1924
*Feb. 12, 13.
*Mar. 21.

WORKMEN'S COMPENSATION BOARD (DEFENDANT) ..... APPELLANT;

AND

THE BATHURST COMPANY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Statute—Construction—Workmen's Compensation Act, 8 Geo. V, c. 37, ss. 48, 57 (2) and 61 (N.B.)—Industry under Part I—Failure to furnish statements to Board—Transfer to operation of Part II—Continuance of default—Operation of s. 48.

By section 48 of the Workmen's Compensation Act of New Brunswick every employer shall, on or before the first of January in each year, furnish the Workmen's Compensation Board with a statement giving an estimate of the pay-roll for that year of each of its industries within the scope of Part I and by section 57 (1) the Board may levy upon each employer a provisional amount based upon such estimate and other information obtained and collect the same, the money thus obtained to furnish a fund out of which compensation may be paid to any employee injured by negligence of his employer or in consequence of a defective system. If an industry falls only under the operation of Part II of the Act the compensation must be paid by the employer.

Section 57 also provides (s.s. 2) that if the estimate required by section 48 is not furnished the Board may itself estimate the amount due from the employer and collect same, and section 48 (2) prescribes a penalty for such default. Then section 61 provides that (1) Any industry in respect of which the employer neglects or refuses to furnish any estimate * * * shall, during the continuance of such default, be deemed to be an industry within Part II * * * and except as provided in subsection (3) no compensation shall be payable under Part I during the continuance of such default; (2) Notwithstanding subsection (1) such employer shall be liable to pay to the Board the full amount or capital value of any compensation to which any workman would be entitled under Part I * * * (3) If, and to the extent, that such employer shall pay to the Board such amount or capital value he shall cease to be liable under subsection (1) and such workman shall be entitled to compensation under Part I." Subsection (4) provides for relief where the default is excusable.

Held, that section 61 does not, in case of default, place the employer permanently under the operation of Part II; nor does it give him a right of election as to which Part he will be subject; notwithstanding the terms of this section the Board may proceed to assess the employer as provided in section 57 (2).

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick affirming the judgment at the trial in favour of the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Mignault and Malouin JJ.

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The question for decision on this appeal is whether or not the respondent company is subject to assessment under Part I of the Workmen's Compensation Act or is only within the operation of Part II. The material sections of the Act and the circumstances under which the question arose are set out in the head-note. The court below held, White J. dissenting, that the respondent only came under Part II.

Lafleur K.C. and *W. B. Wallace K.C.* for the appellant.

Teed K.C. and *Geoffrion K.C.*, (*George Gilbert K.C.* with them) for the respondent.

THE CHIEF JUSTICE.—I am of the opinion that this appeal must be allowed and the action dismissed with costs, for the reasons stated by my brother Duff.

IDINGTON J.—This appeal arises out of an action brought against appellant by the respondent, an incorporated company carrying on at Bathurst in New Brunswick the business of logging, lumbering, manufacturing lumber and pulp and other wood products, and other kinds of industries, and in its said work and operations employs large numbers of workmen.

The respondent, therefore, clearly falls within the category of those to whom the scope of Part I of the Workmen's Compensation Act, 1918, and according to section three, and amendments since, apply.

Section thirty of said Act reads as follows:—

30. (1) The Board shall have jurisdiction to inquire into, hear and determine all matters and questions of fact and law necessary to be determined in connection with compensation payments under this Part and the administration thereof, and the collection and management of the funds therefor; provided that no decision or ruling of the Board shall be binding upon it as a precedent for any other decision or ruling, the intent of this proviso being that each case shall be decided upon its own merits.

That is followed by section 31, giving appellant the like powers of the Supreme Court of New Brunswick for compelling the attendance of witnesses and production of books; and by section 32, enabling it to act upon the report of any of its officers, or other person it appoints to make any inquiry.

And by section 33, it was enacted that except as provided in sections 35 and 66, the decisions and findings of the

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Board upon all questions of law and fact should be final and conclusive.

The only restriction thereon would seem to be as provided in said sections 35 and 66, and anything falling thereunder would not seem to me to justify such a suit as this, which turns upon the interpretation and construction of section 61 of the Act, which reads as follows:—

61. (1) Any industry in respect of which the employer neglects or refuses to furnish any estimate or information as required by section 48 shall, during the continuance of such default, be deemed to be an industry within Part II, and such employer shall be liable for damages as provided in Part II, and except as provided in subsection (3) no compensation shall be payable under Part I during the continuance of such default;

(2) Notwithstanding subsection (1) such employer shall be liable to pay to the Board the full amount or capital value of any compensation payments to which any workman would be entitled under Part I, by reason of any accident occurring during the continuance of such default and such amount or capital value may be assessed against and collected from, such employer by like process and means as in the case of other assessments under Part I.

(3) If, and to the extent that, such employer shall pay to the Board such amount or capital value he shall cease to be liable under subsection (1) and such workman shall be entitled to compensation under Part I.

(4) If satisfied that such default was excusable, the Board may relieve such employer in whole or in part from liability under subsection (1) or subsection (2), or both, on such terms as the Board may deem just.

The courts below give such a comprehensive meaning to the words " shall be deemed to be an industry within Part II " as, if correct, to eliminate any defaulter from coming within the substantial feature of the Act as a Workmen's Compensation Act, as such Acts are, in recent years, usually understood.

I cannot understand any draftsman of such an Act as this, or legislature enacting, having such serious intention.

If such had been the intention of the legislature, they surely would have started with declaring that they desired to enable such captains of industries as chose voluntarily to form an association for producing a scheme to compensate workmen employed by any of them for injuries suffered in the course of their respective employments; or in some such like phraseology suitable for such purpose, and elaborated a scheme in harmony therewith.

For the net result of maintaining the judgment appealed from must simply reduce the operation of the Act to serve the wishes of the employers of labour or to absolutely

nothing but what they can produce by a voluntary association.

As each may see fit he or it can according to said judgment simply make default and then, upon having done so is to be only liable, as at common law or as amended by a few enactments in Part II of this Act, and give a right of action to each employee coming within said law and its said several amendments.

That of course would restore all the evils of costly and worrying litigation, which would impose a burden upon suffering workmen that they cannot bear, and enable their masters to give them only such inadequate compensation as to each seemed fit.

I cannot conceive that any Canadian Provincial Legislature in recent years could have had any such purpose in view in enacting a statute such as now presented for serious consideration.

I submit that such evils as this statute was clearly enacted to remedy were those arising from such causes as I have just mentioned.

To nullify such an attempt at reform on the part of the legislature seems, I respectfully submit, the entire object of this litigation.

There are so many enactments therein tending to demonstrate that the purview which the legislature had in view was entirely inconsistent with such an interpretation and construction as the courts below have put upon said section 61, subsection (1) of the Act, that I cannot accept said interpretation and construction as correct.

That due and obvious purview can easily be observed, and a rational interpretation in accord therewith be given said subsection, which obviously to my mind was intended to give possible sufferers from their employer's default (tending to hinder the main operations of the Act) the right of action given by the Part II, and temporarily ameliorate the condition of those suffering from such default pending the action to be taken by the appellant to enforce the observance by such defaulters of their legal obligations under Part I of the Act.

Alternatively as tending to help to induce by the probable result of enforcing such enactments in said Part I

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there appears in harmony therewith subsections (2), (3) and (4).

The enactment in subsection (1), read in light of said subsection, is easily understood and has to be given a very narrow range of operation. Call it penalizing if you will, it certainly is intended to check such obstructive tactics as this action of appellant shews may be expected and exceptional cases of a like kind arising therefrom.

In harmony with such purpose we have in section 48, subsection (2), the enactment imposing penalties for the defaulter.

I am glad to find that Mr. Justice White's judgment, dissenting from the majority in the Appeal Division, has set forth many other enactments which, as well as those I have above referred to, present the purview I find in the legislative mind bearing upon the question in a way to strengthen same.

I agree in the view presented by that great master of our law, Lord Cairns, in the case of *Atkinson* v. *Newcastle Waterworks Co.* (1), where he had to deal with another kind of statute than that now presented but which like it required the consideration of what was the proper way to look at some statutes.

A single sentence thereof from page 448 shews we must grasp, if we can, the purview of the legislature relative to the enactment as a whole:—

> I cannot but think that that must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the Act with which the court have to deal is not an Act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works.

I am of the opinion that this appeal should be allowed with costs and the action dismissed with costs throughout.

DUFF J.—The question raised by this appeal in its substance may be put concisely; it is whether an employer, carrying on an industry assigned by the Board to one of the classes under the Act, and having failed to furnish to the Board the estimate or estimates required by section 48 or any of the other information demanded by the Board

(1) 2 Ex. D. 441.

under that section, is subject, so long as his default continues, to be assessed pursuant to section 57 of the Act; or whether, on the contrary, by force of section 61, the employer and the industry cease to be subject to assessment under Part I. An alternative point, which must not be overlooked, made by Mr. Geoffrion, is to the effect that any "default" under section 48 comes to an end and ceases to be a "default" within the meaning of section 61 when the Board, acting upon its own estimate under subsection (2) of section 57 has levied the amount assessable in virtue of that estimate. I think there is no serious obstacle in point of interpretation in the way of giving effect to the provisions of section 57 and those of section 61 according to what appears to be the natural meaning of both of them. It is quite true that section 61, in declaring that any industry, during the continuance of the "default" of the employer in respect of his duty to furnish any estimate or information as required by section 48, shall be

> deemed to be an industry within Part II, and such employer shall be liable for damages as provided in Part II,

if these words be read literally and without regard to the context, would appear to be inconsistent with the provisions of section 57. When the language of section 61, however, is read as a whole, one sees that section 61 is a section which is primarily concerned with protecting the interests of the workman. Subsection (4) shews, of course, that it is, in part at least, designed to be punitive and deterrent, but the subject to which it is mainly directed is the position of the workman in respect of compensation in a case in which an employer has neglected or refused to provide estimates and information in compliance with section 48 as the necessary basis for determining the amount of his contribution under the normal operation of Part I. In that event section 61 provides very clearly that the workman shall be entitled to recover damages under Part II, and while he is not entitled to be paid compensation by the Board out of the general fund, he is entitled to recover compensation out of a fund to be provided by the employer himself. Subsection (2) requires the employer to pay to the Board the capital value of any compensation payments to which any of his workmen would be entitled under Part I, a sum which can be

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ascertained by the Board by the ordinary methods established for determining compensation; and such compensation shall by subsection 3 be paid by the Board to the workman; and to that extent the employer is "relieved" from liability under the first subsection to pay damages under Part II. It may seem to savour of harshness that an employer, whose responsibilities are governed by section 61, responsibilities which, under that section alone, are assuredly onerous, can, at the same time, be subjected to an assessment on an estimate made by the Board itself under section 57 for a contribution to the general fund. Two points, however, may be observed. One is that the delinquency of the employer consists in failing to furnish information simply, a course of action prompted, it may be assumed, in most cases by a determination to refuse his co-operation with other employers in working the scheme set up by the Act. The legislature may have been advised that rigorous measures were necessary for the purpose, in such circumstances, of disciplining recalcitrants. Moreover, by subsection (4) of section 61, a very wide authority is given to the Board, if satisfied that the default was excusable, to relieve the employer from the burden of the obligations imposed by the provisions of section 61.

The argument most strongly pressed upon us was that a presumption, and a rather weighty presumption, arises against the existence of an intention on part of the legislature to impose a double liability, which the Act, upon this construction, does seem to impose; and the alternative view is suggested that the legislature really intended that employers should have the right to elect between two courses: First, to come under the liabilities and obligations imposed upon employers who participate in the general scheme provided by Part I; or, secondly, to come under the exceptional scheme provided by section 61.

There is, however, nothing in the language of the Act that points to such a construction as giving effect to the deliberate intention of the legislature. The language of section 61, on the contrary, speaking, as it does, of "default" in failing to furnish estimates and information under section 48 and of such "default" being in some cir-

cumstances "excusable," seems to imply that during the whole of the period while the "refusal" or the "neglect" continues, the employer is still under an obligation under section 48 to provide such estimates and information. And subsection (4) of section 61, in providing for relief against the rigours of subsections 1 and 2, seems almost conclusively to indicate an intention on the part of the legislature inconsistent with the view that the section was setting up an alternative system to which the employer might properly, that is to say, as of right, resort at his option. In this view it seems to follow, inevitably almost, that under section 57 (2) the Board is entitled to proceed as it is proceeding in this case. As to the alternative point, I have great difficulty in finding any justification in the words of the Act for limiting the scope of the word "default" in the manner suggested. So long as the duty imposed by section 48 remains unfulfilled, it would appear that the default continues.

The appeal should be allowed and the action dismissed with costs.

MIGNAULT J.—The New Brunswick Workmen's Compensation Act, 1918, the construction of which is in issue between the parties, is divided into two parts.

Part I is a general Workmen's Compensation law applicable to employer and workmen in a large number of specified industries, with a Workmen's Compensation Board empowered to levy an annual assessment upon the industries subject to this part of the Act and with the obligation of employers to furnish to the Board, on or before the 1st of January in each year, a statement of their estimated pay-roll for the year (section 48). The provisions of Part I are in lieu of all claims and rights of action, statutory or otherwise, to which a workman or his dependents are or may be entitled against the employer for, or by reason of, any accident in respect of which compensation is payable under this part (section 12). I may add that a fund for the payment of compensation to workmen is formed by means of the assessments which the Board is empowered to levy on employers subject to Part I.

Part II applies to industries to which Part I does not apply. Briefly it gives an action of damages to the work-

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man for personal injury, and to his legal representatives in case of his death, by reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises of the employer, or by reason of the negligence of the employer, or of any person in his service acting within the scope of his employment. The doctrine of contributory negligence and common employment does not constitute a bar to the right of recovery. Compensation cannot exceed the sum of $3,500, but contributory negligence is taken into account in assessing the damages (sections 82, 83).

The difficulty between the parties has arisen in connection with the construction and effect of section 61 of Part I of the Act. Whatever may have been the intention of the draughtsman, he has succeeded in rendering it extremely obscure, and the legislature would be well advised should it redraft this provision so as to remove it from the class of legislative puzzles. I do not propose to place a construction on it any further than is necessary to determine whether the contention which the respondent bases on this section is well founded.

Section 61 reads as follows:—

61. (1) Any industry in respect of which the employer neglects or refuses to furnish any estimate or information as required by section 48 shall, during the continuance of such default, be deemed to be an industry within Part II, and such employer shall be liable for damages as provided in Part II, and except as provided in subsection (3) no compensation shall be payable under Part I during the continuance of such default;

(2) Notwithstanding subsection (1) such employer shall be liable to pay to the Board the full amount or capital value of any compensation payments to which any workman would be entitled under Part I by reason of any accident occurring during the continuance of such default, and such amount or capital value may be assessed against, and collected from, such employer by like process and means as in the case of other assessments under Part I.

(3) If, and to the extent that, such employer shall pay to the Board such amount or capital value he shall cease to be liable under subsection (1) and such workman shall be entitled to compensation under Part I.

(4) If satisfied that such default was excusable, the Board may relieve such employer in whole or in part from liability under subsection (1) or subsection (2), or both, on such terms as the Board may deem just.

The respondent contends that this section allows any employer subject to Part I to free himself from the obligations imposed upon him by this part, and to place himself

under Part II, by his mere neglect or refusal to furnish any estimate or information as required by section 48. To my mind such a construction would nullify the whole policy of the Act, and cannot in any event be reconciled with subsection (2) of section 57, which empowers the Board, when the employer has refused or neglected to furnish any estimate or information as required by section 48, to make its own estimate of the amount due by the employer and to levy and collect such amount. I think the object of section 61 is to protect the workman notwithstanding the default of the employer. It gives the workman, by subsection (1), a right to claim damages from the employer as provided in Part II; subsection (2), notwithstanding subsection (1), obliges the employer to pay to the Board the full amount or capital value of any compensation payment to which the workman would be entitled under Part I by reason of any accident occurring during the employer's default; and by subsection (3), when the employer has paid to the Board such amount or capital value, he ceases to be liable under subsection (1), and the workman is entitled to compensation under Part I. Finally it is provided by section 4 that if the Board is satisfied that the employer's default was excusable, it may relieve him in whole or in part from liability under subsections (1) or (2), or both, on such terms as it may deem just.

I cannot think that the intention of the legislature was to give to the employer an easy means to escape by his mere inaction from the obligations imposed on him by the other provisions of Part I of the Act. It is sufficient to hold, and I do not intend to go any further, that the contention of the respondent that it can thus relieve itself from its liability for the assessments imposed by the Board, is without foundation.

The respondent has proved that it paid during the year of assessment $2,878 as compensation to its workmen entitled to claim compensation under the Act. I think this sum should be taken into account by the Board in making its assessment, for to that extent the fund was relieved from liability.

I would allow the appeal and dismiss the respondent's action with costs throughout.

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MALOUIN J.—For the reasons stated by Mr. Justice Duff, with which I concur, I would allow this appeal and dismiss the action with costs.

Appeal allowed with costs.

Solicitor for the appellant: *W. B. Wallace.*

Solicitor for the respondent: *George Gilbert.*