INTERNAL REVIEW DECISION

July 22, 2014

Mr. Jorge P. Segovia
Cox and Palmer
Suite 1000, Scotia Center
235 Water Street
St. John's, NL A1B 1B6

Dear Mr. Segovia:

[redacted]

I have reviewed, in accordance with *Section 46* of the *Workplace Health, Safety and Compensation (WHSCC) Act* (here in referred to as the "Act"), all submissions with respect to your request for a determination as to whether an action brought by [redacted] (Plaintiff) represented by Mr. John Sinnott of the law firm Lewis, Sinnott, Shortall, Hurley, against your clients, [redacted] (1st Defendant) and [redacted] and [redacted] (2nd Defendants) is prohibited by Section 44 of the Act.

This review stems from a Statement of Claim originally registered with the court in 1997 [redacted] by the [redacted] The Statement of Claim was amended on two occasions by the plaintiff's representative; the first being September 28, 2006 with the second being January 21 2011.

BACKGROUND INFORMATION

On April 5, 1995 [redacted] (the worker) while employed as a Mechanic with [redacted] (the employer) sustained physical injuries when a tractor-trailer slid off blocks pinning him underneath same. [redacted] sustained injuries to his abdominal area. The submitted claim was accepted by the Commission and the worker received ongoing benefits. He continues to receive long-term benefits from the Commission.

Through a Statement of Claim, the plaintiff indicates, that as a result of negligence by the first and one or both of the second defendants, he sustained serious and permanent personal injuries and is seeking special damages, general damages, and interest pursuant to the Judgment Interest Act RSN 1990.

The plaintiff claimed compensation from the WHSCC due to the seriousness of his injuries and the fact he had no immediate income. [redacted] On September 21, 1998 the defendants requested a determination by the Commission whether the action, commenced by the plaintiff, was statute barred.

On February 26, 1999, Internal Review Specialist, Mr. Keith Hutchings determined the action was not statute barred by the Act. The defendants applied for judicial review. On December 11, 2011 the court quashed the February 26, 1999 determination by the Commission. The plaintiff requested review through the Court of Appeal. On July 17, 2003 the appeal was dismissed.

On June 15, 2005 the defendant again sought a determination by the Commission as to whether the action commenced by the plaintiff was statute barred. On September 28, 2006 the plaintiff provided an amended Statement of Claim. On May 22, 2009 Ms. Kathy Lewis-Field, Internal Review Specialist, determined the action brought by the plaintiff was statute barred. The plaintiff requested a review of the decision through the court.

On August 9, 2010 the court quashed the May 22, 2009 decision of the Commission and referred the issue back to the WHSCC. It was found the decision of the Internal Review Specialist lacked proper analysis and understanding of the legislation under which the Commission must operate.

On November 30, 2010, I commenced the process of seeking submissions from all parties in order to complete a determination under Section 46 of the Legislation. On January 24, 2011, I received your first submission on behalf of the defendants.

The Plaintiff proceeded to the court questioning the Commission's authority to complete a *Section 46* determination. In April 2012 the court ruled the Commission does have the authority to make such determinations under the provisions of the Act.

Subsequently, I requested response from the plaintiff regarding your application. On May 30, 2012 the plaintiff proceeded to the Court of Appeal regarding the April 2012 determination of the lower court. In February 2013 the Court of Appeal denied the plaintiff's appeal and held that the WHSCC had jurisdiction under all provisions of the Act with regard to determinations under Section 46.

As requested by the plaintiff, an oral hearing was conducted on May 1 and 2, 2013. Subsequent to the hearing, on May 31, 2013 the defendant supplied a further brief with additional documents for consideration in support of their position. On June 14, 2013 the plaintiff supplied their rebuttal. Finally, on July 2, 2013 the defendant provided their last brief in support of their position.

Mr. Jorge P. Segovia
[redacted]
July 22, 2014

STATEMENT OF CLAIM

The plaintiff indicates the first defendant is a body corporate duly incorporated under the laws of the Province of Newfoundland and Labrador and was the owner of a 1985 Tractor-Trailer (international) bearing Newfoundland license plate number [redacted] (the truck). The defendant's truck is a motor vehicle duly registered under the Highway Traffic Act of Newfoundland and Labrador. The second defendants reside at [redacted] in the province of Newfoundland.

The plaintiff indicates on or about July 4, 1995 the defendant's truck was involved in an accident at [redacted] whereby the truck's driveshaft and air tanks were damaged. It is indicated the second defendants manually disconnected the truck's air brakes, including the parking or emergency brakes. On the following day the defendants brought the truck, with the air brakes still disengaged, from [redacted] to their yard [redacted] This was completed by means of a flatbed trailer and truck owned by the first defendant and operated by an employee of the first defendant. On the morning of July 5, 1995 the defendant's moved the truck from the flatbed trailer onto the defendant's parking lot by means of a front-end loader and a chain whereby the back of the defendant's truck involving both sets of rear double wheels was raised and the defendant's truck was backed off the flatbed on the front wheels of the said truck.

The plaintiff notes the front-end loader is a motor vehicle owned by the first defendant and is registered under the Highway Traffic Act of Newfoundland and Labrador, with a registered plate and licensed to be operated on the roads of the province. The plaintiff indicates the front-end loader was used to move the defendant's truck into the defendant's garage. It is noted the front-end loader was operated by [redacted] (second defendant) with another employee sitting in the cab of the truck and steering same. It is noted the second defendant brought the front-end loader up against the rear of the truck pushing the defendant's truck on its front wheels into the garage. When the front end loader and truck were in the garage with the front wheels of the truck on the floor, the rear was elevated and blocks were placed under the rear wheels of the truck with the truck then being lowered onto same. The chain was then taken off the bucket of the front-end loader and remained hooked to the truck.

It is claimed the defendants brought the front-end loader to the front of the truck and another chain was used to hoist the front of the truck by means of the front-end loader. Once the front of the truck was hoisted and blocks were put underneath the front wheels of the truck the front wheels were then lowered onto the blocks. This left the truck elevated on four blocks. It is noted the defendant's truck was on blocks with the brakes manually disengaged including the parking brake. It is also noted the defendants left the truck's parking brake button in the on position falsely showing the parking brakes were engaged. It is indicated the defendants had negligently tampered with the brakes and negligently placed the vehicle raised on blocks without brakes being engaged.

The plaintiff states that on the morning of July 5, 1995 he was asked by his employer and supervisors (the defendants) to enter the garage to effect repairs to the defendant's truck. It is noted the plaintiff checked to ensure the truck's parking brakes were on. It is indicated the parking brake button was in the on position which indicated to the plaintiff the parking brakes

were on when in fact they were not and that he was not informed of same. The plaintiff notes that approximately 8:30 AM on July 5, 1995 having checked that the parking brakes were on proceeded to get underneath the truck to begin the process of replacing a rear end pinion seal on the truck. The plaintiff notes application of air from an air gun in order to remove a nut to replace the seal on the front differential of the rear double axel. When power was applied by means of the air gun to the nut, the truck rolled ahead and off the blocks and as such the plaintiff sustained crush injuries to his lower abdominal area.

The plaintiff claims being brought to hospital by the second defendant, [redacted] during which time he was advised the defendant had forgotten to inform that the brakes had been disconnected. The plaintiff claims the first and second defendants failed to inform him the brakes had been disconnected and further failed to ensure the park brakes of the truck were engaged. As such the plaintiff indicates he sustained physical injuries.

The plaintiff outlines particulars of negligence of the first and second defendants and states that as a result of the negligence of the defendants he sustained serious and permanent personal injuries and claims special damages, general damages, interest pursuant to the Judgment Interest Act, R.S.N. 1990, c. J-2, costs, and any further relief as seen just by the court.

You present the defendant's version of the facts surrounding the injury. The defendants indicate on July 4, 1995 the truck was damaged while in the [redacted] area of the TransCanada Highway. The defendants indicate the driveshaft broke and punctured the truck's air tank causing a loss of air pressure. As a result the truck's air brakes could no longer function. The loss of air pressure also caused the maxi brakes to automatically engage preventing the truck's wheels from turning. The second defendant, [redacted] subsequently disengaged the truck's maxi brakes and the truck was pushed off the road.

On July 5, 1995, a worker transported the truck on the flatbed trailer, to [redacted] yard. A worker then pushed the truck, with the front-end loader, into the garage while another worker was in the truck steering it. Subsequently, using the front-end loader and a chain, the second defendant, [redacted] lifted the rear of the truck and lowered it on blocks that had been placed under the rear wheels by one or more workers. The truck's maxi brakes remained disengaged. The plaintiff then positioned himself underneath the truck to effect repairs to same. While conducting certain repairs, the truck rolled off the blocks, striking the plaintiff and causing physical injury.

LEGISLATION AND POLICY

Section 2 (1) of the Act states:

> *"In this Act*
>
> *(i) 'employer' means an employer to whom this Act applies and who is engaged in, about or in connection with an industry in the province and includes*

(i) a person having in his or her service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in a work in or about an industry within the scope of this Act,

(ii) the principal, contractor and subcontractor referred to in section 120,

(iii) in respect of an industry referred to in subparagraph (i) a receiver, liquidator, executor, administrator and a person appointed by a court or a judge who has authority to carry on an industry,

(iv) a municipality,

(v) the Crown in right of Canada where it may in its capacity of employer submit to the operation of this Act,

(vi) the Crown and a permanent board or commission of the Crown where the province may in its capacity of employer submit itself or a board or commission to the operation of this Act, and

(vii) in respect to the industry of fishing, whaling or sealing, the managing owner or person operating a boat, vessel or ship employed or intended to be employed in the industry."

Section 2 (1) of the Act states:

"In this Act

(o) 'injury' means

(i) an injury as a result of a chance event occasioned by a physical or natural cause,

(ii) an injury as a result of a wilful and intentional act, not being the act of the worker,

(iii) disablement,

(iv) industrial disease, or

(v) death as a result of an injury

arising out of and in the course of employment and includes a recurrence of an injury and an aggravation of a pre-existing condition but does not include stress other than stress that is an acute reaction to a sudden and unexpected traumatic event."

Section 2 (1) of the Act states:

"In this Act

(z) 'worker' means a worker to whom this Act applies and who is a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes

(i) in respect of the industry of fishing, whaling or sealing, a person who becomes a member of the crew of a boat, vessel or ship under an agreement to prosecute a fishing, whaling or sealing voyage in the capacity of a person receiving a share of the voyage or is described in the Shipping Articles as a person receiving a share of the voyage or agrees to accept in payment for his or her services a share or portion of the proceeds or profits of the venture, with or without other remuneration, or is employed on a boat, vessel or ship provided by the employer,

(ii) a person who is a learner, although not under a contract of service or apprenticeship, who becomes subject to the hazards of an industry for the purpose of undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment,

(iii) a part-time or casual worker, and

(iv) an executive officer, manager or director of an employer."

Section 43 (1) of the Act states:

"Compensation under this Act is payable

(a) to a worker who suffers personal injury arising out of and in the course of employment, unless the injury is attributable solely to the serious and wilful misconduct of the worker."

Section 44 of the Act states:

"(1) The right to compensation provided by this Act is instead of rights and rights of action, statutory or otherwise, to which a worker or his or her dependents are entitled against an employer or a worker because of an injury in respect of which compensation is payable or which arises in the course of the worker's employment.

(2) A worker, his or her personal representative, his or her dependents or the employer of the worker has no right of action in respect of an injury against an employer or against a worker of that employer unless the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer."

Section 44.1 of the Act states:

"(1) Section 44 shall not apply where the worker is injured or killed

(a) while being transported in the course of the worker's employment by a mode of transportation in respect of which public liability insurance is required to be carried; or

(b) as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment.

(2) In subsection (1) 'motor vehicle' means

(a) a motor vehicle

(i) registered under the Highway Traffic Act, or

(ii) authorized under section 12 or 17 of the Highway Traffic Act to be operated on a highway in the province without being registered under that Act,

whether or not it is being operated on a highway; or

(b) another motor vehicle while being operated on a highway in the province and for the purpose of this definition 'highway' means a highway as defined in the Highway Traffic Act."

Section 46 of the Act states:

"Where an action in respect of an injury is brought against an employer or a worker by a worker or his or her dependent, the Commission has jurisdiction upon the application of a party to the action to adjudicate and determine whether the action is prohibited by this Act."

Policy EN-19, ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT, of the Client Services Policy Manual states:

"POLICY STATEMENT

Entitlement to compensation is based on two fundamental statutory requirements:

1. *the worker meets the definition of 'worker' under subsection 2 (z) of the Act; and*

2. *the injury as defined under subsection 2 (o) is one arising out of and in the course of employment.*

This policy focuses on the established principles that have evolved to define 'arising out of and in the course of employment' within the compensation system. It also provides established guidelines on the extent and/or limitations of coverage in varying circumstances.

GENERAL

Arising out of and in the course of employment

Section 43 of the Act states:

(1) Compensation under this Act is payable

(a) to a worker who suffers personal injury arising out of and in the course of employment, unless the injury is attributable solely to the serious and wilful misconduct of the worker; and,

(b) to the dependents of a worker who dies as a result of such an injury.

The term 'arising out of and in the course of employment' means the injury is caused by some hazard which results from the nature, conditions or obligations of the employment and the injury happens at a time and place, and in circumstances consistent with and reasonably essential to the employment. Arising out of refers to what caused the injury; in the course of refers to the time and place of the injury and its connection to the employment."

Position of Defendants

The defendants take the position that the truck which the plaintiff was repairing was not in "*use*" at or around the time of the accident. The truck was disabled and unable to fulfill its purpose. The defendants indicate Section 44.1 (1) (b) can only be applied if the accident involved the "*use*" of a motor vehicle. The defendants indicate applying its ordinary meaning, the word "*use*" does not include repairs, maintenance, etc. Consequently, this was not an accident involving the "*use of a motor vehicle*".

As for any other motor vehicles such as the front-end loader that helped to place the truck in the garage, any connection between that vehicle and the accident is far too remote to trigger Section 44.1 (1) (b). The fact that such a vehicle may have been in use at some point prior to the accident is merely incidental and fortuitous. Consequently, this was not an accident involving the "*use*" of a motor vehicle.

The defendants also contend that Section 44.1(1) (b) includes, by intent, a requirement of automobile liability insurance. They conclude this is the premise behind the exemption to the statutory bar. You note, by way of legislative history and documentation, that the intent of the legislation is to ensure the integrity of the no-fault system by ensuring an alternate source of payment for injuries occurring in the transportation industry.

The defendant's position is that the action taken by the plaintiff is statute barred.

Plaintiff's position

The plaintiff takes the position that the injuries sustained were as a direct result of the "*use*" of two motor vehicles. They state that the defendant's truck was not the only motor vehicle in use at the time of injury but rather the front-end loader was also involved. It is the position of the plaintiff that the use of the front-end loader is not remote enough to exclude its use in the accident. They also take the position that maintenance and repairs to motor vehicles constitute "*use*".

The plaintiff indicates that Section 44.1 (1) [b] does not include a requirement of automobile liability insurance. They disagree with the defendant's position on the triggering of this section of legislation. The plaintiff notes that the language of the statute is clear and not ambiguous and therefore there is no requirement to avail of extrinsic aids to determine the meaning of the section in question.

It is the plaintiff's position that as the accident did involve the use of a motor vehicle, Section 44.1 (1) (b) does apply and therefore the action is not statute barred.

REASONING AND CONCLUSION

I have reviewed and considered all submissions from the parties with respect to this case. My task is to determine, in accordance with Section 46 of the Act, whether the action brought by [redacted] against [redacted] and [redacted] is barred by the Workplace Health, Safety and Compensation Act. I have reviewed the arguments put forth by both parties, briefs submitted, court cases, and other documentation. I have also considered the proceedings from the oral hearing of May 1 and 2, 2013.

Section 43 of the Act provides that compensation is payable to a worker whose injuries arise out of and in the course of employment. Hence, there are two basic statutory requirements which must be met. An individual must meet the definition of "*worker*" according to section 2 (1) (z) and consideration must be given to the definition of "*injury*" as outlined under section 2 (1) (o). When this criterion is met, compensation entitlement is provided.

In this determination, I have considered the following issues:

1. Was [redacted] a "*worker*" within the meaning of the Act?
2. Was [redacted] an "*employer*" within the meaning of the Act?
3. Was [redacted] a "*worker*" within the meaning of Act?
4. Was [redacted] a "*worker*" within the meaning of the Act?
5. Did the injuries sustained by [redacted] *arise out of and in the course of employment*?
6. Did the injuries result from the "*use of a motor vehicle*"?

Section 2 (1) (z) of the Act directs that the Commission is to determine whether an individual is a "*worker*" within the meaning of the Act. In order to determine same, several criteria must be considered. A worker is a person who has entered into or works under a contract of service for apprenticeship, written or oral, express or implied, by way of manual labor or otherwise. From my review of the facts of this case, [redacted] was a Mechanic with [redacted] at the time of the injuries. He was completing repair work on the truck. I find these facts support he was a "*worker*" within the meaning of the Act. As we know, through the oral hearing, all parties agreed [redacted] was a "*worker*" within the meaning of the Act.

Section 2 (1) (j) of the Act outlines the requirements for consideration to be an "*employer*" within the meaning of the Act. According to Commission's records, [redacted] is a registered employer with Firm # [redacted]. Its primary industrial undertaking is that of construction/trucking. I find, in accordance with the Act, [redacted] was an "*employer*" at the time the injuries were sustained. I find they were carrying out business usual and incidental to their industry. Through the oral hearing, all parties agreed [redacted] Limited was an "*employer*" within the meaning of the Act and were carrying out business usual and incidental to their industry.

At the time of the injuries sustained by [redacted] both [redacted] and [redacted] were directors of [redacted] In accordance with Section 2 (1) (z) of the Act, I find both [redacted] and [redacted] were workers within the meaning of the Act.

The Commission determined [redacted] injuries "*arose out of and in the course of employment*". The claim was accepted under claim # [redacted].

The main issue in this case is whether [redacted] injuries resulted from the "*use of a motor vehicle*" as found in Section 44.1 (1) (b). This is the main focus of my determination and the issue which is in dispute between both parties. Both parties have provided their positions regarding this issue and their views on the intent of the statutory bar found under section 44.1 of the Act.

I will begin by indicating I will not be considering Section 44.1 (1) (a). The injuries sustained by the plaintiff were not incurred while being transported in the course of employment by a mode of transportation in respect of which public liability insurance is required to be carried. What is at issue is whether Section 44.1 (1) (b) applies in this case. Are the injuries, sustained by the plaintiff, as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment?

Sections 44 through 46 of the Act reflect what is referred to as the "*historic trade-off*". In return for a secure, no-fault system of compensation, injured workers lost the right to commence actions against another worker or an employer for injuries covered by the compensation scheme. Instead, guaranteed payment is ensured to workers when they incur injuries arising out of and in the course of employment. This also provides protection to the employer in that by paying premiums to the compensation system they are afforded protection from litigation so as to not pay twice for protection. The legislation provides certain exceptions to that principle. The exceptions are found under Section 44.1 of the Act. In this case, the plaintiff suggests that an exception to the statutory bar applies and they have the right to continue with the commenced action. The defendants disagree. The issue in this case is whether an exception as specified in Section 44.1 (1) (b) applies.

Intent of Section 44.1 (1) (b)

Both parties have provided a number of sources for consideration with respect to what the intention of the legislation is with respect to the statutory bar found under Section 44.1 (1) (b). These have included case law, principles of construction of statutes, excerpts from legislative authorities, Annual Reports of the Commission, media reports, memorandums from Commission's counsel, government documentation, and similar legislation from other jurisdictions. I will now outline the sources and indicate what relevancy they have to assist in determining the intent of the legislation. I have not assigned any specific order to the importance of the documentation outlined.

Documentation considered

Warford versus Weir's construction limited (2001)

The Commission determined that Section 44.1 (1) (b) of the Act applied to the facts. In making its determination, the Internal Review specialist found that there was no case law directly on point that would help him make a determination of the words "*use of a motor vehicle*" under Section 44.1 (1) (b) of the Act. He stated that he might have come to a different decision had he looked solely at the intent of the legislation, but felt compelled to follow the broad interpretation of the phrase use of a motor vehicle as found in insurance law. The court held the Commission exceeded its jurisdiction by incorrectly applying the rules of statutory interpretation. The question to be answered by the Commission involved the interpretation of legislation. The Internal Review specialist did not have expertise in statutory interpretation. He erred by failing to look at the intent of the legislation and using the case law from the insurance area to assist him in his determination. **(This case deals with the issue of statutory interpretation ultimately to determine the intent of the legislation)**

Warford versus Weir's construction limited (2003)

This was an appeal by the Workplace Health, Safety and Compensation Commission from a decision that its Internal Review specialist erred in his interpretation of the word "*use*" in the Act. The Commission's Internal Review specialist gave a broad meaning to the word use and concluded that the litigation was permitted. The review specialist found that the case law in the insurance context was clear on the meaning of the word. On judicial review, the court found

that the standard of review for the Internal Review specialist's decision was one of correctness as a result of his lack of experience in statutory interpretation. It found that the specialist should not have felt compelled to follow the case law without referring to the intent of the Act. It was held the appropriate standard of review for the Internal Review specialist's decision was that of patent unreasonableness. The decisions of the Commission were subject to a privative clause. However, the nature of the interpretation of the case did not give the specialist an advantage over the court on the basis of expertise. The specialist's interpretation of the law was patently unreasonable. He believed that the law required him to follow a particular course. **(This case deals with the issue of statutory interpretation ultimately to determine the intent of the legislation)**

Warford versus Weir's construction limited (2010)

This was an application for judicial review to quash a decision of the Workplace Health Safety and Compensation Commission in which it was determined that the action was statute barred. The Commission determined the action was statute barred by virtue of Section 44 of the Act. The Internal Review specialist interpreted the legislation and in doing so she considered the intention of the Commission in establishing the statutory bar. The application was allowed. The decision of the Commission was unreasonable as the specialist sought to discover the intention of the Commission rather than the legislation in establishing the statutory bar to such actions and the exemption from the bar in the case of injuries resulting from accidents involving the use of a motor vehicle. The decision was also unreasonable on the basis of fundamental errors of statutory interpretation based on the wording of the statute. **(This case deals with the issue of determining the intention of their legislation)**

R. vs. Multiform Manufacturing Co.

This is a criminal law case dealing with a search and seizure warrant. A warrant under Section 443 of the criminal code was issued to have access to books, records and documents for the purposes of an investigation into allegations of certain Bankruptcy Act violations. The warrant was issued and officers searched the premises and seized various documents. The appellant applied to have the warrant quashed on the grounds that the search should have been conducted pursuant to Section 6 (2) of the Bankruptcy Act, not Section 443 of the criminal code. **(This case gives direction to the proper analysis to discover the intention of Parliament through the interpretation of a statute and to accept the statute by examining the actual words and to read them in their ordinary and natural sense)**

Worker's Compensation Act, 1983 (NFLD) (Piercey Estate vs. General Bakeries Ltd.)

This case examined and reaffirmed the history and objectives of the Workers Compensation System. It confirmed the cornerstone of the system is the *"historic trade-off"*. This essentially indicates employers pay assessments based on annual earnings of the workers who forfeit their right to sue an employer or another worker covered under the Act unless the statutory bar applies. Essentially, employers are protected by the statutory bar and workers receive benefits under the act. **(This case confirms the fundamental principles of the Workers Compensation System and assists in statutory interpretation)**

Sullivan and Driedger on the Construction of Statutes

This addresses the *Presumption of Straightforward Expression* and *Presumption against Tautology*. This addresses the issue that in so far as possible legislatures will adopt a simple, straightforward and concise way of expressing themselves. Also provides discussion regarding use of extrinsic aids to assist in interrupting legislation. **(Provides guidance in the interpretation of statutes)**

1991 and 2000 Annual Reports of the Commission

These provide information on the overall status of the Commission for the respective calendar years.

Excerpts from The Evening Telegram of April 1992

This provides information on the financial concerns of the Commission. **(Demonstrates the financial concerns of the Commission and changes needed to sustain viability of the system)**

Excerpt from Interpretation Act

This is a statute enacted by the Newfoundland and Labrador legislature dealing with the interpretation of statutes. **(This provides guidance to the rules of construction as to how statutes are developed and applied)**

Archean Resources Ltd. vs. Newfoundland (Minister of finance)

This case was an appeal by Archean from judgment that the net smelter royalty Archean received from Diamond Fields Resources Inc. under a license to explore for minerals was a royalty payable in respect of a grant of the right to engage in mining operations and was subject to Newfoundland's royalty tax. The tax applied to royalties received from the operators of any mine developed with respect to the Voisey's Bay mineral deposits. Archean argued that on a proper interpretation of legislation, the royalty in question was not subject to the tax because it was in consideration of the assignment of a mineral exploration license granted at a time when the Voisey's Bay deposits had not been discovered and which did not grant any right to engage in mining operations. The grant entitled Archean to a 3% net smelter royalty on any subsequent mineral production from those lands. Because the Voisey's Bay ore deposit was not yet developed, no royalty payments had been made. The court held that the appeal was dismissed. The interpretation applied by the court and the decision resulting therefrom, could be justified in terms of its consistency and promotion of the broad purpose of the legislation and was not inconsistent with the language of the legislative text when read in proper context. **(This case deals with the issue of legislative interpretation)**

Warford vs. Weir's construction limited (2012)

This case deals with an appeal by the plaintiff from an order staying his action against the defendants. The case gives the history of the court proceedings with respect to the two previous decisions rendered by the Commission. The court held that the appeal by Warford was dismissed and the appeal by Weir's was allowed. It is noted the Commission has exclusive jurisdiction to determine whether Warford's action against Weir's was statute barred and it was appropriate to stay his action pending determination by the Commission. **(This case defines the Commission has exclusive jurisdiction to determine whether an action is statute barred and references the statutory bar which is central to the workers compensation system)**

October 19, 1993 memorandum from Catherine J. Crosbie, (General Counsel/corporate Secretary of the Commission) to the Commission's Board of Directors. **(Deals with the issue of recommended legislative changes to the minister regarding definition of "motor vehicle" and the exception to the statutory bar)**

March 3, 1993 correspondence to the Deputy Minister from Catherine J. Crosbie, General Counsel of the Commission. **(Assists in determining the interpretation of the intent of the statutory bar with respect to motor vehicles and liability insurance)**

Rizzo and Rizzo Shoes Ltd.

In this case, a bankrupt firm's employees lost their jobs when the receiving order was made with respect to the firm's property. Wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The Ministry of Labor audited the firm's records to determine if there was any outstanding termination or severance pay was due to the former employees under the Employment Standards Act and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the grounds that the bankruptcy of an employer did not constitute dismissal from employment and accordingly created no entitlement to severance, termination or vacation pay under the Act. The Supreme Court of Canada allowed the appeal. The court determined that although the legislation of the Employment Standards Act suggested that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be found in the wording of the legislation alone. The court indicated that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. The court approved the use of legislative history in interpreting the legislation. **(This case provides guidance in indicating that it is appropriate to examine legislative history to determine the overall intent of legislation)**

Newfoundland and Labrador (Attorney General) vs. Newfoundland and Labrador (Information and Privacy Commissioner)

This is a case which involved an appeal by the Privacy Commissioner from a declaration that the Department of Justice was not obliged to produce, for review, certain records requested by the Commissioner for the purpose of verification of a claim that the records were subject to solicitor/client privilege. In December 2008 an employee of the Department of Justice sought

access to certain documents in the file of the department's solicitor relating to an internal human resources issue. The requester was advised the application was denied on the basis that the requested information was subject to solicitor/client privilege. A request was then generated that the Commissioner review the refusal to provide the records. An analyst with the Commissioner's office requested that the department forward a copy of the requested records pursuant to legislation under the Access to Information and Protection of Privacy Act (ATIPPA). The department again refused to release the requested records on the basis that they were subject to solicitor/ client privilege. The Supreme Court of Canada allowed the appeal. The court determined the applications judge erred in law declaring that the Commissioner was not entitled to access to the requested records for review and verification of the claim to solicitor client privilege. The court made use of extrinsic sources as part of the process of interpreting ATIPPA. The court considered a report prepared by a review committee as well as statements made in the House of Assembly and sources of legislative history could be relied upon, by a court, in determining the proper interpretation of the statute. **(This case provides guidance in indicating that extrinsic sources can be considered in order to determine interpretation of statute)**

Diamond Estate vs. Robbins

This case arose by where an appeal by Diamond, administrator of the estate, from the decision of the Supreme Court, granting Robbins to file a counterclaim against the estate more than five years after the commencement of the action. The case involved a motor vehicle accident which occurred in 1998 whereby the driver of one of the vehicles was killed. In February 1999 Diamond brought an action in negligence against Robbins. Robbins filed a defense shortly thereafter. No further action was taken until 2004. In 2003 Robbins had retained additional counsel to make a claim for personal injuries he suffered in the accident. Counsel had applied for leave to file a counterclaim. The judge noted where an action was commenced against the deceased person, the Survival of Actions Act modified the Limitations Act but the Limitations Act overrode the limitation period if the action was a counterclaim. The Court of Appeal dismissed the appeal in that leave to file a counterclaim may be granted after the expiration of the limitation period stipulated in the former Survival of Actions Act. The court, in its interpretation, referred to both a working paper and a report of the Newfoundland Law Reform Commission to assist in its ruling. **(This case provides guidance in noting that the court accepts the use of extrinsic documentation to interpret statute)**

Keddy vs. New Brunswick (Workplace Health, Safety and Compensation Commission)

This is a case whereby Keddy was at work when she accidentally sliced part of her left ring finger with an industrial saw. After surgery, Keddy received an intramuscular injection to control pain. It is alleged that the nurse negligently administered the injection near the sciatic nerve causing further pain. Keddy commenced litigation against the nurse and the hospital. The Appeals Tribunal determined the action was barred as the intramuscular injection was a direct result of the earlier work related injury. The nurse and hospital argued that the issue of whether Keddy had been in the course of her employment at the time she sought medical assistance with respect to a work-related injury was a question of fact and therefore not subject to review. The court of appeal determined the tribunal did not err in concluding that Section 11 (1) of the Act provides an exception for injuries where arising from accidents involving the use of a motor

vehicle or private insurance coverage is required barred Keddy's claim against the nurse and the hospital. As a matter of law, a worker who was injured while receiving medical treatment with respect to a work-related injury was acting within the course of his or her employment at the time of the subsequent injury. There was a sufficient causal connection between the initial and subsequent injury. The latter was a necessary incident of the former. This conclusion was consistent with the objectives of the no-fault compensation scheme. **(This case provides guidance in assisting to interpret Section 44.1 of the WHSCC Act which is modeled after the New Brunswick Legislation exception regarding motor vehicles. In the legislation the exception is noted to be for injuries arising from accidents involving the use of a motor vehicle where private insurance coverage is required. As the Newfoundland exception is modeled after the New Brunswick exception then it is reasonable for Newfoundland to follow the same application.)**

Bell ExpressVu Limited Partnership vs. Rex

This is a case where the appellant engages in the distribution of direct to home television programming and encrypts its signals to control reception . The respondents sell decoding systems to Canadian customers that enable them to receive and watch US programming. They also provide US mailing addresses to their customers who do not have one since the broadcasters will not knowingly authorize their signals to be decoded by persons outside the United States. The appellant, as a licensed distribution undertaking, brought an action in the court pursuant to sections of the Radio Communications Act. They requested in part an injunction prohibiting the respondents from assisting resident Canadians in subscribing to and decoding United States programming. A section of the Radio Communication Act enjoins the decoding of encrypted signals without the authorization of the lawful distributor of the signal or feed. The judge declined to grant the injunctive relief. A majority of the Court of Appeal held there was no contravention of Section 9 (1) (c) where a person decodes unregulated signals such as those broadcast by the United States companies and dismissed the appeal. The court held the appeal should be allowed in that Section 9 (1) (c) of the Act prohibited the decoding of all encrypted satellite signals with a limited exception. The court discussed that it was necessary in every case for the court charged with interpreting a provision to undertake the preferred contextual and purposive interpretive approach before determining that words of the statute are ambiguous. It noted this required reading the words of the act in their entire context and in their grammatical and ordinary sense harmoniously within the scheme of the Act, the object of the Act, and the intention of Parliament. The court indicated that when words are read in their grammatical and ordinary sense in harmony with the legislative framework in which the provision is found and there is no ambiguity, accordingly there is no need to resort to any of the subsidiary principles of statutory interpretation or in essence extrinsic aids. **(This case assists in determining whether or not the use of extrinsic aids is appropriate to determine the intent of the legislation)**

New Brunswick (Human Rights Commission) vs. Potash Corporation of Saskatchewan Inc.

This was an appeal case by the New Brunswick Human Rights Commission of the decision concerning a complaint by an employee who was asked to retire at the age of 65 pursuant to the mandatory retirement policy contained in his employer's pension plan. He alleged it

constituted age discrimination. Age discrimination provisions in the Human Right's Code were expressly declared not to apply to a decision to terminate an employee if the decision was taken pursuant to a bona fide pension or retirement plan. A board of inquiry found that a bona fide pension plan was subject to a three-part occupational requirements test to show the plan was bona fide. Through judicial review the decision was set aside. The court applied a different test indicating the pension plan must be both bona fide and reasonable in order for the pension plan to be deemed a bona fide one. The Court of Appeal dismissed the Commission's appeal and allowed the employers cross-appeal in ruling that the reasonableness portion of the test did not apply. It concluded that the applicable test was whether the plan was subjectively and objectively bona fide. The court held the appeal was dismissed. It noted the three-part test did not apply in that pensions were traditionally treated differently in most human rights codes but they rose from different protective concerns. It went on to indicate the test had a subjective and objective component and the pension plan had to be a legitimate claim, adopted in good faith and not for the purpose of defeating protected rights. It noted the plan had to be evaluated, not a piecemeal examination of particular terms. The court went on to note that unless there was evidence that the plan as a whole was not legitimate it would be found immune from the conclusion that a particular provision compelling retirement at a certain age constituted age discrimination. With respect to principles of statutory construction the court commented that the starting point of statutory construction is the words of the statute and that if they are clear that is the end of the matter. However the court went on to note that in this case they were not clear and when confronted with a phrase that could be interpreted in more than one way it was reasonable to turn to principles of statutory interpretation which could require consideration of the words of the provision, read as a whole, in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. **(This case provides assistance in determining the intent of the legislation with regard to Section 44.1 (1) (b) by considering the process of statute construction.)**

Reference re: Judicature Act (Alberta)

This is a case whereby a judge of the Alberta court gave an authorization to intercept private communications but refused to grant an order authorizing entry upon private premises to install and to remove the microphone. The Alberta government, as a result of this judgment, referred questions to the Court of Appeal raising the issues of whether a part of the criminal code, Parliament intended by necessary implication to empower police officers to enter private property to install listening devices when they act on an authorization to intercept private communications and also whether a judge may expressly authorize such entry when he granted authorization for an interception of private communications. The court answered both questions in the negative. The Court of Appeal held that the appeal should be allowed and the two questions should be answered in the affirmative. In the case the court made reference to several recent judgments it had made regarding the admissibility of extrinsic materials where issues of statutory interpretation were raised. It was noted that from those cases it was clear that extrinsic evidence is not receivable as an aid to the construction of the statute. It noted this was of course true whether or not the case raised a constitutional issue. No direct assistance can be derived from the materials relied upon by the appellant in deciding the intention of Parliament. **(This case provides insight and comment as to the court's opinion regarding the use of extrinsic aids and possible ambiguity in statute)**

February 28, 1992 Memorandum from the Minister of Employment and Labor Relations to Executive Council with the subject "*Operational, Policy and Legislative Changes in Workers Compensation*" This document included recommendations submitted to Cabinet regarding amendments to the Workers Compensation Act **(This document assists in determining the intent of the legislation regarding the exemption to the statutory bar)**

August 10, 1992 Memorandum from the Minister of Employment and Labor Relations to Executive Council with the subject of "*An Act to Amend the Worker's Compensation Act, 1983*" **(This document assists in determining the intent of the legislation regarding the exemption to the statutory bar)**

Upper Churchill Water Rights Reservation Act 1980 (Newfoundland)

In this case, Churchill Falls Corporation, a federally incorporated company, developed the hydroelectric resources of Churchill Falls under a statutory release granted by Newfoundland and provided for in the Churchill Falls Corporation Limited Act, 1961. In 1969 the company signed a contract with Hydro-Québec whereby it agreed to supply, and Hydro-Québec agreed to purchase, virtually all of the hydroelectric power produced at Churchill Falls for a term 65 years. Delivery of power to Québec began in 1971 and the development was completed by 1976. Subsequently, since 1974 Newfoundland attempted unsuccessfully to recall more power than was provided for in the power contract. In 1980 the Newfoundland Legislature enacted the Upper Churchill Water Rights Reversion Act providing for the reversion to the province, free and clear of all encumbrances and claims, of the rights to use of the waters and the waterpower rights described in statutory lease. The Act also provided for the repeal of the Churchill Falls Corporation Limited Act, 1961, including the statutory lease, and for the expropriation of the company's fixed assets used in the generation of electric power. The Act limited compensation to creditors and shareholders. Newfoundland referred the matter to the Court of Appeal which held that the Act inter vires the Newfoundland Legislature. It was held the appeal should be allowed. It was noted that in constitutional cases, extrinsic evidence may be considered to ascertain not only the operation and effect of the impugned legislation but also its true object and purpose as well. The court noted they agreed with the Court of Appeal in the present case that extrinsic evidence was admissible to show the background against which the legislation was enacted. There was also agreement that such evidence was not receivable as an aid to construction of the statute. **(This case assists in determining how courts see the use of extrinsic evidence in determining the intent of statutes)**

Global Securities Corporation vs. British Columbia (Securities Commission)

In 1988 the appellant entered in a memorandum of understanding with the United States Securities and Exchange Commission (SEC) whereby the signatories agreed to provide the fullest mutual assistance including obtaining documents and taking evidence from persons when requested by another signatory. In the same year British Colombia amended its Securities Act. Included in the new provisions was Section 141 (1) (b) which authorized the appellant's Executive Director to order a registrant to produce records to assist in the administration of the securities laws of another jurisdiction. In 1996 the appellant made an order under the section against the respondent pursuant to a request from SEC which was investigating possible violations of US law by the respondent and or its employees. The

respondent provided part of the information requested but refused to provide anything else. Accordingly, the appellant served the respondent with a notice of hearing under Section 161 (1) of the Securities Act to determine if it was in the public interest to order the respondent to comply with the order for production. The respondent in turn filed a petition in the British Columbia Supreme Court seeking a declaration that Section 141 (1) (b) was ultra vires the province. The petition was dismissed. The Court of Appeal, in a majority decision, reversed that judgment. It was held that the appeal should be allowed and that Section 141 (1) (B) of the Securities Act was in intra vires the province. In this case, the court indicated it is well settled that the court is free to consider relevant, reliable, extrinsic evidence. However the court took liberty to outline the proper uses of extrinsic evidence as had been indicated in other court cases. **(This case provides guidance into the use of extrinsic evidence and how that evidence is to be used and considered)**

Workers Compensation Act of Manitoba Section 9 (7.1)

This section of legislation indicates the statutory bar does not apply where the accident results from the use or operation of a motor vehicle, as defined in the Highway Traffic Act, by a person other than the employer of the worker, a worker of that employer or a director of a corporation that is the employer. **(Similarity is drawn to Section 44.1 (1) (b) in that the legislation in Manitoba does not mention insurance as being a requirement. This assists in determining the intent of the legislation)**

The Highway Traffic Act of Manitoba

This provides the definition of a motor vehicle in the province of Manitoba. It notes the definition has nothing to do with insurance or registration. **(This provides guidance to assist in determining the intent of the legislation)**

Worker's Compensation act of Nova Scotia section 28 (2)

This section of legislation indicates the statutory bar does not apply where the injury results from the use or operation of a motor vehicle registered or required to be registered pursuant to the Motor Vehicle Act. **(This provides guidance to assist in determining the intent of the legislation)**

R. vs. Sall (Nfld. C. A.)

This case was an appeal by an accused from a decision allowing an appeal from his acquittal on a charge of refusing to comply with a breathalyser demand. At trial, the judge found as a fact that the accused had an inadequate understanding of the breathalyser demand. The appeal was allowed indicating the appeal judge could not make his own findings of primary facts. The trial judge's finding was not reviewable. The trial judge heard conflicting evidence from two witnesses. It was noted the judge appeared to go further than expressing a reasonable doubt. It was noted the appeal judge was not open to make a reassessment of the evidence and substitute his own findings of primary facts. The matter went to the court on the basis of a question of law only. It was noted it would only compound the error for the court to make its own assessment of the evidence except to the extent that it was necessary to determine

whether or not the appeal judge exceeded the scope of his authority. The principle of law in this situation is that an appeal judge cannot substitute his own finding of fact for that of the trial judge where there is evidence to support the latter. In this case, the court references the principle of "*maxim expression unius exclussio alterius*". The court cautions that this is one of the perhaps few so-called rules of interpretation which has more frequently been misapplied and stretched beyond their due limits. **(This case gives guidance surrounding the issue of interpreting the intent of the legislation regarding the exception to the statutory bar)**

Eco-Zone Engineering Ltd. vs. Grand Falls – Windsor (Town)

This case is an appeal from a decision of the trial division in which the appellant was denied the declaratory relief requested. The parties were signatories to a construction contract. The case turned on the interpretation of the contract. In this case the court references the interpretation of legislation. It was noted the respondent replied that a term was useful only in the context of the interpretation of the legislation. The court stated no authority had been provided for such a limitation however, the case law was filled with warnings regarding the blind application of the maxim. It was noted it was a valuable servant but a dangerous master. It was also noted the expression only operates where not outweighed by other interpretive factors. The court referenced Driedger on the Construction of Statutes (3rd edition) which indicates an implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating expressed reference to a thing, the more telling the silence of the legislation. **(This case gives guidance to the principle of "*maxim expression unius exclussio alterius*". It offers assistance in determining the intent of legislation regarding the exception to the statutory bar)**

What was the intent of the provincial legislation when Section 44.1 (1) (b) was given royal assent? Both parties have provided argument with respect to the intent of the legislation regarding this section.

The Supreme Court of Canada has provided direction on the interpretation of statutes. The court has indicated that when the words used in the statute are clear and unambiguous, no further step is needed to identify the intention of Parliament. It is indicated a simple reading of the statute will suffice. However the court has also confirmed on numerous occasions that the preferred approach to statutory interpretation is that which has been set out by Elmer Driedger in construction of statutes which indicates, "*Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.* (Emphasis mine).

In reviewing documentation leading up to the time of the introduction of the exception to the statutory bar, submissions from the plaintiff clearly demonstrate the Commission was in a situation of financial difficulty. There was great concern the system could collapse and thus the "*historic trade-off*" would be lost. As such, change was needed to the system to counteract the

problem. The provincial legislature saw it appropriate to introduce an exception to the statutory bar to allow recovery of costs. The intent behind the exception can be seen in the 1993 correspondence provided from the Commission to the deputy minister recommending changes to the exception with respect to motor vehicles. Further, memorandums from the Minister of Employment and Labor Relations to the Executive Council recommended changes to the Act. From this documentation it is clear the intent was to access liability insurance which was in place with respect to accidents occurring in the transportation sector. This change would assist to accomplish the goal of ensuring the Worker's Compensation System would not cease to operate.

While Section 44.1 (1) (a) clearly references the requirement of public liability insurance, Section 44.1 (1) (b) does not state this. The latter section indicates the statutory bar does not apply as a result of an accident involving the "*use of a motor vehicle*". There is no reference to the requirement of insurance. Does this mean that the provincial legislation intended that accidents involving motor vehicles were limited to recovery while being transported in same only or that there was another form of insurance in place which could be accessed? To answer this it is necessary to consider Section 44.1 (2).

The provincial legislation provides a clear definition of motor vehicle. First and foremost, it indicates a motor vehicle is "*registered under the Highway Traffic Act*". Inherent in that act is that a motor vehicle, at a minimum, is required to carry public liability insurance. Given this and considering the documentation which I have already outlined, I find it is clear the intent of the introduction of the exception was to avail of liability insurance, whether it is public or private, to alleviate the cost to the system for accidents in the transportation industry. Particularly with respect to motor vehicles the minimal requirement is public liability insurance. I am satisfied it is appropriate to interpret that the intent of the provincial legislation was to allow recovery, from other sources, the costs of claims. The cost could be recovered, at a minimum, through public liability insurance. The exception to the statutory bar was implemented to achieve this goal.

What does "*use of a motor vehicle*" mean within Section 44.1 (1) (b)

The parties have provided documentation in support of their arguments as to the interpretation of this portion of the legislation and exactly as to what "*use*" of a motor vehicle constitutes. As I did previously, while listing same, I have not placed the documents considered in any particular order of importance.

Documentation considered

Citadel General Assurance Co. vs. Vytlingam

This case involves Michael Vytlingam and his family driving on the highway when their vehicle was struck by a large boulder that had been dropped from an overpass by two individuals (Farmer and Rayner) who had brought the boulder to the overpass in Farmer's motor vehicle. Michael Vytlingam suffered catastrophic injuries. His mother and sister suffered serious psychological harm. The injured motorists were seeking insurance coverage under their own automobile insurance policy. In order to recover under the policy the injuries had to arise

"*directly or indirectly from the use or operation*" of Farmer's vehicle. The Supreme Court applied the two-part purpose and chain of causation test. The court found that the purpose test was satisfied since transportation is what motor vehicles are used for. However, the court held that the chain of causation had been broken by an intervening act of negligence. The court found that the rock throwing was an activity entirely severable from the use or operation of Farmer's vehicle. The court held that there was no coverage under the policy. **(This case deals with the severing of a relationship and use of vehicle to an accident/injury)**

Czarnuch et al. vs. Devon Transport (1989)

In this case the insured was in the business of renting vehicles. It rented a truck to the plaintiffs. A fire started in the box of the truck and damaged the plaintiff's belongings due to the negligent "*hard wiring*" of the dome light in the box which could not be shut off when the vehicle lights were on. The insured settled the plaintiff's action against it and sought indemnification from its insurer. The trial judge found that the insurer was entitled to rely on an exclusion for claims arising out of the "*ownership, use or operation by or on behalf of the insured*" of any vehicle. The insurer appealed. The appeal was allowed. The exclusion did not apply for two reasons. The claim arose out of the negligent maintenance of the truck, not out of the use or operation of it. When the insured did maintenance work on the truck, it was not "*using or operating*" the vehicle. Secondly, the plaintiffs did not use the vehicle on behalf of or for the benefit of the insured. They had exclusive possession of the vehicle and used it solely for their own use and benefit. While the insured received the benefit from the rental payments, it did not receive any benefit from the use or operation of the vehicle. **(This case supports the view that "*use*" and "*maintenance*" have different meanings. It provides guidance with respect to interpretation of the word "*use*")**

Lumberman's Mutual Casualty Co. vs. Herbison

This case involves a hunter, Wolfe, accidentally shooting a member of his hunting party, Herbison, while driving his truck to a designated hunting spot. It was just before sunrise. Wolfe, believing he saw a deer in headlights, got out of his truck and inadvertently shot Herbison. The issue before the court was whether the injury sustained by Herbison arose "*directly or indirectly from the use or operation*" of an automobile. The court applied a two-part test that had been traditionally applied by the courts. It concluded that although the purpose test was satisfied given the truck was being driven at the time of the shooting, the chain of causation test had not been satisfied and ruled that the policy does not apply. The court concluded there had been an intervening act of negligence that had been the cause of the accident. The court held this was independent of the use and operation of the truck. **(This case supports the view that the injuries did not arise from the "*use*" of the motor vehicle – an intervening event severed the relationship)**

The Canadian Oxford Dictionary/Webster's 9th New Collegiate Dictionary provides a dictionary definition of the word use. **(provides guidance in interpreting the meaning of the word use)**

Excerpts from the Automobile Insurance Act **(demonstrates exclusions sanctioned regarding operation or repair of an automobile, exemptions from liability, and minimum liability under policy)**

Excerpts from the Highway Traffic Act **(distinguishes between ownership, maintenance, operation or use of a motor vehicle and provides information regarding the requirements of registration and insurance of motor vehicles, etc)**

Excerpt from Section 21 of the Judgment Recovery (NFLD) Limited Act **(demonstrates distinction between ownership, maintenance, operation, or use of a motor vehicle)**

Standard Automobile Policy provides information with respect to third-party liability, accident benefits, loss of or damage to insured automobiles, general provisions, definitions and exclusions.

Clarke Estate vs. Marine Support Services Ltd.

This is a case where a worker was killed on a barge while he was performing welding when he was struck by a container being loaded by a boom truck. An action was commenced against the employer. The employer argued the action was statute barred. The Internal Review specialist determined the action was statute barred and in the decision incorrectly cited a reference to "*use and operation*" of a motor vehicle. The court quashed the decision and referred the matter back to the Commission for a new determination given the insertion of the word "*operation*". **(This case does not offer any assistance as it deals with the issue of a multipurpose vehicle and the decision was quashed as a result of insertion of the word "*operation*" which is not seen in the exception to the statutory bar)**

Elias vs. Insurance Corporation of British Columbia

This is an insurance law case whereby the plaintiff was carrying out repair on a vehicle during non-business hours at his employer's premises. The vehicle was registered in the name of the plaintiff's wife. The worker was being carried out with her consent. A spark from a welder used by the plaintiff set the vehicle a fire. The fire spread throughout the building causing extensive damage. The work the plaintiff was completing on the vehicle was to repair and prevent rust by filling screw holes left in the doors after removing chrome stripping. The employer's insurer, having paid the cost to repair the premises, turned to the plaintiff in a separate action. The plaintiff looked to the Insurance Corporation to defend and to indemnify him for damages that may be found against him in the action. It was found coverage was for loss or damage which arose out of the ownership, use or operation of a vehicle. It was found there was an unbroken chain of causation and the work being done went to the "*use*" of the vehicle. It was found prevention of deterioration is an integral part of use. **(This case discusses issues to assist in the determination of "*use*" of a motor vehicle)**

Monroe Estate vs.Johnston

This is an insurance law case where a claim was made for damage to a home caused by a fire that resulted from grinding worn spots on the exhaust assembly of a car in the garage of a home. It was in close proximity to a container of volatile solvent. It was alleged that the fire and

damage were caused by negligence in ownership, use or operation of a motor vehicle. It had been counter argued that the actions amounted to "*maintenance*" of the vehicle and not "*use or operation*". It was also argued there was a break in the chain of causation. The court held the action was allowed and damages were awarded in that the work being completed was not "*maintenance standing by itself*" but fell within the "*use*" of the vehicle. **(This case discusses issues to assist in the determination of "*use*" of a motor vehicle)**

Strickland vs. Miller

This is an insurance law case whereby the defendant was driving the vehicle of her sister when one of the tires came off and collided with the vehicle operated by the plaintiff. This caused personal injuries to the plaintiff. It was alleged that the tire had come off as it had been improperly installed. The plaintiff commenced an action. The court held the claim fell within the exclusion contained in the homeowner's policy. It was noted the phrase "*use or operation of a vehicle*" referred to ordinary activities to which automobiles are put. It noted repair work was necessary to the operation of a motor vehicle and the act of replacing the tire was therefore a use of the vehicle. **(This case discusses issues to assist in the determination of "*use*" of a motor vehicle)**

Stevenson vs. Reliance Petroleum Ltd

This is an insurance law case whereby a company engaged in the distribution of petroleum products employed in that business tank trucks with gasoline and other products were delivered to service stations. While gasoline was being delivered from one of the tank trucks it escaped as a result of the negligence of the driver of the truck and caught fire which caused extensive damage to the service station and to the property of others on the premises. The company paid the claims of the persons damaged and sought indemnity under two policies of insurance. The company was entitled to recover under one policy but not the other. The first policy, an automobile liability policy, expressly insured against liability "*arising from the ownership, use or operation*" of the vehicle. It was found the loss clearly arose from the "*use*" of the tank truck within the meaning of the insuring clause. The second policy was a general liability policy and specifically excluded "*any claim arising or existing by reason of any motor vehicle*". **(This case discusses issues to assist in the determination of "use" of a motor vehicle)**

Gramak Ltd. Et al. vs. State Farm Mutual Automobile Insurance Co.

This is an insurance law case whereby an individual was completing work on a vehicle. He was drilling a hole through the trunk whereby a wire could lead to a travel trailer which would then be hauled by the vehicle to take a vacation. During the process of drilling, the gasoline tank was punctured and a fire followed which caused damage to the plaintiffs. The plaintiffs brought an action to recover said damages. The court held that the drilling of the hole was a use of the motor vehicle in that repairing is also considered use. The decision was appealed and through the Court of Appeal it was agreed that damages arose from the use of the motor vehicle. **(This case provides guidance in determining the "*use*" of a motor vehicle)**

Kracson et al. vs. Pafco Insurance Company Ltd.

This is an insurance law case whereby the plaintiff had removed parts from a motorcycle and was cleaning same with a gas soaked rag when suddenly a flash of flames occurred. The cylinder head was dropped into a container of gas which resulted in a fire occurring causing substantial damage to the plaintiff's residence. The defendant, his insurance company, had issued a standard form automobile liability policy and the defendant agreed to indemnify the plaintiff against liability imposed by law upon him for loss or damage arising from the ownership, use or operation of the motorcycle. The court held that the damages arose from the use of the motorcycle and that the insurer should indemnify the plaintiff accordingly. **(This case discusses issues to assist in determining "*use*" of a motor vehicle)**

Shelton vs. Insurance Corporation of British Columbia

This is an insurance law case whereby the plaintiff was draining gasoline from the fuel tank of his motorcycle in the basement when a fire occurred causing damage to his landlord' s residence. The judge dismissed the action on concluding that the insurer was entitled to deny liability under an exemption clause in the policy which excluded coverage in respect of claims made against arising from... ownership, use or operation of any motorized vehicle unless the vehicle was expressly covered which in this case the policy did not cover the motorcycle. The plaintiff appealed and the court dismissed same indicating the plaintiff was using the motorcycle when the fire started and it was as a result of this use the fire started accordingly the risk was exempted. **(This case discusses issues to assist in determining the "use" of a motor vehicle.)**

Pilliteri vs. Priore et al.

This is an insurance law case whereby while body repairs were being completed on a car. A fire started through the negligent use of an oxyacetylene torch. The fire destroyed the premises where the car was being repaired. Claims were made against insurance policies and it was found that the act of repair was a use of the vehicle within the meaning of the automobile policy. It was determined there was no intervening cause leading to the damage and negligence did not break the chain of causation. The negligent use of the vehicle caused the damage. **(This case discusses issues to assist in determining the use of a motor vehicle)**

Royal Insurance Company of Canada and Guardian Insurance Company of Canada

This is an insurance law case whereby a storage shed was purchased and arranged for delivery to a home. The shed was delivered by a truck which towed a forklift. The forklift was used to unload the shed and position it on the property. The truck was parked on the slope with the forklift in neutral position. As the hitching mechanism on the front of the forklift was detached from the hitch on the back of the truck, the forklift rolled downhill causing bodily injury to an individual who was helping to unhitch the forklift against the truck. It was found that the individual who parked the truck was negligent in that he failed to properly advise or instruct the injured individual respecting the danger in unhitching the forklift and that he failed to secure the

forklift before unhitching it. Under the insurance policy, the insurer was obliged to indemnify the insured against the liability imposed by law for loss or damage arising out of the ownership, use or operation of the automobile and resulting from bodily injury. It was found that unhitching the towed equipment from the delivery truck was an integral and necessary part of accomplishing the truck's purpose, which was making a delivery. **(This case discusses issues to assist in determining the use of a motor vehicle)**

Superior Equipment Haulers (1966) Limited vs. Zürich Insurance Company (1988) Ltd.

This is an insurance law case whereby the insured tractor was towing a non-owned trailer. The trailers brakes failed and it had to be left on the highway. The driver left it parked on the highway with one to four feet extending onto the traveled portion. As a result, the trailer was struck by another vehicle. The court found that the loss was covered as it did not arise from the ownership, use or operation of the insured tractor. The plaintiffs appealed. The appeal was allowed. The damage was seen to have been caused first and foremost by the use of the tractor in positioning the trailer. It was seen to be the negligent use or operation of the insured tractor which caused the damage. **(This case discusses issues to assist in determining the use of a motor vehicle)**

Oesh vs. Ratz

This is an insurance law case whereby a tractor and trailer were separately insured. At issue was the liability of the two insurers for a collision with the parked trailer. The driver parked the empty trailer behind a loaded trailer and unhitched it and proceeded to park the tractor in front of the loaded trailer so that it could be attached to his tractor. In the process of unhitching the empty trailer, the lights on the trailer were extinguished. The driver retrieved the warning devices from the tractor with the intention of placing them behind the empty trailer. Before he could do so, the plaintiff collided with the empty trailer. The court held the action was allowed against both insurers. It noted there were two acts of negligence. First, the tractor was used to park the trailer and disconnected without adequate protection. Secondly the trailer was used, again without being seen that its use could be maintained without danger to the public. **(This case discusses issues to assist in determining the use of a motor vehicle)**

Furlong vs. O'Donnell's Trucking Ltd.

This is a Workers Compensation case whereby the defendants sought to have the court declare the plaintiff's action was statute barred by virtue of the New Brunswick Worker's Compensation Act. In this case, a worker was not suing his employer but was suing the owner of the transport truck that he was offloading as a forklift operator. The worker was injured when the forklift fell off the end of the tractor trailer. The tractor trailer moved away from the ramp which the forklift operator was driving over. The plaintiff's action was not statute barred as it was seen the accident fell under the exception involving use of the motor vehicle. The court held that offloading was a well-known activity to which tractor-trailers were ordinarily put and consequently confirmed the action was not statute barred. **(This case discusses the use of a motor vehicle)**

Cochrane vs. ING Halifax Insurance Co.

This is an insurance law case whereby an unoccupied motor vehicle owned by the applicant exited his property and collided with the vehicle owned and operated by the plaintiff. The plaintiff commenced a lawsuit against the applicant for damages arising out of the collision. Damages were sought through the homeowners broad form policy. The insurer indicated the event was excluded. The court found that "*parking*" is one of the ordinary and well-known roles or modes which most vehicles occupy most of the time. It was noted the chain of causation test was satisfied. **(This case discusses issues surrounding use of a motor vehicle)**

It has been suggested by the plaintiff that use includes operation, maintenance, etc. of a motor vehicle. In the opposite, the defendant indicates none of the foregoing are seen to be use of a motor vehicle. References have been made to the Highway Traffic Act, court cases, and other authorities to support both sides of the arguments presented.

In reviewing other provincial legislation, particularly the Highway Traffic Act and the Judgment Recovery (NFLD) Ltd. Act, it can be seen both provide inclusions of ownership, maintenance, operation, or use of a motor vehicle. In reviewing Section 44.1 (1) (b) it includes, "*use* "only. Can it be said the provincial legislation intends that use would also include maintenance or repair?

The Canadian Oxford dictionary definition of the word "*use*" is given as, *"employ (something) for a particular purpose... exploit (a person or thing) for one's own end... the act of using or the state of being used... employ, apply… would be in a position to benefit from"*. This definition does not include repair or maintenance. The provincial legislature did not specifically state what was meant by "*use*". With regard to Section 44.1 (1) (b), it is clear they did not include such words as operation, repair, or maintenance of a motor vehicle. Therefore, it is a reasonable conclusion that, "*use*" does not include same but refers to the purpose of a motor vehicle and that the purpose is being fulfilled. I have given consideration to insurance law cases which discuss that "*use*" of a motor vehicle includes repairs, maintenance, etc. I find it is important to consider other legislation such as the Highway Traffic Act and the Judgment Recovery (NFLD) Limited Act which are both provincial statutes. In reviewing these provincial statutes it is clear there was a distinction made by the legislature in each of the statutes particularly to motor vehicles. Therefore, I find it more appropriate to follow the provincial legislature rather than how insurance law defines "use" of a motor vehicle.

The defendants have acknowledged that the flatbed, front-end loader, and truck are all motor vehicles and are registered under the Highway Traffic Act. This is not in dispute. What must be determined is whether the plaintiff was injured as a result of an accident involving the "*use*" of any of these motor vehicles. It has been suggested by the plaintiff that there is connection between the flatbed and front-end loader in respect of the accident. The defendants disagree and indicate the connection of both these vehicles had been broken.

With respect to the flatbed, it is indicated in the Statement of Claim that this motor vehicle transported the truck from [redacted] to the yard on the [redacted] Road. The purpose of a flatbed is to transport objects from one point to another. On the morning of July 5, 1995 the truck was removed from the flatbed by the front-end loader, another motor vehicle. I find this

supports that once the truck was removed from the flatbed, the purpose or "*use*" of the flatbed had been fulfilled. The flatbed was no longer a part of the equation and therefore a relationship to the accident was severed. We must also remember it is alleged that the negligence of the second defendants, by not informing of the brakes being disengaged, also had a role to play in the accident. This also severs the use of the flatbed. Given the circumstances I find this supports, with respect to the flatbed, that the worker was not injured "*as a result of an accident involving the use of a motor vehicle*"

With respect to the front-end loader, this motor vehicle maneuvered the truck from the flatbed into the garage so that repairs could be commenced. The front-end loader used chains and lifted the truck, one end at a time, so that blocks could be placed under same. Typically, the use of a front end loader is for construction. However, in this instance, it was being used for a different of purpose. However, that being said, once the truck was placed up onto blocks by the "*use*" of the front-end loader, its connection to the accident had been severed. The purpose of the front-end loader had been fulfilled. Again, similar to the flatbed, it is alleged that the negligence of the second defendants, by not informing of the brakes being disengaged, had a role to play in the accident. This also has a role to play in severing the use of the front-end loader. Therefore, given the circumstances, I find this supports with respect to the front-end loader, that the worker was not injured "*as a result of an accident involving the use of a motor vehicle*".

With respect to the truck, the purpose of same would be to transport tractor-trailers from one point to another. The circumstances of the case show the truck was not able to maneuver under its own power. It was in a state of disrepair. The truck's driveshaft and air tanks had been damaged. It was unable to maneuver on its own as it was up on blocks. The truck was not able to be used while being repaired. It was unavailable for use therefore unable to fulfill its purpose. The plaintiff was carrying out his normal duties of repairing the vehicle, and from my review, I am satisfied this activity does not constitute "*use*" of a motor vehicle. Therefore, with particular reference to the truck, I find the facts of the case support the worker was not injured "*as a result of an accident involving the use of a motor vehicle*".

SUMMARY

On the date of the accident, [redacted] was completing repairs to the truck. When applying an air impact gun to commence repairs the truck rolled off its blocks falling upon [redacted] causing his injuries. The truck had been placed upon blocks so that the repairs could be carried out. Two other motor vehicles, namely the flatbed and front-end loader, had assisted in the process of placing the truck in the garage. However, I find that any connection of these two motor vehicles to the accident in question had been severed. I find their purpose or "*use*" had been fulfilled. I also find the intervening event of the actions of the second defendants also severed any connection of the said two vehicles. With regard to the truck, it was in a state of disrepair and not able to fulfill its purpose. I find repairs/maintenance do not constitute use of a motor vehicle. Therefore, I find the plaintiff was not injured through the use of a truck.

Mr. Jorge P. Segovia

[redacted]

July 23, 2014

From my review of this case, I find [redacted] injuries "*arose out of and in the course of employment*" and did not involve the "*use of a motor vehicle by the worker or another person in the course of his employment*". I find the exception to the statutory bar does not apply. The action commenced by the plaintiff against the defendants is statute barred.

This is the final decision of the Commission with respect to this case. Enclosed you will find a copy of our certificate which may be filed with the court.

Sincerely,

Paul Tobin

Paul Tobin
Internal Review Specialist

PT:jh

c: Yvonne McDonald, Administrative Officer, Internal Review Division
c: Mr. John Sinnott, Lewis, Sinnott, Shortall, Hurley