

The Impact of the Charter of Rights and Freedom on Workers' Compensation Legislation

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Article abstract

La Charte canadienne des droits et libertés prévoit l'égalité de tous devant la loi. L'auteur commente les conséquences de certains principes immuables de la Charte par rapport aux législations sur les accidents du travail. Concrètement, peut-on limiter ou refuser le droit de recours d'un travailleur accidenté, face à son employeur ? L'auteur aborde cette question à la lumière de l'arrêt *Piercey c. General Bakeries Limited et al*, rendu par la Cour suprême de Terre-Neuve.

The Impact of the Charter of Rights and Freedom on Workers' Compensation Legislation

by

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*La Charte canadienne des droits et libertés prévoit l'égalité de tous devant la loi. L'auteur commente les conséquences de certains principes immuables de la Charte par rapport aux législations sur les accidents du travail. Concrètement, peut-on limiter ou refuser le droit de recours d'un travailleur accidenté, face à son employeur ? L'auteur aborde cette question à la lumière de l'arrêt *Piercey c. General Bakeries Limited et al*, rendu par la Cour suprême de Terre-Neuve.*

Workers' compensation legislation which restricts the right of an injured worker and his dependents from instituting a civil action for damages arising as a result of a work-related accident, has been challenged on the basis that such legislation is in violation of the Charter of Human Rights and Freedoms (the Charter).

In Ontario, the attempts have been unsuccessful. For example, in *Re Terzian et al. and Workmens' Compensation Board* (1983), 148 D.L.R. (3rd) 380, the Ontario Divisional Court held that the provisions in the *Ontario Workers' Compensation Act* which restricted an employee's right of action for damages did not contravene section 7 of the Charter which provides that :

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

It was the decision of the Divisional Court that workers' compensation legislation which took away the right to bring an action for damages is not a matter which falls within the meaning of

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“security of the person” nor does it deny any other “charter-protected right otherwise than in accordance with the principles of fundamental justice”.

In September 1986, the decision of the Supreme Court of Newfoundland in the case of *Piercey v. General Bakeries Limited et al.* (1986), 31 D.L.R. (4th) 373, provided a major victory for the proponents of removing the restrictions in workers’ compensation legislation on instituting a private tort action. The *Piercey* case was commenced by the widow of a worker who was killed in the course of his employment. His employer, the defendant General Bakeries Limited, was a registered employer under the *Workers’ Compensation Act* of Newfoundland (the *Act*). The Workers’ Compensation Commission awarded Mrs. Piercey the sum of \$37,000, after which she commenced an action and claimed that provisions of the Act, namely sections 32 and 34, deprived her of a right guaranteed by section 15 of the Charter.

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Section 32 of the Act takes away from a worker (or a dependent) the right to sue his employer for damages as a result of injuries sustained by him in the course of his employment. The only right to compensation is found in the Act, which precludes any statutory or common law right the worker or his dependent may have otherwise had. Section 34 of the Act gives the Commission the exclusive jurisdiction to hear and determine an individual’s claim under the Act. In other words, the Act empowers a statutory tribunal, in place of a court of law, to determine the entitlement of an injured worker or his dependent to compensation and to “fix the amount of compensation within the maximum sum provided under the Act regardless of the magnitude of the loss suffered”.

Section 15 of the Charter (the *equality* section) provides :

“15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.

The Court held that sections 32 and 34 did in fact violate section 15 of the Charter, but before going into the reasons for this decision, it should be noted that Mrs. Piercey’s action failed due to the finding of the Court that her cause of action, i.e. the date of the death

of her husband, arose prior to the date section 15 of the Charter came into force. The Court held that section 15 of the Charter could not apply retrospectively. Ordinarily, if the issue of retrospectivity is decided against the plaintiff, the case will not proceed further with respect to the substantive argument, i.e. the constitutional validity of challenged sections of a statute. In this case, the Court was requested to rule on the Charter issues raised in the case as it would affect many similar cases awaiting adjudication on the constitutionality of workers' compensation legislation.

316 Mr. Justice Hickman held that sections 32 and 34 did indeed infringe upon and deprive the plaintiff of her rights guaranteed under the Charter. These sections discriminate against workers and their dependents as a class of persons by denying them equality, both before and under the law, and the equal protection and equal benefit of the law insofar as they are denied their *day in court*, a remedy which is available to all other Canadians who seek damages for their injuries suffered as a result of another's negligence.

Although the equality right in the Charter encourages the courts to strike down discriminatory legislation, there is a *saving* provision in the Charter which may be invoked to uphold legislation which *prima facie* infringes any rights guaranteed under the Constitution. If it can be shown that the legislation which limits or denies a fundamental right is "reasonable and demonstrably justified in a free and democratic society", such legislation will be upheld.

In the *Piercey* case, Mr. Justice Hickman held that a workers' compensation scheme which restricts the rights of injured workers or their dependents from bringing an action in the courts for damages arising out of injuries sustained in the course of their employment is unreasonable and not demonstrably justified. Mr. Justice Hickman stated that

"The legislation could have provided a worker and his dependents with the right of speedy recovery of compensation benefits to be fixed by a board regardless of fault at the same level now provided in the Act *without eliminating the right to pursue an action in the courts against a tortfeasor*". (emphasis mine)

In other words, the objectives of a workers' compensation scheme, i.e. to provide a minimum level of benefits available to injured workers or their dependents on a no-fault basis, could be main-

tained without depriving them of the right to commence an action in the courts for the purpose of recovering damages in excess of the maximum compensation provided for under the Act. In support of this position, Mr. Justice Hickman referred to section 33 of the Act which, in certain situations, gives the injured worker or his dependent the right to receive compensation *and* commence an action in the Courts. The fact that all the provinces have similar restrictions and that specific benefits of a workers' compensation scheme accrue to workers and their dependents was not, in the Court's view, sufficient, to justify the restrictions.

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Given the serious implications of Mr. Justice Hickman's decision, the matter has been referred to the Newfoundland Court of Appeal. It is the writer's opinion that this issue will in all likelihood be heard by the Supreme Court of Canada because it raises the question of the constitutional validity of workers' compensation legislation in other provinces which contains provisions restricting the right of an injured worker or a dependent to bring a tort action. The decision of the Newfoundland Court of Appeal, or perhaps the Supreme Court of Canada, will most likely emerge as the leading authority on this issue.

The questions which have been referred to the Court of Appeal are :

1. Does section 15(1) of the Charter apply to causes of action arising prior to April 17, 1985 ?
2. Are sections 32 and 34 inconsistent with section 15(1) of the Charter ?
3. If sections 32 and 34 of the Act are inconsistent with section 15(1) of the Charter, are sections 32 and 34 of the Act saved by section 15(2) of the Charter ?
4. If sections 32 and 34 of the Act are inconsistent with section 15(1) of the Charter and are not saved by section 15(2) of the Charter, to what extent, if any, can such limits on the rights protected by section 15(1) of the Charter be justified under section 1 of the Charter and thereby rendered not inconsistent with the Constitution Act, 1982 ?

The main proponent for upholding the validity of the Newfoundland legislation is the Attorney General of Newfoundland, however, several interested parties have been given standing to present written and oral argument in this matter including the Canada Labour Congress, the Canadian Manufacturers' Association and provincial workers' compensation boards.

Question 1 deals with the retrospective application of section 15 of the Charter and it is most likely that the Court of Appeal will confirm that section 15 was intended to operate prospectively only.

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On the remaining questions, only 2 and 4 need be addressed, namely, whether sections 32 and 34 of the Act are inconsistent with section 15(1) of the Charter, and if so, whether sections 32 and 34 are reasonable limits under section 1 of the Charter.

Generally, the position taken by all the intervening parties, with the exception of Shirley Piercey (the dependent of a deceased worker who, it is argued, is in expectation of increased economic gain as a result of being unable to bring her case before the courts), is that workers' compensation legislation is not discriminatory against workers or their dependents and, therefore, sections 32 and 34 are not inconsistent with section 15(1) of the Charter. Alternatively, if sections 32 and 34 are inconsistent with section 15(1) of the Charter, then any such inconsistency can be demonstrably justified as a reasonable limit in a free and democratic society under section 1 of the Charter.

In support of their position, the intervening parties have outlined the various social, economic and legal factors which surround this issue and when analysed it becomes difficult to accept the reasoning and justification given by Mr. Justice Hickman for his decision. The following summary of the argument presented by the Canada Labour Congress (the *CLC*) provides a good example in this regard.

The *CLC* takes the position that the replacement of the tort action by a workers' compensation scheme does not constitute discrimination against workers and their dependents. It argues that workers and their dependents, being the class of individuals who are allegedly the subject of discrimination, are not adversely affected by

workers' compensation schemes, but, in fact, benefit from such legislation.

Whether any legislation *adversely affects* a class of individuals subject to its provisions, i.e. by denying them their equality rights, it is necessary to have regard to the entire legislative scheme. The CLC has outlined the history and rationale which led to the development of comprehensive compensation schemes in Canada.

Prior to the enactment of workers' compensation legislation, it was evident that the tort system disadvantaged workers in several respects. For example :

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1. In a tort action, a worker was required to prove fault, i.e. that his injury was caused by the negligence of his employer. Further difficulties arose for the injured worker through the application of such legal principles as contributory negligence, vicarious liability and voluntary assumption of risk.
2. Even if successful in a tort action, a worker was often without redress in enforcing a judgment where the defendant employer was insolvent, uninsured or ceased to carry on business.
3. The inherent delay in a tort action often proved detrimental to the worker's financial well-being.
4. A large number of work-related injuries are brief in duration and pursuing a tort action, with its inherent delay and costs, was simply not viable.
5. A tort action is adversarial and the employee/employer relationship was often jeopardized.

The CLC points out that several Royal Commissions and Inquiries in Canada (and in other industrialized countries) have studied this question and their findings have prompted and formed the basis of legislative changes. The deficiencies of the pre-existing tort system were overcome by its replacement with a comprehensive compensation scheme from which workers and their dependents obtained significant advantages. For example :

1. Compensation for any work-related injury or disease is provided to the injured worker (or in the event of death to a dependent) on a no-fault basis.

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2. A work-related injury or disease is presumed to be compensable under the Act unless the contrary is shown. Compensation is received promptly and all reasonable inferences are drawn in favour of the worker.
3. Provision is made for rehabilitation, education or retraining as required by any injured worker.
4. Provision is made for medical aid in addition to any compensation including medical, dental, surgical and nursing services and medical apparatus such as braces and prosthesis.
5. A statutory obligation is imposed on employers to notify the workers' compensation commission of any work-related injury or disease and to allow access to its premises in the investigation of any claim.

When weighing the above factors, the CLC argues that workers and their dependents who are subject to the provisions of workers' compensation legislation, and in the case at hand the *Workers' Compensation Act* of Newfoundland, are not discriminated against nor adversely affected when compared to the class of individuals who are required to pursue a tort action for injuries sustained outside the workplace.

In the event the legislation is found to be discriminatory against workers and their dependents, the CLC argues that such discrimination is demonstrably justified as a reasonable limit under section 1 of the Charter. A limitation on a right guaranteed by the Charter is demonstrably justified where it can be shown that the objectives served by the challenged legislation relate to pressing and substantial concerns and the means to obtain those objectives are proportionate to them.

It is the CLC's position that workers' compensation legislation was enacted to overcome the inability of the tort system to deal with the special problems surrounding compensation for work-related accidents or disease. There was, and still remains, a pressing and substantial need to develop and implement a system of compensation specific to the special needs of the injured worker and his dependents. In fact, the CLC lends evidence to support its position that,

". . . it would have been irrational to retain the tort system, together with all its deficiencies, when designing an entirely different

system of compensation for workplace accidents and disease, especially when it was the tort system itself which caused and gave rise to the very pressing and substantial concerns which led to the enactment of workers' compensation legislation across the country".

The thrust of the argument presented by the CLC appears to be that the development and implementation of workers' compensation schemes was a step forward in affording protection to injured workers and their dependents. The replacement of the tort action with workers' compensation was a rational response and the only reasonable alternative available to the legislatures upon consideration of the economic and political realities in an industrialized society. To revive the tort action in this area would not only be illogical but a step backward.

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Whether the challenged provisions of the workers' compensation legislation violates the Charter can only be answered by the Courts. The arguments presented by the intervening parties are cogent and supported by evidence which will make it extremely difficult to rule in favour of reviving the pre-existing tort system in this instance. The consequences of so doing would, no doubt, be extensive and damaging not only to the interests of workers and their dependents, but to employers as well.

The matter has been heard by the Newfoundland Court of Appeal and the decision should be rendered within a short time. When this decision will be known, we will provide some comments in this regard.

May 12, 1987