The Right-to-Sue Executive Officers

W. Augustus Richardson*

I believe that the decision of the Appeals Tribunal in *Decision No. 516 (Dietrich et al. v. Zimmer et al.)* was wrong.

The Tribunal, with respect, erred:

1. In believing that it was bound by the decision of the Ontario Court of Appeal in *Berger v. Willowdale A.M.C. et al.* (1983), 41 O.R. (2d) 89 to conclude that executive officers and directors were excluded from the protection against civil law suits otherwise afforded employers under the Act;
2. In its interpretation of the intent of Legislature in failing to make the 1984 amendment retroactive.

THE EFFECT OF BERGER

Berger does not and never has stood for the proposition that directors were excluded from the Act. All it decided was that there could be a duty of care owed by a director to an employee of his company. That issue was completely divorced from the issue of whether a director fell within the Act.

In *Berger*, the latter issue had already been disposed of, and was not before the Court of Appeal at all.

Consider the history of the action in *Berger*.

As appears from the decision of the Ontario Court of Appeal in *Berger*, there had been an application under section 15 of the Act by one of the parties to the Board for a decision as to "whether the action is one the right to bring which is taken away by" Part 1 of the Act: (s. 15).

The Board in the *Berger* case decided that the right of action against the director was not one which had been taken away by Part 1. That decision was "final and conclusive": (s. 15).

In other words, once that decision of the Board was made, it was no longer open to any party in the action to argue that the plaintiff's right of action had been taken away by the Act. It was no longer an issue.

The only remaining *legal* issue in the civil action which thereafter proceeded was whether or not a director of a company owed a duty of care to an employee of the company of which he was a director.

The Court of Appeal applying the time honoured principles set out in *Donoghue v. Stevenson*, [1932] A.C. 562 at 580, held that a director did owe a duty of care to an employee of a company of which he was a director.

But, the fact that *at common law* a director of a company may owe a duty of care to an employee of that company, had no bearing on any subsequent section 15 applications.

The Board is not bound to follow strict legal precedent (s.80(1)), and is free to reconsider its approach and come to a different conclusion. In other words, the Board could always determine on a subsequent section 15 application on similar facts, that a director *was* an "employer" within the meaning of the Act, and hence entitled to shelter behind the defence afforded by section 8(9). So long as such a decision was reasonable, a Court would not overturn it on judicial review (which is the effect of the decision of the Divisional Court in *Ryan v. Workmen's Compensation Board* (1984), 6 O.A.C. 33).

I appreciate that Mr. Justice Cory stated in passing at pp. 98-99 of the decision that "the exclusion of the executive officers of corporations from the definition of 'employee' in the Act maintains the right of an employee against such officers". I accept that passage suggests that His Lordship thought that executive officers were indeed excluded from the provisions of the Act.

However, with respect, I do not think that he really meant to say that.

The passage is buried in a long discussion on policy. And that discussion was part of the discussion concerning whether a common law duty of care should be imposed upon the defendant director.

In law, the decision as to whether a duty of care is to be imposed in a given situation always involves a consideration of two matters: proximity and whether there are any policy reasons negativing the imposition of a duty of care, notwithstanding the existence of proximity.

It must always be remembered that in negligence it is not sufficient simply to establish that there was proximity, in the sense of the "neighbour" test proposed by Lord Atkin in *Donoghue v. Stevenson*. For once the neighbour test is satisfied, the Court still has to determine whether or not there are any policy reasons that negative the imposition of a duty of care, notwithstanding the satisfaction of the neighbour test.

As was observed by Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) at 751-52:

> . . .the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages: *First one has to ask whether*, as between the alleged wrong-doer and the person who has suffered damage *there is a sufficient relationship of proximity or neighbourhood* such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. *Secondly, if the first question is*

answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to who it is owed or the damages to which a breach of it may give rise. (emphasis added)

Hence, the observation of Cory, J.A., was more likely aimed at counsel's argument that the Court should not impose a duty of care because social policy, as evidenced by the Act, was against the imposition of such a duty. Mr. Justice Cory's response, *in effect*, was that the Act did not evidence such a social policy. Thus, there was no reason why the Court should refrain from imposing such a duty.

As well, His Lordship's comment was not a necessary element to the decision. Indeed, the earlier decision of the Board on the section 15 application rendered any comments by His Lordship on that subject moot.

DO OFFICERS AND DIRECTORS FALL WITHIN THE PROTECTION OF THE ACT?

Tribunal *Decision No. 516* deals at length with the meaning of the word "worker" under the Act.

Leaving aside the issue of the effect of the decision of the Court of Appeal in *Berger*, the Tribunal's reasoning appears to be as follows:

(a)the definition of "worker" under the Act specifically excludes "an executive officer of a corporation";
(b)when the Legislature in 1984 amended the Act so as to include from that day on, an executive officer or director within the protection afforded by the Act, it failed to make the provision retroactive. Hence, the Legislature must have believed that prior to the 1984 officers and directors were not within the Act.

Based on this reasoning, the Tribunal concludes that prior to 1984 an executive officer or director, not being a "worker" within the meaning of the Act, was not afforded any protection under the Act from a civil law suit.

I note in passing that the Tribunal reaches this decision with extreme reluctance. Indeed, on p. 7 of the decision, the Tribunal states that they would have interpreted the Act in such a way as to protect executive officers if it had not been bound by *Berger*.

Given the Tribunal's understanding of the policy underlying the Act (with which, with respect, I agree) it is unfortunate that the Tribunal concluded that executive officers or directors were excluded from the protection afforded by the Act.

Nor, with respect, do I believe that its reasoning in so concluding is unimpeachable.

In my view, there are two flaws with the Tribunal's reasoning.

First, it fails to consider the question of whether an executive officer or director might be included within the meaning of "employer" in the Act.

Secondly, it misinterpreted the effect of the 1984 amendment on the Act as it existed prior to that amendment.

EMPLOYER

The definition of "employer" in the Act is not exclusive. The definition provides that the word "employer" *includes* certain individuals and entities, but that list is not exhaustive.

In my view, it would have been open to the Tribunal to conclude that the word "employer" included an executive officer or director.

Such a definition would not in my view have been unreasonable.

The definition of "employer" in the Act certainly contemplates the inclusion of members of collective entities (i.e., the reference to permanent Tribunals or Commissions appointed by the Crown).

As well, the *Interpretation Act*, R.S.O. 1980, c. 219, s. 10 provides that:

> Every Act shall be deemed to be remedial. . . and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

Given the object of the Act as revealed by its underlying intent, purpose and rationale, it would in my view have been reasonable for the Tribunal to so interpret the word "employer" as to include executive officers and directors.

To do otherwise is to create an anomaly.

It would mean that all individual proprietorship would be included in the Act; but that once that proprietorship becomes incorporated, the officer, director, and sole shareholder, who remains the driving force of the corporate entity, is suddenly excluded from the protection afforded by the Act.

Yet, in terms of the social policies to be effected by the Act (in particular, the relationship between the "employer" and the worker, the right of the worker to receive compensation quickly, etc.), there is no reason to treat a sole proprietorship and a corporate officer differently.

Hence, it would not in my view have been unreasonable for the Tribunal to have arrived at an interpretation of the word "employer" that would include an executive officer or director. The Courts from time to time have recognized that a corporate entity for certain purposes, may simply be the alter ego of the officer, director and shareholder that animates it.

Indeed, the Divisional Court in *Ryan* upheld the decision of the Board that an executive officer or director *was* within the Act. In other words, the Court held that an interpretation of the pre-1984 Act that included an executive officer or director within the protection afforded by the Act was not so unreasonable as to require judicial intervention.

It is unfortunate that the Tribunal in *Decision No. 516* failed to take heed of the signal given to it by the Court.

EFFECT OF AMENDMENT

As noted above, the Tribunal appears to conclude that because the Legislature failed to make the amendment retroactive, that must have meant that the Legislature did not understand the pre-1984 executive officers or directors to have been covered by the Act.

The difficulty here is that such an approach is expressly forbidden by Act of the Legislature. Sections 17, 18 and 19 of the *Interpretation Act* provide as follows:

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.
18. The amendment of an Act shall be deemed not to be or to involve a declaration that the law under the Act was or was considered by the Legislature to have been different from the law as it has become under the Act as so amended.
19. The Legislature shall not, by re-enacting, revising, consolidating or amending an Act, be deemed to have adopted the construction that has by judicial decision or otherwise been placed upon the language used in the act or upon similar language.

The effect of the above-noted provisions of the *Interpretation Act* suggests that an equally appropriate approach is this: the Legislature always intended and understood the Act to include executive directors or officers; the decision of the Tribunal or the Court of Appeal in *Berger* suggests a possible misinterpretation; accordingly, so as to more clearly express the intent and will of the Legislature, the Act is amended to achieve that end; but the amendment does not in any way represent an acknowledgement that the view of the Board in *Berger* was a proper or correct rendering of the meaning and intent of the Act.

RETROACTIVITY

The long discussion of retroactivity in *Decision No. 516* is, with respect, beside the point.

It is, of course, quite true that legislation which affects the rights of individuals is not to be interpreted as having retroactive effect, unless such an intention is manifestly clear.

But in this case, that only begs the question of what were the "rights" of workers vis a vis executive officers and directors under the Act. That question was open, and had to be decided first.

The Board in *Berger* had decided that executive officers were subject to civil suit. The Board in *Ryan* decided that they were not. The Divisional Court in *Ryan* upheld the Board's right to so interpret the Act.

Accordingly, there was absolutely nothing in either the jurisprudence, or the intent of the legislature as evidenced by the 1984 amendment, which forced the Tribunal to decide the issue either way. Given the Tribunal's professed unhappiness at excluding executive officers from the Act, it is thus unfortunate that it felt that it was bound to make the decision that it did. It was not.

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Admissibility of Evidence and the Operation of the Three Week Rule: The Presumption of Irrelevance

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The Tribunal has tremendous power to determine appeal procedure and an equally extensive "discretionary" power to determine the admissibility of evidence and thereby direct the outcome of the appeal. Different limitations are imposed on the Tribunal's authority, in relation to these two distinct concerns.

Unfortunately, upon strict analysis of the operation of what is commonly referred to as the "three week rule", it would appear that this distinction is not recognized. This purely procedural rule appears to have been transformed in practice, into a general exclusionary rule of evidence. The transformation would appear to be in excess of the lawful authority of the Tribunal.

The Appeals Tribunal is referred to in legal circles as "a creature of statute", that is, the extent of power or authority to determine rights, or in this case, the privilege of workers to compensation under the *Workers' Compensation Act*, is derived from the legislation. The Tribunal has no "lawful" authority to exercise power over anyone, beyond that which has been awarded under the Act.

Under the Act, the Tribunal is neither bound to follow strict rules governing the admissibility of evidence, nor is it bound by the procedural provisions of the *Statutory Powers Procedure Act* R.S.O. 1980 c.484.

Under sections 80 and 81 of the *Workers' Compensation Act*, the Tribunal is "required" to determine the admissibility of evidence through the exercise of "discretion", to assure that the decision is based on the merits of the claim.

Section 80 is the most basic statement of principle upon which decisions with respect to the admissibility of evidence must be based:

> 80(1) Any decision of the Board shall be upon the real merits and justice of the case, and it is not bound to follow strict legal precedent but shall give full opportunity for a hearing.

A "determination on the real merits and justice of the case" presumes that admissible evidence speaks to the merits of the substantive claim, and therefore, by necessary implication, the Panel must review the evidence and determine whether it is relevant to the substantive issue or issues to be heard.

> Section 81 provides authority, only limited by the effect of section 80, 81(b) to accept such oral or written evidence as in its discretion it considers proper whether admissible in a court of law or not.

The legal concept of "discretion", requires the person authorized to hear the claim, to decide whether evidence will be accepted, on a case by case basis, without recourse to general rules. Discretion limits the Tribunal's power in that it precludes the establishment of "exclusionary rules" and allows only lawful authority to identify policy guidelines.

Basically, anything goes, within the bounds of reason and the context of the substantive claim.

The nature and extent of the Tribunal's lawful authority in relation to "process", is separate and distinct. The Tribunal has been awarded explicit power to make specific "rules" regarding the conduct of an appeal.

Under section 86k the Tribunal has authority to determine its own practice and procedure and may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers in respect thereto, and may prescribe such forms as it considers necessary.

Procedure is essentially administration of a case load though it would be naive to believe that rules establishing the structure through which a claim to benefits is assessed, will not also influence the outcome.

Somewhere between the two distinct statutory powers resides the three week rule; proposed as a purely procedural rule, but used to exclude relevant evidence.

The precedents which have been identified and published by the Tribunal as "significant decisions", provide only limited information as to the application of the procedural aspect of this rule.

The precedents merely confirm that the three week rule requires that the materials upon which the party intends to rely, and the names of any witnesses that will be called, be submitted to Tribunal Counsel, at least three weeks prior to the hearing.

Reference must be had to the standard form covering letter to the Case Description which is supplied by Tribunal Counsel. The letter outlines this rule in greater detail and indicates that the only evidence that will be admitted at the hearing, is that which is contained the Case Description. Tribunal Counsel cautions:

> Please review this material carefully. If you think the Case Description is unclear or incomplete in any way, or if you object to any of the documents being seen by the Hearing Panel, or you wish to add other documents to the Case Description you should contact. . .(the assigned Tribunal