
1999 NSCA 29
Nova Scotia Court of Appeal

Conrad v. Imperial Oil Ltd.

1999 CarswellNS 123, 1999 NSCA 29, [1999] N.S.J. No. 68, 173 D.L.R. (4th) 286, 174 N.S.R. (2d) 62, 532 A.P.R. 62

Harley Conrad, Appellant and Imperial Oil Limited and McColl-Frontenac Petroleum Inc., Respondents

Freeman J.A., Glube C.J.N.S., Pugsley J.A.

Heard: January 19, 1999
Judgment: March 1, 1999
Docket: C.A. 148879

Proceedings: affirming (1998), 169 N.S.R. (2d) 59, 508 A.P.R. 59 (N.S. S.C. [In Chambers])

Counsel: *Ronald A. Pink, Q.C.* and *David J. Roberts*, for Appellant.
Brian Johnston, Q.C., for Respondent.

Headnote

Labour law --- Labour relations boards — Jurisdiction — General principles
Oil company sold fleet of ocean tankers to purchaser — Purchaser hired all 88 employees in comparable or better positions — Worker brought action for declaration of entitlement to sixteen weeks' pay in lieu of sixteen weeks' notice of group termination — Trial judge found employee were transferred not terminated and refused claim for pay in lieu of notice — Worker appealed — Trial judge had solid anchor for determination not to exercise jurisdiction — Canada Labour Code was comprehensive statutory scheme with its own enforcement mechanisms which made no allowance for enforcement by private civil action — Oil company was not charged or convicted of any offences under enforcement mechanisms — Jurisdiction of court was not extinguished by parallel process — Court's jurisdiction should not be exercised in manner which interfered with Code's alternative procedures — No provision existed in Code for enforcement of internal enforcement mechanisms through civil actions by individual employees — Trial judge did not err in declining jurisdiction — Appeal dismissed — Canada Labour Code, R.S.C. 1985, c. L-2, s. 212.

Labour law --- Discipline and termination — What constituting discipline or termination
Oil company sold fleet of ocean tankers to purchaser — Purchaser hired all 88 employees in comparable or better positions — Worker brought action for declaration of entitlement to sixteen weeks' pay in lieu of sixteen weeks' notice of group termination — Trial judge found employee were transferred not terminated and refused claim for pay in lieu of notice — Worker appealed — Section 189 which dealt with transfer of employees was not incorporated into Division IX of Part III of Code — Nothing in Canada Labour Code precluded adjudicative authority from reaching result on evidence identical with result which could have been deemed had appropriate statutory device been provided — No statutory imperative required determination oil company employees were terminated — Employer with 49 or fewer employees which sold business could be deemed to have transferred work force — Determination on evidence as matter of fact whether employees were terminated or transferred required with 50 or more employees — Parliamentary intention to determine questions important to futures of large groups of employees by proof rather than presumption was reasonable — Trial judge's conclusion was factual finding on evidence and entitled to

deference — Trial judge did not err in dismissing worker's action and appeal was dismissed — Canada Labour Code, R.S.C. 1985, c. L-2, s. 189.

Table of Authorities

Cases considered by *Freeman, J.A.*:

A'Hearn v. T.N.T. Canada Inc. (1990), 74 D.L.R. (4th) 663 (B.C. C.A.) — considered

Frame v. Smith, 78 N.R. 40, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81, 23 O.A.C. 84, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 9 R.F.L. (3d) 225 (S.C.C.) — considered

Gendron v. Supply & Services Union of the P.S.A.C., Local 50057, [1990] 4 W.W.R. 385, 66 Man. R. (2d) 81, [1990] 1 S.C.R. 1298, 44 Admin. L.R. 149, 90 C.L.L.C. 14,020, 109 N.R. 321 (S.C.C.) — considered

Saan Stores Ltd. v. Nova Scotia (Labour Relations Board) (1999), 173 N.S.R. (2d) 222, 527 A.P.R. 222 (N.S. C.A.) — considered

St. Anne Nackawic Pulp & Paper Co. v. C.P.U., Local 219, 86 C.L.L.C. 14,037, [1986] 1 S.C.R. 704, 28 D.L.R. (4th) 1, 68 N.R. 112, 73 N.B.R. (2d) 236, 184 A.P.R. 236 (S.C.C.) — referred to

Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 2 W.W.R. 609, 87 B.C.L.R. (2d) 1, 18 C.C.L.T. (2d) 209, [1994] 1 S.C.R. 114, 110 D.L.R. (4th) 289, *(*sub nom. *Toneguzzo-Norvell v. Savein)* 162 N.R. 161, *(*sub nom. *Toneguzzo-Norvell v. Savein)* 38 B.C.A.C. 193, *(*sub nom. *Toneguzzo-Norvell v. Savein)* 62 W.A.C. 193, *(*sub nom. *Toneguzzo-Norvell v. Savein)* [1994] R.R.A. 1 (S.C.C.) — applied

Statutes considered:

Canada Labour Code, R.S.C. 1985, c. L-2

Generally — considered

Pt. III — referred to

Pt. III, Div. IV — referred to

Pt. III, Div. VII — referred to

Pt. III, Div. VIII — referred to

Pt. III, Div. IX — considered

Pt. III, Div. X — referred to

Pt. III, Div. XI — referred to

Pt. III, Div. XIII — referred to

Pt. III, Div. XIII.1 [en. 1993, c. 42, s. 33] — referred to

Pt. III, Div. XIV — referred to

s. 189 — considered

s. 189(1) — considered

s. 209(5) — referred to

s. 210(4) — referred to

s. 212 — considered

s. 212(1) — considered

s. 234 — referred to

s. 239(5) — referred to

s. 239.1(11) [en. 1993, c. 42, s. 33] — referred to

s. 246(1) — referred to

s. 256(1) — referred to

s. 256(2) — considered

s. 258 — referred to

s. 258(1) — considered

Trade Union Act, R.S.N.S. 1989, c. 475

s. 31(1) — referred to

The Court:

1 Appeal is dismissed as per reasons for judgment of Freeman, J.A., Glube, C.J.N.S., and Pugsley, J.A., concurring.

***Freeman, J.A.*:**

2 When the East Coast Marine Division of Imperial Oil Limited sold its fleet of ocean tankers to Algoma Tankers Limited in early 1998, all 88 of the employees affected, including the appellant, were hired by Algoma in comparable or better positions. No collective agreements were involved. The parties agreed that both Imperial and Algoma, as well as the employees, were governed by the *Canada Labour Code* R.S.C. 1985, c. L-2.

3 The appellant, a chief engineer who described himself as chair of the "Imperial Tanker Employees' Termination Committee", had attempted to bring a civil action for pay in lieu of wages as a terminated employee. The trial judge, Justice Gruchy of the Supreme Court of Nova Scotia, found he was not suing in representative form but only on his own behalf, and he has accepted that position in the appeal. He is seeking a declaration that he is entitled to sixteen weeks' pay in lieu of the sixteen weeks of notice of a group termination which Imperial would have been required to give the Minister of Human Resources, formerly the Minister of Labour, pursuant to Division IX of Part III of the *Canada Labour Code*.

4 Justice Gruchy found the employees were not terminated but transferred, so provisions of the *Canada Labour Code* relating to group terminations did not apply. Accordingly, he refused the appellant's claim to sixteen weeks' pay in lieu of notice.

5 The fundamental issue is jurisdictional, whether the Supreme Court of Nova Scotia was the appropriate forum. The issues on the merits are firstly, whether the trial judge erred in finding the alteration in the employment relationship was a transfer and not a group termination and secondly, if so, whether the trial judge erred in finding that the appellant was not entitled to pay in lieu of notice to the Minister. The respondent raises the further issue that a civil remedy is not available to enforce the statutory duty imposed in Division IX.

Jurisdiction

6 The question whether the Supreme Court of Nova Scotia is the appropriate forum goes beyond the mere existence of jurisdiction and requires a determination whether jurisdiction, even if it exists, should be exercised.

7 Division IX occurs in Part III of the *Canada Labour Code* governing standard hours, wages, vacations and holidays. It includes *s. 212* which provides:

Notice of group termination

212. (1) Any employer who terminates, either simultaneously or within any period not exceeding four weeks, the employment of a group of fifty or more employees employed by the employer within a particular industrial establishment, or of such lesser number of employees as prescribed by regulations applicable to the employer made under paragraph 227(b), shall, in addition to any notice required to be given under section 230, give notice to the Minister, in writing, of his intention to so terminate at least sixteen weeks before the date of termination of the employment of the employee in the group whose employment is first to be terminated.

8 The *Code* treats breaches of the provisions of Division IX as summary convictions or indictable offences under *s. 256 (2)*, which provides:

Offences and Punishment

256(1)...

256(2)

Idem

(2) Every employer who contravenes any provision of Division IX or any regulation made pursuant to section 227 is guilty of

(a) an offence punishable on summary conviction and liable to a fine not exceeding ten thousand dollars; or

(b) an indictable offence and liable to a fine not exceeding one hundred thousand dollars.

9 While the *Code* specifically preserves an employee's right to bring a civil action against an employer for arrears of wages, it does not contemplate a resort to the civil courts by employees who have lost tangible benefits as the result of an employer's breaches of the provisions of Division IX. Rather, employers charged and convicted of such breaches are required to compensate employees any amounts they are found to be owed as part of the punishment imposed in the criminal or quasi-criminal proceedings. *Section 258* provides:

258(1) Order to pay arrears of wages

258. (1) Where an employer has been convicted of an offence under this Part in respect of any employee, the convicting court shall, in addition to any other punishment, order the employer to pay to the employee any overtime pay, vacation pay, holiday pay or other wages or amounts to which the employee is entitled under this Part the non-payment or insufficient payment of which constituted the offence for which the employer was convicted.

10 Imperial has not been charged nor convicted of any offence under Division IX. Rather, the Department of Labour has accepted its position that the matter was a transfer rather than a termination. A letter dated February 25, 1998, from an official of Human Affairs Development Canada, formerly the Department of Labour, expressing what appears to be an official ruling on behalf of the Department, states that "the employees are not being terminated, they are being transferred... Division IX would not apply."

11 Justice Gruchy agreed with this conclusion and found that:

...Imperial was not under an obligation to give the Minister notice of termination; in fact, the Minister declined notice. From the subjective perspective of Mr. Conrad and his fellow employees, there was no termination of employment within the meaning of Division IX of the **Code**. The intention of the notice period referred to in **s. 212** is to minimize the adverse effects which may be suffered by employees who will be losing employment. Here there was no termination of employment by either Mr. Conrad or his fellow employees within the meaning of Division IX of the **Code**.

12 While this factual finding may not have been strictly necessary in view of the jurisdictional issue, it provides a solid anchor for Justice Gruchy's determination that, assuming he had civil jurisdiction over an employer not convicted of a Division IX offence, he should not attempt to exercise it.

13 Dealing with the jurisdiction of the court, he stated:

> The **Canada Labour Code** establishes a complete regime for standards of employment in federal works, undertakings and businesses, including the tanker business of Imperial under consideration. The collective rights of employees under the jurisdiction of the **Code** are exclusively governed by its terms. When approached by the parties, the Labour Affairs Officer of Human Resources Development Canada, the Federal department charged with the responsibility for administration and enforcement of the **Code**, ruled that Division IX did not apply to the situation under consideration. There is no appeal procedure from such a decision set forth in the **Code**.

14 Justice Gruchy relied on various pronouncements of the Supreme Court of Canada to this effect, beginning with the decision of Estey J. at p. 14 of *St. Anne Nackawic Pulp & Paper Co. v. C.P.U., Local 219* (1986), 28 D.L.R. (4th) 1 (S.C.C.) which was followed by the British Columbia Court of Appeal dealing with the *Code* in *A'Hearn v. T.N.T. Canada Inc.* (1990), 74 D.L.R. (4th) 663 (B.C. C.A.) as follows:

> Since **St. Anne** was decided there has been a clear message from this court and from other courts in Canada that it would be wrong for the court to assume a jurisdiction parallel to that of specialty labour tribunals and other specialty tribunals to deal with claims such as those forming the subject of this appeal. For the courts to do so would be to frustrate the comprehensive scheme assigned by Parliament to the other tribunals whose sole work is to address and supervise these matters.

15 Justice Gruchy also cited *Gendron v. Supply & Services Union of the P.S.A.C., Local 50057*, [1990] 1 S.C.R. 1298 (S.C.C.). Justice L'Heureux-Dube stated at pp. 1326-7:

> It is clear then that this court has enunciated a principle of deference, not only to decision-making structures under the Collective Agreement but as well to structures set up by labour legislation and in general to specialized tribunals operating within their fields of expertise...
>
> As the statute is applicable in the present case, the respondent in this case cannot base his claim on the common law but must instead have recourse to the statute. For the above reasons, I would also conclude that the statutory duty owed to the respondent was one that must first proceed to the decision-making structure assigned this task under the legislation, the Canada Labour Relations Board. There is no original jurisdiction in the ordinary courts to decide the matter, only the ability to review Board decisions in the very limited parameters contemplated by the privative clause.

16 Justice Gruchy declined jurisdiction in the following words:

> Justice L'Heureux-Dube went on to conclude that the Courts owe deference to decision-making structures set up by labour legislation in general. In this case the appropriate officer pursuant to the **Code** ruled that Division IX does not apply. Deference requires this court to honour that decision — even though it is one by which jurisdiction was declined. I conclude that to apply a sanction against Imperial by ordering 16 weeks' pay in lieu of the notice requirement of **s. 212** would amount to an interference with and intervention in the process contemplated by the **Code**. Part of that process includes a mechanism in **s. 248** whereby the Minister of Labour may cause an inquiry to be made into and concerning employment. In addition, an inspector may be designated by the Minister who, pursuant to **s. 251**, is empowered to order the payment of wages to employees entitled to them. That is the remedy which Mr. Conrad seeks by this action to have imposed by the Court. An order by the Court paralleling the **Code's** process would, in my view, be inappropriate.

17 The issue of jurisdiction to enforce a statutory breach by granting a civil remedy is closely related.

Enforcement of a statutory breach

18 Justice Gruchy cited the decision of LaForest J. writing for the majority of the Supreme Court of Canada in *Frame v. Smith* (1987), 42 D.L.R. (4th) 81 (S.C.C.), at pp. 115 -117:

> But what really determines that matter, in my view, is that any possible judicial initiative has been overtaken by legislative action.
>
> . . . . .
>
> It seems obvious to me that the legislature intended to devise a comprehensive scheme for dealing with these issues. If it had contemplated additional support by civil action, it would have made provision for this....
>
> In adopting this position, I am merely following the approach taken by this court in a number of recent cases. In ***Board of Governors of Seneca College of Applied Arts and Technology v. Bhaduaria*** (1981), 124 D.L.R. (3d) 193..., the court had to deal with the issue whether the repeated denial of employment on the ground of racial discrimination gave rise to a common law tort. As in the case here, a comprehensive statute, the **Ontario Human Rights Code**, R.S.O. 1970, c. 318, had been enacted to deal with the problem in the face of rudimentary common law development. As here too, the substance of the right was defined by the statute and an array of remedies had been devised to enforce it. Laskin C.J.C., speaking for the court, at p. 200 D.L.R., p., 189 S.C.R. made it clear that there was no room "to create by judicial flat an obligation ... to confer ... [a] benefit upon certain persons ... solely on the basis of a breach of a statute, which itself provides comprehensively for remedies for its breach."...
>
> More generally, what the present action appears to contemplate is the enforcement of a statutory duty, or what amounts to a the same thing, an order made by virtue of a statutory discretion, by means of a civil action rather than by means of the remedies provided by the Act. This court had occasion to deal with that issue in ***The Queen in Right of Canada v. Saskatchewan Wheat Pool*** (1983), 143 D.L.R. (3d) 9.... The court flatly rejected the notion of a nominate tort of statutory breach; if the legislature wished to provide for a civil action, it held, it could do so. Any other course would simply allow the courts to choose, in no predictable fashion, to grant a civil remedy for a statutory breach whenever they thought fit...

19 Justice Gruchy concluded that the *Code* is a comprehensive statutory scheme with its own enforcement mechanisms. It makes no allowance for enforcement by private civil action. "It is my conclusion that this action is, in effect, an attempt to have the Court enforce what the plaintiff sees as a statutory obligation." He found that such a course was not mandated by the circumstances, which would not translate to the remedy sought. "...[T]his court should not resort to it."

20 Justice Gruchy appears to have concluded, as the authorities he has cited suggest, that while the jurisdiction of the Supreme Court of Nova Scotia is not extinguished by the parallel process established of the *Canada Labour Code*, the court's jurisdiction has become redundant and should not be exercised, particularly in a manner which would interfere with the alternative procedure contemplated by the *Code*. The *Code* makes no provision for enforcement of Division IX by individual employees in a civil action, and to attempt to entertain such an action would result in undesirable hybridization of the two approaches. For example, remedies against an employer under Division IX are predicated on conviction for an offence, which requires proof beyond a reasonable doubt, which is not the standard in a civil action seeking damages.

21 In my view Justice Gruchy committed no error in declining jurisdiction, and I agree with the reasoning and conclusions. While this disposes of the appeal, I will more briefly review the additional issues.

The form of the Action

22 Justice Gruchy's disposition of the form of the appellant's action was listed as a ground of appeal but not argued as an issue. I include mention of it not for its present relevance but because it may contribute to the factual context.

23 The workers were advised of the impending change on January 7, 1998, and told they would be offered employment with the purchaser commencing on the closing date about February 7, 1998. Those who signed releases would receive a cash settlement "in recognition of the fact that there may be some differences in the terms and conditions of employment." These severance packages were equivalent to three to eleven weeks' pay. Nineteen of the affected employees accepted the packages;

the others, including Mr. Conrad, did not and refused to sign releases. Thirty-one of the employees were promoted by Algoma to higher classifications than they had held at Imperial.

24 The appellant, contended that Imperial's move was a group termination. He applied in the Supreme Court of Nova Scotia, purportedly on behalf of the employees in the group he said he represented, for an injunction restraining Imperial from terminating the employment of the affected workers until Division IX was complied with. Associate Chief Justice Kennedy, as he then was, found it to be an arguable issue whether Division IX applied. He denied the injunction because a remedy could be found in damages.

25 Justice Gruchy explained how the matter then came before him:

> On April 2, 1998, Mr. Conrad filed an additional affidavit in which he stated that after the decision of Justice Kennedy, he and his fellow employees of Imperial had in fact taken employment with Algoma. He said that he had instructed his counsel to seek leave of the Court to amend the Originating Notice Application, dated January 20, 1998, by "deleting the application for injunction ... and substituting in its place the words an order requiring Imperial to pay the employees of its East Coast Marine Division whose employment was terminated effective February 1, 1998 sixteen (16) weeks pay in lieu of the notice required by Division IX of the **Canada Labour Code**."
>
> The applicant does not appear to have pursued his stated intent to make application to the court for leave to amend the Originating Notice, Application, and in fact the Originating Notice remains as it was initially framed. The parties, however, appear to have acted on the assumption that leave of the Court had been obtained and the amendment made. I will act on the same assumption. That is, this is an application for an order requiring Imperial to pay the various employees of its East Coast Marine Division 16 weeks' pay in lieu of the notice required by Division IX of the **Canada Labour Code**.

26 In considering the form of the action Justice Gruchy concluded that Mr. Conrad had no right to ask for remedies affecting other people: "if Mr. Conrad has any right of action, he has taken it in the wrong form."

27 The question whether Mr. Conrad was acting for other employees rather than for himself alone is no longer an issue on appeal. There are other apparent deficiencies of form, possibly subject to correction by amendment, but the form of the action is no longer a live issue both because of the conclusions reached as to jurisdiction and the appellant's acceptance of the finding that he was acting for himself alone. Evidentiary deficiencies were also identified. Justice Gruchy had no evidence of the benefits allegedly lost by the transfer to Algoma or of the compensation package offered or accepted by Imperial. It is noteworthy that Division XIV of Part III of the *Code* dealing with unjust dismissal, which the appellant's action resembles, provides statutory remedies for unjust dismissal but specifically preserves civil remedies as well. That Division is not at issue in this appeal.

Transfer or Termination

28 Ignoring the conclusions as to jurisdictional issues for the moment, Mr. Conrad's case depends for its substance on the determination whether he and his fellow employees were terminated by Imperial or transferred to Algoma. The appellant argues, and the trial judge found, that all other requirements necessary to bring Division IX into play had been met. A finding of termination was crucial. The trial judge found, to the contrary, that there had been a transfer. The appellant contends the trial judge erred in law, essentially because he did not find that the absence of a reference to s. 189 in Division IX rules out transfer.

29 Section 189 of the *Canada Labour Code* provides:

> **Sec. 189**. (1) Where any particular federal work, undertaking or business, or part thereof, or in connection with the operation of which an employee is employed is, by sale, lease, merger or otherwise, transferred from one employer to another employer, the employment of the employee by the two employers before and after the transfer of the work, undertaking or business, or part thereof, shall, for the purposes of this Division, be deemed to be continuous with one employer, notwithstanding the transfer.

30 Section 189 occurs in Division IV dealing with annual vacations, but it is specifically incorporated into a number of other divisions as follows: Division VII, "Reassignment, Maternity Leave and Paternity Leave" (*Section 209*(*5*): Division VIII, "Bereavement Leave" (*s. 210*(*4*); Division X, "Individual Terminations of Employment" (*Section 234*); Division XI, Severance Pay"; Division XIII, "Sick Leave", (*Section 239*(*5*)); Division XIII.1, "Work Related Illness and Injury" (*Section 239.1*(*11*)) and Division XIV, "Unjustified dismissal" (*Section 246* (*1*)).

31 The absence of a provision incorporating *s. 189* into Division IX appears to be the strongest argument put forward by the appellant that the relocation of the Imperial work force with Algoma must be considered a termination rather than a transfer. The significance of the omission cannot be ignored, as Mr. Conrad's counsel emphasizes. It would be contrary to sound principles of statutory interpretation to treat its absence as an oversight and to read it into Division IX. Rather, it must be seen as having been excluded to serve a purpose known to Parliament.

32 However a deeming provision such as *s. 189* is merely a judicial shortcut. When specified conditions are met, a certain result is presumed. When there is no deeming provision, it is necessary to determine the result by weighing the evidence. There is nothing in the *Canada Labour Code* to preclude an adjudicative authority from reaching a result on the evidence identical with a result that could have been deemed had an appropriate statutory device been provided. The route is different, but the destination may be the same. It cannot be said that the Imperial employees must, as a statutory imperative, have been terminated and not transferred to Algoma because *s. 189* is not incorporated into Division IX.

33 This view is reinforced when Division IX, which applies only to groups of fifty or more employees, is read in the context of the *Canada Labour Code* as a whole. The most closely related provision is Division X, "Individual Terminations of Employment," into which *s. 189* is incorporated. Terminations of 49 or fewer employees are treated as individual terminations under Division X, because 50 people are the minimum number necessary for a group termination under *s. 212*.

34 To pursue this reasoning, when requisite conditions are fulfilled an employer with 49 or fewer employees which sells its business may be deemed to have transferred its work force. This would not be the case if the group of employees numbers fifty or more; then it would have to be determined on the evidence as a matter of fact whether the employees were terminated or transferred. If they are found to be terminated, 16 weeks' notice would have to be given to the Minister, a joint planning committee would have to be formed, and binding arbitration would become a possibility.

35 It would seem reasonable that Parliament should have intended that questions important to the futures of large groups of employees should be determined by proof rather than presumption. On the other hand, it would have been remarkable had Parliament expressed its intention to completely exclude the important concept of transfers when larger groups are involved, as the appellant urges, by a device so subtle as the mere omission of a reference to *s. 189* in Division IX in the statute.

36 In *Saan Stores Ltd. v. Nova Scotia (Labour Relations Board)* [reported, (1999), 173 N.S.R. (2d) 222 (N.S. C.A.)] 148507, February 2, 1999, the issue was whether the appellant was a successor employer under *s. 31*(*1*) of the *Trade Union Act*, R.S.N.S. 1989 c. 475 when the business of the bankrupt employer of unionized employees was transferred to the appellant by the trustee in bankruptcy. This was answered affirmatively by the Labour Relations Board of Nova Scotia and upheld by the Supreme Court of Nova Scotia and this court. The question whether the employees had been transferred was considered to be one of fact to be determined by the Board from the evidence, and reviewable only on the standard of patent unreasonableness.

37 In the present case Justice Gruchy weighed the evidence and found as a matter of fact that Mr. Conrad was transferred and not terminated. He stated:

> Unquestionably, Imperial ended its employment relationship with each of the employees. All criteria serving to identify an employer/employee relationship as between Conrad and Imperial ended. But Human Resources Development Canada and Imperial both said the employment of the employees in question was not terminated; the employment was transferred. Indeed, it is clear on Mr. Conrad's evidence that there was no loss of employment for him or for any of his fellow employees. By their acceptance of employment with Algoma, Mr. Conrad and his fellow employees all appear to have consented to the exchange of employers. Imperial takes the position that it did not terminate employment of those concerned, but rather,

ensured the continuation of their employment with another employer. This is the crucial question with respect to **s. 212**. All other conditions relative to the applicability of **s. 212** are present. That is, there was a group of fifty or more employees involved whose employment by Imperial was terminated. If there was a termination of employment, then the Minister was entitled to sixteen weeks' notice and a copy of that notice was to be given to the employees affected.

Mr. Conrad has pointed to ***In re Rizzo and Rizzo Shoes Ltd.*** (1998), 154 D.L.R. (4th) 193. That case, however, ... is distinguishable on its facts. In that case there was a termination of employment from the perspective of both employer and employee. There is no mention in the report of arrangements having been made by the employer for the continued employment of its employees, as in the case before me. The case is not helpful in addressing the factual situation here.

In my view, there is no question as to the purpose or the scheme of the **Canada Labour Code**. Both are abundantly clear. The **Code** would clearly have required notice to the Minister if the employment of Mr. Conrad and his fellow employees had been terminated without arrangements for continued employment by Algoma.

I have concluded that in the circumstances of this particular case Mr. Conrad suffered no termination of employment. His employment was continued by the new employer. Accordingly Imperial was not under an obligation to give the Minister notice of termination; in fact, the Minister declined notice. From the subjective perspective of Mr. Conrad and his fellow employees, there was no termination of employment within the meaning of Division IX of the **Code**. The intention of the notice period referred to in **s. 212** is to minimize the adverse effects which may be suffered by employees who will be losing employment. Here there was no termination of employment by either Mr. Conrad or his fellow employees within the meaning of Division IX of the Code.

38 The respondent argued that *s. 189* did apply to Mr. Conrad because, while he was part of the larger group contemplated in *s. 212*, he nevertheless remained an individual subject to transfer under Division X. It is not necessary to decide this point but in the circumstances of this case it gains some plausibility because of the finding that Mr. Conrad was acting as an individual and not representing a group.

39 If the proper exercise of the court's jurisdiction had permitted him to rule on the merits, Justice Gruchy's finding that Mr. Conrad was transferred and not terminated would have been sufficient to determine the appeal. Even if it was possible to agree that Parliament intended that employees meeting the relevant criteria should receive pay in lieu of the sixteen weeks of notice to the Minister required under *s. 212*, that section is not engaged because of Justice Gruchy's finding that Mr. Conrad was transferred and not terminated. It is not necessary to rule on the point, but I would find it difficult to disagree with Justice Gruchy's conclusion that Parliament did not intend to equate sixteen weeks' notice to the minister with sixteen weeks of pay in lieu to employees.

40 In the present circumstance, his conclusion that the employees were transferred and not terminated would have been a factual finding on the evidence to which the trial judge is entitled to deference. This court has consistently followed the statement of the law expressed in the judgment of McLachlin J. in *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital* (1994), 162 N.R. 161 (S.C.C.) in which she stated at p. 167:

> It is by now well established that a Court of Appeal must not interfere with a trial judges conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only interfere if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it (authorities omitted). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The findings of fact and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

Conclusion

41 I have not been satisfied that Justice Gruchy erred in dismissing the appellant's claim on any of the issues raised in this appeal. I would dismiss the appeal with costs which I would fix at $1,000 plus disbursements.

Glube, C.J.N.S. **and** ***Pugsley, J.A.*****:**

42 We Concurred.

Appeal dismissed.