

Decision of the Review Board

Number: 904050 D & E
Date: May 1, 1998
Panel: P. Michael O'Brien, Douglas Strongitharm, Susan Polsky Shamash
Subject: Status of a Deceased Worker's Estate to Commence and/or Continue an Appeal

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Introduction

The worker applied for compensation for multiple injuries as a result of a fall at work on October 11, 1989. His claim was accepted by the Workers' Compensation Board (the Board) and he was paid wage loss and medical aid benefits initially until November 22, 1990. A temporary psychological disability was later accepted. His claim was reopened for further wage loss benefits for post-traumatic stress disorder from February 5 to June 2, 1991. On appeal this was extended to September 21, 1991. He was also awarded a 2% permanent partial disability pension for his back and shoulder symptoms. Following further appeals, the worker's claim was reopened from January 6, to February 26, 1993 and his pension was increased to 3.5%.

The worker subsequently appealed two decisions of the Board. In the first, dated December 4, 1993, a Claims Adjudicator declined to pay wage loss benefits for his time loss from work on November 6 and 7, 1993 because his pension was designed to compensate him for fluctuations in his condition. Later, in a decision of February 19, 1994, an Adjudicator denied the worker's application to re-open his claim for further wage loss and medical aid benefits. The worker filed Notices of Appeal Part 1 on January 30, 1994 and May 3, 1994 respectively from these decisions. On October 16, 1994, prior to filing the Notices of Appeal – Part 2, the worker died from causes unrelated to his claim. The worker's widow, acting as personal representative of his estate, now wishes to proceed with these appeals.

Method of Appeal

The issue this appeal poses has arisen in a number of appeals and the outcome has varied considerably among various Review Board panels. A Chair's panel was therefore constituted to enhance consistency in approach to this jurisdictional question. The panel researched and analyzed the issue of the Review Board's jurisdiction and invited submissions from both the worker's estate and the Respondent employer. We now set out the results. At the request of the appellant's representative, we will only address the jurisdictional question in this finding. The merits of the substantive issues will be the subject of a supplementary finding after receiving further submissions.

Issues

The general issue that arises on these appeals concerns the Review Board's jurisdiction to decide an appeal commenced by a worker and continued after his death by his estate. The issue of whether or not the right of appeal to the Review Board survives the death of a worker for the benefit of the estate can arise in three distinct sets of circumstances:

- (1) The worker dies after filing a claim for compensation, but before commencing an appeal to the Review Board;
- (2) The worker dies after commencing an appeal to the Review Board but before the oral hearing or before the appeal has been distributed to a read and review panel; or
- (3) The worker dies after the hearing or distribution but before the finding is issued.

As a result, the broader issue addressed by the Chair's panel is whether the estate of a deceased worker has jurisdiction to commence and/or continue an appeal to the Review Board.

In addressing the matter the panel did not consider the issue of whether the estate has standing to apply for compensation to the Workers' Compensation Board under Section 55 of the *Workers Compensation Act* (the *Act*). Presently, the Review Board's position on that issue has been expressed in a prior Chair's panel finding (Appeal no. 880716-A). It is therefore not necessary to address the question of the interpretation of Section 55.

Although the Chair's panel had previously phrased the issue to include the question of whether a dependant had standing to initiate and continue an appeal, neither representative addressed this question in detail. Both agreed that workers' dependants in

their capacity as dependants did not have standing and that the reference to them in Section 90(1) only conferred standing on them to appeal decisions regarding their own benefit entitlement. The Chair's panel agrees with this analysis. In our view, to find otherwise would create an unjustifiable difference between those workers who have and those who do not have dependants.

Findings and Reasons

The Appellant submits that the rights of the deceased's estate should be governed by the common law because there is no express wording in the *Act* nor inference by necessary implication which provides that the rights of the worker under the *Act* are extinguished, or alternatively, continued upon his death. The Respondent's position is that entitlement to workers' compensation benefits is entirely statutory and that the personal representative of a deceased worker does not have any statutory right under Section 90(1) either to initiate or continue an appeal to the Review Board which was commenced by a deceased worker before his death.

1. Workers Compensation Act

The Panel will first address the meaning of "person" in the *Workers Compensation Act*, R.S.B.C. 1979 c. 437 (the *Act*) and in particular in Section 90(1).

Section 90(1) of the *Act* gives the Review Board authority to consider appeals from decisions of Board Officers made with respect to workers. The Section also sets out those who have standing to initiate appeals: "... the worker, or, if deceased, the worker's dependants, or the worker's employer, or a person acting on behalf of the worker, the dependants or employer ...".

The Respondent submitted that if the Legislature had intended the word "person" to include personal representative for purposes other than Section 10 of the *Workers Compensation Act*, it would have worded the definition in Section 1 differently. Alternatively, it would have omitted the definition altogether thus incorporating the broader definition in the *Interpretation Act*. He argued that, since "person" is defined in the *Workers Compensation Act* as including personal representative for the purpose of Section 10, by implied exclusion the reference to person in Section 90(1) cannot mean a personal representative.

The Respondent further submitted that by virtue of the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another), because Section 103 of the *Act* expressly refers to the "legal personal representatives of the worker", "person" in Section 90(1) cannot be interpreted as including a personal representative. The Appellant submitted that the

maxim has no application to the definition of “person” in the *Workers Compensation Act*.

(a) Definition of “Person”

Section 1 of the *Workers Compensation Act* defines “person” as follows:

“person” includes, for the purpose of Section 10, his or her personal representative.

“Person” is also defined in Section 29 of the *Interpretation Act*, R.S.B.C. 1979, c. 206:

“person” includes a corporation, partnership or party, and the personal or other legal representative of a person to whom the context can apply according to law.

The *Interpretation Act* also contains a definition of “personal representative”:

“personal representative” includes an executor of a will and an administrator with or without will annexed of an estate; and, where a personal representative is also a trustee of part or all of the estate, includes the personal representative and trustee;

The definition of “personal representative” in the *Interpretation Act* does not add anything to the common law meaning of the term (see *Re Fair* (1971) 17 D.L.R. (3d) 751 at 758 (N.S.C.A.) and *Kitto v. Hanson* [1990] 46 B.C.L.R. (2d) 72 at 79 (B.C.S.C.)). A personal representative, either the executor or administrator, “represents” the deceased in all matters concerning his or her estate. The estate is all the assets/possessions left after death (see the definition in the *Estate Administration Act*, R.S.B.C. 1979, c.114 and *Black’s Law Dictionary*, 6th ed. (St. Paul: West Publishing, 1990) at 547).

The fact that definitions are included in a definition section of a statute may lead to an assumption that all definitions in that *Act* are included in that definition section. However, definitions in interpretation statutes apply unless the context indicates otherwise (see *Meux v. Jacobs* (1875) 7 L.R. (E. & I. App.) 481 at 493 (H.L.)). This principle is codified in Section 2(1) of the *Interpretation Act*: “[e]very provision of this Act extends and applies to every enactment ... unless a contrary intention appears in this Act or in the enactment”. The British Columbia Court of Appeal in *Sealey v. Crystal* [1987] 14 B.C.L.R. (2d) 235 at 239 (B.C.C.A.) held that the latter phrase in Section 2(1) means that the definitions are to apply unless it is clear from the context that they cannot be applied sensibly.

Some of the principal objects of interpretation statutes are to shorten and simplify written laws by avoiding needless repetition, and to promote consistency of form and language.

The benefit of shortening particular enactments by general interpretation provisions is obvious. One of the disadvantages is that many may not refer to them or even know that they exist. In most instances, these definitions are used to resolve doubts about the meaning or application of naturally ambiguous language in the text of a statute.

While the *Workers Compensation Act* provides a definition of “person”, Section 29 of the *Interpretation Act* contains a much broader definition. As the definition of “person” in the *Workers Compensation Act* is prefaced by the word “includes”, the ordinary meaning of the word continues to apply unless its context demonstrates the contrary. Moreover, by virtue of Section 2(1) of the *Interpretation Act*, the definition of the word “person” in that *Act* also applies (see *Gibson v. City of Hamilton* (1919) 48 D.L.R. 428 (Ont. C.A.), *International Ladies’ Garment Workers’ Union v. Harwill Originals Ltd.* (1982) O.L.R.B. Rep. 875 (O.L.R.B.), *R. v. Park Hotel (Sudbury) Ltd.* [1966] 2 O.R. 316 (Ont. Dist. Ct.), *Re Toronto Rowing Club* (1916) 31 D.L.R. 686 (Ont. S.C.)).

By virtue of the word “includes” in the definition of “person” in both Section 29 of the *Interpretation Act* and Section 1 of the *Workers Compensation Act*, neither is exhaustive. As the definition in the *Interpretation Act* also applies to the *Workers Compensation Act*, the two definitions overlap. As a result, unless a contrary intention appears, the phrase “person acting on behalf of the worker” in Section 90(1) of the *Workers Compensation Act* ought to be construed as including a personal representative (see particularly *Allum v. Hollyburn Properties Management Inc.* [1992] 15 C.H.R.R. D/171 (B.C. Human Rights Council), *Mans v. Council of Licensed Practical Nurses (British Columbia)* [1991] 14 C.H.R.R. D/221 (B.C. Human Rights Council), *B.A.O. v. New Westminster (City)* (1990) 11 C.H.R.R. D/400 (B.C. Human Rights Council), *Skelly v. Assist Realty Ltd.* [1991] 16 C.H.R.R. D/1 (B.C. Human Rights Council)).

In the *Allum* case, the complainant died after filing a complaint with the Human Rights Council. The question that arose was whether the complainant’s wife, as executor of his estate, could continue the complaint. Section 11(1) of the *Human Rights Act*, S.B.C. 1984, c. 22, states that a “person” who alleges that he has been discriminated against may file a complaint with the Council. “Person” is defined in Section 1 as follows:

“person” includes an employer, an employment agency, an employers’ organization, an occupational association and a trade union.

The Council considered this definition in light of the definitions of “person” and “personal representative” in the *Interpretation Act*, and concluded at D/172:

It is clear from these definitions that the term “person” in the [*Human Rights Act*] extends to, and includes, the personal representative of the deceased person. [The wife], the executor of [the deceased’s] estate, acted in that

capacity for the complaint of [the deceased]. I therefore, have jurisdiction to hear the complaint of [the deceased].

(b) “Includes” and Expressio Unius Est Exclusio Alterius

An argument based on the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another) is available whenever the Legislature sets out some but not all members of a category or class, or mentions some things but fails to mention others that are comparable. The reasoning is that if the Legislature had intended to include all possible members or things, it would have mentioned all of them or described them using general terms; it would not have mentioned one or some while saying nothing about the others, because that would be irrational and disorderly. Therefore the Legislature’s failure to mention something becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied.

The maxim is a rule of statutory construction and not a rule of law; thus, it can be overcome by a strong indication of contrary legislative intent (see Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 174-175 and Reed Dickerson, *The Interpretation and Application of Statutes* (Boston: Little, Brown and Co., 1975 at 234-235). Pierre-Andre Cote in his book, *The Interpretation of Legislation in Canada* (Cowansville: Les Editions Yvon Blais Inc., 1984) sums up the limited value of the maxim at 266:

Since it is only a guide to the legislature’s intent, *a contrario* reasoning [e.g. use of the maxim *expressio unius exclusio alterius*] should certainly be set aside if other indications reveal that its consequences go contrary to the statute’s purpose, are manifestly absurd, or lead to incoherence and injustice that could not have been the desire of Parliament.

Indeed, the Supreme Court of Canada has consistently cautioned against the dangers of indiscriminate use of the *expressio unius* maxim because the omission may be accidental or inadvertent. If the application of the maxim leads to inconsistency or injustice it ought not to be applied. See *Nicholson v. Haldimand-Norfolk Reg. Police Commrs* [1979] 1 S.C.R. 311 at 321-322, and *L’Alliance des Professeurs Catholiques de Montreal v. The Labour Relations Board of Quebec* [1953] 2 S.C.R. 140 at 154, where Rinfret J. quoted with approval Farwell L.J. in *Lowe v. Darling & Son* [1906] 2 K.B. 772 at 784-785:

It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.

(See also *Turgeon v. Dominion Bank* [1930] S.C.R. 67, *La Congregation des Freres de l'Instruction Chretienne v. Grandpres Sch. Commr.* [1977] 1 S.C.R. 429 at 435, Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. at 175 and John Bell and Sir George Engle, *Statutory Interpretation*, 2nd ed. (London: Butterworths, 1987) at 139.)

Further, the maxim *expressio unius*, like any other cannon of construction, should be used as an interpretive device when necessary, not as a determinative rule when the words of a statute are otherwise clear (see *Jones v. Attorney General of New Brunswick* [1975] 2 S.C.R. 182 at 195-196, and *Canadian Pacific Ltd. v. Carlyle (Town)* [1987] 4 W.W.R. 232 (Sask. C.A.)).

In the panel's opinion, the maxim *expressio unius est exclusio alterius* is rebutted in this case as it would leave the opening words of the Section 1 definition of "person" meaningless. There is a difference between statutory definitions that are exhaustive and those that are not. "Includes" does not limit; it has the opposite effect. In interpretation clauses it enlarges the meaning of specific words used in a statute to embrace something else not specifically stated (see *Rex v. McLeod* [1950] 97 C.C.C. 366 at 371-372 (B.C.C.A.), *R. v. Loblaw Groceteria (Manitoba) Ltd.* [1961] S.C.R. 138 at 142, *R. v. B.C. Fir & Cedar Lumber Co.* [1932] A.C. 441 at 448 (P.C.), *Laidlaw v. Metro Toronto* [1978] 2 S.C.R. 736 at 744, *Nova v. Amoco Canada Petroleum Co.* [1981] 2 S.C.R. 437 at 460-461, *Canadian Pacific Ltd. v. Attorney General of Canada* [1986] 1 S.C.R. 678 at 688, *R. v. Girone and Genoe* [1953] 17 C.R. 60 at 68 (B.C.C.A.), *Brompton Holdings Ltd. v. British Columbia* (1995) 16 B.C.L.R. (3d) 164 at 181-182 (B.C.C.A.), *Huber v. Regina (City)* [1956] 19 W.W.R. 657 (Sask. Dist. Ct.), *Re Atlantic Sugar Div. of Atlantic Consolidated Foods Ltd. (No. 2)* (1975) 65 D.L.R. (3d) 129 at 133 (N.B.C.A.), *Wardle v. Man. Farm Loans Assn.* [1953] 9 W.W.R. (N.S.) 529 (Man. Q.B.), and Elmer Driedger, *The Composition of Legislation* 2nd ed. (Ottawa: Dept. of Justice, 1976) at 46).

In *Dilworth v. Commissioner of Stamps* [1899] A.C. 99, a decision of the Privy Council which is often referred to in relation to the meaning of the word "include" in interpretation clauses, Lord Watson said at 105-106:

The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of a statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include.

(See also *Ricard v. Lord* [1941] 1 D.L.R. 536 at 542 (S.C.C.). In other words, where "includes" is used, the word has both its extended statutory meaning and its ordinary, popular, and natural meaning whenever that would be properly applicable.

In contrast, if a definition is introduced by the word “means” it is considered to be exhaustive. It limits the meaning of the word to what is set out in the definition (see *R. v. Hauser* [1979] 1 S.C.R. 984 at 1009, *Yellow Cab v. Board of Industrial Relations* [1980] 2 S.C.R. 761 at 768, *Maxwell on the Interpretation of Statutes*, 12th ed. (Bombay: N.M. Tripathi Private Ltd., 1976) at 270, Kenneth Gifford, *How to Understand an Act of Parliament*, 3rd ed. (London: Sweet & Maxwell Ltd., 1972) at 53-54, Ruth Sullivan, *Statutory Interpretation* (Concord: Irwin Law, 1997) at 80, Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 20, *R. v. Jollimore* (1950) 98 C.C.C. 388 at 389-390 (N.S.S.C.), *R. v. Mansour* [1979] 2 S.C.R. 916 at 920, *R. v. Verrette* (1978) 85 D.L.R. (3d) 1 at 14, Norman Singer, *Statutes and Statutory Construction*, 4th ed. vol. 2A (Wilmette, Ill.: Callaghan & Co., 1984) at 133 and the *Canadian Encyclopedic Digest (West. 3rd)* “Statutes” (Scarborough: Carswell, 1996) at 72).

As previously stated, while it is clear that where a definition in a statute begins with the word “includes”, the meaning of the word is expanded; it does not change its ordinary meaning. It therefore follows, in the panel’s view, that the word “person” in Section 1 is not limited to meaning personal representative only for the purpose of Section 10. The implied exclusion argument here is outweighed by the use of the word “includes” in Section 1.

Another way to rebut an implied exclusion argument is to explain why the Legislature expressly mentioned some things and was silent with respect to others (see Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. at 174). The Legislature may wish to emphasize the importance of the matters mentioned, *ex abundanti cautela* (out of an abundance of caution) to ensure that matters are not overlooked, to anticipate potential misunderstanding, to settle a doubt or to resolve an ambiguity (see *R. v. Shubley* [1990] 74 C.R. (3d) 1 at 18 (S.C.C.), *Martineau v. Matsqui Institution Disciplinary Board* [1978] 1 S.C.R. 118 at 130, *Her Majesty in Right of the Province of Alberta v. Canadian Transport Commission* [1978] 1 S.C.R. 61, Pierre-Andre Cote, *The Interpretation of Legislation in Canada* at 265-266, Elmer Driedger, *The Composition of Legislation* 2nd ed. at 46-47, and Ruth Sullivan, *Statutory Interpretation* at 82).

In this instance, it may be that the definition of “person” was inserted in Section 1 of the *Workers Compensation Act* out of an abundance of caution, to reduce the possibility of future misunderstanding or mistake regarding whether a personal representative has rights under Section 10. Pursuant to subSection 10(2) and 10(6), where a worker’s injury or death was caused by some “person” other than a worker or employer and the worker elects to claim compensation, the Board becomes subrogated to (that is, stands in the place of) his or her cause of action for personal injury against that other person. Section 66(4) of the *Estate Administration Act* states that when the person alleged to be at fault dies, the “person wronged” may continue the action against the estate. It is unclear from a plain reading of this provision whether an insurer who is subrogated to the insured’s position with respect to a deceased wrongdoer can be considered a “person wronged” under Section 66(4) and make a claim. The definition in Section 1 of the *Workers Compensation Act* may have been

inserted in anticipation of any potential misunderstanding or problem in applying Section 10 so as to ensure that the Board, as insurer, may continue a subrogated action against the estate of the alleged wrongdoer. Indeed, Section 66(9) of the *Estate Administration Act* provides that “[t]his section is subject to Section 10 of the *Workers Compensation Act* ...”. Thus, the panel finds the maxim *ex abundantia cautela* to be more persuasive than *expressio unius* in understanding the definition of person contained in the *Workers Compensation Act*.

In the panel’s view, to read the definition of “person” in the *Act* as excluding personal representatives for the purposes of provisions other than Section 10 would be the same as inserting the words “only for” before the words “the purposes of Section 10” or “means” in the place of “includes”. This ought not to be done; there is a presumption against adding or deleting words in a statute (see Pierre-Andre Cote, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Les Editions Yvon Blais, 1991) at 231 and Elmer Driedger, *Construction of Statutes*, 2nd ed. at 94-96).

We do not know precisely what precipitated the introduction of a definition for “person” in the *Workers Compensation Act*. The definition in the *Interpretation Act* existed since the first enactment of that statute in 1872, whereas the definition as it currently appears in the present *Workers Compensation Act* was added in 1955. Even if the definition in the *Workers Compensation Act* is strictly speaking superfluous, it is difficult to impute to the Legislature which provided “person includes...” in Section 1 an intention to restrict the meaning that the word had before 1955.

The panel disagrees with the Respondent’s submission that, by virtue of the maxim *expressio unius*, because Section 103 expressly refers to the “legal personal representatives of the worker”, “person” in Section 90(1) cannot be interpreted as including a personal representative. Such an interpretation would make the word “includes” in the Section 1 definition of “person” meaningless.

(c) “Includes” as Equivalent to “Means and Includes”

It may be that the word “includes” in Section 1 of the *Workers Compensation Act* is equivalent to the phrase “means and includes”, and is therefore an exhaustive or all-embracing definition of the word “person” for the purposes of the *Act*. In *R v. Loblaw Groceteria (Manitoba) Ltd.* [1961] S.C.R. 138 at 142, the Supreme Court of Canada held that a definition might be exclusive even though it used the word “include”.

Pierre-Andre Cote addressed this issue in his 1991 text, at page 58 by stating that it is necessary to examine the words in their context:

The words “includes” or “means” are *usually* sufficient to indicate whether a definition is exhaustive or not. In some cases, however, the context or the

legislative history will indicate that even a definition introduced by “includes” should be considered exhaustive. These authorities indicate, once again, the need to read words in their context. Context may often dictate that the usual meaning be set aside in order to bring harmony to the whole, or in order to reconcile a text with the enactment’s purpose as suggested, for example, by its legislative history. (emphasis added)

In this instance, the interpretation section of the *Workers Compensation Act* suggests that the definition of “person” introduced by “includes” is non-exhaustive. There are many definitions in Section 1 of the *Act*, some of which use the word “means” and some “includes”. The terms are employed to preserve the distinction between them; twenty-six words are defined in the interpretation section and in eleven instances the word “includes” is used. It is difficult to accept that meaning of the word “includes” in the definition of “person” unless it is used in two entirely different senses in the same interpretation section of the *Act*.

It is therefore apparent that distinctions are intended and some definitions are to have wider scope than others. On the clear and unambiguous wording contained in the interpretation section, which has survived several redrafts, the definition of “person” in Section 1 is not exhaustive and does not exclude the definition in the *Interpretation Act* which expressly includes a personal representative. While certainly in some cases the context or legislative history will indicate that a definition introduced by “includes” should be considered exhaustive, this is not the case here. Using “includes” to mean “means and includes” violates the standard practice of legislative draftsmen in Canada because a definition cannot enlarge and restrict simultaneously. However, as Driedger states in his text, *Construction of Statutes, 2nd ed.* at 18: “[t]here may be cases ... where an includes definition is so exhaustive that it is virtually a means definition.”

We cannot conclude that there is anything in the context which narrows the scope of “includes” in Section 1 of the *Workers Compensation Act*. Hence, the term as used in the definition of “person” in Section 1 of the *Act* ought to be given the meaning generally accepted in statutory interpretation, that is to say, to be treated as not having a limiting effect.

(d) Context of “Person” in Section 90(1) and Agency Law

The Respondent also argued that “person” in Section 90(1) means a representative who is acting on behalf of a living worker and cannot be interpreted to include a personal representative of a deceased worker.

The panel is of the view that the limited interpretation of “person” submitted by the Respondent does not take into account its immediate context in Section 90(1). Where a defined word is used in a context to which the definition is clearly not applicable, the rules of interpretation require that the context must prevail over the “artificial conceptions of the definition clause” (*Canadian Encyclopedic Digest (West. 3rd)*, “Statutes” at 72; *R. v. Scory* [1965] 51 W.W.R. 447 at 448 (Sask. Q.B.)). In *Sealey v. Crystal* the British Columbia Court of Appeal held that the phrase “unless contrary intention appears in this Act or in the enactment” in Section 2(1) of the *Interpretation Act* means that definitions are to be used unless it is clear from their context that they cannot be applied sensibly. Therefore, if the *Interpretation Act* definition of “person” can be applied sensibly to Section 90(1), it must be applied. As C. Dallas Sands wrote in *Statutes and Statutory Construction*, 4th ed. vol. 1A (Chicago: Callaghan & Co., 1972) at 310:

Statutory definitions of words used elsewhere in the same statute furnish official and authoritative evidence of legislative intent and meaning, and are usually given controlling effect. Such internal legislative construction is of the highest value and prevails over executive or administrative construction and other extrinsic aids.

Where a definition clause is clear it should ordinarily control the meaning of words used in the remainder of the act because of its authoritative nature. But courts are not bound to follow a statutory definition where obvious incongruities in the statute would thereby be created, or where one of the major purposes of the legislation would be defeated or destroyed. Where a definition is not clear then the court should use all intrinsic and extrinsic aids to determine the legislative intent but the presumption should be that a fair interpretation of the meaning of the words as defined in the definition section should control.

...

To ignore the definition section is to refuse to give legal effect to a part of the statutory law of the state. To hold that the “words of the act” control the definition section is to declare that the legislative intent is exactly opposite of that declared by the legislature.
(emphasis added)

The context in which “person” is found in Section 90(1) — “person acting on behalf of the worker” — suggests that it was intended to signify something broad enough to embrace a personal representative. There are no Canadian cases directly on point. However, it appears from *Currie Estate v. Bowen* (1989) 35 B.C.L.R. (2d) 46 at 49 (B.C.S.C.), that such a construction is permissible. As Hutchinson L.J.S.C. said:

While the [*Wills Variation Act*] does not explicitly authorize the claim to be made on her behalf by a personal representative as it did under Section 13 of

[the precursor statute, the *Testator's Family Maintenance Act*], I find the words in Section 2, "in an action by or *on behalf of the wife*" authorize the commencement of this action by personal representatives. (emphasis added)

As we find that it is clear from the context that the *Interpretation Act* definition of "person" can be applied sensibly to Section 90(1), that definition cannot be ignored in favour of an alternative interpretation of the words in that provision.

In Appeal No. 911323-B, a Review Board panel applied agency law to interpret the phrase "person acting on behalf of the worker" as meaning a representative acting in the capacity of an agent for the principal, the worker. Its reasoning and decision were subsequently adopted by other panels in Appeal No. 950917-A and Appeal No. 941224-A. The relevant portion of the first panel's finding provides at 27–28:

A representative is an agent, whose agency exists only during the life of the principal. A representative is an agent only so long as the worker is alive. On the other hand, a personal representative does not come into existence until the principal has actually died ... Once dead, a deceased person can no longer have representatives by way of agents, but now must have personal representatives by way of executors or administrators ... Section 90 of the *Act* specifically deals with a person acting "on behalf of the worker," i.e. a representative as agent while the principal is still alive.

In other words, the reasoning was that a "person acting on behalf of a worker" must be an agent, and because agency terminates on the death of the principal (i.e. worker), the "person acting on behalf of the worker" cannot include a personal representative because personal representatives come into existence after the worker dies.

This finding that the phrase "person acting on behalf of the worker" cannot include a personal representative is premised on the assumption that agency law governs the relationship between the "person acting on behalf of the [deceased] worker" and the deceased worker. A "person acting on behalf of a worker" may be an agent while the principal is alive. However, because "person" is defined in the *Interpretation Act* as including a personal representative, on the death of the principal, the relationship would then be governed by the law specific to personal representatives which is similar to the law of trusts.

Agency is the relationship between one party (the "principal") and another (the "agent") where the latter is empowered to act on behalf of and to represent the former. An agent performs a service for his/her principal, represents him/her to the outside world, can acquire rights of his/her principal, and can subject the principal to liabilities (see *Black's*

Law Dictionary, 6th ed. at 63, and *Canadian Encyclopedic Digest* (West. 3rd), "Agency" (Scarborough: Carswell, 1996) at 77).

The role of a personal representative in the administration of a deceased's estate is not that of an agent but is more similar to that of a trustee (see G. Fridman, *The Law of Agency*, 6th ed. (London: Butterworths, 1990) at 19-23, D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Scarborough: Carswell, 1984) at 34-46, *Minister of National Revenue v. Fitzgerald* [1949] 4 D.T.C. 580 (S.C.C.)). There are certain differences between the two offices which, though less extensive than the similarities, reflect the fact that, while a trust is essentially a means whereby property can be enjoyed by a succession of persons over a period of time, the personal representative's concern is merely to wind up the affairs of another and distribute his or her effects.

We do not accept the above reasoning and decision of the previous panel because it is premised on the assumption that agency law governs the relationship between the "person acting on behalf of the [deceased] worker" and the deceased worker. It also did not consider that the phrase can also be interpreted as referring to an advocate as has been the practice of the Review Board since it was created in 1974. Moreover, that panel reached its finding without considering the definition of "person" in the *Interpretation Act*.

In view of the foregoing, the panel finds that there is nothing in the context of the phrase "person acting on behalf of the worker" in Section 90(1) to exclude the meaning of "person" given by the *Interpretation Act* when the worker has died. To the contrary, it would appear that the context of the word permits, and is consistent with, the definition in the *Interpretation Act*. Indeed, it may have been that specific reference to Section 90(1) in the definition of "person" in the *Workers Compensation Act* was omitted because the drafters deemed it unnecessary given its context in Section 90(1).

(e) Section 19(1) of the *Act*

Further support for the proposition that "person" in Section 90(1) of the *Workers Compensation Act* was intended to be used in a wider sense than was given to it by the interpretation Section comes from Section 19(1). It defines "person" for the purposes of subsection 19(1), (2) and (2.1):

"person" does not include a widow or former common law wife of a deceased worker if the widow or former common law wife remarried or entered into a new common law relationship before April 17, 1985.

Although it may be more convenient to place a definition required for one section alone into that section rather than in the general definition section, it is simply a matter of judgment (Elmer Driedger, *The Composition of Legislation*, 2nd ed. at 49.) Therefore, it is not

possible to draw any inference from the fact that a definition of “person” for the purpose of Section 10 is set out in Section 1, while a separate definition of “person” for the purposes of subSection 19(1), (2) and (2.1) is set out in that section. These do not affect the interpretation of “person” in Section 90(1).

(f) “Appellant”

In his submission the Respondent referred to Section 90(3) of the *Workers Compensation Act*:

Every finding of the review board, together with its reasons, shall be recorded in writing and promptly sent to the appellant and his employer or worker, or the dependants, as the case may be, and to the Workers’ Compensation Board.

He argued that if the intent of Section 90(1) was to include a worker’s personal representative in the phrase “person acting on behalf of the worker”, Section 90(3) would have been drafted with greater clarity to indicate that the worker may be deceased. In response, the Appellant submitted that Section 90(3) does include the estate by using the word “appellant”.

Section 13 of the *Interpretation Act* provides that “[a]n expression used in a regulation has the same meaning as in the enactment authorizing the regulation”. Section 5(2)(a) of the *Workers’ Compensation Act (Review Board) Regulation*, B.C. Reg. 32/86, O.C. 342/86, also refers to the term “appellant”. It states that “[a]n appeal shall be in writing signed by the appellant or his agent ...”.

The party who brings an appeal is the appellant (see Daphne Dukelow *Dictionary of Canadian Law*, 2nd ed. (Scarborough: Carswell, 1995) at 61, *Jowitt’s Dictionary of English Law*, 2nd ed. (London: Sweet & Maxwell, 1977) at 118, and John Yogis, *Canadian Law Dictionary*, 3rd ed. (New York: Barron’s Educational Series Inc., 1995) at 18). In our view, who may commence an appeal to the Review Board, and hence may be considered “appellants” for the purpose of Section 90(3) of the *Act* or Section 5(2) of the *Regulation* is set out in Section 90(1). As discussed earlier, by virtue of the definition of “person” in the *Interpretation Act* and the word “includes” in the definition in Section 1 of the *Workers Compensation Act*, the term “person” in Section 90(1) also refers to a personal representative. The corollary of this is that the word “appellant” in Section 90(3) and Section 5(2) also includes the personal representative.

(g) Other Provisions

Both the Respondent and the Appellant referred to various other provisions of the *Workers Compensation Act* in their submissions, in particular, subsection 15 and 35(4). Section 15 provides that:

15 A sum payable as compensation or by way of commutation of a periodic payment in respect of it shall not be capable of being assigned, charged or attached, nor shall it pass by operation of law except to a personal representative, nor shall a claim be set off against it

Section 35(4) states that:

35(4) Any compensation owing or accrued to a worker or pensioner for a period not exceeding 3 months before his death may, at the discretion of the board, be paid to a widow, widower or a person who takes charge of the funeral arrangements, free from debts of the deceased.

In *Decision No. 95-0991* (1995) 11 W.C.R. 507 at 516, the Appeal Division concluded that:

... the estate of a deceased worker has standing to continue proceedings initiated by the worker, where the worker was seeking to have his entitlement to compensation benefits recognized or given full effect.

The Appeal Division examined published governors' policy in *Decision No. 135* (1975) 2 W.C.R. 139 which found that any arrears in compensation benefits due to the worker at the time of his death but not yet paid should be paid into his estate. The Appeal Division concluded that not only did Section 15 of the *Act* support the idea that a worker's death did not extinguish his claim if an award was made prior to his death it, when read together with *Decision No. 135*, could reasonably be interpreted also to allow his estate to maintain a claim to such benefits where the worker died before the award was made. There the panel considered that the wording of Section 35(4) supported this reading of Section 15.

The Appellant argued that "a sum payable" can, even in its ordinary meaning be interpreted to include a sum found payable at any time before or after a worker's death. The Appellant agreed with the Appeal Division's conclusion that Section 15 can be interpreted to allow an estate to maintain a claim (appeal) for benefits where a worker dies before an award is made.

The Respondent argued that following the ordinary meaning rule of statutory interpretation, where the meaning of a word is clear, it cannot be redefined. He submitted

that, in its ordinary meaning, the phrase refers only to a sum payable at the time of death. In support of this position, he rejected the reasoning of the Appeal Division. For similar reasons the Respondent submitted that the phrase “owing and accrued” in Section 35(4) did not refer to benefits not yet awarded. The Appellant submitted that it is unreasonable to presume that only the amount set out in Section 35(4) is payable after the worker’s death.

While these submissions are informative with respect to the possible meaning of the phrases “a sum payable” or “owing or accrued”, they are not determinative of whether an estate can commence or continue an appeal before the Review Board. If, within the statute, it is clear that the personal representative has standing to appeal, these sections would not override that intent. Fortunately the *Act* is not silent on the matter. As discussed above, “person” in Section 90(1), when considered in conjunction with the definition section and the *Interpretation Act* does include a personal representative. Once that determination is made, any reference to or the need for an in depth analysis of subsection 15 and 34(5) becomes unnecessary.

(h) Conclusion

While Section 1 of the *Workers Compensation Act* provides a definition of “person”, there is a much broader definition of “person” in Section 29 of the *Interpretation Act*. By virtue of Section 2(1) of that *Act*, and the fact that the definition of “person” in the *Workers Compensation Act* is prefaced by the word “includes”, the definitions in the former continue to apply to the *Workers Compensation Act* unless the context demonstrates the contrary.

The *Interpretation Act* defines “personal representative” as including an executor and administrator. Hence, following the judgment in *Allum v. Hollyburn Properties Management Inc.*, the word “person” in Section 90(1) of the *Workers Compensation Act* ought to be given the extended meaning in the *Interpretation Act* and therefore should include personal representatives of deceased workers. On the clear and unambiguous wording contained in the interpretation section of the *Workers Compensation Act*, the definition of “person” is not exhaustive and does not exclude the *Interpretation Act* definition. This broad construction of “person” in Section 90(1) is supported by the immediate context of the word in that provision, the distinctive use of the terms “means” and “includes” in other Section 1 definitions, and the definition of “person” in Section 19; it is also consistent with the wording of Section 15.

Although the maxim *expressio unius exclusio alterius* is a valuable aid to the construction of legislation, it has its limitations. Here, the principle is rebutted by the presence of the word “includes” in the definition of “person” in Section 1 of the *Workers Compensation Act*. Whether that definition was inserted *ex abundanti cautela*, or as a result of careless drafting, it does not provide a sufficiently clear reference to any legislative intention to limit

the scope of the meaning of the word “person” for the purposes of provisions other than Section 10.

We cannot accept the interpretation adopted by previous Review Board panels that “person acting on behalf of the worker” cannot include a personal representative because it is premised on the notion that the relationship between the worker and the “person acting on behalf of the worker” is governed by agency law. The Respondent has provided us with no authorities in support of a restrictive interpretation of the word “person” in the *Workers Compensation Act*, which, in effect, would make the definition in Section 1 exhaustive notwithstanding the presence of the word “includes”. Hence, we find no indication in the wording of the *Act* to demonstrate that the *Interpretation Act* definition of “person” ought not apply to Section 90(1). In our view, a more restricted interpretation of “person” in Section 90(1) which excludes personal representatives would be contrary to the ordinary rules of statutory interpretation.

The panel finds that by virtue of the definition of person in the *Workers Compensation Act* and the *Interpretation Act*, the widow, acting in her capacity as personal representative of the worker’s estate, has standing as a “person acting on behalf of the worker” in Section 90(1) of the *Workers Compensation Act* to continue these appeals to the Review Board. Moreover, the panel finds that the widow is entitled to receive payment of retroactive benefits as personal representative of the estate.

Although this case concerns the authority of an estate to continue an appeal already commenced by a worker, we nevertheless find that the same result would have been reached had the worker died after making a claim for compensation but before filing an appeal, or, alternatively, after the oral hearing or distribution of the appeal to a read and review panel but before the finding was issued.

2. Estate Administration Act

The question that arises next is whether Section 66(2) of the *Estate Administration Act* can be interpreted to allow a personal representative to continue, or bring and maintain, an appeal to the Review Board on behalf of a deceased worker. More precisely, can an appeal before the Review Board be considered an “action” under Section 66(2)? That section provides:

66(2) The executor or administrator of a deceased person may continue or bring and maintain an action for all loss or damage to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to, ...

Both the Appellant and the Respondent submit that the *Estate Administration Act* is of little assistance. The Respondent submitted that the *Estate Administration Act* does not apply because an appeal before the Review Board is not an “action” pursuant to Section 66(2); thus, personal representatives have no entitlement to initiate or continue appeals to the Review Board. The Appellant agreed submitting that workers’ compensation appeals are outside the judicial system and Section 66(2) does not apply. Although most previous Review Board panels are in agreement with the parties’ position here, a few have concluded otherwise. They found that the deceased worker’s estate had standing either to commence or continue a Review Board appeal. As a result, we will address the question here.

A general definition of “action” may be found in *Dorosh v. Bentwood Chair & Table Co.* (1939) 47 Man. R. 133 at 138 (Man. C.A.):

The word “action”, according to the legal meaning of the term, is a proceeding by which one party seeks in a Court of justice to enforce some right against, or to restrain the commission of some wrong by, another party. It includes both civil and criminal proceedings. In its more restricted or popular sense it denotes a civil action commenced by a writ: 1 Halsbury, p. 1, par. 1

In *Dymond v. Wilson* (No. 1) (1937) 1 D.L.R. 286 (B.C.C.A.) the British Columbia Court of Appeal considered the meaning of the words “action pending” in the context of the *Administration Act Amendment Act, 1934, c.2*, Section 2(4), amending Section 71, the predecessor of Section 66(4) of the *Estate Administration Act*. S. 2(4) in part provided that

In the case of an action pending between two persons in respect of any tort or injury to the person or property of one of them, if the person wronged dies, his executor or administrator may continue the action against the person who committed the wrong.

At issue was whether an “action” in a court included appeals, or cases pending appeal, from a trial decision. After considering the definition of “action” in the *Supreme Court Act, R.S.B.C. 1924, c. 51*, MacDonald C.J.B.C. cited with approval a 1913 English decision, *Johnson v. Refuge Ass’ce Co.* [1913] 1 K.B. 259, and more particularly a statement by Lord Justice Kennedy that the word “action” refers “to any proceeding in the nature of a litigation between a plaintiff and a defendant”.

(a) Canadian and British Jurisprudence

The key Canadian case is *Vancouver (City) v. Reid* (1996) 25 B.C.L.R. (3d) 162 (B.C.S.C.) where Saunders J. said at 176-178:

I have concluded the word "action" means court proceedings and not proceedings before a tribunal.

...

I also consider that ascribing a meaning to the term "action" as a court proceeding is consistent with common parlance. (emphasis added)

The conclusion in *Vancouver (City) v. Reid* that "action" does not include proceedings before tribunals is consistent with English jurisprudence that claims for workers' compensation benefits do not constitute "actions". In *Darlington v. Roscoe & Sons* [1907] 1 K.B. 219 (C.A.) a worker died as a result of an accident arising out of and in the course of employment. His widow made a claim against the worker's employer for compensation under the *Workmen's Compensation Act, 1897*. Farwell L.J. allowed her claim on the basis that the doctrine that a personal right of action dies with the party did not apply. One of the bases for reaching this conclusion was that the widow's claim for compensation did not constitute an "action".

Vancouver (City) v. Reid is also consistent with other Canadian case law which has found that the term "action" did not include the particular tribunal proceeding in question. See also *Royal Canadian Legion Norwood (Alberta) Branch 178 v. City of Edmonton* (1994) 111 D.L.R. (4th) 141 (Alta. C.A.) (the Court of Revision and the Alberta Assessment Appeal Board), *McPhail's Equipment Co. Ltd. v. District of Surrey* (1991) 44 L.C.R. 173, at 178 (British Columbia Expropriation Compensation Board), and *West End Construction Ltd. v. Ontario (Minister of Labour)* (1990) 62 D.L.R. (4th) 329 at 339-340 (Ont. C.A.) (Human Rights Tribunal). Two prior Review Board decisions dealing with the issue, Appeal No. 891059-B (at 7), Appeal No. 930105-A (at 11) have adopted this reasoning to reach the same conclusion.

In our view, this conclusion that "action" does not include proceedings before an administrative tribunal is consistent with the language of other sections of the *Workers Compensation Act* which refers to the words "action" and "proceeding". In several sections, the *Act* mentions "proceeding" (e.g. in subsection 96(1), 85(6), and 65) and in other sections it specifically refers to "action" (e.g. in subsection 96(1), 10(1), 10(2), 10(7), 10(8), 10(11), 11, 12, 45(1), 103(1), 103(2), and 105). In certain sections, such as in subsection 10, 11, and 103, it is clear that the term "action" is being used in connection with a court action commenced by writ of summons leading to a judgment and damage award. For example, Section 10(2) refers to the worker's or dependant's right of election to "claim compensation or bring an action". Similarly, Section 12 states that a worker under the age of 19 years is sui juris for

the purpose of Part 1 of the *Act*, and that no other person has a “cause of action or right to compensation” for the personal injury or disablement except as expressly provided under that Part.

(b) Conclusion

Section 66(2) of the *Estate Administration Act* does not apply to proceedings before the Review Board because an appeal is not commenced by a writ of summons, nor is it a court proceeding in the nature of litigation between a plaintiff and a defendant; therefore it cannot be considered an “action” for the purpose of that provision. The panel finds the judgment of the British Columbia Supreme Court in *Vancouver (City) v. Reid* strongly persuasive and concludes that the word “action” in Section 66(2) means court proceedings, not proceedings before a tribunal. We therefore agree with the Appellant and the Respondent and find that the personal representative of a deceased worker cannot obtain standing to commence and/or maintain a Review Board appeal from Section 66(2) of the *Estate Administration Act*.

3. Common Law

In the event we are wrong in our interpretation of “person” in Section 90(1) of the *Workers Compensation Act*, and that an appeal to the Review Board is not an action, it is necessary to consider the applicability of the common law doctrine that personal actions die with the person. The Appellant’s representative submitted that the worker’s estate has by common law the right to continue an appeal, and that because of the absence of express wording or intention in the *Act* to eliminate these rights upon the worker’s death, his common law rights must continue. The Respondent submitted that the worker has no common law right to receive workers’ compensation benefits in the event of work-related disability or death, therefore the common law does not apply to the question of the devolution of those benefits upon death. In his view, the Appellant’s focus on the common law was improper, and the primary focus ought to be on the enabling legislation itself.

The principle of legislative sovereignty provides that validly enacted legislation is paramount over the common law. Where there is an outright conflict between legislation and the common law, the legislation prevails. Acting within its constitutionally defined jurisdiction, the Legislature can change or abolish the common law to any extent that it considers appropriate. This concept is known as paramountcy.

The paramountcy of legislation over the common law has several implications. Courts are required to give effect to the purpose and meaning of legislation, regardless of its impact on the common law (see *Schiell v. Morrison* [1930] 2 W.W.R. 737 at 741 (Sask. C.A.), *R. v. Corbett* [1988] 1 S.C.R. 670 at 700-701, *A.G. of Quebec v. Carrieres Ste-Therese Ltee* (1985) 20 D.L.R.

(4th) 602 at 607 (S.C.C.), and *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.* [1956] S.C.R. 610 at 614). Once the Legislature indicates expressly or by implication that it has dealt with a matter fully to its own satisfaction, it is not permissible to vary or add to the legislation by resorting to the common law. This principle applies to both substantive and procedural law (Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. at 298). However, where common law principles associated with the subject matter of the statute, are not expressly affirmed or denied, the extent to which the common law is altered or changed is left to implication.

(a) Actio Personalis Moritur Cum Persona

(i) In Rem or In Personam

Several previous Review Board panels which addressed the issue of an estate's standing to commence or proceed with a Review Board appeal, spent considerable time and energy in determining whether workers' compensation benefits were "in rem" or "in personam".

There are three classes of action: personal, real and mixed. A personal action, also known as an action "in personam" is an action seeking judgment against a person involving his/her personal rights and based on the standing of his or her person, as distinguished from a judgment against property (which is "in rem"). A real action, also known as an action "in rem", is one brought for the specific recovery of things, for example, lands. "In rem" is defined as meaning proceedings or actions instituted against the thing, as opposed to personal actions (see *Black's Law Dictionary*, 6th ed. at 791, 793, and Daphne Dukelow, *Dictionary of Canadian Law*, 2nd ed. at 607). A mixed action is one in the nature of both real and personal actions, that is, one in which some real property is demanded as well as personal damages for a wrong (see *Canadian Encyclopedic Digest*, (West. 3rd.), "Actions" at 2-31).

Black's Law Dictionary, 4th ed. (St. Paul: West Publishing, 1968) at 899, states:

The phrases [in personam and in rem] were especially applied to actions; an actio in personam being the remedy where a claim against a specific person arose out of an obligation, whether ex contractu or ex maleficio, while an actio in rem was one brought for the assertion of a right of property, easement, status, etc., against one who denied or infringed it.

Generally, the panels concluded that the workers' compensation benefits were "in personam". On the assumption that personal actions perish with the worker, they found that personal representatives did not have standing to commence or continue Section 90(1) appeals on behalf of deceased workers.

(ii) Effect of the *Estate Administration Act* on the Maxim

This idea that personal rights die with the worker is an old common law doctrine expressed by the maxim *actio personalis moritur cum persona*, or colloquially, a personal right of action dies with the person. The result was that, at common law, personal representatives could neither sue nor be sued for any wrong committed against or by the deceased in his or her lifetime, although claims of other kinds which were less personal in nature survived the death (*Fitzgerald Estate v. Fitzgerald* [1981] 96 A.P.R. 541 at 553 (N.S.S.C.)).

Historically, the maxim was disliked by the courts, and many attempts were made to limit the scope of its application or to exclude its operation in given circumstances. Eventually, legislation was introduced in all Canadian jurisdictions, England, and elsewhere in the common law world, to remove the maxim and its consequences from the law (see Gerald H.L. Fridman, *Introduction to the Law of Torts* (Toronto: Butterworths, 1978) at 18, *Novick Estate v. Miller* [1989] 58 D.L.R. (4th) 185 at 189 (Sask. C.A.), *Mason v. Town of Peterborough* [1893] 20 O.A.R. 683 at 685 (Ont. C.A.), *Barr v. Miller* [1938] 4 D.L.R. 278 at 284 (Man. K.B.), and *Duncan Estate v. Baddeley* (1997) 196 A.R. 161 at 163, 165 (Alta. C.A.)).

In British Columbia, the rule embodied in the maxim was abrogated by subsection 66(2) and 66(4) of the *Estate Administration Act* in 1934 (see Gerald H.L. Fridman, *The Law of Torts in Canada*, v. 1 (Toronto: Carswell, 1989) at 386, 408-409, *M. (L.N.) v. Green* [1995] 11 B.C.L.R. (3d) 374 (B.C.C.A.), *Dos Remedios v. Morey* [1966] 56 W.W.R. 21 at 24 (B.C.C.A.), *Moss v. Chin* (1995) 120 D.L.R. (4th) 406 at 417 (B.C.S.C.) and *Child v. Stevenson* (1973) 37 D.L.R. (3d) 429 at 436 (B.C.C.A.)). Section 66(2) applies to actions brought on behalf of a deceased victim/plaintiff, whereas Section 66(4) applies to actions where the person alleged to be at fault dies. As Davey C.J.B.C. said in *Pesonen v. Barre* (1968) 62 W.W.R. 299 at 301 (B.C.C.A.):

In my opinion, the effect of subsec. (2) of sec. 71 of the *Administration Act* [the predecessor of Section 66(2)] ... is to revoke the rule that actions for wrongs die with the injured person. The effect of that is this: That the deceased had an action in his lifetime and his personal representatives continued to have an action for the injury which the deceased suffered which could be maintained after his death. Fortunately we have the authority of this court, in the judgment of Sloan J.A., in *Mah Ming Yu v. Terminal Cartage Ltd.* [1943] 1 WWR 623, 58 BCR 470 [B.C.C.A.], in which this court held that the effect of the *Administration Act* was not to create a new cause of action but simply to abolish the old principle that rights of action arising out of wrongs, such as negligence, die with the deceased. The effect was, therefore, that a cause of action possessed by an injured person continued notwithstanding his death and could be exercised by his personal representatives for the benefit of his estate. That being so, all we have left is the abatement of the action by the

death of the party. Where a cause of action continues notwithstanding abatement, an order may be properly made under the Supreme Court Rules substituting personal representatives for the deceased party and the personal representatives may carry on the action.

(See also *Dalzell v. Viereck* [1985] 3 W.W.R. 248 at 253 (B.C.S.C.)).

The result today is that most tort actions, apart from those circumstances set out in Section 66, survive for the benefit of the deceased's estate and against the wrongdoer's estate. It is the estate of the deceased, his/her executors if the deceased dies leaving a will, or administrators if the deceased died intestate, which brings or defends the action. Thus, subsection 66(2) and 66(4) broaden the category of claims which may be maintained by the estate of the deceased victim and against the estate of a deceased wrongdoer.

Section 66(2) is the applicable provision for this discussion. Categorization of compensation benefits as "in rem" or "in personam" is irrelevant under the *Estate Administration Act* because the fact that an action is personal is not determinative of the issue of whether it ceases on the death of an injured victim/party under that *Act*. Section 66(2) applies to actions for loss or damage to the person or property of the deceased. Hence, under Section 66(2) any such right of action vested in the deceased — whether real or personal — survives, so long as it does not fall within the purview of one of the enumerated subsections.

The panel finds that, apart from the exceptions set out therein, the common law concept that personal actions die with the injured victim/party no longer applies in British Columbia because survival of such actions is now governed by Section 66(2). Regardless of whether a Review Board appeal in respect of workers' compensation benefits constitutes an "action" under Section 66(2) and therefore can be continued, it is clear that the legislation displaces or precludes resort to the common law rule expressed by the maxim *actio personalis moritur cum persona*. Thus, the panel is unable to follow the findings reached by previous Review Board panels — that workers' compensation benefits are "in personam" and therefore perish with the death of the worker — because the common law rule on which they rely was revoked by Section 66(2) of the *Estate Administration Act*.

(iii) Application of the Maxim to Workers' Compensation Claims

Categorization of compensation benefits as "in rem" or "in personam" does not assist in the resolution of the larger issue because, even if the common law maxim survived the enactment of Section 66 of the *Estate Administration Act*, it would still have no application to workers' compensation claims.

Statutory obligations were exempted from the maxim *actio personalis moritur cum persona*. In *Lohnes v. Eastern Trust Co.* [1956] 3 D.L.R. (2d) 40 at 45 (N.S.S.C.) Isley C.J. said:

The general principle, as far as contractual obligations are concerned, is stated in *Williston on Contracts, Revised Edition*, [New York, 1938] vol. 6, p. 5449, para. 1945 as follows: "Unless a contractual obligation is personal in character, death of the obligator will not discharge it, though no right of action had accrued prior to the death." Statutory obligations are, I think, in the same position in this regard as contractual obligations. See *Peebles v. Oswaldtwistle Urban Dist. Council* [1896] 2 Q.B. 159.

Peebles v. Oswaldtwistle Urban District Council is an English case in which a manufacturer sought to compel the defendant Council to construct a sewer to enable it to dispose of liquid waste from its factory. The plaintiff died prior to judgment and the executors applied to be substituted. On appeal, the Council relied on the maxim to argue that the right of action extinguished with the death of the plaintiff. The Court of Appeal rejected this argument and held that the right to enforce a statutory duty passed to the personal representatives and on that basis excluded the maxim.

Peebles was referred to by the British Columbia Court of Appeal in *Barker v. Westminster Trust Co.* [1941] 3 W.W.R. 473. *Barker* dealt with a statutory right of action by a husband under the *Testator's Family Maintenance Act*, R.S.B.C. 1936, c. 285, precursor to the present *Wills Variation Act*, to vary his wife's will. The purpose of the statute, referred to broadly as dependants' relief legislation, is to place limits on testamentary freedom by empowering the court to grant relief in estate matters whenever a testator dies without making adequate provision in his or her will for the proper maintenance and support of his or her dependants. Judgment on appeal in this case was reserved, and before it was delivered the husband died. His counsel moved to add his executors as parties. The respondent resisted this motion on the ground that it was an *actio personalis moritur cum persona*. O'Halloran J.A. stated at 476:

As this is not a case in tort or in contract arising out of tort, the maxim can have no application. We are concerned with an equitable right vested by statute. We are concerned with proceedings founded in a statutory duty of the wife to her husband to provide adequately for his "proper maintenance and support." In *Peebles v. Oswaldtwistle Urban Dist. Council* [1896] 2 Q.B. 159, 65 L.J.Q.B. 499, the Court of Appeal held that the right to enforce a statutory duty passed to the personal representatives. Reference was there made to a note to *Wheatley v. Lane* (1667) 1 Wms. Saund. 216, 85 E.R. 228, reciting the principle of the common law that if an injury were done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom the wrong

was done. Emphasis was then placed upon the ensuing portion of the note to *Wheatley v. Lane*, at p. 229, reading:

“But this rule [the maxim] was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any *other duty* to be performed; for there the action survived.”

And vide *Broom’s Legal Maxims*, supra, at p. 622. The Court of Appeal held the statutory duty in the Peebles case came within “any other duty to be performed” in *Wheatley v. Lane* and thus excluded the maxim. And vide also *Philips v. Homfray* [1892] 1 Ch. 465, 61 L.J.Ch. 210 at pp. 212-214, and *Darlington v. Roscoe & Sons*, [1907] 1 K.B. 219, 76 L.J.K.B. 371. *The right sought to be enforced here, e.g., an equitable right vested by statute, is equally “any other duty to be performed.” Certainly it does not sound in tort or in contract arising out of tort. In the circumstances the maxim is inapplicable.* (emphasis added)

The difficulty with *Barker* is that it cannot be considered decisive authority on the issue of an estate’s right to continue an action on behalf of a deceased claimant under dependants’ relief legislation because no clear judicial principle is discernable from the decision. In the view of O’Halloran J.A., the maxim was irrelevant because the right in question was vested by the *Testator’s Family Maintenance Act*, and the statutory duty came within “any other duty to be performed” in *Wheatley v. Lane*. Hence, if a testator died without having made reasonable provision for the dependants in his/her will, the right passed to his or her personal representatives. In McDonald J.A.’s view, however, the *Act* did not contemplate the survival of an action after the death of the applicant. Sloan J.A. gave the third decision, and while he aligned himself with O’Halloran J.A. in the result, he found it unnecessary to come to a conclusion on the applicability of the maxim.

Until the recent case of *Currie Estate v. Bowen*, a 1989 British Columbia Supreme Court case cited above, it would probably have been safe to assume from the dictum in various cases that, in jurisdictions other than in British Columbia, the courts would not entertain an action for relief under dependants’ relief legislation which was commenced by the representative of a deceased claimant (see *Re Kerby Estate* [1949] O.W.N. 187 (Ont. Co. Ct.), *Re Smith, Wetzel v. National Trust Co. Ltd.* [1956] 18 W.W.R. 556 (Sask. C.A.), and *Re McMaster* (1957) 21 W.W.R. 603 (Alta. S.C.)). However, this assumption is no longer valid in light of *Currie*, which dealt with the commencement of an action by the personal representatives of a claimant. In *Currie*, the widow of the testator survived him only by a short period of time, and the action under the *Wills Variation Act* was brought by the administrators of her estate. The presiding judge, Hutchinson L.J.S.C., essentially adopted the view of O’Halloran J.A. in the *Barker* case and allowed the personal representatives of the deceased widow to commence the proceeding on the basis that the widow’s right to claim an equitable share of

her husband's estate vested in her at the time of his death. In the words of Hutchinson L.J.S.C. at 49:

Because the right to advance this claim was *granted by statute*, is not founded in tort and as it is broader than a claim for mere support or maintenance, it follows that the cause of action survives the death of Patience Currie, it is not "actio personalis". (emphasis added)

O'Halloran's ruling was also adopted by the Court in *Re Calladine Estate* (1958) 25 W.W.R. 175 (B.C.S.C.) where the Court made an award in favour of the estate of a claimant who died after the commencement of an action, and by the Saskatchewan Queen's Bench in *Retailers' Trust Co. Ltd. v. Regush and Regush (No. 2)* [1958] 26 W.W.R. 381 at 383 (Sask.Q.B.), which dealt with the issue of whether the maxim *actio personalis moritur cum persona* applied to workers' compensation claims.

Thus, notwithstanding the absence of a clear judicial principle in *Barker*, O'Halloran's judgment is significant because it was subsequently followed by the British Columbia Supreme Court in *Re Calladine Estate* and *Currie*. *Currie* went beyond any previous enunciation on the issue of survivorship of the right of action under dependants' relief legislation in British Columbia and is now considered the leading case on the issue in this province (see Leopold Amighetti, *The Law of Dependents' Relief in British Columbia* (Scarborough: Carswell, 1991) at 56–61).

Although *Barker* and *Lohnes v. Eastern Trust Co.* concern issues outside of the workers' compensation context, the judgments are nevertheless significant because they affirm the conclusion reached in *Peebles* that the maxim *actio personalis moritur cum persona* does not apply to statutory rights. Outside of the references to O'Halloran's judgment in *Barker*, the decisions in *Re Calladine Estate* and *Currie* are of little relevance in interpreting the *Workers Compensation Act* as dependants' relief legislation was designed for a different purpose, and conferred on the court different powers from those given to the Board and Review Board under the *Workers Compensation Act*. However, the Panel is strongly persuaded by the fact that O'Halloran's judgment was followed by the Saskatchewan Queen's Bench in *Retailers' Trust Co. Ltd. v. Regush and Regush (No. 2)* in the context of workers' compensation claims.

The extent to which the maxim applies to compensation matters has long since been addressed. All the English cases on this point have held that it does not apply to rights for workers' compensation benefits.

An early English case which addressed the issue is *Darlington v. Roscoe & Sons* [1907] 1 K.B. 219 (C.A.). A dependant widow of a deceased worker whose death was caused by an accident arising out of and in the course of his employment made a claim against his employers for compensation under the *Workmen's Compensation Act, 1897*. She died before

any award was made. The issue before the court was whether the right of the widow under the *Act* was “transmittable to the legal personal representative of the dependant”. The main ground upon which the employers relied was that the maxim *actio personalis moritur cum persona* applied. In response, the appellant argued that the maxim applied only to actions in tort, and that the right to compensation was not founded on tort but rather was a statutory duty; hence the maxim did not apply. The English Court of Appeal agreed with the appellant and found that the maxim had no application. In particular, Farwell L.J. said that, assuming that a claim for compensation was analogous to an action, the maxim did not apply because, at 230:

The respondent’s claim is not based on any tort committed by the appellants [i.e. employers], but seeks to compel the performance of a newly imposed statutory duty - a duty which is wholly independent of any wrong-doing by the party to be charged, but is made by statute part of every contract of employment to which the *Act* applies. If it must be either a tort or contract [for a debt] (as Pollock B., in *Story v. Shear* [[1892] 2 Q.B. 515], would seem to suggest), it is certainly contract, the provision of the statute being part of the contract, just as the “custom of the country,” which is local law, is part of a contract of tenancy which does not expressly exclude it. *But I prefer to say that it is neither tort nor contract, but a statutory duty; and to such a duty this Court has held that the maxim in question has no application: see Peebles v. Oswaldtwistle Urban District Council* [[1896] 2 Q.B. 159].

Further, the respondent’s claim is not put forward in any action... (emphasis added)

Similarly, Collins M.R. said, at 227, that:

I wish to say a word or two with regard to the effect of the maxim “*Actio personalis moritur cum persona*” in this case, on the assumption that the claim to compensation is to be regarded as analogous to an action. *I think that there is express authority that, even so, the right would survive to the legal personal representative, in the case of Peebles v. Oswaldtwistle Urban District Council.* (emphasis added)

Perhaps the strongest British case on point is *United Collieries Ltd. v. Simpson* [1909] A.C. 383, where the House of Lords held that the maxim did not apply to cases under the *Workmen’s Compensation Act, 1906*. It concluded that the right of the dependent of a deceased worker to claim compensation under the *Act* was transmittable to the executor. In the words of Lord Macnaughten, with the majority of the Court concurring, at 391:

With Lord M'Laren, *I put aside the semblance of argument founded on the maxim, "Actio personalis moritur cum persona."* The application of that maxim is limited to actions in which remedy is sought for a tort, or for something which involves, at any rate, the notion of wrong-doing. Liability under the *Workmen's Compensation Act* [1906] has no connection with any wrong-doing on the part of the employer... The answer to the question now in debate must, I think, depend solely on the meaning of the statute itself, gathered from its own language without the addition of anything that is not necessarily implied. (emphasis added)

Similarly, at 396, 399, Lord Shaw said that:

The truth is that this maxim "Actio personalis moritur cum persona" is of doubtful origin, has produced confusion rather than guidance in specific cases, and is used rather to dress up a conclusion already formed than as a safe guide towards a conclusion. *I agree with Lord Kinnear [of the lower court] in thinking, so far as this case is concerned, that "it has no bearing on the question of the Workmen's Compensation Act."*

I desire to express my concurrence with the terms of the judgment of Lord Kinnear in the Court below, and of Lord Collins (Master of the Rolls) in *Darlington v. Roscoe & Sons*, which case was in my opinion, rightly decided. (emphasis added)

Lord Dunedin said, at 399:

In other words I agree with Lord Kinnear when he said, "Now if there is a statutory right to a sum of money accrued, I am unable to see any ground in law for holding that it does not transmit to the representative of the person to whom it is accrued."

Retailers' Trust Co. Ltd. v. Regush and Regush (No. 2), a 1958 decision of the Saskatchewan Queen's Bench cited above, is the only case in Canada to address the maxim as it applies to claims for workers' compensation benefits. Following a work injury, the worker commenced a civil action for damages, but the trial was dismissed because the evidence did not establish any negligence on the part of the defendant employers. As part of his submission at trial, the worker argued that even if he had not been entitled to succeed in an action for damages in common law, he would nevertheless be entitled to compensation benefits under the *Workers Compensation Act*, R.S.S. 1953, c. 255. Shortly after trial and before judgment was delivered, the worker died. The administrator of the worker's estate was then substituted as plaintiff in the civil action, and appealed its dismissal. On appeal, the

Court referred the case back to the trial judge to determine whether the defendant employers were liable to pay compensation under the *Act*.

The employer contended that the maxim *actio personalis moritur cum persona* applied; hence, in view of the worker's death, they were under no liability for compensation. The Court, per Thomas J., disagreed (at 382–383), relying on *United Collieries Ltd. v. Simpson* and *Darlington v. Roscoe & Sons*. Thomas J. also cited the comments of O'Halloran J.A. in *Barker v. Westminster Trust Co.* with approval.

The Saskatchewan Queen's Bench held that the maxim *actio personalis moritur cum persona* did not apply to the worker's compensation claim because the right to compensation under that *Act* was a statutory right in the nature of a debt (at pp. 383–384):

The legislature, apparently, intended that claims for compensation under *The Workmen's Compensation Act* should be regarded as debts because sec. 11(3) provides that where a company is being wound up under *The Companies Winding Up Act*, RSS, 1953, ch. 131, claims for compensation under *The Workmen's Compensation Act* are to be included among the debts of the company and, subject to certain limits, are to be paid in priority to all other debts. Lord Shaw in *United Collieries Ltd. v. Simpson*, *supra*, made it quite clear that in his opinion the liability of the employer under the corresponding provisions of the *Imperial Statute* was in the nature of a debt, and at p. 136 stated this opinion in the following terms:

“In this sub-section it is accordingly clear that the liability to the workman is, in the circumstances mentioned, not only to be treated as a debt, but as specially preferable among debts. And the kind of thing which is thus created a debt is ‘compensation, the liability wherefor accrued before’ bankruptcy. Take another case, namely, under sub-s. 1, which provides for bankruptcy of an employer who is insured ‘in respect of any liability under this Act to any workman.’ The sub-section provides that the insurer's liability to the employer is, in the case of the employer's bankruptcy, to be ‘transferred to and vest in the workman.’

“My Lords, in view of these provisions of the statute it seems to me impossible to contend successfully that the liability of the employer was not of the nature of a debt.”

I am of the opinion that the right to compensation conferred by The Workmen's Compensation Act is a statutory right in the nature of a debt which vests in the

workman as of and from the time of the accident. In that case the cause of action would not abate and the plaintiff company, as the administrator of the estate of the deceased, would have the right to claim the compensation to which the deceased, but for his death, would have been entitled. (emphasis added)

The Respondent submitted that *Retailers' Trust Co. Ltd. v. Regush and Regush (No. 2)* and *United Collieries Ltd. v. Simpson* ought to be distinguished on the basis that they were decided in the context of legislation where employers were directly liable to pay compensation to injured workers. In contrast, under the *British Columbia Workers Compensation Act* compensation benefits are payable not by the employer, but by the Board out of a fund to which employers are required to contribute. The Respondent submitted that, on the basis of this distinction, compensation benefits granted by the Board could not be properly characterized as being in the nature of a debt against the employer; hence the maxim ought to apply.

The Appellant disagreed arguing that the distinction is not relevant. She submitted that while the notion of a link between compensation paid to a worker and payment of assessments by the employer may have been rejected in the present *Act*, the right to compensation arising from a statutory duty remains unchanged.

A similar position to that of the Respondent was advanced by dissenting judge, McDonald J., in *Barker*. Nevertheless, O'Halloran J.A. found that the maxim did not apply because the husband's right of action under the *Testator's Family Maintenance Act* was a right vested by statute, and the statutory duty came within "any other duty to be performed" in *Wheatley v. Lane*. In other words, regardless of whether or not the statutory right constituted a debt, he found that the maxim was irrelevant because the right in question was vested by statute and, following *Peebles*, the maxim does not apply to statutory rights. In *Darlington v. Roscoe & Sons*, Farwell L.J. made no mention of debt in his judgment; apparently the presence or absence of a debt was irrelevant to his conclusion. Therefore, it appears logical to assume that his conclusion would have been the same regardless of whether or not the statutory right in question constituted a debt.

Recent Canadian cases have found that claims for workers' compensation benefits are statutory rights. In *Quebec (Commission du salaire minimum) v. Bell Telephone Co.* [1966] S.C.R. 767 at 773-774, Martland J. for the Supreme Court of Canada made the following comment:

The Workmen's Compensation Act conferred upon injured employees and upon the dependants of deceased employees certain statutory rights to compensation where the injury or death resulted from an accident arising out of and in the course of the employment. *Compensation was payable not by the employer, but out of a fund administered by the Board to which employers were*

required to contribute. Viscount Haldane [in *Canadian Pacific Railway v. W.C.B.* [1919] A.C. 185 (P.C.)] (p. 191) refers to the employee's right under the Act as the result of a "statutory condition of employment", but I think it is more accurately described as a statutory right. The Act did not purport to regulate the contract of employment. What it did do was to create certain new legal rights which were to be in lieu of all rights of action to which the employee or his dependants might otherwise have been entitled at common law or by statute. (emphasis added)

This principle of the nature of workers' compensation rights was referred to by Beetz J. speaking for the Supreme Court of Canada in *Bell Canada v. Quebec (Commission de la sante et de la securite du travail)* [1988] 1 S.C.R. 749 at 763. Moreover, in *Isaac v. Workers' Compensation Board* (1994), 93 B.C.L.R. (2d) 273 at 287 (B.C.C.A.), Goldie J.A. for the British Columbia Court of Appeal said that he was "in agreement with Mr. Justice Martland's description of the worker's right to compensation under Pt. 1 of the [*Workers Compensation*] Act as a 'statutory right'".

(iv) Conclusion

The panel finds *Retailers' Trust Co. Ltd. v. Regush and Regush (No. 2)* strongly persuasive and concludes that appeals respecting workers' compensation benefits are not affected by the common law maxim *actio personalis moritur cum persona*. Regardless of whether compensation benefits are categorized as "in rem" or "in personam", it is clear that the maxim does not apply to workers' compensation matters. We therefore are not persuaded by previous Review Board panels who based their findings on the distinction between actions "in rem" and actions "in personam".

With respect to the issue of whether workers' compensation claims constitute a statutory right, we find the judgments in *Isaac v. Workers' Compensation Board* and *Quebec (Commission du salaire minimum) v. Bell Telephone Co.* strongly persuasive. Furthermore, we are unable to accept the Respondent's submission that the maxim ought to apply because of the distinction between the British Columbia legislation, and the Saskatchewan and English statutes in *Retailers' Trust Co. Ltd. v. Regush and Regush (No. 2)* and *United Colliers Ltd. v. Simpson*. We find that regardless of whether or not the statutory right to workers' compensation benefits under the *Workers Compensation Act* constitutes a debt, the maxim has no relevance because the right in question is vested by statute and the courts are very clear that the maxim does not apply to a statutory right (*Peebles*, which was adopted by the courts in *Lohnes v. Eastern Trust Co.* and *Darlington v. Roscoe & Sons*, and by O'Halloran J.A. in *Barker*).

In coming to this conclusion, we are strongly persuaded by Farwell L.J.'s judgment in *Darlington*, which was cited with approval in *Retailers' Trust Co. Ltd. v. Regush and Regush*

(No. 2). In the event that the Panel is wrong in this conclusion, we nevertheless find that the maxim does not apply because the Appellant's appeal is not an "action" (*Darlington v. Roscoe & Sons* at 230, and *United Collieries Ltd. v Simpson* at 402). We therefore conclude that under the common law the deceased worker's estate has the right to commence and/or continue appeal proceedings to the Review Board.

(b) Nunc Pro Tunc

Previous Review Board panels addressed the issue of nunc pro tunc and its applicability to the standing of an estate to continue an appeal on behalf of a deceased worker who attended the hearing but died before the panel issued its findings. The administrators or executors in those cases argued that the Review Board ought to apply the nunc pro tunc principle adopted in civil courts to issue findings retroactively effective the date of the hearing. Although not strictly speaking an issue before us, we will address it for the sake of completeness.

Nunc pro tunc is defined in *Black's Law Dictionary, 6th ed.*, at 1069, as "now for then":

A phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, i.e. with the same effect as if regularly done. Nunc pro tunc entry is an entry made now of something actually previously done to have effect of former date....

(See also John Yogis *Canadian Law Dictionary, 3rd ed.* at 151, which was cited with approval by the Ontario District Court in *Gordon v. Deputy Minister of National Revenue (Customs & Excise)* [1990] 44 C.P.C. (2d) 129 and Daphne Dukelow, *Dictionary of Canadian Law, 2nd ed.* at 817).

Generally, the principle applies in civil actions where parties to a litigation have proceeded through trial and concluded arguments, the court reserves judgment, and the plaintiff dies before judgment is entered. The court may enter the judgment nunc pro tunc as of the date of the closing of arguments. This is done to place the parties in the same position as if judgment had not been delayed by the court.

The authorities permitting this are founded on the narrow proposition that the court will not allow a claim to be defeated by an act, i.e. failing to deliver judgment forthwith, which is solely within the court's own control (*Lankenau v. Dutton* [1991] 5 W.W.R. 71 at 87 (B.C.C.A.), leave to appeal to the S.C.C. refused, (1991) 58 B.C.L.R. (2d) xxxiv, *Turner v. London & South-Western R. Co.* (1874) 17 L.R. Eq. 561 at 566, *Gunn v. Harper* (1902) 3 O.L.R. 693 at 695-696 (Ont. C.A.), *Young v. Town of Gravenhurst* (1911) 24 O.L.R. 467 at 475 (Ont. C.A.); see also *Loyie Estate v. Erickson Estate* [1994] 94 B.C.L.R. (2d) 33 at 38-41 (B.C.S.C.)). Most often nunc pro tunc is used to overcome an administrative failure of the court in the

nature of a slight or omission where there is no prejudice to the parties, rather than to cure the failing of one of the litigants (*Krueger v. Raccah* (1981) 128 D.L.R. (3d) 177 at 179-180 (Sask. Q.B.), and *Parker v. Atkinson* (1993) 104 D.L.R. (4th) 279 at 186 (Ont. U.F.C.)).

With only a few exceptions, all of the cases which permitted judgment to be entered nunc pro tunc arose in the context of an application to the court for an order. To date, only one tribunal, the Ontario Commercial Registration Appeal Tribunal, in *Re Bilodeau* [1994] O.C.R.A.T.D. No. 90, has found that it had the power to make an order nunc pro tunc. In that case, the Tribunal found that it had statutory authority under section 10(8) of the *Ministry of Consumer and Commercial Relations Act*, R.S.O. 1990, c. M.21, to make an order nunc pro tunc for the time of delivery of notice. In contrast to the courts' power to make an order nunc pro tunc, which is based on the common law, the Tribunal found its authority to issue a decision nunc pro tunc on a reading of its statute.

In two British Columbia labour relations cases, the union argued that the Labour Relations Board had the statutory power to grant an order nunc pro tunc. In both instances, however, the Board dismissed the application on other grounds, declining to address the issue directly (see *Becnor Construction Co.* [1987] B.C.L.R.B. No. 130/87 and *Expo 86 Corporation v. Theatrical Stage Employees, Local 118* [1986] B.C.L.R.B. No. 321/86, reconsideration denied [1987] B.C.L.R.B. No. 70/87). In *Expo 86 Corporation v. Theatrical Stage Employees, Local 118*, the Board concluded that:

While, for purposes of argument, the Board accepts that it *may* have the authority to make a nunc pro tunc order by way of analogy under Section 34 and 35 of the Code to avoid prejudice due to the administrative failure of the Board or to intervening external events, the Board questions whether it is appropriate to use these powers to cure, in part, the failings of one or both of the parties. (emphasis added)

In Review Board Appeal No. 911323-B, which was subsequently adopted by panels in Appeal Nos. 950917-A and 941224-A, the Review Board panel found, at 16:

The nunc pro tunc principle, in our view, does not apply to proceedings before the Review Board; the features that characterize its application are absent from Review Board proceedings.

The panel concurs with the direction taken by the Ontario Commercial Registration Appeal Tribunal and that suggested as a possibility by the Labour Relations Board of British Columbia. We find that the principle of nunc pro tunc is applicable to appeals at the Review Board in certain narrow circumstances: where the oral hearing has been held or the read and review distributed, all further investigations completed and submissions received, and all that remains is for the panel to make the decision and issue the finding.

In our view, the very purpose of administrative tribunals, that is, to be expeditious, accessible and practical, demands such an application of this principle. To require that the appeal be held in abeyance until an executor or administrator is appointed or a personal representative comes forward is wrongheaded. During the course of our research we found many decisions from a variety of tribunals who simply carried on in the face of the death of the appellant/applicant without exploring the standing question in any depth. This may be why there is so little case law to assist us.

4. Summary

We find that by virtue of the definition of “person” in the *Interpretation Act* and the word “includes” in the Section 1 definition of the term in the *Workers Compensation Act*, “person” in Section 90(1) of the *Workers Compensation Act* includes the personal representative of the deceased worker. Hence, the right of the estate to commence and/or continue an appeal to the Review Board is authorized by Section 90(1). In the event that we are wrong in this conclusion, we find that the common law applies and that the worker’s rights are not affected by the maxim *actio personalis moritur cum persona*.

Previous Review Board panels relied on the distinction between “in rem” and “in personam”, but in our opinion that distinction cannot assist in the resolution of the issue for two reasons: first, it is based on the common law doctrine that personal actions die with the party, and the maxim does not apply to workers’ compensation claims; and second, even if it were to be taken as having some applicability to such claims, the common law concept no longer has any application in British Columbia because survival of such rights is now governed by the *Estate Administration Act*.

Thus, the worker’s estate has the standing to initiate and/or continue the appeal. It follows that the widow, in her capacity as administratrix or executrix of the estate, has standing to proceed with the appeal. Before the widow can act in her representative capacity as executrix or administratrix for the purposes of an appeal under Section 90(1), she must provide proof to the Review Board of her appointment as such, in the form of a grant of probate, letters of administration, or letters of administration with will annexed, or in an alternative manner satisfactory to the Review Board.

Conclusion

The panel allows the appeal on the preliminary question of the Review Board’s jurisdiction to decide an appeal commenced or continued by a deceased worker’s estate in accordance with the above findings and reasons.

