

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

**IN THE MATTER of the Government of the Northwest Territories
Northern Business Incentive Policy; and**

**IN THE MATTER of the Decision of the Preference Advisory
Committee dated April 20, 1993;**

BETWEEN:

VOLKER STEVIN N.W.T. ('92) LTD.



- and -

**THE COMMISSIONER OF THE NORTHWEST TERRITORIES,
MEMBERS OF THE PREFERENCE ADVISORY COMMITTEE and
MEMBERS OF THE SENIOR MANAGEMENT PREFERENCE COMMITTEE**

Respondents

Applications for an Order in the nature of certiorari, and an injunction, in connection with a government decision to revoke the Applicant's status as a "Northern Business". Application dismissed, with costs.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD

Application heard: May 19, 1993
Reasons filed: June 11, 1993

Counsel for Applicant: M. Triggs
Counsel for Respondents: C. McGee

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REASONS FOR JUDGMENT

1 The Applicant seeks an order in the nature of certiorari. On the return of the Applicant's notice of motion in chambers, and prior to the Respondents' filing with the Clerk of the Court the certificate and documentation required by Rule 651, counsel for the Respondent Commissioner of the Northwest Territories raises a preliminary matter. The issue is whether the impugned decision of the "Preference Advisory Committee" is subject to judicial review by this Court.

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REASONS FOR JUDGMENT

The Applicant seeks an order in the nature of certiorari. On the return of the Applicant's notice of motion in chambers, and prior to the Respondents' filing with the Clerk of the Court the certiorari and documentation required by Rule 651, counsel for the Respondent Commissioner of the Northwest Territories raises a preliminary matter. The issue is whether the impugned decision of the "Preference Advisory Committee" is subject to judicial review by this Court.

The background facts are set forth in the affidavit of Siegfred Hoelzl, the President of the Applicant company. The Applicant is a company incorporated in this jurisdiction and carries on a construction business in this jurisdiction. Until April 20, 1993 it was designated as a "Northern Business" under a policy document of the Government of the Northwest Territories entitled "Business Incentive".

A photostat copy of this policy document is attached as an exhibit to Mr. Hoelzl's affidavit. The opening paragraph of the policy document reads:

"The Government of the Northwest Territories may provide an incentive to Northern Business in order that Northern Business is able to:

- 1. Provide goods and services to Government, the private sector and the general public at a reasonable price, and**
- 2. Provide financial support, through the reinvestment of corporate earnings, to the Northern economy.**

To achieve this purpose, the Government of the Northwest Territories has developed a number of principles in respect to its Business Incentive Policies. These are ..."

Seven principles are listed, and then the policy concludes "for elaboration of this Policy, see Directive." The ensuing 13-page Directive sets out residence requirements and other criteria for receiving designation as a northern business, and provides a preference to such businesses when government is evaluating and awarding contracts for the supply of goods and services to government. The Directive makes reference to a committee of Deputy Ministers entitled "Senior Management Preference Committee" established to provide policy coordination and monitoring of government's

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To achieve this purpose, the Government of the Northwest Territories has developed a number of principles in respect to its Business Incentive Policies. These are ..."

Seven principles are listed, and then the policy concludes "for elaboration of this Policy, see Directive". The ensuing 17-page Directive sets out residence requirements and other criteria for receiving designation as a northern business, and provides a preference to such businesses when government is evaluating and awarding contracts for the supply of goods and services to government. The Directive makes reference to a committee of Deputy Ministers entitled "Senior Management Preference Committee" established to provide policy coordination and monitoring of government's

preference policies. The Directive also makes reference to a working committee of the Senior Management Preference Committee entitled the "Advisory Committee". In addition to representatives of government departments, the Advisory Committee includes representatives from the N.W.T. Chamber of Commerce and the N.W.T. Construction Association. The Advisory Committee is given responsibility to grant, refuse and revoke designations as a northern business. The Senior Management Preference Committee's role is to ensure that the true spirit and intent of the preference policy is exercised at all times and can, *inter alia*, entertain an appeal from a decision made by the Advisory Committee.

4 No evidence is expressly provided to the Court, by either party, as to the status or origin of the policy document attached to Mr. Hoelzl's affidavit. This policy document is not a statute or a regulation. It is not an "enactment" as defined in the Interpretation Act, R.S.N.W.T. 1988, ch.I-8. No evidence is provided as to the legal status, if any, or the legal creation, if at all, of the Senior Management Preference Committee or the Advisory Committee referred to in this policy document. I note that in the court documents filed by the Applicant, i.e., the notice of motion and Mr. Hoelzl's affidavit, reference is made to the "Preference Advisory Committee", yet there is no mention of any committee by that precise name in the policy document.

5 The Respondent Commissioner of the Northwest Territories is a creature of statute, authorized by the Parliament of Canada to administer the government of the

preference policies. The Directive also makes reference to a working committee of the Senior Management Preference Committee entitled the "Advisory Committee". In addition to representatives of government departments, the Advisory Committee includes representatives from the N.W.T. Chamber of Commerce and the N.W.T. Construction Association. The Advisory Committee is given responsibility to grant, refuse and revoke designations as a non-main business. The Senior Management Preference Committee's role is to ensure that the true spirit and intent of the preference policy is exercised at all times and can, inter alia, entertain an appeal from a decision made by the Advisory Committee.

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Northwest Territories, pursuant to instructions given from time to time by the federal Minister of Indian Affairs and Northern Development. Northwest Territories Act, R.S.C. 1985, c.N-27, s.5. The Commissioner has delegated that authority (presumably on the federal Minister's instructions) to the Executive Council of the Northwest Territories. The Executive Council's responsibility for management of government is stated in the Legislative Assembly and Executive Council Act, R.S.N.W.T. 1988, c.L-5.

56. The Executive Council shall be responsible for the overall management and direction of the executive government of the Northwest Territories, including matters of policy.

Although, as I have stated, the Court has no specific evidence on the point, I am assuming, for purposes of this preliminary objection to the Court's jurisdiction, that the policy document was adopted by the Executive Council to direct the conduct of government business by government employees.

7 Mr. Hoelzl's affidavit indicates that the Applicant applied for and received designation as a Northern Business in June 1992. His affidavit further indicates that the Preference Advisory Committee revoked this designation on April 20, 1993, in a manner which he alleges was unfair to the Applicant. It is for this reason that the Applicant seeks a judicial review of the committee's decision.

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CONFIDENTIAL

The right to judicial review of the actions of governmental officials was formerly restricted to those actions which constituted the exercise of judicial or quasi-judicial powers granted by the legislature. In more recent years, however, the availability of certiorari has been greatly expanded to include a review of those decisions made by statutory delegates or bodies which are merely administrative in nature. Nicholson v. Haldimand-Norfolk Regional Board of Police Commissioners [1979] 1 S.C.R. 311 (S.C.C.); McCarthy vs. Board of Trustees of Calgary Roman Catholic Separate School District No. 1 [1979] 4 W.W.R. 725 (Alta.S.C.); Hallett v. Minister of Personnel for the Northwest Territories [1987] N.W.T.R. 263 (N.W.T.S.C.).

9 While it is clear that the governmental decision under attack in the Applicant's motion is a purely administrative one, the real difficulty lies in the fact that the decision was not made by a statutory body nor pursuant to any statutory authority. A committee of middle management and/or senior management civil servants is simply making a decision as part of the general conduct of government business.

10 The Parliament of Canada, and the Legislative Assembly of the Northwest Territories, have given to the Commissioner of the Northwest Territories and the Executive Council of the Northwest Territories the power to direct and administer the government of the Northwest Territories. It is within the prerogative of the Executive Council, on a general policy basis, to establish (or not to establish) procurement policies, or preference policies, for the conduct of the business of government. The

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policy document attached to Mr. Hoelzl's affidavit is not a "law", and does not have the force of law. It cannot be argued that the Commissioner, or government employees, have breached or infringed any law.

11 The legislature, in delegating the general management of government business to the Executive Council, has specifically not placed any restrictions on the manner in which that is to be done in the context of northern preference policies, as it has in other fields, e.g. the management of the public service - see Public Service Act, R.S.N.W.T. 1988. c.P-16. The intent of the legislature then, is to leave this situation within the Executive Council's management prerogative and outside any formal framework of "law", and this legislative content must be respected.

12 The Commissioner and the Executive Council are creatures of statute, and their decisions are made pursuant to statute. However, it is not every decision made by the Commissioner, the Executive Council, or civil servants, that is subject to review by this court. (See Vaydik v. Kakfwi and Commissioner of Northwest Territories [1991] N.W.T.R. 134 (N.W.T.S.C.) for an example of a general policy decision made by the Executive Council held not amenable to judicial review.) As was stated by Galligan J. in Ainsworth Electric Co. and Board of Governors of Exhibition Place (1987) 58 O.R. (2d) 432 (Ont.H.C.) at p. 436: "... there must be some limit on the type of power which the court can review."

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Court Library

The line has been drawn in a number of reported cases. In Ainsworth, the applicant was an electrical contractor who sought judicial review of a decision by a statutory body which decision stipulated the manner in which electricians' services were to be provided on an exclusive basis at a public exhibition venue. The statutory body had a legislative mandate to manage and operate the exhibition venue and the court held that the decision was a commercial decision that was not reviewable by the court in the exercise of its prerogative jurisdiction.

14 In Re: Midnorthern Appliances Corp. and Ontario Housing Corp. (1977) 17 O.R. (2d) 290 (Ont.H.C.), the court was asked to review a decision made by the board of directors of the Ontario Housing Corporation, which had been incorporated by statute. The corporation had been given a mandate by the statute to manage certain housing projects. The board of directors, for its own reasons, refused to allow Midnorthern to bid on certain tenders for the housing projects. The court held that this decision was one made within the corporation's management prerogative (and not as a result of a duty imposed by statute) and was not reviewable by the court.

15 In Allard Contractors Ltd. v. District of Coquitlam and Jack Cewe Ltd. (1983) 54 B.C.L.R. 18 (B.C.S.C.), it was alleged that a municipal authority had not acted fairly to one of the bidders, in making a decision to sell surplus municipal lands. The court held that the decision of the municipal council to sell its land did not call for the application of the rules of fairness, and was not subject to judicial review.

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St. Lawrence Cement Inc. v. The Queen in right of Ontario (1991) 3 O.R. (3d) 30 (Ont.Ct.Gen.Div.), involved an unsuccessful bidder who sought to provide services to government. The court held that the awarding of a government contract was a commercial transaction which was not reviewable by way of certiorari proceedings.

17 Similarly, in Whissel Enterprises Limited v. The Deputy Minister of Public Works of the Northwest Territories, the Commissioner of the Northwest Territories and the Deputy Commissioner of the Northwest Territories, N.W.T.S.C. #5295, April 25, 1980, unreported, Tallis J held that this court should not entertain the use of the prerogative writs in reviewing the tendering and awarding of government contracts.

8 Judicial review was refused in each of the foregoing cases where the impugned decision was not the exercise of a statutory authority.

19 In the present case, the Applicant relies on Council of Civil Service Unions et al vs. Minister for the Civil Service [1984] 3 All E.R. 935 (H.L.), for the proposition that even decisions of non-statutory bodies do not enjoy immunity from judicial review. With respect, that decision of the House of Lords is clearly distinguishable from the present case. Firstly, what was under attack in the C.C.S.U. case was a decision of a Minister of government. Lord Diplock, at p. 950, specifically refers to non-statutory decision-making powers exercised "by those holding ministerial rank". In fact, the Minister's decision which was under judicial review in C.C.S.U. was made

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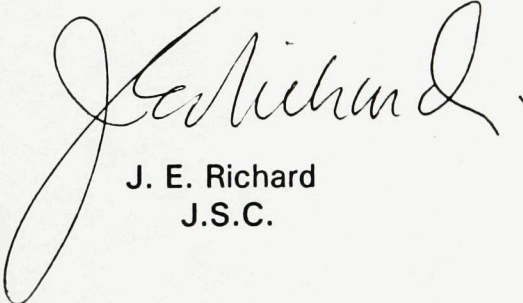
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pursuant to a specific power granted to the Minister by an Order-in-Council. Further, the court's review in C.C.S.U. was made in the context of a newly legislated regime of judicial review in England (described in greater detail by Lord Denning M.R. in O'Reilly v. Mackman et al. [1982] 3 All E.R. 680 (C.A.), at p. 691-693). These factors are not present in the instant case.

20 Judicial review, in the context of the within proceedings, is the power of the court to review the exercise of statutory authority. In my view, both the adoption by the Executive Council of the policy document entitled "Business Incentive", and the decisions made by civil servants in carrying out those directives, are not the exercise of statutory or regulatory authority but are simply decisions by government as to how it will carry out its procurement of goods and services. These decisions are within the exclusive prerogative of management and are not amenable to judicial review. The remedy for any abuse of the management prerogative lies in the political and not the judicial field.

21 For the foregoing reasons, I find merit in the Respondent's preliminary objection. The applications for certiorari and for the accompanying injunction are dismissed, with costs.


J. E. Richard
J.S.C.

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For the foregoing reasons, I find merit in the Respondent's preliminary objection. The application for certiorari and for the accompanying injunction are dismissed, with costs.


J. E. Richard
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UNITED STATES DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY
WASHINGTON, D. C.

IN REPLY TO YOUR LETTER OF APRIL 15, 1947, CONCERNING THE
MATERIALS FOR THE PREPARATION OF THE

REPORT ON THE PROGRESS OF THE WORK OF THE
COMMISSION ON THE ORGANIZATION OF THE

SECRET

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**Reasons for Judgment of the
Honourable Mr. Justice J.E. Richard**

