SUPREME COURT OF YUKON

Citation: *Postma v Horizon Helicopters Ltd.,* 2016 YKSC 15

Date: 20160308
S.C. No. 14-A0011
Registry: Whitehorse

Between:

JONATHAN POSTMA and RAPHAEL ROY-JAUVIN

Plaintiffs

And

HORIZON HELICOPTERS LTD., PAUL'S AIRCRAFT SERVICES LTD. and ROBINSON HELICOPTER COMPANY INCORPORATED

Defendants

Before Mr. Justice R.S. Veale

Appearances:

Jamie L. Thornback	Counsel for the Plaintiffs
Sean Taylor	Counsel for the Defendant Horizon Helicopters Ltd.
Brian C. Poston	Counsel for the Defendant Paul's Aircraft Services Ltd.
Daniel G. Fetterly	Counsel for the Defendant Robinson Helicopter Company Incorporated

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for the opinion of the Court by way of stated case under Rule 35 of the *Rules of Court* on the interpretation of s. 50(4) of the *Workers' Compensation Act*, S.Y. 2008, c. 12 (the "*Act*").

[2] Section 50 of the *Act* sets out a bar to worker-against-worker and worker-against-employer civil actions for work-related injuries. The *Act* provides no-fault compensation for injured workers in exchange for this statutory bar protecting the employer and co-

workers from personal or corporate liability. Section 50(3) of the *Act* also bars actions against an employer who is not the employer of the worker.

[3] Section 50(4) of the *Act* provides an exception to the statutory bar in s. 50(3) when the work-related injury arises from the "use or operation of a vehicle" "vehicle" is defined in s. 3(1) as "any mode of transportation the operation of which is protected by liability insurance", in this case, a helicopter.

[4] Horizon Helicopters Ltd. ("Horizon"), the registered owner of the helicopter, seeks an interpretation that limits the recovery of the worker in a civil action permitted under s. 50(4) of the *Act* to the amount payable under the policy of liability insurance.

THE FACTS

[5] The Notice of Stated Case contains the following agreed facts:

1. On July 10, 2012, Mr. Roy-Jauvin and Mr. Postma were injured as a result of a helicopter accident near Carcross, Yukon.
2. On that date, Mr. Roy-Jauvin and Mr. Postma were collecting grizzly bear hair samples as part of their work on a grizzly bear survey project for the Yukon Government.
3. The various sites for collecting the grizzly bear hair samples were accessed by helicopter. Horizon contracted with the Yukon Government to supply the helicopter and pilot, which it did on July 10, 2012.
4. Horizon was the registered owner of the helicopter being used to transport the plaintiffs at the time of the accident.
5. Mr. Roy-Jauvin and Mr. Postma were passengers in the helicopter at the time of the accident.

6. The helicopter was being piloted by Paul Rosset at the time of the accident.

7. Mr. Rosset was attempting to land the helicopter near a grizzly bear hair collection site at the time of the accident.

8. Horizon paid Mr. Rosset for his services through Paul's Aircraft Services Ltd. Paul's Aircraft Services Ltd. was 100% owned by Mr. Rosset.

9. In the February 2013 employer's payroll return delivered to the Yukon Workers' Compensation Health and Safety Board (the "Board"), Horizon included amounts it paid to Paul's Aircraft Services Ltd. for Mr. Rosset's services in its total assessable payroll for 2012.

10. Paul's Aircraft Services Ltd. was not a registered employer with the Board. It did not pay assessments to the Board on the income it received from Horizon for Mr. Rosset's services.

11. Mr. Rosset did not register as an individual with the Board. Mr. Rosset did not pay assessments to the Board on income he received from Paul's Aircraft Services Ltd.

12. By letter dated August 25, 2015, counsel for Horizon sought various determinations from the Board. The General Counsel and Corporate Secretary of the Board confirmed by letter dated September 14, 2015, that "s. 50(4) [of the *Act*] would apply and would allow this claim to proceed".

13. The General Counsel and Corporate Secretary of the Board further confirmed by way of a letter dated September 22, 2015, that "the legal action of Postma and Roy-Jauvin is able to proceed against Horizon

because of the application of section 50(4) of the *Workers' Compensation Act.*"

14. The Board further confirmed on September 22, 2015, that the Board of Directors did not have jurisdiction to determine the issues raised about the potential cap on damages as against Horizon under s. 50(4) of the *Act*.

15. Horizon purchased liability insurance for the subject helicopter and this insurance was in place on the day of the accident.

Stated Issue

[6] Does s. 50(4) of the *Act* allow a plaintiff/worker to recover from a defendant/employer any damages assessed over the limit of the liability insurance policy held on the applicable vehicle? Put another way, is the maximum liability for any employer/defendant sued under s. 50(4) of the *Act* the amount payable under the policy of liability insurance?

[7] Section 50 of the *Act* is as follows:

> 50(1) No action lies for the recovery of compensation and all claims for compensation shall be determined pursuant to this Act.
>
> (2) This Act is instead of all rights and causes of action, statutory or otherwise, to which a worker, a worker's legal personal representative, or a dependent of the worker is or might become entitled to against the employer of that worker or against another worker of that employer because of a work-related injury arising out of the employment with that employer.
>
> (3) If a worker suffers a work-related injury and the conduct of an employer who is not the worker's employer, or of a worker of an employer who is not the worker's employer, causes or contributes to the work-related injury, neither the worker who suffers the work-related injury, nor their personal representative, dependent, or employer,

> has any cause of action against that other worker or other employer.
>
> (4) Subsection (3) does not apply when the work-related injury arose from the use or operation of a vehicle.
>
> (5) Any party to an action may, on notice to all other parties to the action, apply to the board of directors for a determination of whether the right of action is removed by this Act.

[8] Section 3(1) of the *Act* defines a vehicle as follows:

> "vehicle" means any mode of transportation the operation of which is protected by liability insurance; "véhicule"

The Modern Principles of Statutory Interpretation

[9] The modern principle of statutory interpretation is based upon a statement by Elmer Driedger in *Construction of Statutes*, *2nd ed*. (Toronto: Butterworths, 1983) where he recognized at p. 87, that statutory interpretation cannot be founded on the wording of the legislation alone. He was quoted and relied upon in *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 ("*Rizzo Shoes"*), at para. 21:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[10] This is also consistent with s. 10 of the *Interpretation Act*, R.S.Y. 2002, c. 125:

> Every enactment and every provision thereof shall be deemed remedial and shall be given the fair, large, and liberal interpretation that best insures the attainment of its objects.

[11] The modern principle was updated and elaborated on by Ruth Sullivan in *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at p. 3:

> The modern principle says that the words of a legislative text must be read in their ordinary sense *harmoniously* with the scheme and objects of the Act and the intention of the legislature. In an easy case, textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague, obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. If the modern principle has a weakness, it is its failure to acknowledge and address the dilemma created by hard cases. (emphasis already added)

[12] Clearly, Canadian courts follow the modern principle of statutory interpretation which involves the examination of the following three dimensions:

1. the grammatical and ordinary sense of the words;
2. legislative intent, or
3. compliance with legal norms.

Grammatical and Ordinary Meaning

[13] The key words to be interpreted, those that remove the statutory bar to suing an employer, are in the definition of vehicle which "means any mode of transportation the operation of which is protected by liability insurance". (my emphasis)

[14] In *Nanaimo-Ladysmith School No. 68 v. Dean (Litigation guardian of)*, 2015 BCSC 11, Fitzpatrick J. stated:

> 32 It is, of course, a well-accepted principle of statutory interpretation that the legislature intends all words in a provision to have meaning. When construing the meaning of words within the modern principle of statutory construction, words that are precise and unambiguous are to be understood in their grammatical and ordinary sense: Driedger at 2. Further, there is a rebuttable assumption that:
>
> > Words should not be put into a statute unless they have a grammatical or substantive function. A reader of statutes, therefore, has the right to assume, at least

> as a starting point, that every word has meaning and function.
>
> (Driedger at 92 [emphasis already added]).

[15] Counsel for Horizon submits that the *Act* is silent as to what may occur when an insurance policy is insufficient to meet an award of damages in connection with an action commenced under s. 50(4). I would add that the *Act* makes no reference whatsoever to the coverage or limits in an insurance policy or to the damages that may flow from a civil case, with the exception of s. 51 which makes the Board an assignee of the worker's action and sets out the recipients of the payout of any settlement or judgment.

[16] Counsel submits that the phrase "protected by liability insurance" clearly means that the vehicle exception applies "only when" there is a policy of insurance in place on the applicable vehicle. Counsel follows with this assertion:

> The obvious intention is that it is the insurance money, not the personal or corporate funds of the employer/defendant that will be relied upon to pay any damages assessed in an action commenced pursuant to s. 50(4) of the *Act."*

[17] Counsel focussed on the "protected by" phraseology selected by the legislature to mean that the insurance policy is "in place" rather than "required" to be in place.

[18] It is helpful to compare the Yukon wording with clearer wording in the Northwest Territories legislation:

> Exceptions
>
> 62(3) Subsection (1) does not apply to an action against
>
> > (a) a worker who was not acting in the course of his or her employment;
> >
> > (b) an employer who was not acting in the course of its business; or

> (c) an employer who is not the employer of the worker who suffered the personal injury, disease or death, or another worker in the employ of such other employer, if the injury, disease or death is attributable to a vehicle or other mode of transportation and is insured by a policy of liability insurance.
>
> Maximum liability
>
> (4) The maximum liability for any employer or worker referred to paragraph (3)(c) is the amount payable, under the policy of liability insurance, in respect of the personal injury, disease or death.
>
> *Workers' Compensation Act*, SNWT 2007, c. 21.

[19] This statutory provision explicitly separates the exception to the usual statutory bar from the maximum liability wording. Nunavut has an identical provision in its Act.

[20] In my view, the Nunavut and Northwest Territories legislations are of assistance in the interpretation of s. 50(4) of the *Act*. As I read s. 50(4), it establishes the exception to the statutory bar rule but it is completely silent on the issue of limiting recovery to the maximum coverage in the applicable policy.

[21] Counsel for Horizon also relies upon the Preamble of the *Act* to bolster its submission:

> And recognizing that the historic principles of workers' compensation, namely the collective liability of employers for workplace injuries, guaranteed, no fault compensation for injured workers, immunity of employers and workers from civil suits, should be maintained;

[22] In my view, this reference to historic principles does not change the ordinary and grammatical meaning of s. 50(4) and the definition of vehicle in s. 3(1). I will address the preamble again in the discussion of the intention of the legislature.

[23] I conclude that the ordinary grammatical meaning of s. 50(4) and the s. 3(1) definition of vehicle can only be read together as defining the exception rather than the

coverage or maximum liability available in such a court action. Counsel for Horizon blends the grammatical and ordinary meaning analysis with a reference to intention. The ordinary grammatical meaning of "protected by liability insurance" is that a policy of insurance covers the helicopter in this case. Unlike the Northwest Territories and Nunavut legislation, these words make no reference to a maximum liability being the amount payable under the insurance policy.

[24] To give the interpretation sought by counsel for Horizon, one must add words that were simply not in the wording of s. 50(4) and the definition of vehicle. I am of the view that it is too great a leap from the words "protected by liability insurance" to read in and expand the meaning to be that the insurance coverage will create a cap to civil liability or to oust the general compensation principles that apply in tort law. The language of s. 50(4) says that the statutory bar has been lifted or removed as opposed to being replaced by the maximum liability coverage of an insurance policy. I do not find any ambiguity in the words of s. 50(4) or the definition of vehicle.

[25] However, the context of the *Act* and the legislative intent could make the plain meaning unacceptable in the event that I am incorrect in finding no ambiguity in the wording.

Legislative Intent

[26] The analysis to be undertaken in determining intent was stated by the Supreme Court of Canada in *Montréal (City) v. 2952-1366 Québec Inc.,* 2005 SCC 62, at para. 17:

> Having identified the ways in which the wording of art. 9(1) is ambiguous, we must now consider its context. The context of legislation involves a number of factors. The overall context in which a provision was adopted can be determined by reviewing its legislative history and inquiring into its

> purpose. The immediate context of art. 9(1) can be determined by analysing the By-law itself. This review will enable us to determine whether the City has the power to adopt the impugned provision. We will accordingly address each of these contextual indicia: history, purpose and the By-law itself.

[27] The "historic trade-off" of workers' compensation legislation refers to workers losing their right of action against employers but gaining no-fault compensation that did not depend on the employers' ability to pay. Thus, as noted by Sopinka J. in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at paras. 23 – 31, from the perspective of employers, they are forced to contribute to a mandatory insurance scheme but in return "gained freedom from potentially crippling liability". The bar to actions against employers was central to the scheme. However, as will be noted below, the "historic trade-off" has never been an absolute bar to civil actions against an employer in the workers' compensation scheme in the Yukon.

[28] Counsel for Horizon submits that s. 50(4) creates an unfairness in that some employers with insurance policies are now subject to court actions while still being forced to pay into a no-fault insurance scheme. Or put another way, Horizon loses one of the historic benefits of the workers' compensation scheme, i.e. freedom from civil liability, despite paying WCB premiums. However, as will be discussed below, while Yukon employers were historically free from actions by their own workers they were not immune to civil action by the workers of other employers.

[29] Employers do need liability insurance for passengers in their vehicles whether they are employees or not. To the extent this is the case, then workers' compensation schemes would be saying, in effect, why should insurers receiving insurance premiums be let off the hook simply because a passenger happens to be an employee. This raises

the polycentric purposes at play here, i.e. counsel for Horizon's view of the unfairness to the employer in the historic sense versus the unfairness to the employee whose recovery would be limited by the choice of an employer's insurance arrangement for public liability.

[30] It is well-established that a court may take judicial notice of the debate about a legislative amendment recorded in *Hansard* and the legislative history of the *Act* to determine if there was any direct or implicit indication that the Yukon Legislative Assembly intended to make the amount of insurance payable to be the maximum liability under s. 50(4) of the *Act.*

[31] Initially, the *Worker's Compensation Ordinance* was passed in 1917. It was overhauled in 1953 when employers were required to insure with private companies to ensure that compensation payments would be available to insured workers. It was not until 1973 that Yukon established a government-based insurance scheme to replace the private insurance companies.

[32] However, before 1978, an injured worker was required to elect to sue or take compensation if the injury arose from the actions of a person other than the employer or a co-worker. In the case of an election for compensation, the Commissioner had the right of subrogation for the worker's claim against the "other person" or "other employer". In other words, the pre-1978 plan was a hybrid scheme which preserved the worker's right to elect compensation or to sue other employers and their co-workers.

[33] In 1978, the previous requirement to elect compensation or sue a person other than an employer or a worker of that employer was amended to permit a worker to receive compensation and sue the other person.

[34] On November 22, 1977, this history and intention of the *Act* was stated by Brian Booth, Administrator for the Workers Compensation to the Yukon Legislative Assembly:

> … The whole concept of Workmen's Compensation is to provide financial assistance, first of all, to any worker injured during the course of or arising out of his employment, and, secondly to protect an employer, who is covered under the Ordinance, from suit.
>
> Under the old Ordinance, a worker could sue another worker, another employer or his worker. He just could not sue his own co-workers and his employer. This was fine in the days when a lot of industries were not covered under Workmen's Compensation, but today most industries are. So, what we are attempting to do with this section is, to take away the right of action against any employer or worker who is covered under the *Workmen's Compensation Ordinance*, and secondly, to provide immediate financial assistance to the injured worker, so that he can proceed with third party action, if he wishes, against any third party.
>
> Hansard, November 22, 1977, page 241

[35] In 1978, s. 16(4) of the Workers' Compensation Ordinance read:

> Where an accident happens to a worker in the course of employment entitling him or his dependants to compensation under this Ordinance and the circumstances of the accident are such as to also entitle the worker, his legal personal representative or his dependants to an action against some person other than his employer, the Commissioner is subrogated to the cause of action of the worker, his legal personal representative or his dependants against each other person for or in respect of the personal injury to or death of the worker.

[36] It was not until 1992 that s. 41 of the *Act* barred actions against both the employer of the worker and co-workers as well as another employer and their workers. However, s. 41(4) introduced the exception where the disability arose from the use or occupation of a vehicle "protected by liability insurance". This is the first time that the liability insurance exception to the bar to a court action for the worker was legislated.

[37] Piers McDonald, the responsible minister, introduced the 1992 Act with the following:

> **Hon. Mr. McDonald:** Like workers' compensation itself, which is based on what is called the historic compromise, this bill balances many interests for the benefit of all. Almost 100 years have passed since the first, as it was called, *Workmen's Compensation Act* was passed in Canada, in Ontario.
>
> While the intent of compensating workers injured on the job was present in that legislation, the historic compromise I have just referred to was not. Aside from the very real concern that compensation levels were limited to a maximum of 50 percent of a worker's wages, up to a maximum of one pound per week, employers were not required to insure their risk.
>
> …
>
> In 1986, the Workers' Compensation Board was in the position to both increase workers' benefits and decrease employers' assessments, the latter by 22 percent.
>
> Rates were still down from previous years but running at about twice the national average. The WCB consequently increased its efforts to improve workplace safety. It became apparent, however, that legislation, as well the services based on it, needed major changes. The Yukon workplace had changed dramatically since 1973.
>
> We now accept that the risk of disability resulting from our work is of concern to all of us, not just those involved in dangerous occupations. We now know that there are growing numbers of occupational diseases, diseases that disable or even kill hundreds of workers across Canada each year. We now know that it is not just enough to provide financial compensation but there is a social and psychological toll associated with work-related disability, which also [must] be dealt with.
>
> It is for these reasons that the Workers' Compensation Board requested the government to review the *Workers' Compensation Act*. The review had three objectives. The first was to determine if benefits for injured workers and the assessments for employers were fair and if they were

> adequate for the needs of the 1990s. The second was to find out how open and accessible the workers' compensation system is. We wanted workers to tell us how they felt about the processes in place for making a claim and for appealing a decision. The final objective was to determine if the original goals and principles of the workers' compensation system were still relevant and, if not, what changes should be made.
>
> …
>
> The bill before you today contains the many compromises, both historic and contemporary, that successfully balance the interests of the people and organizations it affects.
>
> …
>
> Bill No. 6 will meet the needs of Yukon employees and employers for many years to come. It holds fast to the six principles of workers' compensation, especially the historic compromise of exchanging the right to sue for the right of guaranteed fair benefits.
>
> …
>
> It was an historic compromise that led to the development and growth of workers' compensation boards across the country. A delicate balance is inherent in the system and is very much present in the legislation now before you. I am pleased that Yukon people knowingly and willingly reached the same basic compromises, once again, in developing Bill No. 6. (my emphasis)
>
> Hansard, April 27, 1992, pages 58, 60, 61, 62 and 63.

[38] It is clear from a reading of the Hansard debate in April 1992 that no member mentioned the specific issue of s. 41(4) changing the previous delicate balance and while prohibiting court actions generally, permitting actions against other employers covered by vehicle insurance policies. However, it is also clear that the Minister stated that employers were not contributing enough to fund the expanded scheme and that the historic compromise required change while maintaining the balance, both in the historic and contemporary sense.

[39] The *Act* was amended in 2008 and s. 50(4) was addressed directly by the Minister as follows:

> … A number of areas within the legislation include changes that are designed to reduce the cost of the system and ultimately should then reduce assessment rates as they have done in other jurisdictions through similar measures.

[40] Craig Tuton, the CEO of the Board:

> One of the other areas of cost saving is in – I believe it was the minister in his preamble who spoke briefly about – subrogated claims. As you know, the workers' compensation system is a no-fault system and the merited principles would indicate that a worker would be fully compensated as long as the injury occurred in and out of the workplace and that the employer would be protected from lawsuit under the same principle.
>
> What this refers to when we talk about the subrogation of these claims is third party. It may be determined and I think I used an example to the member yesterday. What that means is that if it can be determined that the workplace injury was caused by neglect from a third party – and I used the example of perhaps a helicopter incident – that we would have an ability to go and put a lawsuit on the third party, to try to mitigate our liability. Presently, the worker gets 25 percent after subrogation and the legal costs are paid. Sorry. That would be under the current legislation. The cost of that – medical costs, the rehab costs and all of those costs related would still be borne by the system.
>
> Because of the size of the jurisdiction, that additional cost and, in the case of a long-term disability – for example, if that injury meant the worker was crippled for life – those costs would be significant and in the millions of dollars. It wouldn't be fair to expect that employer or industry to cover those costs.
>
> As we get a ruling that says that third party was responsible, or partly responsible, and a negotiated settlement occurred, then it would only seem natural that part of that settlement would go to recover the costs incurred to provide that medical and rehabilitative process. (my emphasis)
>
> Hansard, April 3, 2008, p. 2306

[41] This refers to s. 51(1) of the 2008 *Act*, which corresponds to s. 42 of the 1992 *Act* and provides as follows:

> 51(1) If a worker suffers a work-related injury and the worker, the worker's legal personal representative or the dependents of a deceased worker have a cause of action in respect of the work-related injury, the board is deemed to be an assignee of the cause of action and the board is vested with all the rights to any cause of action arising out of the work-related injury.
>
> …
>
> (d) the board may, at any time, agree to a settlement with any party regarding the cause of action of a worker or a worker's dependents for any amount or subject to any conditions the board considers appropriate.
>
> (3) Money recovered in an action or settlement of an action pursuant to this section shall be paid to the board, and
>
> (a) if the money is accepted in full settlement of the cause of action, the board shall release the person paying the money or on whose behalf the money is paid from all liability in the cause of action;
>
> (b) where money received, as a result of action taken or a settlement arrived at by the board, on behalf of the worker, the worker's legal personal representative or the worker's dependent, it shall be applied to pay legal costs, disbursements and past, present and future compensation costs of the board;
>
> (c) all excess funds after payment of legal fees, disbursements, and past, present and future compensation costs of the board, shall be paid to the worker, the worker's legal personal representative or the worker's dependent.
>
> (4) In an action taken under subsection (2), a defendant may not bring third party or other proceedings against any employer or worker against whom the plaintiff may not bring an action because of this Act, but if the Court is of the opinion that that employer or worker contributed to the damage or loss of the plaintiff, it shall hold the defendant

> liable only for that portion of the damage or loss occasioned by the defendant's own fault or negligence. (my emphasis)

[42] The section determines how the Board will divide the settlement or judgment against another employer who is covered by a vehicle liability insurance policy. The funds will first be applied to legal costs, then to compensation costs of the Board and finally the excess will be given to the worker. Significantly, this section makes no reference to a cap on recovery under s. 50(4) of the *Act* based on the amount of insurance coverage of the employer. In fact, it is quite the opposite as the board may settle a cause of action "for any amount."

[43] I conclude that the history of the Yukon workers compensation legislation has been to allow court actions by workers against other employers and their workers until the 1992 *Act*, when those actions were also prohibited except when the injury arose from the use or operation of an insured vehicle by the other employer.

[44] The legislative intent that can be gleaned from the Minister's statements is that the intent of the legislation is to make "many compromises, both historic and contemporary". The intention of the Minister and the Legislative Assembly was to give effect to the delicate balance inherent in the system, while maintaining the solvency of the Workers' Compensation benefits program. That delicate balance was never expressed to limit the employer's liability under s. 50(4) of the *Act* to the insurance on the vehicle. Rather, as expressed by Mr. Tuton, the CEO of the Board, the intention was to use subrogated claims as a cost-saving tool to recover costs that, for example in the helicopter industry, could be in the millions of dollars in the case of a long-term disability.

[45] The intent expressed is that of a cost-saving to the compensation scheme through claims against third parties to which the Board would be subrogated.

[46] I note that there was no express or implicit intent by the legislature to limit recovery to the amount payable under the particular liability insurance policy. This is despite the recommendation contained in the Recommendations for Amendment to the *Workers' Compensation Act* prepared by the Workers' Compensation Act Review Panel dated April 2007. That report recommended that employers or workers be excluded from the definition of vehicle and that legal action should not be taken against other employers or workers. Thus, legislative silence in this case can be interpreted as indicating the legislature's intention to not limit compensation. See Abella J. in *Mobile 6 v. Ontario*, 2008 SCC 12, at para. 42.

[47] I conclude that the effect of the 1992 *Act* was to expand the protection to all employers under the *Act* but permit actions where there was public liability insurance in place. Thus, the protection to employers under the 1992 *Act* was increased subject to the narrow exception for insured vehicles. However, there was no expression of intent to limit recovery to the specific amount of the coverage under the policy of insurance. The historic compromise between workers and employers had never limited actions against third parties to the maximum of their insurance liability coverage.

Compliance with Established Legal Norms

[48] Counsel for Horizon submits that s. 62(4) of the Nunavut and Northwest Territories Acts should guide the interpretation of s. 50(4) of the Act. The submission is that the broad application of s. 50(4) should be "read down" by importing the maximum liability wording of s. 62(4) on the argument that this limit is strongly implied by the "protected by" phraseology.

[49] In support of in effect re-writing s. 50(4), counsel relies upon *Sullivan on the Construction of Statutes*, 2014 (6th ed.) LexisNexis, at p. 193:

> **§7.6 Paraphrase vs. amendment.** Judicial pronouncements on rewriting legislation presuppose a meaningful distinction between permissible paraphrase on the one hand and impermissible amendment on the other. When paraphrasing, interpreters restate the law declared by the provision in their own words; in effect, they redraft the provision so as to more clearly set out the law the legislature intended to enact. Such paraphrase inevitably adds words to or otherwise changes the wording of the text. This redrafting is permissible in so far as the paraphrase accurately expresses the legislature's intent.
>
> **§7.7** On this analysis, paraphrase is not just an acceptable part of interpretation; it is the essence of interpretation. It is the interpreter's best effort to accurately formulate the law the legislature intended to enact as it applies to particular facts.
>
> **§7.8** In contrast to paraphrase, amendment changes not just the words in which the law is expressed but the law itself. Such a change is illegitimate because it usurps the legislature's role. It is one thing to identify and give effect to the unstated or imperfectly stated intentions of the legislature; it is quite another thing to disregard those intentions.
>
> **§7.9** Although the distinction between paraphrase and amendment is crucial in statutory interpretation, it is not an easy one to draw. Much of the confusion in this area arises from the tendency of some courts to characterize any interpretation that adds words to a legislative text as amendment rather than paraphrase. This characterization ignores the important distinction between reading down and reading in. When this distinction is taken into account, amendment can be understood as consisting of (1) most if not all reading in and (2) reading down that cannot be persuasively justified. (my emphasis)

[50] Sullivan goes on to say that reading down and reading in are different and courts must be cautious in using the reading in technique or remedy.

[51] She states at p. 195, paras. 7.13 and 7.14:

> **§7.13** At first glance, reading down and reading in may seem to be symmetrical techniques and remedies, two sides of the same coin. However, the courts are right to distinguish them and to be much more cautious in using the reading in technique or remedy. As an interpretation technique, reading down merely makes explicit what the court finds to be implicit in the legislative text. It is impossible for drafters to spell out every qualification or limitation that might appropriately apply in a given set of circumstances. Otherwise, provisions would go on for pages. Modern legislation is drafted in general terms, effectively delegating to official interpreters the work of adapting the language to particular facts and reading down its scope when there is a good reason to do so.
>
> **§7.14** Reading in is different. It does not purport to operate within the scope of the legislative text, but rather to expand that scope to matters that are neither explicit nor implicit in the legislation. It expands legislation to matters that cannot come within any plausible understanding of the wording adopted by the legislature. (my emphasis)

[52] Ultimately, Sullivan says reading in is not ordinarily considered to be a legitimate interpretive technique, as opposed to reading down, which is a legitimate interpretive technique provided the reasons for narrowing the scope of the legislation can be justified. (**§**7.19)

[53] The essence of the issue is whether the interpretation sought by Horizon is reading down to make explicit what is implicit in the legislative text or reading in matters that are neither explicit nor implicit in the legislation.

DISPOSITION

[54] In my view, there are no words in s. 50(4) or the definition of vehicle in s. 3(1) that make it explicit or implicit that the Yukon Legislative Assembly intended to make the employer's liability insurance for a vehicle the maximum liability for any employer. Such an interpretation expands the wording of s. 50(4) beyond any plausible understanding of the language used by the legislature. The effect of such an interpretation is to read in

words that are not in the legislation which would, in effect, permit the employer to establish the limit to liability through the selection of its insurance policy.

[55] The legislature clearly intended to limit the cost exposure of the workers' compensation fund by transferring the burden to employers' liability insurance but in no way intended to limit the recovery of the worker to the maximum of the public liability insurance purchased by the employer.

[56] Such an interpretation is akin to an amendment that would re-balance the delicate balance addressed by the legislation. That is a task for the Yukon Legislative Assembly.

[57] I dismiss this application to interpret s. 50(4) of the *Act* as limiting the maximum liability of the employer to the amount payable under the particular policy of insurance.

[58] Counsel may speak to costs, if necessary, in case management.

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VEALE J.