

Date: 20121221

Docket: 12/19

Citation: *Warford v. Weir's Construction Limited*, 2012 NLCA 79

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

ROLAND WARFORD

APPELLANT

AND:

WEIR'S CONSTRUCTION LIMITED

FIRST RESPONDENT

AND:

BILL WEIR AND JAMES WEIR, JR.

SECOND RESPONDENTS

AND:

WORKPLACE HEALTH, SAFETY AND
COMPENSATION COMMISSION

INTERVENOR

AND

Docket: 12/38

BETWEEN:

WEIR'S CONSTRUCTION LIMITED

FIRST APPELLANT

AND:

BILL WEIR AND JAMES WEIR JR.

SECOND APPELLANTS

AND:

ROLAND WARFORD

RESPONDENT

AND:

WORKPLACE HEALTH, SAFETY AND
COMPENSATION COMMISSION

INTERVENOR

AND

Docket 12/45

AND:

WEIR'S CONSTRUCTION LIMITED

INTENDED
FIRST APPELLANT

AND:

BILL WEIR AND JAMES WEIR JR.

INTENDED SECOND
APPELLANTS

AND:

RONDA WARFORD

INTENDED RESPONDENT

AND:

WORKPLACE HEALTH, SAFETY AND
COMPENSATION COMMISSION

INTERVENOR

Coram: Rowe, Harrington and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (General) 1997010357

Appeal Heard: November 15 and 16, 2012

Judgment Rendered: December 21, 2012

Reasons for Judgment by Rowe J.A.

Concurred in by Harrington and Hoegg JJ.A.

Counsel for Roland and Ronda Warford: Andrew A Fitzgerald
Counsel for Weir's Construction Limited, Bill Weir and James Weir, Jr.:
Jorge Segovia
Counsel for The Workplace Health, Safety and Compensation Commission:
Krista Gillam

Rowe J.A.:

FACTS

[1] In July 1995, Roland Warford was injured in the course of his employment as a mechanic while repairing a mobile crane in a garage owned by his employer, Weir's Construction Limited (Weir's). Mr. Warford applied for, received and continues to receive benefits from the Workplace Health, Safety and Compensation Commission (the Commission) for this injury. Weir's is an employer registered under the *Workplace Health, Safety and Compensation Act*, RSNL 1990, c. W-11 (the *Act*). Bill Weir and James Weir Jr. are employed by Weir's.

[2] In February 1997, the Commission, pursuant to subrogation rights under the *Act* (to be dealt with further below), commenced an action against Weir's, and Bill Weir and James Weir Jr. (the Defendants). The Commission subsequently decided it did not wish to continue the action.¹ The Commission gave Mr. Warford the option of continuing the action if he so wished, at his own expense, with the Commission to be reimbursed for the benefits it had provided and continues to provide to Mr. Warford in the event the action succeeded. In September 2000, the Commission entered an agreement with John Sinnott Q.C., counsel for Mr. Warford, to take carriage of the action on the basis noted above.

[3] Meanwhile, in September 1998, the Defendants had sought a determination by the Commission pursuant to s. 46 of the *Act* as to whether the action was prohibited by the *Act*. In February 1999, an Internal Review Specialist (an employee of the Commission in the Compensation Services Department) determined that the action was not prohibited by the *Act*.

¹ The action was commenced under s. 44.1 of the *Act* which permits an injured worker who is receiving benefits to sue his employer if the claim arises from activities associated with a motor vehicle owned by the employer which may be insured.

[4] In August 1999, the Defendants applied to the Supreme Court, Trial Division, for an order in the nature of *certiorari*, to quash the Internal Review Specialist's determination. In December 2001, Justice O'Regan quashed the determination and returned the matter to the Commission for a new determination: (2001), 208 Nfld. & P.E.I.R. 138. Justice O'Regan's decision was appealed to this Court. In July 2003, this Court upheld Justice O'Regan's decision: 2003 NLCA 36, 227 Nfld. & P.E.I.R. 48.

[5] In June 2005, the Defendants again sought a determination by the Commission whether the action was barred by the *Act*. In October 2007, a hearing was held before another Internal Review Specialist; in May 2009, she determined that the action was barred by the *Act*.

[6] In June 2009, Mr. Warford applied to the Supreme Court, Trial Division for an order in the nature of *certiorari* to quash this (second) determination. In August 2010, Justice Adams quashed the determination and returned the matter to the Commission for a new determination: 2010 NLTD(G) 130, 300 Nfld. & P.E.I.R. 69.

[7] In November 2010, the Defendants sought a (third) determination by the Commission that the action was prohibited by the *Act*. In December 2010, counsel for Mr. Warford advised the Defendants that their Statement of Defence was required so that discoveries could be conducted. This prompted the Defendants to apply to the Trial Division for a stay of the action pending a determination by an Internal Review Specialist. The Defendants argued that the Commission has exclusive jurisdiction to determine whether the action is prohibited by the *Act* and until that determination is made the action should be stayed. In March 2012, Justice Hall rendered his decision granting the stay: 2012 NLTD (G) 42. In these proceedings, Mr. Warford is appealing Justice Hall's decision.

[8] The foregoing is a summary of the facts relating to Mr. Warford's action. In addition, in July 1997, Ronda Warford, Mr. Warford's spouse, brought an action against the Defendants. In her action, Mrs. Warford seeks to recover for loss of consortium and loss of servitium arising from the injuries suffered by Mr. Warford in the July 1995 workplace accident.

[9] In May 2012, the Defendants applied to the Supreme Court, Trial Division for a stay of Mrs. Warford's action, pending a determination by the Commission whether her action was prohibited by the *Act*. In July 2012, Justice Thompson rendered a decision to the effect that the Commission did

not have jurisdiction to determine whether Mrs. Warford's action was prohibited under the *Act*; rather he held that Mrs. Warford's action against the Defendants could proceed in the Supreme Court Trial Division: 2012 NLTD (G) 167. Accordingly, he denied the stay sought by the Defendants. In these proceedings, the Defendants are appealing Justice Thompson's decision.

[10] This decision encompasses the two appeals, that by Mr. Warford in respect of Justice Hall's decision and that by the Defendants in respect of Justice Thompson's decision. The Defendants seek to have this Court affirm Justice Hall's decision granting a stay in the action on behalf of Mr. Warford. The Defendants also seek to have this Court set aside Justice Thompson's decision and impose a stay in the action by Mrs. Warford. Mr. Warford seeks to have Justice Hall's stay set aside. Mrs. Warford seeks to have Justice Thompson's decision affirmed.

ISSUES

[11] The issues have been variously stated by the parties, but come down to the following:

- (1) regarding the action on behalf of Mr. Warford, does the Commission have exclusive jurisdiction to determine whether it is prohibited by the *Act*; and
- (2) regarding the action by Mrs. Warford, does the Commission have exclusive jurisdiction to determine whether it is prohibited by the *Act*?

[12] In each instance, if the Commission has exclusive jurisdiction, a decision as to whether a stay should be granted follows.

LEAVE TO APPEAL

[13] Leave is required for both appeals, which leave is granted, as these appeals raise issues of law important to be answered for the conduct of these cases and for the general guidance of the Bar and Bench.

THE ACT

[14] Section 3 of the *Act* continues the Commission under its current name. Subsection 4(1) confers on the Cabinet authority to "appoint a board of directors of the commission who shall be responsible for the administration

of this Act.” Subsection 5(1) provides that “[t]he board of directors shall establish policies and programs consistent with this *Act* and regulations ...”.

[15] Section 7 reads, in part:

(1) The board of directors shall appoint as employees of the commission, and prescribe the duties of, those persons that the board of directors considers necessary for carrying out this Act.

...

(3) The board of directors may delegate the powers of administration to those of the employees of the commission that it thinks advisable.

(Emphasis added.)

[16] Thus, the Commission is guided by its board of directors, which establishes policies under the *Act* and delegates authority to specified employees to give effect to the legislation and the policies pursuant to it.

[17] The Commission operates in the same general way as do others across Canada. This has been described in several Supreme Court of Canada decisions, including *Dominion Cannery Ltd. v. Costanza*, [1923] S.C.R. 46; *Alcyon Shipping Company Limited v. O’Krane*, [1961] S.C.R. 299; *Farrell v. Workmen’s Compensation Board* [1962] S.C.R. 48; *Mack Trucks Manufacturing Co. v. Forget*, [1974] S.C.R. 788; and *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*, [1997] 2 S.C.R. 890. In *Pasiechnyk*, Sopinka J. wrote:

24 Workers’ compensation is a system of compulsory no-fault mutual insurance administered by the state. Its origins go back to 19th century Germany, whence it spread to many other countries, including the United Kingdom and the United States. In Canada, the history of workers’ compensation begins with the report of the Honourable Sir William Ralph Meredith, one-time Chief Justice of Ontario, who in 1910 was appointed to study systems of workers’ compensation around the world and recommend a scheme for Ontario. He proposed compensating injured workers through an accident fund collected from industry and under the management of the state. His proposal was adopted by Ontario in 1914. The other provinces soon followed suit. Saskatchewan enacted *The Workmen’s Compensation Act*, 1929, S.S. 1928-29, c. 73, in 1929.

25 Sir William Meredith also proposed what has since become known as the “historic trade-off” by which 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. Similarly, employers were forced to contribute to a mandatory insurance scheme, but gained freedom from potentially crippling liability. Initially in Ontario, only the employer of the worker who was injured was granted immunity from suit. The Act was amended one year after its passage to provide that injured Schedule 1 workers could not sue any Schedule 1 employer. This amendment was likely designed to account for the multi-employer workplace, where employees of several employers work together.

26 The importance of the historic trade-off has been recognized by the courts. In *Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act*, 1983, (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.), Goodridge C.J. compared the advantages of workers' compensation against its principal disadvantage: benefits that are paid immediately, whether or not the employer is solvent, and without the costs and uncertainties inherent in the tort system; however, there may be some who would recover more from a tort action than they would under the Act. Goodridge C.J. concluded at p. 524:

While there may be those who would receive less under the Act than 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.

I would add that this so-called negative feature is a necessary feature. The bar to actions against employers is central to the workers' compensation scheme as Meredith conceived of it: it is the other half of the trade-off. It would be unfair to allow actions to proceed against employers where there was a chance of the injured worker's obtaining greater compensation, and yet still to force employers to contribute to a no-fault insurance scheme.

27 Montgomery J. also commented on the purposes of workers compensation in *Medwid v. Ontario* (1988), 48 D.L.R. (4th) 272 (Ont. H.C.). He stated at p. 279 that the scheme is based on four fundamental principles:

- (a) compensation paid to injured workers without regard to fault;
- (b) injured workers should enjoy security of payment;
- (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
- (d) compensation to injured workers provided quickly without court proceedings.

I would note that these four principles are interconnected. For instance, security of payment is assured by the existence of an injury fund that is maintained through contributions from employers and administered by an independent commission,

the Workers' Compensation Board. The principle of quick compensation without the need for court proceedings similarly depends upon the fund and the adjudication of claims by the Board. The principle of no-fault recovery assists the goal of speedy compensation by reducing the number of issues that must be adjudicated. The bar to actions is not ancillary to this scheme but central to it. If there were no bar, then the integrity of the system would be compromised as employers sought to have their industries exempted from the requirement of paying premiums toward an insurance system that did not, in fact, provide them with any insurance.

[18] This Court has confirmed that what the Supreme Court of Canada has said regarding workers compensation schemes in Canada is applicable to the scheme set out in this province's legislation. In *Workplace Health, Safety and Compensation Commission v. Weir's Construction Ltd.* 2003 NLCA 36, 227 Nfld. & P.E.I.R. 48, at para. 19, Cameron J.A. wrote:

The history and purpose of workers' compensation legislation was examined in **Reference re: Workers' Compensation Act, 1983**, and in **Pasiechnyk**. In the latter, Sopinka J. observed, at paragraph 32, that: there are three main aspects to the system "(1) compensation and rehabilitation of injured workers, (2) the bar to actions, and (3) the injury fund. ... all three are essential to the system as it was conceived by Meredith and implemented by each provincial legislature. The Board has a role in respect of each of these aspects." The same could be said of the system and the Commission in this province. See, in particular, sections 19, 44, and 44.1 of the **Act**.

See also, *King v. Workplace Health, Safety and Compensation Commission (Nfld.)* (1999), 176 Nfld. & P.E.I.R. 171, per Orsborn J. (as he then was).

[19] As noted by Sopinka J. in *Pasiechnyk*, at para. 26, "the bar to actions against employers is central to the workers compensation scheme". That bar is set out in s. 44 of the *Act*, which reads in part:

(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.

[20] This rather straight forward situation is complicated to some degree by s. 44.1 and s. 45, which reads in part:

- 44.1 (1) Section 44 shall not apply where the worker is injured or killed
- (a) while being transported in the course of the worker's employment by a mode of transportation in respect of which public liability insurance is required to be carried; or
 - (b) as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment.

(2) In subsection (1) "motor vehicle" means

- (a) a motor vehicle
 - (i) registered under the *Highway Traffic Act*, or
 - (ii) authorized under section 12 or 17 of the *Highway Traffic Act* to be operated on a highway in the province without being registered under that Act,

whether or not it is being operated on a highway; or

- (b) another motor vehicle while being operated on a highway in the province and

for the purpose of this definition "highway" means a highway as defined in the *Highway Traffic Act*.

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 ...

- (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.

...

(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.

...

(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.

(Emphasis added.)

[21] The determination as to whether an action is prohibited is dealt with in s. 46, which reads:

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.

The determination whether or not an action is prohibited is itself based on other decisions, e.g. “whether an injury has arisen out of or in the course of an employment within the scope of this Act” (s. 19(1)(a)).

[22] The Commission has exclusive jurisdiction to determine such questions, as provided in s. 19(1) which reads in part:

(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;

...

(g) the existence of dependency;

...

- (i) whether a worker in an industry is within the scope of this Act and entitled to compensation under the Act;
- (j) whether or not, for the purpose of this Act, a person is a worker, subcontractor, independent operator or an employer; ...

[23] This exclusive jurisdiction to decide matters “arising under this Act and ... in respect of which a power, authority or distinction is conferred on the commission” is protected by the privative clause in s. 19(2). I would note, as well, s. 19(3):

(2) Subject to Part II, an action or decision of the commission is final and conclusive and is not open to question or review in a court of law and proceedings by or before the commission shall not be restrained by injunction, prohibition or other process or proceedings in a court of law or be removable by certiorari or otherwise into a court of law.

(3) Nothing in subsection (1) or (2) shall be construed to prevent the commission from reconsidering a matter which has been dealt with by it or from rescinding, altering or amending a decision or order previously made by it.

[24] The exercise of the authorities under sections 44-46 is dealt with in Commission Policy EN-08, the title of which is “Third Party Actions”. I will quote at length from this document:

PART I – 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, dirtbikes (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.

...

[A] worker or dependents must elect to claim compensation or pursue an action.

PART II – ELECTION

A. To Sue or Claim Compensation?

A worker or dependent cannot claim compensation and pursue a court action. Faced with the option to claim or sue they must elect to do one or the other. ...

There is no entitlement to compensation benefits when a worker or dependent decides to sue.

The Commission has control over available court actions when a worker or dependent chooses compensation. The legal term for this process is "subrogation". It means the Commission can stand in the place of an injured worker or dependent and recover any money it pays out to the worker or dependent in the form of workers' compensation benefits, with the possibility of additional money being paid to the worker or dependents. The Commission will take all reasonable measures in its opinion to maximize recovery through court action. [see PART III - SUBROGATION]

B. How to Elect

...

A claim is processed in the regular way if there is a definite election to claim compensation. Once a payment has been accepted the election will not be revoked unless the Commission consents and all monies paid out under the claim, including the applicable administration charge, are repaid.

...

PART III – SUBROGATION

BY THE COMMISSION

Definition: Subrogation means the Commission 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 the Commission is subrogated to the court action. The Commission 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 the Commission 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 the Commission.

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.

If the Commission takes an unsuccessful action it pays all costs.

If a worker or dependent disagrees with a Commission decision not to sue, the Commission may consent to their selecting a lawyer in order to conduct the action. The retained legal counsel will be informed of the Commission's reasons for not pursuing the action. The legal counsel will be given the full or estimated cost of the Commission's claim and shall agree that full recovery (if successful) must be paid to the Commission subject to recognition of a lien for fees and disbursements. The Commission will not be responsible for fees or disbursements if the action fails.

PART IV – DETERMINATION

OF RIGHT OF ACTION

Section 46 of the Act gives the Commission 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 Compensation Services Department 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.

(Underlining added.)

[25] Thus, Policy EN-08 (page 5) delegates to the Commission's "legal department" the decision under s. 45(9) whether or not to take a subrogated action. Policy EN-08 (page 6) delegates to the "Compensation Services Department" the determination under s. 46 whether the action is "prohibited" by the *Act*. As the Intervenor, the Commission, explained the "legal department" is a different group of Commission employees from the "Compensation Services Department"; as well, officials in the Compensation Services Department who make determinations under s. 46 are Internal Review Specialists.

ANALYSIS

The claim on behalf of Mr. Warford

[26] In his decision to grant a stay, Justice Hall held that the Commission has exclusive jurisdiction to determine whether the (subrogated) action on behalf of Mr. Warford is prohibited by the *Act*.

[27] I would note, parenthetically, how peculiar the action on behalf of Mr. Warford is. It commenced as a subrogated action taken by the Commission standing in the place of Mr. Warford. However, the Commission, having given over carriage of the action to Mr. Warford's counsel, Mr. Warford is in fact carrying on a (nominally) subrogated action on his own behalf. That said, nothing turns on it in the disposition of this appeal.

[28] In his reasons for decision, Justice Hall relies on a series of decisions by the Supreme Court of Canada. In paragraph 31 of his reasons, Justice Hall quotes as follows from *Mack Trucks Manufacturing Co. v. Forget*, *supra*, at 791:

There are three decisions of this Court which conclusively hold that it is within the exclusive jurisdiction of the Board to determine whether or not the plaintiff's right of recovery and right of action are taken away by the provisions of the statute. These cases are: **Dominion Cannery Ltd. v. Costanza** [1923] S.C.R. 46; **Alcyon Shipping Co. Ltd. v. O'Krane** [1961] S.C.R. 299; **Farrell v. Workmen's Compensation Board** [1962] S.C.R. 48.

[29] In paragraph 42 of his reasons, Justice Hall also relies on the following passage from *Pasiechnyk*, *supra*, at para. 42:

There can be no question that the question of eligibility for compensation is one that is within the Board's exclusive jurisdiction. It is also clear upon examination that the issue of whether an action is barred is equally within the Board's exclusive jurisdiction. It would undermine the purposes of the scheme for the courts to assume jurisdiction over that question. It could lead to one of the problems that workers' compensation was created to solve, namely, the problem of employers becoming insolvent as a result of high damage awards. The system of collective liability was created to prevent that, and thus to ensure security of compensation to the workers. Individual immunity is the necessary corollary to collective liability. The interposition of the courts could also lead to uncertainty about recovery. Anglin J. recognized this in *Dominion Cannery*, where he suggested that the purpose of the Act reserving to the Board exclusive jurisdiction over the question of whether an action was barred was to avoid a worker's being

completely denied recovery should the Board determine that he or she was not entitled to compensation but the court determine that he was.

[30] In this Court's 2003 decision in this case (2003 NLCA 36), Cameron J.A. wrote:

20 As already noted, the Act grants to the Commission and to the Commission alone, the task of determining if an action is prohibited by the Act. In **Pasiechnyk**, Sopinka J. said that the "courts have consistently held that the question of whether the statutory bar applied to an action was finally committed to the board." That is not to suggest that the procedure for making such determinations is precisely the same in all jurisdictions. The person or persons making the decision may be different from jurisdiction to jurisdiction and in some jurisdictions there is an internal review process of such decisions. However, these differences in legislation and the fact that this case involves an exception to a general rule do not detract from Justice Sopinka's statement nor its application to this case.

(Emphasis added.)

[31] Justice Hall also relied, in para. 57 of his reasons, on the 2010 decision by Justice Adams in this case (2010 NLTD(G) 130). In that decision, Justice Adams wrote at para. 86:

... The Legislature has seen fit to give exclusive jurisdiction to the Commission to make the determination of whether the action is statute barred by the Act. The Court's role is supervisory only – to determine whether the decision of the Commission is reasonable, not to substitute the Court's decision for that of the Commission where more than one reasonable outcome is possible.

A similar view is implicit in the reasons of Justice O'Regan: (2001) 208 Nfld. & P.E.I.R. 138 at paras. 9-11.

[32] While Justice Hall held that the Commission has exclusive jurisdiction to determine whether the action is prohibited by the Act, he held that the Commission could not make this determination pursuant to s. 46, but could do so under s. 19. The Defendants seek to have this Court affirm what Justice Cameron wrote in the 2003 decision at para. 6:

The Commission and Warford claim that Warford falls within section 44.1(1)(b). Whether that is the case is not determined by the court in which an action is commenced but by the Commission, pursuant to section 46.

[33] By contrast, Mr. Warford seeks to have this Court adopt Justice Hall's holding that s. 46 does not apply in this case and, further, overturn Justice Hall's holding that s. 19 provides authority for the Commission to determine whether this action is prohibited by the *Act*.

[34] I turn now to Mr. Warford's main submissions. The first is that by deciding to take a subrogated action under s. 45(9), the Commission has thereby determined that the action is not prohibited. No authority is proffered for this interpretation of s. 45(9) and s. 46. It rests on the proposition that if the Commission has commenced an action, then it must implicitly have determined that the action is not prohibited by the *Act*.

[35] This proposition is incorrect. In Policy EN-08, authority to decide whether to bring an action under s. 45(9) is delegated by the Board of Directors to the legal department. By contrast, under Policy EN-08, authority under s. 46 to determine whether an action is prohibited under the *Act* is delegated to the Compensation Services Department.

[36] Thus, by virtue of Policy EN-08 (made pursuant to s. 5(1) and s. 7(3) of the *Act*), the legal department has no authority to make a determination whether an action is prohibited under the *Act*, that authority being expressly conferred instead on the Compensation Services Department, where it is exercised by adjudicators referred to as Internal Review Specialists.

[37] The Intervenor made clear that in its view, the two decisions, under s. 45(9) and under s. 46, are distinct and that they are taken independently by different officials holding different mandates within the Commission's structure, as described in Policy EN-08. I agree.

[38] A second proposition advanced by Mr. Warford is that s. 46 does not relate to subrogated actions. Reference is made to the opening wording:

Where an action in respect of an injury is brought against an employer or a worker by a worker or his or her dependant

(Emphasis added.)

Mr. Warford argues that a subrogated action is not brought "by a worker", but rather by the Commission in the place of the worker. This Justice Hall found persuasive. In my view, this is wrong in law.

[39] It is abundantly clear from the scheme of the legislation that s. 46 is intended to confer on the Commission the authority to determine whether or not actions are prohibited by the *Act*. The interpretation of s. 46 to exclude from its scope subrogated actions is an interpretation which is inconsistent with a purposive approach to statutory interpretation. See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21 and *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124, at paras. 17-23 and 27.

[40] Repeatedly, the Supreme Court of Canada has clearly stated that decisions as to whether an action is prohibited under workers compensation legislation are within the exclusive jurisdiction of the Commission. This Court in its 2003 decision in this case made clear that the Supreme Court of Canada's jurisprudence applies to this province's legislation. Furthermore, in its 2003 decision, this Court expressly stated that such decisions are taken pursuant to s. 46 of the *Act*. (See above paragraphs 17, 18 and 30.)

[41] A third proposition advanced by Mr. Warford is that even if the Commission does have jurisdiction to determine whether an action is prohibited by the *Act*, that jurisdiction is not exclusive, but rather is shared with the superior court of the province.

[42] In support of this, counsel for Mr. Warford referred to the following passage from *Canada (Attorney General) v. Telezone Inc.* 2010 SCC 62, [2010] 3 S.C.R. 585, at para. 42, per Binnie J. for the Court:

What is required, at this point of the discussion, is to remind ourselves of the rule that any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language: "[The] ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court . . . requires clear and explicit statutory wording to this effect": *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 46; see also *Pringle v. Fraser*, [1972] S.C.R. 821, at p. 826; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 38. ...

[43] The foregoing is, without question, good law. But it is clear that, in effect, such derogation has occurred, given the unbroken line of Supreme Court of Canada authorities stating that the determination of whether an action is prohibited under workers compensation legislation is within the "exclusive jurisdiction" of workers compensation commissions and not the jurisdiction of the courts. See above paragraphs 17, 28 and 29.

[44] Many ancillary propositions were advanced by counsel for Mr. Warford, but his line of argument is based on the foregoing three fundamental propositions:

- (1) a decision to bring an action under s. 45(9) is, in effect, a determination that an action is not prohibited by the *Act*;
- (2) the authority to make a determination under s. 46 does not relate to subrogated actions; and
- (3) the superior courts have concurrent jurisdiction to make a determination whether an action is prohibited under the *Act*.

[45] For the reasons set out above, all three of these propositions are wrong in law. In these circumstances, it is proper to stay Mr. Warford's action, as it would not be in the interests of justice to proceed with an action in the Trial Division of the Supreme Court, where the exclusive jurisdiction to determine whether the action is prohibited is conferred on the Commission. I would dismiss the appeal and affirm Justice Hall's decision. I would add that I am in general agreement with his reasons, save as regards the applicability of s. 46, as explained above.

The Claim by Mrs. Warford

[46] Mrs. Warford has commenced an action in her own right; it is not a subrogated action. That said, her claim is for damages arising from the same industrial accident that caused injury to her husband.

[47] As noted above, the Defendants sought a stay of Mrs. Warford's action pending a determination by the Commission under s. 46 whether the action is prohibited under the *Act*. Their argument is straight forward: there is ample authority that such determinations are within the exclusive jurisdiction of the Commission. Thus, the stay should be granted, pending the Commission's determination.

[48] The arguments by Mrs. Warford were equally clear:

- (1) she is not eligible to receive workers compensation benefits and, thus, is not affected by the "historic trade-off" set out in s. 44;

(2) she does not come within the meaning of “dependent” as defined in s. 2(f) of the *Act*, as that contemplates “the death of the worker” and Mr. Warford is still living;

(3) her action is not subject to a determination by the Commission under s. 46, as that provision refers to determining whether an action is prohibited when it is brought by “a worker or his or her dependent”.

[49] Justice Thompson considered the points noted above and agreed with Mrs. Warford. In so doing, he erred in law. His error was not that he gave incorrect answers to these questions. I express no view in that regard. Rather, Justice Thompson’s error was to answer questions where exclusive jurisdiction to do so has been conferred on the Commission. Thus, Justice Thompson erred by purporting to exercise jurisdiction that he did not have. Whether Mrs. Warford’s action is prohibited by the *Act* is a determination within the exclusive jurisdiction of the Commission to make.

[50] The appeal is allowed, Justice Thompson’s decision is set aside and a stay of Mrs. Warford’s action is granted, pending a determination by the Commission whether the action is prohibited by the *Act*.

CONCLUSION

[51] The appeal of Justice Hall’s decision in the action on behalf of Mr. Warford is dismissed and that decision is affirmed. The appeal of Justice Thompson’s decision in the action by Mrs. Warford is allowed, that decision is set aside and a stay of the action is granted, pending a determination by the Commission whether the action is prohibited under the *Act*.

[52] Costs of these appeals shall be paid on a party and party scale, Column 3 on a 50-50 basis by Mr. Warford and Mrs. Warford to the Defendants, but not to the Intervenor. As well, costs of the application before Justice Thompson shall be paid on a party and party scale at Column 3 by Mrs. Warford to the Defendants.

[53] I would urge the parties to clarify the status of these two actions by seeking immediate determinations by the Commission as to whether they are prohibited by the *Act*.

M. H. Rowe J.A.

I Concur: _____

M. F. Harrington J.A.

I Concur: _____

L. R. Hoegg J.A.