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CV 04656

SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BAFFIN PLUMBING & HEATING LTD.

Appellant

- and -

LABOUR STANDARDS BOARD and
the LABOUR STANDARDS OFFICER

Respondents

Application by appellant to add a party respondent; cross-application by respondents to strike them as parties.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES

Heard at Yellowknife, October 25, 1993

Reasons filed: November 3, 1993

Counsel for the Appellant: Austin F. Marshall

Counsel for the Respondents: Dan J. Jenkins

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REASONS FOR JUDGMENT

INTRODUCTION

1 The appellant has filed a Notice of Appeal respecting a decision of the Labour Standards Board of the Northwest Territories. By that decision, the Board upheld the issuance of a certificate by the Labour Standards Officer to the effect that wages were owing by the appellant to one Wesley Mitchell (whom I shall refer to as "the claimant").

2 At this stage of the proceedings, the appellant wishes to amend the Notice of Appeal by adding the claimant as a respondent to the appeal. The respondents, however, have applied to have each of them removed as parties to this appeal.

3 These two applications highlight the continuing confusion over the question of who

are proper parties to such proceedings. This confusion is due in part to a misunderstanding by counsel as to the nature of these proceedings and in part to the lack of coherent and detailed guidelines in the legislation of the Northwest Territories dealing with appeals from administrative tribunals.

LEGISLATION

4 The Labour Standards Act, R.S.N.W.T. 1988, c.L-1, establishes, among other things, a system whereby employees may claim for unpaid wages without going through traditional civil remedies. Certain powers are given to the Officer and to the Board to determine if wages are owing and then to enforce payment.

5 The pertinent portion of the statute is section 53:

> **53. (1) Where the Labour Standards Officer**
> **(a) receives information that an employer has failed to pay to an employee all wages earned, and**
> **(b) is satisfied that the employee is not proceeding with any other action for the recovery of the unpaid wages,**
> **the Labour Standards Officer may, at any time,**
> **(c) make a certificate in which shall be set out the wages owing, and**
> **(d) send a copy of the certificate to the employer by registered mail, giving the employer 30 days after the date of the mailing of the certificate within which to present evidence and make representation.**

(2) The Board, after the investigation that it considers adequate, including the holding of hearings that it considers advisable, and consideration of representation, if any, from the persons concerned, may

(a) confirm the wages owing as set out in the certificate; or

(b) cancel the certificate and

(i) make another certificate, in which shall be set out the wages owing; or

(ii) take no further action.

(3) The Board may, at any time, cause the certificate confirmed or made under subsection (2) to be filed with the Clerk of the Supreme Court and upon that the certificate shall be enforceable as a judgment or order of the Supreme Court in favour of the Board for the recovery of a debt in the amount of wages owing as set out in the certificate.

(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.

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

THE APPEAL

6 Without going into the details of the case under appeal, suffice to say that the Board had to determine if the claimant was owed wages for overtime worked or if any

such claim was subject to a purported wage agreement which the employer (the appellant) said it made with the claimant. The Board confirmed the Officer's conclusion that the claimant was entitled to the overtime wages claimed. In doing so it apparently relied solely on written representations made to it.

7 The Notice of Appeal sets out four substantive grounds of appeal:

> "1. The Respondents erred in law in concluding that the Appellant company should have documented any agreement to alter its original agreement with its former employee.
>
> 2. The Respondent erred in law in holding that the lack of a written agreement led to a finding that no such agreement was made.
>
> 3. The Respondents erred in finding that the rate paid to Mr. Mitchell represented a straight hourly wage rate for all hours worked.
>
> 4. The Respondents erred in law in making findings on the credibility of the parties when there had been no viva voce hearing of the evidence."

8 It would seem to me, having regard to the restriction in s.53(4) of the Act that an appeal is limited to "any point of law raised before the Board", that of the four specified grounds only ground number 1 would fit this category (assuming that it was raised before the Board). Ground number 2 may be a point of law but, depending on the Board's reasons, it may simply be the application of an evidentiary standard. Ground number 3 seems to me to be a question of fact. Ground number 4 meanwhile is a "natural justice" issue going to the fairness of the Board's procedures.

9 The characterization of the grounds of appeal becomes important because, as I will argue later, the question of who should be parties to an appeal depends on the relief sought and the claims made about the tribunal's proceedings.

10 I note that in addition to these appeal proceedings the appellant has also launched, by way of Originating Notice of Motion, proceedings in the nature of certiorari seeking to quash the Board's decision in this matter (file number CV 04865). This seems to be a recurring practice. The grounds set out in that application are similar in substance to those set out in the Notice of Appeal.

THE PARTIES' SUBMISSIONS

11 The appellant submits that it inadvertently failed to name the personal claimant as a respondent. Its position, however, is that while the claimant is a convenient party he is not a necessary party.

12 Appellant's counsel says that the Board is a necessary party because (a) the appeal raises jurisdictional issues, and (b) the Board is the body empowered by the statute with carriage of the proceedings. On this second point, counsel argues that s.53(3) of the Act, which permits the Board to file the certificate with the court and then enforce it as a judgment in favour of the Board, makes it an active participant in any proceedings. Counsel for the respondents did not address this point directly but I think I can dispose

of it fairly quickly.

13 The enforcement powers of the Board, as set out in s.53(3), are for the benefit of the employee. Any money received by the Board in respect of wages owing to an employee shall, by virtue of s.60 of the Act, be paid to the employee. The fact that the legislation has given this enforcement power to the Board does not make the Board any more or less involved in appeal proceedings than any other administrative tribunal.

14 Similar enforcement procedures can be found in the statutes relating to employment standards in most provinces. I note that in Ontario, for example, all tribunals are given a general power to enforce orders as judgments by registration in the superior court: see s.19 of the Ontario Statutory Powers Procedure Act. I know of no authority for the proposition that the presence of such an enforcement mechanism makes the Board a necessary party. I therefore conclude that this aspect of the appellant's argument is without merit.

15 The respondents submit that appeal proceedings are confined to errors of law on the face of the record. As such the Board is not a proper party since it is the Board's decision that is being appealed. It would be tantamount to having a judge participate in an appeal from his or her judgment. Respondents' counsel argues that the only time when the Board is a proper party is when there is a jurisdictional challenge to its proceedings or a "natural justice" issue is raised. But then those types of issues, it is

submitted, can only be raised by way of one of the prerogative remedies (such as certiorari).

16 To analyze the issue of whether the Board should be a party, I will discuss the nature of an appeal as that provided by s.53(4) of the Act and the role of tribunals on appeals or reviews of their decisions. Before doing so I wish to dispose of some of the other questions raised on this application.

THE CLAIMANT AS A PARTY

17 It seems to me undeniable that the personal claimant should be a party to these proceedings. The results of the decision of the Officer and the Board were for his benefit. Any attempt to overturn those decisions would be to his detriment. Hence he should be a party. And, this applies whether the relief sought is by an appeal or by a prerogative remedy: see, for example, Re CNCP Telecommunications & Alberta Government Telephones et al (1983), 145 D.L.R. (3d) 575 (Fed.C.A.).

THE OFFICER AS A PARTY

18 The Labour Standards Officer's role is over once the Board's decision is made. It is the Board's decision that is the subject of an appeal. It is the Board's proceedings that are the subject of any jurisdictional or "natural justice" complaint. Hence the Officer

should not be a party to such proceedings.

NATURE & SCOPE OF THE APPEAL

19 Earlier I commented on what I perceive as a misunderstanding by counsel as to the nature of these proceedings. Appellant's counsel says that jurisdictional issues can be raised as points of law on an appeal but yet, perhaps out of an abundance of caution, he brings separate certiorari proceedings on substantially the same grounds. Respondents' counsel says that any appeal is limited to errors on the face of the record and jurisdictional issues must be raised by way of the prerogative writs, specifically certiorari.

20 Generally speaking, certiorari will be refused where a statutory form of appeal is provided and the allegations are non-jurisdictional errors of law: Chad Investments Ltd. v. Longson, Tammets & Denton Real Estate Ltd., [1971] 5 W.W.R. 89 (Alta.C.A.). If the allegations go to questions of jurisdiction or raise issues of "natural justice", then certiorari will lie: Re Harelkin & University of Regina (1979), 96 D.L.R. (3d) 14 (S.C.C.). If there is no right of appeal then certiorari applies for jurisdictional issues or "intra-jurisdictional" errors that are patently unreasonable: C.A.I.M.A.W. v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983.

21 When referring to the various types of errors that could be committed by a tribunal, I use them in this context:

(i) an "error of law" is an error committed by a tribunal in good faith in interpreting or applying a provision of its enabling statute or in making a decision within its jurisdiction;

(ii) a "jurisdictional error" is an error relating to a misinterpretation of the statutory provisions that describe, list, or limit the tribunal's powers; and,

(iii) a "natural justice" issue goes to jurisdiction in theory but it is more appropriately a collateral error going to fundamental fairness, such as bias or a failure to afford equal opportunity for both sides to be heard.

See Syndicat des Employés de Production du Quebec v. Canada Labour Relations Board, [1984] 2 S.C.R. 412 at pages 420-421.

22 The question that must be decided on this aspect of the application is the scope of the appeal power conferred by s.53(4) of the Act when it states that an appeal lies on "any point of law raised before the Board".

23 The Canadian situation is, in my opinion, accurately set out in D.J. Mullan and J.D. Whyte, "Administrative Law", paragraph 172, C.E.D. (Western), 3rd ed.:

> **Just as the right of appeal is a creature of statute, so too is the scope of appeal subject to statutory definition. The most common appeal rights created by statute in Canada can be classified into three categories: (a) appeals on questions of law and jurisdiction; (b) appeals on questions of law; (c) general rights of appeal. Where an appeal right is created on questions of law and jurisdiction, the scope**

> **of the appeal right will embrace not only errors of law within jurisdiction but also errors of law and fact going to or affecting jurisdiction and, where applicable, a failure to follow the rules of natural justice. If the appeal clause does not specifically mention jurisdiction as a ground for appeal but confines the appeal right to questions of law, the issue then arises as to whether the term "questions of law" is to be read as including questions of jurisdiction. One view is that a defect of jurisdiction nullifies a decision and accordingly there cannot be an appeal from a nullity. There is simply nothing on which to base an appeal. However, it is doubtful whether this view prevails in Canada. Canadian courts have held that defects of jurisdiction can be cured on appeal and the better view would seem to be that an appeal on questions of law alone does include the right to raise questions of a jurisdictional nature. The same is probably true of a general right of appeal. (citations omitted)**

24 I am of the opinion that appeals pursuant to s.53(4) encompass errors of law, jurisdictional errors, and natural justice issues. There is extensive case law from which to conclude that certiorari is not an appropriate vehicle when there is an adequate statutory appeal process. The jurisdiction of the court pursuant to the statutory appeal process is co-extensive with the jurisdiction of a reviewing court under certiorari proceedings. Useful reference may be made to Provincial Secretary of P.E.I. v. Egan, [1941] S.C.R. 396; Re Clark & Ontario Securities Commission, [1966] 2 O.R. 277 (C.A.); Re City Abattoir (Calgary) Ltd. and City of Calgary (1970), 8 D.L.R. (3d) 457 (Alta.C.A.); Rozander v. Energy Resources Conservation Board (1978), 93 D.L.R. (3d) 271 (Alta.C.A.); Re Harelkin & University of Regina (supra); Calvin v. Carr, [1979] 2 All E.R. 440 (P.C.); and, Edith Lake Service Ltd. v. Edmonton (1981), 132 D.L.R. (3d) 612 (Alta.C.A.).

25 For this reason, it is an undesirable practice to bring an appeal and an application

for review by way of certiorari: Lischka v. Criminal Injuries Compensation Board (1982), 37 O.R. (2d) 134 (Div.Ct.). Such practice leads to superfluous litigation as well as the potential of conflicting judgments.

26 In Cadillac Investments Ltd. v. Labour Standards Board et al. an unreported decision of this court dated February 19, 1993, de Weerdt J. was asked to rule on an application to stay certiorari proceedings pending disposition of an appeal under the Act. It appears that he was not asked to consider whether the two proceedings could co-exist. In my view they should not.

27 This does not mean that certiorari is never available to review the Board's actions. On the contrary, certiorari, as an instrument of the supervisory function of the court, is always available in an appropriate case. For example, where the allegations are purely ones of jurisdiction or "natural justice", then certiorari would be the procedure to bring the issue before the court. But certiorari is a discretionary remedy. Where, as here, "natural justice" issues are mixed in with allegations of errors of law, then the statutory appeal process is an adequate and appropriate procedure to bring all issues before the court in one proceeding. This now brings me to the question of appropriate parties.

THE BOARD AS A PARTY

28 There is ample case law, from this jurisdiction and others, that should serve as a

guide for determining when a tribunal is a proper party to a proceeding.

29 The Supreme Court of Canada, in Northwestern Utilities Ltd. v. Edmonton, [1979] 1 S.C.R. 684, stated that, in the absence of statutory provisions as to the role and status of the tribunal in appeal or review proceedings, the tribunal is confined strictly to arguments on the issue of its jurisdiction to make the decision in question. The term "jurisdiction" is used in the same context as I used it previously. Issues of "natural justice" are not issues of jurisdiction in this context. If the complaint is that the rules of "natural justice" have been breached, then the tribunal is not usually allowed to justify its actions: see Northwestern at pages 708-711. The circumstances in which the tribunal is allowed to make representations are limited to its jurisdiction or lack thereof.

30 On an appeal, again in the absence of statutory guidelines, the tribunal is not allowed to participate since, akin to a judge whose judgment is under appeal, it should never act as an advocate of one side or another. An appeal after all involves a dispute between two parties and the decision-maker should not be allowed, nor be compelled, to try to justify its decision by making arguments on the merits.

31 As I noted earlier, there is ample authority along these lines: Ciboci v. Inuvik Housing Authority, [1989] N.W.T.R. 317 (S.C.); 841538 N.W.T. Ltd. v. Labour Standards Board, [1988] N.W.T.R. 239 (S.C.). See also Re Canada Labour Relations Board and Transair Ltd. (1976), 67 D.L.R. (3d) 421 (S.C.C.); International Association of Machinists

v. Genaire Ltd. (1958), 18 D.L.R. (2d) 588 (Ont.C.A.); and, Re Beattie & Director of Social Services (1978), 93 D.L.R. (3d) 477 (Man.C.A.).

32 In this case, the grounds listed in the Notice of Appeal do not reveal an allegation of jurisdictional error. Therefore it is inappropriate to include the Board as a party to these proceedings. There is a ground alleging a breach of "natural justice" but, unless the Board seeks leave to make representations so as to explain the record, there would be no role for the Board to play on that issue. Therefore I conclude that the Board is not a proper party to this proceeding.

SUMMARY

33 For sake of convenience I will summarize my conclusions on the issues raised by these applications. These conclusions are based of course on the specific statutory scheme established by the Labour Standards Act. They may, however, be applicable to appeal and review proceedings respecting other tribunals under similar statutes.

34 Where there is a right of appeal on questions of law, then proceedings to challenge the tribunal's decision should be taken by Notice of Appeal unless the challenge is solely based on jurisdictional or "natural justice" issues. In such case proceedings by way of certiorari may be taken.

35 Whether by Notice of Appeal or by way of certiorari, the parties to the dispute, i.e., the employer and the employee in the case of this statute, must be named as parties. The Board itself should not be named as a party unless the sole basis for attack is jurisdictional error. Whether named as a party or not, if the attack includes allegations of jurisdictional error or a "natural justice" violation then, whether brought by way of Notice of Appeal or certiorari, the Board and the Attorney-General must still at least be served with notice of the proceedings as required by Rule 644(3) of the Supreme Court Rules. In addition the Board will be required to make the return contemplated by Rules 650 and 651.

36 The Board, if it appears on the hearing, will be limited to arguments on jurisdictional issues and to explanations, if requested by the court, of the record of the proceedings. If the Board wishes to have a broader role to play then, in the absence of statutory guidelines, it must seek leave of the court to do so.

37 One may express the hope that at some time in the foreseeable future the legislature will rationalize the procedures for appeals and judicial review of decisions by administrative tribunals by means of comprehensive legislation. This has been done in other jurisdictions so there should be no impediment to doing so here.

42 The record reveals that the appellant's motion to add the claimant as a party was served on the respondents on October 6, 1993. The Notice of Motion was endorsed as follows:

> "Service admitted under protest it being the alleged respondent's submission that they are not properly parties to the within appeal."

And the endorsement was signed by counsel for the respondents.

43 The respondents filed, on October 21, 1993, an affidavit from the Board's executive secretary which stated, in part, that it was made "in support of an application" to amend the style of cause to delete the respondents as parties. No Notice of Motion or any other formal notice of this application was filed.

44 I know of no rule of court that permits an admission of service "under protest". Service is either admitted or is not. If a party wishes to be removed from the proceeding then the appropriate course is an application under Rule 48. Such an application, like any other application, is brought by filing and serving a Notice of Motion. Here there was nothing on the record to indicate ahead of time that the actual application was being made by the respondents.

45 Furthermore, neither counsel seems to have had regard to the requirements of

CONCLUSIONS

38 For the foregoing reasons I order as follows:

1. The claimant, Wesley Mitchell, shall be added as a party respondent to this appeal.

- and -

2. The Labour Standards Board and the Labour Standards Officer are hereby removed as parties.

39 The style of cause should be amended accordingly.

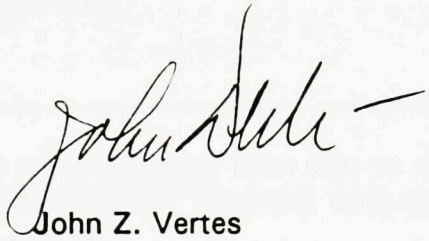
COSTS

40 The question of costs obliges me to address some procedural concerns.

41 The respondents have been substantially successful on this application so they would ordinarily be entitled to recover their costs. However, they failed to take the proper procedural steps to place these issues before the court.

Practice Direction No. 17, which has been in force since 1978, calling for the advance filing of a list of authorities prior to the argument of a contested chambers matter. The Rules and the Practice Directions are there to expedite matters in court. Counsel should not be under the misapprehension that they can be ignored with impunity.

46 For the foregoing reasons, each side is to bear their own costs of this application.



John Z. Vertes
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