

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE MUNICIPAL
ORDINANCE R.O.N.W.T. 1974,
Chapter M-15

AND IN THE MATTER OF A CERTAIN
ORDER MADE UNDER THE AUTHORITY
OF THE COMMISSIONER OF THE NORTH-
WEST TERRITORIES WITH RESPECT TO
ELECTIONS IN FROBISHER BAY IN THE
MONTH OF DECEMBER, 1976

AND IN THE MATTER OF THE JUDICA-
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BETWEEN:

IRWIN PFEIFFER,

Applicant

- and -

THE COMMISSIONER OF THE
NORTHWEST TERRITORIES,

Respondent

Application for an Order in the Nature of *Certiorari*
Application heard at Yellowknife, N.W.T., January 17, 1977
Judgment of the Court filed *February 21, 1977*
Application Dismissed

Reasons for Judgment of:

The Honourable Mr. Justice C. F. Tallis

Counsel on the Hearing:

Mr. E. D. Johnson for the Applicant

Miss L. Lane for the Respondent

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Counsel on the Hearing:

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Miss L. Lane for the Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE C. F. TALLIS

This is an Application for an Order in the nature of certiorari to quash a certain Order made by the Commissioner of the Northwest Territories under Section 357 of the Municipal Ordinance R.O.N.W.T. 1974, Chapter M-15.

There is little, if any dispute as to the facts. Counsel were able to agree on a number of facts which were

conveniently summarized in an Agreed Statement of Facts in the following form:

- "1. On or about September 13, 1976, one Dennis Patterson was appointed Returning Officer for the 1976 election of the Municipality of Frobisher Bay, (hereinafter referred to as "the Municipality") as required by the Municipal Ordinance, R.O.N.W.T. 1974, Chapter M-15.
2. On or about November 13, 10, and 17, 1976, the said Dennis Patterson caused to appear, Notices of Election in the Nunatsiaq News, the local Frobisher Bay weekly newspaper, in English and Inuktitut.
3. On or about the 30th day of October, 1976, Dennis Patterson also caused to appear said Notice of Election at the Post Office, Bank Building, Village Office, and Hudson's Bay Company Store in Frobisher Bay, Northwest Territories.
4. That said Notices of Election called for nominations for the election to be filed by November 15, 1976.
5. As of the close of nominations on November 15, 1976 there were four nominations, namely; Ross McKinnon, George Butler, Steve Lenoghan and the Applicant.
6. On or about November 24, 1976 and December 1, 1976, said Dennis Patterson Caused to appear in English and Inuktitut, Notices of Poll and Notice of Advance Poll in said Nunatsiaq News.
7. The said Notices of Election called for the election to be held on December 13, 1976.

"8. On or about December 6, 1976, an advance Poll was held at the Arnakodlak Building (Court House) in Frobisher Bay, Northwest Territories between 10:00 a.m. and 7:00 p.m. with one Joe Etidluie being sworn in as Deputy Returning Officer and Jamesee Teemotee being sworn in as Poll Clerk at said Advance Poll. At said Advance Poll a total of five ballots were cast.

9. On or about December 7, 1976, the Council of the Municipality sent a telex message to the Commissioner of the Northwest Territories (hereinafter referred to as "The Commissioner") requesting that the election set for December 13, 1976 be postponed, to allow for greater participation in the election by the Native community.

10. On or about December 8, 1976 the Commissioner sent a telex message to the Council of the Municipality confirming that a Commissioner's Order would issue if the Municipality would confirm a new timetable for the receiving of nominations and the holding of a new election.

14. That at a special meeting of the Municipality on December 8, 1976 the Council passed a resolution asking that nominations close for the election on January 5, 1977 and that the election be held on January 19, 1977. Council also passed resolutions relieving the Returning Officer, Dennis Patterson, from his duties and extending the term of the incumbent Council to January 31, 1977.

15. Subsequent to said December 8, 1976 meeting of the Council of the Municipality, the Commissioner issued an Order pursuant to Section 357 of the Municipal Ordinance postponing the

"election until January 19, 1977 and extending the date for the filing of nominations to January 5, 1977.

16. Subsequent to said Order of the Commissioner, the Municipality appointed one Monica Ell as Returning Officer for the January 19 election.

17. Since the issuance of the said Commissioner's Order the said Monica Ell has accepted nominations other than those filed as of the original closing date of November 15, 1976."

(The underlining is mine).

On December 8, 1976, Deputy Commissioner John H. Parker, exercising the powers of Commissioner issued the following Order pursuant to Section 357 of the Municipal Ordinance.

"

725-76

MUNICIPAL ORDINANCE

The Deputy Commissioner of the Northwest Territories, pursuant to section 357 of the *Municipal Ordinance*, R.O.N.W.T. 1974, chapter M-15, orders as follows:

1. The day mentioned in section 35 of the *Municipal Ordinance* for the holding of a poll, is, in respect of the Municipal election to be held in the municipality of Frobisher Bay in the Northwest Territories extended from the second Monday in December 1976 to January 19, 1977.
2. Nominations of candidates for the said election close at three o'clock in the afternoon of January 5, 1977.
3. The term of office of the successful candidates for election shall commence on February 1, 1977 and shall expire

- "
- a) on December 31, 1977 in respect of those Councillors elected for a one year term, or
 - b) on December 31, 1978 in respect of those Councillors elected for a two year term.
4. The terms of office of those Councillors whose term of office would normally expire on December 31, 1976 are extended to January 31, 1977."

(The underlining is mine).

Subsequent to the issue of this Order the Applicant Irwin Pfeiffer nominated 31 candidates for the office of Councillor in the Municipality of Frobisher Bay. By agreement of Counsel photocopies of the actual nomination papers were filed as an exhibit in this Court. Accordingly there is no need to refer to all of the documents but the following nomination paper signed by the Applicant sets out the Form that was signed by the Applicant in making each of the nominations for Councillor:

" NOMINATION PAPER

Subsection 34(1)

We, Erwin Pfeifer/Roger Cousins residing at House 932 in the Municipality of Frobisher Bay, and residing at Rowe House 509 in the Municipality of Frobisher Bay, hereby nominate Peteroosie Alilaqtaq (E7-479) residing at house 479 Frobisher Bay, as a candidate at the election now about to be held for Councillor in the Municipality of Frobisher Bay.

Each of us declares that to the best of his knowledge, information and belief, the above-named candidate:

- " (a) is nineteen years of age or over;
(b) is a Canadian citizen;
(c) is legally qualified to be nominated, elected and to hold the office of Councillor in this Municipality;
(d) is not subject to any of the dis-qualifications set out in subsection 13(2) of the Municipal Ordinance.

Dated at Frobisher Bay, N.W.T. this 23 day of December, 1976.

"Erwin Pfeifer"

Nominator

"R. W. Cousins"

Nominator

I consent to the above nomination.

"Alieemataq"

Candidate

"

From my perusal of the 31 nomination papers signed by the Applicant it appears that a breakdown of the signing dates is as follows:

- (a) Two were signed on December 9, 1976
(b) One was signed on December 15, 1976
(c) Thirteen were signed on December 22, 1976
(d) Nine were signed on December 23, 1976
(e) Six were signed on December 24, 1976

It will be seen from the foregoing that the Applicant, after the issue of the Commissioner's Order chose to nominate some 31 additional candidates for election to office.

The ground upon which this application is based is as follows:

"1. That the Commissioner of the Northwest Territories exceeded the jurisdiction conferred upon him under Section 357 of the Municipal Ordinance in ordering that the date specified in Section 34(2) of the Municipal Ordinance for the closing of the filing of nominations be extended to January 5, 1977."

At the hearing of this Application Counsel for the Applicant made it quite clear that the Applicant's attack was restricted to that portion of the Order of December 8, 1976 reading as follows:

"2. Nominations of candidates for the said election close at three o'clock in the afternoon of January 5, 1977."

In other words no attack was made with respect to 1, 3 and 4 reading as follows:

"1. The day mentioned in section 35 of the *Municipal Ordinance* for the holding of a poll, is, in respect of the Municipal election to be held in the municipality of Frobisher Bay in the Northwest Territories extended from the second Monday in December 1976 to January 19, 1977.

3. The term of office of the successful candidates for election shall commence on February 1, 1977 and shall expire

- a) on December 31, 1977 in respect of those Councillors elected for a one year term, or
- b) on December 31, 1978 in respect of those Councillors elected for a two year term.

"4. The terms of office of those Councillors whose term of office would normally expire on December 31, 1976 are extended to January 31, 1977."

I was also asked to direct a stay of proceedings with respect to the civic election scheduled for Wednesday, January 19, 1977 but I declined to do so on the hearing and gave oral reasons at that time. Learned counsel for the Applicant referred to the case of *Re Blackwood Beverages Limited and Dairy Employees and Warehousemen Local No. 834*, 18 W.W.R. 481 (Sask. C.A.) which deals with the jurisdiction of a Court to grant a stay under appropriate circumstances.

In indicating that the Applicant was only attacking the above quoted portion of the Order of December 8, 1976, learned Counsel took the position that such an Order is severable and cited the case of *Re Hoogendoorn and Greening Metal Products & Screening Equipment Co. et al*, (1967) 1 O.R. 712 with particular reference to p. 733 of the Judgment of Laskin, J.A. (as he then was). I would point out that this case dealt with an arbitration award and when examined in the light of other authorities I do not think that it is applicable to this case. Furthermore when one reads the Order of December 8, 1976 the various parts of it appear to be linked together. I have considered the following cases in this connection but having regard to the conclusion I have reached in this application it is not necessary for me to decide the question of severability in this case: *Re Blackwood Beverages Limited and Dairy Employees*

and Warehousemen Local No. 834, 18 W.W.R. 481; *Re Simpson-Sears Limited and Department Store Organizing Committee*, 18 W.W.R. 492; *Northern Taxi Limited v. Manitoba Labour Board* 27 W.W.R. 12; *R. v. Arundel Justices Ex parte Jackson* (1959) 2 All E.R. 407.

On the hearing of this Application learned Counsel for the Respondent took two preliminary objections which may be conveniently summarized as follows:

- (a) The Supreme Court of the Northwest Territories does not have jurisdiction to hear this Application for certiorari and any such Application for certiorari against the Respondent should have been brought in the Federal Court of Canada.
- (b) The Commissioner of the Northwest Territories in making an Order under Section 357 of the Municipal Ordinance is merely acting as an officer, servant or agent of the Crown and is accordingly not subject to the prerogative writs such as certiorari and mandamus.

I now turn to a consideration of the question of jurisdiction of this Court as raised by the first preliminary objection. Learned Counsel for the Respondent submitted that the Commissioner must be viewed as the Crown in the Right of the Dominion of Canada. He is appointed pursuant to a Federal Statute and learned Counsel for the Respondent referred to the following, inter alia, provisions in the Northwest Territories Act:

"3. (1) The Governor in Council may appoint for the Territories a chief executive officer to be styled and known as the Commissioner of the Northwest Territories.

2. The Governor in Council may appoint a Deputy Commissioner of the Territories.
3. If the Commissioner is absent, ill or unable to act or the office of Commissioner is vacant, the Deputy Commissioner has and may exercise all the powers and functions of the Commissioner.
4. The Commissioner shall administer the government of the Territories under instructions from time to time given by the Governor in Council or the Minister.
5. The executive powers that were, immediately before the 1st day of September 1905, vested by any laws of Canada in the Lieutenant Governor of the Northwest Territories or in the Lieutenant Governor of the Northwest Territories in Council shall be exercised by the Commissioner so far as they are applicable to and capable of being exercised in relation to the government of the Northwest Territories as it is constituted at the time of the exercise of such powers.
6. The Commissioner and the Deputy Commissioner shall, before assuming the duties of their respective offices, take and subscribe, in such manner as the Governor in Council may prescribe, such oaths of office and allegiance as the Governor in Council may prescribe.
8. (1) There shall be a Council of the Territories consisting of fifteen members elected to represent such electoral districts in the Territories as are named and described by the Commissioner in Council.

(2) Every Council shall continue for four years from the date of the return of the writs for the general election and no longer, but the Governor in Council may at any time, after consultation with the Council where he deems such consultation to be practicable or, otherwise, after consultation with each of the members of the Council with whom consultation can then be effected, dissolve the Council and cause a new Council to be elected.

"16. (2) Any ordinance made after the 25th day of June 1970 or any provision of such ordinance may be disallowed by the Governor in Council at any time within one year after its passage."

Under the circumstances it is submitted that Section 18 of the *Federal Court Act* applies. This section provides as follows:

"18. The Trial Division has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal."

It should be noted that under Section 24.1(1) of the *Northwest Territories Act* the following provision is made for appointment of judges:

"24.1(1) The Governor in Council shall appoint the judges of such superior, district or county courts as are now or may hereafter be constituted in the Territories."

Effective July 15, 1971, by Proclamation dated July 14, 1971 (pursuant to R.S.C. 1970, c. 48 (1st Supp.) many of the provisions of Sections 25 - 43 were repealed with the result that in the field of the administration of justice the position

of the Northwest Territories was in some respects similar to that of a province.

Accordingly, the *Judicature Ordinance*, 1970 (3rd) c. 5

Part I provides inter alia:

"3. The Court now existing under the name of the Supreme Court of the Northwest Territories is hereby continued under that name and shall continue to be a superior court of record with all jurisdiction, powers and authority of that Court.

4. There shall be a seal of the Court that shall be prescribed by the Commissioner.

5. (1) The Court shall consist of a judge of the Court and such *ex officio* judges and deputy judges as may be appointed from time to time by the Governor in Council.

(2) Where under any Act of the Parliament of Canada or any Ordinance or other law in force in the Territories any power or authority is to be exercised or anything is to be done by a judge of a court, such power or authority shall, in the Territories, be exercised or such thing shall be done by the judge of the Court, unless some other provision is made in that behalf by such Act, Ordinance or other law.

10. For the administration of the laws for the time being in force within the Territories, the Court possesses within the Territories, in addition to any other jurisdiction, powers, rights, incidents, privileges and immunities that immediately before its organization were vested in or capable of being exercised with the Territories by the Territorial Court as constituted under the *Northwest Territories Act* at the time of the coming into force of this Ordinance, the jurisdiction that on the first day of July 1870, was in England vested in

- "
- (a) the High Court of Chancery, as a common law court, as well as a court of equity, including the jurisdiction of the Master of the Rolls, as a judge or master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a common law court;
 - (b) the Court of Queen's Bench;
 - (c) the Court of Common Pleas at Westminster;
 - (d) the Court of Exchequer, as a Court of revenue, as well as a common law court;
 - (e) the Court of Probate;
 - (f) the courts created by commission of assize, of oyer and terminer and of general gaol delivery, or any such commissions; and
 - (g) any other superior court or court of record.

11. The jurisdiction mentioned in section 10 includes

- (a) the jurisdiction that at any time before the organization of the Court was vested in or capable of being exercised by the judge of the Court, sitting in Court or chambers or elsewhere, when acting as a judge pursuant to a statute, law or custom,
- (b) all the powers given to any Court referred to in section 10 or to any judge by a statute or Ordinance, and
- (c) all ministerial powers, duties and authorities incident to any and every part of the jurisdiction so conferred.

From the foregoing it will be seen that the Supreme Court of the Northwest Territories is a Superior Court of Record having both civil and criminal jurisdiction in the Northwest Territories. A superior Court may be broadly classified as one having inherent jurisdiction to administer justice and hear or determine most any issue. In order to oust the jurisdiction of the Supreme Court it is necessary to show that it has been restricted or excluded altogether such as by privative clauses in special legislation or that jurisdiction exists in some other court to the exclusion of the Supreme Court. The position is stated succinctly in *Halsbury* Volume 9 (3rd) pp. 349 - 350:

" Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognisance of the particular court. An objection to the jurisdiction of one of the superior courts of general jurisdiction must show what other court has jurisdiction, so as to make it clear that the exercise by the superior court of its general jurisdiction is unnecessary. The High Court, for example, is a court of universal jurisdiction and superintendency in certain classes of actions, and cannot be deprived of its ascendancy by showing that some other court could have entertained the particular action. In an inferior court, other than a county court, unless the proceedings show on their face that the cause of action arose within its jurisdiction, the action cannot be maintained, and even in inferior courts with a local limit of jurisdiction it must appear that such limit is not being exceeded."

In this connection I have also considered the following, inter alia, authorities: *Stout v. Stout* 46 D.L.R. (2d) 759; *Board v. Board* (1919) 2 W.W.R. 940; *Fletcher v. Fletcher* (1920) 1 W.W.R. 5; *Barracough v. Brown* (1897) A.C. 615; *Kredl v. Attorney General of Quebec* (1966) S.C.R. 320.

Learned Counsel for the Respondent vigorously contended that exclusive jurisdiction to hear this application is now vested in the Federal Court of Canada by virtue of the provisions of Section 18 of that Act and referred particularly to the case of *Re Greene & Faquy et al* 28 D.L.R. (3d) 297.

On the other hand, Counsel for the Applicant submitted that this Court does have jurisdiction in this type of proceeding and referred to the position of the Commissioner as being a unique statutory creation with functions as described by Morrow, J. in *Royal Bank of Canada v. Scott* 20 D.L.R. (3d) 728.

It is to be observed that the Order under attack in this application was made by the Respondent under Section 357 of the Municipal Ordinance. This Ordinance was passed by the Commissioner in Council of the Northwest Territories under legislative powers contained in Section 13 of the *Northwest Territories Act* and has not been disallowed by the Governor in Council.

I would adopt with respect the judgment of Morrow, J. (as he then was) in *Fortier Arctic Ltd. v. Liquor Control Board of the Northwest Territories* (1971) 5 W.W.R. 63 at pp. 71-72 where he says:

" There remains a third problem to resolve. Counsel for the Board submitted that the new Federal Court Act had the effect of ousting the supervisory jurisdiction of the Territorial Court of the Northwest Territories. He relied on two sections. These are:

'18. The Trial Division has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal'.

'2. In this Act, . . .

(g) 'federal board, commission or other tribunal' means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of *The British North America Act, 1867*.'

It is suggested here that the Board is a body exercising powers under the authority of The Liquor Ordinance which in turn was passed under authority of the Northwest Territories Act, R.S.C. 1952, c. 331, s. 13 [am. 1966-67, c. 22, s. 4]. That therefore this brings it within the definition of a "federal board, commission or other tribunal" as defined in s. 2(g) above since the Northwest Territories Act is an Act of the Parliament of Canada, and as a consequence, by s. 18(a) above, the proceedings should have been launched in the new Federal Court.

I should first observe that the "jurisdiction of superior courts is not taken away unless by express language": per Anglin J. at p. 61

"in *Dominion Cannery Ltd. v. Costanza*, [1923] S.C.R. 46, [1923] 1 D.L.R. 551; see also *Balfour v. Malcolm* (1842), 8 Cl. & Fin. 485 at 500, 8 E.R. 190. The Territorial Court of the Northwest Territories, as now existing under the Judicature Ordinance, 1970 (N.W.T.) (3rd sess.), c. 5, and as originally constituted by the Northwest Territories Act, s. 20 [re-en. 1955, c. 48 s. 9; am. 1960, c. 20, s. 3], is a superior court of record.

The exceptions set forth in s. 2(g) of the new Federal Court Act are:

- (i) A "body constituted or established by or under a law of a province."
- (ii) A person "appointed under or in accordance with a law of a province."
- (iii) A person appointed "under section 96 of *The British North America Act, 1867*."

By virtue of the Interpretation Act, 1967-68 (Can.), c. 7, s. 3(1), effect must be given to s. 28 [am. 1967-68, c. 25, s. 58; 1970, c. 1, s. 64(3)] where the meaning of s. 2(g) of the Interpretation Act states:

'28. In every enactment,

(29) 'province' means a province of Canada, and includes the Yukon Territory and the Northwest Territories.'

Using province in the sense it is used above, the relevant exceptions set forth in s. 2(g) of the Federal Court Act can quite properly be read as "any such body constituted or established by or under a law of the Northwest Territories." To arrive at any other construction would, in my opinion, throw a cloud over the

"enactments of the Commissioner in Council and unless the language clearly does this a court should strive against it. In this respect I approve the language of C. R. O. Munro, Q.C. set forth in his brief submitted on behalf of the Attorney General of Canada where he states:

' Any argument to the contrary involves the proposition that there is no such thing as a law of the Northwest Territories. Such a proposition violates common sense, and is inconsistent with section 13 of the *Northwest Territories Act* which confers upon the Commissioner in Council legislative power to make laws for the Government of the Territories similar in scope to the legislative powers of the provinces. The argument in effect elevates to a constitutional issue what is really a semantic matter. It is true that all ordinances of the Northwest Territories are made under the authority of Parliament, and in that sense could be described as laws of Canada. However, they are made by the Legislature constituted for the Territories and in that sense are laws of the Territories. Whether they are to be considered one or the other is not a constitutional issue, but a question of definition of terms.'

I therefore conclude that I have jurisdiction to hear the herein motion and grant the relief sought.

In the result there will be an order to the effect that the acts of the Board constitute a nullity and orders 9 and 10 are accordingly quashed. Counsel have indicated in argument that there be no costs."

Any purported Order made by the Respondent was pursuant to these statutory provisions in a Territorial Ordinance as distinct from a statute of the Dominion of Canada.

Under the circumstances I do not think that the term "Laws of Canada" as used in Section 101 of the *British North America Act* was intended to oust the jurisdiction of the Supreme Court of the Northwest Territories when the legislation involved in the litigation is an Ordinance passed by the elected Council of the Northwest Territories. In considering this matter I have also referred to the judgment of the Supreme Court of Canada delivered by Chief Justice Laskin in *Quebec North Shore Paper Company et al v. Canadian Pacific Limited et al* (June 29, 1976 - as yet unreported) where the Supreme Court of Canada in considering a question of jurisdiction stated as follows:

" The question of jurisdiction turns on the meaning and application of s. 23 of the *Federal Court Act*, 1970 (Can.), c. 1 in the light of the contracts out of which the claims for relief arose. Section 23 reads as follows:

'23. The Trial Division has concurrent original jurisdiction as well between subject and subject as otherwise, in all cases in which a claim for relief is made or a remedy is sought under an Act of the Parliament of Canada or otherwise in relation to any matter coming within any following class of subjects, namely bills of exchange and promissory notes where the Crown is a party to the proceedings, aeronautics, and works and undertakings connecting a province with any other province or extending beyond the limits of a province, except to the extent that jurisdiction has been otherwise specially assigned.'

" In the French version of this section there is a comma after the second "autrement" ("otherwise"), and I think that this clarifies its import as being connected with the words "Act of the Parliament of Canada". I would observe that if the respondents' position is maintainable then, of course, it would be open to Parliament to vest exclusive jurisdiction within the terms of s. 23 in the Federal Court.

Section 23 must be assessed initially under the terms of s. 101 of the *British North America Act* because it is that provision which alone authorizes the Parliament of Canada to establish Courts of original and appellate jurisdiction in addition to authorizing the establishment of this Court. Section 101 reads as follows:

'101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.'

The relevant words, for the purposes of the present case, are "administration of the laws of Canada". When s. 23 of the *Federal Court Act* speaks of a claim for relief or a remedy "under an Act of the Parliament of Canada or otherwise", it cannot be given a construction that would take it beyond the scope of the expression "administration of the laws of Canada" in s. 101."

I have also had the opportunity to read the recent judgment of Chief Justice Jackett of the Federal Court of Appeal in *Johnston v. The Attorney General of Canada, as represented by the Crown Attorney, In and for the Northwest Territories* (January 21, 1977 - as yet unreported). I find some support for the

approach I have taken in the following comments of Chief Justice Jackett at pp. 2 - 4:

" On November 29, 1976, the section 28 application was filed seeking an order under section 28 of the *Federal Court Act* setting aside "the decision of the Attorney General of Canada, as represented by the Crown Attorney in and for the Northwest Territories . . . to seek a greater punishment against the applicant by reason of a previous conviction pursuant to the terms of sections 236(1)(d) and 740(1) of the *Criminal Code*."

On December 9, 1976, the respondent made this motion to quash that section 28 application on the grounds that this Court has no jurisdiction to entertain it.

By virtue of section 28(1) of the *Federal Court Act*, this Court has jurisdiction to set aside a "decision" of a "federal board, commission or tribunal" but there is specifically excepted from that jurisdiction any jurisdiction to set aside "a decision . . . of an administrative nature not required by law to be made on a judicial or quasi-judicial basis".

In this case the subject matter of the section 28 application that is the object of the motion to quash is described as "the decision of the Attorney General of Canada, as represented by the Crown Attorney in and for the Northwest Territories . . . to seek a greater punishment against the applicant by reason of a previous conviction pursuant to the terms of sections 236(1)(d) and 740(1) of the *Criminal Code* . . ." Section 740(1) of the *Criminal Code* reads as follows:

740. (1) Where a defendant is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed upon him by reason thereof unless the prosecutor satisfies the summary conviction court that the defendant, before making his plea, was notified that a greater punishment would be sought by reason thereof.

Section 236(1) creates an offence "for which a greater punishment may be imposed by reason of previous convictions".

In considering the question whether this section 28 application should be quashed on the ground that section 28 does not operate to give the Court jurisdiction in the matter, three questions are obvious, viz:

- (a) Is the "prosecutor" a "federal board, commission or other tribunal"?
- (b) Does action taken to comply with section 740(1) of the *Criminal Code* involve a "decision" within section 28(1) of the *Federal Court Act*? and
- (c) Assuming that the answer to (b) is in the affirmative, is the "decision" a "decision . . . of an administrative nature not required by law to be made on a judicial or quasi-judicial basis"?

With reference to the first of these questions, for the purpose of the *Federal Court Act*, "federal board, commission or other tribunal" is so defined, by section 2 thereof, as to exclude therefrom "any person . . . appointed under or in accordance with a law of a province . . ." If therefore, the question had arisen in one of the ten provinces of Canada, I

"should have thought that one could take judicial notice of the fact that the "prosecutor" did not fall within this statutory definition of "federal board, commission or other tribunal". Having regard to the fact that, by virtue of section 28 of the *Interpretation Act*, the word "province" in a federal statute is to be read as including the Northwest Territories, I should have thought that the same question would have to be considered in a case arising in those Territories. However, as it seems to me, there are not enough facts on the record as yet for a decision to be made with regard thereto."

Under the circumstances I conclude that I have jurisdiction to hear this motion. In coming to this conclusion I have also considered the following, inter alia, authorities: *Re McLeod's Certiorari Application* (1973) 5 W.W.R. 129; *Re Smith & Best et al* 54 D.L.R. (3d) 627; *Re Paulette & Registrar of Land Titles* 39 D.L.R. (3d) 81; *Canadian Pacific Transport Company Limited and Highway Traffic Board* (Sask. C.A. July 7, 1976 - unreported as yet).

In the latter case, Culliton, C.J.S., in dealing with the issue of jurisdiction that had been raised, stated as follows:

" Section 3(1) of The Vehicles Act, supra, provides for the establishment of The Highway Traffic Board, and reads:

'3. - (1) There shall be a board to be styled "The Highway Traffic Board" and to be composed of five or more members to be appointed by the Lieutenant Governor in Council, one of whom shall be

" 'appointed as chairman and shall be entitled to hold the position of chairman as long as he continues a member of the board.'

Section 3 of the Motor Vehicle Transport Act, Canada, R.S.C. 1970, Chapter M-14 is as follows:

'3. (1) Where in any province a licence is by the law of the province required for the operation of a local undertaking, no person shall operate an extra-provincial undertaking in that province unless he holds a licence issued under the authority of this Act.

(2) The provincial transport board in each province may in its discretion issue a licence to a person to operate an extra-provincial undertaking into or through the province upon the like terms and conditions and in the like manner as if the extra-provincial undertaking operated in the province were a local undertaking.'

By Section 18 of the Federal Court Act, R.S.C. 1970, Second Supplement, Chapter C-10, the Federal Court is given exclusive jurisdiction in extraordinary remedies relating to a federal board, commission or other tribunal:

'18. The Trial Division has exclusive original jurisdiction

- (a) to issue an injunction, writ of certiorari, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
- (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding

' brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.'

In Section 2 of the Federal Court Act, supra, a 'federal board, commission or other tribunal' is defined as follows:

"federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province under section 96 of The British North America Act, 1867;

The contention of learned counsel for the appellant is simply that because of the authority granted to the Board by Section 3 of the Motor Vehicle Transport Act, supra, that Board is a 'federal board, commission or other tribunal' as defined in the Federal Court Act, and consequently any injunctive relief in respect thereto is vested exclusively in the Federal Court of Canada by virtue of Section 18 of the Federal Court Act.

In support of this position, reference was made to the case of Klingbell v. Treasury Board, [1972] 2 W.W.R. 389; and Re Lingley and Hickman, (1972), 33 D.L.R. (3d) 593. In Klingbell v. Treasury Board, supra, the remedy sought by way of certiorari was to quash an adjudication made pursuant to the Public Service Staff Relations Act, a federal statute. In that case Martin, who heard the grievance, was exercising a power and a jurisdiction conferred by an Act of the Parliament of Canada and came clearly within the definition of a federal board, commission or other tribunal in respect of which exclusive jurisdiction was vested in the Federal Court by Section 18 of the Federal Court Act. Simi-

"larly, in Lingley and Hickman, supra, an action was taken for declaratory relief to replace the judgment made by a board of review appointed by the Lieutenant Governor in Council of the Province of New Brunswick pursuant to the provisions of the Criminal Code. Again it is evident that the board was a 'federal board, commission or other tribunal' as it was established pursuant to an Act of the Government of Canada, and was exercising jurisdiction under that act.

I think the principle to be drawn from these two decisions is that whether the board or the person is a 'federal board, commission or other tribunal' lies to be determined from the definition as set out in Section 2 of the Federal Court Act, supra.

In City of Hamilton v. Hamilton Harbour Commissioner, 27 D.L.R. (3d) 385, Gale, C.J.A., said, at page 386,

'It seems to me that the definition of a 'federal board, commission or other tribunal' contained in Section 2 of the Act is perfectly plain and unequivocal ***.'

with this observation I am in complete agreement.

It is beyond dispute that the Board is a body constituted and established under The Vehicles Act, supra, a law of the Province of Saskatchewan. While subsection (2) of Section 3 of the Motor Vehicle Transport Act, supra, provides that the provincial transport board may, in its discretion, issue a licence to permit an extra-provincial undertaking to operate into or through the Province, that in no way alters the basic nature and character of the provincial board; it is still a body constituted and established by and under the law of the Province. That being so, in the clear language of the definition in Section 2, it is not a 'federal board, commission or other tribunal' as therein defined. The jurisdiction, therefore, in the matter involved in this action is not given by Section 18 to the exclusive jurisdiction of the Federal Court as contended by the appellant, but rests in, and remains with, the Court of Queen's Bench of Saskatchewan."

With respect to the second preliminary objection I have concluded that the respondent was not acting as the agent or servant of the Crown in a duty to be performed by the Crown. I am of the opinion that Section 357 of the Municipal Ordinance merely designates an administrative function which may be carried out by the person named in the Ordinance. Such a function could just as easily have been vested in the Returning Officer or some other person.

It follows that the principles enunciated in the following cited cases are not applicable in this case: *Re Kingston Enterprises Ltd. and Minister of Municipal Affairs*, (1970) 12 D.L.R. (3d) 516; *Re Lofstrom and Murphy et al*, (1972) 22 D.L.R. (3d) 120; *Regina ex rel. Central Canada Potash Co. Limited and Schmitt v. Minister of Mineral Resources of Saskatchewan*, (1972) 6 W.W.R. 62, affirmed (1973) 1 W.W.R. 193, further affirmed (1973) 2 W.W.R. 672 (Can.).

In disposing of this application I am faced with a preliminary question which is -- does certiorari lie to attack the Order of the Respondent dated the 8th day of December, 1976 wherein the time for nominations was extended to three o'clock in the afternoon of January 5, 1977. Unless it does the Court cannot consider the merits of the application. Furthermore the Court cannot, under the guise of a prerogative writ such as certiorari, assume an appellate jurisdiction.

In dealing with this preliminary question, the first issue to be determined is whether or not the Order for an extension of the nomination date pursuant to Section 357 is an administrative or judicial act. If it is an administrative

act then certiorari is not an appropriate remedy and the Court ought not to entertain the application: *The Security Export Company v. The Honourable J. E. Hetherington, Provincial Secretary Treasurer of the Province of New Brunswick*, (1923) S.C.R. 539; *Regina v. Board of Trustees of the Estevan Collegiate Institute Ex parte Dirks*, 16 D.L.R. (3d) 570.

As already mentioned Section 357 of the Municipal Ordinance provides as follows:

"357.(1) Where a thing that is to be done within a number of days or at a time fixed by or under this Ordinance cannot be so done or is not so done, the Commissioner, or a person designated by him in writing, may appoint a further or other time for so doing it, whether the time at or within which it ought to have been done has or has not arrived or expired, as the case may be."

The Municipal Ordinance sets forth a number of provisions dealing with time in relation to the holding of civic elections. Sections 34, 35, 36, 37 and 38 provide as follows:

"34.(1) Any two or more persons qualified to vote at an election may nominate a candidate for any office to be filled by the election by

- (a) signing a nomination paper in Form F of Schedule A; and
- (b) delivering the nomination paper to the returning officer at any time between the giving of the notice of election and the hour fixed for the close of nominations.

" (2) Nominations of candidates for election close at three o'clock in the afternoon of the third Monday in November or on the next day following that is not a holiday if such Monday is a holiday.

(3) Where the number of persons nominated to serve as councillors for the municipality does not exceed the requisite number of persons to be elected, the returning officer shall declare the persons so nominated duly elected.

(4) Where only one person is nominated to serve as mayor or chairman, as the case may be, the returning officer shall declare the person so nominated as duly elected.

(5) Where the number of persons nominated to serve as councillors for the municipality is less than the requisite number of persons to be elected, suitable persons to fill the vacancies that would otherwise exist may be appointed by the Commissioner and shall thereupon become members of the council for all purposes of this Ordinance, for the term hereinbefore specified.

35. Where the number of persons nominated to serve as members of the council of the municipality exceeds the requisite number of persons to be elected, a poll shall be held on the second Monday in December next following and the returning officer shall appoint deputy returning officers to hold such poll and determine the time and place where the result of such poll shall be declared.

36. Where a poll is required to be held, the returning officer shall, without any unreasonable delay after the nomination, cause to be posted in at least three conspicuous places within the municipality a notice in Form G of Schedule A and cause a copy of the notice to be inserted in a newspaper circulated in the municipality, if any.

"37.(1) Any candidate nominated pursuant to section 34 may withdraw within forty-eight hours after the close of nominations by filing with the returning officer or deputy returning officer a declaration in writing to that effect, signed by himself in the presence of the returning officer, a deputy returning officer, a justice of the peace or a notary public.

(2) Where a candidate withdraws and there remains a number of candidates equal to or less than the vacancies in the office to be filled by the election, the returning officer shall declare the remaining candidates elected, and if there are no other offices for which an election need be held, he shall cancel the poll.

38. The poll shall be kept open from 10 o'clock in the forenoon until 7 o'clock in the afternoon of the same day."

The characteristics which distinguish an administrative order from a judicial order have been fully dealt with in a number of authorities and I refer particularly to the following: *Duplain v. Cameron, Beaudry and Holgate*, (1960) 32 W.W.R. (N.S.) 193; *Lee Wing and Yee Sui Wing v. Peter Don Chang and Dong Chuck and Provincial Mediation Board*, (1954) 13 W.W.R. (N.S.) 353; *R. v. Liquor Licencing Commission (Saskatchewan) Ex parte Thorpe et al*, (1969) 8 D.L.R. (3d) 186, 70 W.W.R. 316.

After reviewing the legislation in question I am of the opinion that the exercise of the authority granted to the Commissioner under Section 357 is an administrative and not a judicial act.

This approach is consistent with the views expressed by Lord Radcliffe in *Nakkuda Ali v. M. F. De S. Jayaratne*, (1951) A.C. 66 where at p. 78, he said:

"But the basis of the jurisdiction of the courts by way of certiorari has been so exhaustively analysed in recent years that individual instances are now only of importance as illustrating a general principle that is beyond dispute. That principle is most precisely stated in the words of Atkin L.J. (as he then was) in *Rex v. Electricity Commissioners*, [1924] 1 K.B. 171, 205: '... the operation of the writs has extended to control the proceedings of bodies who do not claim to be, and would not be recognised as, courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs'. As was said by Lord Hewart C.J., in *Rex v. Legislative Committee of the Church Assembly*, [1928] 1 K.B. 411, 415, when quoting this passage, 'In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be super-added to that characteristic the further characteristic that the body has the duty to act judicially.'"

In the same judgment at p. 75, Lord Radcliffe stated:

"The writ of certiorari has been issued to the latter since such ancient times that the power to do so has long been an integral part of the court's jurisdiction. In truth, the only relevant

"criterion by English law is not the general status of the person or body of persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at their decision."

Viewed in this light it is my opinion that the nature of the process by which the Commissioner arrives at his decision to order an extension of time for nominations is not governed by judicial principles. The legislation does not require him to act judicially. Such an order is therefore an administrative and not a judicial act and therefore its validity cannot be questioned in these proceedings.

If I should be wrong in this view, I would point out that the granting of a Writ of Certiorari is a matter of discretion in the Court. In the circumstances herein I would refuse to exercise my discretion in favour of the Applicant. I have already pointed out after the Order under attack was made the Applicant chose to nominate a number of candidates for the office in question. Learned Counsel for the Respondent submitted that there had been acquiescence on the part of the Applicant. After reviewing the situation I am satisfied that the conduct of the Applicant went beyond acquiescence. The Applicant affirmatively took advantage of his apparent right under the Order impugned to nominate a number of candidates for the office in question.

Under the circumstances I would refuse to exercise my discretion even if I had concluded that the impugned Order involved a judicial (or quasi

judicial) act as distinct from an administrative act. In coming to this conclusion I have considered the following, inter alia, authorities: *Regina ex rel. Central Canada Potash Co. Limited and Schmitt v. Minister of Mineral Resources of Saskatchewan*, (1973) 1 W.W.R. 193; *Re The Imperial Tobacco Co. Ltd. et al and McGregor*, 1939 O.R. 627; *Halsbury*, 2nd Edition Vol. 13 para. 199; *De Busche v. Alt*, 8 Ch. D. 286; *Litvenenko and Olenikoff v. Saskatchewan Municipal Hail Insurance Association*, (1936) 2 W.W.R. 545.

Learned Counsel for the Respondent also contended that I should in the exercise of my discretion refuse to grant relief by way of certiorari in any event because there is another alternative remedy available to the applicant under Section 76 of the Municipal Ordinance dealing with Controverted Elections and in the absence of special circumstances relief by way of certiorari should not be granted: *Re Wilfong: Cathcart v. Lowery*, (1962) 37 W.W.R. (N.S.) 612; *Regina ex rel Lotochinski v. Antonenko*, (1961) 34 W.W.R. 286 (N.S.) (Sask. C.A.). Having regard to the conclusion I have reached on this Application it is not necessary for me to decide this issue, and particularly the question of whether or not there is an alternative remedy.

It is possible that there may be a remedy under the provisions of the Municipal Ordinance dealing with Controverted elections. It is possible that the action of the Commissioner

in extending the time for nominations as he did, after the date for nominations closed, was an invalid order. However, in the disposal of this application it is neither necessary nor advisable that I should express my opinion as to the validity of the impugned order, or the rights of the Appellant, if any, in other proceedings.

In making these observations I am aware of the general rule that the Court has no jurisdiction over matters pertaining to elections unless specially authorized by statute. In this connection I refer to the following, inter alia, authorities: *Redman v. Buchanan*, 11 D.L.R. 389; *Re Dubuc* (1906) 3 W.L.R. 248; *Lamb v. McLeod*, (1932) 1 W.W.R. 206; *Re Nipissing (Can.): Klock v. Varin*, (1901) 21 C.L.T. 258 (Ont.); *Temple v. Bulmer*, 1943 S.C.R. 265.

The Application is dismissed. Leave is reserved to Counsel to speak to the matter of costs.

Dated at Yellowknife, Northwest Territories this 21st day of February, 1977.


C. F. Tallis, J.S.C.

NO. 3699

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

IN THE MATTER OF THE MUNICIPAL
ORDINANCE R.O.N.W.T. 1974,
Chapter M-15

AND IN THE MATTER OF A CERTAIN ORD
MADE UNDER THE AUTHORITY OF THE
COMMISSIONER OF THE NORTHWEST
TERRITORIES WITH RESPECT TO ELECTI
IN FROBISHER BAY IN THE MONTH OF
DECEMBER, 1976

AND IN THE MATTER OF THE JUDICATUR
ORDINANCE

BETWEEN:

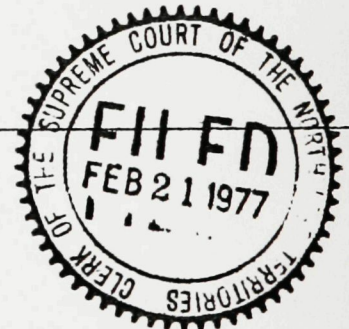
IRWIN PFEIFFER,

Applic

- and -

THE COMMISSIONER OF THE
NORTHWEST TERRITORIES,

Respon



REASONS FOR JUDGMENT OF THE HONO
MR. JUSTICE C. F. TALLIS
