Date: 19980915
Docket: CV07687

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARGARET K. WITTE

Applicant

- and -

THE WORKERS COMPENSATION BOARD OF THE NORTHWEST TERRITORIES and THE CORPORATE BOARD OF THE WORKERS' COMPENSATION BOARD OF THE NORTHWEST TERRITORIES and JAMES O'NEIL, SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY NEILL, JUDIT PANDEV, ELLA MAY CAROL RIGGS AND DOREEN VODNOSKI

Respondents

Application for judicial review of decision of the Corporate Board under the *Workers' Compensation Act.*

Heard at Yellowknife, NT, on September 2, 1998

Reasons for Judgment filed: September 15, 1998

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE J.B. VEIT

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Respondents

REASONS FOR JUDGMENT

Summary

[1] On September 18, 1992, a bomb blast at the Giant Mine in Yellowknife killed 9 miners. At that time, Ms. Witte was the Chief Executive Officer of Royal Oak Mines Inc., which operated the Giant Mine. The dependants of six of the miners, and a miner who claims that he suffered injuries from the explosion, have sued Royal Oak Mines for damages; these individuals are the respondents. The respondents have also sued Ms. Witte personally, alleging that she personally did or failed to do various things that contributed to the death of the miners.

[2] The claims of the dependants were also registered as claims under the workers' compensation legislation. The miners were "workers" and their dependants have received compensation from the Workers Compensation Board. The WCB is subrogated to, and has an interest in, any monies recovered by the dependants in the legal proceedings. Indeed, in this case, the WCB hired a lawyer to advance the claim of the dependants of the six miners against Ms. Witte; the Board has also acknowledged that it has had confidential meetings with that lawyer. That lawyer represents the dependants of the six miners on this application, and represented those dependants at the original hearing before the WCB.

[3] WCB legislation shields one "worker" from lawsuits by other "workers" and their dependants. Ms. Witte applied to the WCB for a determination that she was a "worker",

and that she was therefore personally immune from the lawsuits initiated by the dependants of the dead miners.

[4] The WCB concluded that Ms. Witte was not a “worker” who benefited from statutory immunity but that she was deemed to be a worker for the purposes of payroll assessment.

[5] Ms. Witte now asks this court for judicial review of the WCB decision. She claims that because the Board has a direct interest in the parallel lawsuit, she has a reasonable apprehension that the Board is biassed against her. She recognizes, however, that the Board is the only tribunal that has the legislative jurisdiction to make a determination about immunity. Therefore, she proposes that the standard of review that should be applied to the Board’s decision is correctness. She claims that the Board’s decision is incorrect and irrational.

[6] The claim for judicial review is allowed.

[7] Although the decisions of the WCB about who is a “worker” would normally be protected from judicial scrutiny unless they were clearly irrational, in this case, the unusual fact that the Board has itself hired a lawyer to sue Ms. Witte puts the Board in an overt conflict of interest. Normally, where such a conflict of interest arises, the tribunal would be prevented from acting. However, in this case, because the Legislature of the N.W.T. has given exclusive jurisdiction to the Board to make decisions about who are “workers”, it is necessary for the Board to make the decision about whether Ms. Witte is a “worker”. In order to reduce, as much as possible, the sting of the conflict, the Board’s decision about whether Ms. Witte is a “worker’ must be correct. In this way, Ms. Witte cannot complain about the conflict. Although the Board will have made the decision, the decision that it makes will have been the same decision as that made by an impartial tribunal.

[8] The decision made by the Board about whether Ms. Witte is a “worker” is wrong. The Board failed to give effect to the words chosen by the Legislature of the N.W.T. when it stated that a chief executive officer was not a “worker” . . . **“for the purpose of receiving compensation”**. Ms. Witte is not asking to receive compensation. She is not therefore excluded from the application of the other portions of the Act, including the part of the act that deals with immunity. This interpretation of the statute does not produce an absurd result and does not undermine the purpose of the legislation.

Cases and authorities cited by

[9] **Applicant Witte:** *Jahnke v. Wylie* (1994), 26 Alta. L.R. (3d) 46 (C.A.);*Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionelles)*, [1993] 2 S.C.R. 756, at pp. 774 - 775; *Canadian Broadcasting Corporation v. Canada Labour Relations Board*, [1995] 1 S.C.R. 157, at pp. 193 - 194; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 590; *Hagen v. Strommer* (1998), 212 A.R. 1 (C.A.), at §12 - 18; *Alberta Union of Provincial Employees v. Alberta Alcohol and Drug Abuse Commission* (1995), 177 A.R. 1 (Q.B.), at §§20 and 22; *Yeoman v. Miller* (1991), 83 Alta. L.R. (2d) 24 (Q.B.); *Driedger on the Construction of Statutes*, 3rd ed (1994), pp. 6 - 16; *Pasiechnyk v. Procrane Inc.* (1997), 216 N.R. 1 (S.C.C.), at §46 - 49.

[10] **Respondents Fullowka et al :** *C.U.P.E. Local 963 v New Brunswick Liquor Corp.*, as found in the WCB authorities; *Canada (A.G.) V PSAC* [1993] 1 S.C.R. 941 at 963; Jones and de Villars, *Principles of Administrative Law* (2nd ed.) p. 433; *Can. Kellogg Co. v Indust. Rel. Bd. (Alta.)* [1976] 2 W.W.R. 67 at 74; *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board* (1994) 111 D.L.R. (4th) 1 at 18 (S.C.C.); *Clark v W.C.B. of the N.W.T.,* as yet unreported, Docket CV07443, issued August 24, 1998 (N.W.T. Sup. Ct.)

[11] **Respondent O'Neil:** *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp*. as found in the WCB authorities; *Pasiechnyk v Saskatchewan (Workers' Compensation Board)* as found in the WCB authorities; *O'Krane v Alcyon Shipping Co. Ltd.* (1961) 34 W.W.R. 615 (S.C.C.); *Canada (A.G.) V PSAC* as found in the Fullowka authorities; *Union des employes de service, Local 298 v Bibeault* as found in the WCB authorities; *Costanza v Dominion Canners Ltd.* [1923] S.C.R. 46

[12] **Respondent WCB:** Excerpts from the *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* (1979), 97 D.L.R. (3d) 417 (S.C.C.); *Farrell et al v. Workers Compensation Board and A.G. of B.C.* (1961), 31 D.L.R. 177; [1962] S.C.R. 48, 37 W.W.R. 39; *Pasiechnyk v. Saskatchewan (Workers Compensation Board)*, [1997] 149 D.L.R. (4th) 577; *Paccar of Canada Limited v. C.A.I.M.A.W., Local 14* (1989), 62 D.L.R. (4th) 437 (S.C.C.); *Unions de employes de services, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Bouchard v. The Workers Compensation Board of Manitoba* (1997), 144 D.L.R. (4th) 760 (Man. C.A.); *Brosseau v. Alberta Securities Commission*, [1989] 3 W.W.R. 456 (S.C.C.); *Fisher v. Manitoba (Workers' Compensation Board*) (1990), M.J. No. 413 (Q.B.) (Appealed on other grounds to Man. C.A. at 73 Man. Reports (2nd) 288 (C.A.); *A.E. Manning Ltd. v. Ontario Securities Commission* (1985), 23 O.R. (3d) 256; *Duncan v. Law Society of Alberta (Investigating Committee)* (1991), 80 D.L.R. (4th) 702 (Alta. C.A.); *Driedger on the Construction of Statutes*, Third Ediiton, Butterworths, @ page 159 - 163; *William Graff*

and Torrens Trucking Ltd. v. The Workers' Compensation Board (Alberta) (Unreported, January 6, 1988).

1. Background

a) Factual

[13] On September 18, 1992, a bomb blast at the Giant Mine in Yellowknife killed 9 miners. One Roger Warren has been convicted of setting the bomb. Six of the miners were employees of Royal Oak Mines Inc., which operated the Giant Mine; three of the miners were employees of Procon Miners Inc.

[14] Ms. Witte was the Chief Executive Officer of Royal Oak Mines Inc.; she has a contract of service with the company. Ms. Witte never requested s. 9(2) coverage, typically referred to as "optional coverage", under the Act. In accordance with the Board's then existing policy, Ms. Witte's remuneration from Royal Oak was not included in the company's payroll for workers' compensation assessment purposes.

[15] The dependants of six of the miners, and a miner who claims that he suffered psychological injuries from the explosion, have sued Royal Oak Mines for damages; these individuals are the respondents. The respondents have also sued Ms. Witte personally, alleging that she personally did or failed to do various things that contributed to the death of the miners. The misconduct alleged against Ms. Witte consists of acts or omissions that arose in the course of her employment with Royal Oak; Ms. Witte would not have any duty of care to the miners but for her employment with Royal Oak. This lawsuit was initiated on September 12, 1994.

[16] The claims of the estates or dependants of the six miners were registered by the W.C.B. to the account of Royal Oak on September 22, 1992. The six miners were found to be "workers" and their estates and dependants have received compensation from the WCB under the Act on that basis from 1992 to the present.

[17] The WCB is subrogated to and has an interest in any moneys recovered by the plaintiffs in the Supreme Court Action: section 12(4) of the Act. In this case, the W.C.B. retained, instructed and paid J. Philip Warner, Q.C. of Bishop & McKenzie to act as counsel for the plaintiffs in the Supreme Court Action. In the civil action, the plaintiffs are claiming damages of approximately $30 million.

b) Procedural

[18] By letter dated May 24, 1996 Ms. Witte made application under section 7(1) and section 7(2)(j) to the WCB for a determination of her status as a "worker" entitled to the protection of section against civil suit by another "worker" under section 12(2).

[19] By letter dated April 23, 1997 Jeff Miniely, the WCB investigator, concluded that:

1. the Six Miners were "workers in the employ of Royal Oak at the time the cause of action arose";

3. "the allegations made against Witte relate to her actions as an executive officer."

"Determination: All of the alleged acts or omissions of Witte set forth in the Civil Action related to her activities as an officer and/or director of Royal Oak." and, accordingly

4. "it is not necessary to address" whether the claims of the Six Miners are "barred to the extent that any of the alleged acts or omissions of Witte relate to her activities as a worker";

2 & 5. "Although Witte apparently worked under a contract of service for Royal Oak, her position was that of President and C.E.O. It can readily be concluded that Witte was an executive officer of a corporation in a position to guide or control the policies and purposes of the corporation within the meaning of paragraph (a) of subsection 9 (1) of the Act."

"The Board has always taken the position that there must be symmetry between compensation paid and assessment received. When section 9 is read in its entirety it would appear that the intention of the Act is to exclude executive officers from the application of the Act unless they make a specific application pursuant to subsection 9 (2)."

"Under the Act Witte had the option as per subsection 9 (2) to apply for coverage. Had she done so, and had the application been accepted, then she would have been deemed to be a worker and would then have been entitled to immunity to suit."

"Determination: Witte is not a worker of Royal Oak and the claims of the six Royal Oak miners are not statute barred."

[20] By letter dated May 22, 1997, Ms. Witte sought administrative review by the WCB of its investigator's conclusions respecting the six miners. In particular, while no objection was taken to the determination that the six miners were workers employed by Royal Oak, Ms. Witte objected to:

- the Board's investigator's determination of whether the allegations against Ms. Witte were in relation to her activities as an officer and/or director as being in

excess of the Board's jurisdiction under section 7 of the Act and, in any event, wrong in fact and law as there are no allegations pleaded against her "as a director";

- the Board's investigator's failure to determine whether the allegations against Ms. Witte's all relate to her activities as a worker and are statute barred as being a jurisdictional error;

- the Board's investigator's determination that Ms. Witte is not a "worker" and that the Act does not bar the Supreme Court Action as being based on a patently unreasonable interpretation and application of the Act.

[21] Subsequently, on June 18, 1997 Mr. Miniely also concluded that the three miners employed by Procon Miners Inc. should not be deemed employees of Royal Oak and that Ms. Witte was not immune for the Supreme Court Action so far as it is brought by the estate and dependants of the three miners. Ms. Witte did not seek administrative review of the Board's investigator's conclusions respecting the three miners.

[22] On October 22, 1997 the Corporate Board of the WCB heard submissions respecting its investigator's conclusions respecting the status of Ms. Witte and her claim to immunity from action brought in right of the six miners.

[23] On April 24, 1998, the WCB issued its decision, deciding:

Issue #1:

The Six Royal Oak Miners were workers in the employ of Royal Oak at the time the cause of action arose.

Issue #2

Witte was a worker in the employ of Royal Oak for assessment purposes at the time the cause of action arose, but she was not a worker to whom the *Act* applies.

Issue #3, #4 and #5:

We have concluded that it is not necessary for the Board to make a determination as to whether the acts or omissions of Witte set forth in the Civil Action relate to her activities as a worker or her activities as an officer and/or director of Royal Oak. It is sufficient to conclude that Witte is an executive officer of the corporation who is in a position to guide or control the policies and purposes of the corporation. For the reasons above noted, the Board has concluded that the alleged acts or omissions of Witte set forth in the Civil Action are not statute barred.

[24] The parties have indicated that the Witte decision was the first time that the N.W.T. WCB was called on to make an immunity decision.

[25] At the relevant time, Board Policy 02.03 stated, among other things, that executive officers are excluded from compensation coverage by virtue of section 9(1) of the Act and must apply for personal optional coverage to be covered by the Act.

[26] Similarly, Board Policy 02.05 provided “that because an Executive Officer of a corporation is not considered to be a worker in accordance with subsection 9(1) of the Act, an Executive Officer is not to be included in the corporation’s annual payroll report”.

[27] On May 13, 1998 Ms Witte commenced this action for judicial review of the WCB's April 24, 1998 decision.

c) Legislative

[28] The sections of the *Workers’ Compensation Act* which are of direct application here are reproduced in the Appendix.

2. Standard of Review

[29] Ms. Witte recognizes that, ordinarily, the Workers Compensation Board’s decisions about who is a worker are entitled to very great deference because those decisions are made deep within the Board’s jurisdiction and expertise.

[30] The Board, and the other parties, recognize that, if a tribunal breaches the standards of natural justice when it makes a decision, that decision will be struck down and the matter remitted to it for a fresh decision.

[31] The Board, and the other parties, recognize that, ordinarily, if a tribunal makes a decision when it is in a conflict of interest, that tribunal has committed a breach of natural justice.

[32] There is a difference between the parties about whether there is a breach of natural justice in this case. That is the first issue which must be resolved.

a) Conflict of Interest

[33] The Board, and the other respondents, argue that it cannot be said that the Board is in a conflict of interest when it is necessary for the Board to make a decision. With respect, that is confusing two different issues - the issue of conflict and the issue of necessity.

[34] There are different levels of conflict. A tribunal whose member owns 10 shares of the Royal Bank may still make a decision involving the Royal Bank on the basis that the number of shares owned is so small relative to all the outstanding shares of the bank that the conflict is minimal. If the member of the tribunal owns mutual funds which in turn owns shares of the Royal Bank, the tribunal may well have to consider if the mutual fund interest represents a material interest in the Royal Bank. If the member of the tribunal owns 5% of the issued shares of the Royal Bank, the tribunal may well feel that it is in a conflict of interest, and decline to sit.

[35] Workers Compensation Boards typically make decisions which have an impact on the Accident Fund. However, those decisions are almost exclusively decisions which require the Fund to pay an injured worker. In those circumstances, where an entity makes a decision against its own interest, there is no reasonable apprehension of bias because the entity finds against itself. In all of the cases decided by Boards and by the courts, the respondents have only been able to cite a very few cases dealing with situations where the Board is protecting the Fund from payment.

[36] The ordinary conflicts faced by Workers Compensation Boards are real conflicts. However, the Board makes decisions despite those conflicts either because it finds against the Accident Fund (thus producing no reasonable apprehension of bias) or because of necessity.

[37] The common law has always recognized that, in some cases, although it would be preferable if a tribunal did not act because of perceived partiality, a tribunal must act because there is no alternative. In recognizing such necessities, the law does not say that there is no conflict - it merely acknowledges that there is no solution to the problem presented by the conflict.

[38] What happens, however, in a case such as this one where the Board has become an active party in litigation against Ms. Witte? This is a situation, in Kerans J.A.'s descriptive phrase, where the Board was not content to wait to see if the dependants of the dead miners effected any recovery against Ms. Witte, but where the Board has gone out to "shake the tree" in an attempt to produce the fall of some money into its lap. The Board's action in finding and hiring and paying a lawyer to represent the dependants of the six miners, and privately discussing legal strategy with that lawyer, has created a real, serious, material, direct conflict between the Board and Ms. Witte.

[39] Having concluded that there is, in this particular case, a breach of natural justice, the next question is how can this breach of natural justice be redressed.

b) How to Remedy Conflict of Interest

[40] The Board says that if there is a breach of natural justice, necessity requires that the Board should, in any event, make the decision and that the resulting decision could not be reviewed except on the basis of patent unreasonableness. This means that the Board could make a seriously wrong decision which could not be reviewed.

[41] Ms. Witte advances two arguments. First, she says that the statute here contains a privative clause which specifically refers to natural justice. Therefore, she argues, the privative clause only protects those decisions untainted by breaches of natural justice. With respect, that reasoning is false. The statutory privative clause here has only codified the common law. The privative clause that applies here does not allow a court greater latitude to interfere with a decision of the Workers Compensation Board than it would have if the privative clause had not referred to breaches of natural justice. In every case involving the most comprehensive form of privative clause, a court will always be entitled to interfere with a tribunal's decision if there has been a breach of natural justice.

[42] However, the second argument advanced by Ms. Witte is more compelling: since the Board must decide the question that Ms. Witte needs answered, if the court requires that decision to be correct, Ms. Witte's reasonable apprehension of bias disappears. In the few cases cited to me in which there were lawsuits running parallel to the workers' compensation proceedings, there is no discussion of this approach; there is certainly no indication that such an approach is misguided.

[43] I accept Ms. Witte's position on this issue.

[44] Imposing the standard of correctness on the decisions of tribunals which are in serious conflict of interest respects both the doctrine of necessity and the need for independent tribunals by imposing the least interference with the jurisdiction of the conflicted tribunal.

[45] Having concluded that the Board must make a correct determination on the issue of whether Ms. Witte enjoys the same immunity as protects workers from lawsuits from their fellow workers, I must turn next to the issue of whether the Board's decision was correct.

3. Was the Board's Decision Correct?

[46] The Board decided that Ms. Witte was not a "worker" within the meaning of the Act, and therefore not entitled to immunity, but that she was deemed to be a "worker" for purposes of payroll assessment.

[47] That decision is incorrect.

[48] Interpreting legislation is a constitutional function. Parliament, or a Provincial Legislature, has passed a law. In interpreting that law, a court must respect the rights of the

legislator. Therefore, if the words used by the legislator are plain and unambiguous, the courts cannot stretch or bend or ignore the wording, or otherwise subvert the intention of the legislator.

[49] What words did the legislator use here? The words it used were plain and unambiguous. The statute begins with a definition of “worker” that is very comprehensive:

> “Worker” means a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes . . .

[50] Section 8 states that the Act does not apply to workers excluded under s. 9.

Section 9 (1) begins:

> The following persons shall not be considered to be workers **for the purpose of receiving compensation under this Act**

[51] The plain reading of the Act therefore results in the following conclusion. Every person who works under a contract of service, even though she does not engage in manual labour i.e. Witte, is a worker, except for purposes of receiving compensation. Witte is not asking for compensation. Therefore, she appears, on the plain reading of the statute, to be a worker for purposes other than receiving compensation, including for the purpose of immunity.

[52] Does interpreting the plain meaning of the words used by the legislator in s. 9(1) of the Act produce a result that is contrary to the purpose of the statute, or one which is unintelligible, absurd or totally unreasonable? No.

[53] When interpreting a statute, a court cannot merely look at the literal meaning of specific words in isolation from the wording used in the rest of the statute. Here, the words chosen by the legislator do not support the expanded construction advanced by the WCB. Some grounds for coming to this conclusion include:

- the words used by the legislator include “receiving” in reference to compensation. This is a very specific aspect of compensation and exhibits a degree of specificity that was obviously chosen, not inexorable;

- although s. 9(4) does include a reference to “workers to whom this Act applies” rather than “workers for the purpose of receiving compensation”, it is a principle of statutory interpretation that the specific prevails over the general. Therefore, the specific wording of s. 9(1) prevails over the general wording of s. 9(4);

- Part II of the Act which includes ss. 8, 9, and 12, is divided into two groupings of sections. The first grouping is headed “Application of Act” and the second is headed “Rights of Action and Subrogation”. Obviously, therefore, the legislator has treated these two groups of issues separately.

[54] However, the most important tool for interpretation arising out of the internal structure of the legislation is a brief review of the headings of the Act. That review discloses that while compensation is the major theme of the legislation, there are other themes. Notably, Part V of the act deals with medical and surgical treatment. That part includes such sections as s. 54:

> The Board, at the time of the accident arising out of and during the course of employment and after that during the disability, shall furnish or provide for the injured worker such medical aid as it considers reasonably necessary to diagnose, cure and give relief from the effects of the accident.

[55] This is clearly a purpose of the Act which has nothing to do with compensation but which has to do with the overall welfare of a worker.

[56] As the WCB itself pointed, another part of the legislation is Part VIII which is entitled Assessments. This is also an important aspect of the workers’ compensation legislation since the application of this section determines the contributions to be made by employers to the Accident Fund.

[57] In summary, on the analysis of the legislation itself, there is nothing which suggests anything except that the words chosen by the legislature mean what they say - executive officers are not workers for purposes of receiving compensation.

[58] When interpreting legislation, one should be mindful that the interpretation should not undermine the purpose of the legislation. In approaching this purposive interpretation, a court or a tribunal should begin by reminding itself of its constitutional obligation to respect the will of the legislator. Therefore, while the court or tribunal should strive for a purposive interpretation of legislation, it should obviously not, in claiming to serve the intention of the legislator, overrule specific words chosen by the legislator; in other words, the obligation to give a purposive interpretation of legislation does not allow the court or tribunal to replace the legislator’s intention - clearly expressed - with the court or the tribunal’s idea of the purpose of the legislation.

[59] In this case, the Board did not identify any purpose of the legislation that would be subverted or undermined if the interpretation of s. 9(1) of the Act were interpreted as meaning what it says. The court certainly cannot think of any such negative result.

[60] Although the Board did not identify mutuality as the reason for its determination, if there were any concern about mutuality in the application of the legislation, it would be appropriate to note that because the Board has found Ms. Witte to be a worker for purposes of assessment, it has established mutuality. In fact, it appears to have established a lack of mutuality because Ms. Witte ends up with the worst of both worlds - she has no immunity, she is not eligible to receive compensation, but her remuneration is part of the payroll for assessment purposes.

[61] In summary on the purposive interpretation, there is no basis for finding that the words used in s. 9(1) must be interpreted otherwise than according to their plain meaning.

[62] Finally, I note that the Board was referred to a decision from the Ontario Court of Appeal, *Berger* v *Willowdale A.M.C.* (1983) 145 D.L.R. (3d) 242. In that case, the court held that an employee could sue an executive officer of her corporate employer. However, the court was very clear about the reason why that lawsuit was allowed:

> An executive officer of a corporation is specifically excluded from the definition of “employee” contained in s. 1(j) of the Act.

[63] Neither the majority nor the minority opinions in *Berger* cited the definition on which they relied. However, in order to appreciate the precedential value of that decision, it is necessary to repeat the exact words of the Ontario legislation that applied in that case. The definition under that statute was:

> (j) "employee" includes a person who has entered into or is employed under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes a learner, a member of a municipal volunteer fire brigade, a member of a municipal volunteer ambulance brigade, an auxiliary member of a police force, a person deemed to be an employee under section 11, and a person who is summoned to assist in controlling and extinguishing a fire under the Forest Fires Prevention Act or who assists in any search and rescue operation at the request of and under the direction of a member of the Ontario Provincial Police Force, but where used in Part I **does not include** an out worker, or **an executive officer of a corporation** or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business.
>
> (Emphasis added)

[64] It can easily be seen that the wording in the Ontario statute is fundamentally different from the wording of the N.W.T. legislation. It stands to reason that the decision in this case must be different from the result in *Berger*. Where the Legislature of the Territories has chosen

such clear wording as that used in s. 9(1), the wording of the legislation must be respected, just as the wording used by the legislator in *Berger* was respected.

[65] In overall summary, the Board incorrectly interpreted the words “for the purpose of receiving compensation” as meaning “for the purposes of this Act”.

4. Was the Board’s Decision Irrational?

[66] If I were wrong in concluding, on the facts of this case, that the W.C.B. of the N.W.T. was bound to a standard of correctness in deciding whether Ms. Witte was an employee for the purposes of immunity, the Board’s decision should then be assessed on a standard of patent unreasonableness. To help courts interpret the term “patently unreasonable”, the Supreme Court of Canada has said that a decision will not be patently unreasonable unless it is clearly irrational. That is obviously a very high bar to review.

[67] Indeed, it is hard to imagine a situation in which a decision of a tribunal could properly be described as clearly irrational.

[68] Relying on this background meaning of the term “patently unreasonable”, I could not say, in this case, that the decision of the W.C.B. was clearly irrational. Although the Board’s decision that Ms. Witte was not entitled to immunity is seriously wrong, it is not clearly irrational. The Board has attributed some reason to its decision, even though that reason flies in the face of what the legislature has said and also fails to take into account the very broad function of the legislation.

5. Costs

[69] If the parties are not agreed on costs, I can be spoken to within 30 days of the release of this decision.

DATED at Yellowknife, NT this day of September, 1998.

D.J.S.C.N.T.

CV07687

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REASONS FOR JUDGMENT OF THE
HONOURABLE MADAM JUSTICE J.B. VEIT

APPENDIX

1 (1) In this Act

"worker" means a person who has entered into or works under contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, ...

7 (1) Subject to section 7.3, the Board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act, and the action or decision of the Board on them is final and conclusive and is not open to question or review in any court and, except where there has been a denial of natural justice or an excess of jurisdiction exercised by the Board, no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceedings in any court or be removable by *certiorari* or otherwise into any court, nor shall any action be maintained or brought against the Board in respect of any act or decision done or made by the Board in the honest belief that it was within the Board's jurisdiction. [as amended by R.S.N.W.T. 1988. c. 70 (Supp.), s. 2]

(2) Without restricting the generality of subsection (1), the exclusive jurisdiction of the Board extends to examining, inquiring into, hearing and determining

(j) whether a person is a worker within the meaning of this Act; ...

8 (1) This Act applies to all employers and workers in all industries carried on in the Territories except the employers, workers or industries designated as exempt under the regulations or excluded under section 9.

9 (1) The following persons shall not be considered to be workers for the purpose of receiving compensation under this Act:

(a) an executive officer of a corporation who is in a position of guide or control the policies and purposes of the corporation; ...

(2) Notwithstanding subsection (1), the Board may deem a person mentioned in subsection (1) to be a worker for the purpose of receiving compensation under this Act, if the person is specifically named in the

application and the actual rate of remuneration is set out in the application or the Board is satisfied that the actual rate of remuneration exceeds the Year's Maximum Insurable Remuneration for the year to which the application relates and the appropriate assessment is paid to the Board.

(4) The approval of an application under subsection (2) is effective until December 31 next following but the Board may at any time revoke its approval of an application under sthis section, and upon that the persons referred to in the order of revocation cease to be workers to whom this Act applies as at the effective date of the revocation, 1997(1),c.7,s.10; 1985(1),c.4,s.9; 1986(2),c.8,s.5.

12 (2) This Act and the regulations are in place of all rights and causes of action, statutory or otherwise, to which a worker or his or her legal personal representative or dependants are or might become entitled against

(a) the employer by whom he or she was employed at the time of the accident, or

(b) any worker in the employ of such employer,

by reason of personal injury to or the death of the worker caused by an accident to the worker that arises out of and in the course of his or her employment, and no action in respect of such personal injury or death lies against any employer or worker mentioned in paragraph (a) or (b).

12 (4) Where an accident happens to a worker in the course of employment and compensation under this Act is paid in respect of the accident and the circumstances of the accident are such as to also entitle the worker, his or her legal personal representative or his dependants to an action against a person other than a person mentioned in paragraph 2(a) or (b), the Board is subrogated to the cause of action of the worker, his or her legal personal representative or his or her dependants against such other person for or in respect of the personal injury to or death of the worker.

66 (2) Every person rendering service to a corporation, wherever and however incorporated or constituted, under a contract of service, written or oral, express or implied, whether that person is or is not a member, officer or executive of the corporation, and whether or not the corporation is or is not under legal obligation to pay such person any remuneration, shall be deemed to be a worker employed by the corporation and shall be included on the payroll of the corporation...

Section 7.3 (added in 1988, referred to in section 7(1)) has no application in this case.