

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**ALGAR THIESSEN**



- and -

**CARRIERE TOYOTA NWT LTD., COOPERS &  
LYBRAND LIMITED, FRED CARRIERE, WALACE FINLAYSON,  
KEN COOPER AND KEN WEAVER**

**Defendants**

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**Application by personal defendants to strike out Statement of Claim as disclosing no cause of action. Cross-application by plaintiff for leave to amend the Statement of Claim.**

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**REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES**

Heard at Yellowknife, Northwest Territories  
on July 13, 1995

Reasons filed: July 25, 1995

Counsel for the Plaintiff: Charlene M. Richmond

Counsel for the Personal Defendants: Virginia A. Schuler, Q. C.

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

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Plaintiff

- and -

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REASONS FOR JUDGMENT

1 Two applications were heard together: (1) an application by the personal defendants, Fred Carriere, Wallace Finlayson, Ken Cooper and Ken Weaver, to strike out the Statement of Claim on the ground that it discloses no cause of action as against them; and (2) an application by the plaintiff for leave to amend his Statement of Claim so as to plead the provisions of s.76 of the *Companies Act*, R.S.N.W.T. 1988, c. C-12, as against the personal defendants.

2 The Statement of Claim was filed on June 21, 1994. In it, the plaintiff claims against his former employer, Carriere Toyota NWT Ltd., unpaid wages in an amount exceeding \$85,000.00 calculated on the basis of a commission agreement. He also claims against the personal defendants, pursuant to the statutory liability for unpaid wages imposed on directors by the *Labour Standards Act*, R.S.N.W.T. 1988, c. L-1, a sum equivalent to the statutory limit of such claim. In July, 1994, the plaintiff issued a garnishee summons before judgment and served it on the bankers for the personal defendants. A sum of money was paid into court as a result.

Application to Strike Out Statement of Claim:

3 The plaintiff pleads and relies on the provisions of s.62 of the *Labour Standards Act*:

62. Every officer of a corporation is liable for the unpaid wages of the employees of the corporation, but not exceeding the equivalent of two months wages for each employee who has not been paid, and the provisions of this Act respecting the recovery of wages apply, with the necessary changes and so far as they are applicable, to the recovery of such wages from a director and other officer of a corporation that does not pay its employee's wages.

4 As I noted in my recently released reasons for judgment in Stelmaschuk v. Dean & Colburne (N.W.T.S.C. No. CV 05713; July 24, 1995), the use of only the term "officer" in the opening words of s.62, as compared to the reference to "director and other officer" later on, must be a legislative oversight. All similar legislation refers to "directors", not "officers". No issue, however, was taken with this distinction.

5 The reference to the "provisions of this Act respecting the recovery of wages" in s.62 relates to the enforcement procedure established by s.53 of the *Labour Standards Act*. An employee may complain to the Labour Standards Officer about wages owing. The Officer may investigate and then issue a certificate setting out the amount of wages owing. The employer may then appeal to the Labour Standards Board who may (i) confirm the certificate; (ii) cancel the certificate; or (iii) make a new certificate. An appeal lies to this court on any point of law raised before the Board. The certificate may be registered with this court and may be enforced in like manner as a judgment. Unpaid wages constitute a lien against the employer's property and the statute gives such liens a priority over certain other claims.

6 The personal defendants submit that the *Labour Standards Act* does not provide a private cause of action against them. And since there is no common law liability on directors for unpaid wages, then there can be no action against them. The argument is based on the view that this Act is a self-contained statute which establishes only one procedure and does not create liability enforceable through a civil action.

7 The plaintiff relies on the case of Dallas Oilfield Contractors Ltd. v. Syroteuk, [1980] 3 W.W.R. 119 (Sask. D.C.), a decision of Dielschneider D.C.J. in which he held that an employee may invoke the remedies provided by the Act or he may in the alternative launch an action for the recovery of wages in court. With respect I do not agree.

8 The *Labour Standards Act* is a comprehensive code of employment standards with a self-contained method of enforcement. It has been described as legislation enacting a broad social scheme for the benefit of employees. The enforcement mechanism is established not for the purpose of settling private disputes but to facilitate that beneficial purpose. It provides a summary procedure for recovery. The enforcement powers reside solely in the Labour Standards Officer and the Board. Under the Act, the wages found owing are a debt to the Board, not to the individual employee. The Act is an alternative to civil action. The Act does not give an employee standing to pursue a civil cause of action based on the statutory obligations created by the Act. This is the point made by numerous cases from different jurisdictions: Re Evans & Employment Standards Board et al (1983), 149 D.L.R. (3d) 1 (B.C.C.A.); Kenney v. Browning-Ferris Industries Ltd. (1988), 63 Alta. L.R. (2d) 164 (Q.B.); Hine v. Susan Shoe Industries Ltd. (1989), 71 O.R.

(2d) 438 (H.C.J.), affirmed (1994), 18 O.R. (3d) 255 (C.A.); and, Canadian Imperial Bank of Commerce v. General Wholesale Products Corp. (1991), 59 B.C.L.R. (2d) 207 (S.C.).

9 Section 71 of the Act provides that "no civil remedy of an employee against his or her employer for arrears of wages is suspended or affected by this Act". In my opinion this section reinforces my conclusion that the Act is a comprehensive code that does not either affect civil remedies or create a cause of action. The section merely preserves existing rights. I agree with the conclusion of Conrad J. in the Kenney case (noted above) that the statute creates an exhaustive remedy and does not authorize civil actions through the courts for the enforcement of the statutory obligations. The statutory remedies are distinct from civil claims. Hence, the *Labour Standards Act* does not provide a cause of action against the personal defendants in this case.

Application to Amend the Statement of Claim:

10 The plaintiff seeks to amend his Statement of Claim by adding a plea relying on s.76 of the *Companies Act*. That section states:

76. The directors of a company are jointly and severally liable to its employees for all debts, not exceeding six months wages, due for services performed for the company during the period while the directors were acting as such, but no director is liable to an action for that purpose unless

- (a) the company is sued for that purpose or a judgment is obtained against the company within one year after the debt becomes due,
- (b) an execution against the company is returned unsatisfied in whole or in part, and
- (c) the director is sued for that purpose within one year after the time he or she ceased to be such director,

and the amount unsatisfied on such execution is the amount that may be recovered with costs from the directors.

11 Plaintiff's counsel submits that s.76 imposes *prima facie* liability on directors and may not even need to be pleaded. I agree that the provision does create a liability and it is one, unlike the *Labour Standards Act* provision, that can be pursued in a civil action.

12 Defendants' counsel argued against this amendment on the basis that it is out of time since the claim was brought more than one year after the debt was due (as required by subclause (a) of section 76). I agree, however, with plaintiff's counsel that if the only complaint is based on a limitation argument, then that should not be decided on this chambers application. It should be a matter of pleading and evidence. But, in my opinion, what has been missed is that the claim against the directors is premature.

13 In Fraser & Stewart, Company Law of Canada (6th ed. 1993), there is extensive commentary on the federal legislation imposing liability on directors for unpaid wages (see pages 468 - 484). The *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, provides in s.119:

119. (1) Directors of a corporation are jointly and severally liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.

(2) A director is not liable under subsection (1) unless

- (a) the corporation has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part;
- (b) the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within six months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution; or
- (c) the corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the debt has been proved

within six months after the date of the assignment or receiving order.

(3) A director is not liable under this section unless he is sued for a debt referred to in subsection (1) while he is a director or within two years after he has ceased to be a director.

(4) Where execution referred to in paragraph (2)(a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

14 The editors note that the recovery of a judgment against the company is a condition precedent to the right to sue the directors unless one of the situations in subsection (2) applies. Even if the company has been only just sued, there must still be an unsatisfied execution returned as against the company. If the company is in liquidation or receivership then the claim must first be duly filed and proved.

15 The *Companies Act*, by use of the conjunctive "and", requires that all three conditions set out in subclauses (a), (b) and (c) of s.76 be satisfied before a director becomes liable to an action. Subclause (b) requires that execution be returned unsatisfied. Subclauses (a) and (b) are similar to subsection 2(a) of s.119 of the federal act. Indeed that is the only comparable section. There are no provisions respecting the liability of directors for wages in the case of liquidation or bankruptcy similar to subsections 2(b) and (c) of the federal act. There are however priorities created for unpaid wages by s.16 of the *Companies Winding-Up Act*, R.S.N.W.T. 1988, c. C-13.

16 In this case there is no evidence that the conditions precedent to suit, as required by s.76 of the *Companies Act*, have been satisfied.

17 Plaintiff's counsel relies on the Ontario case of Ralph v. Bieberstein (1984), 53 C.B.R. 57 (Prov. Ct.), for the proposition that the directors can be sued prior to any claim against the company being proved. But the applicable section in the Ontario statute is significantly different in that it says "a director is liable...only if" the conditions are met. With such wording I can see why the court held that proof is not a condition precedent to commencement of the action. The Northwest Territories statute, however, says that "no director is liable to an action...unless" the conditions are met. The conditions precedent apply to the commencement of an action directly. In addition, the Northwest Territories statute does not contain comparable provisions to the bankruptcy clauses found in the Ontario act and analyzed in the Ralph case.

18 The Northwest Territories provision is similar to the provision in the Manitoba *Companies Act* considered in Derbach v. Shaw, [1933] 2 W.W.R. 605 (Man. C.A.):

35. The directors of the company shall be jointly and severally liable to the laborers, servants and apprentices thereof, excluding the officers of the company, for all debts not exceeding one year's wages due for services performed for the company whilst they are such directors respectively, but no director shall be liable in an action therefor, unless the company has been sued therefor within one year after the debt became due, nor yet unless such director is sued therefor within one year from the time when he ceased to be such director, nor yet before an execution against the company has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against the directors.

19 The Court of Appeal held that the recovery of a judgment against the company is a condition precedent to the right to sue the directors. The same applies to the situation here.

20 Accordingly leave to amend the Statement of Claim is denied.

**Conclusions:**

21 I have concluded that the *Labour Standards Act* does not provide a private cause of action to the plaintiff and that the conditions precedent to the commencement of action required by the *Companies Act* have not been satisfied. Since there is no other cause of action against the personal defendants, the Statement of Claim is struck out as against them.

22 The garnishee summons before judgment is set aside. The clerk is directed to return any funds forwarded in response to the summons to the garnishee.

23 Costs normally follow the event. Counsel may make written submissions to me, within the next 30 days, if they are unable to agree.

  
John Z. Vertes  
J.S.C.

Dated this 25th day of July, 1995

Counsel for the Plaintiff: Charlene M. Richmond

Counsel for the Personal Defendants: Virginia A. Schuler, Q.C.

CV 05276

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Honourable Mr. Justice J. Z. Vertes

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