# WorkplaceNL

Health | Safety | Compensation

**Third Party Determination**

May 22, 2019

Philip Osborne
Solicitor
4th Floor, East Block
Confederation Building
PO Box 8700
St. John's, NL A1B 4J6

Dear Mr. Osborne:

**Re: Request for Section 46 Determination**
[redacted]

I have reviewed in accordance with Section 46 of the Workplace Health, Safety and Compensation (WHSC) Act (herein referred to as the "Act") all submissions with respect to your request for determination as to whether the following actions are prohibited by Section 44 of the Act:

- [redacted] as Executrix of the Estate of [redacted] and [redacted] in her own right (Plaintiff) (herein referred to as "[redacted]") against [redacted] (First Defendant) (herein referred to as the "[redacted]"), [redacted] (Second Defendant) (herein referred to as the [redacted], [redacted] Limited (Third Defendant) and [redacted] (Fourth Defendant) (herein both referred to as the "[redacted]"
- [redacted] against [redacted] (First Defendant) (herein referred to as "[redacted]"), [redacted] (Second Defendant) (herein referred to as "[redacted]"), [redacted] (Third Defendant) (herein referred to as "[redacted]"), [redacted] (First Third Party), and [redacted] (Second Third Party).
- [redacted] (Plaintiff) (herein referred to as "[redacted]") against [redacted] (First Defendant), [redacted] (Second Defendant), [redacted] (Third Defendant) (herein referred to as "[redacted]"), [redacted] (Fourth Defendant) (herein referred to as "[redacted]"), [redacted] (Fifth Defendant) (herein referred to as "[redacted]"), [redacted] (First Third Party), and [redacted] Second Third Party).

For the purposes of this determination, the application of the statutory bar in the actions against the owner ([redacted]) and operator ([redacted]) are not in dispute. My

determination is regarding the application of the statutory bar in relation to the actions against [redacted]

## Background Information

On July 5, 2011, [redacted] while employed as a [redacted] sustained fatal injuries that resulted when a motor vehicle owned [redacted] struck [redacted] and another pedestrian. [redacted] and the other pedestrian, employed by different employers, were standing [redacted]. At the time of the accident, as part of his employment duties, [redacted] and the other pedestrian, were conducting a joint inspection of the highway asphalt. At approximately 1:00 pm, the motor vehicle driven by [redacted] traveling in an eastward direction left the roadway [redacted] and struck [redacted] and the other pedestrian. As previously stated, [redacted] was fatally injured while [redacted] sustained injuries but survived.

On July 4, 2013, a Statement of Claim was filed by Mr. David P. Goodland of the law firm Goodland O'Flaherty, on of behalf of [redacted] citing that [redacted] fatal injuries were caused by the negligence of [redacted]. The July 4, 2013, Statement of Claim alleged that the Defendants failed to maintain a safe working environment for [redacted], including failing to meet their obligations under the Occupational Health and Safety Act, R.S.N.L. 1990, c. O-3.

On December 28, 2011, a Statement of Claim was filed by Mr. David P. Goodland on behalf of [redacted] citing that [redacted] fatal injuries were the result of a motor vehicle/pedestrian collision in which [redacted] was a pedestrian. The December 28, 2011, Statement of Claim alleged that [redacted] fatal injuries were caused by the negligence of [redacted] who was driving a 2000 Chevrolet Blazer owned by [redacted]. The Statement of Claim also named [redacted]

On March 21, 2013, a third-party notice was issued adding the [redacted] as third parties. The Statement of Claim against the third parties alleged that the third parties exposed [redacted] to risk without ensuring that appropriate safety measures were taken.

On November 1, 2012, a Statement of Claim was filed by Ms. Valerie A. Hynes on behalf of [redacted] citing that he suffered serious personal injuries when a motor vehicle owned by [redacted] and driven by [redacted] struck [redacted] who was a pedestrian in the course of his employment in the [redacted] The November 1, 2012, Statement of Claim alleged that [redacted] injuries were caused by the negligence of [redacted] The Statement of Claim also named [redacted] as the S.E.F. 44 insurers.

On March 7, 2013, a third-party notice was issued adding [redacted] as third parties. The Statement of Claim against the third parties alleged that the third parties exposed [redacted] to risk without ensuring that appropriate safety measures were taken.

On April 21, 2016, you requested, on behalf of the Defendants, that WorkplaceNL determine, pursuant to Section 46 of the Act, whether the above noted actions are prohibited by Section 44 of the Act.

The following submissions were received and provided to all parties as follows:

- [redacted] lawyer, Mr. David P. Goodland of Goodland O'Flaherty filed submissions dated June 9, 2016 and August 23, 2016.
- [redacted] lawyer, Mr. R. Barry Learmouth of Learmouth Dunne Boulos, contacted law firm, no submissions will be filed.
- [redacted] lawyer Mr. R. Barry, Learmouth of Learmouth Dunne Boulos, contacted law firm, no submissions will be filed.
- [redacted] lawyer, Mr. Stephen Fitzgerald of Browne Fitzgerald Morgan Avis filed a letter dated June 30, 2016, in support of [redacted] s application, but they did not intend to file materials.
- [redacted] lawyer, Mr. Alex Templeton of McInnes Cooper filed a submission dated July 8, 2016.
- [redacted] Ms. Valerie Hynes of Roebothan, McKay Marshall filed a submission dated June 13, 2016 and August 25, 2016
- [redacted] lawyer, Mr. Ed Vanderkloet filed a letter dated May 26, 2016, indicating they take no position on [redacted] no submission filed.
- [redacted] Laura Brocklehurst of Cox & Palmer filed a letter dated December 6, 2018, in support of [redacted] positions, but no further materials were filed.

Both [redacted] submit that [redacted] fatality and [redacted] injuries occurred as a result of the use of a motor vehicle and, therefore, actions against the Defendants are not statute barred pursuant to the provisions of the Act.

The Defendants and Third Parties, who have provided submissions, take the position that the actions against them are barred by Section 44 of the Act.

**Legislation and Policy**

**Section 2 (1)** of the Workplace Health, Safety and Compensation Act states:

**Definitions**

**2.** (1) 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;

(j) "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;

(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 19 (4)** of the Act states:

**Exclusive jurisdiction**

**19.** (4) 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** of the Act States:

**Compensation payable**

**43.** (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.

**Section 44 (1) (2)** of the Act states:

**Compensation instead of action**

**44.** (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:

**No compensation**

**44.1** (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 45** of the Act states:

**Where action allowed**

**45.** (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:

**Commission decides if action prohibited**

**46.** 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-08 – Third Party Actions** of the Client Service Policy Manual states:

**Background**

Third parties are individuals or bodies not protected by the Workplace Health, Safety and Compensation Act (the Act) who may be responsible for a work injury.

Since January 1, 1993 a worker who is injured in the course of employment as a result of someone else's negligence, or the worker's dependents where the injury results in death, must choose how they wish to be compensated. Their choice is to claim workers' compensation benefits and turn over the right to sue the negligent party to WorkplaceNL, or not claim workers' compensation benefits and sue the negligent party on their own without any involvement by WorkplaceNL.

If a worker or dependent elects to claim workers' compensation benefits, WorkplaceNL takes over the right to sue the person or persons responsible for the injury. If court action is taken and WorkplaceNL successfully recovers more money than is payable under the Act (plus an administration charge and legal expenses), the worker or dependent is entitled to the excess.

If a worker or dependent decides to sue on their own, they will not be entitled to receive workers' compensation benefits. This is so even if they receive less money from the person or persons responsible for the injury than they would have received in workers' compensation benefits.

**Policy Statement**

WorkplaceNL believes that third parties who cause injuries to workers should be responsible for damages to the worker and for any resulting costs to the Injury Fund. It also believes that injured workers or their dependents have the right to choose whether they will take a court action or claim compensation.

To encourage informed decision making, WorkplaceNL promotes full disclosure of an injured worker's or dependents' options before they decide to sue or claim compensation. WorkplaceNL will provide all reasonable assistance to help workers/dependents understand the issues and consequences of their decisions.

Sometimes the existence of a right of action against a third party is not apparent to either the worker, dependents or WorkplaceNL at the time of injury (e.g. product liability cases). If the worker or dependent accepts compensation before the existence of a right of action is realized, they will be considered as having elected not to sue and WorkplaceNL has the right to take court action.

Every reasonable effort will be taken to maximize recovery where WorkplaceNL takes a court action on behalf of a worker or dependent. The goal is to put workers/dependents in as good a position as if they had taken the action themselves.

## Part 1 – Rights of Action

### A. Where Court Action Not Allowed

Section 44 of the Act prevents a worker or his or her dependents from suing another worker or an employer covered under the Act. Even though another worker or an employer may have been responsible for the injury, a worker or dependent has no choice other than to claim compensation.

Where another worker or an employer has caused an injury, it must be clearly established that they were in the course of their employment (and, therefore, covered under the Act) at the time of injury.

### B. Where Court Action Is Allowed - Injury Involving Motor Vehicle or Other Modes of Transportation

The restrictions on rights of action in Section 44 do not apply where a worker is injured or killed in a motor vehicle accident or while being transported in a vehicle or craft for which public liability insurance is required to be carried. This is provided for in Section 44.1 of the Act.

Modes of transportation where public liability insurance is required to be carried include:

1. cars, trucks, vans
2. emergency vehicles - police cars, fire trucks, ambulances
3. buses, school buses
4. taxis
5. motorcycles, mopeds
6. tractors, backhoes, heavy equipment
7. commercial and private aircraft
8. snowmobiles, ATV's, dirt bikes (if used on a highway or to cross a highway)

The Section 44.1 exception applies even if it is the worker's employer or co-worker who is operating the vehicle or craft. Actions will also be possible where the worker is a pedestrian or bystander struck by a vehicle or craft in this category.

### C. Where Court Action Possible Worker/Dependents Must Elect

Where a right of action exists following a work injury, Section 45 of the Act states that a worker or dependent may claim compensation or may bring an action. Among other things, this section provides guidelines which direct a worker or dependent to elect one option or the other within 3 months of the injury.

Under Section 45, WorkplaceNL will consider whether an employer or worker from another jurisdiction can be sued. For example, a right of action may exist against a manufacturer or designer of an injury-causing product if that product was imported to the province.

In any case, a worker or dependents must elect to claim compensation or pursue an action.

## Part IV – Determination of Right of Action

Section 46 of the Act gives WorkplaceNL jurisdiction to adjudicate and determine whether an action is prohibited by the Act.

Where an action has been brought and a party to the action applies for a determination, the Internal Review Division will decide whether the action is prohibited by the Act. The process of determination will, as far as possible, be agreeable to all parties to the action and conducted within the bounds of natural justice.

**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.

While no single criterion is conclusive in classifying an injury as one arising out of and in the course of employment, various indicators are used for guidance, including:

- whether the injury occurred on the premises of the employer (see also **"Employer's Premises"** section);

- whether it occurred in the process of doing something for the benefit of the employer;
- whether it occurred in the course of action in response to instructions from the employer;
- whether it occurred in the course of using equipment or materials supplied by the employer;
- whether it occurred in the course of paid employment;
- whether the risk to which the worker was exposed was the same as the risk to which he/she is exposed in the normal course of production;
- whether the injury occurred during a time period for which the worker was being paid; and
- whether the injury was caused by some activity of the employer, a fellow worker, or a third party.

**Position of [redacted] represented by Philip Osborne**
In your April 21, 2016, Application you requested that WorkplaceNL determine that, pursuant to Section 46 of the Act, the actions brought by [redacted] are prohibited by Section 44 of the Act.

[redacted] submits that at the time of the accident on July 5, 2011, [redacted] were workers, engaged in the work of their employers. "As such, where a worker is injured in the course of his/her employment, the operation of ss 43-44 of the Act generally precludes a private law action against the employer. Section 44 generally prevents a worker, or the worker's dependents, from suing an employer covered under the Act, even though the employer may have been responsible for the injury. The worker must instead seek compensation through the Commission's compensatory mechanism." [redacted] submits that the Supreme Court of Canada decision in the case of **Newfoundland (Workplace Health, Safety & Compensation Commission) v Ryan Estate** outlines the rationale for this approach in what is referred to as the "historic trade-off" between employers and employees. Workers who suffer workplace injuries get the benefit of a more efficient and less onerous compensation process, while employers enjoy security against potential tort actions.

[redacted] submits that Section 44.1(b) is one of the circumstances under which an action can be brought against an employer or co-worker. [redacted] notes "The section 44.1 exception applies even if it is the worker's employer or co-worker who is operating the motor vehicle, or conceivably where the worker is a pedestrian struck by a motor vehicle." [redacted] indicates the workers were either injured or killed by a motor vehicle while in the course of their employment. [redacted] notes what is not clear is whether there needs to be a nexus between the operation of the vehicle and the course of employment. "In other words, it is unclear whether the use of the vehicle in question needs to be in the course of employment or if it is sufficient to find an injury in the course of employment has been caused by a vehicle which has no direct connection to the employer or to the employees."

[redacted] further submits that interpretation of Policy EN-08 appears to imply that even a vehicle with no connection to the employer or employee is sufficient for the purposes of Section 44.1 and 45 of the Act. However, [redacted] submits that interpreting the Policy in this manner is problematic. If the employee is injured by a motor vehicle which has no connection to the employer; the employer is unable to access public liability insurance as a means of defending themselves against a private action. This would result in the employer assuming a risk which is not covered by either the workers compensation regime or any automobile insurance. [redacted]

[redacted] submits "...that when read in context, the proper interpretation does not extend to allowing actions against a coworker/employer in the fact situation giving rise to these actions." [redacted] states that Cabinet Recommendations, the Memorandum to Executive Council, and the House of Assembly Explanatory Notes, for amendments to the Act all provide insight into the legislative intention of Sections 44.1 and 45 of the Act, which according to [redacted] is to allow actions against an employer/co-worker where there is access to public liability insurance. This would in turn reduce the financial burden on the Workers' Compensation Fund by redistributing costs to a public liability insurance policy which the employer/coworker were already obligated to carry.

[redacted] submits "...that the intent of section 44.1 was to allow a worker or employer to be sued in a situation where a motor vehicle involved in an accident, in the course of the worker's employment, was owned or insured by the worker or employer. The action would be allowed in the situation where the worker or employer has access to public liability insurance that was attached to the motor vehicle. The purpose of the s. 44.1 exception is to allow actions against a coworker/employer in a situation where the coworker/employer has access to public liability insurance. It is not intended to expose the coworker/employer to an action in a situation where the coworker/employer would be personally exposed without the ability to have insurance coverage."

In the conclusion [redacted] states: "It is submitted that the legislative intention underlying these amendments was to ensure that the Commission's regime would not have to subsidize public liability insurance. There was, therefore, no contemplation of the employer having to bear an uninsurable risk. As such, a reasonable interpretation of the Act should lead to the conclusion that the legislature intended s 44.1 to allow actions against a coworker/employer only when the accident involves vehicles that belong to, and can be insured by the coworker/employer. To do otherwise would do violence to the delicate balance of the "historic trade-off" that maintains the integrity of the Act. It is submitted that under a proper interpretation the subject actions against [redacted] did not fit within the exception provided by section 44.1 and that actions against [redacted] should be barred by the Act."

It is [redacted] position that the private actions against [redacted] are statute barred.

**Position of [redacted] represented by Mr. Alex Templeton**

[redacted] submits a position similar to that of [redacted] and joins and supports [redacted] application. [redacted] also seeks a determination as to whether the Plaintiffs are prohibited by the Act from bringing an action against [redacted] and [redacted] which involves consideration of whether the section 44.1 exception to the bar applies in the circumstances of the Plaintiffs case. [redacted] position "...is that section 44.1 of the Act, when read together with sections 44 and 45, is clear and unambiguous, such that the exemption to the statutory bar does not apply in the circumstances of this case...Alternatively, should it be found that section 44.1 is ambiguous, specifically in that it is unclear whether the section requires a nexus between the motor vehicle that caused the accident and the injured worker's employer or co-worker, [redacted] position is that the proper interpretation to be applied to section 44.1 is such that [redacted] cannot avail of section 44.1 and that section 44 statutory bar prevails. Such an interpretation accords with the principles and scheme of the Act."

[redacted] submits that when determining the application of section 44.1 to this case, WorkplaceNL is to apply a principled approach to statutory interpretation, and that such an approach is summarized in **Warford v. Weir's Construction (2003), 227 Nfld. & P.E.I.R. 48 (N.L.C.A.)** paragraph 42 as "...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."

[redacted] submits "The scheme of the Act is such that when a worker suffers injury or death in the course of his employment, the section 44 statutory bar removes the worker's right to bring a private law action against his or her employer and substitutes it with the compensation scheme administered by the Commission. This is the foundation of the "historic trade-off" whereby workers gain the advantage of guaranteed compensation in the event of injury or death and employers benefit from the indemnity provided by the Commission's regime." Section 45 does, however, preserve a worker's civil right of action in certain circumstances with the understanding that the worker can only elect to bring an action by waving entitlement to compensation under the Act. [redacted] submits in this particular case, the circumstances at issue are set out in subsections 45(1)(a) and 45(1)(c), which provide that a worker may elect under section 45 to bring an action where he or she is entitled to bring one "against some person other than an employer or worker" or where he or she is entitled to bring an action "where section 44.1 applies". "Subsection 45(1)(a) describes a worker's entitlement to bring an action against someone other than an employer or worker and subsection 45(1)(c) describes a worker's entitlement to bring an action against an employer or worker in an exceptional circumstance."

[redacted] further submits "As subsections 45(1)(a) and 45(1)(c) are listed in sequence in the same provision and separated by the term "or", they must be distinguished from one another and read as describing different, mutually exclusive scenarios. The scenarios described in subsection 45(1)(c) - "where section 44.1 applies", which provision describes the circumstance where a worker is injured or killed "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" - is a scenario different than that described in subsection 45(1)(a), where a worker is entitled to bring an action "against some person other than an employer or worker." [redacted] submits that difference between the two scenarios is that subsection 45(1)(c) requires a nexus between the employer or the worker in the use of the motor vehicle; a nexus which does not exist where a worker is simply entitled to bring an action "against some person other than an employer or worker", pursuant to subsection 45(1)(a). In other words, the nexus must be something other than merely the fact the workers were struck by a motor vehicle "in the course of his or her employment" as the trigger for the right of private action.

With regard to application of the statutory bar protecting employers from claims by employees covered by worker's compensation, [redacted] submits that **Pasiechnyk v. Saskatchewan (Workers Compensation Board), [1997] 2 S.C.R. 890** is the Supreme Court of Canada leading case. The Court referred to the "historic trade-off" by which workers gave up the right to sue employers but gain compensation that depends on neither fault nor ability to pay. At the same time, employers were forced to pay into a mandatory insurance scheme but gained freedom from potentially crippling liability. While noting that employees might receive less compensation under the workers' compensation system, the Supreme Court of Canada recognized that this negative feature was far outweighed by the advantage of receiving immediate compensation regardless of the solvency of the employer. In other words, where a

worker is injured in the course of his or her employment, Section 44 the Act will preclude a private law action against the employer, even if the employer is responsible for the injury. This is beneficial to both the employer and the injured worker, by allowing the worker access to a more efficient and less onerous compensation process and the employer enjoys security against the unpredictability of potential tort liability. Only in limited circumstances defined in Section 45 of the Act are a worker's right to a private law action preserved, in which case, the worker (or his or her dependents) are required to make an election.

[redacted] submits that Section 45 defines the circumstances under which the right to private law action is preserved, one of which is when Section 44.1 applies. [redacted] further submit "...that the intent of section 44.1 is to allow an employer or co-worker to be sued in a situation where a motor vehicle involved in an accident injuring the worker, in the course of his or her employment, was owned or insured by the employer or co-worker. In other words, section 44.1 allows for an action against an employer or co-worker in a situation where the employer or co-worker would have access to public liability insurance that would attach to the motor vehicle involved in the accident. The purpose of the section 44.1 exemption to section 44 statutory bar is to allow actions against employees or co-workers in limited circumstances where the employer or co-worker has access to public liability insurance. It was not intended to expose the employer or co-worker to an action where the employer or co-worker would be personally exposed without the ability to call on public liability insurance coverage."

[redacted] also submit that the nexus required for the purposes of Section 45(1)(c) of the Act is that the employer/co-worker against whom an injured worker has a right to bring an action must have been involved in the use of the motor vehicle that caused the accident. It is the [redacted] position that the nexus between the motor vehicle that caused the accident and the employer/co-worker does not exist and, therefore, the Plaintiffs do not have the right to bring an action.

[redacted] submit that the interpretation of the Plaintiffs is not in keeping with the purpose and scheme of the Act. If the Plaintiffs were permitted to pursue a private action against the employer, in a situation where the motor vehicle involved is not connected to the employer or co-worker, and the employer or co-worker has no ability to access public liability insurance as a means of defending against such an action, this would deny the employer the benefit of the "historic trade-off", which is a fundamental principle of the workers compensation scheme. [redacted] submit that it would be inequitable if the employer or co-worker has to answer to the risk of an accident where no public liability insurance exists when the employer is required to contribute to the workers' compensation fund.

**Position of [redacted] Represented by David Goodland**

[redacted] represented by [redacted] submits that the action against [redacted] and the [redacted] is not barred pursuant to Section 44 of the Act as [redacted] suffered fatal injuries as a result of an accident involving use of a motor vehicle by "another person". At the time of the accident on July 5, 2011, [redacted] was a pedestrian, standing in the median of the ORR along with two other pedestrians, examining asphalt while in the course of his employment with [redacted] At approximately 1 pm a motor vehicle driven by [redacted] left the roadway [redacted] and struck all three pedestrians, fatally injuring [redacted]

It is the position of [redacted] that Section 44.1 of the Act, when read in conjunction with Section 44 and 45, is clear and unambiguous in that Section 44 which bars the right to an action is not applicable, given that [redacted] a worker under the Act, was in the course of his employment when he was fatally injured as a result of an accident involving the use of a motor vehicle by another person. [redacted] position is that by virtue of Section 45 of the Act, the statutory bar to an action is not applicable in this case, and she is entitled to bring a private action against [redacted] It is submitted that if this action is barred, [redacted] will be significantly under compensated, which is inconsistent with the purpose of the Act.

[redacted] further submits that WorkplaceNL Policy EN-08, Third Party Actions, confirms her right to pursue an action against the Defendants given the following policy:

> The Section 44.1 exception applies even if it is the worker's employer or co-worker who is operating the vehicle or craft. Actions will also be possible where the worker is a pedestrian or bystander struck by a vehicle or craft in this category.

**[redacted] Represented by Valarie Hynes**

[redacted] represented by Ms. Hynes, submits that on July 5, 2011, while in the course of his employment as an Engineer with [redacted] he was standing with [redacted] in the [redacted] inspecting pavement when a motor vehicle driven by [redacted] struck them. The accident resulted in fatal injuries to [redacted] and serious personal injury to [redacted].

[redacted] submits that Section 44.1(1)(b) of the Act is clear and unambiguous in its application to the circumstances of the July 5, 2011, motor vehicle accident. Further [redacted] submits that the application of Section 44.1(1)(b) in this case would not offend the underlying principles of the Act, and supports the submissions of [redacted] (Plaintiff).

[redacted] submits that the modern approach to statutory interpretation does not negate the importance of considering the words actually contained in a legislative provision. [redacted] contends that where clear and unambiguous language is present in the Act, the Courts cannot substitute their own interpretation or add words, and are guided by the understanding that "the legislature does not speak in vain".

[redacted] submits the same argument as [redacted] that in this case Section 44.1(1)(b) provides an exception to the statutory bar contained in Section 44. [redacted] is a worker who was injured "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." The motor vehicle was the [redacted] vehicle driven by [redacted] another person, while [redacted] was in the course of his employment [redacted] maintains the language under Section 44.1(1)(b) is clear and unambiguous in this circumstance providing an exception to the statutory bar under Section 44, in turn allowing an action against the Defendants. [redacted] submits that if the intention of the legislature was to limit the ability to bring about an action under Section 44.1(1)(b) only in circumstances where public liability insurance was available, it would have expressed this in the provision.

**Reasoning and Analysis**

I have reviewed and considered all submissions from all parties involved in this case. Section 44(1) of the Act provides the statutory bar to claims made by a worker or his/her dependents against an employer for an injury that arises in the course of the worker's employment.

My task is to determine whether the action brought against [redacted] is barred by the provisions of the Workplace Health, Safety and Compensation Act, R.S.N.L. 1990. In arriving at my determination there are a number of factors I have considered:

1) Were [redacted] "workers" at the time of the accident?

Section 2(1)(z) of the Act defines a worker as a person who has entered into or works under a contract of service or apprenticeship, written or oral, expressed or implied, by way of manual labour or otherwise. From my review of the facts of this case I confirm that [redacted] were employed as Civil Engineers and are considered "workers" under the Act. This status has not been disputed.

2) Were the Defendants [redacted] "employers" at the time of the accident?

According to WorkplaceNL's records, [redacted] (the Defendants) were registered as employers within this province. From my review of the facts of this case, I confirm that the Defendants are "employers" within the meaning of Section 2(1)(j) of the Act. This fact is not disputed.

3) Did [redacted] fatal injuries and [redacted] injuries "arise out of and in the course of employment"?

To address this question I have reviewed Policy EN-19 which was developed by WorkplaceNL to assist in determining if an injury has arisen out of and in the course of employment. 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 and "in the course of" refers to the time and place of the injury and its connection to the employment. From my review of the facts of this case I confirm that [redacted] were in the course of their employment as Civil Engineers with [redacted] and [redacted] respectively on July 5, 2011. I also confirm that [redacted]'s fatal injuries and [redacted] injuries arose out of their employment when they were struck by a motor vehicle traveling on the [redacted] where they were conducting pavement inspections. I confirm that [redacted]'s fatal injuries and [redacted]'s injuries did "arise out of and in the course of employment".

4) Are [redacted] statute barred under Section 44 to bring an action against the Defendants? Or does Section 44.1 apply providing an exception to the statutory bar?

These questions are the main focus of my decision and are the issues that are in dispute between the parties involved in this case.

**Section 19(4)** of the Act states:

**Exclusive Jurisdiction**

(4) 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.

While the WorkplaceNL is not bound to follow strict legal precedents, I have reviewed the case law submitted to determine relevance and applicability to this case at hand.

**Case Law**

**Pasiechnyk v. Saskatchewan (Workers' Compensation Board), 1997 CarswellSask 401, 1997 CarswellSask 402, [1997] 2 S.C.R. 890**
In this particular case, employees at a construction site were injured when a crane collapsed landing on top of the trailer occupied by the workers. The workers commenced a civil action against various defendants including the Government of Saskatchewan alleging it failed to adequately inspect the crane. The government applied for determination that the action against it was prohibited on the grounds that it was an employer under the provincial workers' compensation legislation and hence entitled to protection under the workers' compensation act. The Workers' Compensation Board found the government was an employer and that the action against it was prohibited. The Supreme Court of Canada held that the 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 of Canada noted the "historic trade-off" by which workers lose their cause of action against employers, but gain compensation that depends neither on the fault of the employer nor its ability to pay. Similarly, employers were required to contribute to a mandatory insurance scheme, but gained freedom from potentially crippling liability. The Court in this case also noted "It would be unfair to allow actions to proceed against employers where there was a chance of the injured worker's obtaining greater compensation, and yet still force employers to contribute to a no-fault insurance scheme."

**Reference re: Workers' Compensation Act, 1983 (NFLD.) (Piercey Estate v. General Bakeries Ltd.)**
This decision confirmed the cornerstone of the Workers' Compensation System as the "Historic Trade-off". This means employers contribute to a no-fault insurance scheme based on their annual payroll, then workers forfeited their right to sue an employer or another worker covered under the Act, unless an exception to the statutory bar applies. Aside from any stated exceptions, employers are protected by the statutory bar and workers receive benefits under the Act.

**Analysis**

In these cases, the Courts note that the "Historic Trade-off" is a fundamental basis of the Workers' Compensation System, and that it would be unfair for employers to be subject to private legal actions while at the same time being forced to contribute to a no-fault insurance scheme. I find these cases relevant as they provide confirmation regarding the purpose of the Act and the importance of the historic trade-off in the workers' compensation system.

**Weir's Construction Ltd. v. Warford, 2003 NLCA 36 CarswellNfld 172**
This is a decision involving an injured worker who was in the course of his employment as a mechanic with Weir's Construction Ltd. when a disabled truck which he was working on rolled on top of him. WorkplaceNL's Internal Review Specialist provided a broad meaning to the word "use", and initially concluded that the matter was not statue barred.

The Court of Appeal's conclusion was that the Internal Review Specialist had been patently unreasonable when he felt he was compelled to follow a line of insurance cases that mandated a broad interpretation of the word "use". The Court of Appeal held that it was necessary to adopt a purposive approach to statutory interpretation. The Court adopted the approach to statutory interpretation where the words of an Act are to be read in the entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the objective of the Act and the intent of Parliament.

**Analysis**
In this case, the Court of Appeal was clear that when determining whether the exception found under Section 44.1(1)(b) of the Act applies to a given situation, WorkplaceNL must examine the purpose of the Act in general and Section 44.1(1)(b) in particular.

I find the Warford case relevant as it confirms WorkplaceNL is to apply a purposive approach to statutory interpretation and consider the purpose of the Act in general and Section 44.1(1)(b) in particular. At paragraph 44 and 45 of the Warford case, Justice Cameron also provided some reasoning involved in the application of the purposive approach in interpreting Section 44.1.

**Archean Resources Ltd. v. Newfoundland (Minister of Finance), 2002 NFCA 43 CarswellNfld 199**
This case involved a dispute concerning smelting royalties between Archean Resources Ltd. and the Government of Newfoundland. The Court of Appeal provided guidance when determining the objective of legislature in accordance with its true meaning.

The Court noted that every provision of an Act is to be considered "remedial" and to interpret it so that it "best" ensures the attainment of its "objects" according to its "true" meaning. The Court noted that when arriving at the "true" meaning the surrounding text, interrelation of other related statutes, the social and legislative context in which the provision was enacted, and other extrinsic aids are sources to be consulted during the process of determining the "true" meaning of a particular statute.

**Workplace Health, Safety and Compensation Commission v. Allen, 2014 NLCA 42**
This is a case concerning calculation of pension replacement benefits ("PRB") and whether or not the Commission correctly interpreted the **Workplace Health, Safety and Compensation Act, RSNL 1990** when calculating an individual's PRB. The Court of Appeal determined that the applications judge was appropriate in concluding that application of the remedial construct rule required going beyond the plain meaning of legislation and subjecting it to a reality check by

testing it against other sources of information. The Court quoted the Supreme Court of Canada and noted that:

> [43] However, satisfying oneself as to the ordinary meaning of the phrase "is not determinative and does not constitute the end of the inquiry" (ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140, at para.
>
> 48). Although it is presumed that the ordinary meaning is the one intended by the legislature, courts are obligated to look at other indicators of legislative meaning as part of their work of interpretation. That is so because [w]ords that appear clear and unambiguous may in fact prove to be ambiguous once place in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.

**Analysis**
Neither the Archean Resources case nor the Allen case involved the "use of a motor vehicle" in any way. However, they do serve as confirmation that when reviewing a particular provision of an act, such as Section 44.1(1)(b) the purpose of the Act, the entirety of the surrounding text, objectives of the Act, interrelation of other related statues, and the social and legislative context in which the provision was enacted must be considered when determining the "true" meaning of Section 44.1.

**McSween v. Marsh, 1995 CarswellNS 426**
This is a case of a motor vehicle that struck a worker of Nova Scotia Power Incorporated while she was on the property of the employer. Both the driver of the vehicle and the owner of the same vehicle (the Defendants) sought to join the injured worker's employer as a third-party to an action initiated by the Workers' Compensation Board in Nova Scotia. The employer applied to the Courts seeking to dismiss the claim against it on the basis of the statutory bar. The Courts ultimately ruled in favor of the employer, citing that an action against Nova Scotia Power Incorporated would place the employer in the situation of having to pay twice, first by paying premiums to the compensation fund and also potentially contributing to the Defendants' liability.

**Analysis**
While this case concerns an accident involving a motor vehicle it falls under the jurisdiction of another province, and is subject to the provisions of that province's Act. However, I do find it is of some assistance as it provides some guidance in the interpretation of provisions regarding the statutory bar in the context of the principles of the workers' compensation legislation. It is interesting to note that the Court did not apply the motor vehicle exception to allow an action against an employer who was not protected by public liability insurance.

**Manitoba (Workers' Compensation Board) v. Hagebock, 1985 CarswellMan 313**
This case relates to Defendants who seek to bring third-party proceedings against Canada Cement LaFarge Ltd, even though, by statute, no contribution, indemnity, or relief, of a financial nature, can be obtained. In this situation, the third-party notice seeks only a declaration of fault on the part of Canada Cement LaFarge Ltd. The Court determined that the proceedings were not appropriate and the third-party notice was to be struck out. The Court determined that the Manitoba Workers' Compensation Act contained a provision which allowed it to determine fault even though the employer was not a party to the action.

**Analysis**
This case has little relevance because it is based on the Manitoba legislation which is different than our Act. Our Act does not have a provision which specifically allows allocation of fault to an employer who is not a party to the action.

[redacted]

**Newfoundland (Workplace Health, Safety and the Compensation Commission) v. Ryan Estate, 2011 NLCA 42, 2011 CarswellNfld 200** and **Marine Services International Ltd. v. Ryan Estate, 2013 SCC 44**
This is the case involving the spouses and dependents of Joseph Ryan and David Ryan, who sought to pursue an action against a number of Defendants for a marine accident that resulted in the death of the Ryan brothers when the Ryan's Commander, a fishing vessel, capsized in heavy seas off Cape Bonavista in September 2004.

The mainstay of the case was that the **Marine Liability Act, S.C. 2001**, a federal statute, and the **Workplace Health, Safety and Compensation Act, RSNL 1990**, a provincial statute, were at constitutional odds regarding whether a right of action was statute barred. The federal statute allowed for fault-based tort law, while the provincial statute eliminated fault-based tort law in respect of workplace injuries, substituting a no-fault insurance scheme requiring employers within the province, covered by this scheme, to pay into a common insurance fund which workers and their dependents benefit from.

I cite the following from the Supreme Court of Canada's decision in the case of Ryan Estate concerning the historic trade-off:

> [29] The central element of Sir Meredith's proposal was what has come to be called the "historic trade-off": workers "lost their cause of action against their employers but gained compensation that depends neither on the fault of the employer nor its ability to pay", while employers had to contribute to a common fund "but gained freedom from potentially crippling liability": Pasiechnyk, at para. 25
>
> [30] This "historic trade-off" provides timely and guaranteed compensation for workers (or their dependents) and reduces liability for employers. In Pasiechnyk, Sopinka J. described it as a necessary and central feature to a workers' compensation scheme (para. 26). See also Reference re: Workers' Competition Act, 1983 (Nfld.), ss. 32, 34 (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.).
>
> [31] The WHSCA is a workers' compensation scheme in Newfoundland and Labrador providing no-fault compensation to workers and their dependents arising from workplace accidents; it mandates automatic compensation without the need to establish fault on the part of the employer. The WHSCA replaces the tort action for negligence with

compensation. As such, it is distinct from tort law. Section 44 of the WHCSA provides for the statutory bar that is at the heart of the "historic trade-off".

In the Court of Appeal decision, in dissent Justice Welsh suggests that Section 44.1 is a limited to situations where an alternative insurance scheme applying to motor vehicle accidents is engaged. She reasons that it would be inequitable to expose an employer to action for which it is required to contribute under the Workers' Compensation Act. She states that:

> [146] ...There are, in fact, certain limited circumstances in which the Workplace Compensation Act does allow a claimant to elect to commence an action in court rather than to accept compensation under the Act. However, the possibility of election does not apply in this case. Section 45 of the Act sets out when an election is permitted:
>
> (1) Where a worker sustained 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 [certain motor vehicle accidents],
>
> the worker or his or her dependents, where they are entitled to compensation, may claim compensation or may bring an action.
>
> (Underling added.)
>
> [147] It is clear from this list of three exceptions that the option to elect to take an action in court, as opposed to receiving compensation under the legislation, is limited to situations where the claim is against the person who is not a participant in the insurance scheme, or the injury or death occurred outside the normal operations of the business, or where an alternate insurance scheme applying to motor vehicle accidents is engaged. No election is permitted where the injury or death involved a worker or an employer who is covered by the Workplace Compensation Act and the injury or death occurred during the ordinary operations of the business, other than as a result of a motor vehicle accident. The reason for denying an election is that the employer is required to contribute to the insurance fund established under the Act, and it would be inequitable to impose that requirement while leaving an employer exposed to an action in the court.

**Analysis**

I find the Ryan Estate decisions of both the Supreme Court of Newfoundland and Labrador Court of Appeal and the Supreme Court of Canada are relevant as it assists me in determining the intent of the Workers' Compensation System and Section 44.1 when considering whether or not an action is statutory barred.

**Markevich v. Canada [2003] 1 S.C.R.**

This is a Supreme Court of Canada decision involving the Respondent (Markevich) a resident of British Colombia who received a Notice of Assessment from the Minister of National Revenue regarding federal and provincial tax liabilities that arose from a series of tax assessments between 1980 and 1985. After taking no steps to collect the outstanding taxes, in 1998 the Minister of National Revenue sent a statement to the respondent's account indicating the balance had increased when factoring in the taxes owing as of 1986 plus accrued interest. The issue before the Court was whether the provincial and federal time limits to collect outstanding debts applied.

The Supreme Court of Canada noted the following in its decision:

> [12] The noted author E. A. Driedger in Construction of Statutes (2nd ed. 1983), at p. 87, stated that the modern approach to statutory interpretation requires the words of an Act "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"...
>
> [15] ...It is "a basic principle of statutory interpretation that the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording": see Friesen V. Canada, [1995] 3 S.C.R. 103, at para.27...

**Analysis**
I find this case relevant by virtue of the fact that it provides guidance on statutory interpretation.

**Gellately v. Newfoundland (Workers' Compensation Tribunal) 1994 No. 152, Supreme Court of Newfoundland and Labrador, Court of Appeal**
The Gellately case involves a worker who is employed as the District Manager for Granada Hospital Services Limited, which provided televisions for hospitals. While travelling home from Gander on a work related trip he was involved in a motor vehicle collision which left him seriously and permanently disabled. Blood alcohol testing completed at the Health Sciences Centre in St. John's revealed a blood-alcohol reading approximately 4 times the legal limit as defined by the Criminal Code of Canada.

Mr. Gellately's application for benefits under the **Workplace Health, Safety and Compensation Commission Act, R.S.N.L. 1990** was denied as it was determined his level of intoxication constituted serious and willful misconduct, breaking the employment nexus, and was the sole cause of the accident, and as a result the injury did not arise out of and in the course of employment.

On appeal to the Supreme Court of Newfoundland Court of Appeal, the Court determined that Mr. Gellately's injuries arose out of and in the course of employment. The Court stated:

> 9 The words "in the course of employment" refer to the time, place, and circumstances under which the accident takes place. The words "arising out of employment" refer to the origin of the cause of the injury. There must be some causal connection between the conditions under which the employee worked and the injury which he received (Black's Law Dictionary). In Mackenzie v. Grand Trunk Pacific Railway (1925), [1926] 1 D.L.R. (S.C.C.), MignaultJ. cited with approval [at p. 7] the

statement of Lord Atkinson in St. Helens Colliery Co. v. Hewitson, [1924] A.C. 59 (H.L.), that the words " ' "arising out of" suggested the idea of cause and effect, the injury by accident being the effect and the employment i.e., the discharge of the duties of the workmen's service, the cause of that effect...' " Today, doing something incidental to his or her employment would be sufficient, the discharge of the duty having been rejected as too narrow a view.

**Analysis**
The Gellately assists in interpreting the term "arising out of and in the course of employment".

**Wilson v. British Columbia (Superintendent of Motor Vehicles) [2015] 3 S.C.R.**
This case involves an appellant driving a motor vehicle that was stopped in 2012 at a police road check. The appellant provided samples of his breath which registered a "Warn", at which point the officer issued a Notice prohibiting the appellant from driving for a period of three days. The matter was before the Supreme Court of Canada to determine if the Superintendent of Motor Vehicles decision not to revoke the prohibition was reasonable.

**Analysis**
The Court confirmed Driedger's modern rule of statutory interpretation. The Court in this case highlighted that Charter values cannot be introduced to create ambiguity where none exists, and that the "plain meaning" of the referred to section of the Motor Vehicle Act is unambiguous. The Supreme Court of Canada stated that genuine ambiguity exists only when there are two or more plausible reading, each equally in accordance with the intention of the statute. The Supreme Court of Canada held in this case the words of the Motor Vehicle Act could not be clearer. The case at hand is not as clear since the phrase "use of a motor vehicle" can have different interpretations, which is supported by the many court cases regarding this subject. This leads me to conclude that I may consider extraneous materials in order to make my decision, which I reference further on in my determination.

The Court also held that the interpretation is reasonable and consistent in the context of the statutory scheme and is consistent with the legislative objectives.

**Culshaw v. Crow's Nest Pass Coal Co., 1914 CarswellBC 150**
In the Culshaw case an employee of Crow's Nest Pass Coal Co. was killed by a snow slide while seeking shelter from cold weather in a mountainous region. The shelter the worker was inside was built for all employees of the company to seek shelter from the cold weather. While in the shelter a snow slide occurred resulting in the employee's death. Upon application for benefits an arbitrator determined that the snow slide, which resulted in the fatality, occurred as a result of adverse weather conditions as opposed to duties related to the employment.

The Court stated that the workman met with the injury by accident arising out of and in the course of employment, and the Act plainly covers all injuries by accidents incidental to the special employment.

**Analysis**
This case speaks to interpretation of arising out of and in the course of employment.

**Vance, Re, 1932 CarswellNS 55, [1933]**

This case involves a worker who was employed as a Tub Repairer with Cumberland Railway and Coal Company. On the day the worker was fatally injured, after conducting personal business at the lamp cabin and then having lunch in the carpenter cabin, he was returning from lunch when he was crushed between two coal cars as he crossed a series of railway tracks. The employer contended that the route the worker too was not the "regular way". The question before the Court in this case is whether the fatal injuries arose out of and in the course of employment.

**Analysis**
This case provides additional assistance in interpreting arising out of and in the course of employment.

**Grand Trunk Pacific Railway v. Dearborn, 1919 CarswellAlta 114, [1919]**
This is a Supreme Court of Canada decision involving failure to renew a chattel mortgage in accordance with sections of The Bills of Sale Ordinance Alberta.

**Analysis**
The Court stated that where language of a statue is plain and unambiguous, the Court should not amend such statue either by eliminating words or inserting limiting words unless the grammatical and ordinary sense of the words as enacted leads to some absurdity or some repugnance or inconsistency with the rest of the enactment and in those cases only to the extent of avoiding that absurdity, repugnance and inconsistency. The case provides some principles of statutory interpretation

**Other Submissions**

**Craines on Statue Law, Seventh Edition, by S.G.G. Edgar**
In my determination I have also considered excerpts from the above noted and I note the following passages:

> The canon as to departure from the grammatical meaning was thus further stated by Lord Blackburn in Caledonian Ry v. North British Ry: "There is not much doubt about the general principle of construction. Lord Wensleydale used to enunciate (I have heard him many and many a time) that which he called the golden rule for construing all written engagements. I find that he stated it very clearly and accurately in Grey v. Pearson in the following terms: 'I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted—at least in the courts of law in Westminster Hall—that in construing wills, and indeed statues and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further.'...
>
> ... And in The Duke of Buccleuch, Lindley L.J. put the rule thus: "You are not to construe the Act of Parliament as to reduce it to rank absurdity. You are not to attribute to general language used by the legislature in this case, any more than any other case, a meaning which would not carry out its object, but produce consequences which, to the ordinary intelligence, are absurd. You must give it such a meaning as will carry out its objects."

> "It is a good general rule in jurisprudence," said the Judicial Committee in Ditcher v. Denison, "that one who reads a legal document whether public or private, should not be prompt to ascribe--should not, without necessity or some sound reason, impute-- to its language tautology or superfluity, and should be rather at the onset inclined to suppose every word intended to have some effect or be of some use."
>
> ..."In the construct of statutes you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature."

**Sullivan on the Construction of Statues, Sixth Edition, by Ruth Sullivan**
I have considered text from the above noted document in my determination. I note the following:

> **8.21 Presumption of orderly and meaningful arrangement.** It is presumed that in preparing the material that is to be enacted into law the legislature seeks an orderly and economical arrangement. Each provision expresses a distinct idea. Related concepts and provisions are grouped together in a meaningful way. The sequencing of words, phrases, clauses and larger units reflects a rational plan.
>
> **8.23 Governing principle.** It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a stature is presumed to make sense and to have a specific role to play in advancing the legislative purpose.
>
> ... As these passages indicate, every word in provision found in the statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.

**Ministerial Recommendations**
I reference the Ministerial Recommendations of Roger Grimes, former Minister, Department of Employment and Labor Relations, from February 28, 1992. Mr. Grimes notes provide a background regarding Section 44.1 of the Workplace Health, Safety and Compensation Act, RSN 1990. According to the recommendations, the Statutory Review Committee recommended changes to the Act to include a section allowing injured workers to claim compensation or bring an action against an employer or another worker if certain circumstances applied. Previous legislation allows workers to claim compensation and commence legal action which created administrative and collection issues. The following was the Ministerial Recommendation of the then Section 33 of the Act:

> Section 33 of the Workers' Compensation Act be amended to stipulate the choice of a worker to claim compensation or take legal action.

I also note the "Miscellaneous Legislative Changes Public Liability Insurance Claims" began with a background regarding the purpose of the Workers' Compensation Act, 1983 which was to provide compensation ". . .in lieu of all rights of action to which a worker or his dependents are or may be entitled to against an employer or a worker." which I reference as the statutory bar.

According to the Ministerial Notes the same statutory bar also extended to persons operating motor vehicles or traveling by other modes of transportation even though public liability insurance is required to be carried by the employer or worker in relation to the vehicle. This resulted in the workers' compensation system subsidizing the public liability coverage of private insurers. According to the analysis other jurisdictions resolved this dilemma "...by exempting the statutory bar to recover costs for accidents in the transportation sector for which there is public liability insurance either for motor vehicle mishaps only or transportation accidents generally." The analysis further notes the positive financial impact of recovering from private insurance funds that were otherwise payable through Workers' Compensation. This change would redistribute costs through higher private insurance premiums to those who make motor vehicle or public conveyance accident claims under public liability coverage of the typical insurance coverage. The following Ministerial Recommendation was made:

> The Workers' Compensation Act be amended by providing that the statutory bar in Section 33 does not apply where the worker was injured or killed while being transported in the course of the worker's employment by any mode of transportation in respect of which public liability insurance is required to be carried, or as a result of an accident involving the use of a motor vehicle by the worker or any other person.

According to the Explanatory Notes for Bill 48, An Act to Amend the Workers' Compensation Act, "Clause 8 of the Bill would amend the Act by stating that section 44 shall not apply where the claimant is injured or killed as a result of a motor vehicle accident while working and being transported by a mode of transportation with respect of which public liability insurance is required to be carried."

I reference the following in the August 10, 1992, Memorandum to Executive Council regarding amendments to Section 44:

> In discussing with the Minister of Justice amendments to Section 44 to remove the statutory bar to sue for damages when motor vehicle or common carrier liability insurance exists, it was recognized that any action by Government depends on its assessment of the policy issues. On the one hand, a complete statutory bar can be argued as workers' compensation is a universal, no-fault insurance program that employers fund in return for community from legal suit. On the other hand, by requiring employers to claim against private liability insurance before accessing workers' compensation would reduce the financial burden on the workers' compensation insurance program. Restoring financial stability in the workers' compensation was the principal reason behind the changes Government announced. On balance therefore, I recommend that exceptions to the statutory bar in Section 44 as contained in provision 9 of the draft Bill be approved as was done in several other jurisdictions in Canada.

I also note on November 22, 1993, former Minister Roger Grimes proposed "Housekeeping Changes" that would define "motor vehicle" for the purposes of section 44.1 of the Act. As we know section 44.1 creates an exception to the statutory bar which prevents workers from an action against employers or other workers. According to former Minister Grimes "This amendment would ensure that the exception would only operate with respect to accidents involving motor vehicles which must be covered by public liability insurance."

Upon review of the Ministerial Recommendations as outlined above, I find this is information vital to my determination as it provides an explanation as to the intention and object of the legislature when Section 44.1 was enacted.

**Workplace Safety and Insurance Act S.O. 1997**
Included with [redacted] submission is Part I, Interpretation Purpose of the Workplace Safety and Insurance Act, 1997. This is a section of the Act that governs workers' compensation in Ontario. It was submitted for the principle that one of the purposes of Workers' Compensation legislation is to provide compensation and other benefits to workers and dependents in a financially responsible and accountable manner.

**Interpretation Act, RSNL 1990, c I-19**
I reference the Interpretation Act, RSNL 1990, c I-19 and draw particular attention to Section 16 which states the following:

> 16. Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.

This section of the Interpretation Act refers to the Rule of construction, which I have already referenced.

**WorkplaceNL Policy EN-08, Third Party Actions**
Policy EN-08, Third Party Actions, further explains the exceptions to statute bar actions. Section 44 does not apply where a worker is injured or killed as the result of the use of a motor vehicle or while being transported in the vehicle or craft for which public liability insurance is required. This right is provided under Section 44.1. The exception to statutory bar under Section 44.1 applies even if the worker's employer or co-worker is operating the vehicle or craft as well as when the worker is a pedestrian or bystander struck by a craft or vehicle. According to the policy modes of transportation where public liability insurance is required include cars, trucks, vans, emergency vehicles, buses and school buses, taxis, motorcycles and mopeds, tractors, backhoes, heavy equipment, commercial and private aircraft, as well as snowmobiles, ATVs, and dirt bikes if used on a highway or to cross a highway.

**Conclusion**
On the date of the accident, July 5, 2011, [redacted] and [redacted] were in the [redacted] near the [redacted] inspecting pavement as a requirement of their employment. While performing these duties they were struck by a motor vehicle driven by [redacted]. The motor vehicle driven by [redacted] had no connection to the employer or co-workers at the worksite. While I confirm that [redacted] fatal injuries and [redacted] injuries arose out of and in the course of employment, I have determined that Section 44.1 cannot be used to provide an exception to the statutory bar when the employer is not protected by public liability insurance.

Section 44(2) of the Act states that a worker or his/her dependents have no right of action against an employer or a worker for an injury that occurs, while carrying out operations usual in or incidental to the industry carried on by the employer. This provision ensures what is known as the "Historic Trade-Off" as outlined in the **Pasiechnyk v. Saskatchewan (Worker's**

**Compensation Board (1997) 2 S.C.R. 890** and **Reference Re: Workers' Compensation Act, 1983 (Nfld.) (Piercey Estate v. General Bakeries Limited).** The "Historic Trade-Off" is highlighted by the fact that where a worker is injured and the injury arose out of and in the course of the employment, compensation benefits and services are provided to the worker without having to endure lengthy legal actions and without regard to fault. In turn, the employer is afforded the protection of not facing potentially financially crippling legal actions in relation to work related injuries.

Section 44.1(1)(b) outlines the criteria that must be considered in determining if a right of action exists. It states that Section 44 shall not apply where the worker is injured or killed 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. The motor vehicle driven by [redacted] was registered under the Highway Traffic Act to [redacted]. The vehicle meets the definition of "motor vehicle" as outlined in Section 44.1(2)(a) of the Act.

Section 44.1(1)(b) of the Act cannot be taken in isolation from the surrounding text of the Act. Legislative provisions which refer to use of a motor vehicle have been the subject of many court cases which leads to ambiguity in interpretation. I refer to a passage from the **Markevich v. Canada** Supreme Court of Canada decision as follows:

> [12] The noted author E. A. Driedger in Construction of statutes (2nd ed. 1983), at. p. 87, stated that the modern approach to statutory interpretation requires the words of an Act "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 the parliament".

I also refer to the Supreme Court of Canada in McLean which stated:

> [43] However, satisfying oneself as to the ordinary meaning of the phrase "is not determinative and does not constitute the end of the inquiry" (ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48). Although it is presumed that the ordinary meaning is the one intended by the legislature, courts are obligated to look at other indicators of legislative meaning as part of their work of interpretation. That is so because [w]ords that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.

When I consider these passages, I am reminded that I must consider the entire context of the Act, the scheme of the Act, the object of the Act, and the intention of the legislature at the time Section 44.1 was enacted. The purpose of the Act is to ensure that injured workers receive compensation in a timely manner. In turn, injured workers forfeit the right to take an action against an employer. The employer is required to pay into the workers' compensation insurance scheme fund and benefits by being protected from financially crippling litigation. This is known as the "Historic Trade-off".

With regard to Section 44.1, the intention of the Legislature can be determined from the Ministerial Notes. In the August 10, 1992, Memorandum to Executive Council it was noted that the amendments to Section 44 were "to remove the statutory bar to sue for damages when

motor vehicle or common carrier liability insurance exists." It notes that "by requiring employers to claim against private liability insurance before accessing workers' compensation would reduce the financial burden of the workers' compensation insurance program." The November 22, 1993, Memorandum to Executive Council dealt with adding a definition of motor vehicle to the Act. The Housekeeping Changes section states "This amendment would ensure that the exception would only operate with respect to accidents involving motor vehicles which must be covered by public liability insurance."

From these notes I have concluded that the legislature intended the cost of injuries arising from "use of a motor vehicle" be directed towards the public liability insurance system and away from the workers' compensation system. It was not the intent of the legislature to have the employer pay into the workers' compensation scheme while also being subjected to private actions where there is no ability to access public liability insurance.

In interpreting Section 44.1(1)(b) of the Act in light of the scheme and object of the Act, I must consider the Historic Trade-off which is a fundamental principle of the Act. I also must consider the intention of Parliament. As suggested by Judge Welsh of the Newfoundland Court of Appeal in the Ryan case, Section 44.1 is limited to situations where an alternative motor vehicle insurance scheme is engaged. She reasons that it would be inequitable to expose an employer to an action for which it is required to contribute under the workers' compensation scheme.

The Plaintiffs have argued that interpreting the statutory bar to prohibit the actions against [redacted] would lead to the Plaintiffs being significantly under compensated. The Newfoundland Court of Appeal has addressed the statutory bar in **Reference Re: Worker's Compensation Act, 1983 (Nfld.)**. The Court acknowledged the Historic Trade-off and states:

> The workers and their dependents to whom the Act applies are deprived of the benefits which might otherwise be available to them but have all the benefits available to them under the Act. The legislature has ordained that some will receive more, some will receive less, than they otherwise might. This is the manner that has been chosen to structure the social regime of workers' compensation.
>
> ....
>
> The workers' compensation scheme provides a stable system of compensation free of the uncertainties that would otherwise prevail. While there may be those who would receive less under the Act then otherwise, when the structure is viewed in total, this is but a negative feature of an otherwise positive plan and does not warrant the condemnation of the legislation that makes it possible. Judicial defense to the legislative will is required here.

The Supreme Court of Canada also addressed the issue of under compensation in Pasiechnyk:

> It would be unfair to allow actions to proceed against employers where there was a chance of the injured worker's obtaining greater compensation, and yet still force employers to contribute to a no-fault insurance scheme.

It has been suggested that employers may be able to access other forms of insurance other than mandatory public liability insurance. However, this would force employers to purchase additional insurance to cover losses which are supposed to be covered by the Act. As Judge

Cameron of the Newfoundland Court of Appeal suggested in the 2003 Warford Case if it was the intention of the Legislature to require employers to purchase insurance to protect against liability when they were covered under the Act, then why limit it to motor vehicle accidents.

I have determined that it was the intention of the Legislature to access mandatory public liability insurance in Section 44.1(1)(b).

I have not accepted the argument that a nexus is required between the use of a motor vehicle and the course of employment. The consequence of the nexus reasoning is that a worker would be prohibited from taking an action resulting from a motor vehicle accident where the driver or the owner is another employer or worker who is not connected to the injured worker's employment. This is not consistent with the intention of the legislature.

I have reviewed the various principles of interpretation that have been submitted and the arguments related to the relevant sections of the Act. I have made my determination on the basis of the object and scheme of the Act and the intentions of the legislature. However, I will address the arguments related to Section 44.1 and 45. There have been various arguments regarding redundancy and surplusage. However, the provisions of the Act all deal with different situations where an action is permitted under the Act

In comparing the subsections of 45(1), I note that 45(1)(a) allows an action against a person other than an employer or worker. This section may be applied to motor vehicle accidents but also applies to other actions such as slip and falls, product liability, medical malpractice, etc. Section 45(1)(c) references Section 44.1 and it specifically pertains to motor vehicles and other modes of transportation requiring public liability insurance. It allows actions against employers or workers in certain circumstances.

In reviewing Section 44.1(1)(a) and (b) I note that Section 44.1(1)(a) pertains only to workers who are being transported. This section includes forms of transportation other than motor vehicles. This has been used to allow actions for accidents regarding transporting workers in planes and helicopters.

Section 44.1(1)(b) includes accidents where the worker is not being transported such as actions were the injured worker is a pedestrian or a driver who is struck by another worker or employer.

In the case of [redacted] fatality and [redacted] injuries, Section 44.1 cannot be applied to allow an action against employers who are not protected by mandatory public liability insurance because it will offend the Historic Trade-off which is a fundamental principle of the Workers' Compensation system. To do so would be inconsistent with the scheme and object of the act and the intention of Parliament.

**Determination**

It is my determination that the action brought by the Plaintiffs against [redacted] is statute barred. I have filed a certificate with the court, a copy of which is attached.

Sincerely,

**Kathy Gliddon**
Internal Review Specialist

KG: jh

C: Paula Fudge, Administrative Officer, Internal Review
David Goodland, Goodland Buckingham
Barry Learmouth, Learmouth Dunne Boulos
Stephen Fitzgerald, Browne Fitzgerald Morgan Avis
Alex Templeton, McInnes Cooper
Valerie Hynes, Roebothan McKay Marshall
Laura Brocklehurst, Cox & Palmer
[redacted]