SUPREME COURT OF NOVA SCOTIA

Citation: *Roach v. Nordic Ins. Co. of Canada*, 2023 NSSC 342

Date: 20231019
Docket: 482484
Registry: Sydney

Between:

Neil James Roach

Plaintiff

v.

The Nordic Insurance Company of Canada

Defendant

Judge:	The Honourable Justice Patrick J. Murray
Heard:	October 18, 2022, in Sydney, Nova Scotia
Written Decision:	October 19, 2023
Counsel:	Taylan Caliskan for Mr. Roach Guy Harfouche for The Nordic Insurance Company of Canada

By the Court:

Analysis

Introduction

[1] The Plaintiff, Mr. Roach, incurred a workplace injury while employed as a licensed practical nurse in May 2004. He applied for Workers' Compensation benefits and initially received temporary earnings replacement benefits (TERB). From January 2010 he received extended earnings replacement benefits (EERB). He was injured in a car accident in October 2015, while working as a cab driver. He was still receiving EERB at the time of the accident. He filed for Section B benefits under his auto insurance policy. The Defendant, Nordic Insurance Company, his Section B insurer, denied weekly benefits on the ground that they were offset by his ongoing receipt of EERB benefits.

[2] The Plaintiff seeks an order under Civil Procedure Rule 12 respecting the treatment of workers' compensation benefits under the *Automobile Insurance Contract Mandatory Conditions Regulations*, NS Reg 181/2003.

[3] The parties agreed at the hearing that the defendant's framing of the issue was acceptable: "How should worker's compensation extended earning replacement benefits be treated in the calculation of weekly loss of income benefits payable under the *Automobile Insurance Contract Mandatory Conditions Regulations*, subsection 2?"

[4] For the following reasons I have concluded that the decision in ***McLean v. Portage la Prairie Mutual Insurance Co***, 2018 NSSC 110, [2018] NSJ No 171, is binding in the circumstances of this case, and is not distinguishable. As such, the Plaintiff's EERB benefits are deductible from his Section B benefits.

[5] In my respectful view, even if ***McLean*** is not binding, an original legislative analysis leads to the same conclusion, that the Plaintiff's EERB benefits are deductible from his Section B benefits. Fundamentally, while there may be some differences in the fact pattern between it and this case, there are no distinctions that lead to a different legal result.

[6] In my reasons I have discussed an argument that favours the Plaintiff's position as it relates to the word "employment" as contained in subsection 2 of the

Regulations. While I have not adopted this interpretation, I shall later refer to it in this decision.

Background

[7] In ***McLean***, the court was asked to determine whether the WCB benefits that Mr. McLean was receiving at the time of the accident giving rise to the claim were deductible as "payments for loss of income from employment" under the Regulations. Justice Boudreau held that the plaintiff's EERB benefits were deductible from his Section B benefits.

[8] In this case the Plaintiff, Mr. Roach, submits that the Court is not bound by the decision in ***McLean***, because the Court did not apply principles of statutory interpretation or consider binding caselaw from the Nova Scotia Court of Appeal.

[9] The Defendant, Portage LaPrairie, submits that ***McLean*** is on "all fours" with the Plaintiff's case, that it is binding in the circumstances, and is not distinguishable. Therefore, Mr. Roach's EERB payments must be deducted from his Section B benefits as a result of the jurisprudence in Nova Scotia.

[10] The question being asked in this case may be broader, in that the Court is asked to rule on "how EERB should be treated in the calculation of weekly loss of income benefits under the Regulations, in subsection 2?" (Emphasis added)

[11] In ***McLean*** the WCB benefits that Mr. McLean was receiving at the time of the accident were found to be "payments for loss of income from employment". I concur with that finding.

[12] The crux of the dispute between the Plaintiff and the Defendant concerns the treatment of the extended earning replacement benefits ("EERBs") received by an individual from the Workers Compensation Board. The Plaintiff argues that EERBs should not be deducted as a "payment for loss of income" when calculating an individual's Section B weekly indemnity payment. The Defendant disagrees as the jurisprudence from this Court states the opposite.[1]

[1] Paragraph 4 of the Defendant's Motion Brief

Preliminary Issue

[13] The Defendant requests that the affidavit of Hannah Greer, sworn August 8, 2022, be struck in its entirety pursuant to Civil Procedure Rule 39.04(2) and (3). My decision in relation to the affidavit is attached hereto as Appendix "A".

The Workers' Compensation Act scheme

[14] Several sections of the *Workers' Compensation Act*, SNS 1994-95, c 10 (WCA), are relevant to the issue on the motion. Sections 34(1) and 37(1) state, respectively:

> Permanent-impairment benefit
> 34(1) Where a permanent impairment results from an injury, the Board shall pay the worker a permanent-impairment benefit.
> ...
>
> Earnings-replacement benefit
> 37(1) Where a loss of earnings results from an injury, an earnings replacement benefit is payable to the worker in accordance with this Section.

[15] The amount of an earnings-replacement benefit is the difference between 75 percent of the loss of earnings and the amount of permanent-impairment benefit payable (s 37(2)(a) and (b)). (The 75 percent of lost earnings rises to 85 percent after 26 weeks: s 37(3)(a)). Subject to certain exceptions, earnings-replacement benefits are payable until the earlier of "the date the Board determines that the loss of earnings has ended or no longer results from the injury" (s 37(9)(a)) or the age of 65 (s 37(9)(b)).

[16] The *WCA* contemplates both "temporary" and "extended earnings-replacement benefit", as defined at ss 2(ad) and (o), respectively:

> (ad) "temporary earnings-replacement benefit" means any earnings replacement benefit payable to a worker prior to the date on which an extended earnings-replacement benefit, if any, becomes payable;
> ...
>
> (o) "extended earnings-replacement benefit" means an earnings-replacement benefit payable to a worker from the later of
>
> > (i) the date on which the Board determines the worker has a permanent impairment pursuant to Section 34, and

> (ii) the date on which the worker completes a rehabilitation program pursuant to Section 112, where the worker is engaged in a rehabilitation program on or after the date the Board determines the worker has a permanent impairment pursuant to Section 34...

[17] Section 37 of the *WCA* describes earnings-replacement benefits:

> Earnings-replacement benefit
> 37(1) Where a loss of earnings results from an injury, an earnings replacement benefit is payable to the worker in accordance with this Section.
>
> (2) The amount of any earnings-replacement benefit payable to a worker is the difference between
>
> (a) an amount equal to seventy-five per cent of the worker's loss of earnings; and
>
> (b) the amount of any permanent-impairment benefit payable to the worker pursuant to Section 34.
>
> (3) The amount of any earnings-replacement benefit payable to a worker after the worker has received compensation pursuant to subsection (2) for a total of twenty-six weeks is the difference between
>
> (a) an amount equal to eighty-five per cent of the worker's loss of earnings; and
>
> (b) the amount of any permanent-impairment benefit payable to the worker pursuant to Section 34.
>
> (4) Notwithstanding subsection (1), the Board shall not pay compensation pursuant to subsection (1) until the worker who is injured is unable to continue to work with the employer for whom the worker was working when the injury occurred for a period of time during which the worker would have received remuneration from that employer equivalent to two fifths of the worker's net average weekly compensation.
>
> (5) The Board shall not pay compensation to a worker in respect of the period of time referred to in subsection (4) except as provided for in subsection (6).
>
> (6) Where a loss of earnings results from an injury for more than five weeks, the Board shall pay to the worker the amount deducted pursuant to subsection (4).
>
> (7) and (8) repealed 1999, c. 1, s. 4.

(9)Subject to subsection (10) and Sections 72 and 73, earnings replacement benefits are payable until the earlier of

(a) the date the Board determines that the loss of earnings has ended or no longer results from the injury; and

(b) the date the worker attains the age of sixty-five years.

(10) Where a worker is sixty-three years of age or older at the commencement of the worker's loss of earnings, the Board may pay the earnings replacement benefits for a period of not more than twenty-four months following the date the loss of earnings commences.

(11) The loss of earnings referred to in subsection (1) shall be calculated in accordance with Section 38.

(12) Earnings-replacement benefits are payable periodically, in the manner and form and at times determined by the Board.

[18] Section 73 sets out the conditions under which the Workers' Compensation Board may "review and adjust its determination of the amount of compensation payable to a worker as an extended earnings-replacement benefit" (s 73(1)).

[19] This motion involves the interplay of the *WCA* with the *Insurance Act*, RSNS 1989, c 231, and Schedule 2, Section B, Subsection II, Part II of the *Automobile Insurance Contract Mandatory Conditions Regulations*, NS Reg 181/2003. Schedule 2 governs mandatory medical, rehabilitation, and accident benefits in motor vehicle liability policies. Section B concerns itself with accident benefits, with Subsection 2 dealing with loss of income payments in Part II. The relevant provisions, in the version in force at the time of the Plaintiff's car accident in 2015, read as follows:

Part II - Loss of Income

Subject to the provisions of this Part, a weekly payment for the loss of income from employment for the period during which the insured person suffers substantial inability to perform the essential duties of his occupation or employment, provided,

(a) such person was employed at the date of the accident;

(b) within 30 days from the date of the accident and as a result of the accident the insured person suffers substantial inability to perform the essential duties of his occupation or employment for a period of not less then seven days;

> (c) no payments shall be made for any period in excess of 104 weeks except that if, at the end of the 104 week period, it has been established that such injury continuously prevents such person from engaging in any occupation or employment for which he is reasonably suited by education, training or experience, the Insurer agrees to make such weekly payments for the duration of such inability to perform the essential duties. [Emphasis added.]

[20] Part II sets out the scheme for calculating the amount of the weekly payment, which shall be the lesser of (a) $250 per week or

> (b) 80 per cent of the insured person's gross weekly income from employment, less any payments for loss of income from employment received by or available to such person under
>
> (i) the laws of any jurisdiction,
>
> (ii) wage or salary continuation plans available to the person by reason of his employment, and
>
> (iii) subsection 2A;
>
> but no deduction shall be made for any increase in such payment due to a cost of living adjustment subsequent to the insured person's substantial inability to perform the essential duties of his occupation or employment. [Emphasis added.]

[21] For the purpose of Part II, a person is deemed to be employed if, *inter alia*, they were "actively engaged in an occupation or employment for wages or profit at the date of the accident..." (Part B(3)).

Caselaw

[22] The interplay of Section B with EERB benefits under the *WCA* was considered in ***McLean***. Unlike the present case, at the time of the accident in ***McLean***, the plaintiff, was receiving EERB benefits while employed full-time. He applied for Section B loss of income benefits from the defendant, his insurer. The issue on the Rule 12 motion was whether the WCB benefits were deductible from his section B benefits. D. Boudreau, J., held that the EERB benefits were "in the nature of income replacement." The insurer says ***McLean*** is a complete answer to the Plaintiff's claim in this case.

[23] The insurer in ***McLean*** argued that the EERB constituted "payments for loss of income from employment" deductible under Part II of the Regulations. The insurer relied on two decisions of the Ontario Financial Services Commission:

Jensen v. GAN Canada Insurance Co, 1999 CarswellOnt 5721 (an appeal decision), and ***Fortin v. Economical Mutual Insurance Co***, [2002] OFSCID No 106 (an arbitration decision).

[24] In ***Jensen***, the appellant was receiving temporary workers' compensation benefits, but was not working when he had a motor vehicle accident. The legislation provided for a weekly amount of the lesser of $600 or "80 per cent of the insured person's gross weekly income from his or her occupation or employment, less any payments for loss of income, except Unemployment Insurance benefits..." (para 12). The commission addressed the purpose of weekly accident benefits:

> 20 Income benefits under s. 12 are intended to provide those injured in automobile accidents with speedy, adequate and secure income maintenance when they are unable to work. In *Bapoo*, Justice Laskin identified a number of legislative purposes underlying the rules determining the level of benefit. These included: ensuring a fair or adequate level of income replacement, seeing that applicants are not overcompensated and that automobile insurers pay last by taking other sources of income replacement into account, and ensuring that benefits will be delivered quickly and efficiently by means of a system that is administratively manageable.
>
> 21 The rules balance these objectives. They make concessions for the sake of administrative simplicity. Unlike fault-based damages in the courts, the rules do not provide an individualised assessment of loss. Income benefits are broadly intended to replace income likely lost as a result of the accident within certain parameters. However, the loss is fixed strictly by reference to the person's earnings track-record in the four and 52 weeks before the accident. It is only in limited circumstances - where the person qualifies through a future job offer - that benefits are based on prospective income.

[25] The appellant argued that it would be unfair to deduct the workers' compensation benefits as "payments for loss of income" without first including them as "gross weekly income from his or her occupation or employment" (paras 41-49). The commission said:

> 50 Temporary total disability benefits are in the nature of income replacement. They have been held to be deductible under the terms of s. 12(4)(b)(i) whether they relate to the automobile accident or to a previous condition. In *Mouawad*, the Divisional Court confirmed that a future economic loss award under the WCA is also deductible. However a permanent disability pension based on the degree of physical impairment, - the pre-1990 system of compensation for permanent injuries - is not, nor is a vocational supplement intended to encourage an injured worker to participate

> in an authorised rehabilitation program. The subsection specifically exempts unemployment insurance benefits from being deductible.
>
> 51 In a number of decisions, arbitrators have declined to include sources of income replacement such as workers' compensation in income from employment for the purposes of s. 12(7), in light of these provisions.
>
> 52 *Jolin v. Jevco Insurance Co.* [1993 CarswellOnt 4789 (Ont. Insurance Comm.)] (A-002187, October 27, 1993), supplementary decisions issued on March 31, 1994 and April 14, 1994 [1994 CarswellOnt 4837 (Ont. Insurance Comm.)]), involved an applicant who had been injured in three accidents over two years. It was agreed that he remained employed and so qualified for benefits under s. 12. The arbitrator held that his temporary total disability benefits and Schedule C accident benefits from the first two accidents could not be treated as income from employment in calculating his statutory accident benefits from the third. In her view, the legislative scheme clearly distinguished revenue which is treated as "income" from the kind of revenue characterised as "payments for loss of income", and that treating a benefit as both was "not a logically consistent outcome." She acknowledged that the outcome might appear harsh or inequitable but concluded that it was mandated by the regulation. Other cases dealing with WCB benefits have adopted the same approach. Unemployment insurance benefits likewise have been held not to be "income from employment" as have statutory accident benefits.

[26] The commission in ***Jensen*** held that “the arbitrator was right when she described the effect of the statutory provisions on Mr. Jensen's statutory benefit rate as reflecting ‘his pre-accident employment income but not the workers' compensation or unemployment insurance benefits he received in the year before the accident’” (para 60).

[27] Reviewing ***Jensen*** in ***McLean***, D. Boudreau, J., acknowledged there were differences in the circumstances:

> 24 ... The benefits in the case of the plaintiff McLean are extended disability benefits. Furthermore, as notes the plaintiff, the Ontario legislation (as it then was) provided for the deductibility of payments for "loss of income"; the Nova Scotia legislation provides for the deductibility of payments for "loss of income from employment".

[28] Justice Boudreau went on to consider ***Fortin***, where the commission distinguished “temporary” from “permanent” disability benefits:

> 25 In *Fortin* ..., the distinction between "temporary" disability benefits and "permanent" disability benefits was explained:

> 15 In determining whether a particular collateral benefit was a payment for loss of income, arbitrators considered the nature and source of the payment, viewed in the context of the program in which it operated. Temporary total worker's compensation disability benefits were intended to compensate for loss of income, and so were deductible under section 12(4)(b) of the SABS 1990, whether they related to the same motor vehicle accident, or to a prior workplace injury.
>
> 16 Permanent disability pensions, on the other hand, were held not to be directly related to the employment income of an individual, because they were not intended to reimburse an injured worker for loss of that income. They were assessed according to the nature and degree of permanent disability and were payable for life, as compensation for permanent injury, regardless of subsequent earnings. They were neither included as employment income, nor deducted from it...

[29] Justice Boudreau noted that the plaintiff's WCB benefits consisted of "two main parts": the Permanent Impairment Benefit, which the insurer did not argue should be deducted from Section B benefits; and a larger EERB, "calculated by the WCB by taking the plaintiff's net weekly income (at the time of his workplace injury) and multiplying it by 85%" (para 27). She then reviewed the provisions governing earnings-replacement benefit in ss 37 and 2(o) of the WCA, before returning to "the question to be answered: do these EERB payments constitute "payments for loss of income from employment", for the purposes of Part II of the automobile insurance contract/regulations, such that they must be deducted from the calculation pursuant to that Part" (para 30). She said:

> 31 In my view, the material before me supports the interpretation being suggested by the defendant. The EERB benefit is in the nature of income replacement. By its very name, it is an earnings replacement benefit. Section 37 of the *Worker's Compensation Act* refers to the requirement for a "loss of income" before such benefits are, or can be, paid. The amount is directly related to the worker's income, and is calculated by taking a percentage of that income. The benefit is not permanent but is rather "extended"; ending when the plaintiff reaches 65 years of age.
>
> 32 Both the Act and the plaintiff's WCB decision separate the calculation of the EERB benefit from that of the PIB benefit, making a very clear distinction between the two. They are treated differently because their nature is different; they are payable for different reasons. While it appears that the PIB is paid in recognition of a permanent disability (akin to the loss of an asset), the EERB is not.

[30] Justice Boudreau concluded that the Ontario caselaw under similar legislation was not distinguishable. She acknowledged that the language of the

legislation was different, referring to deduction of payments for “loss of income”, while Section B referred to payments for “loss of income from employment.” She concluded that this was not a “significant distinction” in the circumstances (para 33):

> 34 The Ontario legislation (as it then was) went on to provide that "income" meant that which was "received by or available to the insured person under the laws of any jurisdiction or under any income continuation benefit plan, or received under any sick leave plan"; in other words, a specific reference to income related to employment.
>
> 35 Furthermore, in my view, the addition of the words "from employment" in Nova Scotia does not affect the applicability of the logic of the Ontario caselaw to the case at bar. Although the Ontario legislation would appear to be somewhat wider-reaching, in my view the logic from those cases remains applicable.
>
> 36 I conclude that the EERB benefits payable to the plaintiff are in the nature of income replacement. They are not in the nature of a "permanent disability pension based on the degree of physical impairment" (as, perhaps, the PIB benefit might be). In my view the EERB benefits are a "payment for loss of income from employment", which must therefore be deducted as per the weekly indemnity benefits calculation.

[31] The plaintiff in ***McLean*** made several alternative submissions. He argued that if EERB benefits were a "payment for loss of income from employment" and therefore deductible, they should also constitute "income from employment" and should be added to the calculation at the beginning” (para 38). The commission had rejected this argument in ***Jensen***. Additionally, Justice Boudreau cited ***Jolin v. Jevco Insurance***, 1993 CarswellOnt 4789 (Arb), where the arbitrator rejected the same submission. The claimant in that case argued that, while he had not been working before the accident, he received “income” from his occupation “as a disabled person” (para 78). The arbitrator rejected this argument:

> 80 I cannot accept this argument. I find that the term "occupation", in the context of section 12(4)(b), which refers to "gross weekly income from ... occupation or employment" means "an activity by which one earns one's living", and is not meant to include activities in which one otherwise passes time (since one does not earn income from such activities). In any case, the term "occupation" must refer to an activity in which one engages, and not to a health or employment status such as "disability".
>
> 81 Furthermore, section 12(4)(b) provides that the weekly benefit shall be "80% of the insured person's gross weekly income from his or her occupation or employment, less any payments for loss of income..." Accepting the Applicant's

> argument, it would follow that workers' compensation payments, for the purposes of section 12(4)(b), must be considered both "income" and "payments for loss of income" at one and the same time.
>
> 82 This is not a logically consistent outcome, and I cannot accept that it was intended by the framers of the legislation. Instead, I find that section 12(4)(b) clearly distinguishes revenue which is treated as "income" from the kind of revenue which is labelled "payments for loss of income", and in respect of which amounts are deductible from the weekly income benefit.

[32] Similarly, in ***Shearstone v. York Fire & Casualty Insurance Co***, [2002] OFSCID No 5, the appellant was injured in an accident shortly after returning to work from a period of disability due to a workplace accident. He had retained his job while he was unable to work and collecting workers' compensation benefits. He argued that "income from employment" included the workers' compensation payments. The Ontario Financial Services Commission summarized the precedents:

> 5 York relies on a number of Commission decisions under the SABS-1990, the accident benefits scheme that applies to accidents between June 22, 1990 and December 31, 1993. Subsection 12(4) of that Schedule states that an insured person's weekly income benefit shall be 80 per cent of his or her "gross weekly income from ... occupation or employment." Arbitral and appeal decisions consistently held that workers' compensation benefits are not "income from occupation or employment" for purposes of calculating the benefit rate under that provision. Instead, workers' compensation benefits for temporary disability were found to be "payments for loss of income" under s. 12(4)(b), and they were held to be deductible from the insured person's accident benefits whether they related to the same accident that gave rise to the accident benefits, or a prior work-related disability. Unemployment insurance benefits, which are expressly exempted from the deductibility rule, were also found not to be "income from employment."

[33] The commission concluded:

> 10 However, Mr. Shearstone's LOE benefits were paid by the Workplace Safety and Insurance Board, not Chrysler, and the core of the employment relationship - the exchange of money for services - is lacking between Mr. Shearstone and the WSIB. Although Mr. Shearstone is entitled to workers' compensation benefits because he was injured while working for a Schedule 1 employer, his entitlement to those benefits did not depend on his remaining an employee, and he would have been entitled to benefits if he had lost his job as a result of his workplace injury, as many workers do. FSCO adjudicators have given "income from employment" a broad definition, but the cases do not extend to including payments from a third party.
> ...

> 17 As a result of excluding workers' compensation benefits from "income," Mr. Shearstone's income replacement benefits undercompensate his income loss resulting from the motor vehicle accident. Nevertheless, I have little doubt this is what the drafters intended. Each of the accident benefit schemes represents a different balance between the legislative objectives of compensation and cost control. In my view, the most natural reading of the SABS-1996 is one that excludes workers' compensation benefits from "income." Therefore, I find that the arbitrator's decision turned on an error of law in interpreting the regulation, and the decision cannot stand.

[34] Justice Boudreau concluded that the decisions excluding workers' compensation benefits from income were persuasive:

> 45 As I have already noted, the applicable section in Nova Scotia refers to "gross weekly income from employment". In both the *Jolin* and *Jensen* cases, the relevant passage was "gross weekly income from his or her occupation or employment". In the *Shearstone* case, the wording was "gross annual income from employment". In my view, these are not differences which would affect the usefulness of the Ontario caselaw. The reasoning which applied in those cases, would be applicable here.
>
> 46 In the case at bar, I simply see no reasonable way to characterize the plaintiff's EERB benefits as "income from employment". They are not income from employment; they do not come from an employer. They are, simply put, payments being made due to a loss of income.

[35] The Plaintiff concedes that this case is "almost on all fours" with ***McLean***.

Stare decisis

[36] The rule of "horizontal *stare decisis*" was recently addressed in ***R v. Sullivan***, 2022 SCC 19 (see paras 73-77). Kasirer J said, for the court:

> [73] Horizontal *stare decisis* applies to decisions of the same level of court. The framework that guides the application of horizontal stare decisis for superior courts at first instance is found in [*Re Hansard Spruce Mills*, [1954] 4 DLR 590 (BCSC)], described by Wilson J. as follows (at p. 592):
>
> > . . . I will only go against a judgment of another Judge of this Court if:
> >
> > (a) Subsequent decisions have affected the validity of the impugned judgment;
> >
> > (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;

> (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.
>
> ....
>
> [75] The principle of judicial comity — that judges treat fellow judges' decisions with courtesy and consideration — as well as the rule of law principles supporting stare decisis mean that prior decisions should be followed unless the *Spruce Mills* criteria are met. Correctly stated and applied, the *Spruce Mills* criteria strike the appropriate balance between the competing demands of certainty, correctness and the even-handed development of the law. Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:
>
> 1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
>
> 2. The earlier decision was reached *per incuriam* ("through carelessness" or "by inadvertence"); or
>
> 3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

[37] As the defendant points out, the court made clear that exceptions to *stare decisis* are narrow: "mere personal disagreement between two judges is not a sufficient basis to depart from binding precedent" (para 74).

[38] As to decisions taken *per incuriam*, the court said:

> [77] ... [A] judge can depart from a decision where it was reached without considering a relevant statute or binding authority. In other words, the decision was made *per incuriam*, or by inadvertence, a circumstance generally understood to be "rare"... The standard to find a decision *per incuriam* is well-known: the court failed to consider some authority such that, had it done so, it would have come to a different decision because the inadvertence is shown to have struck at the essence of the decision. It cannot merely be an instance in which an authority was not mentioned in the reasons; it must be shown that the missing authority affected the judgment... [Emphasis added.]

[39] The Plaintiff asks that the Court depart from the general rule of "horizontal *stare decisis*" on the ground that Justice Boudreau's decision in *McLean* was rendered *per incuriam*. The insurer responds that the legal question at issue here has already been settled in ***McLean***, and *stare decisis* requires the Court to follow its own previous decision.

Was *McLean* decided *per incuriam*?

[40] The general principles of construction of legislation – derived from the well-known Driedger and Sullivan "modern approach" – were recently summarized by Farrar JA, for the Court of Appeal, in ***Sparks v. Holland***, 2019 NSCA 3:

> [27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that "[t]he 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 (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at ¶21).
>
> [28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan's text, *Sullivan on the Construction of Statutes*, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.
>
> [29] Ms. Sullivan's questions have been applied in several cases, including *Keizer v. Slauenwhite*, 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the Sullivan questions are:
>
> 1. What is the meaning of the legislative text?
>
> 2. What did the Legislature intend?
>
> 3. What are the consequences of adopting a proposed interpretation? (Sullivan, pp. 9-10)

[41] Section B is subject to a "broad and liberal" construction. In ***Logan v. Pafco Insurance Co* (2000)**, 184 NSR (2d) 184, [2000] NSJ No 130 (CA), Bateman JA, for the court, summarized the governing principles set down in earlier cases:

> 10 Schedule II of the *Insurance Act*, referred to in s.74, contains language identical to that in Section B of the Policy. These provisions, being prescribed by statute, are not subject to the *contra preferentum* rule, but must be interpreted as one would legislation... In *Co-operators General Insurance Co. v. Boucher* (1995), 138 N.S.R. (2d) 236, this court said that "a broad and liberal approach should be adopted in interpreting Section B ... but not one that distorts the meaning of the words...."

[42] The Plaintiff cites ***Thomas v. Aviva Insurance Co***, 2011 NBCA 96, [2011] NBJ No 371, which suggests that the correct approach to the interpretation of statutory conditions "mirrors the *contra proferentum* rule applicable to consensual policy terms" (para 52). As the insurer points out, however, the law in Nova

Scotia is that "the doctrine of *contra proferentem* ... has no application to legislatively mandated wording": ***Miller Estate v. Co-operators General Insurance Co***, 2005 NSSC 260, [2005] NSJ No 382, at para 20. Further, the principle that "insurance coverage should be construed broadly and exclusions narrowly" is only applicable "as an aid to interpretation ... where an ambiguity has been found, or in situations where the wording was created by the insurer": *Miller* at para 21. Contrary to the plaintiff's argument, the insurer submits, there is no general principle calling for a narrow interpretation of exclusions required by statutorily-mandated language.

[43] The Plaintiff says the court in ***McLean*** did not apply the principles of statutory interpretation but focused "narrowly" on the grammatical and ordinary meaning of Section B, without sufficiently considering the words in their entire context harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of the legislature. Further, the court did not refer to the "binding authorities" of *Boucher* and *Logan*, which mandate a "broad and liberal" analysis of Section B.

[44] The insurer submits that the Plaintiff's claim that the court in ***McLean*** failed to consider relevant authorities is "nothing more than an inadequacy of reasons argument dressed up in the language of a horizontal *stare decisis* exception." As the court said in ***R v. REM***, [2008] 3 SCR 3, a judge "need not expound on matters that are well settled, uncontroversial or understood and accepted by the parties" (para 19). In ***McLean***, while Justice Boudreau did not expressly describe the governing principles, there is "no indication that she did not engage with the legislative text in an appropriate manner." Additionally, the insurer submits, the adjudicators' decisions that Justice Boudreau applied appeared to have rested on correct statutory principles.

[45] In my view, there is no persuasive reason not to treat ***McLean*** as a binding precedent. The Court of Appeal decisions that the plaintiff alleges were overlooked are not cited as authority on the specific issue before the court, but only as authority on the general interpretative approach to be taken to Section B. Given the language of the relevant provisions, there is no reason to think that merely adverting to those cases would have led to a different result in ***McLean***. As to the suggestion that approaching the analysis expressly through the prism of legislative interpretation would have led to a different result, that too is unconvincing. In my view ***McLean*** is good law and binds the court.

Is the Ontario caselaw distinguishable?

[46] Alternatively, the Plaintiff says, ***McLean*** should not be followed because the Ontario cases applied by Boudreau, J – specifically ***Jensen, Jolin,*** and ***Shearstone*** – did not involve long-term workers' compensation benefits, but short-term benefits. Additionally, the claimants in the Ontario cases had not gone into new lines of work while receiving workers' compensation benefits.

[47] In ***Jensen*** the commission said, "[t]emporary total disability benefits are in the nature of income replacement. They have been held to be deductible under the terms of s. 12(4)(b)(i) whether they relate to the automobile accident or to a previous condition... However a permanent disability pension based on the degree of physical impairment, - the pre-1990 system of compensation for permanent injuries - is not" (para 50). In ***Shearstone***, the Commission said, "Arbitral and appeal decisions consistently held that workers' compensation benefits are not "income from occupation or employment" for purposes of calculating the benefit rate under that provision. Instead, workers' compensation benefits for temporary disability were found to be "payments for loss of income" under s. 12(4)(b), and they were held to be deductible from the insured person's accident benefits whether they related to the same accident that gave rise to the accident benefits, or a prior work-related disability" (para 5). The authorities cited for this statement included ***Jolin*** and ***Jensen***. However, in a footnote, the commission noted that "[p]ermanent disability benefits and benefits that are contingent on the worker's participation in a rehabilitation program were found not to be 'payments for loss of income'" (para 5, note 4).

[48] The insurer submits that the Plaintiffs' alleged distinction on the ground that the Ontario cases did not deal with long-term workers' compensation payments is a red herring, "a distinction based on a non-meaningful premise." The *WCA* makes "no material distinction between the nature of these benefits", other than the time they are triggered. This is apparent from the definitions in ss 2(ad) and (o) of the *WCA*, which use identical descriptive language: an "earnings-replacement benefit payable to a worker." Section 37, the operative provision, speaks only of "earnings-replacement benefits." In my view this is correct, and is consistent with Justice Boudreau's distinction between benefits intended to replace income and permanent disability, such as the Permanent Impairment Benefit. I do not believe that there is a relevant distinction between the reasoning in the Ontario cases as applied in ***McLean*** and the circumstances of this case.

Interpretation of the provisions

[49] In the event that ***McLean*** is not binding, I will review the arguments respecting the interpretation of the relevant provisions in accordance with the approach set out in such cases as ***Sparks v. Holland***, 2019 NSCA 3, referred to above.

Meaning of the legislative text

[50] Section B deems a person to be employed if, *inter alia*, they are "actively engaged in an occupation or employment for wages or profit at the date of the accident" (ss 3(a)). Calculating the amount of the weekly payment under Section B requires a deduction of "(b) ... any payments for loss of income from employment received by or available to such person under ... (ii) wage or salary continuation plans available to the person by reason of his employment...." The Plaintiff says this language requires the Claimant to be employed at the time of the accident in order to qualify for loss of income payments, and that it prevents "a double recovery by the insured person who is no longer able to work but is getting some sort of salary payments thanks to their employment."

[51] The Plaintiff says that because the EERB payments he receives under the *Workers' Compensation Act* are not based on his employment as a taxi driver at the time of the accident – his WCB benefits having originated from an injury sustained while he was working as a nurse – the EERB payments were not attributable to his "employment." As support for this, he cites the holding in ***McLean*** that there was "no reasonable way to characterize the plaintiff's EERB benefits as 'income from employment'. They are not income from employment; they do not come from an employer. They are, simply put, payments being made due to a loss of income" (para 46).

[52] The insurer points to the phrase "loss of income from employment" in Section B, which plainly indicates payments to replace income. Similarly, the phrase "earnings replacement benefit" suggests payments intended to replace earnings – in other words, income. The Workers' Compensation Board is not an employer. As such, the words of their face cannot support the plaintiff's submission that workers' compensation payments are "income from employment." There is no ambiguity.

[53] The insurer says the plaintiff's argument that Section B only offsets payments arising from the specific accident which gave rise to the entitlement is

unsupportable on the face of the legislation, which contains no such specific limitation. By comparison, section 113A of the *Insurance Act* does contain language to that effect, excluding from available damages from income loss or loss of earning capacity "all payments in respect of the incident..."

[54] The plaintiff's reading of Section B is somewhat strained. There nothing in the language that would exclude WCB payments for loss of income from employment from the amount deductible simply because the claimant was in receipt of the WCB benefits in respect of previous employment and was working in a different job at the time of the accident. In my view, this would require reading non-existent language into Section B. As Boudreau, J., reasoned in ***McLean***, "[t]he contract and regulations do not so limit the deductions; they could clearly have done so if that was the intention" (para 38). This follows from the language, even if Justice Boudreau's language referred to a contractual analysis. It would be perfectly foreseeable to the legislature that a person might be injured in a car accident and claim Section B benefits while already collecting WCB benefits, but no such limitation can be found in the language. Clearer language is required for such a limitation to exist.

[55] There is an argument, however, that would support the Plaintiff's interpretation of the *Act* and Regulations. In his brief Mr. Roach submitted:

> 34. We further argue that, when the principles of statutory interpretation are applied, the legislature, through the *Act* and the subsequent *Regulations*, intended to provide benefits to persons who can no longer work due to a car accident. While the Regulations make it clear that any payments obtained through income continuation plans can be deducted, the triggering event is always the automobile accident and not a workplace accident from many years ago.
>
> 62. Applying these principles to Mr. Roach's case further underlines that WCB EERB payments are not based on his employment as a taxi driver at the time of the accident. Mr. Roach was a nurse by training and experience; however, he was working as a taxi driver when the accident happened. [Emphasis added]

[56] I turn now to consider this submission. This was addressed in ***McLean*** briefly at paragraph 37 of Justice Bourdeau's decision:

> 37. In the alternative, the plaintiff submits that the Court should interpret the contract as limiting the "payments for loss of income from employment" deductions, to only those payments relating to the employment giving rise to the accident benefits claim. In other words, since the EERB benefits are not for loss of income

> from the Carquest employment (which is the reason for the accidents benefits claim), they should not be deducted.

Deductibility of EERB (WCA Benefits)

[57] In ***McLean***, Justice Boudreau was satisfied that the legislature placed no limit on the language of Part II that would restrict the word "employment" to the employment at the time of the accident. Thus, my learned colleague concluded that the earnings replacement (WCB) benefit, received by Mr. McLean for his previous workplace injury should be deducted from the Section B weekly indemnity benefit, as they were "payments for loss of income from employment". (See Paragraphs 31 and 36)

[58] In the present case, the Plaintiff has submitted that the case of Mr. Roach is "almost" on all fours with that of Mr. McLean but asserts that "contractual" and not "statutory" interpretation was applied in ***McLean***. The Defendant maintains that ***McLean*** "is on all fours" with this case, and that the issue has already been decided. In terms of the Plaintiff's argument that the principles of statutory interpretation were not applied, the Defendant says this is simply not the case, and it is "settled law" that EERBs are to be deducted from Section B benefits.

[59] The Defendant submits that the interpretation in ***McLean*** is harmonious with the purpose of the Regulations, stating it was never the intention of Section B benefits to provide full recovery for a loss. To interpret the text otherwise would "disrupt the balance", the Defendant says, adding that the purpose of the legislation is also to ensure commercial viability to insurers.

[60] In short, ***McLean's*** consequence promotes the purpose of the *Act*, as considered by Justice Boudreau in her decision. The Section B benefits were not designed to make the Plaintiff whole, which inevitably means that "certain individuals may be undercompensated". Nordic, as insurer, submits that unlike fault-based insurance, "the rules do not provide for an individual assessment of loss". There is earnings replacement available, but within "certain parameters". Had the legislature intended otherwise, it could have restricted or limited the scope of the deduction.

[61] I have noted some differences between ***McLean*** and the present case. The Plaintiff in ***McLean*** was working full time at the time of his second accident, whereas Mr. Roach was working part time, in sedentary employment, due to his previous workplace accident.

[62] Further, in her decision, Justice Boudreau did not find it necessary to go beyond the meaning of whether EECB benefits were "payments for loss of income from employment".

[63] In this case, I have observed that "80 percent of the insured person's gross weekly income from employment" would have to mean (accepting ***McLean's*** conclusion that EERB benefits are not income from employment) weekly income from the "employment" at the time of the loss. In Mr. Roach's case, this would necessarily mean loss of income from his employment as a taxi driver.

[64] This would suggest that the legislation intended there would be some minimum earnings replacement, even if that amount was not intended to be full compensation.

[65] I have struggled with the notion that the weekly indemnity benefits, intended "broadly to replace income", could so easily be excluded, when a plaintiff has suffered loss while earning an income that is quite separate from and unrelated to a previous incident, 11 years earlier.

[66] In other words, the replacement of income, "within certain parameters" might also give rise to an argument that the legislature, if it intended to impose such limits, could have just as easily defined what the parameters would be. For example, if it intended to exclude payment for loss of income from "any" employment, it could easily have said that.

What are the types of earnings replacement that the legislature, expressly stated were to be deducted?

[67] Returning to the language of Section II, the legislature was specific in identifying the payments for loss of income from employment that are to be deducted as those payments, "received by or available to such person under" three (3) categories of payments:

> (i) the laws of any jurisdiction;
> (ii) wage or salary continuation plans available to the person by reason of his employment; and
> (iii) subsection 2A;

[68] The emphasis in the submissions received pursuant to Rule 12 has been with respect to clause (ii) above, namely payments for loss of income from employment received by or available to such person under "wage or salary continuation plans

available to the person …". The parties have not put forward ss(b)(i) or (iii) for consideration.

[69] At this point, it is important to take note of the word "plans", as in "plans available to the person". There is further specificity such as the reference to "wage or salary continuation plans" available by reason of the person's "employment"; I have previously noted that the word "employment" in the first line of Part II is obviously and logically referring to the employment at the time of the accident giving rise to the calculation in the first place. Otherwise, if it is not, there would be no need for a calculation at all.

[70] I have earlier referenced that clause (i) of the Section II deduction does refer to payments being received or available to such person under "the laws of any jurisdiction". Needless to say, the *WCA* falls within that category, as a statute in this Province.

[71] That said, I find the integral question from the point of view of statutory interpretation is the meaning in Subsection 2(b)(ii) of the words "his employment", as part of the phrase, "available to the person by reason of his employment".

[72] There is no dispute that "employment" for the purpose of entitlement (i.e. "substantial inability to perform the essential duties of his occupation or employment") refers only to employment at the time of the accident for which the current benefits are sought.

[73] There is no need to belabour my reasons on this point. If Part II expressly (or inferentially) indicates that the "gross weekly income from employment" means the insured person's income at the time of the accident giving rise to the benefit, it is arguable the words "his employment" should be given a meaning consistent with the language describing the triggering event.

[74] Once again, ***McLean*** would indicate that "payments for loss of income from employment" to be deducted does not mean only payments from his "employment" at the time of the accident, but also the payments resulting from Mr. Roach's previous loss of income from employment as a nurse at the time of his earlier accident in 2004.

[75] It could be argued that the word "employment" should be interpreted identically in both the entitlement and the calculation/deduction portions of Part II, resulting in non-deductibility of "payments for loss of income from employment"

under “wage or salary continuation plans available to the person by reason of his employment” that do not relate to the specific employment at the time of the accident giving rise to the claim.

[76] It is true that the legislature is presumed to use language consistently: see Ruth Sullivan, *Construction of Statutes*, 7th ed. (LexisNexis, 2022), at §8.04. This does not displace the “modern principle”, however, and, as Sullivan says, “[a]t the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just” (Sullivan at §2.01). The presumption of consistency, in other words, does not necessarily prevail over the other considerations. The Court must look at “the entire context of the text to be interpreted” (Sullivan at §2.03).

[77] In this case, a different construction on the scope of the word “employment” in the two portions of Part II is suggested by the context. The entitlement provisions refer expressly to employment “at the date of the accident” in defining what is compensable. Further, the word “employment” does not appear in isolation, but as part of the phrase “substantial inability to perform the essential duties of his occupation or employment...” By contrast, the calculation/deduction provisions make open-ended reference to “any payments for loss of income from employment...” Moreover, while the authorities call for a “broad and liberal” construction of Section B (see ***Logan*** at para. 10), the legislative intent that gave rise to the relevant statutory and regulatory language must also be considered.

What did the Legislature intend?

[78] The Plaintiff says the purpose of the legislation is to provide benefits to people involved in motor vehicle accidents, specifically, to “compensate people who can no longer earn their salaries from their employment due to a car accident.” He also cites the New Brunswick Court of Appeal decision in ***Thomas*** for the proposition that “the legislation was designed for the protection of the insured and that it should be construed in the way most favourable to them.” The Plaintiff says it is “obvious and logical that the Regulations only intended to offset payments received in relation to the loss it related to.”

[79] The court in ***McLean*** concluded that the EERB payments "should be deducted from the calculation of Part II (Loss of Income) benefits, as a 'payment for loss of income from employment' and cannot be added as 'income from employment'" (para 47). The Plaintiff says, "this interpretation contradicts the intent of the legislature" and results in "a narrow and distorting interpretation of the *Regulations* which creates ambiguity." The "broad and liberal" approach required in interpreting Section B, he says, would lead to the conclusion that the EERB payments "are indeed for loss of earnings due to his workplace accident in 2005" and that the Legislature would not have intended that "an unrelated benefit" to which he was entitled "whether he was working or not, is in any way connected to the employment and such can be an offset when calculating weekly payments under Section B..."

[80] The Defendant says the compensatory purposes referenced by the Plaintiff are not exhaustive, as indicated by ***McLean***, where Justice Boudreau quoted the following passage from *Jensen*:

> 20. Income benefits under s. 12 are intended to provide those injured in automobile accidents with speedy, adequate and secure income maintenance when they are unable to work. In *Bapoo*, Justice Laskin identified a number of legislative purposes underlying the rules determining the level of benefit. These included: ensuring a fair or adequate level of income replacement, seeing that applicants are not overcompensated and that automobile insurers pay last by taking other sources of income replacement into account, and ensuring that benefits will be delivered quickly and efficiently by means of a system that is administratively manageable.
>
> 21. The rules balance those objectives. They make concessions for the sake of administrative simplicity. Unlike fault-based damages in the courts, the rules do not provide an individualized assessment of loss. Income benefits are broadly intended to replace income likely lost as a result of the accident within certain parameters...

[81] The insurer argues that the purposes of the legislation "are predicated on balance. If one were to interpret these provisions with only the purposes that the Plaintiff has identified, this balance is disrupted." The insurer notes that the Court of Appeal has observed on several occasions that the 2003 amendments to the *Insurance Act* were intended to limit the expense of insurance premiums: see *Sparks* at paras 36-40.

[82] In my view, the purpose of Section B benefits is broader than the essentially purely compensatory model suggested by the Plaintiff, and takes into account broader policy and legal considerations, such as limiting insurance premiums and

creating an administratively manageable system to provide partial benefits, but not to "make the claimant whole" in the tort law sense. Arguably, as the Plaintiff suggests, another purpose is not to deprive an insured of benefits that they are otherwise entitled to by subtracting benefits that are not deductible.

Consequences of the proposed interpretation

[83] The Plaintiff says the Defendants' interpretation – following ***McLean*** – would result in "under-compensation" of people injured in motor vehicle accidents, resulting in people who find work to supplement their EERB payments and are subsequently left unable to work in later accidents being denied the ability to have their employment and income at the time of the car accident considered in setting their benefit levels. The result would be to discourage people receiving EERB payments from trying to return to the workforce.

[84] The insurer submits that the plaintiff's "under-compensation" argument is a "hyperbolic hypothetical" that fails to recognize that no one plans to be involved in a motor vehicle accident. To suggest that Nova Scotians receiving EERBs would choose not to work due to the possibility that these wages would not be deductible from a hypothetical Section B weekly indemnity claim is absurd." Further, Section B is not intended to provide full recovery for the claimant's loss, but only partial recovery: ***Miller Estate*** at para 41. The benefits are not intended to provide an individualized assessment of the loss or to make the claimant whole.

[85] In my view, the Plaintiff overstates the consequences of the insurer's interpretation. More to the point, of course, in my view the Plaintiff's interpretation would require imposing a strained meaning on relatively straightforward language in Section B.

Conclusion

[86] There is a coherent and arguable line of reasoning that says that "employment" and "employed" should have a consistent meaning throughout Part II, which would support the view that the "employment" referred to in the entitlement parts of the text (i.e. the beginning) should be the same as the "employment" referred to in the deduction part. There is no dispute that "employment" for the purpose of entitlement (i.e. "substantial inability to perform the essential duties of his occupation or employment") refers only to employment at the time of the accident for which the current benefits are sought. This is inconsistent with the strict meaning of "employment" as it is meant in the phrase

"less any payments for loss of income from employment received by or available to such person under ... (ii) wage or salary continuation plans available to the person by reason of his employment", since that phrase includes other sources, such as the EERB benefits in this case.

[87] Conversely, the calculation/deduction provisions do not make an express exception from the plain language of "wage or salary continuation plans available to the person by reason of his employment" that would limit it to his employment at the time of the accident -- unlike, for instance, s 113A of the *Insurance Act*, which specifies that in a civil action damages for lost income or earning capacity" shall be reduced by all payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income-continuation benefit plan if, under the law or the plan, the provider of the benefit retains no right of sub-rogation."

[88] In the final analysis, if ***McLean*** is binding, and the result in ***McLean*** is the one intended by the legislature and the drafters of Section B, this effectively amounts to an unjust outcome (in my view, at least), since the insurer is receiving the benefit of payments that have no connection to the insurance contract, no connection to the accident, and which, in the worst case scenario, might even leave a claimant even worse off as a result of the second accident, depending on the respective amounts of gross weekly income and payments for loss of income being received.

[89] Notwithstanding the potential harshness of the result, I find that Section B can only carry the construction placed upon it by the insurer. I do not believe there is an ambiguity. Different wording would be needed to support a contrary finding, such as the one suggested by the Plaintiff. If the legislature had intended to limit the amounts deductible under Section B in the manner claimed by the Plaintiff, it could have included language similar to that in s. 113A of *Act*. The deductibility of EERB benefits already in receipt from a previous job at the time of the accident is not inconsistent with the multiple purposes of the legislation, nor does it lead to consequences that are inconsistent with the purposes of the legislation. It can however, lead to an unjust result, as suggested by the Plaintiff but it is not for this Court to stand in for the legislature.

[90] An ambiguity is a lack of clarity or lack of certainty. Because words are used in different contexts, or there is more than one interpretation, does not mean

there is necessarily an ambiguity when the words are considered in context. The word “employment”, for example, may have different meanings when used in the same provision.

[91] In the result, I find that the result in ***McLean*** is fundamentally what was intended to be captured by the statutory language and thus the one intended by the legislators and the drafters of Section B.

[92] In conclusion, in answer to the question posed by the parties, the EECB benefits received by the Plaintiff from the workplace injury in 2004, is properly deducted from his entitlement to Weekly Income Benefits under Part II of the Tort Regulations of Nova Scotia, s. 2.

[93] Order accordingly.

Murray, J.

Appendix “A”

[94] The Defendant requests that the Affidavit of Hanna Greer filed by the Plaintiff be struck in its entirety pursuant to Rule 39.04(2) and (3).

[95] As outlined in prior correspondence to the Court by the Defendant, Nordic says that the affidavit contains inadmissible hearsay and inadmissible opinion evidence.

[96] The Defendant submits the affidavit fails to identify the source and its belief in the source at paragraphs 6, 6 (sic) and 7. Further, the insurer says paragraph 11 contains inadmissible opinion evidence.

[97] Underlying this objection is the Defendant’s argument that the Plaintiff has failed to meet the burden of establishing all facts necessary to “scaffold” a pure question of law under Rule 12.

[98] The Defendant states that there is no evidence other than the pleadings that would support the motion.

[99] The Defendant says in the alternative the Court may adjudicate the motion if it is limited to the interpretation of statutory wording.

[100] The Court questioned Counsel at the motion hearing regarding this issue. Eventually the parties agreed on the appropriate question.

[101] Having reviewed the affidavit of Ms. Greer, I would agree that Exhibit “F” contains “without prejudice” correspondence and that paragraph 11 is not relevant to the question to be answered.

[102] With respect to paragraphs 6, 6 (sic), and 7, while the source is not mentioned there are exhibits which disclose the source, and the paragraphs themselves support the affiant’s belief in the source.

[103] Admitting into evidence, these basic facts: 1) that there was an accident; 2) that the Plaintiff applied for benefits and 3) that he received WCB benefits does not impair or prejudice the Defendant. The question being asked of the Court engages the appropriate context, statutory framework and identifies the source of the dispute.[2]

[2] Defendant’s Motion Brief , para.19.