SC CIV 95 046

CV 05804

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of the *Labour Standards Act*, R.S.N.W.T. 1988 c. L-1, and amendments thereto;

AND IN THE MATTER of a decision of the Labour Standards Board, dated January 26, 1995, rejecting an appeal by the Applicant from a decision of the Labour Standards Officer, dated January 12, 1993;

BETWEEN:

SANDRA DOWDALL

Applicant

- and -

NERCO CON MINE, LTD.

Respondent

Application for an order in the nature of certiorari to quash a decision of the Labour Standards Board.

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

Heard at Yellowknife, Northwest Territories
on December 14, 1995

Reasons filed: December 20, 1995

Counsel for the Applicant: Austin F. Marshall

Counsel for the Respondent: Scott Duke

Counsel for the Labour Standards Board: Dan Jenkins

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REASONS FOR JUDGMENT

This application raises the question of the inter-action, if any, between employment standards legislation and collective bargaining agreements. Specifically, the applicant seeks to quash a decision of the Labour Standards Board of the Northwest Territories which held that a payment made by her employer on her dismissal satisfied the termination pay requirements of the applicable legislation. The applicant claims that this payment was severance pay under her collective agreement. Her position is that these are separate benefits and that she is entitled to both payments.

Facts:

The applicant was employed by the respondent for 12 years. On October 1, 1992, she was permanently laid off. She was given no notice but she did receive a severance payment equal to 8 weeks' salary, benefits, and accrued vacation pay.

The applicant was a member of the Union of Northern Workers, Local X0023, and, pursuant to the terms of the collective bargaining agreement in effect at the time, she was entitled to "severance" pay in accordance with Article 9 of the agreement:

> 9.01 In the event that it becomes necessary to lay off employees, those employees laid off shall be eligible for a severance allowance of one (1) week's pay for each year of service up to a maximum of eight (8) weeks pay for eight (8) years service.
>
> 9.02 An employee shall neither be eligible nor entitled to such severance pay under the terms of this article in the event of a voluntary quit, involuntary discharge for just cause, or is laid off temporarily.
>
> 9.03 Temporary lay-off is defined as a lay-off of less than six (6) months with a predetermined recall date.

4 The collective bargaining agreement was made under the authority of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the "Code"), since the Northwest Territories has no equivalent labour relations legislation. Parts of the Code, however, are not applicable to the Territories, including those parts dealing with termination and severance.

5 Northwest Territories legislation provides a general employment standards and wage recovery scheme through the *Labour Standards Act*, R.S.N.W.T. 1988, c. L-1 (the "Act"). This statute applies to all workplaces in the Territories. Unionized industries are not excluded. The only significance of having a unionized workplace, or indeed any

workplace with specific contracts or agreements covering terms of employment, is reflected in s.3(1) of the Act:

> 3. (1) This Act applies notwithstanding any other law or any custom, contract or arrangement, whether made before, on or after July 1, 1968, but nothing in this Act shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his or her rights or benefits under this Act.

6 The import of s. 3(1) was considered by my colleague de Weerdt J. in Arny's General Stores Ltd. v. Labour Standards Board, [1987] N.W.T.R. 184 (S.C.). Basically, it prohibits an employer or employee from contracting out of the provisions of the Act but a contract, if there is one, may give the employee rights or benefits that are more generous than those prescribed by the Act. The legislation sets out minimum requirements and contractual arrangements that do not meet those requirements can be set aside: Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986. In the labour relations context, a saving provision such as s. 3(1) enables arbitrators to "top up" defective or deficient terms in a collective agreement so as to comply with the statutory requirements: Re Queen's University and Fraser et al (1985), 19 D.L.R. (4th) 240 (Ont. Div. Ct.).

7 The Act provides for "termination" on notice or with pay in lieu of notice in s.14.03:

> 14.03 (1) No employer shall terminate the employment of an employee who has been employed by that employer for a period of 90 days or more, unless the employer
>
> (a) gives the employee notice of termination; or
>
> (b) pays the employee termination pay.

> (2) An employer who wishes to terminate the employment of an employee by notice of termination shall
>
> (a) give the employee written notice of termination of not less than
> (i) two weeks, if the employee has been employed by the employer for less than three years, and
> (ii) an additional week for each additional year of employment, to a maximum of eight weeks; and
>
> (b) indicate in the notice of termination the date
> (i) on which the notice is given, and
> (ii) on which the employment is terminated.
>
> (3) The period of notice required by subsection (2) shall not coincide with the annual leave of the employee whose employment is being terminated.
>
> (4) An employer who wishes to terminate the employment of an employee by paying termination pay in place of giving notice of termination pay in an amount equal to the wages and benefits to which the employee would have been entitled if the employee had worked his or her usual hours of work for each week of the period for which notice would otherwise be required by subsection (2).

8 Certain differences between Article 9 of the agreement and s.14.03 of the Act will be readily apparent. The Act provides for notice or pay in lieu of notice; the agreement is silent as to notice and merely speaks in terms of payment of a "severance allowance". The Act requires payment in lieu of notice equal to wages and benefits; the agreement merely refers to "pay" (although I would think, without having to decide the point, that the term "pay" encompasses wages and all wage-related benefits).

9 As it turns out, the applicant's entitlement, whether under the formula set out in the agreement or that in the Act, works out to 8 weeks' compensation due to her length of service. The respondent paid her not just the wages she would be entitled to but the value of all benefits as well. For all intents and purposes, the applicant has been paid the

same amount she would have received either under the Act or the agreement. The point of this case, however, is that she claims to be entitled to both payments.

10 After her dismissal, the applicant, with the support of her union, launched a two-pronged attack. First, they filed a grievance under the agreement alleging that the applicant had not been paid everything she was entitled to receive as a laid-off employee. Next, they filed a complaint with the Labour Standards Officer appointed under the Act alleging that the respondent had laid-off the applicant without notice or pay in lieu of notice as required by the Act. In essence they were saying that, yes, she received a payment; the payment may satisfy Article 9 or it may satisfy s. 14.03, but it has not satisfied both; and the issue of entitlement to both payments should be resolved by the arbitrator in the grievance or by the Labour Standards Officer (or perhaps preferably by both).

11 The Labour Standards Officer issued a decision on January 12, 1993. He rejected the applicant's complaint. He concluded that "severance" pay under the agreement and "termination" pay under the Act are the same benefit and, in the absence of some specific indication otherwise either in the agreement or in the Act, they are not to be treated separately. In other words, they are not concurrent benefits but alternative ones with the more favourable one being the effective one. The Officer ruled that the applicant was not entitled to a further payment. The applicant appealed this decision to the Labour Standards Board. The Board's decision will be reviewed below.

12 On March 17, 1993, the arbitrator appointed under the agreement delivered his decision on the applicant's grievance. He observed that his task was simply to determine if the respondent breached the terms of the agreement. He held that by making the payment it did the respondent fulfilled its obligations under Article 9 of the agreement. He failed to find any apparent conflict between Article 9 and the Act insofar as the payment of compensation is concerned. He declined to consider whether the respondent is in violation of the Act and liable to make the payment required by the Act in addition to that under Article 9. The arbitrator held (and with this I respectfully agree) that, if the employer is in violation of the Act, then that is a matter to be taken up under the Act.

The Board's Decision:

13 By the time this matter reached the level of the Labour Standards Board, the respondent company had been taken over by another company called "Miramar". This makes no difference to the issue before me but I point it out because the Board makes reference to Miramar in its reasons. Extensive submissions were made to the Board and lengthy reasons were issued by the Board on January 26, 1995. Why it took so long to issue a decision was not explained.

14 The Board rejected the applicant's appeal and upheld the Labour Standards Officer's decision that no further payment was owing to her. The Board identified the issue before it correctly in my view (at page 24 of its reasons):

> The question that is before the Board in this case is -- did the company pay Ms. Dowdall the amounts to which she was entitled under the Act when it terminated her employment? That is the matter over which the Board has jurisdiction. The arbitrator has made the decision about the payment required under the agreement; the Board's duty is to make the decision about the payment required under the Act.

15 The Board considered the question of whether the "termination" pay provisions of the Act provide a separate and distinct benefit from the "severance" pay provisions of the agreement. It placed emphasis on the lack of statutory recognition of severance as a separate benefit (at page 27):

> However, the Board finds that Miramar's arguments on this point are more convincing and compelling than those put forward by the UNW. The Act makes no provision for severance pay as a separate benefit from termination notice or pay. While Part III of the Canada Labour Code does contain such a scheme, Part III does not apply to employment at Miramar's Con mine. The arbitrator, who has authority to arbitrate disputes arising from the interpretation of the collective agreement, found that there was no meeting of the minds on the meaning of Article 9.01 and its relationship to the Act, although both parties could for their own reasons agree with the wording. The question of whether an employee would be entitled to the severance allowance if he had received notice of the termination of his employment does not appear to have been put to the arbitrator for resolution.

16 Having decided that they were not separate benefits, the Board then went on to compare the two to determine which provision is more favourable to the employee. It concluded, without explicitly saying so, that in the applicant's case the benefits are equal and hence the payment made by the company satisfied the requirements of the Act. It held (at pages 28 - 30):

> The Board has jurisdiction to decide that a benefit provided under a collective agreement is less than the benefit provided under the Act and thus is of no effect. The Board has jurisdiction to decide that an employer agreed to provide employees with a greater benefit than the minimum set by the Act. But the Board does not have jurisdiction to expand the minimum benefit provided under the Act by adding to it a provision from a collective agreement. The Act sets minimum standards but does not prevent an employer from exceeding those standards. If an employer had exceeded those minimum standards, the Act would not operate to reduce that more beneficial arrangement to the minimums of the Act. Section 3(1) states that "nothing in this Act shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his or her rights or benefits under this Act."

> However, the Board notes that the Act phrases this as an "either/or" proposition. The Board must look at whether the rights or benefits of the Miramar employees under the agreement are more favourable than their rights under the Act. This means comparing what is set out in an agreement with what is set out in the Act. More favourable rights or benefits under any "law, custom, contract or arrangement" are compared with the employee's rights or benefits under the Act. This is what the Officer found he had to do in order to see if Ms. Dowdall was entitled to termination pay under the Act; he had to see what she was entitled to under the agreement, in order to see if that was more favourable to her than what she was entitled to under the Act. But the question is not, were the rights or benefits of the employees under the Act and the agreement put together more beneficial to the employees than the Act; the question is, were the rights or benefits under the agreement more favourable than their rights under the Act (emphasis in original).
>
> In determining the answer to this question, the Board looked at the wording of the Act and the wording of the agreement. The agreement shows that the parties agreed to provide a payment of eight weeks pay on termination to an employee with eight years' service. The arbitrator says the company has made that payment. The Act says that an employer who wishes to lay off an employee without notice must pay an employee the wages and benefits he would have earned had he continued to work for the appropriate notice period, to a maximum of eight weeks. The Board has found that the employer has made that payment.

17 The applicant now seeks to quash this decision on the ground that the Board made a patently unreasonable error of law.

Preliminary Jurisdictional Issue:

18 At the hearing before me, counsel for the respondent company advanced a preliminary objection to the jurisdiction of this court to hear this matter. To be more precise, counsel invited this court to decline jurisdiction on the basis that in essence this dispute arises out of the collective bargaining context and therefore should be resolved through the arbitration process set out in the agreement.

19 Counsel for the respondent relies on the recent case of Weber v. Ontario Hydro (1995), 125 D.L.R. (4th) 583 (S.C.C.). In that case the Supreme Court of Canada set forth an "exclusive jurisdiction" model for the resolution of disputes that arise from the interpretation, application, administration or violation of a collective agreement. In such situations, and when as here there is a mandatory arbitration process, the courts should defer to the jurisdiction of that arbitration process.

20 Counsel submits that the essential nature of this dispute is one arising from the collective agreement, namely, whether the respondent made the proper payment pursuant to Article 9 of the agreement. The issue, he says, is one of severance pay pursuant to the agreement, not termination pay pursuant to the Act. I do not agree.

21 The dispute here arises from the employment relationship but the issue on this specific application is not the applicant's entitlement to severance pay but her entitlement to termination pay under the Act. The Labour Standards Board has no power to interpret a collective agreement and it did not purport to do so other than as a point of comparison with the benefits provided under the Act. This it was entitled to do because it is an inherent part of the process provided by s. 3(1) of the Act to try and determine which provision is more favourable. But the Board in this case was essentially adjudicating the applicant's entitlement to benefits under the Act. And that is something within its jurisdiction and outside the jurisdiction of an arbitrator (as recognized by the arbitrator in this case).

22 As I noted in Stelmaschuk v. Dean & Colburne, [1995] 9 W.W.R. 131, the *Labour Standards Act* is legislation enacted for the benefit of employees. It has a self-contained enforcement mechanism. There is no other forum available to the applicant to resolve the question of her eligibility for benefits under the Act. Hence, this application to review the Board's decision is properly before this court. The preliminary objection is therefore denied.

Standard of Review:

23 The issue the Board was asked to decide was whether the payment made by the employer satisfies the Act. There is no doubt in my mind that the Board had jurisdiction to do so. There is also no doubt that the Board considered the extensive submissions of both parties. There is no suggestion of procedural unfairness. It embarked on a comparison of the collective agreement provisions and the Act to determine what is the more favourable formula to the employee. This too was within its jurisdiction. The essential question before me therefore is whether the Board, in deciding that the "termination" benefits of the Act are not in addition to the "severance" benefits of the agreement, committed an error of law, and if so, does that error justify judicial intervention.

24 Counsel for the Board appeared on this hearing solely for the purpose of answering jurisdictional issues. He characterized the problem before me not as a jurisdictional one but as one of an alleged error of law. I agree. This now calls for a brief review of the Act since there is an appeal process provided for errors of law.

25 There are two avenues of appeal to the Labour Standards Board. The first is from any decision of the Labour Standards Officer. This avenue contains a privative clause:

> 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.

26 The second avenue is specific to the wage recovery provisions of the Act. This method provides for an appeal to the court but only on points of law raised before the Board:

> 53. (1) Where the Labour Standards Officer
>
> (a) receives information that indicates 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,
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> the Labour Standards Officer may, at any time,
>
> (c) make a certificate in which shall be set out the wages owing, and
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> (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
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> (a) confirm the wages owing as set out in the certificate; or
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> (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.**

27 The termination pay benefits of the Act are considered to be wages and therefore recoverable through the procedure provided by s. 53 of the Act. So, then, why is this not an appeal under s. 53(4) as opposed to an application for judicial review which, by its nature, is extraordinary and discretionary?

28 The applicant's counsel submits that judicial review is the only available route since the Board acted under s. 45(1) and not s. 53(2) in this matter. The applicant's complaint may have been investigated by the Labour Standards Officer under s. 53(1) but, by denying the claim, the Officer refused to issue a certificate. A close reading of subsections 53(1)(c) and 53(2) reveals that a certificate is issued only if the Officer finds that wages are owing. Unless there is a certificate, the Board has no appeal powers. Therefore, there is no appeal to this court. The situation, anomalous as it may seem, is that if the Officer finds there are no wages owing and thus does not issue a certificate, the only appeal to the Board is under s. 45(1). Then there is no appeal to this court. For that reason, I agree with the applicant's submission that judicial review is the only recourse available to her.

29 I have already said that the issue before the Board was one within its jurisdiction to decide. The Board was concerned with the interpretation and application of provisions confided by its constituent Act to its exclusive administration. The applicable standard

of review is therefore one of patent unreasonableness: United Brotherhood v. Bradco, [1993] 2 S.C.R. 316. Since there is a privative clause in s. 45(1), a mere error of law will not justify intervention unless it is patently unreasonable. All errors of law which are patently unreasonable are jurisdictional in nature and therefore cannot be immunized from judicial review: Canada (Attorney-General) v. P.S.A.C., [1993] 1 S.C.R. 941. The appropriate question to ask is that set out by Dickson J. in C.U.P.E. v. New Brunswick Liquor Corp. (1979), 97 D.L.R. (3d) 417 (at page 425): "Was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the Court upon review?"

Review:

30 The fundamental issue to determine is whether the "termination" pay benefits under the Act and the "severance" pay benefits under the collective agreement are distinct benefits by nature.

31 The applicant's counsel submits that there is a well established distinction in law between the concepts of termination pay and severance pay. The distinction can be found in several differences: termination pay is paid in lieu of notice of termination whereas severance pay is an independent benefit paid regardless of whether notice is given; severance pay generally reflects years of service to an employer whereas notice of termination or pay in lieu of notice is designed to assist the employee while looking for new employment; and, severance pay is paid in a lump sum whereas notice of termination occurs over time. Applicant's counsel, however, was unable to refer me to any authority

that recognizes the distinction as a matter of law in the absence of a statutory enactment creating the distinction.

32 Much of the applicant's argument centred on the distinctions between termination pay and severance pay found in statutes from other jurisdictions. Both the *Canada Labour Code* and the Ontario *Employment Standards Act* make the distinction. They both have termination pay provisions similar to those found in the *Labour Standards Act* but they also have additional severance pay provisions. But the entitlement to severance pay is not unconditional. The Code requires that an employee have completed at least 12 consecutive months of employment in order to qualify for severance pay. The severance provisions of the Ontario statute are applicable only to employees with 5 years of service or more and employed by an employer having an annual payroll of $2.5 million or more. This suggests that in Ontario at least severance pay is used as a special benefit, not generally, but to a specific category of worker only. In contrast there is no limitation on the entitlement to severance pay found in Article 9 of the agreement. I also note, from reviewing a publication entitled Employment Standards in Canada (1993-94 edition), published under the authority of the Minister of Labour, Government of Canada, that the federal Code and the Ontario Act are the only statutes in Canada to establish separate severance pay entitlements.

33 Respondent's counsel submits that, while a distinction between termination pay and severance pay could exist (as in Ontario), one should not assume that a distinction does exist. Here, he argues, the Act and agreement use different terms but their objects are the same. To hold otherwise, he submits, would be to allow the applicant to "stack"

the benefits under the agreement and the Act with a resulting double recovery for the same cause, that being the termination of her employment.

34 There is considerable confusion about the two terms even in Ontario. In Mattocks v. Smith & Stone (1982) Inc. (1990), 34 C.C.E.L. 273 (Ont. Gen. Div.), Corbett J. described "severance" pay in the following terms (at pg. 279):

> ...[T]he nature and purpose of severance pay is similar to the nature and purpose of common law damages for failure to give reasonable notice of termination of employment. The triggering event is the same, namely, termination of employment. Severance pay cushions economic hardship and provides some compensation for loss of employment...this payment is made whether or not the employee gets another job...

35 There was a contrary view expressed in Stevens v. Globe & Mail (1993), 45 C.C.E.L. 50 (Ont. Gen. Div.). In that case Gibson J. was concerned with the specific question of the deductibility of severance pay from damages awarded for wrongful dismissal (a point on which he and Corbett J. disagreed). He also interpreted the purpose of severance pay differently (at page 55):

> As was pointed out by Referee Novich, at page 11 of her reasons, in her view, severance pay is compensation for years of service that an employee has devoted to an employer — "The long service employee who is terminated, loses a great deal of his seniority, rights are extinguished. Severance pay, to some extent, compensates the employee for that loss." I respectfully feel that this is the correct and proper view of severance pay.

36 In this case the arbitrator who heard the applicant's grievance found that the parties, while they agreed on the wording of Article 9 of the agreement, clearly had different interpretations as to its effect. They were each willing to rely on their own interpretation in any future dispute. The difficulty with that, from the applicant's

perspective, is that she was compelled to argue before the arbitrator that the payment she received was termination pay under the Act while in front of the Board she argued it was severance pay under the agreement. Neither the arbitrator nor the Board were able to give the applicant the answer she wanted because to do so would mean that they would infringe on the other's jurisdiction. All either one could say was that the payment that was made meets the requirements of the Act or the agreement. By the way the applicant and her union approached this issue, those answers, incomplete as they were from their point of view, were almost inevitable.

37 There is no doubt in my mind that if the severance benefits were clearly identified in the agreement as being in addition to the termination benefits of the Act, the two provisions could co-exist and the applicant would receive the benefit of both. As noted by the Alberta Court of Appeal in Blair v. Godwaldt et al (1995), 125 D.L.R. (4th) 732, the purpose of "saving" provisions such as s. 3(1) of the Act is to preserve rights under the Act and at the same time extend to an employee any additional benefits or rights given under a collective agreement. But in this case there is no clear indication that the two benefits were to co-exist. The applicant relies solely on the distinction drawn by the federal Code and the Ontario statute, neither of which apply to this case.

38 One way of looking at this problem is to ask if the severance provision of the agreement could stand on its own irrespective of the Act. In the previously noted Machtinger case, the Supreme Court of Canada held that, as a principle of law, an employer is required to give reasonable notice of an intention to terminate the employment absent express contractual language to the contrary. The point of that case

was that the contractual terms under review failed to meet the minimum standards set by legislation and thus were null and void. But the Court recognized that parties may contract express terms as to termination including notice, if any, and pay in lieu of notice.

39 In the present case, the parties contracted for severance pay based on length of service. There is no notice provision but then the common law, just like the *Labour Standards Act*, has always allowed the option of pay in lieu of notice. It is a contractual alternative to what the dismissed employee may recover if she were able to bring a civil claim for wrongful dismissal. In my opinion Article 9 could stand on its own. The fact that there is a statutory requirement for termination pay means, as in the Machtinger case, that one must examine the contractual benefit to determine if it meets the minimum requirements of the Act. If it does, then it is enforceable. But, it is not necessarily in addition to the benefits under the Act.

40 Applicant's counsel made the point before me, as was apparently made before the Board, that the two benefits must be different because the employer would still be liable to pay severance under the agreement even if it had given the notice required under the Act. That may be but that does not necessarily make them separate benefits. It may be an additional benefit to the employee when the employer gives notice but there is nothing in law obligating the employer to give notice so long as there is pay in lieu of notice.

41 In my opinion, it can be rationally argued that the purpose of termination pay under the Act and severance pay under the agreement is one and the same: to compensate the employee for the loss of her employment. In the absence of a distinction being drawn in

legislation, or a recognition of such a distinction by the parties in the agreement, I cannot say that the Board's decision in this case was patently unreasonable. The applicant has failed to meet the test of showing that the Board's decision, in the words of the C.U.P.E. case, "cannot be rationally supported by the relevant legislation." This is not a case that demands judicial intervention. If anything, it is exactly the type of issue that properly belongs on the collective bargaining table or in the legislature.

Conclusions:

42 The application for an order in the nature of certiorari is dismissed. Costs may be spoken to if necessary.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 20th day of December, 1995

Counsel for the Applicant: Austin F. Marshall

Counsel for the Respondent: Scott Duke

Counsel for the Labour Standards Board: Dan Jenkins

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Reasons for Judgment of the Honourable Mr. Justice J. Z. Vertes