COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Plesner v. British Columbia Hydro and Power Authority,*** 2009 BCCA 188

Date: 20090430
Docket: CA034541

Between:

Peter Plesner

Appellant
(Petitioner)

And

British Columbia Hydro and Power Authority,
Workers' Compensation Appeal Tribunal,
Workers' Compensation Board of British Columbia

Respondents
(Respondents)

Before: The Honourable Madam Justice Prowse
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Frankel

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Place and Date of Hearing:	Vancouver, British Columbia October 3 & 4, 2007
Place and Date of Judgment:	Vancouver, British Columbia April 30, 2009

Dissenting Written Reasons by:
The Honourable Madam Justice Ryan

Written Reasons by:
The Honourable Madam Justice Prowse (p. 43, para. 89)

Concurred in by:
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

[1] The appellant, Peter Plesner, pursued a claim to the Workers' Compensation Board (the "Board" or "WCB") for compensation under the *Workers Compensation Act*, R.S.B.C. 1996 c. 492 (the "*Act*"), for a workplace injury. His claim was refused by the Board in September of 2004. The matter made its way through a number of appeals – the last administrative appeal being to the Workers Compensation Appeal Tribunal ("WCAT" or the "tribunal") - and eventually to judicial review before Mr. Justice Wong. Mr. Plesner argued before Mr. Justice Wong that Policy Item #13.30, relied on by WCAT in dismissing his appeal was unreasonable, or patently unreasonable, and should not have been followed. In the alternative, Mr. Plesner submitted that s. 5.1 of the *Act,* on which Policy Item #13.30 is based, discriminated against him contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms* and should be struck down or read down. Mr. Justice Wong found that the reasons of WCAT were "internally inconsistent" and sent the matter back to the tribunal for further clarification. In doing so the Supreme Court Justice declined to rule on the *Charter* questions.

[2] The appellant's appeal to this Court is based on the failure of the learned chambers judge to decide the *Charter* issues. If successful, Mr. Plesner seeks an order that s. 5.1 of the *Act* be set aside or read down, that Policy Item #13.30 is of no force and effect and that the matter be remitted to the tribunal to be determined in accordance with such orders of this Court.

[3] The respondent employer, British Columbia Hydro and Power Authority ("Hydro"), appeared through counsel in the proceedings before the tribunal, WCAT, but did not participate in the judicial review proceedings or in the appeal to this Court. The absence of the employer, who would have been entitled to fully participate in the appeal, has magnified a number of procedural difficulties that became apparent during the hearing of this appeal. I will discuss those problems presently.

Factual Background

[4] Mr. Plesner has been an employee of Hydro since 1991. He began work in February 2002 as an auxiliary steam plant operator at the Burrard Thermal Generating Station in Port Moody.

[5] On January 16, 2003, a truck and trailer being positioned at the site to unload a container accidentally ran over a natural gas pipeline causing it to rupture. At the time of the rupture, Mr. Plesner was on the site but at some distance away at a training session with fellow employees, standing at the back of an emergency response van. Mr. Plesner reported that the group heard a loud hiss but had trouble identifying where it was coming from. Mr. Plesner said that he could not see anything so climbed the stairs of an ammonia plant to get a better look. The evidence was not that clear, but it seems that from the staircase he could see a plume of gas shooting from the broken gas line about 40 or 50 feet from him. The break in the pipe caused a stream of natural gas to rise 30 to 40 feet in the air. Mr. Plesner said he thought the plume was at least 100 feet high. Mr. Plesner

reported that the loudness of the hiss convinced him that the situation was very dangerous. He thought that an explosion was imminent. By this time alarms were sounding to alert the employees of the plant to evacuate. Mr. Plesner made his way, as required by the evacuation alert, to a gravel parking lot, the most westerly point of the property. He said that while moving to that area he feared that the gas would explode, setting off a chain reaction. Once at the muster station Mr. Plesner said he was not allowed to leave the property because one of his superiors told him that there was a chance that some hydrogen containers would explode and that they should just stay put. It took 67 minutes to contain the gas escape.

[6] After the leak was contained the appellant remained at work, voluntarily staying overtime.

[7] Two weeks after the incident Mr. Plesner visited his family physician, Dr. Brumwell. She noted symptoms of stress and referred Mr. Plesner to a psychiatrist. It was not until June of 2003 that Mr. Plesner was able to see the psychiatrist, Dr. Gopinath.

[8] In the meantime Mr. Plesner found that he was unable to continue work after February of 2003.

[9] Mr. Plesner was eventually diagnosed with post traumatic stress disorder ("PTSD") which he says prevents him from returning to work. He says that he should be entitled to, but has been refused, compensation under the *Act*.

The Legislation and Policy Item

[10] The history and scheme of workers' compensation legislation across Canada has been commented upon by many courts. In *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, the Supreme Court of Canada said this at paras. 24 and 25:

> [24] Workers' compensation is a system of compulsory no-fault mutual insurance administered by the state. Its origins go back to 19th century Germany, whence it spread to many other countries, including the United Kingdom and the United States. In Canada, the history of workers' compensation begins with the report of the Honourable Sir William Ralph Meredith, one-time Chief Justice of Ontario, who in 1910 was appointed to study systems of workers' compensation around the world and recommend a scheme for Ontario. He proposed compensating injured workers through an accident fund collected from industry and under the management of the state. His proposal was adopted by Ontario in 1914. The other provinces soon followed suit. Saskatchewan enacted *The Workmen's Compensation Act, 1929*, S.S. 1928-29, c. 73, in 1929.
>
> [25] Sir William Meredith also proposed what has since become known as the "historic trade-off" by which workers lost their cause of action against their employers but gained compensation that depends neither on the fault of the employer nor its ability to pay. Similarly, employers were forced to contribute to a mandatory insurance scheme, but gained freedom from potentially crippling liability. …

[11] As noted above, in return for the loss of the right to sue an employer for damages or injuries arising out of his or her employment (in British Columbia this is found in s. 10(1) of the *Act*), the worker receives the benefit of a no-fault scheme where the right to compensation is not tied to the fault of the employer or its ability to pay. In this sense then, the legislation may be referred to as a benefits scheme.

[12] In British Columbia the Workers' Compensation Board is created by and charged with the administration of the *Workers Compensation Act*. Sections 2-35 of the *Act* set out the Board's responsibility and authority with respect to the adjudication of claims and payment of compensation benefits. The *Act* compensates workers who are disabled by injuries or diseases arising out of employment or dependants of workers who are killed by injuries or diseases arising out of employment.

[13] Sections 36-52 create an assessment structure whereby the Board collects from employers, subject to the *Act*, all funds necessary to pay compensation and fulfill the Board's other obligations. The Board is wholly funded by British Columbia employers under part 1 of the *Act*. Section 36 establishes the accident fund for the payment of compensation, outlays and expenses under Part 1 of the *Act* and for payment of expenses in administering Part 3, the workplace health and safety provisions of the *Act*.

[14] Section 5 of the *Act* establishes no-fault entitlement to compensation by workers injured or killed in the course of employment. Section 5.1 (to which I return in detail) establishes no-fault entitlement to compensation for workers who develop a mental stress condition following a traumatic event at work. Sections 2-35 provide the basis for calculating the level of compensation payable. Where a worker's injury arises out of and in the course of employment, the Board must pay compensation as provided by Part 1 of the *Act*, regardless of whether the worker's employer is registered and regardless of whether the Board can collect assessments from the

employer. Sections 36-52 of the *Act* distribute the cost of that no-fault scheme amongst the various employers of the province.

[15] The *Act* creates a complete scheme for administering the payment of compensation benefits and levying of assessments to maintain the accident fund. Part of that scheme is an appeal structure. Sections 96.2-96.5 establish an internal review system for certain Board decisions. Sections 231-253 establish the WCAT, an independent and external tribunal, to hear appeals of Board decisions.

[16] Section 96(1), a privative clause, provides that all decisions of the Board under Part 1 of the *Act* are final and conclusive and not open to review in any court. Sections 254-255 provide the same protection to decisions of the WCAT made under Part 4 of the *Act*. This Court has described the s. 96(1) privative clause in this way: "96(1) of the *Workers' Compensation Act* establishes a complete and comprehensive privative clause; nothing is left out." (*Van Unen v. British Columbia (Workers' Compensation Board)*, 2001 BCCA 262, 87 B.C.L.R. (3d) 277 at para. 6).

[17] Mr. Plesner's claim is for mental stress which falls under what was then s. 5.1(a) and is now s. 5.1(1)(a) of the *Act*. That section currently provides:

> 5.1(1) Subject to subsection (2), a worker is entitled to compensation for mental stress that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental stress
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> (a) is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment,
>
> (b) is diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's

> Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and
>
> (c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment. [Emphasis added.]

[18] Section 82(1) of the *Act* requires the board of directors of the WCB to set policies respecting, among other things, compensation and assessment. It provides:

> 82(1) The board of directors must
>
> (a) set and revise as necessary the policies of the board of directors, including policies respecting compensation, assessment, rehabilitation and occupational health and safety, and
>
> (b) set and supervise the direction of the Board.

[19] Section 250(2) of the *Act* requires the appeal tribunal, WCAT, to apply the policies of the Board. It provides:

> 250(2) The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case. [Emphasis added.]

[20] Section 251(1) of the *Act* provides that WCAT may refuse to apply a policy of the board of directors only if the policy is patently unreasonable. It states:

> 251(1) The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.
>
> (2) If, in an appeal, the appeal tribunal considers that a policy of the board of directors should not be applied, that issue must be referred to the chair and the appeal proceedings must be suspended until the

chair makes a determination under subsection (4) or the board of directors makes a determination under subsection (6), as the case may be.

(3) As soon as practicable after an issue is referred under subsection (2), the chair must determine whether the policy should be applied.

(4) If the chair determines under subsection (3) that the policy should be applied, the chair must refer the matter back to the appeal tribunal and the tribunal is bound by that determination.

(5) If the chair determines under subsection (3) that the policy should not be applied, the chair must

(a) send a notice of this determination, including the chair's written reasons, to the board of directors, and

(b) suspend any other appeal proceedings that are pending before the appeal tribunal and that the chair considers to be affected by the same policy until the board of directors makes a determination under subsection (6).

(6) Within 90 days after receipt of a notice under subsection (5)(a), the board of directors must review the policy and determine whether the appeal tribunal may refuse to apply it under subsection (1).

(7) On a review under subsection (6), the board of directors must provide the following with an opportunity to make written submissions:

(a) the parties to the appeal referred to in subsection (2);

(b) the parties to any appeals that were pending before the appeal tribunal on the date the chair sent a notice under subsection (5) (a) and that were suspended under subsection (5) (b).

(8) After the board of directors makes a determination under subsection (6), the board of directors must refer the matter back to the appeal tribunal, and the appeal tribunal is bound by that determination.

(9) The chair must not make a general delegation of his or her authority under subsection (3), (4) or (5), but if the chair believes there may be a reasonable apprehension of bias the chair may delegate this authority to a vice chair or to a panel of the appeal tribunal for the purposes of a specific appeal.

[21] The board of directors' policies relating to mental stress are found in the *Rehabilitation Services & Claims Manual, Volume II*. The relevant portions of Policy Item #13.30 provide:

> A worker may be entitled to compensation for mental stress that does not result from a physical injury or occupational disease if the impairment is due to an acute reaction to a sudden and unexpected traumatic event.
>
> "Mental stress" is intended to describe conditions such as post-traumatic stress disorder or other associated disorders. Mental stress does not include "chronic stress", which refers to a psychological impairment or condition caused by mental stressors acting over time. Workers, who develop mental stress over the course of time due to general workplace conditions, including workload, are not entitled to compensation.
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> …
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> Under subsection 5.1(1)(a), the *Act* establishes a two-part test:
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> 1. There must be an acute reaction to a sudden and unexpected traumatic event.
> 2. The acute reaction to the traumatic event must arise out of and in the course of employment.
>
> An "acute" reaction means – "coming to crisis quickly", it is a circumstance of great tension, an extreme degree of stress. It is the opposite of chronic. The reaction is typically immediate and identifiable. The response by the worker is usually one of severe emotional shock, helplessness and/or fear, it may be the result of:
>
> - a direct personal observation of an actual or threatened death or serious injury;
> - a threat to one's physical integrity;
> - witnessing an event that involves death or injury; or
> - witnessing a personal assault or other violent criminal act.
>
> For the purposes of this policy, a "traumatic" event is a severely emotionally disturbing event. It may include the following:
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> - a horrific accident;
> - an armed robbery;
> - a hostage taking;
> - an actual or threatened physical violence;
> - an actual or threatened sexual assault; and,
> - a death threat.

> In most cases, the worker must have suffered or witnessed the traumatic event first hand.
>
> In all cases, the traumatic event must be:
>
> - clearly and objectively identifiable; and
> - sudden and unexpected in the course of the worker's employment.

Mr. Plesner's Claim History and the Findings of the Tribunal

[22] In January of 2003, Mr. Plesner made a claim to the WCB for compensation for symptoms he believed were caused by exposure to a chemical at work. This claim was denied October 29, 2003.

[23] On October 23, 2003, Mr. Plesner filed a claim with the WCB for compensation relating to injuries suffered from 1998 to February 6, 2003. In his application Mr. Plesner stated that there had been many critical incidents at his workplace over a four year period that resulted from operator errors. He said that there were many close calls on his life and that as a result he was suffering from stress and depression. The physician's report accompanying the claim was composed by Mr. Plesner's physician, Dr. Brumwell, who said that her diagnosis was depression and post traumatic stress. Dr. Brumwell also supplied the Board with a letter she had written June 21, 2003, to the Sun Life Assurance Company. In that letter Dr. Brumwell said that Mr. Plesner had presented in the fall of 2002 with preoccupation with the safety of his workplace and environment and multiple somatic symptoms. She said that he experienced his first episode of major depression after the January 16, 2003 accident. In a report dated June 16, 2003, Dr. Gopinath reported that Mr. Plesner had "come under considerable stress at work

in the last 5 years, experiencing some impaired vegetative functions and fleeting paranoid ideas and what appears to be mild psychotic features, seems to have developed features of PTSD since the incident at work in January 2003".

[24] By letter to Mr. Plesner dated January 21, 2004, the WCB denied Mr. Plesner's claim. It will be remembered that entitlement to compensation for mental stress under s. 5.1 of the *Act* requires that the stress be "an acute reaction to a sudden and unexpected traumatic event" arising in the course of the worker's employment. In her letter the WCB case manager advised Mr. Plesner that she found that his stress was chronic as opposed to acute. Relying on Policy Item #13.30 of the *Rehabilitation Services and Claims Manual (Volume II)* (*supra*) which defines and provides examples of situations which may prompt an "acute reaction" and examples of a "traumatic event" for the purpose of mental stress claims, the case manager concluded that Mr. Plesner had not experienced an acute reaction to a sudden and unexpected traumatic situation.

[25] Mr. Plesner appealed the denial of both his claims to the Review Division of the WCB. On September 9, 2004, a review officer upheld the decision to refuse Mr. Plesner's claims. With respect to the second claim, the review officer accepted that Mr. Plesner was suffering from PTSD which was linked to the gas rupture. After examining the circumstances of the gas rupture, however, the review officer reached the conclusion that it could not be said that the gas rupture amounted to a "traumatic event" within the meaning of the *Act* and as described in the policy manual. The review officer gave four reasons for this. First, he said, the rupture took place at a

significant distance from the operating location of the worker and of the muster station. Second, those on the scene, the Port Moody Fire Department and the employer's Response Team, immediately extinguished all potential ignition sources and hosed down the gas leak to further suppress the possibility of explosion. Third, the worker did not deal himself with the rupture; he was asked to evacuate to a muster station, and he walked rather than ran about the workplace after the accident. Fourth, Mr. Plesner did not report that he smelled gas or felt that he was surrounded by gas that was likely to explode – the gas plume was at a significant distance.

[26] The review officer accepted that the accident created a moderately dangerous situation but said that it "never materialized". He said that Mr. Plesner was only peripherally involved in the incident. The review officer concluded that while the entire staff at the plant was put at a life-threatening risk:

> … mere risk from a potential accident is not one of the "traumatic" events listed in policy item #13.30. Rather, where as here, an accident is in issue, the accident must be "horrific". I am simply unable to conclude that the accident that occurred on January 16, 2003, is reasonably described as "horrific".

[27] Mr. Plesner appealed both claims further to the appeal tribunal, WCAT, under Part 4 of the *Act*. In its July 21, 2005 decision WCAT upheld the decisions of the review officer. WCAT accepted the position of the employer that the tribunal could examine both complaints to find, if supported by the evidence, a pattern of chronic disaffection with the workplace. In the end WCAT rejected the characterization of the appellant's illness as "chronic stress". The tribunal accepted that Mr. Plesner

had suffered from stress at work, but that the January 16, 2003 incident "tipped" him "into full syndromal PTSD". The tribunal found that the appellant's PTSD was, in the words of the *Act*, an acute onset that was triggered by one specific, work-related cause.

[28] This left at issue the question whether the events surrounding the gas rupture could be said to be a "traumatic event" within the meaning of the *Act*. In its argument in support of the review officer's findings, the employer referred to the results of six questionnaires filled out by six employees who were at the workplace at the time of the incident. The tribunal summarized that evidence in this way:

> … These [the questionnaires] showed that although they were all in different areas of the workplace, and had different responsibilities, they recognized the potential seriousness of the situation. They all indicated that they believed the situation was reasonably controlled, and that no one was in imminent danger, although one of those interviewed did express concern for the safety of the "first response team" as he did not know how they were dealing with the incident. Also mentioned by some of those responding was that the gas was venting outside and upwards, which lessened the risk, but one person mentioned being aware of gas clouds forming in lower areas. Another interviewee commented that office staff might have had more reason to be concerned because they would not have been aware of exactly what was happening and the ways in which it could be controlled, while those involved in operations would be very familiar with the training and equipment for situations like this.

[29] When analyzing whether the rupture could be said to be a traumatic event, the tribunal said this:

> This leads directly to the same question the review officer addressed – was the January 16, 2003 work place incident a traumatic event in the context of section 5.1 of the Act and item #13.30 of the RSCM II? Although I do not doubt that the worker retrospectively perceived it as extremely traumatic, I conclude that the incident did not fulfil the

> statutory and policy requirements. I would agree with all the reasons outlined by the review officer, and I also note that the insights from the co-workers illustrated the principle that there is an important difference between a potentially serious event and an extremely emotionally disturbing event, as they were in a position to fully appreciate the dangers of the situation. Item #13.30 includes the requirement that the event is "generally accepted as traumatic", and I conclude that this event was not.
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> In summary, for the reasons outlined above both appeals are denied and the Review Division's decisions confirmed.

Judicial Review

[30] Mr. Plesner appealed the WCAT decision to the Supreme Court by way of judicial review. As I noted earlier, the Supreme Court Justice found that the reasons and findings of the appeal tribunal were "internally inconsistent" and remitted the matter back to the tribunal for a rehearing.

[31] The inconsistency was said by the Supreme Court Justice to lie in the fact that the tribunal had concluded that Mr. Plesner suffered from PTSD, but had reached the conclusion that its trigger, the gas explosion, could not be said to be a "traumatic event" in the context of s. 5.1 of the *Act* and Policy Item #13.30 of the RSCM II. The Supreme Court Justice said at para. 5 of his reasons:

> [5] A finding was clearly accepted by [WCAT]: the medical diagnosis of PTSD arising out of that one specific work-related cause. Under those circumstances, it seems to me it was not necessary to go on with the final paragraph, which in turn reached a conclusion and result that was inconsistent with the first finding.

[32] As I understand these reasons, the Supreme Court Justice concluded that if the PTSD was attributable to one event at work, then it would seem to follow that the

event was, by definition, traumatic. As I understand it, all of the parties are agreed that the findings of WCAT are not inconsistent on the basis of the law as it now stands. All agree that the matter should not be returned to WCAT on that basis. The appellant says that he does not intend to reargue the matter on administrative law grounds. He prefers to pursue his *Charter* argument.

[33] Before dealing with the grounds of appeal raised in this Court, it is necessary to turn to the procedural issues raised by this appeal.

The Procedural Conundrum

[34] The respondents, the WCB and WCAT, were parties and appeared in the Supreme Court proceedings pursuant to s. 15 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 ("*JRPA"*). The Attorney General was a party by operation of s. 16 of the *JRPA*, and also by virtue of the fact that he was served by the appellant pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, with notice of the *Charter* challenge to s. 5.1 of the *Workers Compensation Act*.

[35] The same parties appeared in this Court in response to Mr. Plesner's appeal, that is, the decision-makers and the Attorney General. And as I said, the employer did not take part. To complicate matters, WCAT filed a cross-appeal alleging that the decision of the Supreme Court Justice should be set aside on the basis that in ordering a new hearing he had applied the wrong test to the tribunal's findings.

[36] Given the constraints of the case law to which I will refer presently, the decision-making bodies and the Attorney General felt obliged to confine their

submissions to specific issues rather than address the appeal at large. The WCB confined its arguments to the *Charter* challenge to s. 5.1 of its enabling *Act* and Policy Item #13.30 made under the auspices of the *Act*. WCAT spoke to the standard of review applied by the chambers judge, and counsel for the Attorney General addressed the constitutional validity of s 5.1 of the *Workers Compensation Act*.

[37] Thus, without the employer's participation, there was no one present to make full argument on all of the issues raised by the appellant. In the end, the grounds of appeal – the *Charter* issues – were argued before the court much as if this appeal had arrived in the form of a reference. The only procedural complaint made by the appellant was that WCAT had overstepped its boundaries on the cross-appeal in this Court to make submissions on the substance of the issues decided by the tribunal.

a. Status of the Parties

[38] Section 15 of the *Judicial Review Procedure Act* provides:

> 15(1) For an application for judicial review in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power
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> (a) must be served with notice of the application and a copy of the petition, and
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> (b) may be a party to the application, at the person's option.
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> (2) If 2 or more persons, whether styled a board or commission or any other collective title, act together to exercise a statutory power, they are deemed for the purpose of subsection (1) to be one person under the collective title, and service, if required, is effectively made on any one of those persons. {Emphasis added.]

[39] The traditional approach to the right of administrative tribunals to be heard on appeals of their decisions was set out by the Supreme Court of Canada in *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161 ("*Northwestern*"). The principles derived from *Northwestern* and the many cases that have followed it were summarized by this Court in *British Columbia Securities Commission v. Pacific International Securities Inc.*, 2002 BCCA 421, 215 D.L.R. (4th) 58. Speaking for the Court, Mr. Justice Smith said this at paras. 36-44:

> [36] The appellants contend that the [British Columbia Securities Commission] is not entitled to appear on the appeal to defend the merits of its decision. They rely on the judgment of Estey J. in *Northwestern Utilities Limited v. City of Edmonton*, [1979] 1 S.C.R. 684. That case involved an appeal from the Alberta Public Utilities Board, which was, by its constitutive statute, "to be heard ... upon the argument of any appeal".
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> [37] Estey J., relying on another section of the statute that distinguished between the "party appealing" and the "Board", held, at 708, that "in the absence of a clear expression of intention on the part of the Legislature, this right [to be heard] is a limited one. The Board is given *locus standi* as a participant in the nature of an *amicus curiae* but not as a party." He observed, at 708, that the Legislature was right to distinguish between full party-status and the lesser status enjoyed by the Board "in order to avoid placing an unfair burden on an appellant who, in the nature of things, must on another day and in another cause again submit itself to the rate fixing activities of the Board." He continued, at 709:
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> > … The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.
> >
> > It has been the policy of this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction.

[38] In a passage that has particular resonance for this appeal, Estey J. remarked, at 710, that, in a review for failure to adhere to the rules of natural justice, the tribunal itself is under examination and that to allow it "... the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions." He then cited, with approval, the following passage from the reasons of Spence J. in *Canada Labour Relations Board v. Transair Ltd.*, [1977] 1 S.C.R. 722 at 746-7:

> … The issue of whether or not a board has acted in accordance with the principles of natural justice is surely not a matter upon which the Board, whose exercise of its functions is under attack, should debate, in appeal, as a protagonist and that issue should be fought out before the appellate or reviewing Court by the parties and not by the tribunal whose actions are under review.

[39] The vitality of the rule in *Northwestern Utilities* has been sapped only slightly in the intervening years.

[40] In *Bibeault v. McCaffrey*, [1984] 1 S.C.R. 176, the court made an exception where the right to be heard was a statutory right and the question was whether the tribunal had made a patently unreasonable interpretation of the statute in deciding the scope of the right. Similarly, in *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, a specialized tribunal was permitted to argue that the standard of review was reasonableness, not correctness, and that it had made a rational decision within its exclusive jurisdiction without arguing that its decision was correct. La Forest J., writing for the majority, expressed agreement, at 1016, with Taggart J.A. in *BCGEU v. British Columbia (Ind. Relations Council)* (1988), 26 B.C.L.R. (2d) 145 at 153 (C.A.), where he said *per curiam*:

> The traditional basis for holding that a tribunal should not appear to defend the correctness of its decision has been the feeling that it is unseemly and inappropriate for it to put itself in that position. But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them.

[41] *In Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994), 76 F.T.R. 1 (F.C.), Reed J. distinguished *Northwestern Utilities* where to apply it would have left the respondents unrepresented in the judicial review of an award in their favour. Reed J. observed, at para. 51, that the challenge to the decision was purely procedural and "almost totally within the knowledge of the Commission" rather than the respondents. "If the Commission cannot defend the application," she said, "there will be no response made to the applicant's position. I cannot believe that the Supreme Court intended such a result." Similarly, concerns that no one had an adverse interest in the appeal and that no one was willing to absorb the cost of opposing were said to justify permitting a tribunal to be heard on an application for leave to appeal its decision when the tribunal would argue on behalf of the public interest: *Nycan Energy Corporation v. Alberta (Energy and Utilities Board)* (2001), 277 A.R. 391 (Alta. C.A., In Chambers), citing, to the same effect, *Scheckter v. Alberta Planning Board* (1979), 14 A.R. 492 at 497.

[42] The strict rule in *Northwestern Utilities* was not applied in *Re Consolidated-Bathurst Packaging* (1985), 20 D.L.R. (4th) 84 (O.C.J., Div. Ct.), where the applicant objected to the Ontario Labour Relations Board making submissions with regard to its procedure. The Board relied on s. 9(2) of the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224, which provided that the person authorized to exercise the power may be a "party" to applications for judicial review. The court (sitting as a panel of three) held, at 91:

> Once the board is properly a party to the proceedings, it becomes a rule of court, rather than a rule of law, to decide the extent to which it will be entitled to participate in the argument. We were all of the view that since it was a long-standing procedure of the board that was under attack it would be appropriate if their counsel were allowed to make submissions in defence of their practice and, accordingly, we allowed their counsel full latitude in answering the submissions of the applicant.

In dissent, but not on this point, Osler J. distinguished this case from *Northwestern Utilities*, at 101:

> It was argued [in *Northwestern Utilities*] that it was not only undignified for the board to argue in support of its decision, but that in the event that the matter was referred back to the board the parties would lack confidence in the tribunal because of the partisanship displayed before the court. With respect to that submission, however, the board was not here attempting to support a particular decision on the merits, but limited its submission to supporting its procedure so that the particular peril to be guarded against does not appear in the present case.

[43] However, in *Quintette Coal Ltd. v. British Columbia (Assessment Appeal Board)* (1984), 54 B.C.L.R. 359 (S.C.), Finch J. (as he then was) applied *Northwestern Utilities* on a judicial review where he found that an allegation of a breach of the rules of natural justice was not made out. Section 15(1) of the *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209, provided that the statutory decision-maker might, at its option, be a "party" to the application for judicial review. On the point that concerns us, Finch J. said, at paras. 45-47:

> … The question raised by this section is whether the use of the word "party" has the effect of broadening the role of a statutory decision-maker at the hearing of a judicial review application beyond questions of jurisdiction. In my view, it does not.
>
> To change the common law by statute, express and clear language is required: Maxwell, *Interpretation of Statutes* (12th ed.), p. 116. Use of the word "party" in s. 15(1) is not a sufficiently clear expression of an intention to broaden the role of a statutory decision-maker at the hearing of a judicial review application beyond questions of jurisdiction. If the legislature had intended that statutory decision-makers be permitted to make submissions beyond issues of jurisdiction it could have said so expressly in the section. The use of the word "party" in itself is not enough.
>
> The use of the word "party" only indicates an intention that the statutory decision-maker be permitted to appear at the hearing of the application. It does not define the extent of the role of the decision-maker if an appearance is made.

[44] The conclusion that the legislative purpose underlying s. 15(1) was merely to permit the statutory decision-maker to appear before the court on jurisdictional questions finds support in *Bekar v. Bulkley-Nechako (Regional District)* (1987), 19 B.C.L.R. (2d) 256 at 260-61 (S.C.), where Gow, L.J.S.C. reminded us that judicial review is historically founded in the inherent jurisdiction of the Supreme Court to supervise "inferior" bodies. The jurisdiction was originally invoked by the aggrieved party praying the Supreme Court to issue orders commanding the tribunal in question to exercise its powers properly. As Gow, L.J.S.C. observed, the machinery of the prerogative writs – prohibition, *certiorari*, and *mandamus* – was dismantled when the *Judicial Review Procedure Act* was enacted but the principles that governed their issuance remain: *Smithers v. Olsen* (1985), 60 B.C.L.R. 377 (C.A.), per Esson J.A. at 383. Thus, Gow, L.J.S.C. reasoned, at 261:

> Section 15(1) [of the *Judicial Review Procedure Act*] does not introduce any novel requirement or any novel restriction but affirms the common law, namely, that when the issue is jurisdictional the inferior body has the right to appear but, if it does, is subject to the confinement of its submissions to this issue: *Quintette Coal Ltd. v. Assess. App. Bd*. (1984), 54 B.C.L.R. 359 (S.C.), per Finch J. at p. 373. Doubtless s. 15(1) was inserted by the draftsman for the sake of greater caution, lest it be thought that the right of the inferior body to appear had also been dismantled.

[40] This outline of the law raises two concerns. First, given the secondary status granted to the decision-maker by the *JRPA*, is it open to WCAT to file an appeal from the order made on judicial review or is WCAT's role relegated to making submissions as to its jurisdiction only when one of the "true" parties has appealed? Second, should the decision-makers be given a wider scope in which to make their submissions when, such as here, no adversary appears to fully contest the appellant's appeal?

[41] As will be seen from the reasons that follow, because of the view I take of the appellant's grounds of appeal, it is unnecessary to resolve these issues on this appeal.

Grounds of Appeal

[42] The appellant frames his grounds in this way:

> The chambers judge erred:
>
> a. In finding there was an "internal inconsistency" in the tribunal decision instead of finding discrimination in the treatment of Mr. Plesner, a mental injury claimant;

b. In failing to find that the Policy is unconstitutional because it sets out an interpretation of s. 5.1 of the *Workers Compensation Act* that is contrary to s. 15(1) of the *Charter* and cannot be saved by s. 1 of the *Charter*; and,

c. In failing to find that the constitutional violation is inherent in s. 5.1 of the *Workers Compensation Act*, which the Policy interprets, such that s. 5.1 of the *Act* should be read down or declared of no force or effect.

[43] In essence the appellant says that the Supreme Court Justice erred in failing to resolve the issue giving rise to judicial review, that is, the contention that s. 5.1 and Policy Item #13.30 violate s. 15(1) of the *Charter* and cannot be saved by s. 1. The appellant says that accordingly the Supreme Court Justice ought to have found a *Charter* breach, set aside the conclusion of WCAT that the appellant's claim failed, and returned the matter to it for an assessment of the compensation he was owed.

[44] Mr. Plesner's grounds of appeal have narrowed since his application for judicial review. As I understand his position on the judicial review, Mr. Plesner did not argue that WCAT's application of Policy Item #13.30 was patently unreasonable. Rather, he argued that the Policy Item itself was patently unreasonable and should not have been applied by WCAT. Alternatively, his position before the chambers judge was that if the Policy Item was not unreasonable, then both the Policy Item

and s. 5.1 of the *Workers' Compensation Act* should be struck down as violating s. 15(1) of the *Charter*.

[45] Having received no ruling on any of these issues, he appeals to this Court to do what he says the chambers judge should have done. However, he no longer argues that Policy Item #13.30 or its application by WCAT is patently unreasonable. Instead, Mr. Plesner accepts the reasoning in a case decided by Mr. Justice Butler shortly after he launched his appeal, *Hill v. WCB*, 2007 BCSC 1187, 66 Admin L.R. (4th) 265, that Policy Item #13.30 is a plausible interpretation of s. 5.1. As a result, Mr. Plesner's counsel says that the appellant is pursuing the only sensible ground of appeal open to him – that s. 5.1 of *Act* and consequently Policy Item #13.30 offend the equality provisions of the *Charter* and should be struck down or read down to accommodate his claim.

[46] It is this new position that gives rise to a complaint by counsel for the Attorney General that the appellant was required to first exhaust his administrative law grounds before moving to his *Charter* challenge. Without commenting on the strength of the administrative law grounds, as it is not an issue which engages the Attorney General, counsel for the Attorney General submitted that it was open to the Court to consider whether WCAT's application of Policy Item #13.30 was patently unreasonable or that the Policy Item itself was patently unreasonable. Counsel for the Attorney General noted that if this Court found in Mr. Plesner's favour, then he would be entitled to the compensation he is seeking. If Mr. Plesner's appeal could be disposed of on that basis, then it would be wrong for the Court to avoid those

issues and move instead directly to the *Charter* challenge. To do so, urged counsel, would be to engage in a possibly unnecessary academic discussion of the constitutional soundness of the legislation.

[47] I agree with counsel for the Attorney General that this Court should not decide constitutional issues when it is unnecessary to do so. In this case, however, the appellant accepts that WCAT's interpretation of the legislation and policy can be supported on administrative law principles. That interpretation, argues the appellant, violates his equality rights under the *Charter*. I agree with the appellant that he ought to be permitted to frame his grounds of appeal in the manner he chooses. Thus, the task of this Court is to determine whether the legislation as interpreted by the administrative bodies violates the *Charter*. If the legislation and Policy Item as interpreted by WCAT violates the *Charter*, then that would not be the end of the matter. It would then be open to this Court to place on the legislation (if it bears it) an interpretation that does not violate the *Charter*, thus preserving the legislation.

Does Section 5.1 Offend Section 15(1) of the *Charter*?

[48] In *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950, Iacobucci J. set out the framework for a s. 15(1) *Charter* challenge. He said this at para. 62:

> [62] … there are three basic stages to establishing a breach of s. 15. Briefly, the Court must find (i) differential treatment, (ii) on the basis of an enumerated or analogous ground, (iii) which conflicts with the purpose of s. 15(1) and, thus, amounts to substantive discrimination. Each of these inquiries proceeds on the basis of a comparison with another relevant group or groups, and locating the relevant comparison groups requires an examination of the subject-matter of the law,

> program or activity and its effects, as well as a full appreciation of the context. [Emphasis added.]

[49] *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357, was a case involving the denial of a benefit under the Canada Pension Plan. Binnie J., in noting that the starting place for the *Charter* analysis was an analysis of the legislation that denied the benefit, said this at para. 26:

> [26] … in a government benefits case, the initial focus is on what the legislature is attempting to accomplish. It is not open to the court to rewrite the terms of the legislative program except to the extent the benefit is being made available or the burden is being imposed on a discriminatory basis. [Emphasis added.]

a. The Legislative History of Section 5.1

[50] The appellant's view of the legislative context of his challenge is uncomplicated. He begins and ends with the "historical compromise" as set out in paras. 10 and 11 of these reasons. The appellant observes that the trade-off for the workers' compensation scheme is the removal of any right of action by workers against employers or other workers for any personal injury, disablement or death arising out of and in the course of employment. From this it follows, and is well-accepted, he says, that a fundamental principle of the *Act* is to establish a comprehensive system of no-fault compensation for all truly work-caused diseases, injuries and disablements. This is the legislative context in which the determination under s. 15(1) of the *Charter* must be made.

[51] The respondents' view of the legislative context recognizes the goal of the of compensation for all work injuries, but focuses on the difficulty of determining "work-relatedness" which they say explains the genesis of s. 5.1 of the *Act.* I agree with the respondents that this concern (and the concomitant cost) provided the impetus for the enactment of s. 5.1. I turn to it now.

[52] Section 5.1 of the *Workers Compensation Act* was enacted on June 30, 2002 (B.C. Reg. 152/2002). When the bill was introduced for second reading the Minister explained what the government was attempting to achieve by its provisions. He said:

> … This bill is designed to make British Columbia's workers compensation system sustainable, so it can protect workers and employers in the future. The goals of this bill are to restore the system to financial sustainability by bringing costs under control, to make the system more responsive and to maintain benefits for injured workers, which are among the highest and best in Canada, while ensuring fairness for workers and employers. This bill will make it possible for the Workers Compensation Board to maintain employer rates at levels comparable to other provinces, to clarify coverage of conditions related to mental stress and to improve management of the system by providing a new permanent structure for directing WCB.
>
> This bill furthers the government's new-era commitment to make the Workers Compensation Board more responsive to the needs of workers and employers alike. It also follows through on our January 2002 strategic plan, which calls for a more accountable, responsive and cost-effective workers compensation system.
>
> …
>
> The changes introduced through this legislation will make the system sustainable by bringing costs under control, allowing for employer premiums that are comparable with other western provinces and making it possible for the system to avoid falling into a huge deficit in the accident fund, which has been predicted if no action is to be taken. In making these changes, we've been careful to maintain our province's WCB benefits as among the most generous rates in Canada.

> This bill is a balanced and responsible response to disturbing trends within the workers compensation system in British Columbia. Our WCB board, which is funded by premiums charged to employers, is headed towards huge deficits in the accident fund. This is what's used to pay benefits to injured workers. Although the system had a surplus in the year 2000, and that was mainly due to unusually large gains in the funds investment portfolio, it ran a deficit in 2001 of nearly $287 million.
>
> The current forecast calls for an accumulated deficit of more than $900 million by the year 2005. This is due primarily to the system's rapidly increasing costs. If we do not act now, the future of our workers compensation system could be at risk, and benefits for injured workers could be threatened. In recent years Ontario, Saskatchewan, Alberta and Manitoba have been forced by economic realities to renew their systems, but previous B.C. governments did not act.
>
> …
>
> This bill also addresses the difficult issue of mental stress claims. The bill clarifies WCB coverage for mental stress by clearly establishing that compensation will be provided in cases of mental stress due to a sudden and unexpected traumatic event such as the post-traumatic stress that a bank teller may experience after a bank robbery. Coverage will also be provided in cases of mental stress that result from a compensable injury such as the loss of a leg.
>
> Coverage will not be provided in other situations such as chronic stress conditions resulting from the sort of ongoing stress that everyone experiences in their everyday personal and workday lives. This clarification provides greater certainty for workers and brings British Columbia's coverage into line with most other provinces.

[53] The legislative changes were based in part on recommendations in a number of reports including the report of Alan Winter who was commissioned to review the services of the Workers' Compensation Board. In Chapter 9, p. 175 of his report, entitled *Core Services Review of the Workers' Compensation Board*, Commissioner Winter, as mandated by his terms of reference, considered how the condition of "chronic stress" should be dealt with under the legislation. In his report the Commissioner defined the term "chronic stress" as "claims for psychological impairment caused by mental stimuli acting over time (i.e., where no traumatic

workplace incident has occurred).” He noted that his remarks about chronic stress were not intended to apply to psychological impairment caused by traumatic events. He said this:

> Finally, there is one point I wish to emphasize at the outset of my discussion on this topic. In particular, the comments and recommendations I will be raising concerning chronic stress are not intended to apply to psychological impairments which are caused by a traumatic event, such as post-traumatic stress disorder. Such claims are currently accepted by the WCB as being compensable under the *Act*, and in my opinion the WCB should continue to adjudicate these claims pursuant to its existing policies.

[54] Nonetheless counsel for the Attorney General referred extensively to this report in her submissions. Counsel for the appellant argued that the report was unhelpful in that in this section it was dealing with chronic stress as opposed to psychological impairments resulting from workplace trauma. I agree with counsel for the appellant, but recognize, as I understood counsel for the Attorney General to do, that there can be a merging of the two conditions and that the discussion in Mr. Winter’s report is useful to identify the problems in determining when a psychological impairment of any kind can be said to relate to the workplace. For that reason alone I will refer to some of what Mr. Winter has said about chronic stress.

[55] In his report Commissioner Winter observed that several Canadian jurisdictions had amended their workers’ compensation legislation to exclude stress claims, except when they arise as an acute reaction to a traumatic event. For example, the Ontario *Workplace Safety and Insurance Act*, *1997*, S.O. 1997, c. 16 provides in ss. 13(4) and (5):

> 13.(4) Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.
>
> (5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions relating to the workers' employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

[56] Similar exclusionary provisions can be found in workers' compensation legislation in Manitoba, Newfoundland, Nova Scotia and Prince Edward Island. It was Commissioner Winter's view that this was an indication of the political acceptance of the principle that compensation benefits should only be payable when the disabling condition can be directly related to the worker's employment.

[57] In his report Commissioner Winter identified five reasons why chronic stress claims should be excluded from coverage under the *Act* which can be summarized as:

1. Chronic stress arises from a myriad of interacting factors some of which may be related to employment but many of which may arise from the worker's private life. Since stress is omnipresent in everyone's life, it is difficult to understand why workers should be compensated for it under the workers' compensation scheme.
2. Many *bona fide* employment-related decisions are likely to cause a significant stress reaction in particular workers.
3. Chronic stress claims are very subjective to each particular worker. The highly subjective nature of stress claims is different from physical claims and may lead to issues of exaggeration.
4. Including such claims will make the system much more litigious.
5. The concern that acceptance of chronic stress will produce a significant increase in chronic stress claims. This, in turn, may create substantial cost implications to the system.

[58] The Commissioner then turned to competing reasons for the inclusion of chronic stress claims. Again, as summarized, they are:

> 1. A fundamental purpose of the system is to compensate all "truly work-caused" claims, so where chronic stress can be proven to be "truly work-caused" it should be compensated.
> 2. Several Canadian jurisdictions have excluded stress claims except for claims arising from an acute reaction to a traumatic event but concerns have been raised in those jurisdictions about how that is accomplished.
> 3. A possible concern that if such claims are not allowed they may become actionable in certain circumstances.
> 4. A concern that such an exclusion would offend the *Charter*.

[59] Ultimately the Commissioner concluded that the legislation must set out the express conditions that need to be met in order for a worker to be entitled to receive compensation benefits for "chronic stress". These conditions were: (i) the need for an objective standard; (ii) the need to exclude employment related stressors, and (iii) the need to account for the pervasive nature of stress.

[60] I will return to the difficulties in determining "work-relatedness" as it pertains to the legislation at issue on this appeal later in these reasons.

b. The Appellant's Argument

[61] The appellant begins with a comparison of s. 5 and s. 5.1 of the *Act.* Section 5 provides for compensation for physical injury suffered arising out of and in the course of employment. It reads:

> s. 5(1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is

> caused to a worker, compensation as provided by this Part must be paid by the Board out of the accident fund.
>
> (2) Where an injury disables a worker from earning full wages at the work at which the worker was employed, compensation is payable under this Part from the first working day following the day of the injury; but a health care benefit only is payable under this Part in respect of the day of the injury.
>
> (3) Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or serious or permanent disablement.
>
> (4) In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out of the employment.
>
> (5) Where the personal injury or disease is superimposed on an already existing disability, compensation must be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The measure of the disability attributable to the personal injury or disease must, unless it is otherwise shown, be the amount of the difference between the worker's disability before and disability after the occurrence of the personal injury or disease.

[62] Section 5.1 (to repeat) deals with compensation for mental stress arising out of and in the course of the worker’s employment. It reads:

> 5.1(1) Subject to subsection (2), a worker is entitled to compensation for mental stress that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental stress
>
> (a) is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment,
>
> (b) is diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and

> (c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.
>
> (2) The Board may require that a physician or psychologist appointed by the Board review a diagnosis made for the purposes of subsection (1) (b) and may consider that review in determining whether a worker is entitled to compensation for mental stress.
>
> (3) Section 56 (1) applies to a physician or psychologist who makes a diagnosis referred to in this section.
>
> (4) In this section, "psychologist" means a person who is registered as a member of the College of Psychologists of British Columbia established under section 15 (1) of the *Health Professions Act* or a person who is entitled to practise as a psychologist under the laws of another province.

[63] Section 15 of the *Charter* provides:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[64] The appellant submits that s. 5 of the *Act* deals with physical injuries suffered in the workplace while s. 5.1 deals with mental injuries suffered in the workplace. The appellant notes that s. 5.1 of the *Act* expressly imposes qualifications on the payment of compensation for mental stress that do not apply to payment for compensation for physical injuries under s. 5 of the *Act*. A personal injury must be compensated when it is found to be one arising out of and in the course of employment, but a purely mental injury cannot be compensated unless it is an acute reaction to a sudden and unexpected traumatic event. Thus, the appellant says, both the physically injured worker and the mentally injured worker suffer work-

related injuries but they are treated differently. By limiting compensation to those who have suffered by way of an acute reaction to a sudden and unexpected traumatic event, Mr. Plesner argues that the legislation in question discriminates against him on the basis of a personal characteristic, mental disability. Mr. Plesner says that he has suffered an injury that was found to have a specific work-related cause and because he does not meet the requirements of s. 5.1 he is denied access to benefits that he would be entitled to receive if he had suffered any other form of work-related harm.

[65] To put it another way, the *Act* is meant to, but does not, compensate all injuries that are work-related. It compensates physical injuries in one way and those that are psychological in another way. In its application the discriminatory treatment works to exclude from compensation workers whose mental injuries are as work-related as those with physical injuries who are not excluded.

[66] Counsel for the appellant utilized the framework for analysis set out at para. 39 in the decision of *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 ("*Law*"). Writing for the Court, Mr. Justice Iacobucci said this:

> [39] … [A] court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the

> claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And, third, does the differential treatment discriminate in a substantive sense bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

[67] A similar iteration of this framework was set out a year later in *Lovelace* to which I made reference in para. 50 of these reasons.

[68] In *R. v. Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41, the Supreme Court of Canada cautioned courts about an overly technical application of the *Law* criteria (paras. 19-24). However, as this Court noted in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 at para.108, the factors do serve as indicators of discriminatory treatment, and can be useful in determining whether differential treatment is discriminatory.

1. Drawing a Formal Distinction

[69] All parties are agreed that the legislation draws a formal distinction between the claimant and others on the basis of one or more personal characteristics. I need not repeat that distinction.

2. Differential Treatment on an Enumerated Ground/Comparator Group

[70] All parties accept as well that the equality guarantee in the *Charter* has been described as a “comparative concept” and that it follows from this that it is important to locate the appropriate comparator group. In identifying the proper comparator

group it is necessary to consider a variety of factors including the subject-matter and context of the legislation (*Law* at para. 57). I have already stated the appellant's position on legislative context in para. 50 of these reasons.

[71] All parties accept that the comparator group should align with the circumstances of the appellant relative to the statutory benefit sought, except for the enumerated ground.

[72] The appellant, as must already be clear, compares himself to workers who suffer a physical disability in the workplace. Once that worker establishes a *bona fide* causal connection between the injury and the workplace, the worker is entitled to compensation. By contrast, even after a causal connection is found between a mental stress injury and a specific work-related event, further exclusionary tests are applied and compensation may still be denied.

3. Discrimination in a Purposive Sense

[73] Counsel for the appellant submits that it is widely recognized that the mentally ill have suffered particular historical disadvantage and are vulnerable to negative stereotyping. She submits that, by treating physically injured workers in a different manner than those who suffer purely mental injury, the concept that a mental illness is shameful and less deserving of recognition than other injuries is perpetuated by the legislation.

[74] This is especially so, argues counsel, when the legislation requires a work event be sufficiently emotionally disturbing on an objective basis. Counsel submits

that the application of the "traumatic event" exclusionary test for mental stress injury claims draws upon negative stereotyping of the mentally ill which sees such illness as resulting from an inherent mental defect and places personal blame on the mentally disabled for their own illness. The mentally disabled worker is thus made to feel less worthy and less deserving of recognition than a person who is physically injured at work.

[75] The appellant says that for those who suffer a psychological illness as a result of a specific workplace incident but are nevertheless denied compensation, that denial touches a "basic aspect of full membership in Canadian society". Counsel submits that the denial is not based on the unique circumstances or needs of the worker who has suffered a mental disability, but on a conclusion that the injury was not worthy of recognition based on a subsequent objective appraisal of the event that caused the injury.

a. The Attorney General's Position

[76] In describing s. 5 of the *Act* as dealing with physical injuries and s. 5.1 as dealing with mental disabilities, counsel for the Attorney General submits that the appellant overstates the effect of s. 5.1. Counsel for the Attorney General begins with the observation that, unlike the situation in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504, where chronic pain was entirely excluded from the application of the general compensation provisions of the Nova Scotia *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 s. 10B, and found to

violate s. 15(1) of the *Charter*, the *Act* under examination on this appeal does not exclude an entire group. It compensates those who suffer mental stress injuries that accompany physical injuries, and it compensates pure mental stress injuries that meet the *Act's* criteria. It follows that ss. 5 and 5.1 do not subject those suffering from work related mental disability to differential treatment. There is clearly a class of people suffering from psychological injuries caused by employment that will and do receive benefits under the legislation.

[77] Thus, counsel for the Attorney General submitted, the appellant's argument fails in its assertion that the distinction between the appellant's comparator groups is based on mental illness. The Attorney General says that the distinction between the groups is based on the manner in which the injury was occasioned.

[78] The Attorney General submits that the *Act* draws a line, not between physical and psychological injuries, but between mental stress caused by a sudden and unexpected traumatic event and mental stress caused by something else. What is significant about this is that it does not matter what type of acute mental stress a person has suffered. If the event triggering it is not traumatic, then there will be no compensation. If it is then the worker is compensated. Psychological impairment does not determine the result.

[79] The Attorney General says that unlike cases based on differential benefit levels which may or may not be discriminatory, the challenged legislation in this case relates to entitlement. It directly reflects a considered government or legislative policy.

[80] Although Commissioner Winter recommended that chronic stress be made compensable under the *Act*, the government of the day chose not to compensate chronic stress and to only compensate conditions that were caused by a traumatic event at work. However, traumatic events can be highly subjective. I accept the Attorney General's submission that in order to ensure that a psychological illness which emerges in a worker is truly work-related and not the result of an accumulation of non work-related events, the legislation sets out an objective test as to what constitutes trauma for the purposes of s. 5.1.

[81] Mr. Plesner argues, however, that the objective test has worked unfairly in his case. In spite of the fact that psychiatric specialists found that his injury was in fact related to one event experienced at work, he was not compensated because he could not meet the narrow test set out in the legislation. The tribunal was obliged to ignore the findings of the experts on the question of causation and apply the narrow test set out in the *Act* – was his illness "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment". Here, WCAT found that the event that caused Mr. Plesner's disability was not objectively traumatic, and therefore it could not be said, within the meaning of s. 5.1, that his illness was work-related. It is this incongruity, Mr. Plesner says, that exposes the problem with the legislation.

[82] In answer to this the Attorney General accepts that medical professionals commented on the stress suffered by Mr. Plesner and its relation to the work event. Counsel argued, however, that this did not equal a finding that the injury was work-

related. There is a material difference between a medical diagnosis of the cause of an injury and the cause of the injury from the perspective of the legislation. Were it otherwise, counsel submits, the legislation would be effectively be delegating to medical professionals the administration of the *Act* and determination of when a worker is eligible for benefits.

[83] Thus, counsel urges, it cannot be unconstitutional to legislate the use of a non-medical assessment measure (whether the triggering event was traumatic or not) before benefits will be given for a type of injury, the causation of which is notoriously difficult to assess. The use of a legislative standard is meant to objectify the process of asking the question crucial to all workers – was the injury work-related? The Attorney General says that this is a "line-drawing" exercise and not a distinction based on presumed or stereotypical personal or group characteristics.

[84] The respondents submit that line-drawing is inevitable in a government benefits scheme and that the legislature is the proper constitutional actor to make the policy considerations provided the line-drawing does not violate s. 15(1) of the *Charter* and cannot be saved by s. 1. (*Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703 at paras. 14-15.)

[85] I agree with the respondents. In my view the distinction drawn between physically injured workers and psychologically injured workers is not on the basis of an enumerated ground, but on the basis of the manner in which the injury was acquired.

[86] I would dismiss the appellant's ground of appeal challenging s. 5.1 on the basis that it violates s. 15(1) of the *Charter*.

Does Policy Item #13.30 Violate Section 15 of the *Charter*?

[87] I would dismiss the challenge to the policy item for the same reasons. In doing so I make no comment on whether the policy item as an interpretation of s. 5.1 of the *Act* is patently unreasonable, that point having been abandoned by the appellant.

Conclusion

[88] I would dismiss the appeal.

"The Honourable Madam Justice Ryan"

Reasons for Judgment of the Honourable Madam Justice Prowse:

INTRODUCTION

[89] Mr. Plesner suffered post traumatic stress disorder ("PTSD") as a result of the rupture of a natural gas pipeline at his workplace on January 16, 2003. There is no question that this injury arose out of and in the course of his employment. If he had suffered a broken leg while running from the site of the rupture, he would have been compensated for his broken leg. If he had suffered a broken leg while running from the site of the rupture and had then suffered debilitating depression because of a slow recovery from that injury, he would have been compensated for both injuries (because the mental injury was tied to the physical injury). But Mr. Plesner's claim for compensation for PTSD was denied, despite WCAT's finding that his injury was work-related. His "mental stress" injury was found to be non-compensable on the basis that it did not fit within what is now s. 5.1(1)(a) of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 (the "*Act*"), when read together with Policy Item #13.30 ("Policy 13.30"). In particular, WCAT found that his injury was not an acute reaction to a sudden and unexpected "traumatic event".

[90] In brief reasons for judgment, the chambers judge concluded that there was a fundamental inconsistency between WCAT's finding that Mr. Plesner's PTSD was work-related and its denial of compensation. In coming to that conclusion, the chambers judge undoubtedly had in mind the fact that a fundamental underlying purpose of the *Act* is to compensate workers for work-related injuries.

[91] All of the parties to this appeal agree, however, that the chambers judge erred in finding an inconsistency between the finding that Mr. Plesner's PTSD was work-related and the denial of compensation. In fact, Mr. Plesner agrees that WCAT's interpretation of s. 5.1(1)(a) of the *Act*, when read together with Policy 13.30, was reasonable and that those provisions, either read separately, or together, preclude Mr. Plesner from receiving compensation for his work-related mental stress injury. His position is that these provisions, insofar as they require a purely mental work-related injury to arise from a "traumatic event", as described in Policy 13.30, are contrary to s. 15(1) of the *Charter* and cannot be saved under s. 1.

[92] It should be noted that s. 15(1) of the *Charter* was not raised before WCAT. This is because, by reason of the combined effect of s. 245.1 of the *Act* and s. 44(1) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, WCAT "does not have jurisdiction over constitutional questions".

ISSUES ON APPEAL

[93] The only live issues before us on this appeal are whether the requirement of a "traumatic event" in s. 5.1(1)(a) of the *Act*, either alone, or when read together with Policy 13.30, breaches s. 15(1) of the *Charter* and, if so, whether that breach can be justified under s. 1 of the *Charter*.

[94] Mr. Plesner is not pursuing the administrative law arguments he raised before the chambers judge. Nor is WCAT pursuing its cross-appeal with respect to the relevant standard of review. I agree with Madam Justice Ryan that, although it

would have been preferable for the administrative law and *Charter* issues to have been dealt with together, this Court is not required to decide administrative law issues which have been abandoned by Mr. Plesner as a prerequisite to deciding the *Charter* issues which Mr. Plesner continues to pursue. Because the chambers judge did not find it necessary to decide the *Charter* issues, we are left to do so for the first time on appeal.

[95] All counsel agree that both s. 5.1(1)(a) of the *Act* and Policy 13.30 constitute "law" within the meaning of s. 15(1) and s. 1 of the *Charter*.

CONCLUSION

[96] I am satisfied that the requirement of a "traumatic event" in s. 5.1(1)(a) of the *Act*, when read together with Policy 13.30, breaches s. 15(1) of the *Charter* by discriminating against Mr. Plesner, and other workers like him who suffer from purely mental work-related injuries, on the basis of mental disability. Workers with purely mental injuries are forced to meet a significantly higher threshold for compensation which is not required of those who suffer work-related injuries that are purely physical, or who suffer mental injuries which are linked to physical work-related injuries.

[97] I am also satisfied that the breach of s. 15(1) cannot be saved under s. 1.

[98] In my view, it is not an answer to Mr. Plesner's claim of an unjustified breach of s. 15(1) of the *Charter* to say (as do the respondents) that the impugned provisions are designed to enable the fact-finder to more readily determine whether

mental injuries are work-related; that is, to say that they are simply causative provisions. The same argument could be made about a causative provision which said that workers suffering work-related mental injuries could only receive compensation if the event giving rise to their disability was a hostage-taking incident in which the worker affected was the hostage. There is no doubt that such a limiting provision would simplify the problem of determining causation for the purpose of compensation, but, in my view, it would clearly discriminate against those suffering mental injuries by setting a threshold of causation which was not required for those with physical injuries, and which was tailored to exclude most claims for compensation for purely mental injuries.

[99] Nor is it an answer to say that, where the issue is one akin to the distribution of benefits under a legislated benefit plan (in this case an employer-funded plan), the Legislature can draw any line it thinks fit between those who are entitled to receive benefits and those who are not, without risk of *Charter* intervention. The Legislature can draw lines, but those lines cannot run afoul of s. 15(1) of the *Charter.*

[100] The real question in this appeal is whether the causative threshold set by the impugned provisions, and the line-drawing exercise engaged in by the Legislature and the policy drafters, give rise to discriminatory treatment based on an enumerated or analogous ground within the meaning of s. 15(1). Mr. Plesner says that these provisions discriminate against him on the ground of mental disability as compared with those who suffer from physical work-related injuries. I agree. The fact that a subset of workers who suffer from purely mental injuries may meet the

high threshold for compensation under these provisions does not dictate a different conclusion. They, too, are discriminated against in relation to those suffering from physical injuries in a manner which treats all of those who suffer from purely mental injuries as less deserving, less credible, and generally less worthy of compensation under the *Act* than workers suffering from physical injuries, or from mental injuries linked to physical injuries. The provisions are an affront to their human dignity and devalue them as human beings.

[101] In my view, the appropriate remedy in these circumstances is to declare that those provisions of Policy 13.30 highlighted at Schedule "A" to these reasons for judgment violate s. 15(1) of the *Charter* and cannot be saved under s. 1. I would sever those provisions of Policy 13.30 and declare them to be of no force and effect.

BACKGROUND

[102] I adopt the general background giving rise to this appeal set out in the reasons for judgment of Madam Justice Ryan. I will repeat and elaborate on some aspects of that background only to the extent necessary to develop my discussion of the issues.

THE *CHARTER*

[103] The relevant provisions of the *Charter* are ss. 1 and 15(1), which provide as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits

> prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

THE *ACT* AND THE POLICY

[104] Madam Justice Ryan has set out the general scheme of the *Act* at paras. 10-15 of her reasons for judgment. In so doing, she refers to the important and historic trade-off giving rise to workers compensation legislation whereby workers gave up their right to sue their employers (and co-workers) in tort for work-related injuries, in return for receipt of compensation on a no fault basis. (See *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890.)

[105] The provisions of the *Act* which are of particular significance for the purpose of this analysis are s. 5 and s. 5.1(1) which provide as follows:

> **Compensation for personal injury**
>
> 5(1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part must be paid by the Board out of the accident fund.
>
> (2) Where an injury disables a worker from earning full wages at the work at which the worker was employed, compensation is payable under this Part from the first working day following the day of the injury; but a health care benefit only is payable under this Part in respect of the day of the injury.
>
> (3) Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or serious or permanent disablement.

(4) In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out of the employment.

(5) Where the personal injury or disease is superimposed on an already existing disability, compensation must be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The measure of the disability attributable to the personal injury or disease must, unless it is otherwise shown, be the amount of the difference between the worker's disability before and disability after the occurrence of the personal injury or disease.

Mental stress

5.1(1) Subject to subsection (2), a worker is entitled to compensation for mental stress that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental stress

(a) is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment,

(b) is diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and

(c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

(2) The Board may require that a physician or psychologist appointed by the Board review a diagnosis made for the purposes of subsection (1)(b) and may consider that review in determining whether a worker is entitled to compensation for mental stress.

(3) Section 56(1) applies to a physician or psychologist who makes a diagnosis referred to in this section.

(4) In this section, “psychologist” means a person who is registered as a member of the College of Psychologists of British Columbia

> established under section 15(1) of the *Health Professions Act* or a person who is entitled to practise as a psychologist under the laws of another province. [Emphasis added]

(I note that subsections 5.1(2) – (4) came into force on December 31, 2003, after Mr. Plesner's injury, but prior to the decisions of either WCB or WCAT.)

[106] It is significant to observe at this point that all personal injuries, physical and mental, were dealt with under s. 5 of the *Act*, and related policies, until s. 5.1 of the *Act* came into force on June 30, 2002, by B.C. Reg. 152/2002. In other words, until June 30, 2002, physical and mental injuries were dealt with under the same statutory and policy provisions.

[107] At the time s. 5.1 was enacted, Policy 13.30 was added to the list of policies which, under s. 250 of the *Act*, WCAT was required to apply in its interpretation of the *Act* (subject only to a limited mechanism for internal review of a policy that WCAT may consider "so patently unreasonable that it is not capable of being supported by the *Act* and regulations"). Since this Policy is critical to WCAT's reasoning in denying benefits to Mr. Plesner, and is a necessary factor in the interpretation of s. 5.1, I will set it out at length:

> A worker may be entitled to compensation for mental stress that does not result from a physical injury or occupational disease if the impairment is due to an acute reaction to a sudden and unexpected traumatic event.
>
> "Mental stress" is intended to describe conditions such as post-traumatic stress disorder or other associated disorders. Mental stress does not include "chronic stress", which refers to a psychological impairment or condition caused by mental stressors acting over time. Workers, who develop mental stress over the course of time due to general workplace conditions, including workload, are not entitled to compensation.

…

Under subsection 5.1(1)(a), the *Act* establishes a two-part test:

1. There must be an acute reaction to a sudden and unexpected traumatic event.

2. The acute reaction to the traumatic event must arise out of and in the course of employment.

An "acute" reaction means – "coming to crisis quickly", it is a circumstance of great tension, an extreme degree of stress. It is the opposite of chronic. The reaction is typically immediate and identifiable. The response by the worker is usually one of severe emotional shock, helplessness and/or fear, it may be the result of:

- a direct personal observation of an actual or threatened death or serious injury;
- a threat to one's physical integrity;
- witnessing an event that involves death or injury; or
- witnessing a personal assault or other violent criminal act.

For the purposes of this policy, a "traumatic" event is a severely emotionally disturbing event. It may include the following:

- a horrific accident;
- an armed robbery;
- a hostage taking;
- an actual or threatened physical violence;
- an actual or threatened sexual assault; and,
- a death threat.

In most cases, the worker must have suffered or witnessed the traumatic event first hand.

In all cases, the traumatic event must be:

- clearly and objectively identifiable; and
- sudden and unexpected in the course of the worker's employment.

This means that the event can be established by the Board through information or knowledge of the event provided by co-workers, supervisory staff, or others, and is generally accepted as being traumatic. The "arising out of" determination is discussed in policy item #14.00.

In considering the matter of work-relatedness, the Board must determine if there is a connection between the employment and the resulting acute reaction. This requires consideration of personal factors in the worker's life, which may have contributed to the acute reaction. For compensation to be provided, the workplace circumstances or

events must be of causative significance to the worker's mental stress. If there is no causal link to work-related factors, the worker's mental stress will not be compensable.

…

There is no entitlement to compensation if the mental stress is caused by a labour relations issue such as a decision by the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

Examples where there is likely entitlement to compensation for mental stress:

- A person commits suicide by jumping in front of a bus. The bus driver is not physically injured by the incident, but is unable to work due to mental stress arising from the event. The bus driver's physician or psychologist confirms the driver is suffering from a condition described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, and requires time off and professional counselling.
- A worker directly witnesses a very serious accident to a co-worker. The worker suffers no apparent symptoms for the first two weeks after the accident, but then calls in one morning to say he/she is unable to work because he/she is haunted by the images of the event. A physician's diagnosis confirms that the worker suffers from post traumatic stress disorder as described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.
- During a prison riot, inmates hold a guard hostage. The guard is subsequently diagnosed by a physician as suffering from a mental condition described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, and requires time off from work to recover.
- A female worker attends at work and is confronted by her male supervisor who sexually assaults her. As an immediate and direct result of the assault, the worker suffers an acute reaction and is subsequently diagnosed with a mental condition

- described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*. In addition to a potential claim for physical injury, the worker may be entitled to compensation for mental stress. ... [Emphasis added.]

[108] Thus, as of June 30, 2002, the treatment of physical and purely mental injuries under the *Act* was divided: physical injuries (and mental injuries linked to physical injuries) were dealt with under s. 5 (now s. 5(1)-(5)) of the *Act* and related policies, and purely mental injuries were dealt with under s. 5.1 and Policy 13.30.

[109] At para. 52 of her reasons, Madam Justice Ryan has referred to extracts from *Hansard* which reference the policy reasons giving rise to the proposed amendments to the *Act*. It is apparent from those extracts that the amendments, including those related to "clarify[ing] coverage of conditions related to mental stress" were largely cost-driven. These policy considerations are most significant at the stage of a s. 1 justification analysis. Suffice it to say at this point that the introduction of s. 5.1, together with Policy 13.30, completely removed chronic stress as a basis for the recovery of benefits, and established a very high causative threshold for the recovery of compensation for purely mental injuries. That causative threshold did not apply to physical injuries, or mental injuries linked to physical injuries. These changes were not in keeping with the recommendations of either the Royal Commission Report (British Columbia, Royal Commission on Workers' Compensation in British Columbia, *For the Common Good*, (Victoria, B.C.: Queen's Printer, 1999), or the Winter Report (Alan Winter, *Core Services Review of the Workers' Compensation Board* (B.C. Ministry of Skills Development and Labour, 2002), which, amongst other things, recommended against denying compensation for chronic stress. Chronic stress (as contrasted with other types of purely mental stress) was clearly considered to be the most problematic, and potentially costly, aspect of claims for purely mental injuries. Chronic stress is not in issue in this case.

DISCRIMINATION UNDER S. 15(1) OF THE *CHARTER*

[110] Although the law under s. 15(1) of the *Charter* has been evolving since the landmark decision of *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, the recent decision of *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, makes it clear that the principles set out in *Andrews* are alive and well. At pp. 174-75 of *Andrews*, Mr. Justice McIntyre (speaking for the Court on this point) set forth the following oft-cited description of discrimination:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[111] Mr. Justice McIntyre observed that the question of discrimination had most often arisen under provincial human rights legislation and, at p. 173 of *Andrews*, he drew upon the following descriptor of discrimination in the workplace set forth in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at 551:

> [Discrimination] arises where an employer...adopts a rule or standard ... which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.

[112] In this case, Mr. Plesner would say that this description fits the treatment he and others suffering purely mental injuries have been subjected to under s. 5.1(1)(a) of the *Act* and Policy 13.30. Before examining that claim more closely, I will refer to some of the other leading authorities in this area.

[113] The case which is invariably quoted in the context of a s. 15(1) claim is *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. There, Mr. Justice Iacobucci, speaking for the Court, sought to rationalize the development of the law under s. 15(1) post-*Andrews*. He summarized the approach to take to a s. 15(1) analysis at para. 88 of the decision. That approach is generally truncated when referred to in subsequent authorities, but, because of the importance it has been accorded in later decisions, I will set it out at greater length:

> General Approach
>
> (1) It is inappropriate to attempt to confine analysis under s. 15(1) of the *Charter* to a fixed and limited formula. A purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.
>
> (2) The approach adopted and regularly applied by this Court to the interpretation of s. 15(1) focuses upon three central issues:
>
> (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
>
> (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
>
> (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.
>
> The first issue is concerned with the question of whether the law causes differential treatment. The second and third issues are concerned with

whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

(3) Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

> (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

…

Comparative Approach

(6) The equality guarantee is a comparative concept, which ultimately requires a court to establish one or more relevant comparators. The claimant generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry. However, where the claimant's characterization of the comparison is insufficient, a court may, within the scope of the ground or grounds pleaded, refine the comparison presented by the claimant where warranted. Locating the relevant comparison group requires an examination of the subject-matter of the legislation and its effects, as well as a full appreciation of context.

Context

(7) The contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity must be construed and examined from the perspective of the claimant. The focus of the inquiry

is both subjective and objective. The relevant point of view is that of the reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim.

(8) There is a variety of factors which may be referred to by a s. 15(1) claimant in order to demonstrate that legislation demeans his or her dignity. The list of factors is not closed. Guidance as to these factors may be found in the jurisprudence of this Court, and by analogy to recognized factors.

(9) Some important contextual factors influencing the determination of whether s. 15(1) has been infringed are, among others:

> (A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. …
>
> (B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others. …
>
> (C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society. An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. This factor is more relevant where the s. 15(1) claim is brought by a more advantaged member of society.

and

> (D) The nature and scope of the interest affected by the impugned law. The more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s. 15(1).

(10) Although the s. 15(1) claimant bears the onus of establishing an infringement of his or her equality rights in a purposive sense through reference to one or more contextual factors, it is not necessarily the case that the claimant must adduce evidence in order to show a violation of human dignity or freedom. Frequently, where differential treatment is based on one or more enumerated or analogous grounds, this will be sufficient to found an infringement of s. 15(1) in the sense that it will be evident on the basis of judicial notice and logical reasoning that the

> distinction is discriminatory within the meaning of the provision.
> [Emphasis added.]

[114] It is important to observe at this point that the recent decision of the Supreme Court of Canada in *Kapp* points to some difficulties which have been encountered in the application of the *Law* guidelines, including the emphasis placed on the concept of human dignity, and some criticisms of the comparator analyses. Reference is made in *Kapp* to numerous academic articles suggesting that "human dignity" has been elevated to a legal test which must be satisfied by the person claiming a s. 15(1) breach. Further criticism has also been directed to the apparent blurring of distinctions between a s. 15(1), s. 15(2) and s. 1 analysis in the application of the third test in *Law* concerning the ameliorative purpose or effects of the impugned provisions. Having regard to those criticisms, Chief Justice McLachlin, speaking for the majority in *Kapp*, stated at paras. 22-23:

> But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.
>
> The analysis in a particular case, as *Law* itself recognizes, more usefully focuses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to the perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might

> also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.) [Emphasis added.]

[115] These comments in *Kapp* were referenced by this Court in its recent decision, *McIvor v. Canada (Registrar of Indian and Northern Affairs),* 2009 BCCA 153. There, after referring to *Kapp*, Mr. Justice Groberman, speaking for the Court, stated (at para. 109):

> Part of the difficulty that courts have had in applying the *Law* criteria to the concept of discrimination has been the scope of the third *Law* factor. The question of whether the impugned law or program has an ameliorative purpose or effect can easily be expanded into an analysis of whether the law, while discriminatory, is nonetheless justifiable. This latter inquiry is not an appropriate one under s. 15 of the *Charter*. It is an inquiry properly undertaken under s. 1.

[116] With these cautionary words in mind, I turn to the s. 15(1) *Charter* analysis as it applies in this case.

APPLICATION OF SECTION 15(1)

[117] I reiterate that all parties agree that both s. 5.1(1)(a) and Policy 13.30 constitute "law" for the purpose of a s. 15(1) and s. 1 analysis. I also note that the Attorney General has taken no position with respect to the constitutionality of Policy 13.30.

(1) Differential Treatment - the Appropriate Comparator

[118] The importance of choosing the relevant comparator group for the purpose of a s. 15(1) analysis cannot be overstated. This is emphasized in the following

passage from the judgment of Chief Justice McLachlin, speaking for the Court, in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, at paras. 50-54:

> The law pertaining to the choice of comparators is extensively discussed in *Hodge* [*v*. *Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357], *supra* and need not be repeated here. That discussion establishes the following propositions.
>
> First, the choice of the correct comparator is crucial, since the comparison between the claimants and this group permeates every stage of the analysis. "[M]isidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis": *Hodge, supra*, at para. 18.
>
> Second, while the starting point is the comparator chosen by the claimants, the Court must ensure that the comparator is appropriate and should substitute an appropriate comparator if the one chosen by the claimants is not appropriate: *Hodge, supra*, at para. 20.
>
> Third, the comparator group should mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised as the basis for the discrimination: *Hodge, supra*, at para. 23. The comparator must align with both the benefit and the "universe of people potentially entitled" to it and the alleged ground of discrimination: *Hodge*, at paras. 25 and 31.
>
> Fourth, a claimant relying on a personal characteristic related to the enumerated ground of disability may invite comparison with the treatment of those suffering a different type of disability, or a disability of greater severity: *Hodge, supra*, at paras. 28 and 32. Examples of the former include the differential treatment of those suffering mental disability from those suffering physical disability in *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, and the differential treatment of those suffering chronic pain from those suffering other workplace injuries in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54. An example of the latter is the treatment of persons with temporary disabilities compared with those suffering permanent disabilities in *Granovsky* [*v. Canada (Minister of Employment and Immigration*), [2000] 1 S.C.R. 703, 2000 SCC 28], *supra*. [Emphasis added.]

[119] Useful comments with respect to the choice of comparator are also found in the *McIvor* decision, where Mr. Justice Groberman stated (at para. 76):

> It is clear that the claimant under s. 15 is entitled, in the first instance, to choose the group with which he or she wishes to be compared (*Law* at para. 58). This is partly a function of the nature of the equality inquiry. The right to equality is not a right to be treated as well as one particular comparator group. Rather, it is, *prima facie*, a right to be treated as well as the members of all appropriate comparator groups. It is, therefore, no defence to a s. 15 claim that some particular comparator group is treated no better than the group to which the claimant belongs. On the other hand, all that the claimant need show, in order to pass the first stage of analysis of a s. 15 claim, is that there is at least one appropriate comparator group which is afforded better treatment than the one to which he or she belongs. [Emphasis added.]

[120] In this case, I am satisfied that the comparator group chosen by Mr. Plesner is an appropriate comparator group for the s. 15(1) analysis. He submits that the appropriate comparator group is those workers who suffer physical injuries arising out of and in the course of their employment, whether or not those physical injuries are accompanied by mental stress injuries. In other words, he says that the appropriate comparator group is found in those workers whose claims for compensation properly fall under s. 5 of the *Act*. He says that members of the comparator group who receive compensation pursuant to s. 5 of the *Act* simply have to prove that they suffered physical injuries in the workplace and that their injuries arose out of and in the course of their employment in order to obtain compensation. For those who now fall under s. 5.1(1)(a) of the *Act* (those with pure mental stress injuries, unaccompanied by any related physical injury), in addition to having to prove that their injuries arose out of and in the course of their employment, they

have to establish that the event giving rise to their injury fits the descriptor of "an acute reaction to a sudden and unexpected traumatic event" as interpreted in accordance with Policy 13.30. Policy 13.30 makes it clear that the requisite "traumatic event" has to be objectively akin to "horrifying" in nature and of the magnitude of such events as an armed robbery, hostage taking or death threat.

[121] In my view, the comparator group chosen by WCB, those who suffer purely mental stress but who are able to satisfy the description of a "traumatic event" under s. 5.1(1)(a), is not the appropriate comparator group. This group is also disadvantaged in relation to those who suffer work-related physical injuries and fall under s. 5(1), because they, too, have to satisfy the burdensome criteria of an acute reaction to a sudden and unexpected "traumatic event" in s. 5.1(1)(a), as further defined under Policy 13.30, in order to obtain compensation. I do not read any of the decisions to which counsel have referred as requiring that the claimant choose as a comparator group a group which is arguably equally disadvantaged, while ignoring an obvious comparator group which receives the benefits the claimant is seeking. As stated in *McIvor*, (at para. 76), "all the complainant must show, in order to pass the first stage of analysis of a s. 15 claim, is that there is at least one appropriate comparator group which is afforded better treatment than the one to which he or she belongs".

[122] Nor am I persuaded by the Attorney General that the impugned provisions do not draw a distinction between workers like Mr. Plesner and others based on one or more personal characteristics (namely, mental disability). Counsel for the Attorney

General submits that s. 5.1(1)(a) merely establishes an objective test for causation which is required because of the relative difficulty in proving purely mental injuries as compared with physical injuries. Counsel says that it is the nature of the event, rather than any personal characteristic of the worker, or the nature of the injury, which is the relevant distinction raised by s. 5.1(1)(a). She submits that this distinction is simply an exercise in legitimate line-drawing by the Legislature designed to assist the tribunals in determining whether mental injuries are work-related.

[123] I agree that the Legislature and WCB are entitled to establish laws and policies, respectively, to assist those who have to administer the *Act*, but they must do so in a manner which is not discriminatory within the meaning of s. 15. To say that the impugned provisions are merely about causation and line-drawing by government is, with respect, to sidestep the purpose of the analysis, which is to determine whether in drawing lines and setting tests for causation for those with purely mental injuries, the Legislature and policy makers have discriminated against some of the very persons for whose benefit the compensation scheme was designed, namely workers who have suffered a mental disability arising out of and in the course of their employment.

(2) Differential Treatment Based on an Enumerated Ground

[124] I agree with Mr. Plesner that he was subjected to differential treatment based on an enumerated ground, namely, mental disability. He submits that he is less favourably treated in applying for compensation under the *Act* than are his co-

workers who suffer physical disabilities as a result of workplace accidents. Those who suffer physical injuries merely have to show that they suffered a work-related injury and they will receive compensation. He has to show that he suffered a work-related injury and, in addition, that the work–related injury was caused by a particular type of event, which event is described in strict and exclusory language.

[125] In her factum, counsel for the Attorney General took the position that "mental stress" which is the terminology utilized in s. 5.1 and Policy 13.30, is not tantamount to "mental disability" within the enumerated grounds in s. 15(1). She did not actively pursue that argument in oral submissions. In my view, it is apparent that the type of "mental stress" referred to in s. 5.1 and Policy 13.30 is, by definition, mental stress giving rise to a disability and a claim for compensation. Section 5.1(1)(b) specifically requires that the mental stress:

> (b) is diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis ...

[126] Mr. Plesner sought compensation on the basis that he was disabled by mental stress. He suffered PTSD – a clearly disabling form of mental injury. While the Attorney General is correct in saying that not all stress is disabling, that truism is of little moment to this analysis under s. 5.1(1)(a). It is common ground that Mr. Plesner was disabled by mental stress. On the evidence in the record, his disability is such that he has been unable to work since the injury.

(3) Does the Differential Treatment Discriminate?

[127] A violation of s. 15(1) of the *Charter* will only be established where, in addition to the existence of differential treatment based on an enumerated or analogous ground, the claimant proves that such differential treatment is discriminatory in a substantive sense. Differential treatment *per se* does not amount to discrimination within the meaning of s. 15(1). At para. 51 of *Law*, Mr. Justice Iacobucci stated that a substantive discrimination analysis must be informed by the purpose of s. 15(1), which is

> to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

[128] In this case, I have found that Mr. Plesner was subjected to differential treatment based on an enumerated ground. He has been treated differently, and less favourably, than his chosen comparator group – those suffering physical injuries whose claims fall under s. 5(1) of the *Act*. Those who suffer physical injuries (whether or not associated with a related mental injury) are compensated in circumstances where those who suffer purely mental injuries are not. They are compensated if they can show that their injury was work-related in fact. They are assisted in this regard by operation of s. 5(4), which provides that if an injury occurs at work by accident (as here), there is a rebuttable presumption that the injury is work-related.

[129] By way of contrast, if a person suffers a purely mental injury at work, it is not sufficient to establish that the injury was work-related in fact. Rather, s. 5.1(1)(a) requires the worker to meet the threshold of proving that the injury was caused by a "traumatic event", which Policy 13.30, in turn, further qualifies by requiring that event to be akin to "horrifying" as earlier discussed. The distinction is highlighted in the differential treatment accorded claimants under s. 5(1) on the one hand, and s. 5.1(1)(a) of the *Act*, when read together with Policy 13.30, on the other.

[130] In my view, this differential treatment based on an enumerated ground amounts to discrimination within the meaning of s. 15(1). In coming to this conclusion, I have had regard to the contextual factors set out in *Law*. I am satisfied that those suffering from mental disability are subjected to pre-existing disadvantage, stereotyping, prejudice and vulnerability. I find support for that proposition in *Battlefords and District Co-Operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, where Mr. Justice Sopinka, speaking for the majority, stated (at para. 31):

> Aside from the statutory and constitutional treatment of mental disability as a distinct prohibited ground, a second broad factor that should influence a purposive approach is the particular historical disadvantage faced by persons with mental disabilities. In *Equality for All*, a 1985 report of the Parliamentary Committee on Equality Rights, the following passage submitted to the Committee by the Canadian Mental Health Association, New Brunswick Division, is cited at p. 89:
>
> > Mental illness is one of the least understood and least accepted of all illnesses. It creates fear and stereotypical responses in people. Yet who are the mentally ill? Potentially they can be people who suffer from varying degrees of illness, from short term situations that temporarily incapacitate an individual to long term illnesses that require continuous support and attention. Psychiatric disabilities have many possible causes, sometimes physical, sometimes psychological and

> sometimes social. For a great many people, such illnesses are shameful and embarrassing and as a result they are very reticent to stand up for their rights or to protest when injustice has been done to them.

Indeed, the particular disadvantage facing the mentally disabled was recognized by this Court in *R. v. Swain*, [1991] 1 S.C.R. 933. Lamer C.J. stated at p. 994:

> Furthermore, the fact that the claim involves the personal characteristic of insanity (which falls within the enumerated ground of mental disability) leaves no doubt in my mind that, if the differential treatment is "discriminatory" (which remains to be seen), the s. 15(1) claim fits within the overall purpose of remedying or preventing discrimination against groups suffering social, political and legal disadvantage in Canadian society. There is no question but that the mentally ill in our society have suffered from historical disadvantage, have been negatively stereotyped and are generally subject to social prejudice.

[131] I do not understand WCB or the Attorney General to have taken the position that the mentally disabled have not suffered from historical disadvantage. Despite considerable efforts on the part of many mental health groups and others, mental illness of any kind continues to carry a stigma in our society.

[132] In my view, the constitutional issue presented by these provisions is comparable, in some respects, with that raised by the impugned legislation in *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504. In that case, the claimants suffered work-related (physical) injuries which ultimately resulted in them suffering chronic pain. Their claims for compensation were dealt with under impugned legislation which treated chronic pain sufferers differently, and less favourably, than those suffering other types of physical injuries. They were entitled to a four week Functional Restoration Program in lieu of more

generous and ongoing benefits normally awarded to workers injured on the job. Mr. Justice Gonthier, speaking for the Court, found that the impugned provisions infringed s. 15(1) of the *Charter* and could not be saved under s. 1.

[133] The impugned provisions in that case defined "chronic pain" as "pain"

> (a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or
>
> (b) disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain,
>
> and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant objective, physical findings at the site of the injury which indicate that the injury has not healed.

In other words, pain that could not readily be detected based on an objective basis, but was based primarily on subjective complaints, was largely excluded from coverage, whereas pain based on objective physical findings was covered.

[134] The comparator group for the purpose of the s. 15(1) analysis in *Martin* was taken to be workers subject to that *Act* who did not suffer from chronic pain as defined and who were eligible for compensation for work-related injuries. It was conceded that chronic pain sufferers were subject to differential treatment relative to other injured workers subject to that *Act*.

[135] In addressing the third stage of the *Law* analysis, the appellants in *Martin* claimed that chronic pain sufferers have been subjected to pre-existing disadvantage not dissimilar to that claimed in relation to those suffering mental injuries in this case. While Mr. Justice Gonthier did not find it necessary to decide

that point, he said that “many elements seem to point in that direction” and observed that the medical evidence indicated that chronic pain syndrome had a psychological component. In that respect, he stated (at para. 90) that:

> This Court has consistently recognized that persons with mental disabilities have suffered considerable historical disadvantage and stereotypes: *Granovsky, supra,* at para. 68; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 994; *Winko, supra,* at paras. 35 *et seq.* Although the parties have argued the s. 15(1) case on the basis that chronic pain is a “physical disability”, the widespread perception that it is primarily, or even entirely, psychosomatic may have played a significant role in reinforcing negative assumptions concerning this condition.

[136] In *Martin*, Mr. Justice Gonthier found that proof of historic disadvantage was unnecessary in circumstances where there was a lack of correspondence between the differential treatment to which the claimants were subject and their actual needs, capacities and circumstances, which are at the heart of a s. 15(1) claim. He noted that the claimants were not only excluded from the range of benefits available to injured workers whose claims were not based on chronic pain, but, in accordance with the overall legislative scheme, they were also excluded from any potential for recovery in tort. The limited benefits available to them under the legislation were not sufficient to offset the disadvantages. Mr. Justice Gonthier found (at para. 99) that:

> ... the treatment of injured workers suffering from chronic pain under the *Act* is not based on an evaluation of their individual situations, but rather on the indefensible assumption that their needs are identical. In effect, the *Act* stamps them all with the “chronic pain” label, deprives them of a personalized evaluation of their needs and circumstances, and restricts the benefits they can receive to a uniform and strictly limited program.

[137] In my view, those remarks are also applicable to individuals, like Mr. Plesner, who suffer purely mental work-related injuries and who are deprived of all benefits under the *Act* unless they can meet the high causation threshold applicable only to them. They are stamped with a "purely mental stress injuries" label whereby all of their claims are treated with heightened vigilance requiring a distinct and elevated burden of proof in relation to causation. The requirement of a "traumatic event" takes precedence over a case specific assessment of whether an individual's purely mental injury is genuine and "work-related" and ignores the particular needs of workers who suffer such injuries. While they may not be excluded from the compensatory scheme to the same extent as the workers suffering chronic pain in *Martin*, their access to compensation and other benefits is significantly restricted in comparison with workers suffering physical injuries.

[138] As in *Martin*, there is no identifiable ameliorative purpose which these provisions are designed to serve. The most that can be said is that, in limiting the potential for successful claims for purely mental injuries which are work-related by setting a high threshold for recovery not mandated for those suffering from physical injuries, the provisions may have reduced costs, thereby making more money available to those who are already favoured under the legislation, or for other purposes under the *Act*. Cost saving of this kind is not the type of ameliorative purpose or effect contemplated by *Law*.

[139] As in *Martin*, the loss suffered by workers in the position of Mr. Plesner is not purely economic – not only does he lose the direct monetary compensation

accorded to those with physical injuries suffered in workplace accidents, he also loses access to retraining and rehabilitative programs, and other related benefits which are available to those who suffer physical injuries.

[140] In my view, the differences between the impugned provisions in *Martin* and those here, are not differences which dictate a different result under s. 15(1). In that regard, I would adopt, as applicable here, the conclusory comments of Mr. Justice Gonthier with respect to the s. 15(1) analysis at paras. 105-106 of *Martin*:

> Thus, far from dispelling the negative assumptions about chronic pain sufferers [workers suffering purely mental injuries], the scheme actually reinforces them by sending the message that this condition is not "real", in the sense that it does not warrant individual assessment or adequate compensation. Chronic pain sufferers [workers suffering purely mental injuries] are thus deprived of recognition of the reality of their pain and impairment, as well as of a chance to establish their eligibility for benefits on an equal footing with others. This message clearly indicates that, in the Nova Scotia [B.C.] legislature's eyes, chronic pain sufferers [workers suffering purely mental injuries] are not equally valued as members of Canadian society.
>
> The contextual enquiry mandated by *Law* could hardly lead to a clearer conclusion. I am of the view that a reasonable person in circumstances similar to those of the appellants, fully apprised of all the relevant circumstances and taking into account the above contextual factors, would conclude that the challenged provisions have the effect of demeaning his or her dignity. [The impugned sections] violate s. 15(1) of the *Charter*.

[141] I do not consider the decision in *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703, relied upon by the Attorney General, to be of particular assistance in this analysis. There, the Court found that certain "drop-out" provisions of the CPP disability plan did not discriminate against those suffering temporary disabilities in relation to those suffering permanent

disabilities. A significant factor in the analysis was the fact that the impugned provisions were designed to ameliorate the position of those with a history of severe and permanent disability. The "line-drawing" in the allocation of benefits in that case was justified primarily on that basis. The Court also found that that the impugned provisions did not demean persons with temporary disabilities or cast doubt on their worthiness as human beings. In my view, the provisions in issue here are not comparable in either purpose or effect.

[142] While this case was not argued as one of adverse effects discrimination, it is noteworthy that, in one of its decisions, a WCAT panel opined that it would be seldom, if ever, that a person suffering mental health injuries would be able to meet the criteria established through the combination of s. 5.1(1)(a) and Policy 13.30 in claiming compensation. (See *WCAT-2006-04666* (18 December 2006).) At p. 9 of that decision, the panel commented on the narrowed scope of a compensable mental stress claim, and at p. 15 stated:

> The Board's policy at item #13.30 of the RSCM II provides direction on the characterization of a traumatic event by providing examples of events or incidents which the directors of the Board recognize as "traumatic". It is evident from the examples provided that the circumstances must be quite extreme before a claim may be accepted and compensation paid. Modifiers such as "horrific" are used to stress the extremely traumatic character of the experience. The nature of the examples listed in policy is such that most workers will likely seldom, if ever encounter such an incident or event. They involve situations not of simple violence; rather, the actual or threatened violence is extreme, up to and including death. In the case of sudden and unexpected trauma involving "actual or threatened physical violence or sexual assault", the causal significance should be weighed in a manner that is consistent with the listed examples as to what is viewed, by policy, as a "severely emotionally disturbing event."

[143] There is simply no equivalent prerequisite to compensation for workers who suffer work-related physical injuries.

[144] While counsel for the parties analyzed s. 5.1(1)(a) and Policy 13.30 separately for the purpose of the s. 15(1) analysis (indeed, the Attorney General did not make any submissions on the constitutionality of Policy 13.30), I find that it is only when the provisions are read together that the discriminatory effect of s. 5.1(1)(a) is realized. For the purposes of this analysis, and given the fact that the chronic stress provisions of s. 5.1(1)(a) and Policy 13.30 are not in issue in this appeal, I find that it is the descriptor of "traumatic event" in s. 5.1(1)(a), as qualified in Policy 13.30, which gives rise to substantive discrimination on the basis of mental disability in this case. There may well be other aspects of these provisions which are discriminatory, but they are not in issue on this appeal and will have to be left to another day.

[145] In summary on this point, I find favour with most of the arguments raised by Mr. Plesner. The significant difference is that I do not find that s. 5.1(1)(a), in itself, gives rise to substantive discrimination, but that it does so when read in conjunction with Policy 13.30, as s. 250 of the *Act* requires.

SECTION 1 OF THE *CHARTER* - JUSTIFICATION

[146] I now turn to the determination of whether the discriminatory aspects of s. 5.1(1)(a), when read with Policy 13.30, can be saved under s. 1 of the *Charter*, which I restate here for convenience:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[147] Counsel for the Attorney General acknowledged that she would be hard-pressed to pursue a s. 1 argument if the Court were to find that there was a breach of s. 15(1) in this case on the basis of mental disability. Similarly, counsel for WCB did not seek to rely on s. 1 in the event this Court should find a breach of s. 15(1). I consider it appropriate to deal briefly with the s. 1 analysis, however, if only for the sake of completeness.

[148] The well-known principles the Court must apply on a s. 1 analysis derive from the leading case of *R v. Oakes*, [1986] 1 S.C.R. 103, and are summarized by Iacobucci J. in *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 182, as follows:

> A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgment of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

[149] In determining the purpose of these provisions, I would again refer to para. 52 of Madam Justice Ryan's reasons for judgment in which she sets out extracts from *Hansard* on the second reading of Bill 49. It appears from these and related extracts

from *Hansard* that amendments to the *Act*, including s. 5.1, were enacted for two main purposes. The first, and I would say the primary, purpose was cost-related. There was evidence of escalating costs and potential future overruns in the workers compensation system. The reasonable inference to be drawn from *Hansard* is that considerable savings were anticipated by, amongst other changes, removing chronic stress claims as a basis for compensation.

[150] The second purpose (closely linked to the first), was to "clarify" coverage for mental stress claims by limiting the circumstances in which mental stress would be compensated. A person suffering a purely mental injury could not recover if that injury fell within the descriptor of chronic stress, but could recover if it was caused by an acute reaction to a sudden and unexpected traumatic event, such as a bank robbery. This requirement was consistent with the description of an event deemed to be "traumatic" contained in Policy 13.30, which came into force at the same time.

[151] The financial sustainability factor, and the causative factor in relation to mental stress claims, are similar to two of the four objects of the impugned legislation in *Martin*, *supra*. In describing the government's purpose in enacting the chronic pain provisions, Mr. Justice Gonthier described three of the four government purposes at para. 108 of the decision:

> ... <u>The first concern is to maintain the viability of the Accident Fund set up by the Act to compensate injured workers, which has accumulated a considerable unfunded liability. Second is the need to develop a consistent legislative response to the administrative challenges raised by the processing of chronic pain claims. These challenges mostly arise from the difficulties in establishing a causal link between a workplace accident and the later development of chronic pain, as well</u>

> as in assessing the degree of impairment resulting from chronic pain in particular claimants. The third concern, closely related to the first, it to avoid potential fraudulent claims based on chronic pain, which would be difficult to detect under the normal compensation system, given that no objective findings are available to support chronic pain claims. This objective is referred to in the submissions of the Attorney General of Nova Scotia, who rejects the choice made by other provinces to process chronic pain claims under the normal system on the ground that "these schemes are based on subjective findings and self-reporting which are unreliable and difficult to verify … [Emphasis added]

[152] Mr. Justice Gonthier found that the first and second objectives (cost and causation) were not pressing and substantial objectives. At paras. 109-110 of his reasons for judgment, he stated:

> The first concern, maintaining the financial viability of the Accident Fund, may be dealt with swiftly. Budgetary consideration in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the *Charter*: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3 ("*P.E.I. Reference*"), at para. 281; see also *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 709. It has been suggested, however, that in certain circumstances, controlling expenditures may constitute a pressing and substantial objective: see *Eldridge, supra,* at para. 84. I find it unnecessary to decide this point for the purposes of the case at bar. Nothing in the evidence establishes that chronic pain claims in and of themselves placed sufficient strain upon the Accident Fund to threaten its viability, or that such claims significantly contributed to its present unfunded liability. Admittedly, when a court finds the challenged legislation to be supported by another, non-financial purpose, budgetary considerations may become relevant to the minimal impairment test: see *P.E.I. Reference*, at para. 283. But at the present stage of analysis, such a non-financial purpose remains to be identified.
>
> Likewise, the second objective, developing a consistent legislative response to chronic pain claims, could not stand on its own. Mere administrative expediency or conceptual elegance cannot be sufficiently pressing and substantial to override a *Charter* right. In my view, this objective only becomes meaningful when examined with the third objective, i.e., avoiding fraudulent claims based on chronic pain. That objective is consistent with the general objective of the Act, as

> avoiding such claims ensures that the resources of the workers' compensation scheme are properly directed to workers who are genuinely unable to work by reason of a work-related accident. In my view, it is clearly pressing and substantial. As I believe this is the strongest s. 1 argument raised by the respondents, I will first apply the *Oakes* test to this objective. [Emphasis added]

[153] In my view, there is no basis in the record before this Court for concluding that the financial considerations and/or the causative problems posed by mental stress claims provide a pressing and substantial basis for overriding the s. 15(1) right in this case. As in *Martin*, there is little evidence before the Court in that regard. While there is reference in the Royal Commission Report and the Winter Report to concerns about the potential for escalating costs relating to mental stress claims, and perceived difficulties in ascertaining whether those claims were work-related, those comments focused on chronic stress claims, which are not the subject of this appeal. The extreme financial circumstances faced by the province of Newfoundland, which were found to be a pressing and substantial concern justifying the breach of equality rights in *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, have not been shown to be present here.

[154] Unlike the situation in *Martin*, none of the respondents has taken the position that the reason for "clarification" of mental stress claims in the legislation was to avoid fraudulent claims. For that reason, I find it unnecessary to discuss that factor as a pressing and substantial objective.

[155] Even assuming, however, that either financial concerns and/or the need for more objective causative criteria could amount to a pressing and substantial

objective, I would have found that the means chosen to meet these objectives were not rational in relation to mental stress claims which are not chronic in nature, since there is little, if any, evidence showing that such claims represent a substantial draw on the compensation fund. The "floodgates" argument which appears to have been a driving force behind the enactment of s. 5.1 focused on chronic stress claims, which are not in issue here.

[156] I am also satisfied that attempts to justify the breach of s. 15(1) in these circumstances founder at the minimal impairment and proportionality stages. Assuming there was a proven need for additional causative criteria for those with purely mental injuries as a means of either demonstrating the work-relatedness of the injuries, or reducing the financial burden of mental injury claims, the criteria contained in s. 5.1(1)(a) and Policy 13.30 are extreme. As earlier stated, they impose an exclusionary threshold which is difficult, albeit not impossible, for those suffering purely mental work-related injuries to meet. It would take much more clear statistical and other evidence to demonstrate either minimal impairment or proportionality between the ends sought to be achieved and the method chosen to achieve them. There is a dearth of evidence that it is necessary to exclude claims that are otherwise proven to be genuine and work-related simply because the event giving rise to the incident is not "traumatic" as that term is used in s. 5.1(1)(a) when read together with Policy 13.30.

[157] Nor can the fact that similar provisions may be in effect in other provinces operate as a justification under s. 1. It is not clear, for example, that any of those

provinces have the equivalent of Policy 13.30, or s. 250 of the *Act*, and there may be other relevant distinctions. In any event, their legislation may also be susceptible to a *Charter* challenge.

[158] The only other argument alluded to in justification of s. 5.1(1)(a), as read together with Policy 13.30, is that the criteria stipulated in those provisions are similar to the policy line drawn in tort in relation to claims for damages in negligence giving rise to "nervous shock". The argument is that the Legislature was justified in applying the same, or similar, criteria for recovery for those suffering mental injuries under the *Act* as apply at common law.

[159] The first answer to that submission is that the historic trade-off giving rise to workers compensation legislation did not purport to substitute an identical or parallel system for those claiming in tort and those claiming under the *Act*. For example, the measure of compensation for the same type of injury under the *Act* may be, and in many cases is, significantly less than the measure of compensation which would be awarded in a successful tort claim. In return, the claimant under the *Act* is not required to undergo the time, expense and uncertainties faced by plaintiffs seeking compensation in the courts.

[160] Further, there is no requirement that issues of causation under the *Act* mirror those at common law. As Mr. Justice Donald stated in *Kovach, Re,* [1999] 1 W.W.R. 498, 52 B.C.L.R. (3d) 98, at para. 28 (cited to B.C.L.R.), in dissenting reasons adopted by the Supreme Court of Canada on appeal, *Kovach v. British Columbia (Workers' Compensation Board*), 2000 SCC 3, [2000] 1 S.C.R. 55:

> The Board was not bound to apply common law principles of causation, such as *novus actus interveniens*, in deciding the matter. No single theory of causation can be said to be infallible or universally applicable. What works for a tort based system may be unsuitable for a no fault scheme. It all depends on the policy goals of the system.

[161] It does not follow, therefore, that the criteria for succeeding in obtaining an award of damages in tort are an appropriate standard for determining compensation under the no-fault provisions of the *Act*. These are two distinct compensation systems which differ in many fundamental respects.

[162] In conclusion on this point, I find that the breach of s. 15(1) which I have identified has not been justified under s. 1.

REMEDY

[163] The issue of remedy is complicated in these circumstances because of the narrowing of the issues between the parties as the matter progressed before the tribunals and the courts. The *Charter* issue is now specifically focused on the aspects of s. 5.(1)(a) and Policy 13.30 which refer to a “traumatic event”. Because WCAT found that Mr. Plesner’s PTSD did not fall under the descriptor “chronic stress”, those aspects of s. 5.1(1)(a) and Policy 13.30 which clearly refer to “chronic stress” were not directly dealt with in argument, although they were referenced indirectly as contextual factors in determining the purpose and effect of the impugned provisions.

[164] In the result, I have found that it is only when s. 5.1(1)(a) is read together with Policy 13.30 that it offends s. 15(1) of the *Charter*. Thus, the most obvious remedy is to strike those provisions of Policy 13.30 which define and describe a "traumatic event", including the examples given. I have some concerns, however, that the effect of such an exercise could be to render the Policy as a whole of limited utility. Since s. 5.1 and Policy 13.30 came into effect at the same time, it is apparent that they were regarded as complementary, and intended to be read together, as mandated by s. 250 of the *Act.* In the result, I am satisfied that s. 5.1 can stand on its own, but the same is not true of Policy 13.30.

[165] In addressing the question of remedy, I have found some assistance in the following passage from the leading case of *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 697:

> Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are. This concern is reflected in the classic statement of the test for severance in *Attorney–General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, at p. 518:
>
> > The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

> This test recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part. In some cases this assumption will not be a safe one. In those cases it will be necessary to go further and declare inoperative portions of the legislation which are not themselves unsound.
>
> Therefore, the doctrine of severance requires that a court define carefully the extent of the inconsistency between the statue in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion. [Emphasis added.]

[166] After closely examining Policy 13.30, I have concluded that it is possible to sever those portions of the Policy which, when read with s. 5.1(1)(a) of the *Act*, give rise to the discrimination which I have found contravenes s. 15(1). I would, therefore, sever those aspects of the Policy highlighted in Schedule “A” to my reasons for judgment and declare those provisions of Policy 13.30 to be of no force and effect. I would leave it to WCB to revisit Policy 13.30 as a whole it in light of these reasons, perhaps in consultation with the Legislature insofar as both s. 5.1(1)(a) and the Policy are inextricably tied, with a view to determining to what extent, if at all, further revisions may be necessary or appropriate.

RESULT

[167] I would allow Mr. Plesner's appeal, set aside the order of the chambers judge and WCAT, and remit the issue of Mr. Plesner's compensation to WCAT. I would also declare that those provisions of Policy 13.30 highlighted at Schedule "A" to these reasons for judgment contravene s. 15(1) of the *Charter* and cannot be saved under s. 1. I would sever those provisions of Policy 13.30 and declare them to be of no force and effect.

"The Honourable Madam Justice Prowse"

I Agree:

"The Honourable Mr. Justice Frankel"

SCHEDULE "A" TO THE REASONS FOR JUDGMENT OF MADAM JUSTICE PROWSE

POLICY #13.30

#13.30 MENTAL STRESS

The Board provides compensation for psychological impairment where the condition results directly from a compensable physical injury or occupational disease. [See policy items #13.20 and #22.33.]

A worker may be entitled to compensation for mental stress that does not result from a physical injury or occupational disease if the impairment is due to an acute reaction to a sudden and unexpected traumatic event.

"Mental stress" is intended to describe conditions such as post-traumatic stress disorder or other associated disorders. Mental stress does not include "chronic stress", which refers to a psychological impairment or condition caused by mental stressors acting over time. Workers, who develop mental stress over the course of time due to general workplace conditions, including workload, are not entitled to compensation.

Section 5.1 of the *Act* provides as follows:

A worker is entitled to compensation for mental stress that does not result from an injury for which the worker is otherwise entitled to compensation only if the mental stress:

(a) is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment,
(b) is diagnosed by a physician as a mental or physical condition that is described in the most recent American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, at the time of diagnosis, and
(c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

Under subsection 5.1(a), the *Act* establishes a two-part test:

1. There must be an acute reaction to a sudden and unexpected traumatic event.

2. The acute reaction to the traumatic event must arise out of and in the course of employment.

An "acute" reaction means – "coming to crisis quickly", it is a circumstance of great tension, an extreme degree of stress. It is the opposite of chronic. The reaction is typically immediate and identifiable. The response by the worker is usually one of severe emotional shock, helplessness and/or fear. It may be the result of:

- a direct personal observation of an actual or threatened death or serious injury;
- a threat to one's physical integrity;
- witnessing an event that involves death or injury; or,
- witnessing a personal assault or other violent criminal act.

For the purposes of this policy, a "traumatic" event is a severely emotionally disturbing event. It may include the following:

- a horrific accident;
- an armed robbery;
- a hostage-taking;
- an actual or threatened physical violence;
- an actual or threatened sexual assault; and,
  a death threat.

In most cases, the worker must have suffered or witnessed the traumatic event first hand.

In all cases, the traumatic event must be:

- clearly and objectively identifiable; and
- sudden and unexpected in the course of the worker's employment.

This means that the event can be established by the Board through information or knowledge of the event provided by co-workers, supervisory staff, or others, and is generally accepted as being traumatic. The "arising out of" determination is discussed in policy item #14:00.

In considering the matter of work-relatedness, the Board must determine if there is a connection between the employment and the resulting acute reaction. This requires consideration of personal factors in the worker's life, which may have contributed to the acute reaction. For compensation to be provided, the workplace circumstances or events must be of causative significance to the worker's mental stress. If there is no causal link to work-related factors, the worker's mental stress will not be compensable.

It is recognized that some workers, due to the nature of their occupation, may be exposed to traumatic events on a relatively frequent basis (e.g. emergency workers). If such a worker has an acute reaction to a sudden and unexpected traumatic event, compensation for mental stress may be provided even if the worker was able to tolerate past traumatic events.

In all cases concerning entitlement to compensation for mental stress, the worker's mental stress must be diagnosed by a physician as a mental or physical condition that is described in the most recent American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, at the time of diagnosis. There is no entitlement to compensation if the mental stress is caused by a labour relations issue such as a decision by the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

Examples where there is likely entitlement to compensation for mental stress:

- A person commits suicide by jumping in front of a bus. The bus driver is not physically injured by the incident, but is unable to work due to mental stress arising from the event. The bus driver's physician confirms the driver is suffering from a condition described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, and requires time off and professional counselling.

- A worker directly witnesses a very serious accident to a co-worker. The worker suffers no apparent symptoms for the first two weeks after the accident, but then calls in one morning to say he/she is unable to work because he/she is haunted by the images of the event. A physician's diagnosis confirms that the worker suffers from posttraumatic stress disorder as described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.

- During a prison riot, inmates hold a guard hostage. The guard is subsequently diagnosed by a physician as suffering from a mental condition described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, and requires time off from work to recover.

- A female worker attends at work and is confronted by her male supervisor who sexually assaults her. As an immediate and direct result of the assault, the worker suffers an acute reaction and is subsequently diagnosed with a mental condition describe in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*. In addition to a potential claim for physical injury, the worker may be entitled to compensation for mental stress.

Examples where there is likely no entitlement to compensation for mental stress:

- A worker is subjected to frequent sexual innuendo, humour in poor taste, practical jokes, and other forms of inappropriate attention from co-workers. One day the worker calls in to say the stress is too much, and he/she cannot work.

- A worker in a machine shop characterized by high levels of sudden noise calls in one morning to say he/she is unable to work due to mental stress. The worker also cites impossibly high production quotas, machine-pacing of work and constant threats of termination by the foreperson as reasons for the mental stress.

This policy applies to acute reactions to traumatic events that occur on or after June 30, 2002. If a worker's claim for mental stress was allowed prior to June 30, 2002, for a recurrence to be compensable, the claim must meet the requirements of section 5.1 of the *Act*.