CA 79 001

IN THE COURT OF APPEAL

FOR THE NORTHWEST TERRITORIES

THE COURT:

THE HONOURABLE MR. JUSTICE MORROW
THE HONOURABLE MR. JUSTICE LAYCRAFT
THE HONOURABLE MR. JUSTICE HARRADENCE

BETWEEN:

THE NORTHWEST TERRITORIES PUBLIC SERVICE ASSOCIATION AND THE PUBLIC SERVICE ALLIANCE OF CANADA

Respondents
(Plaintiffs)

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES AND THE GOVERNMENT OF THE NORTHWEST TERRITORIES

Defendants

- and -

PATRICIA FLIEGER AND ROBIN BATES

Appellants

REASONS FOR JUDGMENT

OF THE HONOURABLE MR. JUSTICE LAYCRAFT

The Appellants, Patricia Flieger and Robin Bates, respectively the Chief of Legal Services and Director of Personnel of the Government of the Northwest Territories, appeal their convictions for contempt of Court. They were convicted on December 12, 1978 after a nine day hearing and were each fined $500.00. The learned trial Judge Disbery J. filed extensive Reasons for Judgment containing his findings that they had aided and counselled the breach of an undertaking given by counsel to

Labour law - Industrial disputes - Contempt proceedings - Breach of injunction

Tallis J. of the Supreme Court of the Northwest Territories during the hearing of an application for an interim injunction on March 15, 1978.

The convictions arise out of a complex labour dispute between the Territorial Government and The Northwest Territories Public Service Association. The Association and the Government are parties to a collective agreement dated August 5, 1976 entered into pursuant to the terms of the Public Service Ordinance R.O.N.W.T. 1965 Ch. 9. Among the terms of this agreement was Article 40 which provided:

" ARTICLE 40

JOINT CONSULTATION

40.01 The Employer and the Association acknowledge the mutual benefits to be derived from joint consultation and are prepared to enter into consultation on matters of common interest.

40.02** The following terms and conditions of employment will not be changed without prior consultation with the Association:

(a) Settlement Allowance

(b) Removal Expenses

(c) Rental Rates and Rental Conditions

(d) Ration Policy

(e) Duty Travel Expenses

(f) Provision of Work Clothing and Uniforms

(g) Safety and Health

(h) Education Leave

40.03** When any of the subjects in clause 40.02 are modified by the Employer the changes will be communicated, to all employees that are affected, within thirty (30) days from the date that consultation took place with the Association."

The reference in the clause to "Rental rates and Rental Conditions" refers to subsidization of housing expenses of public service employees by the Government designed to equalize their northern living costs with such costs in other parts of Canada. The Government negotiators took the position that there were two classes of subjects in the collective agreement: those which were terms of the agreement which could not, of course, be changed without the concurrence of the Association and those in Section 40 upon which the Government's obligation was merely to consult with the Association. After such consultation, the Government felt it could, if it desired, change those items by unilateral action.

In January, 1978 the Association served notice upon the Government to commence negotiations for a new agreement to replace the agreement of August 5, 1976 which was to expire on March 31, 1978. Among the changes to the agreement sought by the Association were changes to Article 40 which would make each of the items a matter of agreement rather than merely a subject for joint consultation. A preliminary exchange of correspondence set March 6, 1978 for the commencement of discussions. In one letter, Bates who was the chief negotiator for the Government proposed that the meeting on March 6, 1978 deal with the "joint consultation items".

At the meetings which commenced on March 6th Bates asked to proceed with the joint consultation matters; the association stated that all talks were negotiations and declined to classify discussions on these subjects as merely consultation. After discussion the Government negotiators left the meeting. During

the next three days there were various attempts to resolve these preliminary difficulties and to deal with non-monetary items.

On March 10th, Bates tabled two letters dated March 9 and March 10, in which the Government, apparently taking the position that there had been joint consultation, gave notice of a number of changes to the items in Article 40. The first letter notified the Association that, effective April 1, 1978, the management and direction of the Government's staff housing program would be transferred to The Northwest Territories Housing Corporation, which thereafter would assume full responsibility for the establishment of rental and utility rates and for adjustments to the private accommodation allowance. The second letter detailed a number of changes to the various matters in Section 40-02. One group of such changes was to increase rental and utility charges for staff housing. The monthly charge including rent, electricity, heat and water for a 1250 square foot three bedroom home, for example, was to increase from $220.50 to $303.00.

After the letters were tabled, Bates contended that rental rates and conditions were not proper matters to be included in a collective agreement. The Association's negotiators relied upon the definition of "Collective Agreement" in Sec. 42(1)(a) of the Public Service Ordinance which provides:

> "(a) 'collective agreement' means an agreement in writing entered into pursuant to this section between the Commissioner and an employees' association respecting terms and conditions of employment and related matters and shall be deemed to include any award made by an arbitrator".

The Association contended that rental rates and conditions

of staff housing was a "related matter" to the terms and conditions of employment. When no agreement was reached on this difference, the Association then sought to have the dispute arbitrated under Article 37 of the Collective Agreement. The Government negotiators, however, stated that the question whether rental rates and conditions could be included in the Collective Agreement was not arbitrable.

After the meeting of March 10, the Association consulted counsel who telexed Bates on March 12 that the two letters of March 9th and 10th "constituted flagrant and abusive breaches" of the collective agreement. The same rhetoric is contained in a Statement of Claim issued by the Association on March 13 in The Supreme Court of the Northwest Territories. In that action the Association sought a declaration that the Commissioner and the Government "are not entitled to breach the Agreement" and an interim and permanent injunction restraining breaches. The terms of the injunction sought were to restrain:

> "the Defendants, and each of them and each of their successors, agents, servants, any person acting under their instructions, and any other officers thereof or any other person having notice of such order from:
>
> (i) authorizing, counselling, instructing, persuading, inducing or procuring the breach of the terms of the collective agreement in any respects previously referred to.
>
> (ii) Authorizing, counselling, instructing, persuading, inducing or procuring, the breach of the terms of the Public Service Ordinance in any respects previously referred to.
>
> (iii) Ordering, aiding, abetting, counselling, procuring or encouraging in any manner whatsoever, either directly or indirectly, any other person to commit the acts as previously set forth.

(iv) Implementing and enforcing the terms of the letters as referred to in paragraph 6 herein on the dates mentioned therein."

The first three clauses in the proposed injunction assume that to implement unilaterally the changes set forth in the letters of March 9 and 10th was a breach of the agreement. That was, of course, the very point in dispute. The only clause which would have a specific effect would be the 4th clause which would restrain implementation of the changes.

The negotiators met again on March 14. As a result of the discussions on that day, Bates gave the Association a letter which stated:

"This is to confirm that at our meeting this morning I

"1. withdrew from the bargaining table my letter dated March 9; and

"2. undertook to inform all employees that none of the matters outlined in my letter dated March 10 will be implemented until a new collective agreement has been concluded.

"It is my hope that this letter removes any apprehension that might unintentionally have been created, and that we can return to our discussions.

"Yours sincerely,

"'Robin Bates'
"R.H. Bates,
Chief Negotiator,
Government of the Northwest Territories"

On March 15, Counsel for the parties appeared in Chambers before Tallis J. on the Association's application for the interim injunction. Miss Flieger and Mr. Stindor Kumar Lal appeared for the Commissioners and the Government. Mr. James Scott appeared for the Association. Each side moved to have portions of the affidavits filed by the other stricken from the record. During the course of the discussion Tallis J. pointed out that even if the action, as framed, was carried to its conclusion, that action would not determine whether rental rates and conditions could be included in the

collective agreement. Moreover the relief claimed did not include compelling an arbitration to be held.

During the hearing, the letter of March 14 was referred to as an "undertaking". Discussion ensued as to whether, with the undertaking, the Court need proceed with the application for an interim injunction. As often happens in such cases all counsel and the Court itself made various attempts at stating and re-stating the "undertaking" to cover eventualities which might occur. Some of these attempts at re-statement were regarded as significant by Disbery J., and I will consider them later. In due course, however, the parties felt the undertaking was in a form satisfactory to them, and the hearing was adjourned. The formal order which incorporated the undertaking states:

> "IT IS HEREBY ORDERED AND ADJUDGED that this matter be and the same is hereby adjourned sine die upon the undertaking of the solicitor for the Defendants that the Defendants or either of them will refrain from implementing or making any changes in those items in Article 40-02 of the Collective Agreement dated the 5th day of August A.D. 1976 which is Exhibit '1' to these proceedings until such time as the arbitrability of the issue is determined. The issue in this matter is whether or not the items in Article 40-02 of Exhibit '1' to these proceedings are matters properly within the scope of the collective bargaining."

The undertaking set out in the formal order does not limit the parties to any particular mode of determining how the issue between them was to be determined. That issue was: are the items in article 40-02 properly within the scope of collective bargaining. The preliminary matter to be determined was whether the issue was arbitrable. Neither point could be resolved by the action since it was not, as counsel admitted before Tallis J., aptly framed for that purpose. Other references to the resolution of these matters were to a determination by some other undefined tribunal or by the negotiation of the parties

themselves.

One other mode of determining whether the issue was arbitrable was mentioned by counsel for the Association at page 45 of the transcript of the hearing before Tallis J. In discussing why the Association's action did not seek the appointment of arbitrators, counsel said he had found that arbitration polarizes the issues. He then said:

> "And my Lord ... it might well be that the matter is not one that can be negotiated or settled by the Courts. It may well be that it is a legislative matter."
> (Emphasis added)

This method of determining the matter was in fact under consideration. Soon after the action was commenced, Bates had mentioned to the Executive Committee on Legislation of the Executive Council the possibility that the problem be ended by the enactment of legislation. Once the hearing was concluded this alternative was discussed further. At a meeting of the Executive Council held shortly after the hearing, Flieger stated her opinion that the order of Tallis J. in no way restricted the power of the Territorial Legislature to enact an Ordinance removing the subjects in Article 40-02 from the area of collective bargaining. Mr. Bates advised the committee to recommend such legislation.

In April the parties again commenced to negotiate. On the issue of rental rates and conditions, Bates pointed out that legislation to remove that matter from bargaining was a course open to the Government. On May 12, he handed the Association's negotiators a statement for signature which

provided for their agreement that rental and utility rates, rental conditions and private accommodation allowances would not form part of any collective agreement. He stated that if they signed the document, bargaining would continue but not otherwise. When the Association's negotiators refused to sign the statement he told them that the Government would proceed immediately to enact legislation removing the disputed items from the list of subjects which could be included in a collective agreement. All parties were aware that the Territorial Legislature was then in session. The Government negotiators then left the meeting. Again Bates and Flieger met with the Executive Committee on Legislation of the Executive Council. Miss Flieger repeated her opinion that the order of Tallis J. did not prevent the Assembly from enacting legislation. Mr. Bates recommended that this course be taken and the Executive Committee accepted his recommendation.

Miss Flieger returned to her office following the meeting and instructed a member of her legal staff to draft the legislation by which the subject of rental and housing subsidies would be excluded from collective bargaining and from inclusion in any collective agreement. The legislation, Bill 65 for 1978, was read for the first time on May 16. Entitled "An Ordinance to Amend The Public Service Ordinance", it provided:

> "1. Section 42 of the Public Service Ordinance is amended by adding thereto at the end the following subsection:
>
> "'(7) No collective agreement shall deal directly or indirectly with

"'(a) the rents payable by employees or any other conditions of tenure of premises let or leased to them by, or held by them under licence from, the Commissioner, or

"'(b) payments to or in respect of employees relating to owner-occupied premises or premises rented or leased from persons other than the Commissioner.'

"2. This Ordinance shall come into force on a day to be fixed by order of the Commissioner."

On the day the bill was introduced into the Legislative Assembly the Association caused Flieger, Bates and others who are not parties to this Appeal to be served with notice of an application that they show cause why they should not be cited in contempt of Court:

> "in that the Defendants or each of them their servants agents or employees herein:
>
> "(a) attempted to implement or make changes in those items in Article 40.02 of the Collective Agreement dated the 5th day of August, A.D. 1976 which is Exhibit '1' to these proceedings until such time as the arbitrability of the issue is determined."

The Notice further stated:

> "... it is alleged that the undertaking given to this Honourable Court and the order based upon such undertaking has been breached by the Defendants or each of them, their servants, agents or employees."

As Disbery, J. observed, this notice of Motion is "skeletal" in spelling out what actions of Flieger and Bates had breached the undertaking given to the court. What is clear, however, is that the complaints against them were that by some means they had made an attempt to "make changes <u>in those items</u> in article 40-02" or had carried out the actual implementation of such changes.

At a subsequent point of the proceeding and without any demand therefore being made, counsel for the Plaintiffs caused particulars of the actions complained of to be served on the Defendants. The particulars of the offences alleged against Flieger were:

"(1) That having knowledge of the undertakings of yourself, and Stien Lal, solicitors for the Commissioner of the Northwest Territories, the Order based thereon, you did actively, knowingly particinate in formulation of an amendment to the Public Service Ordinance, S. 42(7) contrary to the terms of the said undertaking and Order without proceeding to bring the matter on before the Court beforehand or at all.

"(2) That having knowledge of the undertaking of yourself and Stien Lal, solicitors for the Commissioner of the Northwest Territories and the Order based thereon, you did participate in the creating, drafting, re-drafting, counselling, formulation, discussion and recommendation of passage of those changes in Article 40-02 of the Collective Agreement dated the 5th day of August, A.D. 1976 which is Exhibit '1' to these proceedings, prior to and without determining the arbitrability of the issue. The issue of this matter being whether or not the items in Articles 40-02 of Exhibit '1' to these proceedings are matter properly within the scope of collective bargaining.

"(3) That you knowingly and actively counselled the Commissioner and or members of the Council of the Northwest Territories, directly or indirectly, in such a manner as to cause them to pass the amendment to the Public Service Ordinance, S. 42(7) without firstly complying with the terms of the said undertaking and Order.

"(4) That you knowingly participated in or supervised directly or indirectly, the creating, drafting, re-drafting, discussion and passage of an amendment to the Public Service Ordinance, S. 42(7) without first complying with the terms of the said undertaking and Order.

"(5) All of these matters having been done in your capacity as Chief of Legal Services, Government of the Northwest Territories, Yellowknife, N.W.T.

"(6) All of these matters having been contrary to the undertaking and order aforesaid."

Against Bates, the particulars specified:-

"(1) That having knowledge of the undertakings of Patricia Flieger, Stien Lal, solicitors for the Commissioner of the Northwest Territories, the Order based thereon, you did actively, knowingly participate in formulation of an amendment to the Public Service Ordinance, S. 42(7), contrary to the terms of the said undertaking Order, without proceeding to bring the matter on before the Court beforehand or at all.

"(2) That having knowledge of the undertakings of Patricia Flieger, Stien Lal, solicitors for the Commissioner of the Northwest Territories and the Order based thereon, you did participate in the formulation, discussion and recommendation of passage of those changes in Article 40-02 of the Collective Agreement dated the 5th day of August, A.D. 1976 which is Exhibit '1' to these proceedings, prior to and without determining the arbitrability of the issue.

"The issue of this matter being whether or not the items in Article 40-02 of Exhibit '1' to these proceedings are matter properly within the scope of collective bargaining.

"(3) All of these matters having been done in your capacity as Director of Personnel and during collective bargaining.

"(4) All of these matters having been contrary to the undertaking and Order aforesaid."

The hearing of the motion to cite for contempt commenced before Disbery J. on July 13, 1978 with counsel for the Association functioning as prosecutor. The hearing occupied nine sitting days. On December 12, 1978 Disbery J. found Flieger and Bates guilty of contempt of Court and fined each $500.

In his Reasons for Judgment, after detailing the facts, Disbery J. analyzed the nature and effect of an undertaking to the Court and concluded that a superior Court exercises a summary punitive and disciplinary jurisdiction over its officers. He cited *Geoffrey Silver & Drake v. Baines* (1971) 1 Q.B. 396, *Re Grey* (1892) 2 Q.B. 440 and *Re Hilliard; Ex Parte Smith* (1845) 2 Dow & L 919; 14 L.J.Q.B. 225 and a number of other authorities. He stated that a solicitor's undertaking to the

Court is the personal promise and responsibility of the Solicitor unless the Solicitor expressly limits his personal role in the undertaking. He reviewed the constitutional aspects of the problem since the interpretation of the undertaking urged by the Association would prevent the executive and legislative branches of the Territorial Government from receiving advice from its civil servants and from enacting legislation. After discussing the role of each branch of the government he said:

> "The undertaking is embodied in and forms part of the order of Tallis J. and such is an order of this court made in the exercise of its judicial function. Neither the federal Minister of Indian Affairs and Northern Development nor the commissioner, nor the Executive Committee of the Council, nor any of the deputies, directors, chiefs and other bureaucrats in the service of the Territorial government has any power or authority to interfere with the order or its enforcement. Their duty is not to ignore the order but to obey it."

He then found that the action of Bates in recommending that legislation be enacted and the actions of Flieger in supervising and instructing her juniors to draft and redraft the legislation was a breach of the undertaking given to Tallis J. He stated:

> "The respondents contend that the proper interpretation of the undertaking embodied in the said order is that the defendants 'will refrain from implementing or making any changes in those items in Article 40.02 of the Collective Agreement', and that the following words, 'until such time as the arbitrability of the issue is determined', merely set the time limit during which the undertaking will be in force.
>
> The order distinctly states: 'The issue in this matter is whether or not the items in Article 40.02 ... are matters properly within the scope of the collective bargaining'. The issue therefore was not confined to "Rental Rates and Rental Conditions', but covered the seven additional items set forth in said article as well. Flieger herself approved the order 'as to form and content' and had it entered. A

reading of the transcript (Ex. P 5), particularly p. 65, reveals that government counsel agreed that if these items were found to be 'proper items to be written into a collective bargaining agreement' then the government would thereafter have to proceed on that basis in its dealings with the association.

In my opinion the order is not ambiguous. The undertaking was clearly to keep all the eight matters listed in art. 40.02 in status quo until the primary issue set forth in the order had been determined by the proper tribunal to make that decision. I consequently do not accept the respondents' interpretation of the undertaking.

Learned counsel further argued that no changes had been made in either the amounts of the rents payable or the rental conditions affecting the members of the association. Be that as it may, the passage of Bill 20-65 excluded from the field of collective bargaining 'rents payable' and 'conditions of tenure'. Thus one of the eight items listed in art. 40.02 was completely removed therefrom and from the determination by the proper judicial tribunal as to whether housing was, in the words of government counsel before Tallis J., a 'proper item' for collective bargaining. I cannot think of any greater change that the defendants could have made with respect to the item than they did by removing it in its entirety from the article."

He directed that the Plaintiffs and the respondents should each pay their own costs.

At some time after the hearing of the motion, the Association and the Government settled the disputes between them by negotiation. In consequence, no counsel appeared on this appeal for the Respondents. The terms of the settlement were not disclosed to the Court.

In my opinion the first question to be determined is whether the actions of Bates and Flieger constituted a breach of the undertaking contained in the formal order of Tallis J. In the view I take of that determination it is not necessary to express an opinion on the points of law considered by the learned trial Judge. I do not consider that the undertaking was breached. I reach this conclusion

from what seems to me to be the clear interpretation of the words of the formal undertaking contained in the order, particularly after considering the context in which it was given. It is also the interpretation which in my view is required by the consideration that to construe the undertaking as preventing the Territorial civil servants from performing their duties in recommending and preparing legislation means that the Court intended to interfere with the exercise by the Territorial Council of its legislative powers.

In my opinion the undertaking which is binding upon the Appellants is that which is contained in the formal order of the Court. It is not proper to derive their obligation from a review of this portion or that of the transcript in which counsel are in argument with each other and with the Court in what really amounts to a negotiation as each party perceives more and more clearly the problem to be settled. It is a frequent occurrence in Court or in negotiations that each party will attempt to state and restate a proposition, the object being first to perceive and finally to express more accurately a meaning which by then they understand but have not yet articulated. The very fact that it is necessary to restate a proposition demonstrates that it is not yet accurately stated. Thus in my view in this case it is the undertaking as finally honed to accuracy and contained in the formal order of the Court which states the obligation of the Appellants.

A citation for civil contempt is a matter *strictissimi juris* because it affects the liberty of the subject. The delict

must be defined with particularity and proven beyond a reasonable doubt. In *Re Pollard* 1868 L.R. 2 P.C. 106 at 120 the formal report of the Court is reported as saying:

> "... no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him, and ... in the present case their Lordships are not satisfied that a distinct charge of the offence was stated".

Other cases to the same effect are *R. v. Carter* (1975) 28 C.C.C. (2d) 219 (Ont. C.A.); *Re Bramblevale Ltd.* (1970) Ch. 128, *Redwing Ltd. v. Redwing Forest Products* (1947) 177 L.T. 387 at 390 and *Glazer v. Union Contractors* (1960) 34 W.W.R. 193.

In this case the learned trial Judge was of the view that the particulars furnished by the Association, quoted above fulfil the requirement. Whatever may be one's view of the adequacy of those particulars as defining the offences alleged, they do not purport to define the undertaking itself. If one is to go beyond the terms of the formal order to expand the undertaking in some manner from the transcript the same degree of precision is required.

If statements in the transcript are to be taken as modifying in some fashion the formal undertaking contained in the order, the context in which those statements were made would require detailed analysis. At Page 57 of the transcript of the hearing before Tallis, J. Bates' letter of March 14th, which I have previously quoted, was referred to as the "undertaking". The following exchange then took place:

> "MR. SCOTT: My understanding of the undertaking My Lord, is simply this: Exhibit J. (the letter of March 9) as I understand it, is withdrawn; the terms

of Exhibit K (the letter of March 10) are merely put off from the effective dates that are listed in Exhibit K until such time as a new collective agreement is entered into.

THE COURT: So, in effect, they are held in abeyance?

MR. SCOTT: Precisely. That is my understanding, sir.

THE COURT: Is that correct? In other words, you're not going to change the status quo?

MR. LAL: That's quite correct, My Lord, and as far as the letter of March 9th is concerned, it's totally withdrawn. As far as the letter of March 10th is concerned, we will not implement it on the 10th of June as the letter states."

(emphasis added)

The reference to "the status quo" was made in the context of not implementing the changes specified in the letters of March 9 and 10th. It cannot, in my view, be read as an agreement going further than that. Further discussion then ensued in which both counsel and Tallis J. attempted to restate the "undertaking" and to envisage how the arbitrability of the dispute could be determined since it could not be done by the action as then framed.

"MR. SCOTT: My Lord, I have some difficulty yet because I still - perhaps I'm slow and it may well be, but I cannot differentiate between the fact that they have still made the changes, they've just delayed implementing them, and that may be a very fine point, sir, but that's still a very contentious point.

THE COURT: Obviously, it's a contentious point because if the thing is arbitrated it will be decided whether or not they're entitled to do that. If they rule that these are proper items to be written into a collective bargaining agreement then of course the employer will be bound to proceed on that footing and never attempt to implement these provisions, and I certainly construed Mr. Lal's remarks as indicating that when the issue was resolved and if it was resolved adverse to that particular document they would abide by the resolution of the issue before the proper tribunal. Isn't that what you intended to convey to the Court, Mr. Lal?

MR. LAL: Correct, my Lord ...

MR. SCOTT: I understand the undertaking to be this: that the government or the employer undertakes not to implement or make any changes in those items under article 40.02 until such time as the issue is determined whether or not those items under article 40.02 can go to arbitration pursuant to sub 3 of article 42 - pardon me, not article 42, section 42 of the Public Service Ordinance. That is my understanding, sir, and if that's the correct understanding then I'm folding my papers and I'm gone.

THE COURT: This is the way I understood your undertaking: that until this issue is resolved -

MR. LAL: My Lord, there are a couple of things I must make clear for my sake and for your Lordship's sake.

THE COURT: Yes.

Mr. LAL: One is that this undertaking does not mean that we here and now agree to negotiate rents and other items listed under article 40.02.

THE COURT: No, but you agree that it has to be - that the issue has to be decided -

MR. LAL: - as to whether or not -

THE COURT: - it's an arbitrable issue before the tribunal.

MR. LAL: My Lord, if your Lordship would clarify it one more time.

THE COURT: Well, as I understand it your're going to hold all of these - you're not going to make any unilateral changes whatsoever until this issue has been determined by a proper tribunal.

MR. LAL: That's right.

THE COURT: That's an arbitration tribunal that will determine in the first instance, I would think, because of your objection, whether or not these items are arbitrable issues.

MR. LAL: That's fine, my Lord.

THE COURT: For purposes of a collective bargaining agreement.

MR. LAL: Yes ..."

The Court and both counsel then discussed various ramifications of an arbitration agreement through seven pages of transcript. This discussion was, with respect, somewhat academic since as Tallis J. had earlier pointed out, the action as framed would not determine whether an issue was arbitrable and could not be used to compel an arbitration to take place.

Mr. Lal then said:

> "MR. LAL: My Lord, there is one possibility that Miss Flieger has raised and that is that the agreement may be concluded without this issue ever going to arbitration, in which case that avenue -
>
> THE COURT: Well, if that happens you will bring the matter on before me and I will release you from your undertaking. Mr. Lal just mentioned the possibility of the whole issue being resolved, and this is the most optimistic thing you've heard tonight, Mr. Scott, and I have said that if that happens then the simple way is to bring it on before me and ask to be relieved of the undertaking on that footing and it could be done by consent without Mr. Scott having to be here. I'm sure that you won't have any trouble getting that disposed of. Now does that clarify the issue?
>
> MR. SCOTT: It certainly does for me, my Lord. Thank you.
>
> THE COURT: Is that satisfactory?
>
> MR. LAL: It is, my Lord.
>
> THE COURT: Alright then, under the circumstances the matter is adjourned on the basis that I just outlined."
>
> (emphasis added)

The formal undertaking embodied in the order is virtually identical with the words of Mr. Scott, which I have emphasized. In my view it cannot be extended by a reference to this excerpt or that from the discussion in Court which led to it.

The formal undertaking in the order is a promise to refrain from doing essentially that which the Association had come before the Court to restrain. "The letters of March 9th and 10th" said the Association, in effect, "seek to raise rents and electricity bills. That is a flagrant and abusive breach of the agreement. Stop the Government from implementing the changes in those letters until the arbitrability of the issue is determined." Instead of restraining the implementation of the letters, the Court accepted the promise of a solicitor that they would not be implemented, and the time limit expressed was "until such time as the arbitrability of the issue is determined". The changes in the letters were not implemented and the undertaking was not breached.

One other factor, in my view, leads to this narrower interpretation of the undertaking. Had the injunction been granted in precisely the same words as the undertaking, all persons with knowledge of it, whether served with the order or not, would have been bound to refrain from assisting in its breach: *United Telephone Co. v. Dale* (1884) 25 Ch. D. 778 at 786; *D.V.A. & Co.* (1900) 1 Ch. 484 at 486; *Glazer v. Union Contractors Ltd.* (1960) 33 W.W.R. 145 at 151; affirmed (1960) 34 W.W.R. 193 (B.C.C.A.). The learned Chambers Judge, however, finds that, "the court has no jurisdiction to interfere in any way with the exercise by the Territorial Council of its legislative powers to pass, amend or repeal valid ordinances." To forbid the Territorial Council the assistance of its staff upon pain of a citation for contempt seems to me to produce this very interference. Whether it would be against public policy for a Court to accept an undertaking with that result, it is

for a Court to grant an injunction or to accept an undertaking, the effect of which is that while the Territorial Council could enact a bill, any of its civil servants who performed their duties by recommending it, drafting it or preparing it for enactment would be guilty of contempt of court. To construe an injunction or an undertaking as having that effect would, in my view, be a last resort of construction.

I would allow the appeals, quash the convictions and order the repayment of the fines.

J. A.

DATED at Yellowknife, Northwest Territories
the 7th day of March, 1979.

Duncan W. Shaw, Esq.,
Counsel for Patricia Flieger and Robin Bates

I concur
A.M. Hall J.A.