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CV 04263

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CADILLAC INVESTMENTS LTD.

Applicant

- and -

LABOUR STANDARDS BOARD and
the LABOUR STANDARDS OFFICER

Respondents

Motion to stay or adjourn *certiorari* proceedings pending disposition of an appeal under s.53(4) of the **Labour Standards Act** dismissed. Costs may be spoken to.

Heard at Yellowknife on January 29th 1993

Judgment filed: February 19th 1993

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Applicant: Austin F. Marshall, Esq.

Counsel for the Respondents: John J. Donihee, Esq.

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REASONS FOR JUDGMENT

The Respondents seek either a stay of the applicant's *certiorari* proceedings or, to the same effect, an adjournment of those proceedings pending disposition of the applicant's appeal against a decision and order of the respondent Labour Standards Board pursuant to subsection 53(4) of the **Labour Standards Act**, R.S.N.W.T. 1988, c. L-1, which states:

> 53. (4) An appeal lies to a judge of the Supreme Court from the Board on any point of law raised before the Board under this section and the appeal must be lodged within 30 days after the date of the decision appealed from.

The remainder of section 53 of the Act provides for the making of a certificate by the Labour Standards Officer where an employee to whom the Act applies has not

received wages due by the employer; the mailing of the certificate to the employer giving a period of grace within which the employer or anyone concerned may make representations; confirmation of the wages certified to be owing or correction of the certificate; and filing any confirmed or corrected certificate with the Clerk of this Court, whereupon that certificate is enforceable as a judgment or order of the Court.

3 It is not in dispute that *certiorari* is available on grounds which may not, in a given case, have been raised before the Board. Counsel referred to the case of **Yellowknife Motors Ltd. v. Hai Huynh and Labour Standards Board**, unreported, May 1st 1992 (CV 03540), as a recent instance in which an appeal under s.53(4) was dismissed by this Court because the grounds of appeal did not come within the restricted scope of that subsection.

4 On behalf of the applicant it is submitted that the appeal and the *certiorari* application should be heard together. This is opposed by the respondents, who urge that the appeal be disposed of separately before the *certiorari* application is heard.

5 What is at issue in both the appeal and the *certiorari* proceedings is the question of whether the employee whose wages are the subject of the certificate made by the Labour Standards Officer (confirmed for a lesser amount by the Board) was at the material time employed primarily in a managerial capacity, so as to exclude the employee from the benefits of Part I of the Act by reason of subsection 2(2), which reads:

> 2. (2) Part I does not apply to or in respect of employees who are employed primarily in a managerial capacity.

Part I of the Act governs hours of work. It is common ground that the certificate was made on the assumption that Part I of the Act applied in respect of the employee in question. Arguably, that assumption amounted to a decision of the Labour Standards Officer once it was incorporated in the substance of the certificate. Subsection 40(2) of the Act provides:

> 40. (2) Any decision of the Labour Standards Officer may be appealed to the Board.

Section 45 of the Act also provides for appeals from decisions or orders of the Labour Standards Officer. The pertinent subsections are as follows:

> 45. (1) An employer or employee aggrieved by a decision or order of the Labour Standards Officer may appeal to the Board, and the decision of the Board on the matter is final.
>
> (2) The Board shall hear appeals from any decision or order of the Labour Standards Officer, and shall perform any other functions that are assigned to it by this Act or the regulations.

It will be noticed that the decision of the Board is final in respect of any appeal governed by subsection 45(1). On a jurisdictional point such as whether a certificate could issue on the basis of Part I of the Act, the only recourse against an adverse decision of the Board would thus appear to be by means of *certiorari* unless the point was one raised before the Board within the contemplation of subsection 53(4) of the Act, in which

case an appeal would lie to this Court, rendering *certiorari* superfluous.

9 A further aspect of the matter may be noticed. The decision of this Court in *certiorari* proceedings is subject to an appeal to the Court of Appeal pursuant to subsection 15(2) of the **Judicature Act**, R.S.N.W.T. 1988, c. J-1. However, the decision of this Court on an appeal under subsection 53(4) of the **Labour Standards Act** is not subject to any further appeal, by reason of subsection 53(5) of that Act, which states:

> 53. (5) The decision of a judge of the Supreme Court on appeal is final.

10 In comparing the practical merits of an appeal to this Court under subsection 53(4) of the **Labour Standards Act** with those of *certiorari* proceedings, it is therefore not difficult to appreciate the advantages of the latter where the issue is jurisdictional and the applicability of subsection 53(4) is in doubt. But the risks of choosing the wrong remedy are potentially serious, since appeals under that subsection are limited in point of time; and delay in bringing *certiorari* proceedings can also prove fatal. Clearly, it is not in the interests of justice to encourage duplication of proceedings where that can be avoided. For this reason alone, courts will generally deny *certiorari* where there is adequate recourse by the alternative means of an appeal to a court in the matter in question: **Chad Investments Ltd. v. Longson, Tammets & Denton Real Estate Ltd.**, [1971] 5 W.W.R. 89, 70 D.L.R. (3d) 627 (Alta. C.A.); **Baldwin & Francis Ltd. v. Patents Appeal Tribunal**, [1959] A.C. 663, [1959] 2 All E.R. 433 (H.L.).

An additional consideration put forward on behalf of the applicant employer is that it is not in the interests of justice to have the same question of law considered twice by different judges sitting in Chambers, thus risking conflict in their decisions. And, of course, the parties should not be put to the trouble and expense of arguing the question more often than is strictly necessary. It is equally in the public interest that litigation be kept within proper bounds by avoiding unnecessary duplication or repetition of proceedings. For all these reasons it is argued by the applicant that the appeal and the *certiorari* application should be heard together.

What is assumed in this argument is that both the appeal and the *certiorari* application will engage the Court in a consideration of the same issue, namely: was the employee at the material time "employed primarily in a managerial capacity" within the meaning of subsection 2(2) of the **Labour Standards Act**?

That issue is of course one of mixed law and fact. In point of law it depends on the meaning to be given to the words "employed primarily in a managerial capacity". And, in point of fact, it depends on whether the facts found by the Board are or are not consistent with that meaning.

Was this point of law "raised before the Board" in accordance with subsection 53(4) of the **Labour Standards Act**? I think it was, since the Board's written reasons for its decision show, at page 2, that the basis of the employer's appeal to the Board was that the employee was employed in a capacity so that:

(a) the employee "could promote, demote and dismiss employees";

(b) the employee "could hire employees"; and

(c) the employee "could buy independently and establish budgets".

15 Furthermore, the response filed with the Board on behalf of the employee included a submission that there was no evidence before the Board to suggest that the employee was in a management position "as all decision-making powers rested with ... the General Manager". Clearly enough, these submissions raised the point of law as to what is meant by the expression "employed primarily in a managerial capacity" in subsection 2(2) of the **Labour Standards Act**.

16 There is nothing in the record to show what meaning the Board chose to give to that expression. Nor can that meaning be inferred from the Board's factual findings, which were not articulated when the Board simply "concluded that the claimant was, indeed an employee". I take this to mean that he was an **employee to whom Part I of the Act applied** because he was **not** an employee within the category specifically excluded from the application of that Part by subsection 2(2) of the Act. Assuming that to be what the Board meant, there is nothing to show how it reached that conclusion either in point of law or in point of fact.

17 Indeed, the material before the Board reveals conflicting assertions as to significant matters of fact which could well have influenced the Board in reaching its final conclusion that Part I of the Act applied in respect of the employee. Those assertions

appear in the Board's questionnaire forms, as completed by or on behalf of the parties, and in notes by a Board representative on one of the forms purporting to reflect a discussion with the employee. There are also the assertions made in letters sent to the Board by legal representatives of the parties. It makes no difference, in my opinion, that these assertions were not made under oath or in some other form of solemn or statutory declaration.

It is perhaps trite to observe that a decision-maker cannot fairly choose between conflicting assertions of fact, whether sworn or otherwise, where these are not made subject to cross-examination and where there is no other equivalent basis shown for the choice made. Such a choice of what is taken as fact must appear to a reasonable observer to be purely arbitrary and hence patently unreasonable. It amounts to a departure from the rules of natural justice where, as in this instance, an oral hearing was denied by the Board though requested by the employer.

The Board's file reveals that the employee had left the Northwest Territories and was ostensibly without the means to return for purposes of an oral hearing before the Board. Even if the employee was, as appears, disadvantaged by his lack of means, the Board was in law nevertheless obliged to observe the rules of natural justice by directing an oral hearing so that the conflicting assertions of the parties could be tested. Failing that, the Board could have vacated the Labour Standards Officer's certificate, leaving it to the employee to pursue his remedies at common law. An employee who seeks to take advantage of the remedial provisions of the **Labour Standards Act** should not be allowed

to defeat the process by moving outside the Northwest Territories, beyond reach for purposes of a hearing under section 53 of the Act.

20 Given the lack of factual findings by the Board to explain and support the Board's conclusion, together with the lack of any means to assess the conflicting assertions of fact on appeal, it would be pointless on appeal to attempt to define the legal meaning of the expression "employed primarily in a managerial capacity" in subsection 2(2) of the Act, for purposes of this case, in what is in reality a factual vacuum.

21 That being so, the point of law raised on the appeal is incapable of resolution by that means. It would merely delay the hour of judgment even longer to accede to the respondents' motion to stay or adjourn the *certiorari* proceedings so that this might first be established at the hearing of the appeal itself. There is nothing to be gained by proceeding further with the appeal in the circumstances. This is clearly not a case in which the appeal provides an adequate alternative to the remedy by way of *certiorari*. Nor, for that matter, can or does it provide a means of correcting the Board's refusal to hold an oral hearing in the circumstances which I have indicated.

22 While the foregoing analysis must be carefully confined to the scope of the present motion to stay or adjourn the *certiorari* application, it will be apparent that the analysis does not disclose any basis for further delaying that application; and, moreover, it does indicate that the *certiorari* proceedings may well succeed.

The motion is therefore dismissed. Costs may be spoken to, if necessary.

M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
February 19th 1993

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Counsel for the Respondents: John J. Donihee, Esq.

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