WorkplaceNL

Health | Safety | Compensation

**Third Party Determination**

May 16, 2024

Curtis Dawe
Attn: Shane Belbin
11th Floor, 139 Water Street
PO Box 337
St. John's, NL A1C 5J9

Dear Shane Belbin:

[redacted]

I have reviewed in accordance with **section 46** of the **Workplace Health, Safety and Compensation Act**[1] (herein referred to as the "Act"), the submissions of all interested parties as to whether an action by [redacted] (Plaintiff) against [redacted] (Defendant), is prohibited by **section 44** of **the Act**.

## Background Information

On June 7, 2004, the Plaintiff tripped and fell down stairs at [redacted] in Newfoundland and Labrador. At the time of the fall, the Plaintiff was attending a work-related conference representing the [redacted], and was a resident of [redacted] Saskatchewan.

On June 11, 2004, the Plaintiff completed a Form W1, Worker's Initial Report of Injury, and their employer, [redacted], completed a Form E1, Employer's Initial Report of Injury, regarding the fall at [redacted]. The claim was filed with the Saskatchewan Workers' Compensation Board. On June 16, 2004, the Plaintiff's claim was accepted for a right shoulder injury under the Saskatchewan Workers' Compensation Board.

[1] The Act was amended and the new Act, Workplace Health, Safety and Compensation Act, 2022, SNL 2022, c. W-11.1, came into force on September 1, 2023. The new Act uses modern language and aligns with other legislation. There are no changes to benefits, obligations, authority levels or responsibilities. For ease of reference and consistency with the submissions of the parties in this matter, this decision refers to the section numbers of the previous Act.

On August 26, 2005, a statement of claim was filed by Lois R. Hoegg of the law firm Ches Crosbie Barristers, on behalf of the Plaintiff, against the Defendant. The claim was for damages, interest on all damages, and costs suffered as a result of multiple injuries sustained from the slip and fall incident at [redacted] on June 7, 2004. The statement of claim alleged that the Defendant did not take reasonable care for the reasonable safety of its premises for its users, which resulted in the Plaintiff suffering serious injuries. The statement of claim outlined the particulars of negligence as follows:

> "a) the Defendant failed to provide railings on the said stairwell when it knew or ought to have known of the danger the stairwell without railings posed to lawful users of its premises;
> b) the Defendant failed to warn the Plaintiff and other lawful users of the Defendant's premises that the stairwell posed a hazard and to take care;
> c) the Defendant failed to construct the stairwell so as to prevent back light from altering the perception of lawful users of the stairwell;
> d) the Defendant failed to construct the stairwell in accordance with building code specifications; and
> e) any other such negligence as may appear and be proved."

On November 2, 2005, the Defendant filed a defense to the action, denying liability for the Plaintiff's injuries.

On April 1, 2011, the Defendant filed an amended defense referencing the Workplace Health, Safety and Compensation Act.

On September 25, 2020, an Application for Determination was received from Annette Conway, Curtis Dawe, requesting the Workplace Health, Safety and Compensation Commission (WorkplaceNL) provide a determination as to whether the action was statute-barred pursuant to **section 46** of **the Act** on behalf of the Defendant.

On October 5, 2020, I requested that counsel for the Plaintiff forward their submission in relation to the Defendant's request for a determination pursuant to **section 46** of **the Act**.

On November 18, 2021, a reply submission was provided by the Plaintiff's counsel, Russell Accident Law.

On November 28, 2022, a rebuttal to the Plaintiff's response was provided by the Defendant's counsel. They seek a determination pursuant to **section 46** of **the Act** that the court action in this matter is prohibited against the Defendant.

# Legislation and Policy

## Definitions

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

(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;

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;

(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** of **the Act** states:

**Exclusive jurisdiction**

**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;

(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.

**Section 38** of **the Act** states:

**Application of Act**

**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 one or more of the industries, employers or workers otherwise excluded.

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

**Compensation instead of action**

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

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

**Section 46** of **the Act** states:

**Commission decides if action prohibited**

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

**Section 48** of **the Act** states:

**Residency requirement**

**48.** Nothing in this Act entitles a person not living in the province to compensation payments with respect to an injury sustained within the province.

**Section 49 (1)** and **(2)** of **the Act** states:

**49.** (1) Notwithstanding section 48, where it appears that by the laws of another province, country or jurisdiction a worker or his or her dependents, if living in this province, would be entitled in respect of an injury in that other province, country or jurisdiction to compensation, as distinguished from damages, the commission may order that payments of compensation under this Act may be made to persons living in that province, country or jurisdiction in respect of a worker killed or injured in this province.

(2) The commission may order that payments of compensation under this Act may be made to persons living elsewhere in Canada as the result of any injury sustained in this province after December 31, 1983.

**Section 109** of **the Act** states:

**Arrangement with other provinces**

**109.** The commission may make or carry out arrangement's with the Workers' Compensation Board of another province to avoid duplication of assessment on the earnings of workers protected at the same time under the laws of 2 or more provinces related to workers' compensation and may make an adjustment in assessments by the employers of the workers that the commission considers equitable and may repay another Workers' Compensation Board for payment of compensation made by it under those arrangements.

**Policy EN-19, Arising Out of and In the Course of Employment** states:

**Policy Statement**

Entitlement to compensation is based on two fundamental statutory requirements:

1. the worker meets the definition of "worker" under subsection 2(z) of the Act; and
2. the injury as defined under subsection 2(o) is one arising out of and in the course of employment.

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

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

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

## 4. Special Assignments, Training and Educational Courses

Workers who are on special employer-directed assignments, including courses and conventions, and are paid regular wages are considered to be in the course of the employment during such special assignments. Where such assignments are at a place other than the normal or usual place of employment, travel to the place of the special assignment is covered, as long as the worker travels on a direct route without deviation for personal reasons. Where the conditions of the special assignment require the worker to use overnight hotel accommodations, coverage is extended to activities related to the reasonable use of such facilities (e.g. restrooms, restaurants, etc.) However, activities under taken for purely personal reasons such as visiting a movie theatre or a lounge are not considered to be in the course of the employment.

**Procedure 201.00 of the Client Services Procedure Manual, Employer Registration** states:

### 201.06 Outside Employers Operating in Newfoundland and Labrador

If a non-Newfoundland and Labrador employer operates in Newfoundland and Labrador, in an industry covered under the Act, they are required to register with WorkplaceNL and pay assessments; based only on the earnings of their workers while they are employed in Newfoundland and Labrador. The employer must also pay assessments on the earnings of any workers that they hire in Newfoundland and Labrador.

Worker's earnings reported and assessed in Newfoundland and Labrador are not subject to duplicate assessments in any other Canadian province. In accordance with provincial reporting requirements outlined in Section 109 of the Act, an employer from another Canadian province is permitted to report prorated assessable earnings to avoid duplicate assessment.

The normal requirements for registration, as outlined in this procedure and coverage outlined in Procedure 101.00, will apply to any out of province employers or individuals working in Newfoundland and Labrador.

## Position of the Defendant

The solicitor for the Defendant is seeking a determination pursuant to **section 46** of **the Act** that the Plaintiff has no right of action against the Defendant and the action is barred pursuant to **section 44** of **the Act**.

The solicitor for the Defendant submitted the following information for consideration:

- The Plaintiff was injured on the premises operated by [redacted] on June 7, 2004;
- [redacted] was a registered employer with WorkplaceNL at the time of the incident/injury;
- At the time of the incident/injury, the Plaintiff was a resident of [redacted] Saskatchewan and was at the premises attending a work-related conference;
- The Plaintiff was employed outside of the province of Newfoundland and Labrador;
- The Plaintiff was compensated for their injuries through the Saskatchewan Workers' Compensation Board.

The solicitor highlighted that the Plaintiff received compensation under the Saskatchewan Workers' Compensation Board precluding them from commencing an action for damages in Saskatchewan. The solicitor noted that the Saskatchewan Act cannot operate as a statutory bar to an action in Newfoundland and Labrador as a province can only legislate with respect to actions within its own territorial jurisdiction. The solicitor outlined that for the Plaintiff's action in Newfoundland and Labrador to be statue-barred, the action must be barred under **the Act** in Newfoundland and Labrador. It is the Defendant's position that in this case, under **the Act** in Newfoundland and Labrador, the Plaintiff would be considered a worker during the course of their employment. They submit that the Defendant is an employer and the injury occurred in the conduct of operations usual in or incidental to the industry carried on by the employer. Therefore, the action is statue-barred pursuant to **section 44** of **the Act**.

## Position of the Plaintiff

The solicitor outlined that it is the Plaintiff's understanding that their employer did not apply for coverage from WorkplaceNL to cover the time period that the Plaintiff was in Newfoundland and Labrador in 2004.

The solicitor indicated that an individual's status as a worker under their home legislation (in this case Saskatchewan) does not cross provincial boundaries and make them a worker under another province's legislation (in this case Newfoundland and Labrador). The solicitor outlined that the historical trade-off does not apply across provincial boundaries and workers injured in an out of province accident generally bring actions for damages in the jurisdiction where they are injured.

The solicitor indicated that the Plaintiff was a social worker employed in Saskatchewan at the time of the incident and at no point did the Plaintiff work in Newfoundland and Labrador. The solicitor noted that **the Act** only applies to workers or employers in Newfoundland and Labrador. The solicitor for the Plaintiff outlined that the only issues for determination in this case are:

(a) was the Plaintiff a "worker" under **the Act**?
(b) were the Plaintiff's injuries arising out of and in the course of employment?

The solicitor outlined that the answers to the questions reveal that the Plaintiff was not a worker under **the Act** and the Plaintiff's injuries did not arise out of and in the course of their employment. The Plaintiff requests a determination that the action is not statue-barred pursuant to **section 44** of **the Act** in Newfoundland and Labrador.

## Rebuttal of the Defendant

A reply submission was provided by the solicitor of the Defendant highlighting that the main point of contention is whether or not the Plaintiff was a "worker" under **the Act** in Newfoundland and Labrador at the time of injury. The solicitor outlined that it is the Defendant's position that an extra-provincially employed person can be considered a worker in another province. The solicitor noted that the circumstances of the Plaintiff's case are sufficient enough to make a finding that the Plaintiff was a worker in Newfoundland and Labrador at the time of the injury.

The solicitor stated that it is an abuse of process for the Plaintiff to now deny that their injuries arose out of and in the course of employment given they had been in receipt of benefits from the Workers' Compensation Board in Saskatchewan since 2004. The solicitor stated that if the Plaintiff is not considered a worker, they get the best of both worlds, with immediate entitlement to the benefits of the Workers' Compensation System, while still maintaining the ability to sue for additional damages through the

court system, which undermines the notion of historic trade-off in the context of extra-provincial employees.

## Reasoning and Analysis

I have reviewed and considered all submissions from the parties involved in this case. **Section 44(1)** of **the Act** provides the statutory bar to actions of a worker against an employer or a worker for an injury that arises in the course of a worker's employment. In making this decision, I applied the civil standard of proof which is the balance of probabilities.

The case law is clear that in making my determination there are a number of questions that must be considered:

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

2. Did the Plaintiff's alleged injuries arise out of and in the course of employment?

3. Is the defendant an employer within the meaning of **the Act**?

4. If the defendant is an employer within the meaning of **the Act**, did the injury occur otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer?

Questions 1 and 2 are the core focus of my decision and the main issue which I must determine. Therefore, I will first address questions 3 and 4.

3) Was the Defendant an employer under **the Act**?

Employer is defined in **section 2(1)(j)** of **the Act** as an employer as to whom this Act applies who is engaged in, about or in connection with an industry in the province and includes 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 **the Act**.

At the time of the Plaintiff's alleged fall, the Defendant was a registered employer with WorkplaceNL. I confirm from review of the facts that the Defendant is an employer within the meaning of **section 2(1)(j)** of **the Act**.

4) If the defendant is an employer within the meaning of **the Act**, did the injury occur otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer?

In review of this case, the Defendant operates as a resort business providing catering services, cabin rentals and conference accommodations. The Plaintiff was attending a work-related conference representing the [redacted] at the premises of the Defendant. At the time of the Plaintiff's fall, the Defendant was operating its usual activities and the conference was part of their regular business. Therefore, the alleged injuries occurred in the conduct of operations usual in or incidental to the industry carried on by the employer.

## Case Law and Submissions:

**Section 19(4)** of **the Act** states that decisions of WorkplaceNL shall be made upon the real merits and justice of the case and are not bound to follow strict legal precedent. While WorkplaceNL is not bound to follow strict legal precedent, I have reviewed the cases submitted to determine relevance in relation to this case.

Rowan Companies Inc. v. DiPersio,1990 CarswellNS 61 (NSSC)

A Nova Scotia resident worked on offshore oil rigs for a Texas Company, which operated in Nova Scotia and Texas. The worker was injured and treated in Texas and applied for and received benefits from the Nova Scotia Workers' Compensation Board. The worker brought an action in negligence for damages in Texas against the employer. The employer applied in Nova Scotia for an injunction to restrain the Texas action on the grounds that the Workers' Compensation Act barred recovery where benefits were paid. The Nova Scotia Supreme Court refused to enjoin the Texas action as the court felt that it should not go behind the Workers' Compensation Board decision to pay benefits and accepted that the benefits were properly paid and that the Workers' Compensation Act applied.

### Analysis

This case involves two countries and illustrates that a province in Canada legislates with respect to actions within their own jurisdiction.

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

In this case, a crane owned by Pro-Crane 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 Workers' 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. 0-1 by failing to adequately inspect the crane. Saskatchewan Power Corp., Pro-Crane, and the Saskatchewan Government requested the Workers' Compensation Board make a determination of whether the action was statue-barred by the Legislation in that jurisdiction. The Workers' Compensation Board determined that the action was statue-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 Workers' Compensation 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 "historical 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 illustrates the principle of the workers compensation system and the historic trade-off. The case provides guidance with regard to the fundamental questions to be answered as to whether or not the Plaintiff's action is barred by **the Act**.

Archean Resources Ltd. V. Newfoundland Minister of Finance 2002 NFCA 43

This case involved a dispute concerning smelting royalties between Archean Resources Ltd. and the Government of Newfoundland. The Court of Appeal provided guidance when determining the objective of the 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 statue.

## Analysis

Based on this case, when interpreting **the Act**, we must examine more than the actual language of the sections. We must look at the context and interpret the sections of the legislation liberally in a way that best ensures the attainment of the objects of **the Act**. I have applied the principles in this decision.

Spencer v. Mansour's Ltd. 2000 NSCA 59 (CanLii)

An employee, a resident of New Brunswick and employed by a New Brunswick courier company was injured in a slip and fall accident while making a delivery in Nova Scotia. The employee received compensation from the New Brunswick Workers' Compensation Board. The employee brought an action for damages against three defendants in Nova Scotia. The defendants brought application for declaration that the action was barred. The trial judge found that it was not barred as the respondent was not a worker under **the Act**. An appeal was submitted. The court of appeal held that a decision that a worker at a workplace within Nova Scotia is not covered by **the Act** because they do not reside in the province conflicts with considerations of comity among provinces and the principles of the interjurisdictional agreement. The employee was a worker and was barred from suing.

## Analysis

In this case, the court of appeal noted that the definition of worker was silent regarding residency. The court indicated that the historic trade-off would be seriously eroded by the strict application of residency requirements. While the employee was a resident of New Brunswick, the employee was considered a worker in Nova Scotia and the statutory bar applied. This case is relevant regarding the incident in this matter as the Plaintiff was involved in an incident and sustained an injury while working in another province and received compensation from their home province.

Pe Ben Oilfield (2006) Services Ltd. v. Arlit, 2017 ABQB 678

Employee A was in British Columbia for work and was rear-ended by a truck driven by employee B working with Pe Ben Oilfield Services Ltd. Employee B was employed by an Alberta company and carrying on business in Alberta and British Columbia. At the time of the accident, both employees were residents of Alberta working in the course of their employment in British Columbia. Employee A applied for and received compensation from the Workers' Compensation Board in Alberta and commenced an action against the applicant, Pe Ben Oilfield Services Ltd. in British Columbia. The applicant filed an application seeking an injunction preventing employee A from suing. The court refused to grant the injunction which allowed employee A to proceed with their case in British Columbia and it was outlined that there was nothing to prevent the Workers' Compensation Board from commencing or benefiting from the British Columbia action.

**Analysis**

The Alberta Court held that workers' compensation legislation may not have extra-provincial effect if it creates a conflict of laws or compromises the rights of a non-resident outside its own province. The Pe Ben Oilfield Services case deals with the application of Alberta legislation to an Alberta resident in a British Columbia court action. The case at hand is a different fact situation since it involves the application of Newfoundland and Labrador legislation to a Saskatchewan resident in a Newfoundland and Labrador court action. It does not involve the application of Newfoundland and Labrador law to another jurisdiction.

Appeals Commission for Alberta Workers' Compensation, Decision No. 2018-0330

In this case, a worker, employed as a steamfitter by an employer in Alberta sustained an injury at an Alberta worksite when a pipe that was being tested blew apart. The worker's claim was accepted by the Workers' Compensation Board in Alberta. The worker also commenced a personal civil action in Alberta for damages against the company that produced the pipe, a company located in British Columbia. The company argued that the worker's action should be barred based on the Alberta Workers' Compensation Act as an extra-provincial employer. The commission determined that the worker was never employed by the British Columbia pipe company, the pipe company did not pay premiums in Alberta, the occasional delivery of pipe would not make the British Columbia employer an employer within Alberta, and the pipe company would not be covered under the Alberta Workers' Compensation Act.

**Analysis**

While this case discusses a situation involving two jurisdictions, it is not relevant to my analysis. It involves a case against an employer in British Columbia who was not registered as an employer in Alberta where the action was proceeding.

Toronto (City) v. C.U.P.E. Local 79, 2003 SCC 63

This case involved a grievance of a recreationist with Toronto's Parks Department who had been terminated following his conviction for sexual assault of a minor. An arbitrator reinstated the employee, which was then quashed by the Divisional Court which held that the union's attempt to grieve the dismissal was a collateral attack on a valid judgement. The Divisional Court's decision was upheld by the Ontario Court of Appeal. In dismissing the union's appeal, the Supreme Court of Canada relied on the doctrine of abuse of process, which the Court indicated should focus on the integrity of the adjudicative process, rather than simply on the motives of the party attempting to relitigate a settled matter.

## Analysis

This case discusses the concept of abuse of process where the proceedings violate the fundamental principles of justice. The Supreme Court of Canada stated that the courts will turn to the doctrine of abuse of process to ascertain whether re-litigation would be detrimental to the adjudicative process. It has been applied to preclude re-litigation in circumstances where allowing litigation to proceed would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

Thomson v. Watson, 2020 ONSC 4409 (CanLII)

In this case, an Ontario resident was injured while truck driving in British Columbia for a company based in Alberta. The worker elected to receive benefits from the Alberta Workers' Compensation Board and then bring a tort action against the truck's owner, an Ontario resident. The court held that the action in Ontario was statue-barred. This conclusion was based on considerations of comity and the reasons of justice, necessity and convenience. It was outlined that the workers' compensation scheme established a historic trade-off where workers lost their cause of action against employers but gained compensation that depended neither on the fault of the employer nor ability to pay. It was noted that the provision of the workers' compensation system was country-wide and each plan incorporated a provision reflecting historical trade-off. The Court stated that there was no good reason to establish a tort haven amongst provinces that would encourage the circumventing of provincial workers' compensation legislation by simply moving to a different province. The Court also held that the action represented an attempt at relitigation of a matter covered by insurance to which the defendant had contributed, a circumvention of the historic trade-off and an opportunity to double recovery which was an abuse of process.

## Analysis

In this case, the worker elected compensation benefits from the Alberta Workers' Compensation Board and was statue-barred in Ontario from bringing an action against the Ontario truck owner. This case is relevant to my determination because the facts are similar since the Plaintiff is taking an action in Newfoundland and Labrador resulting from an injury while attending a conference in Newfoundland and Labrador and she received workers' compensation benefits from their home province of Saskatchewan.

The above cases help inform my decision in relation to questions 1 and 2 that must be decided in a statutory bar determination.

In review of the case law, as I have highlighted above, two of the cases are more relevant to this case, namely Spencer v. Mansour's Ltd. and Thomson v. Watson. In both of these cases, the Plaintiffs sustained an injury while working in another province and they filed claims and received compensation benefits. The courts focused on the

historic trade off and comity between provinces and held that they were statue-barred from bringing an action.

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

This is the main focus of my decision and the issue which must be determined. It has been argued by the Plaintiff that they were not a worker in Newfoundland and Labrador at the time of the incident/injury, they were not a resident of Newfoundland and Labrador, and that **the Act** only applies to workers and employers within Newfoundland and Labrador. From my review, I note that the definition of worker under **the Act** is silent with respect to a worker's place of residence.

**Section 49(1)** and **(2)** of **the Act** discuss compensation to non-residents. It outlines that where it appears that by the laws of another province, a worker or his or her dependents, if living in this province, would be entitled in respect of an injury in that other province to compensation, the commission may order that payments of compensation under this Act may be made to persons living elsewhere in Canada as the result of any injury sustained in this province after December 31, 1983. Based on this section of **the Act**, there is no requirement that the Plaintiff has to be a resident in Newfoundland and Labrador to be entitled to compensation benefits. **Section 49** allows non-residents who suffer workplace injuries within Newfoundland and Labrador to be subject to **the Act** and, thereby, considered a worker under **the Act**.

As indicated by the Court of Appeal in Spencer v. Mansour's Limited, a conclusion that a worker at a workplace in Newfoundland and Labrador is not covered by workers' compensation because she resides outside the province conflicts with considerations of comity among provinces and the principles of the interjurisdictional agreement.

**Section 109** of **the Act** is an important section to consider in this case. It states that WorkplaceNL may make or carry out arrangements with the Workers' Compensation Board of another province to avoid duplication of assessment on the earnings of workers protected at the same time under the laws of two or more provinces related to workers' compensation. The section indicates that an adjustment may be made in assessments by the employers of the workers that the commission considers equitable and may repay another Workers' Compensation Board for payment of compensation made by it under those arrangements. This represents the principle in the Interjurisdictional Agreement.

As noted by the Court of Appeal in Spencer v. Mansour's Limited, given that workers travel for their employment, the historic trade-off would be seriously eroded by a strict application on residence requirement. The historical trade-off is at the root of the Workers' Compensation system which provides benefits to workers in exchange for employers being protected from suit.

**Section 38** of **the Act** states that **the Act** applies to workers and employers engaged in, about or in connection with an industry in the province.

**Procedure 201.06** outlines if a non-Newfoundland and Labrador employer operates in Newfoundland and Labrador, in an industry covered under **the Act**, they are required to register with WorkplaceNL and pay assessments based on the earnings of their workers while they are employed in Newfoundland and Labrador. In this case, the [redacted] was operating in Newfoundland and Labrador, when the Plaintiff attended the conference at the Defendant's premises. The employer was required to register with WorkplaceNL and pay assessments during the period of time that the Plaintiff was employed in Newfoundland and Labrador. Whether the [redacted] registered with WorkplaceNL or paid assessments based on the Plaintiff's wages earned while working in Newfoundland and Labrador, does not impact whether the Plaintiff meets the definition of worker under **the Act**. In this case, the Plaintiff submitted their claim to the [redacted] where the claim was adjudicated and accepted as compensable with entitlement to benefits under that board.

From my review of the facts of this case and the applicable legislation, policy and procedures, I confirm that at the time of the incident/injury, the Plaintiff was a worker in the province of Newfoundland and Labrador representing their employer, the [redacted], at a conference being held at the Defendant's premises. Therefore, I find that the Plaintiff was a "worker" as defined under **section 2(z)** of **the Act**.

2) Did the Plaintiff's injuries arise out of and in the course of employment?

**Policy EN-19**, provides a number of indicators which can be used as a guide in determining whether an injury has arisen out of and in the course of employment. While no single criterion is conclusive in classifying an injury as one arising out of and in the course of employment, various indicators are used for guidance, including:

- whether the injury occurred on the premises of the employer (see also "**Employer's Premises"** section);
- whether it occurred in the process of doing something for the benefit of the employer;
- whether it occurred in the course of action in response to instructions from the employer;
- whether it occurred in the course of using equipment or materials supplied by the employer;
- whether it occurred in the course of paid employment;
- whether the risk to which the worker was exposed was the same as the risk to which he/she is exposed in the normal course of production;
- whether the injury occurred during a time period for which the worker was being paid; and

- whether the injury was caused by some activity of the employer, a fellow worker, or a third party.

The policy also highlights special assignments, training and educational courses and outlines that workers who are on special employer-directed assignments, including courses and conventions, and are paid regular wages are considered to be in the course of the employment during such special assignments. The policy notes that where the conditions of the special assignment require the worker to use overnight hotel accommodations, coverage is extended to activities related to the reasonable use of such facilities (e.g. restrooms, restaurants, etc.). However, activities under taken for purely personal reasons such as visiting a movie theatre or a lounge are not considered to be in the course of the employment.

In review of the facts, at the time of the Plaintiff's fall at the Defendant's premises, I find that the Plaintiff was attending a conference representing their employer; for the purpose of doing something for the benefit of their employer; in response to instructions from their employer; and they were paid their regular wages while attending the conference as indicated on the Form E1, Employer's Initial Report of Injury. The Plaintiff utilized the hotel accommodations and attended the conference at the Defendant's premises. As outlined in **Policy EN-19** where the conditions of a conference require overnight accommodation, coverage is extended to activities related to the reasonable use of such facilities. At the time of the injury, the Plaintiff was coming down the stairs of the conference facility with a lamp that was going to be used to provide light for the conference entertainment. This activity was a reasonable use of the conference facility and was part of the conference that the Plaintiff was attending for her work. From my review, the Plaintiff sustained compensable injuries during the course of their employment.

## Conclusion

From my review of the evidence, I find that the Plaintiff while attending a conference at the Defendant's premises was a worker within the meaning of **the Act** representing their employer, the [redacted]. The Plaintiff's alleged injuries arose out of and in the course of their employment. The Defendant was an employer within the meaning of **the Act** and the Plaintiff's alleged injury occurred in the conduct of the operations usual in or incidental to the Defendant's industry.

**Section 44** of **the Act** bars an action by the worker against an employer because of an injury in respect of which compensation is payable or which arises in the course of a worker's employment.

It is not necessary to address the issue of abuse of process since I have determined that the action is statue-barred.

[redacted]

**May 16, 2024**

## Determination

It is my determination that the action brought by the Plaintiff against the Defendant is statue-barred under **the Act**.

The attached certificate has been filed with the court.

Sincerely,

**Lynette Evans**
Internal Review Specialist

LE:kb
Enclosure: Certificate

c: Paula Fudge, Internal Review Clerk
Jessica Dellow, Russell Accident Law