WorkplaceNL

Health | Safety | Compensation

Third Party Determination

August 7, 2019

Cox & Palmer
Attn: Denis J. Fleming
Suite 1000, Scotia Centre
235 Water Street
St. John's, NL A1C 1B6

Dear Denis Fleming:

[redacted]

I have reviewed in accordance with Section 46 of the Workplace Health Safety and Compensation Act (herein referred to as the "Act"), the submissions of all interested parties as to whether an action by [redacted] the (Plaintiff) against [redacted] (First Defendant) and [redacted] (Second Defendant) and [redacted] (Third Defendant) is prohibited by section 44 of the Act.

Background Information

On July 3, 2013, the Plaintiff was injured while working with [redacted] The Plaintiff described that while operating a forklift to unload a salmon truck, she was struck by a forklift operated by [redacted]. The Accident occurred as the Plaintiff, who was operating a forklift, was backing away from the truck after picking up a container of salmon and [redacted] who was also operating a forklift was reversing out of the fish plant after dropping off a container of salmon.

On December 10, 2014, a statement of claim was filed by Allison Whelan of the law firm, Roebothan, McKay & Marshall, on behalf of the Plaintiff against the Defendants for damages for injuries sustained, specifically, but not limited to, her neck, back, shoulders and head. M. Whelan cited the Plaintiff's injuries, pain and discomfort were caused by the negligence of the Defendants.

On April 28, 2018, you requested, on behalf of the Defendants that WorkplaceNL determine, pursuant to Section 46 of the Act, whether the action brought by the Plaintiff against your clients is prohibited by Section 44.1 of the Act. The request was for a

finding that the exception to the statutory bar found in Section 44.1(1) of the Act does not apply in this matter and the Plaintiff is thereby statute barred.

On July 27, 2015, a Section 46 response was filed by M. Whelan, on behalf of the Plaintiff. M. Whelan requested that WorkplaceNL determine that Section 44.1(1) is applicable in this circumstance thereby allowing her claim against the Defendants to proceed.

A reply submission was provided by the Defendant on October 28, 2015. It was noted that the Plaintiffs suggests that the accident happened on public property and, therefore, the worker's forklift and the [redacted] forklift were required to carry insurance under the Highway Traffic Act. The Defendants provided Affidavits from [redacted] Plant Manager and [redacted] Office Manager indicating that this is not correct.

A further submission was provided by the Plaintiff dated October 9, 2018, but not received until November 15, 2018. A second reply submission of the Defendants was received on January 11, 2019. A rebuttal was provided by the Plaintiff on March 11, 2019. The response to the Plaintiff's March 11, 2019, correspondence was provided by the Defendant on April 9, 2019.

Legislation and Policy

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

Definitions

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 or 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 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 the 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 labor 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 voids 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 orchestral worker, and
(iv) an executive officer, manager or director of an employer.

Section 19 of the **Act** states:

Exclusive Jurisdiction

(1) 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

(a) whether an injury has arisen out of and in the course of an employment within the scope of this Act;
(b) the existence and degree of impairment because of an injury;
(c) the permanence of impairment because of an injury;
(d) the degree of diminution of earning capacity because of an injury;

(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(1) of the **Act** states:

Compensation Payable

Compensation under this act is payable

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

Compensation Instead of Action

(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

(1) Section 44 shall not apply with a 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

(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

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" states:

Part 1 - Rights of Action

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

The restrictions on right 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.

Position of Defendants

The Defendants, [redacted], are seeking a determination pursuant to section 46 of the Act, that section 44.1(1) of the Act does not apply in the case of [redacted] injury and action. Therefore the Defendants maintain that [redacted] is barred from maintaining the action pursuant to Section 44 of the Act.

The Defendants put forth that there is no question that the worker's injury occurred while she was engaged in the course of her employment or that each of the Defendants named in the Action qualify as either an employer or worker under the Act. Therefore, unless an exception to the statutory bar applies, the Action is barred pursuant to the Act.

The Defendant's position is that the only possible exception to the statutory bar in the within case is found in section 44.1 of the Act. Section 44.1 applies to accidents that occur while the worker is 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 suffers injury as a result of an accident involving the use of a motor vehicle.

The Defendants argue that Section 44.1(1)(a) is not applicable to this case. The Defendants note that even if WorkplaceNL accepts that the Plaintiff was being

transported in the Plaintiff's forklift at the time of the accident, there was no requirement to carry public liability insurance on the Plaintiff's forklift. The Defendants note that neither the Plaintiff's forklift nor the [redacted] forklift was used on a "highway" as defined in the Highway Traffic Act. As such, neither forklift was registered at the time of the accident therefore there was no requirement for public liability insurance. In addition, the Defendants indicate that Section 44.1(1)(a) is limited to situations in which the worker is a passenger in a vehicle that was at fault for an accident.

With regard to Section 44.1(1)(b), the Defendant submits that the [redacted] forklift does not meet the definition of motor vehicle in the Act since it was not registered under the Highway Traffic Act and was not on a "highway" at the time of the accident. Therefore the exception to the statutory bar in Section 44.1(1)(b) does not apply.

The Defendants also indicate that the purpose and intent of Section 44.1(1)(b) is to transfer certain losses from WorkplaceNL to automobile insurance. Since there is no requirement for automobile insurance coverage to be carried on the [redacted] forklift, this is not one of the circumstances meant to be captured by Section 44.1(1)(b).

The Defendants maintain that the uncontradicted evidence is that the [redacted] forklift was not being used as a method of conveyance at the time of the accident. Rather it was being used as a piece of commercial equipment. Therefore, it cannot be said that the accident was one involving the use of a "motor vehicle". As a result, Section 44.1(1)(b) of the Act does not apply and the action is barred by Section 44 of the Act.

There was a reply submission provided by the Defendants dated November 10, 2015. The Defendants state that much of the Plaintiff's argument is based on a number of flawed factual assumptions. First of all, the Plaintiff suggests that the accident happened on public property and, therefore, the worker's forklift and the [redacted] forklift were required to carry insurance under the Highway Traffic Act. The Defendants note that as set out in the Affidavit of [redacted] sworn October 27, 2015, this assumption is not correct. The incident happened on private property leased by the Respondents and both of the forklifts involved were being used wholly within the confines of the Defendants private property. In these circumstances, the Defendants were not required to register the forklifts. The Defendants state neither the Plaintiff's forklift nor the [redacted] forklift was registered under the Highway Traffic Act at the time of the accident.

They go on to indicate that as set out in the Affidavit of [redacted] only registered forklifts would leave its private property. The fact that the Defendants registered two of their forklifts is consistent with the fact that two of the forklifts involved in the accident were not required to be registered under the Highway Traffic Act.

The Defendants indicate that as neither the [redacted] forklift nor the worker's forklift were operated on a "highway" or were required to be registered under the Highway Traffic Act, the forklifts do not meet the definition of "motor vehicle" in Section 44.1(2) of

the Act and the accident did not involve motor vehicles for which liability insurance was required to be carried.

The Defendants have argued that because the accident occurred on private property, the forklifts did not require registration or insurance. Further, they have argued that the classification of the forklift at any time except the specific moment of the accident is irrelevant.

A reply submission from the Defendants was received on January 11, 2019. They indicate that the issue in the Plaintiff's reply submission is not whether the loading area where the accident occurred was a "highway". The Defendants state that the evidence clearly shows that this was private property and not a highway. Subsection 44.1(2)(b) expressly states that it only applies "while" the vehicle is being operated on a highway. In other words, the location of the vehicle at the time of the accident is what matters. The [redacted] forklift was not on a highway as the term is defined in the Highway Traffic Act at the time of the accident. Even if, as alleged by the Plaintiff in her reply submissions, the [redacted] forklift was operated on "highways" at other times despite not being registered, this has no bearing on the within analysis as the accident did not occur "while" it was on a "highway".

The Defendant's final submission is dated April 9, 2019. They indicate that the analysis in this case is to be conducted under Section 44.1(1)(b) of the act and the fact that the forklifts may have been used improperly at other times did not mean that they were vehicles that were "required to carry mandatory insurance". Rather they were pieces of equipment that were not permitted to be on public roadways; and even if the forklifts were occasionally used as vehicles and the use of the forklift at other times of day meant that they meet the requirements of 44.1 (1)(a) generally, they are multipurpose machines that were being used as equipment (not vehicles) the time of the accident.

Position of the Plaintiff

In the Plaintiff's submission it is argued Section 44.1 of the Act allows exceptions to the statutory bar and therefore the Plaintiff commenced an action in the Supreme Court of Newfoundland and Labrador against the Defendants for damages.

It is the Plaintiff's position that the forklifts in question were functioning as motor vehicles at the time of the accident and that they qualify as motor vehicles for the purposes of Section 44.1 of the Act. The Plaintiff submits that she was being transported in the course of her employment by a forklift, a mode of transportation in respect of which public liability insurance is required to be carried and thus is covered by the exception listed in Section 44.1(1)(a). The Plaintiff further submits that she was injured as a result of an accident involving the use of a forklift, a motor vehicle as defined by Section 44.1(2), in the course of her employment and thus is also covered by the exception listed in Section 44.1(1)(b).

Applying the Section 44.1(1)(a) exception to the statutory bar, the Plaintiff puts forth that public liability insurance is required to be carried if the motor vehicle is used on a "highway", per Section 75 of the Highway Traffic Act. As such, the applicability of Section 44.1(1)(a) of the Act turns on whether or not the wharf where the accident occurred meets the definition of "highway" in the Highway Traffic Act.

The definition of highway was put forth from the Highway Traffic Act where "highway" is defined as "a place or way, including a structure forming part of the place or way, designed and intended for, or used by, the public for the passage of traffic or the parking of vehicles and includes all the space between the boundary lines of the place or way". Where it is possible that the public can use the place or way, even if the use is by a pedestrian or an animal, all vehicles being used on that place or way are required to carry public liability insurance.

The Plaintiff contends that while portions of the wharf are not intended for public use, public use certainly occurs. It occurred on the day of the accident as the salmon truck the Plaintiff was unloading was on a public place or way; it was parked on the public road and not on the private property of the Defendants. Further, public use occurs to such an extent that the Third Defendant instructs employees to keep members of the public away from the salmon bins to ensure that there is no risk of contamination. All that is required to trigger the Highway Traffic Act is any use of the public, including pedestrians. A public road leads directly to the wharf in question, thus the wharf is a structure "forming part of the place or way" that is "used by" the public. At least some public use occurs from time to time, including the day of the accident.

It is argued by the Plaintiff that since the public can use the wharf in question, whether public use is intended or not, it qualifies as a "highway" per the Highway Traffic Act. Since it qualifies as a highway, and public liability insurance is required to be carried on a highway the exception depicted in Section 44.1(1)(a) of the Act applies in the circumstances. Even if WorkplaceNL decides the wharf is not a highway, the forklifts in question ought to have been registered and were "required to be registered" as described in Section 44.1(1)(a), as the forklifts were routinely used in public areas. In fact, the forklifts were regularly used to load and unload trailers on the public road.

It is argued by the Plaintiff that it would be absurd and unfair to read the legislation in such a fashion that public insurance would be required to be carried in all circumstances as a condition precedent in triggering the exception to the statutory bar. Such a scheme would allow employers to willfully avoid liability from bona fide claims simply by choosing not to register and insure certain motor vehicles. The forklifts involved in this accident are to have been covered by public liability insurance, and were in fact covered by such insurance. To maintain the statutory bar in such circumstances would in effect reward the Defendants for this inappropriate omission.

A reply submission of the Plaintiff was received dated October 9, 2018. They contend that the heart of this matter is a determination of whether or not the forklift that the

Plaintiff was operating at the time of the accident was a "mode of transportation in respect of which public liability insurance is required to be carried". If WorkplaceNL determines that the accident involved the "use of a motor vehicle" the Plaintiff's action is not statute barred by virtue of Section 44.1(b) of the Workplace Health, Safety and Compensation Act.

The Plaintiff has indicated that the Defendants have relied on the Affidavit of [redacted] dated October 27, 2015, to support the argument that only registered forklifts would leave its private property. However, when looking at the survey, it is clear to see that the "Loading Ramp" used in the operations of the fish plant is outside of the boundaries of the lease. Furthermore, the Affidavit of the employees, [redacted] and [redacted] support and substantiate that the forklifts that were in operation at [redacted], including the forklift that was involved in the accident that is at issue in this matter, were routinely operated on [redacted] Road and [redacted] Road as part of the normal daily duties of forklift operators employed with [redacted]

The Plaintiff's submission indicates that, the forklifts in question were being operated on a highway in the province, thereby meeting the definition of a motor vehicle described in Section 44.1(2)(b), thus meeting the requirements for the exception to the statutory bar found in Section 44.1(1)(b).

Should WorkplaceNL make a finding that the leased premises are private property, then Section 44.1(1)(b) would not assist the Plaintiff as the forklifts will not meet the definition of "motor vehicle" found in Section 44.1(2) as they were not registered (by choice of the Defendants), and were not found to be operating on a highway.

A final submission by the Plaintiff dated March 11, 2019, agrees that a multi-purpose vehicle, like a forklift, can be used in multiple ways and is not always used as a motor vehicle and is therefore able to change categories or classification multiple times throughout the day depending on its "use" at any particular time. The Plaintiff is in further agreement that in order to make a determination with respect to Section 44.1(1)(b), WorkplaceNL or the Court must look at the "use" of the vehicle involved in the accident at the time of the accident in order to determine whether or not the vehicle involved is being "used" as a motor vehicle at the relevant time. The Plaintiff acknowledges that if a multipurpose vehicle that is involved in an accident is not being "used" as a motor vehicle at the time of an accident, then Section 44.1(1)(b) would not be triggered.

In applying Section 44.1(1)(a), the Plaintiff submits that WorkplaceNL should take into consideration not only the place/location of the mode of transportation at the time of the accident (on a highway vs. on private property), but the manner in which the mode of transportation was operated on a daily routine basis, as well as other possible factors when making a determination of whether or not a mode of transportation is one in respect of which public liability insurance is required to be carried.

In this case, the Plaintiff submits that the affidavit of [redacted] support a factual finding that the forklift which was transporting the Plaintiff at the time of the accident routinely operated on a highway, crossing from the leased premises to the public road regularly throughout the day. The Plaintiff submits that these facts support a finding that the forklift in question is a mode of transportation in respect of which public liability insurance is required to be carried.

The Plaintiff submits that both exceptions to the statutory bar found in Section 44.1(1)(a) and 44.1(1)(b) are applicable and that WorkplaceNL should allow her claim against the Defendants to proceed.

Reasoning and Analysis

[redacted] are the applicants in this case. The matter before me, as a result of the application by the Defendants, is to determine whether the action of the Plaintiff against the Defendants is barred by the provisions of the Act. As provided by Section 46 of the Act, WorkplaceNL has the authority upon the application of a party to the action to adjudicate and determine whether the action is prohibited by the Act. I have reviewed and considered the submissions of the Defendants, the rebuttal submissions by the Plaintiffs, the reply submission of the Defendants, and the subsequent submissions of both parties.

Section 44.1 of the Act provides the statutory bar to actions of the worker against an employer or another worker for an injury which arises out of and in the course of the worker's employment. There is an exception to this provision of the Act. Section 44.1(1) states that Section 44 shall not apply where the worker is injured 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. Section 44.1(1) also states that Section 44 shall not apply where the worker is 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.

In making the determination I have considered a number of issues which include:

1. Was [redacted] a "worker" within the meaning of the Act?

From my review of the facts in this case, [redacted] was employed as a Utility Worker with [redacted]. She was struck while driving a forklift at her workplace by [redacted] who was also driving a forklift. [redacted] is a worker within the meaning of Section 2(1)(z) of the Act.

2. Was [redacted] a "worker" or "employer" within the meaning of the Act?

From my review of the facts in this case, [redacted] was employed as a Forklift Operator with [redacted] He was backing out of the fish plant at his workplace on the forklift when he struck [redacted] who was also operating a forklift. [redacted] is a worker within the meaning of Section 2(1)(z) of the Act.

3. Was [redacted] an "employer" within the meaning of the Act?

According to WorkplaceNL records, [redacted] are registered employers in the province of Newfoundland and Labrador. In accordance with Section 2(1)(j) of the Act, [redacted] are considered employers within the meaning of the Act.

4. Did [redacted] injuries arise out of and in the course of employment?

My review of the facts confirm that [redacted] injuries arose out of and in the course of employment. This is also agreed upon by all parties.

5. Does the exception to the statutory bar in Section 44.1 of the Act apply to this case?

This is the main focus of my decision and the issue that is in dispute between the parties.

The facts of the case show that the Plaintiff was operating a forklift to unload a salmon truck. She was struck by a forklift which was operated by [redacted] who was backing out of the fish plant. At the time of the alleged accident, the forklifts were unloading and moving containers of salmon.

I have reviewed the case law submitted by both parties to determine relevance and applicability to this case.

Case Law and Submissions

Reference Re: Worker's Compensation Act, 1983.

The Lieutenant Governor in Council referred to the Court of Appeal questions relating to the constitutional validity of s.32 and 34 of the Worker's Compensation Act, S.N. 1983 (the Act). Section 32 and 34 of the Act deal with the statutory bar and are similar to Section 44 and 46 of our current Act.

It was concluded that Section 32 of the Act does not infringe on the equality rights protected by Section 15 of the Charter in denying workers and their dependents a right

of action in respect of work-related injuries or death and replacing it with a no fault insurance scheme of compensation.

Analysis

This case explains the historic trade-off whereby workers give up their right of action and the employers collectively agreed to pay compensation regardless of fault. The historic trade-off has been taken into account in my interpretation of the Act.

A Ministerial Recommendation from Roger Grimes, Minister - Department of Employment and Labour Relation entitled "Operational, Policy and Legislative Changes in Workers Compensation" dated February 28, 1992.

M. 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 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 for 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 have dealt with 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 in respect of which public liability insurance is required to be carried."

I reference the following in the August 10, 1992, Memorandum to Executive Counsel 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 employer's fund in return for immunity from legal suit. On the other hand, by requiring employers to claim against a private liability insurance before accessing workers' compensation would reduce the financial burden on the workers' compensation insurance program. Restoring financial stability in worker's 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.

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

Letter to the Deputy Minister, Department of Employment and Labour Relations and from Katherine Crosbie, General Counsel of Workers Compensation Commission dated March 3, 1993, and a memo to the Board of Directors from Katherine Crosbie dated October 19, 1993.

A proposal for a purposive definition of the term "motor vehicle" was outlined. It was noted that the Newfoundland and Labrador Workers Compensation legislation did not include the definition of motor vehicle which forms an integral part of the exception and narrows its application. The letter indicates that Ms. Crosbie's understanding of the intention of Section 44.1 was to make private insurers liable for losses of covered under required liability insurance.

The letter notes that in the absence of a purposive definition, the term "motor vehicle" can be very broadly applied. The Highway Traffic Act defines "motor vehicle" to mean a "vehicle propelled, driven or controlled otherwise than by muscular power, other than a trailer or a vehicle running upon fixed rails." Such a broad definition would include vehicles like forklifts whether or not they are used on public roads and thus whether or not they are required to be insured. The issue of workers suing their employers or co-workers as a result of being struck by a forklift has already been raised.

The memo recommends defining motor vehicle in order to narrow application of Section 44.1 to vehicles which are covered or required to be covered by public liability insurance.

Analysis

M. Crosbie suggests a definition of motor vehicle which is similar to the definition in the current legislation. Upon review of this submission I find this is information important to my determination as it provides some insight into the development of the legislation.

Sullivan on the Construction of Statutes, Sixth Edition, by Ruth Sullivan

I have considered text from the above noted document in my determination.

This article speaks to matters before the courts in which extrinsic documents are admissible when interpreting legislation. It outlines reasons to consult extrinsic aids. Professor Sullivan indicates that materials containing evidence of external context can be helpful in understanding the meaning of legislative language and in inferring legislative purpose.

Analysis

This article deals with the inclusion of documents to assist in the interpretation of legislation as they often contain information about the purpose or meaning of legislation. This article has relevance to the case at hand as Legislative documents and WorkplaceNL documents were presented to assist in the task of interpreting section 44.1 of the Act.

Weir's Construction Ltd v. Warford 2003 NLCA 36

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 concluded that the matter was not statute 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 the statutory interpretation. The Court adopted the approach to the 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 a clear that when determining whether the exception found under Section 44.1 of the Act applies to a given situation, WorkplaceNL must examine the purpose of the Act in general and Section 44.1 in particular.

I find the Warford case relevant as it confirms WorkplaceNL is to apply a purposive approach to the statutory interpretation and considered the purpose of the Act in general and Section 44.1 in particular. At paragraph 44 and 45 of the Warford case, Justin 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

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 objectives 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 of the surrounding text, interrelation of other related statues, the social and legislative context in which the provision was enacted, other extrinsic aids must be consulted during the process of determining the "true" meaning of a particular statute.

Rizzo & Rizzo Shoes Ltd. (Re)

In this case, the court stated that the use of legislative history as a tool for determining the intent of legislature is appropriate.

Analysis

The Archean and Rizzo cases provide guidance in statutory interpretation. These cases confirm that when reviewing a particular provision of an Act, such as Section 44.1(1)(b) the entirely of the surrounding text, objectives, interrelation of provisions, social and legislative intent of the Act and legislative history must be considered when determining the "true" meaning.

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

In this case, an employee requested information from the Department of Justice. The Department of Justice refused the request claiming and that the records were subject to solicitor client privilege. The employee made a request to the Privacy Commission where the Privacy Commissioner's Office requested that the Department of Justice produce records for the purpose of verification that the records were subject to solicitor client privilege. The Department of Justice denied the request indicating that s.52 (3) of the Access to Information and Protection of Privacy Act (ATIPPA) did not circumvent this privilege. The Court found that the production of the records to the Privacy Commissioner was not required. Upon appeal of this finding, the Newfoundland Labrador Court of Appeal found that Section 52 was unambiguous and explicitly permitted the privacy Commissioner to abrogate a claim to solicitor client privilege in order to verify the legitimacy of such a claim in the discharge of his statutory mandate.

Analysis

In this case the Court of appeal, to assist in the process of interpreting ATIPPA, used statements from the Newfoundland Labrador House of Assembly and report prepared by a review committee, determining that such sources of legislative history "may be relied upon by a court in determining the proper interpretation of the statute".

Diamond Estate v. Robbins

In this case there had been an accident between two motor vehicles in February 1998. One of the drivers (David Diamond) was killed in the accident. The estate of M. Diamond commenced an action in which Diamond and others sought release in respect of injury caused by the alleged negligence of Robbins, the other driver involved in the accident. Robbins denied the allegations of negligence and stated that the accident was caused by the negligence of the late David Diamond. After retaining additional counsel in 2003, application was made requesting leave to file a counterclaim in the within action. M. Robbins was granted leave to file a counterclaim.

Analysis

In this case, to assist in interpreting the Limitation Act, the Court referred to the Newfoundland Law Reform Commission reports as evidence of context, legislative purpose and textual meaning.

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

M. Keddy was at work when she cut off part of her finger with a saw. The surgeon amputated the tip of her finger. She attended the hospital for pain treatment. She alleged that the nurse had administered an injection near the sciatic nerve, causing

more pain. M. Keddy brought an action against the nurse and hospital. The nurse applied for determination of whether M. Keddy's action was barred under s.11(1) of the Worker's Compensation Act.

The Court of Appeal held that a sufficient causal connection between the initial and subsequent injury exists in that the latter is a necessary incident of the former. They stated that this conclusion is consistent with the objects under scoring the no fault compensation scheme. What is inconsistent with the scheme is the adherence to common law principles of causation.

Analysis

The court commented on Section 11(1.1) which deals with the exception to the statutory bar in the New Brunswick legislation. The New Brunswick Court of Appeal stated:

> "As is well known, s.11 (1.1) provides for an exception for injuries arising from accidents involving the use of a motor vehicle where private insurance coverage is required."

Amos v. Insurance Corp. of British Columbia

The motorist was attacked by a gang while he was driving. One of the gang members shot and seriously injured the motorist while he was escaping in his vehicle. The motorist applied for benefits under his Automobile Insurance policy. The claim of the motorist was denied; therefore, the motorist subsequently appealed to the Supreme Court of Canada. The Court determined the motorist was driving his van down the street which was an ordinary and well-known use of an automobile. In making this determination, the Court applied a two-part test: (1) did the accident result from the ordinary and a well-known use of an automobile, and (2) if there a causal relationship between the motorist's injuries and the ownership, use or operation of the vehicle. The Court determined that driving a van down the street was an ordinary and well-known activity to which automobiles are put and the injuries were causally connected with the ownership, use and operation of the vehicle. Therefore, the motorist was entitled to insurance benefits.

Analysis

In the Amos case, the injuries or damages were determined to be as a result of the use of a motor vehicle. The motor vehicle in question was an automobile (motorcar) designed to carry people. Amos deals with entitlement to motor vehicle insurance benefits under the Insurance (Motor Vehicle) Act of British Columbia. In this case, it was determined that the motorist's driving was an ordinary and well-known activity, to which automobiles are put. The motorist's injuries were considered to be causally connected with the ownership, use and operation of the vehicle.

The Amos case does not involve an interpretation of the Workplace Health, Safety and Compensation Acts, or similar legislation from another worker's compensation jurisdiction. This case provides little assistance since "use of a motor vehicle" must be interpreted in light of the Act.

Citadel General Insurance Co. vs Vytlingam

The injured motorists were seeking insurance coverage under their own automobile insurance policy. The Plaintiffs in this case were seriously injured when boulders were dropped overhead on their car as they passed through the underpass. The tortfeasors had transported boulders to the overpass with their car. In order to recover under the Policy, the injuries had to arise "directly or indirectly from the use or operation" of the tortfeasor's automobile.

The Supreme Court applied the two-part purpose and chain of causation test. The Court found that the purpose test was satisfied since transportation is what motor vehicles are used for. However, the Court held that the chain of causation had been broken by an intervening act of negligence. The Court found that the rock throwing was an activity entirely severable from the use or operation of the tortfeasor's car. The Court held that there was no coverage under the policy.

Lumbermens Mutal Casuality Co. v. Herbison

In this case, a hunter accidentally shot a member of his hunting party while driving his truck to his designated hunting spot. It was just before sunrise and the hunter, believing he saw a deer in his headlights, got out of his truck and shot the other hunter.

The issue before the Supreme Court was whether the injuries sustained by the other hunter arose "directly or indirectly from the use or operation" of an automobile. The Court applied a two-part test that had been traditionally applied by the Court. The Court concluded that although the purposed test was satisfied, since the truck was being driven at the time of the shooting, the chain of causation test had not been satisfied and ruled that the Policy does not apply. The Court concluded that there had been an intervening act of negligence that had been the cause of the accident-that being the shooting itself. The Court held that this act was independent of the use and operation of his truck.

Analysis

In both of these cases it was determined that there was an intervening act of negligence responsible for the "accident" and the Court concluded that the act was independent of the use and operation of the motor vehicle. These cases provide little assistance since "use of a motor vehicle" must be interpreted in light of the Act.

Harvey v. Shade Brothers Distributors Ltd.

An individual filled the tank of the domestic oil heating plant, and continue to pump oil into the premises, thereby causing damage. The oil was conveyed from the delivery truck (a motor vehicle) by means of a hose and pump, the power for the operation of which was supplied by the truck's engine. The truck was stationary at the time. It was concluded that the motor vehicle was being used as a tank and pump in the accident was not one in which a motor vehicle was involved. The court said that the test to be applied when considering the character of the multipurpose article at any given time is the purpose for which at that time, it was being used.

F. W. Argue Ltd V. Howe

A delivery person overfilled an oil tank from a tank truck. The oil ignited, causing extensive damage to the customer's premises. It was determined that the damage was caused by the use or operation of the fuel pump mounted on the motor vehicle when the motor vehicle itself was stationary. The court determined that the vehicle was being used as something other than a motor vehicle at the time of the accident.

Lanteigne v. Nova Scotia (Worker's Compensation Appeals Tribunal)

The worker was injured when a boom truck toppled onto its side. The injured worker was in the steel bucket at the end of the boom. The Appeal Tribunal held that while the accident involved a motor vehicle, the vehicle was not being used as a motor vehicle at the time of the accident. The Nova Scotia Court of Appeal upheld the decision.

A Dixon Cable Laying Co. Ltd. v. Osbourne Contracting Ltd.

A backhoe was being used to fill in a trench which had been laid for the British Columbia Telephone Company. In the process, the backhoe went out of control and damaged the cable. The backhoe was considered a motor vehicle under the Motor Vehicle Act. The question was whether the limitation under the Motor Vehicle Act applied. In order to apply, the damages had to be occasioned by a motor vehicle. The Court held that the backhoe was being used as a shovel and was not being used as a motor vehicle. The Court further stated that it did not matter that the vehicle was stationary or operational in determining use of the vehicle.

Analysis of the Harvey, Argue, Lanteigne, and Dixon cases.

The cases provide guidance on how the Courts have viewed multi-use vehicles. In the above cases the injuries and damages were determined not to be as a result of the use of a motor vehicle. In these cases the Courts distinguish between when the vehicle was being used as a motor vehicle versus when it was being used as equipment. In the above cases the injuries or damages were deemed not to be a result of the use of a

motor vehicle. In Dixon it was stated that the real question is the use of the vehicle at the time in question.

Walsh v. Marwood Ltd.

In this case, a Forklift Operator was unloading lumber from a trailer and an employee was injured when a load of lumber fell off the forklift and fell on the employee. The injured worker elected to receive benefits from the Workers' Compensation Board. The worker subrogated his rights, and the Board brought an action against the employer. There was a potential exception to the statutory bar if the injury occurred as a result of "driving of a motor vehicle". However, the Supreme Court determined that the forklift was not operating as a motor vehicle at the time of the accident. It was not being used as a means of conveyance but was being used as a piece of industrial machinery. Any movement underway along the ground was incidental to the job of removing wood from the trailer. Even if the forklift was a motor vehicle, it was not being "driven" and as such the accident did not result from driving a motor vehicle registered or required to be registered, therefore, the exception to the statutory bar did not apply. The court stated that the relevant question is how the forklift was being used at the time of the accident.

Analysis

In this case, while the phrase "driving a motor vehicle" was the legislation at issue, and it is more restrictive than the Act's "use of motor vehicle", I find that this case does have applicability to the case at hand. The forklift was not stationary as it was being used to lift lumber as opposed to being used as a means of transportation. The court noted that any movement was incidental to removing the wood. In the case at hand, the forklifts were being used to transport containers of salmon into the fish plant.

Insurance Corp. of British Columbia v. Routley, 1995 CanLII 2716 (BC CA)

The respondent, an R.C.M.P Constable stationed at Grand Forks, was the operator of a police vehicle. He and his partner were attempting to locate a stolen motor vehicle, which they found on an abandoned railway right-of-way. The stolen vehicle was being operated by the defendant Straume, who was unlicensed. The defendant, traveling southbound on the railway right-of-way, initially slowed upon approaching the northbound police vehicle, then accelerated directly towards the police vehicle and struck it head-on. The railway right-of-way on which the collision occurred ran from Grand Forks north to Eholt, and was owned in fee simple by C.P Rail. The railway tracks and ties were removed from the right-of-way in or around 1991.

The railway tracks were taken up some years ago and the abandoned rail bed had come to be used by cyclists, hikers, skiers, horseback riders and various motorized vehicles. The users of the land did not have the permission of C.P. Rail but conversely, C.P Rail was fully aware of these activities and had taken no steps to restrict or control them. The respondent argued that the use to which the area has been put make it a

road, regardless of the fact that the strip of land is an abandoned railway roadbed located on private property.

The Court of Appeal determined that the trial judge was correct in finding that the abandoned railway right of way was being used by the general public for the passage of vehicles and was therefore a "highway" within the meaning of s.19(2).

Analysis

This case provides some guidance in how the courts interpret "highway".

Parrill v. Genge, 1997 CanLII 14696 (NL CA)

In March 1990, Genge was operating a skidoo, owned by his father, on the shoulder of the highway driving with traffic. Parill was driving a car. On a section of road where the shoulder narrowed, the Parrill car came abreast of the Genge skidoo. The car went out of control, turned around and collided with a telephone pole on the other side of the road.

Action was taken on behalf of Parrill against Genge and his father to recover damages arising from the accident. The trial judge found that liability should be apportioned, but that the greater contribution to the cause of the accident was clearly the negligence of the youth driving the skidoo.

Also at issue was Steward Genge's vicarious liability, as skidoo owner, for his son's negligence. The challenge to the fixing of vicarious liability upon Genge's father centered on, if it was being operated on a "highway" within the meaning of the legislation. Counsel argued that that M. Genge's skidoo was not a "vehicle" being operated on the "highway" within the legislation's meaning. Counsel argued that a conveyance only becomes a "vehicle" under the enactment" when it is one whose use is permitted on a highway and which is actually on it. From the standpoint of this reasoning, he concludes that from this definition of "vehicle" it can inferred, if a conveyance is one that is not allowed on the highway, or is allowed but is not actually on it, that it is not a "vehicle" regulated by the Highway Traffic Act with the result that the conveyance's owner will not be vicariously liable for its driver's negligence.

It was determined that the snowmobile was on the highway when being driven on the road's shoulder.

In this case, the definition of "Highway" is debated. It noted that the current definition simply recognized that most highways will be "designed and intended" for use of for public passage of the vehicular traffic; but, as in the definition it replaces, retains the notion that usage is the essential criterion and that it is ultimately immaterial whether the place or way is designed and/or intended for use. The accident occurred on the shoulder of the road and it notes that given a certain amount of passage over it is

inevitable as an incidence of travel over the roadway, it follows that the roads shoulder must form part of the Highway.

Analysis

This case provides some guidance in how the courts interpret "highway".

Clarke et al v. Marine Support Services Ltd. et al, 2006 NLTD 196

A worker was welding on a barge while freight was being loaded aboard. An Operator of a boom truck in a fixed position was lifting a loaded steel container and struck the worker welding on the barge which resulted in the worker's death. A WorkplaceNL Internal Review Specialist made a determination that the actions brought by the Plaintiff against the Defendants were statute barred citing that the injury occurred when the vehicle was being used as a crane and not as a motor vehicle as the truck was in a fixed position and not able to be driven. The Applicant's appealed the decision.

The Court determined that the Internal Review Specialist incorrectly posed the question "use" or "operation" of the motor vehicle. It was concluded that the word "operation" is not found in Section 44.1(1)(b) of the Act and for these reasons, the decision was quashed by the Court.

Analysis

This case provides guidance in ensuring that decision-makers pose questions that are clear and reflective of the information as it is written in the Act.

Analysis and Conclusion

A review of the facts of this case confirms that on July 3, 2013, [redacted] was injured while operating a forklift while employed with [redacted] While operating a forklift to unload a salmon truck, the [redacted] forklift collided with the Plaintiff's forklift.

Section 44.(2) of the Act states that a worker has no right of action against an employer or against a worker for an injury that occurs while carrying out operations usual in or incidental to the industry carried on by the employer. In order for an action to be able to proceed, an exception as stated in Section 44.1 of the Act would need to apply.

Section 44.1(1)(a) states that Section 44 shall not apply where the worker is injured 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.

In determining the applicability of section 44.1(1)(a),the question to be answered is whether [redacted] was injured while being transported in the course of employment by a

mode of transportation in respect of which public liability insurance is required to be carried. To answer this question we must first consider whether [redacted] was being transported and then whether the mode of transportation required public liability insurance.

(i) Was [redacted] being transported by a mode of transportation?

Policy EN-08 provides examples of modes of transportation where public liability is required to be carried. This includes snowmobiles, ATV's, dirt bikes (if used on a highway or to cross a highway) and tractors, backhoes and heavy equipment. The Policy provides a broad list of modes of transportation. I find that a forklift is similar to these vehicles or crafts and it can be considered a mode of transportation.

The Collins English Dictionary defines transport as "an activity of taking goods or people from one place to another in a vehicle". At the time of the accident, the Plaintiff was operating the forklift. She was in the process of moving containers of salmon from a flatbed truck to another area to be picked up. In review of the facts of the case I find that the Plaintiff was not being transported at the time of the accident, rather she was transporting goods. The words "being transported" suggests [redacted] is passively being taken from one place to another. On the contrary, she was performing the activity of transporting the salmon.

Therefore, I find that Section 44.1(a) of the Act does not apply because the Plaintiff was not being transported by a mode of transportation.

(ii) Was public liability insurance required to be carried?

I have determined that the worker was not being transported by a mode of transportation at the time of the accident. Therefore, it is not necessary to answer that question.

Section 44.1(1)(b) states that Section 44 shall not apply where a worker is 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.

In determining the applicability of Section 44.1(1)(b), the first step in this analysis is to determine whether either of the forklifts are motor vehicles as defined Section 44.1 of the Act.

The definition which is applicable in this case is contained in Section 44.1(2) of the Act which provides that:

(2) In subsection (1) "motor vehicle" means
(a) a motor vehicle
(i) registered under the Highway Traffic Act, or

(iii) 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.

The definition raises two questions (i) are either of the forklifts registered under the Highway Traffic Act and (ii) do either of the forklifts meet the criteria of another motor vehicle while being operated on a highway in the province.

(i) Is either the [redacted] forklift or the Plaintiff's forklift registered under the Highway Traffic Act?

[redacted] indicated in his discovery that the plant has five forklifts and a Bobcat. One is registered and licenced for the roadway in case they needed to cross the road. The other forklifts are operated on the property and are not registered. The forklift [redacted] was driving was last registered in 2007. This is confirmed in pictures #7 and 8 as submitted by the Defendants which has an April 2007 registration sticker.

An Affidavit of [redacted] dated October 26, 2015, noted that the forklift being driven by [redacted] had been registered in the past but the registration expired in April 2007, and was not renewed at the time of the accident. With respect to the forklift that the Plaintiff was driving, she noted that this had not been registered at any time prior to the accident.

Pictures were submitted by the Defendant. Picture #5, shows the side view of the forklift driven by the Plaintiff. The caption below the picture indicated that it was not registered for the road. Picture #6, shows the rear of the forklift driven by the Plaintiff. The caption below the picture noted that the forklift did not have a licence plate.

Based on my review of the facts, neither the [redacted] nor the Plaintiff's forklift was registered under the Highway Traffic Act.

(ii) Was the [redacted] forklift being operated on a highway in the province?

The use of the word "while" in the phrase "another motor vehicle while being operated on a highway in the province" indicates that we must consider the status of the forklift at the time of the accident. For the purpose of section 44.1 the Act, the forklift is

considered a motor vehicle while it was being operated on a highway. Therefore, I must determine if the forklift was being operated on a highway at the time of the accident.

As noted by the definition of "highway" from the Highway Traffic Act, "highway" is defined as a place or way, including a structure forming part of the place of way, designed and intended for, or used by, the public for the passage of traffic or the parking of vehicles and includes all the space between the boundary lines of the place or way.

Paragraph seven of the Affidavit of the Plaintiff dated July 24, indicates that at the time of the accident she was unloading a salmon truck that was parked on the wharf.

A sworn Affidavit from the Plaintiff dated July 2, 2015, indicates that she was operating a forklift owned by the Defendants. She was unloading a salmon truck at the public wharf in the Town of [redacted] In paragraph seven she indicates that the accident occurred on the government owned wharf as she was loading salmon into a truck parked on the public road.

In the discovery hearing of [redacted] question 101, he is asked if he was operating on one side of the dock. [redacted] confirms same.

I have also reviewed the November 13, 2014, discovery of [redacted], Plant Manager. In question 30, the interviewer noted that there was an incident that occurred on July 3, of 2013, involving two employees operating some forklifts on the dock. [redacted] confirmed same.

I have reviewed the Affidavit of [redacted] dated October 27, 2015. He notes that pursuant to a lease between Her Majesty in Right of Newfoundland and Labrador and [redacted] dated 31 March 2011, [redacted] leases property in the Town of [redacted] The Leased Property includes all areas of the wharf. The Defendants operate a commercial fish plant on the leased property. The leased property is private property and the Defendants regularly advise members of the public entering on the leased property while the Defendants fish plant is in operation that they are trespassing and subject to removal by the Royal Canadian Mounted Police.

In the Affidavit [redacted] he notes that at the time of the accident the two forklifts that were involved in the accident were used only within the boundaries of the leased property. The parked location of the salmon truck being unloaded and the accident itself occurred wholly inside the boundaries of the leased premises.

During discovery, [redacted] indicated that there are 71 employees working at the fish plant. He indicated that it is a full-time operation, 12 month of the year. Sometimes there is one shift and at other times there are two shifts for 16 hours per day.

The sworn statement from the Plaintiff dated July 2, 2015, indicates that while it was policy that the public was not permitted on the wharf, it would occasionally occur. She was told to instruct members of the public to remain off the wharf, particularly away from the salmon bins to avoid contamination.

Pictures were submitted by the Defendants. In review of pictures # 1, 2, 3 and 4 these show the specific area where the accident occurred. The caption below the pictures indicate that the pictures are showing a view of the dock area where the accident occurred. It outlines the area where [redacted] was reversing from the plant and the area where the Plaintiff was reversing on the dock area.

The Affidavit of the Plaintiff dated July 2, 2015 indicates the accident occurred on the government owned wharf as she was unloading containers of salmon from a truck parked on the public road. This is inconsistent with the Affidavit of the Plaintiff dated July 24, which includes a survey of the leased premises which includes the wharf where the accident occurred. [redacted] has also confirmed that the wharf where the accident occurred is included in the premises leased by [redacted] I accept the evidence of [redacted] that the accident occurred on the wharf on the premises leased by [redacted]

The evidence of both [redacted] and the Plaintiff indicates that the public was not permitted on the wharf. The Plaintiff confirms that she was advised to instruct the public to remain off the wharf. [redacted] indicates that the fish plant is a full time operation and while it is in operation, members of the public who enter the area would be advised that they are trespassing and subject to removal by the RCMP.

Highway is defined as a place or way designed and intended for or used by, the public for the passage of traffic or the parking of vehicles. In this case, the accident occurred on the wharf which is leased by [redacted] Based on the evidence, the wharf is private property and is not designed and intended for, or used by, the public for the passage of traffic or for parking vehicles. Therefore, I find that the wharf area where the accident occurred is not a highway. The [redacted] forklift and the Plaintiff's forklift are not motor vehicles as defined in Section 44.1(2) of the Act since the forklifts do not meet the definition of "another motor vehicle while being operated on a highway in the province".

Since I have determined that the forklifts are not motor vehicles as defined in Section 44.1(2) of the Act, the exception to the statutory bar in Section 44.1(1)(b) is not applicable.

While it is not necessary to address the issue of "use of a motor vehicle" I note that even if the forklifts were determined to be motor vehicles, the forklifts were not being used as motor vehicles at the time of the accident.

Case law supports that when an accident involves the use of multipurpose machine/equipment WorkplaceNL must determine the true character and the purpose for which it is being used at the time of the accident.

The weight of evidence supports that the forklifts were being used as industrial equipment at the time of the accident. The purpose for which the forklifts were being used was to unload containers of salmon from the flatbed truck, and then move these containers into the fish plant.

The forklift was not being used as a "motor vehicle" at the time of the alleged accident since it was not being used as a means of conveyance. It was being used to move containers of salmon from the truck and around the plant. The forklifts were being utilized as industrial equipment not as motor vehicles, at the time of the accident.

As the forklifts were being used as industrial equipment at the time of the accident, the accident did not involve the use of a motor vehicle. Therefore, the exception to the statutory bar found in Section 44.1(1)(b)does not apply in this case.

Section 19(1) provides WorkplaceNL with 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 it. The Plaintiff is a worker under the Act. Section 44 of the Act bars the Plaintiff's action against her co-worker, [redacted] and employers, [redacted] unless the exception to the statutory bar in Section 44.1 is applicable.

Section 44.1(1)(a) pertains only to workers who are being transported in the course of their employment. In this case I have determined that the Plaintiff was not being transported at the time of the accident. Therefore I find that Section 44.1(1)(a) does not apply.

Section 44.1(1)(b) includes accidents where the worker is 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. I have determined that the forklifts were not motor vehicles and were being used as industrial equipment. The accident did not involve the use of a motor vehicle. Therefore, Section 44.1(1)(b) does not apply.

Determination

The action by [redacted] brought against [redacted], is statute barred. Attached is a certificate which may be filed with the court.

[redacted]

August 7, 2019

Sincerely,

Jacqueline Mantey
Internal Review Specialist

JM:kao

c: Paula Fudge, Internal Review Clerk
Roebothan McKay Marshall, Attn: Natalie O'Donnell