



Workplace Health, Safety and Compensation Commission

3<sup>rd</sup>. Party Determination

November 20, 2015

Jorge P. Segovia  
Cox & Palmer Law Offices  
Suite 1000, Scotia Center  
235 Water Street  
St. John's, NL A1C 1B6

Dear Mr. Segovia:

[REDACTED]

I have reviewed, in accordance with Section 46 of the Workplace Health Safety and Compensation Act (herein 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 John R. Sinnott of the law firm Lewis, Sinnott, Shortall against your clients, [REDACTED] et al. is prohibited by Section 44 of the Act.

**BACKGROUND INFORMATION**

On July 5, 1995, [REDACTED] was injured while repairing a mobile crane in [REDACTED] garage during the course of his employment as a mechanic for [REDACTED]. [REDACTED] did not return to work following the accident and is currently in receipt of benefits from the Commission.

On February 3, 1997, an action [REDACTED] was commenced in the Supreme Court of Newfoundland and Labrador Trial Division in [REDACTED] name. The action was brought against [REDACTED]. The Commission was subsequently requested to determine if this action was barred by the Act. This issue was decided on two occasions by the Commission and in each case the determination was set aside upon appeal and was referred back to the Commission by the Court for a new determination. The most recent determination of July 22, 2014 by the Commission concluded that [REDACTED] action against [REDACTED] et al was prohibited by the Act.

On July 3, 1997, [REDACTED] commenced her own action [REDACTED] in the Supreme Court of Newfoundland and Labrador Trial Division against [REDACTED] et al. [REDACTED] alleged that, as a result of the injuries to her husband, she suffered loss of consortium and loss of servitium including, but not limited to, economic loss in an amount to be assessed. In her action she stated she was seeking "*damages both special and general against the defendants.*" [REDACTED] right of action was challenged by the defendants who requested a stay of [REDACTED] action, pending a determination by the Commission whether her action was prohibited by the Act. In July 2012 the Court determined that the Commission

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did not have jurisdiction to determine whether [REDACTED] action was permitted under the Act rather than [REDACTED] action proceed to the Supreme Court Trial Division. The stay requested by the Defendants was denied. The Defendants appealed this decision.

On December 21, 2012 the Newfoundland and Labrador Supreme Court – Court of Appeal allowed the appeal. The decision was set aside and a stay of action was granted pending a determination by the Commission as to whether [REDACTED] action was prohibited under the Act.

On September 10, 2014 you requested a determination from the Commission with regard to whether [REDACTED] action is barred under the Act and provided a submission in support of the Defendants [REDACTED] position that [REDACTED] action is barred.

On October 16, 2014 Mr. John R. Sinnott, counsel for the Plaintiff, [REDACTED], provided a submission in support of [REDACTED] right of action.

On November 18, 2014 you provided a response to Mr. Sinnott's submission.

### LEGISLATION AND POLICY

Section 2 (1) (f) of the Act states:

*"In this Act*

*"dependent" means a member of the family of a worker who is wholly or partly dependent upon his or her earnings at the time of the death of the worker or who, but for the incapacity due to the injury, would have been so dependent."*

Section 19 (1) of the Act states:

*"The Commission has exclusive jurisdiction to examine, hear and determine matters and questions arising under this Act and a matter or thing in respect of which a power, authority or distinction is conferred upon the Commission, and the Commission has exclusive jurisdiction to determine*

- (f) the existence of the relationship of a member of the family of a worker as defined by this Act;*
- (g) the existence of dependency"*

Section 19 (4) of the Act states:

*"The decisions of the Commission shall be upon the real merits and justice of the case and it is not bound to follow strict legal precedent."*

Section 43 (1) of the Act states:

*"Compensation under this Act is payable*

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- (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."*

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."*
- (3) An action does not lie for the recovery of compensation under this Act and claims for compensation shall be determined by the commission."*

Section 45 of the Act states:

- "(1) Where a worker sustains an injury in the course of his or her employment in circumstances which entitle him or her or his or her dependents to an action*
  - (a) against some person other than an employer or worker;*
  - (b) against an employer or against a worker of that employer where the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer; or*
  - (c) where Section 44.1 applies, the worker or his or her dependents, where they are entitled to compensation, may claim compensation or may bring an action."*

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."*

### Positions of the Parties

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In your September 10, 2014 submission you request that the Commission determine, pursuant to Section 46 of the Act, whether the action commenced by the Plaintiff against the Defendants is prohibited by the Act.

A copy of the Application for Determination was provided to the Plaintiff's lawyer, Mr. John R. Sinnott who responded in a submission of October 16, 2014. On November 18, 2014 you provided a further submission in response to Mr. Sinnott's October 16, 2014 submission.

**Position of the Defendants,** [REDACTED]

You submit that the action commenced by [REDACTED] should be barred pursuant to Section 44 (2) of the Act. You state that [REDACTED] action is "in respect of" her husband's injury without which she would have no claim and as such the action is barred. You also state that [REDACTED] was dependent, at least in part, on her husband's earnings at the time of his injury and as such meets the definition of a "dependent" under the Act. You go on to state that as the Commission determined on July 22, 2014 that [REDACTED] action against the defendants is barred by the Act then, as [REDACTED] is a dependent under the Act, her action must also be barred. You state this is consistent with the central role of the Statutory Bar which protects employers from suit. You state without protection for employers there would be no reason for them to fund the Worker's Compensation plan.

You go on to state that should any of [REDACTED] claims survive the statutory bar, such claims must be limited to non-pecuniary damages for the loss of her husband's affection and companionship.

You again reference, in your rebuttal to the plaintiff's submission, the historic trade-off upon which the worker's compensation system is built. You state that, having paid assessments to fund the Worker's Compensation system, employers and workers deserve protection, from both the worker and the worker's dependents. You state "In the circumstances, we have compensation-directly to the worker and indirectly to any dependents - in exchange for the loss of their right to sue." You state this result is consistent with the historic trade-off upon which the system is built. You state with this in mind it is only just that lawsuits, arising from workplace accidents, brought by dependents, ought to be barred. While I concur with your statement regarding the basis on which the worker's compensation system is based, I note that there are situations where third-party action can proceed. In particular, under Section 45 (1) (a) of the Act an action can proceed against a person other than an employer or a worker. For example, when a worker such as a letter carrier is injured on private property, this is considered a workplace accident but an action can proceed.

**Position of the Plaintiff, [REDACTED] as represented by John R. Sinnott with Lewis Sinnott Shortall**

Mr. Sinnott submits that [REDACTED] claim is for loss of consortium and loss of servitium. He states it is not her husband's claim, she is not claiming for injuries to her husband; her claim is for injuries to herself. Mr. Sinnott submits that the Workplace Health Safety and Compensation Act has no application to a wife whose husband is still living. He states that the Legislation does not give any entitlement to a wife to compensation if her husband is injured but is still living. Mr. Sinnott states that as [REDACTED] has no rights whatsoever under Worker's

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Compensation because her husband is still living, she has no right of action under the Act and is not covered by the bar of actions under the Act. Mr. Sinnott notes that the Act provides that a "worker or his or her dependents" may bring an action in certain circumstances however states that as [REDACTED] is still living, [REDACTED] does not meet the definition of dependent under the Act. He submits that the historic trade-off was right to compensation instead of rights of action and as [REDACTED] has no right to compensation the bar to action does not apply.

### REASONING AND CONCLUSION

I have reviewed and considered all the submissions from the parties involved in this case. My task is to determine whether the action brought against Weir's Construction et al by [REDACTED] is barred by the provisions of the Act. Section 19 (1) of the Act gives the Commission the exclusive jurisdiction to examine, hear and determine matters and questions arising under the Act including the existence of the relationship of a member of the family of a worker as defined by this Act and the existence of dependency. In making a determination as to whether [REDACTED] claim is barred by the provisions of the Act, I find that it must be determined whether [REDACTED] is covered by the provisions of the Act. [REDACTED] is not an injured worker but is the spouse of an injured worker. Section 44 (1) of the Act states that 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. In this particular case, it is acknowledged by all parties that it is [REDACTED] who is the injured worker and that [REDACTED] is not a worker under the Act. It must be determined therefore, if [REDACTED] is to be considered a dependent under the Act in which case the statutory bar would apply.

Section 2 (1) (f) of the Act defines a "dependent" as "a member of the family of a worker who is wholly or partially dependent upon his or her earnings at the time of the death of the worker or who, but for the incapacity due to the injury, would have been so dependent". It is acknowledged that [REDACTED] is still living therefore [REDACTED] does not meet the definition of "a member of the family who was wholly or partially dependent upon his or her earnings at the time of the death of the worker." The subsequent portion of the definition states "or who, but for the incapacity due to the injury, would have been so dependent." In considering this Section, I find that the references to "dependent upon his or her earnings" is significant. I find that this Section of the definition refers to situations where, upon the death of the worker, there may be no earnings to consider as the worker may have been incapacitated, for example in a coma for a period of time prior to death. I find this Section of the definition is to protect the family members of workers who may not have earnings at the time of the worker's death due to the nature of the condition. In this particular case, I conclude that, as [REDACTED] is still living, [REDACTED] does not meet the definition of "dependent" as per Section 2 (1) (f). I further find that Section 44 (2) of the Act which bars the right of action by a worker or his or her dependent against an employer or a worker of that employer does not apply in [REDACTED] case as she is not the injured worker in this case nor does she meet the definition of a "dependent".

### Case Law

As outlined in Section 19 (4) of the Act, the Commission is not bound by strict legal precedent. However, I have reviewed the cases submitted by the parties to determine relevance and applicability to the case at hand.

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**Butler vs. Worker's Compensation Commission**

The Plaintiffs, an injured worker, his wife (2<sup>nd</sup> Plaintiff), and son (3<sup>rd</sup> Plaintiff) issued a Statement of Claim against the Commission stating that the Defendant, the Workplace Health Safety and Compensation Commission was negligent in their duty of care to the injured worker. The Defendant sought leave to the Court to strike out the claims of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs, the wife and son, stating that the Defendant owed no duty of care to these Plaintiffs. The Court determined that it was necessary to ascertain whether or not the Act, in its totality, contemplates relationships under which the defendant could owe the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs a duty of care. The Court determined that *"the intent of the Act is clearly to provide benefits for injured workers and in certain cases, "dependents", as defined. However, it is clear from the definition of "dependent" in Section 2 (1) (f), that the second and third Plaintiffs are not dependents within the scope of the definition. Under the definition, there can be no dependent, unless the actual worker in question is deceased."*

**Analysis**

I conclude that the references by the Court regarding the definition of dependent under the Act are applicable in this case as it is to be determined whether [REDACTED] is a dependent within the scope of the Act.

**Budge vs. Calgary (City) Alta. C.A.)**

Mr. Budge, while in the course of his employment, was involved in a motor vehicle accident with a Light Rail Transit Vehicle, the property of the City of Calgary and operated by one of its workers. Both Mr. and Mrs. Budge commenced an action for damages. Mr. Budge claimed damages for personal injury and his wife claimed for loss of consortium. Section 18 (1) of the Alberta Worker's Compensation Act prevented Mr. Budge from taking action against his employer and he held that this Section violated his right to security of person as protected by Section 7 and 15 (1) of the Canadian Charter of Rights and Freedoms. The lower Court initially held that there was a violation of both he and his wife's Charter rights however this was overturned on appeal. The Appeals Court held that there was no violation of the right to life, liberty and security of person under Section 7 of the Charter of Rights and Freedoms. The damages in respect of injury were purely of an economic nature and pure economic rights were not included under Section 7 of the Charter. Therefore, the Alberta Worker's Compensation Act did not violate charter rights.

**Analysis**

In this case the lower Court overturned the Board's decision that the statutory bar applied to Mr. and Mrs. Budge's claims on the grounds that it infringed Section 7 and 15 of the Charter. It was noted by the Appeals Court that Mrs. Budge had settled her claim and she was no longer part of the appeal however the counsel for the Worker's Compensation Board requested the Appeals Court to deal with her claim as it relates to Section 7 of the Charter as there were a number of outstanding claims by dependents under similar circumstances which were awaiting the Court's decision on this case. The Court of Appeal overturned the Trial Judge's decision, ruling that the Charter did not apply. The Court of Appeal did not comment on the specifics of Mrs. Budge's claim or the definition of *"dependent"*. As the Charter is not being argued in this case. I find this decision of limited applicability.

**Driscoll vs. Morgan**

Driscoll was a passenger in the front seat of a motor vehicle which was involved in an accident. Another vehicle hydroplaned and collided with the vehicle in which she was a passenger. Morgan, the driver of the other vehicle, was killed and Driscoll sustained very serious injuries to her legs and less serious injuries to her hands in the accident. She was left with significant permanent disabilities and was unable to work. Driscoll was successful in her action for damages resulting from the injuries however appealed the assessment of damages awarded. The appeal was allowed in part and some of the awards adjusted. Damages were not sought for loss of consortium.

**Analysis**

This case is cited as support for the position that the cause of action for loss of consortium and services has been rendered obsolete and, in any event, to the extent that it does survive, it retains a very limited scope. It is beyond the scope of this review to determine whether the cause of action for loss of consortium has been limited or rendered obsolete by the Court. This is a review under the WHSCC Act to determine whether the statutory bar applies to the cause of action asserted by [REDACTED]. The Court may subsequently decide that such an action is limited or even obsolete; however, that finding would be beyond the scope of the WHSCC Act.

**Fogel vs. Dean**

Fogel was injured in two automobile accidents which rendered her permanently disabled and unemployable. She was awarded non-pecuniary damages for pre-and post-trial loss of housekeeping capacity, future loss of earnings capacity, pain and suffering and loss of amenities. She appealed the judgment as being inadequate and the defendant, Dean also appealed, contending the award was excessive.

**Analysis**

In considering this issue, the Court noted that *"compensation of the victim for loss of capacity to work in the home was traditionally accompanied by awarding compensation to a third-party (a husband or a family member) for loss of services provided to the third-party by the victim. The husband was compensated for loss of consortium. This has never been a satisfactory approach. The loss is personal to the plaintiff but compensation is based on services rendered by the plaintiff to some third party or parties. This approach is antiquated if not sexist."* The Court references other cases where claims were treated in a similar fashion with the victim being entitled to compensation for the loss suffered. Similarly to Driscoll vs. Morgan, the Court's approach to compensation in tort law is not within the scope of the WHSCC Act.

**Pasiechnyk vs. Saskatchewan (Worker's Compensation Board)**

Employees at the construction site were killed and others injured when a crane fell over onto a trailer occupied by the workers. Injured workers and dependents of deceased workers qualified for and received Worker's Compensation benefits. An action was brought against Saskpower, Pro-Crane and the Saskatchewan Government who then applied to the Worker's Compensation Board for a determination of whether the actions were barred by the Act. The Worker's Compensation Board found that all of the parties were employers and therefore, the action was prohibited. An appeal was launched with respect to the action against the Government. When

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subsequently reviewed by the Supreme Court of Canada, the Court supported the findings of the Compensation Board and noted the fundamental questions to be answered were; 1) was the Plaintiff a worker within the meaning of the Act; 2) if so, was the injury sustained in the course of his or her employment; 3) is the Defendant an employer within the meaning of the Act and; 4) If the defendant is an employer within the meaning of the Act, does the claim arise out of acts or defaults of the employer or the employer's employees while engaged in, about or in connection with the industry or employment in which the employer or worker of such employer causing the injury is engaged? The Supreme Court noted the historic trade-off by which workers lose their cause of action against their employers but gain compensation that depends neither on the fault of the employer nor its ability to pay.

### Analysis

In this particular case the issue to be determined is whether the Plaintiff, [REDACTED] is a dependent within the definition of the Act. If not, then the action is not prohibited by the Act.

### Power vs. Moss

Mr. Power suffered significant injuries due to a Motor Vehicle Accident (MVA) which occurred in the course of his employment. Both Mr. and Mrs. Power filed a Statement of Claim against the Defendant, Mr. Moss. While the Defendant admitted liability for the collision, the Court was requested to review a number of issues including whether Mrs. Power was entitled to general damages in respect to the loss of companionship and solatium resulting from the injury sustained by her husband. The Court concluded that Mrs. Power was entitled to damages for the loss of her husband's consortium.

### Analysis

This decision dealt with the issue of the Charter of Rights and Freedoms and whether the denial of Mrs. Power's right of action was a violation of same. The issue of whether the WHSCC Act impacted on this decision was not considered by the Court. Therefore, I find that this decision is not applicable to the case in question.

### Rideout vs. Health Labrador Corp.

This is a Class Action Suit by a group of patients and spouses of patients, with Rideout being a representative Plaintiff, against the Labrador Health Corp. for damages as a result of being tested with improperly sterilized equipment. One of the causes of action was for loss of consortium. It was noted in the Court decision that the Defendant, Labrador Health Corp. denied that, with respect to the cause of action for loss of consortium, there was any such cause of action in this jurisdiction. The Court noted that this was an arguable position based on the authorities cited by the Defendant in support of its position. However, the Court did not make any determination in this matter.

### Analysis

While this case does outline a change in the direction of the Courts in such cases, it has limited relevance in this case as it does not deal with the Workplace Health Safety and Compensation Act.



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**Lewis vs. Low**

Lewis was seriously injured in a collision at a level crossing between a track motorcar which he was driving along the railway tracks of the company and an automobile driven by the Defendant, Low. Lewis was totally disabled and elected to take compensation under the Worker's Compensation Act of Ontario. The company was subrogated to his rights against the Defendant under Section 8 (4) of the Act and brought an action against the Defendant. Mrs. Lewis also bought another action against the Defendant claiming damages under the Family Law Reform Act. A settlement of \$100,000 was agreed to with \$85,000 being awarded to Mr. Lewis's claim and \$15,000 to Mrs. Lewis. The issue before the Court was whether the company was entitled to be subrogated to the wife's claim against the Defendant.

**Analysis**

In considering this issue, the Court held that the rights of the Dependent arise only in the event of the worker's death. I find that, as the wording of the Ontario Worker's Compensation Legislation is similar to that of the Newfoundland Board, the comments of the Court are relevant in this case.

**Summary**

A review of the facts confirm that [REDACTED] is a worker as defined by the WHSCC Act and any entitlement to benefits and/or right of action are as a result of his July 5, 1995 work injury. Section 44 (1) of the Act provides for a right to compensation or right to action to a worker or his/her dependents. Section 2 (1) (f) of the Act defines a dependent as a member of the family of a worker who is wholly or partially dependent upon his earnings at the time of the death of the worker or who, but for the incapacity due to the injury would have been so dependent. As [REDACTED] is still living [REDACTED] does not meet the definition of "dependent" under the Act.

**Determination**

As [REDACTED] does not meet the definition of dependent under the Act the prohibition to action under the Act does not apply in her case.

This represents the final decision of the Commission. Enclosed is a copy of the Certificate which has been filed with the court.

Sincerely,



**Frances Pitcher**  
Internal Review Specialist

FP:jh  
Enclosure: Certificate

c: Yvonne McDonald, Administrative Officer, Internal Review Division  
c: John R Sinnott, Lewis, Sinnott, Shortall