supreme Court") rendered judgment in the case of *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*[1] ("*Fraser*"). Briefly, this case involved seven laboratory technicians from the same hospital who had breast cancer. Each of them filed a claim for compensation under the *Workers Compensation Act* (the "Act"), alleging that their cancer was an occupational disease. In British Columbia, one of the applicable criteria for determining whether there is an occupational disease is that the work must have been of "causative significance" in the development of the illness.

Background

The claims for compensation were denied by the Workers Compensation Board (the "Board"). The workers appealed this decision to the British Columbia Workers' Compensation Appeal Tribunal (the "Tribunal"). In a majority ruling, the Tribunal overturned the Board's decision, holding that a decision-maker can infer causation based on "ordinary common sense", even in the absence of scientific proof thereof. Following a reconsideration, a judicial review and an appeal, the Tribunal's decision was set aside and, accordingly, the workers' claims were dismissed. The workers then filed an appeal to the Supreme Court.

Decision of the Supreme Court

The Supreme Court considered two issues: (1) the jurisdiction of the Tribunal to reconsider its own decision, and (2) the evidence necessary to establish whether the work done as a laboratory technician was of "causative significance" in the development of the breast cancer. We will focus on the second issue in this newsletter.

A majority of the Supreme Court held that a finding of causative significance could be made even in the absence of medical evidence positing or refuting the existence of a causal link. The scientific standards are more stringent than the legal standards for the purposes of establishing causative significance. Furthermore, the Tribunal can take into account other evidence in assessing whether a finding of causative significance can be made. In this case, the two scientific reports that were filed could not establish a link between the cancers and the lab technicians' work. The Supreme Court nevertheless held that the Tribunal's decision was reasonable because it was based on other evidence, particularly the higher incidence of breast cancer at the complainants' workplace, and the fact that the determination of causative significance was a matter that was within the Tribunal's expertise.

It should be noted that Justice Côté gave a strong dissenting opinion on the issue of the evidence necessary to establish causative significance, and on the expertise of the Tribunal. For her, the Tribunal's decision was based on mere speculation and failed to properly consider the criterion of causative significance. She also stressed, as the British Columbia Court of Appeal had also noted, that the Tribunal did not have expertise in medical matters.

[1] 2016 SCC 25.

Impact in Quebec?

Could the Administrative Labour Tribunal ("ALT") be tempted to follow the principles laid down in *Fraser*?

Firstly, it should be noted that there are several significant distinctions between the relevant law in Quebec and British Columbia. Indeed, British Columbia tribunals must apply the statutory concept of "causative significance" to determine whether a worker has suffered from an occupational disease, while the same concept is not present in the Quebec statute, i.e. the *Act respecting industrial accidents and occupational diseases*[2] (the "AIAOD"). Where the presumption under section 29 of the AIAOD does not apply, section 30 of the same statute places the burden on the worker to show that his disease is "characteristic of" the work he was doing or "directly related to the risks peculiar to that work".[3]

There is a further distinction. In its decision, the Supreme Court acknowledges section 250(4) of the British Columbian statute, which provides that where the evidence is "evenly weighted" between the worker and the employer, the Tribunal must resolve it "in a manner that favours the worker". There is no equivalent under Quebec law. At best, the introductory section of the AIAOD states that *[t]he object of this Act is to provide compensation for employment injuries and the consequences they entail for beneficiaries.*[4] This does not relieve the party on whom the burden of proof lies from establishing the facts he alleges on the balance of probabilities. Evidence of equal probative value on both sides should therefore lead to an adverse decision against the party who holds the burden of proof. Since section 30 of the AIAOD states that the burden is on the worker, he must adduce evidence with greater probative value than the evidence against him.[5] If he fails to do so, his claim should be dismissed.

Furthermore, both the dissenting judge in the Supreme Court and the British Columbia Court of Appeal cited the fact that the British Columbian Tribunal does not have expertise in medical matters. This principle originally emerged from the decision in *Page* v. *British Columbia (Workers' Compensation Appeal Tribunal)*,[6] which has been referred to on numerous occasions in the British Columbian case law. In that case, the judge held that the Tribunal could not reject the uncontradicted medical expertise of a psychiatrist who had diagnosed a post-traumatic syndrome and substitute its own expertise — since it had no expertise.

On the other hand, in Quebec, the occupational health and safety division of the ALT has medical expertise by virtue of its specialization.[7] The ALT can even take judicial notice of [translation] "basic notions where they are generally recognized by the medical community, are not the subject of scientific controversy, do not require special expertise, and have been articulated many times in proceedings before the tribunal."[8] In addition, section 26 of the *Regulation respecting evidence and procedure of the Administrative Labour Tribunal*[9] provides that the "Tribunal shall take judicial notice of generally recognized facts and of opinions and information within its field of specialization". Furthermore, section 84 of the *Act to establish the Administrative Labour Tribunal* provides that medical assessors can assist at the hearings.[10] In short, the scope of the ALT's expertise is quite different from that of the British Columbian Tribunal.

Additionally, the Supreme Court's decision in *Snell* v. *Farrel*,[11] which has been applied by various Quebec tribunals, including the Commission des lésions professionnelles (now the ALT), noted that the scientific standards for establishing a causal link are more stringent than the legal standards. Tribunals should not apply the stricter scientific standard, but rather, the standard of proof mandated by law. Therefore, a tribunal could infer a causal link between the work done and the occurrence of the disease even in the absence of conclusive positive or scientific evidence of the existence of such a link. In other words, a worker can prove his disease is "characteristic of" his work or "related to the risks peculiar to his work" without adducing expert evidence. Thus, in some cases, using similar reasoning to that in the Fraser case, decision-makers have inferred a causal nexus based only on circumstantial evidence.[12]

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2 R.S.Q., c. A-3.001.

3 *Ibid*, s. 30.

4 *Ibid*, s. 1.

5 *Richard (Succession de)* et *Centre hospitalier Pierre Le Gardeur*, 2011 QCCLP 3347, para. 430 and following.

6 2009 BCSC 493.

7 Luc Côté and Catherine Dubé-Caillé, «La connaissance d'office et la spécialisation de la Commission des lésions professionnelles: de la théorie à la pratique», in S.F.C.B.Q., vol. 360, *Développements récents en droit de la santé et sécurité au travail (2013)*, Cowansville, Éditions Yvon Blais, p. 137; Stéphanie Rainville, «La connaissance d'office de la Commission des lésions professionnelles, une revue de la jurisprudence récente», in Santé et sécurité au travail, vol 17, Cowansville, Éditions Yvon Blais, 2013, p. 225.

8 *Vereault* et *Groupe Compass (Eurest/Chartwell)*, 2006, no. AZ-50391746 (CLP); *Cléroux* et *SIDO ltée*, 2012 QCCLP 3847.

9 R.R.Q., 1981, c. A-3.001, r. 12.

10 R.S.Q., c. T-15.1, s. 84.

11 [1990] 2 SCR 311.

12 *Tevan* et *Centre de réadaptation de l'Ouest de Montréal*, [2000] No. AZ-00304563 (C.L.P.), *Laverdière* et *Maison du Bingo de Lévis*, 2010 QCCLP 7894.

It will be interesting to see what reading the Administrative Labour Tribunal gives to the *Fraser* decision. Administrative decision-makers could well be influenced by the comments of the Supreme Court. However, as noted above, it should be kept in mind that the law at issue in *Fraser* was different in several ways from the law in Quebec. One should therefore be careful before importing the teachings in *Fraser* into Quebec law.

In any event, the *Fraser* decision reminds us of the great deference that is given to the trial judge in assessing the facts, particularly where the decision-maker in question has expertise on the disputed issue. As previously noted, the ALT has such expertise, both regarding the concept of "risks peculiar to the work" and in medical matters. It is therefore essential for counsel to properly prepare the file before trial, and to ensure that full and convincing evidence is presented to the tribunal — a much less difficult task than persuading the higher courts that the initial judgment is patently unreasonable.

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