WorkplaceNL
Health | Safety | Compensation

Third Party Determination

June 2, 2023

Edward J. Vanderkloet
Senior Legal Counsel
Intact Insurance
10 Factory Lane
St. John's, NL A1C 6H5

Dear Edward J. Vanderkloet:

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 b the (Plaintiff) against , (Defendant), is prohibited by **section 44** of **the Act**.

Background Information

On January 15, 2018, the Plaintiff was injured while working as a home support worker providing home support for the Defendant. It was reported by the Defendant in the Application of , that the Plaintiff was injured while taking out the garbage of the Defendant at the Defendant's home, and slipped and fell on the driveway.

According to the Statement of Claim issued on October 30, 2019, the Workplace Health Safety and Compensation Commission (also referred to herein as WorkplaceNL) is taking a subrogated action in the Plaintiff's name, pursuant to **section 45(8)** of the **Workplace Health Safety Compensation Act**. The Statement of Claim indicates that the Plaintiff attended the Defendant's home on January 15, 2018 and entered the premises for the purposes of providing home care for the Defendant. At approximately 11:30 AM, the Plaintiff exited the premises and proceeded down the steps and onto the driveway of the premises when suddenly and without warning, the Plaintiff lost her footing on an uneven surface and fell backwards thereby suffering injury, loss and damage.

The Counsel for the Defendant submitted in the Statement of Defence, that the incident giving rise to the action by the Plaintiff did not occur on Defendant's property but on an adjacent property and declined the use of the term premises. The Defendant admits that the Plaintiff attended his property on January 15, 2018 and when the Plaintiff left the home she lost footing and fell but not on the Defendant's property. It is put forth by the Defendant that there is a contract between the contracto [redacted] and the Defendant to provide home care to the Defendant.

On November 19, 2020, Counsel for the Defence requested on behalf of the Defendant that WorkplaceNL determine, pursuant to **section 46** of **the Act**, whether the action brought by the Plaintiff against the Defendant is prohibited by **section 44** of **the Act**.

The Response to the Application of [redacted] was provided by the Plaintiff on December 11, 2020. A Rebuttal to the Response of the Plaintiff was provided by the Defendant on January 8, 2021.

Legislation and Policy

The Workplace Health Safety and Compensation Act (the Act) states:

Section 2(1)

(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 willful 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 a reaction to a traumatic event or events;

(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

(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;

(j) whether or not, for the purpose of this Act, a person is a worker, subcontractor, independent operator or an employer;

(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.

Application of Act

Section 38

(1) This Act applies to workers and employers engaged in, about or in connection with an industry in the province except those industries, employers or workers that the Lieutenant-Governor in Council may exclude by regulation.

(2) In addition to those industries, employers and workers excluded under subsection (1), the commission may by regulation exclude an employer or worker from the scope of this Act, where it is of the opinion that the exclusion is appropriate.

(3) Notwithstanding that certain industries, employers or workers are excluded from the scope of this Act, the commission may, on application, order that this Act apply to 1 or more of the industries, employers or workers otherwise excluded

Section 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 willful misconduct of the worker; and

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

Section 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.

Where action allowed

Section 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; (other than)

(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.

(2) The worker or his or her dependents shall make an election under subsection (1) within 3 months of the injury and an application for compensation is a valid election for the purpose of this section.

(3) Where the worker or his or her dependents elect to bring an action, he or she or they shall immediately serve notice in writing of the election on the commission.

(4) Where the commission is satisfied that due to a physical or mental disability a worker is unable to exercise his or her right of election, and undue hardship will result, it may pay the compensation provided by this Act until the worker is able to make an election.

(5) Where the worker referred to in subsection (4) elects not to claim compensation, no further compensation shall be paid, but the compensation that has been paid shall be a 1st lien against a sum that may be recovered.

(6) Where a person who is required to make an election under this section is under the age of 18 years, his or her parent or guardian may make the election.

(7) Where a worker referred to in subsection (1) or the worker's dependents bring an action or settle out of court and less is recovered and collected than the amount of the compensation to which the worker or dependents would be entitled under this Act, the worker or dependents are not entitled to claim compensation under this Act.

(8) Where the worker or the worker's dependents apply to the commission claiming compensation under this Act, neither the making of the application nor the payment of compensation under it shall restrict or impair a right of action against the party liable, but in relation to those claims the commission is subrogated to the rights of the worker or his or her dependents and may maintain an action in his or her or their names or in the name of the commission against the person against whom the action lies for the whole or an outstanding part of the claim of the worker or his or her dependents.

(9) The commission has exclusive discretion to determine whether it shall take an action, release its claim for an action or compromise the right of action, and its decision is final.

(10) Where, in an action under subsection (1), a worker or the worker's dependents receive money as the result of a judgment given by a court of law and the commission is owed money under this section by the worker or his or her dependents, the judge shall order that the money owed be paid to the commission.

(11) Where the commission is subrogated to the rights of a worker or the worker's dependents and recovers and collects more than the amount of the compensation to which the worker or dependents would be entitled under this Act, the sum representing the amount of the excess, less costs and administration charges, shall be paid to the worker or dependents.

(12) Costs may, notwithstanding that a salaried employee of the commission acts as its solicitor or counsel, be awarded to and collected by the commission in an action taken by the commission under this section.

(13) The commission may, in an action brought under subsection (8), also recover amounts paid to or on behalf of a worker or his or her dependents by way of compensation, including amounts paid as medical expenses, rehabilitation expenses and other expenses paid by the commission to or on behalf of the worker or his or her dependents.

Commission decides if action prohibited

Section 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.

Information may be required

Section 101

(1) An employer shall on becoming an employer, or where required by the commission, provide to the commission a statement showing an estimate of the amount of the payroll, together with information that may be required by the commission for the purpose of assigning the industry carried on by the employer to the proper class and of making the assessment in relation to the class.

(2) An employer shall at the time and in the form that may be required by the commission

(a) provide a certified statement of his or her payroll, including a calculation of a difference between his or her prior year's estimated payroll and the actual payroll;

(b) provide the commission with an estimate of his or her payroll for the coming year;

(c) remit to the commission money calculated to be owing for the prior year and the amount estimated to be owing for the next year; and

(d) provide the commission with the financial statements or other information that the commission considers necessary to determine the employer's assessment.

(3) An employer shall keep in the form and with the detail that may be required for the purpose of this Act careful and accurate accounts of wages paid to his or her employees and those accounts shall be produced, on request, to the commission.

(4) Where the business of the employer embraces more than 1 branch or class of industry the commission may require separate statements to be made in relation to

each branch or class of industry and the statements shall be provided in accordance with subsection (1) or (2).

(5) Where an employer does not provide to the commission the statements or accounts referred to in subsections (1), (2) and (3) within the prescribed time the commission may base an assessment or supplementary assessment made upon him or her on a sum that, in its opinion, is the probable amount of the payroll of the employer and the employer is bound by the assessment.

(6) Where it is ascertained that the amount referred to in subsection (5) is less than the actual amount of the payroll the employer is liable to pay to the commission the difference between the amount for which he or she was assessed and the amount for which the employer would have been assessed on the basis of his or her payroll.

(7) A person shall, where required, make a return to the commission stating whether he or she has employed workers during a period that the commission designates, and where the person has employed workers he or she shall state in the return the nature of the industry in which they were employed and provide other information that the commission may require.

Assessment where work contracted

Section 120

(1) Where work is undertaken for a person, in this section called the principal, by a contractor, both the principal and contractor are liable for the amount of an assessment in respect of the work and the assessment may be levied upon and collected from either of them, or partly from 1 and partly from the other, but in the absence of a term in the contract to the contrary the contractor is as between himself or herself and the principal primarily liable for the amount of the assessment.

(2) Where work is performed under a subcontract, the principal, the contractor and the subcontractor are liable for the amount of assessment in respect of the work, and the assessment may be levied upon and collected from any or all of them, but in the absence of a term in the subcontract to the contrary the subcontractor is primarily liable for the amount of the assessment.

(3) The commission may consider

(a) a contractor or subcontractor who has not been assessed with respect to the work carried on by him or her as contractor or subcontractor, or a worker of the contractor or subcontractor to be a worker of the principal; and

(b) a worker of a subcontractor to be a worker of the contractor with respect to an industry,

but in the absence of a term in the contract or subcontract to the contrary,

(c) the principal is entitled to recover from the contractor the amount or proportionate part of an assessment paid by the principal with respect to the contractor or his or her workers or with respect to the subcontractor or his or her workers; and

(d) the contractor is entitled to recover from the subcontractor the amount or proportionate part of an assessment paid by the contractor with respect to the subcontractor or his or her workers.

(4) Where a principal is liable for an assessment with respect to work carried on by a contractor,

(a) the principal is entitled to withhold from money payable to the contractor an amount which the commission may estimate as the probable amount for which the principal is or may become liable; and

(b) in an action that the contractor may bring against the principal the principal has the right to set off the amount against the contractor and the contractor is not entitled to recover from the principal a portion of the amount,

but after the final adjustment by the commission of the amount due with respect to the work carried on by the contractor, the contractor is entitled to an amount still remaining in the hands of the principal after payment of the amount due the commission.

(5) As between a contractor and subcontractor the contractor is for the purpose of this section considered a principal and the subcontractor a contractor.

Workplace Health Safety and Compensation Regulations (Regulations) states:

Exclusions from Act

4. Under subsection 38(2) of the Act the following types of employment and occupations are excluded from the application of the Act

(a) employment by a person in respect of construction or renovation of a private residence, where the residence is or shall be used as a private residence of that person;

(b) employment by a person in respect of a function in a private residence of that person; and

(c) professional sports competitors.

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 III-Subrogation by WorkplaceNL

Definition: Subrogation means WorkplaceNL can stand in the place of an injured worker or dependent and recover money it pays out to the worker or dependent, with the possibility of additional money being paid to the worker or dependent. When a worker or dependent elects to claim compensation WorkplaceNL is subrogated to the court action. WorkplaceNL will sue if, pursuant to Section 45(9) of the Act, its legal department determines there is a worthwhile cause of action against a third party.

When WorkplaceNL sues in the place of an injured worker or dependent it will seek all types of damages (i.e. general and special), as if the worker or dependents were taking the court action on their own. This does not mean that the worker or dependent is entitled to receive compensation for these damages from WorkplaceNL.

If more money is received through the courts or through settlement than is payable under the Act, the worker or dependent is entitled to the excess. Excess monies shall be calculated by subtracting the following from the amount recovered: the cost of the compensation claim to the date of settlement; the present value of any anticipated future costs of compensation; administrative and legal costs. If the claim is ever reopened, compensation benefits will not be paid until the amount due surpasses the amount of excess monies previously awarded.

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 ES-01 Optional Coverage Employer Services of the **Client Service Policy Manual** states:

Definitions

Proprietor: is an individual who operates a non-incorporated business.
Partner: is one of two or more individuals who operates a non-incorporated business.
Independent Operator: is a non-incorporated self-employed individual who does not employ workers.

Policy Statement

WorkplaceNL may extend coverage to individuals who are not mandatorily covered by the Workplace Health, Safety and Compensation Act (the Act) in the form of Optional Personal Coverage or Householder Coverage.

General

- Coverage is in effect from the date of receipt of the application by WorkplaceNL or from the coverage date requested in the application, whichever is latest.
- Premiums for the period of coverage must be paid in full, at the time of application, or arranged as per Policy ES-04 Deferred Payment of Assessment, or coverage will not be applied.
- Coverage automatically expires on December 31 of each year, or on the date specified in the application, whichever is earliest. If a deferred payment arrangement is in place and a payment goes into default, coverage will be cancelled effective the start of the coverage period of the failed payment.
- Proof of earnings must be submitted with a claim for lost time benefits. Benefits will be based on the actual amount of earnings loss, but in no case will exceed the amount of coverage requested or the maximum compensable earnings specified by the Act.

Merits and Justice

It is important to consider Policy EN-22 Merits and Justice when making a decision under this policy.

Position of the Defendant

The Defendant, is seeking a determination pursuant to **section 46** of **the Act**, that **section 44. (1)** and **(2)** of **the Act** applies in the case of the Plaintiff's injury and action. Therefore, the Defendant maintains that the Plaintiff is barred from maintaining the action against the Defendant pursuant to **section 44** of **the Act**.

The Defendant acknowledges that the worker's injury occurred while engaged in the course of employment and that the injury arose out of and in the course of employment. . was retained by the Defendant to provide home care in his home a . assigned two employees to provide home care to the Defendant, one of which was the Plaintiff.

On January 15, 2018 the Plaintiff provided home care services, and at the end of the morning shift, took garbage from the Defendant's home in order to place it at the roadside. The Memorandum and Argument of Applicant stated that while the Plaintiff was "walking down the driveway she fell and hurt herself." It was stated that the Plaintiff managed to get up and make her way to her car and drive home. The Plaintiff had fractured her left ankle and she was placed off work for approximately 6 months. Claim was made under the Workplace Health Safety Compensation Act (**the Act**) and compensation for the injury was received from WorkplaceNL. According to this memorandum, the Plaintiff was walking down the driveway at the time of the reported incident and injury.

The Defendant states that was retained to provide home care services and that the employee, the Plaintiff, was assigned to provide that home care in the home. The Defendant states that within the meaning of **the Act**, and specifically **section 2(1)(j)(ii)** and **section 120**, the Defendant was the "principal" of . which was the "contractor", and that by definition both were the employer of the Plaintiff who was a "worker" within the meaning of the definition of that term in **section 2(1)(z)** of **the Act**.

The Defendant also indicates in the memorandum that it is alleged by the Defendant that the fall occurred on the property adjacent to his property. It is indicated by the Defendant that this point is only relevant to whether the Defendant was an occupier and therefore potentially liable in occupier's liability.

It is argued that **subsection 44(1)** of **the Act** applies in that the right to compensation is instead of rights of action to which the worker would be entitled against an employer, and that according to **subsection 44(2)**, that the worker has no right of action in respect of an injury against an employer. The Defendant acknowledges that was the Plaintiff's immediate employer and that there is no right to sue for workplace injury.

The Defendant has put forward that by virtue of having contracted the home care provider , the Defendant was engaged… in connection with the home care industry and the contract between the Defendant and established that connection between him and industry in the province. The argument goes further to reference **subsection 120(1)** contending that the Defendant is the principal of the contractor

It is put forth that by definition, in **section (2)(j)(ii),** both the principal and contractor referred to in **section 120** of **the Act** are an "employer".

The argument by the counsel for the Defendant is that the workers compensation regime requires funding. Counsel has argued that the Defendant is the Plaintiff's immediate employer. The contractor, is the primary employer responsible for paying the assessment and is primarily liable to pay. It is contended that **the Act** imposes liability to pay the assessment upon both the contractor and the person for whom the work was undertaken, the principal.

The concept being put forward is that even in the normal situation, where the contractor pays assessment, the business reality is that the assessment increases the cost of service, and that cost gets passed on to the principal. "Thus, it could be said that in virtually all cases the principal pays the assessment, whether directly or indirectly." The Defendant's argument is that the Defendant is an employer under **the Act** and is subject to the statutory bar. Case law was provided in support of the Defendant's position.

On January 15, 2018, the applicant attended the home of the Defendant providing home care. At the end of the morning shift the Plaintiff took out the garbage from the defendant's home to place on the road. While walking on the driveway, the Plaintiff slipped and fell resulting in a fractured ankle. The Defendant did not return to work and during the period of disability received compensation from WorkplaceNL.

The Defendant recognizes that WorkplaceNL has the exclusive jurisdiction to determine who is a worker and who is an employer within the meaning of **the Act** and has the jurisdiction under **section 46** to decide if an action against an employer is prohibited. It is put forth that the Plaintiff in this case was a worker who experienced a personal injury arising out of and in the course of employment.

The Defendant has argued that the Plaintiff's action against the Defendant is prohibited as the worker has no right of action in respect of an injury against an employer. It is contended that the Defendant is an employer within the meaning of **the Act**. This is considered to be the main issue made in the application by the Defendant. The position that the Plaintiff who is a worker cannot take an action against an employer is extended to WorkplaceNL's subrogated action against the Defendant being prohibited in the worker's name, as WorkplaceNL is also prohibited from taking an action against an employer.

Position of the Plaintiff

The Plaintiff provided a response to the application of the Defendant. The solicitor for the Plaintiff in the subrogated action asserts that WorkplaceNL has exclusive jurisdiction

to determine whether an action is barred. It was provided that the parties agree that the injury was sustained in the course of the worker's employment as a home care worker. There is agreement with the Defendant that the Plaintiff is a worker under **the Act** as she works under a contract of service with .; but, she is not a worker for the Defendant as the Plaintiff has no contract of service with the Defendant. It is also recognized that the Plaintiff was a worker who was injured in the course of employment as a home care worker.

The Plaintiff submits that the Defendant is not a principal, contractor, nor subcontractor, and does not meet the definition of employer in **the Act**. The Defendant is not registered with WorkplaceNL as an employer and he has not complied with the reporting requirement for any other obligations of employers under **the Act**. The Defendant has not entered into a contract of hiring with the Plaintiff. Therefore, the Defendant is not the employer of the Plaintiff.

Workers compensation is a statutory scheme which is administered in the province of Newfoundland and Labrador in accordance with **the Act**, Workplace Health, Safety and Compensation Regulations, 1025/96 (**the Regulations**) and WorkplaceNL policies and procedures. **The Act**, Regulations, Policies and Procedures outline a process for mandatory registration for all employers in the province of Newfoundland and Labrador. The Defendant is not registered with WorkplaceNL and does not have a WorkplaceNL employer registration number.

Under **the Act**, Regulations, Policies and Procedures, there are numerous requirements imposed upon employers. Upon becoming an employer, according to **section 101** of **the Act**, the employer is required to register with WorkplaceNL and provide a statement showing the estimate of payroll and other information so that WorkplaceNL can assign the employer to the appropriate industry class. **Section 114** of **the Act** imposes penalties upon an employer who fails to comply with **section 101**. **Section 125 (1)** of **the Act** states that a person who contravenes this **Act** or the **Regulations**, is guilty of an offense and liable on summary conviction to a fine not exceeding $25,000 or to imprisonment for a term of not more than six months, or both.

The Plaintiff contends that the Defendant has purchased services from and that **section 120** of **the Act** cannot be interpreted such that the statutory bar protects an individual who is not registered as an employer, does not pay assessments, and has not met the requirements for employers under **the Act**. The Plaintiff's position is that since the Defendant is not an employer under **the Act**, **section 44** of **the Act** does not bar the Plaintiff's action against the Defendant.

Reasoning and Analysis

(Defendant) is the Applicant in this case. The matter before me is to determine whether the action of the Plaintiff against the Defendant 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 written submission of the Defendant, the Response Submission by the Plaintiff, the Rebuttal submission of the Defendant and the pleadings in the action.

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

1. Was the Plaintiff a "worker" within the meaning of **the Act**?

   From my review of the facts in this case, the Plaintiff was employed as a home care worker with when the injury occurred. The Plaintiff is a worker within the meaning of **section 2 (1)(z)** of **the Act**.

2. Did the Plaintiff's injuries arise out of and in the course of her employment in accordance with **section 19(1)** and **section 43** of **the Act**?

   The parties agree with the position that the Plaintiff was in the course of employment when the injury to her ankle took place. The Plaintiff elected to claim compensation. Based on my review of the facts, I conclude that the Plaintiff's injury arose out of and occurred in the course of her employment in accordance with **section 19(1)** and **section 43** of **the Act**.

3. Was an "employer" within the meaning of **the Act**?

   According to WorkplaceNL records is a registered employer in the province of Newfoundland and Labrador. In accordance with **section 2 (1)(j)** of **the Act** is considered an employer within the meaning of **the Act**.

4. Was the Defendant an "employer" within the meaning of **the Act**?

   The answer to this question is at the core of the request for determination of the Defendant. In my review I will examine the facts and factors along with the submissions to determine whether action against the Defendant by the Plaintiff is subject to the statutory bar.

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 in the course of the worker's

employment. **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. This provision promotes a fundamental aspect of the Worker's Compensation system known as the "historic trade-off" where workers give up the right to sue in exchange for fair and timely compensation, and employers are protected from being sued for workplace accidents in exchange for funding the collective liability of the system through payment of assessments. This "historic trade-off" is reflected in **sections 44-46** of **the Act** and as is outlined in 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). With respect to this application, the examination of whether an employer was conducting operations usual in or incidental to the industry carried on by the employer is only necessary if it is determined that the Defendant is an employer.

Facts

Arguments have been put forward regarding facts. There have been claims of negligence as a result of actions of the parties involved, and dispute regarding the property ownership of the specific location of the slip and fall. While I am able to draw conclusions on the facts, my review does not involve determinations of issues involving negligence or fault. The application which has been made to WorkplaceNL is for a determination of whether **section 44** of **the Act** applies and the Plaintiff's action against the Defendant is statute barred. **Section 46** of **the Act** provides WorkplaceNL with the jurisdiction to adjudicate and determine whether the action taken against a party in respect to an injury is prohibited by **the Act**.

[redacted] is an employer in the province of Newfoundland and Labrador which provides professional home care services to clients in the homes in which the clients reside. The Plaintiff, is an employee of [redacted] who was directed by the employer to provide home care services to the Defendant, in his home at [redacted] Newfoundland and Labrador.

The Defendant pays [redacted]. for the home care services. There are two home support workers providing home care to the Defendant- the Plaintiff being one of those home support workers. Although the total cost of home care services per month has not been provided, $390 per month is paid by the Defendant as his portion of the cost of home care service. The total cost for home care is greater, as the Defendant has acknowledged that a subsidy is paid by the provincial government for the remaining amount up to the total cost charged by [redacted] The Plaintiff is paid directly by [redacted] which pays assessments to WorkplaceNL based on the industry rate, and based on the amount of T4 earnings paid to its employees.

On January 15, 2018, the Plaintiff provided home care to the Defendant. At the end of the shift, the Plaintiff left the home carrying garbage to the roadside and claims to have slipped in the driveway and fell striking the ground. The Defendant has confirmed the driveway was an area which he maintained. As a result of the fall, the Plaintiff experienced injury to the left ankle and was put off work. A claim for compensation for a left ankle injury was filed with WorkplaceNL and accepted. The parties agree that the injury was sustained in the course of the worker's employment as a home care worker.

Counsel for WorkplaceNL commenced a subrogated action in the Plaintiff's name on October 29, 2019.

Case Law and Submissions

Section 19(4) of **the Act** states the decisions of WorkplaceNL shall be upon the real merits and justice of the case and is not bound to follow strict legal precedent. While WorkplaceNL is not bound to follow strict legal precedents, I have reviewed the cases submitted to determine relevance and applicability to the case at hand.

Pasiechnyk v. Saskatchewan (Workers Compensation Board) [1997] 2 S.C.R.890

In this case, a crane owned by Pro-Crane Inc. fell onto a trailer in which employees of Saskatchewan Power Corp. were taking a morning coffee break. Two employees died and six others were seriously injured. The injured workers and dependents of the deceased workers elected to receive benefits from the Worker's Compensation Board in Saskatchewan.

In January 1991, the respondents initiated an action against Saskatchewan Power Corp., Pro-Crane, and the Saskatchewan Government. The action against the Saskatchewan Government alleged it failed to meet requirements under the Occupational Health and Safety Act, R.S.S. 1978, c. o-1 by failing to adequately inspect the crane. Saskatchewan Power Corp., Pro-Crane, and the Saskatchewan Government requested the Worker's Compensation Board (the Board) determine whether the action was statute barred by the Legislation in that jurisdiction. The Board determined that the action was statute barred and the Court of Queen's Bench denied the respondents request for judicial review.

The Court of Appeal allowed the respondents' appeal with respect to action against the government as a regulatory body, but dismissed the action against Pro-Crane and Saskatchewan Power Corp. agreeing with the Board that the action against Pro-Crane and Saskatchewan Power Corp. was statute barred. The ruling was appealed to the Supreme Court of Canada. The judgement of the court, delivered by J. Sopinka, noted that as conceived by Sir William Meredith, the workers' compensation scheme provides

a "historic trade-off" whereby the workers lost their cause of action against their employers but gained compensation in a no-fault system. In turn, employers were mandated to pay into a mandatory insurance scheme but gained immunity from suits from injured workers and their dependents. The court found that the bar to action against employers is central to the workers' compensation scheme and it would be unfair to allow an action against an employer when the injured worker could obtain greater compensation through the no-fault insurance scheme funded by employers.

Analysis

This case provides guidance in the intent of the workers' compensation scheme and assists in determining whether an employer is conducting operations usual in or incidental to an industry. The court provides guidance in determining whether the Defendants are employers and, if so, they have immunity to action as part of the overall no-fault insurance scheme funded by employers to cover accidents that occur in the course of business.

King v. Newfoundland (Workplace Health Safety & Compensation Commission)

In this case, a home care worker was injured at her workplace when the toilet became dislodged in the washroom facilities and the worker fell to the floor. The worker elected action against the employer. Workplace Health Safety and Compensation Commission (WHSCC) in Newfoundland and Labrador found the action against the employer statute barred as the accident occurred during conduct of operations usual to the employer. Upon judicial review requested by the worker, it was found that WHSCC properly considered the involvement of the employer in describing the employer's business, and the accident occurred during the normal conduct of operations of the employer. In this case, Omega Investments was a registered employer with WHSCC that was active since 1981 and was assigned a firm number with WHSCC.

The finding by WHSCC that was upheld on judicial review was that in accordance **section 46 of the *Act*,** the worker was in the course of employment at the time of the injury and that Omega investments was in the conduct of operations usual in incidental to the industry of providing rental facilities.

Analysis

I find this case is relevant in that **section 19 (1)** provides WorkplaceNL with the exclusive jurisdiction to determine who is an employer, worker, subcontractor, or independent operator for the purposes of **the Act**. If a person is considered an employer, then **section 44** provides the authority to determine whether there is a right of action by a worker, his or her dependents, or the employer of the worker with respect to an injury. There is no right of action unless the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the

employer. WorkplaceNL has the authority to determine conduct of operations usual in or incidental to the industry carried on by the employer. First it needs to be determined if the company or person is an employer, then if the employer status is established, one can then examine the conduct of operations.

Newfoundland (Workplace Health, Safety and the Compensation Commission) v. Ryan Estate, 2011 NLCA 42, 2011 Carswell Nfld 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 from which workers and their dependents benefit.

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 limited to situations where an alternative insurance scheme applying to motor vehicle accidents is engaged. Justice Welsh reasons that it would be inequitable to expose an employer to action for which it is required to contribute under the Workers' Compensation Act. Justice Welsh 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 <u>some person other than an employer or worker</u>;
>
> (b) against <u>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</u> 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.
>
> (Underlining 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 they assist in determining the intent of the Workers' Compensation System, noting that the "historic trade-off" is a fundamental basis of the Workers' Compensation System. Further, 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 this case relevant as it provides confirmation regarding the purpose of **the Act**, which is that the worker forfeits the right to an action, aside from any stated exceptions. Those exceptions being 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.

Weir's Construction Limited v. Warford (Estate) (2018) NLCA 5

The worker, a mechanic, was assigned to fix an out of service truck which arrived at his place of employment via a flatbed truck. The truck was lifted off the flatbed and placed on blocks by the use of a front-end loader. While the worker was working on the out-of-service truck during the course of his employment, the truck unexpectedly rolled off the blocks and on top of him. In 2010 the matter was referred back to WorkplaceNL for a new decision involving the interpretation of **section 44.1** of **the Act**. In 2014, following Weir's seeking a third determination from WorkplaceNL, a WorkplaceNL internal review specialist found that the action was prohibited as the accident was not one involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment mirroring the language in **section 44.1(1)(b)** of **the Act**. Judicial review was sought of the internal review specialist's decision.

In this recent case, the Court of Appeal reviewed the matter and highlighted that the central issue was in the interpretation of the phrase "an accident involving the use of a motor vehicle". The internal review specialist's decision determined that the involvement of the flatbed truck and the front-end loader were in the transferring of the out-of-service truck onto the blocks, and once this activity was completed, their function had been fulfilled. The internal review specialist had concluded that the narrower meaning of the term "use" does not include repair. The Court of Appeal overturned the Application Judge's decision and determined that the internal review specialist's approach and interpretation were reasonable, including the narrower interpretation of the definition of "use" based on the dictionary definition and the reliance of the language used in other statutes.

Analysis

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

The case before me does not involve the use of a motor vehicle. It is; however, relevant in my examination of the purpose of **the Act** in general and the statutes involved.

Rizzo and Rizzo Shoes Ltd. (Re)

In this case Rizzo and Rizzo Shoes Limited had declared bankruptcy and when a receiving order was made with respect to the firm's property, the firm's employees lost their jobs. Proof of outstanding termination or severance pay owing to former employees under Employment Standards Act (ESA) was provided to the Trustee by Ontario's Ministry of Labour. The trustee in this case disallowed the claims of the employees on the grounds that the bankruptcy of the employer does not constitute dismissal from employment and accordingly created no entitlement to severance, termination or vacation pay under the ESA.

The appeals court found that termination as a result of an employer's bankruptcy gives rise to an unsecured claim provable in bankruptcy pursuant to section 121 of the *Bankruptcy Act* for termination and severance pay in accordance with the subsection 40 and 40a of the ESA. The court stated that the use of legislative history as a tool for determining the intent of legislature is appropriate.

Analysis

The *Rizzo and Rizzo Shoes* case provides guidance in statutory interpretation. The case confirms that when reviewing a particular provision of an Act, such as **section 44.(1) and 44.(2)** the entirety of the surrounding text, objectives, interrelation of provisions, social and legislative intent of **the Act** must be considered when determining the "true" meaning of that section**.**

2002 Supreme Court of Newfoundland and Labrador Court of Appeal
Tony Sweeney and Insurance Corporation of Newfoundland Limited vs. Liberty Insurance Company of Canada, and Frances Dwyer

In this case the Supreme Court of Newfoundland Labrador overturned the order of a judge in the Trial Division. The injured party, Dwyer, had executed a settlement and release of her claim against the tortfeasor. There was a settlement and release as a "full and final settlement of her claim for damages" against Tony Sweeney and Insurance Corporation of Newfoundland Limited (ICON). Subsequently, she brought an action to

recover certain other benefits from her own insurer, Liberty. Frances Dwyer alleged that she received section B benefits from Liberty Insurance for a time following a motor vehicle accident, but on March 4, 1998 Liberty Insurance denied continuing payment of the benefits.

Dwyer alleged that Liberty insurance breached contract of insurance with her, and Liberty filed a defence denying the Plaintiff's claim. Liberty issued a third-party claim against Sweeney and ICON and relied upon its right of subrogation against Sweeney for full contribution of indemnification for all compensation paid to that date in 2000. At trial, the judge allowed the subrogated action to proceed against Sweeney and ICON by Liberty.

The Court of Appeal found that the trial judge had erred in the original decision, and that Liberty Insurance did not have the subrogated right to pursue an action against Sweeney, as Dwyer had already executed the settlement and release with Sweeney and ICON.

Analysis

In the case before me, the Defendant argues that the Plaintiff is unable to take an action against the Defendant as he is an employer. It is argued that WorkplaceNL has no more right to take a subrogated action than the Plaintiff who is unable to take an action against an employer.

As to the relevance of the above case, it does not involve WorkplaceNL Legislation which applies to the case before me. **The Act** provides the right to subrogated action where it is found that a third-party action can proceed. 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. There has been no settlement and release in the case before me. The payments paid by WorkplaceNL in the management of health care and wage loss of the compensation claim of an injured worker does not represent a settlement and release with the worker or with a third party.

1983 Supreme Court of Canada. Gene A. Nowegijick, Appellant, and Her Majesty the Queen, Respondent, and The Grand Council of the Crees(of Quebec)et al, and Chief Henry Mianscum, et al and Grand chief Billy Diamond, et al and The National Indian Brotherhood, Intervenants.

This case involved determining whether wages of an Indian, resident on a reserve, received from a corporation, resident on the reserve, had exemption from income tax. The Court of Appeal held that such wages were tax exempt. This is a case where the

court delved into words and phrases within the Income Tax Act and Indian Act to determine whether the aforementioned wages were exempt from income tax. The court quoted a departmental interpretation bulletin which stated that although administrative policy and interpretation are not determinative, they are entitled to weight and can be an important factor in case of doubt about the meaning of legislation.

The words “in respect of” were in the court’s opinion the words of widest possible scope. It was stated that these words import such meanings as “in relation to”, “with reference to” or “in connection with”. The court found that the phrase contained in the Indian Act “in respect of” is probably the widest of any expression intended to convey some connection between two related subject matters. The wages earned on a reserve by Nowegijick were considered property on a reserve. In this case the appellant was seeking tax exemption for wages earned in 1975, and the judgment of the court was that personal property situated on a reserve is tax exempt and this included the wages earned on the reserve.

Analysis

This case has relevance in that the Defendant has argued that by virtue of having contracted with the home care provider, that he is a person “who is engaged in, about or in connection with an industry in the province …” the home care industry and by establishing the connection between himself and the , he meets the definition of an employer according to **the Act**.

It is argued that the intent is for the broader interpretation of principal and employer. The case presented is also an example where, in interpreting intent, weight can be given to other sources where there is doubt about the meaning of legislation. It is contended that **the Act** imposes liability to pay the assessment upon both the contractor and the person for whom the work was undertaken, the principal.

The Defendant argues that the contractor pays assessments, which increases the cost of service, and that cost gets passed on to the principal. Thus, with this broad interpretation the principal pays the assessment, and WorkplaceNL should include the principal as an employer in this case. It is argued that the Defendant is an employer engaged in, about or in connection with the home care industry under **the Act** and is subject to the statutory bar.

The principles in determining a matter under the Income Tax Act are not transferrable to the workers compensation system. The Defendant in this case is not engaged in the home care industry, operating and earning income from that industry. The Defendant is not intending to earn income or profit from the home care industry, but is the recipient of a service provided by a home care company. That company , charges for their services and is engaged in making money from the provision of those services. While the Defendant raises this question, the Defendant is not in the home care business and is simply a recipient of home care, for which he contributes a

portion of the fee charged by the home care company. As a recipient of a home care service, he does not automatically become engaged in the industry with all the rights, responsibilities and liabilities of an employer.

Kerri v Decker

This case involved the interpretation of the definition of “owner” under the Highway Traffic Act. Ford Credit Canada Limited (Ford Credit) was the registered owner of the vehicle involved in a motor vehicle accident. The persons who suffered loss or damage, pleading sections 200 and 211 of the Highway Traffic Act, sought to attribute liability to Ford Credit. In the cases which were brought forward, the vehicle was registered in the name of Ford Credit and subject of a hire-purchase agreement, with Ford credit as the lessor and Decker and White respectively as Lessees. When the accidents that gave rise to claims occurred, the lessees were in possession of the vehicles.

The finding of the court was that although the definition of “owner” in the Highway Traffic Act will permit more than one owner of a motor vehicle either as legal owners of registered owners, or a combination of both, the possibility of more than one owner does not extend to a lease or under a higher-purchase agreement or a vendor under conditional sale contract, provided the mortgagor or conditional purchaser is entitled to possession and the lessee under a higher-purchase agreement is in possession pursuant to the agreement. This meant that the lessee, Kerri and White were liable.

Analysis

The Defendant has argued that a broad interpretation of **subsection 2(1)(j)** would support the claim that the Defendant is an employer as he is a person engaged in a work in or about an industry within the scope of **the Act**. Also, it is argued that the Defendant is a principal who hired a contractor. If the Defendant comes within the meaning of one of the subclauses with regard to the term principal, then it is irrelevant that he does not satisfy any of the descriptions in the other six subclauses. This position takes a very narrow view of what WorkplaceNL would consider in determining who is an employer the province of Newfoundland and Labrador. This type of view does not consider **the Act** and statutes as a whole in determining the intent of the legislation, whereby WorkplaceNL has exclusive jurisdiction to determine who is an employer and who is not.

Boy Scouts of Canada v Doyle

This case involved claim and ownership of land and interest in a trust property after a scout troop ceased to exist. The appeals judge ruled on the grant and trust provisions, finding error with the trial judge’s decision regarding the land Grant of 1931. The finding regarding the land was that it is reverted back to the Crown. The Court of Appeal ruled

on the provisions indicating that the property in question should not be devolved to ownership by the Boy Scouts. It was determined that the intention of the Crown was that the estate to be for the use of the scout troop as long as it existed as part of the Boy Scouts movement, not that if both the scout troop would cease to exist and the scouting movement itself would cease to exist, that the land would revert back to the Crown.

Analysis

The case involved the judge's interpretation of the intention of the grant and trust provisions of this case and the factors which led to the finding on the intent of the grant provisions. This does not involve a review of **the Act**. I find this is relevant to the Defendants argument that the Defendant needs to meet the parameters of one subclause of **section 2(j)** "employer" to meet the definition of employer. This is a very narrow view of what it is to be an employer within the no fault insurance scheme. It is within the jurisdiction of WorkplaceNL to determine who is an employer in Newfoundland and Labrador and in doing so, to follow the legislative intent.

Analysis and Conclusion

A review of the facts of this case confirms that on January 15, 2018, the Plaintiff provided home care to the Defendant. At the end of the shift, the Plaintiff left the home carrying garbage to the roadside and states that she slipped in the driveway and fell striking the ground. The Defendant has confirmed the driveway was an area which he maintained. As a result of the fall, the Plaintiff experienced injury to the left ankle and was put off work. A claim for compensation for a left ankle injury was filed with WorkplaceNL and accepted. The parties agree that the injury was sustained in the course of the worker's employment as a home care worker.

The Defendant is the Applicant in this case. The matter before me is to determine whether the action of the Plaintiff against the Defendant 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**.

Counsel for WorkplaceNL commenced a subrogated action in the Plaintiff's name on October 29, 2019. Subrogation as defined in **Policy EN-08** means WorkplaceNL can stand in the place of an injured worker or dependent and recover money it pays out to or on behalf of the worker or dependent, with the possibility of additional money being paid to the worker or dependent. When a worker or dependent elects to claim compensation WorkplaceNL is subrogated to the court action. WorkplaceNL will sue if, pursuant to **section 45(9)** of **the Act**, its legal department determines there is a worthwhile cause of action against a third party.

When WorkplaceNL sues in the place of an injured worker or dependent it will seek all types of damages (i.e. general and special), as if the worker or dependents were taking the court action on their own. This does not mean that the worker or dependent is entitled to receive compensation for these damages from WorkplaceNL.

I find that WorkplaceNL has the authority as provided under **section 45** of **the Act** to take a subrogated action.

In my determination of this matter as to whether WorkplaceNL has the right to take an action against the Defendant, I have considered the pleadings, submissions and materials submitted by the Parties as well as the case law and the requirements of the applicable statutory provisions.

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 on it. WorkplaceNL also has the exclusive jurisdiction to determine whether an injury has arisen out of and in the course of an employment within the scope of **the Act**. **Section 43** of **the Act** provides that compensation under this **Act** is payable to a worker who suffers personal injury arising out of and in the course of employment. was injured in the course of her employment.

There were submissions regarding the “historic trade off” giving rise to the Workers Compensation scheme. Extrinsic evidence has been provided regarding the intention of the legislature. The Newfoundland Court of Appeal has addressed the statutory bar in reference re: Workers’ Compensation Act, 1983 (NFLD), ss. 32, 34 1987 67 NFLD & PEIR16 (NL CA). The court acknowledges 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 Worker’s 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 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 deference to the legislative will is required here.”

As noted there is a historical trade-off at the root of the Worker's Compensation system which provides benefits to workers in exchange for employers being protected from suit. The Plaintiff has access to the Worker's Compensation system.

The Plaintiff commenced an action against the Defendant through subrogated action by the Counsel for WorkplaceNL. **Policy EN-08**, **Third Party Actions** of the **Client Service Policy Manual** distinguishes that third parties are individuals or bodies not protected by **the Act** who may be responsible for a work injury. The Plaintiff in this case, elected to claim workers compensation benefits. WorkplaceNL then took over the right to sue for damages the person they determined was responsible for the injury. **Policy EN-08** indicates that 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.

The application which has been made to WorkplaceNL is for a determination of whether **section 44** of **the Act** applies and whether the Plaintiff's action against the Defendant is statute barred. **Section 46** of **the Act** provides WorkplaceNL with the jurisdiction to adjudicate and determine whether the action taken against a party in respect to an injury is prohibited by **the Act**. I have drawn conclusions on the facts as presented by the parties to the Action.

The statutory bar in **section 44** of **the Act** bars an action by a worker against an employer or a worker for a workplace injury.

Section 44(1) affirms that the right to compensation provided by **the Act** is instead of rights and rights of action against an employer or worker because of an injury in respect of which compensation is payable or which arises in the course of the worker's employment.

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.

The Defendant has argued that there is a contract of service with and therefore was "engaged… in connection with the home care industry. The argument being that he is a principal and therefore an employer in accordance with **section 2(j)(ii)** of **the Act**. The Defendant maintains that by meeting one criteria under this section, means he is an employer. It is maintained tha is the contractor. The facts of the case reveal that the Plaintiff does not have a contract of service with the Defendant.

What is argued by the Defendant is that he is an employer, and therefore an action cannot be taken against him. If he is an employer at the time of this accident, he would have been considered to be an employer while he was contracting for home care. The Defendant had not registered as an employer, had not reported payroll to WorkplaceNL

as an employer, had not paid assessments, and had not fulfilled the obligations of an employer under **the Act**. If the Defendant had been an employer and not fulfilled those obligations under **the Act**, then he would therefore be open to the imposing of penalties for failure to comply with **the Act**. He could then be found guilty of an offence and liable on summary conviction to fines or imprisonment. In my review, care must be taken to interpret words of **the Act** within their entire context and ensure these are not be interpreted in such a way that the result would produce absurd consequences. A finding that the Defendant in this case is an employer would be an absurdity, such that any homeowner who contracts for a service in their home becomes the employer, even when the service provider has an employer who has been contracted to provide the service.

Central to the argument put forward by the Defendant is that he is a principal under **the Act,** while the Plaintiff asserts that the Defendant is neither a principal, contractor, nor subcontractor and does not meet the definition of employer in **the Act**. The Defendant points to **subsection 120(1)** of **the Act** where the language in **the Act** states,

> "Where work is undertaken for a person, in this section called the principal, by a contractor, both the principal and the contractor are liable for the amount of an assessment in respect of the work and the assessment may be levied upon and collected from either of them or partly from one and partly from the other but in the absence of a term in the contract to the contrary the contractor is as between himself or herself and the principal primarily liable for the amount of the assessment."

The intent of **the Act** is to ensure that assessments are collected for the work which is completed. I find the meaning of principal is that the principal of the contract is an employer. The principal, the contractor, and subcontractor are each an employer under **the Act** and are each liable for the amount of assessment for the work. A person who is not an employer cannot be liable for the assessments of employers. This is not a situation where the Defendant hired workers to complete work at his home. The Defendant went to [redacted]. and requested the provision of home care services for which he and a subsidizing funding source pay.

The facts of this case reveal that [redacted]. is an employer in the province of Newfoundland and Labrador which provides professional home care services to clients in the homes in which the clients reside. The Plaintiff [redacted], is an employee of [redacted] who was directed by the employer to provide home care services to the Defendant in his home at [redacted], Newfoundland and Labrador.

The Defendant pays [redacted]. for the home care services. There are two home support workers providing home care to the Defendant- the Plaintiff being one of those home support workers. Although the total cost of home care services per month has not been provided, $390 per month is paid by the Defendant as his

portion of the cost of home care service. The total cost for home care is greater, as the Defendant has acknowledged that a subsidy is paid by the provincial government for the remaining amount up to the total cost charged by
The Plaintiff is paid directly b and assessments are paid to WorkplaceNL based on the amount of T4 earnings paid to its employees and based on the industry rate.

The Defendant is purchasing a service from a company which is an employer, and whose employees are sent to his home to provide that service. There is no evidence to support that there is an employer/employee relationship between the Defendant and the Plaintiff. The Defendant does not behave in the manner in which employers behave. The Defendant does not do the hiring of employees. Instead the home care company assigns workers to the Defendants home to provide home care services. If there are issues with the home care workers, this is the responsibility of the home care company to deal with things like termination and discipline. No evidence has been presented to support the Defendant was an employer who paid wages or Mandatory Employment Related Costs that employers are required to pay based on federal or provincial/territorial laws such as employment insurance and Canada Pension Plan. The wages are paid to the worker by

The Defendant has put forth, that by paying for a service he is an employer and responsible for funding the regime, because uses some of that money to pay assessments to WorkplaceNL to fund the regime. This connection to the home care provider is not sufficient to make a person receiving a service an employer.

In accordance with **section 101** of **the Act,** an employer is required to register with WorkplaceNL and provide an Employer Payroll Statement which estimates payroll and provides information used in determining the industry class for the employer. The Defendant is not registered as an employer with WorkplaceNL nor has he provided any of the information required of the employer in **section 101** of **the Act**.

The requirements of an employer under **section 101** are:

(1) An employer shall on becoming an employer, or where required by the commission, provide to the commission a statement showing an estimate of the amount of the payroll, together with information that may be required by the commission for the purpose of assigning the industry carried on by the employer to the proper class and of making the assessment in relation to the class.

(2) An employer shall at the time and in the form that may be required by the commission

(a) provide a certified statement of his or her payroll, including a calculation of a difference between his or her prior year's estimated payroll and the actual payroll;

(b) provide the commission with an estimate of his or her payroll for the coming year;

(c) remit to the commission money calculated to be owing for the prior year and the amount estimated to be owing for the next year; and

(d) provide the commission with the financial statements or other information that the commission considers necessary to determine the employer's assessment.

(3) An employer shall keep in the form and with the detail that may be required for the purpose of this Act careful and accurate accounts of wages paid to his or her employees and those accounts shall be produced, on request, to the commission.

The Defendant has not submitted an application to WorkplaceNL for registration as an employer. WorkplaceNL has numerous reporting and remittance activities that are required to be satisfied by employers. These range from the provision of payroll and financial statements, to the paying of money in the form of assessments. The Defendant has performed none of these requirements. The Defendant does not have an employer firm number with WorkplaceNL and at no time did he identify as an employer in the no-fault insurance scheme covered by **the Act**.

In accordance with **section 4** of the **Regulations** there are types of employment that are excluded from coverage by **the Act**. **Section 4** states:

(a) employment by a person in respect of construction or renovation of a private residence, where the residence is or shall be used as a private residence of that person;

(b) employment by a person in respect of a function in a private residence of that person; and…

There is an option for Householder Coverage by the homeowner or optional personal coverage by a person performing the work, as an option for coverage by WorkplaceNL. This type of coverage is optional coverage that can be applied for by a private individual when hiring other individuals to do work in or around the residence of the householder. Home care is one of the examples detailed in **Procedure 103.03**. There is an application with terms and conditions for Householder Coverage. The applicant in such a case is the homeowner, and coverage is only extended for the workers listed on the Householder Coverage Application Form. Householder coverage assessment premiums

must be paid in full in advance. This type of coverage is not required if services are obtained from a home care agency for example. In an application for homeowner coverage, the homeowner would be hiring the individuals, estimating the labour cost, and determining the type of work which is to be done. If there is no valid homeowner coverage, **section 4 B** of the **Regulations** means there would be no coverage, and that the employment would be excluded from **the Act**.

I find that WorkplaceNL offers this type of coverage to individuals to ensure that the workers paid by these householders have coverage under **the Act**. The Defendant did not have this coverage nor were the home care workers hired by the Defendant. The service provided was by a home care company who is an employer in this province who sent two workers to this home with the direction to provide the home care services to the client,

Although argued by the Defendant that **section 120** of **the Act** applies in this case, **section 120** of **the Act** is not intended to be applied to the person who purchases a service from another employer. The evidence does not support that the Defendant ever intended to be the employer of the Plaintiff or any other home care worker who provided him care in his home. The actions of the Defendant in this case prior to the incident are not the actions of an employer. The Defendant was and is not a registered employer with WorkplaceNL in the Province of Newfoundland and Labrador, does not pay assessments to WorkplaceNL, nor has he ever done so. The Defendant does not meet the requirements in the definition of employers under **the Act.**

As the Defendant is not an employer under **the Act**, the action by the Plaintiff against the Defendant is not statute barred.

Determination

The action by the Plaintiff against the Defendant is not statute barred.

The attached certificate has been filed with the court.

Sincerely,

Brian Woolfrey
Internal Review Specialist

BW:kb

c: Paula Fudge, Internal Review Clerk
Krista Gilliam, Solicitor for the Plaintiff