SC CIV 77 006

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

YELLOWKNIFE DISTRICT HOSPITAL SOCIETY,

Applicant

- and -

NORTHWEST TERRITORIES LABOR ADVISORY BOARD AND THE COMMISSIONER OF THE NORTHWEST TERRITORIES,

Respondent

Application for an Order declaring the rights of parties interested in the construction of a statute

Application heard at Yellowknife February 21, 1977

Reasons for Judgment filed May 31, 1977

Application Dismissed

Reasons for Judgment of:

The Honourable Mr. Justice C. F. Tallis

Counsel on the hearing:

Miss B. A. Browne and
Mr. M. Sigler for the Applicant

Miss Leslie Lane for the Respondent

William Stefura appeared for the Non-Medical Members of the Staff of the Applicant

Miss Susan Green appeared for the Staff Nurses' Association

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M. Sigler for the Applicant

Miss Leslie Lane for the Respondent

William Stefura appeared for the Non-Medical Members of the Staff of the Applicant

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

This is an application under Rule 410(e) of the *Alberta Rules of Court* for an order

" Declaring the rights of parties interested in the construction of a statute, the Labor Standards Ordinance, R.O.N.W.T. 1974, c. L-1, Section 3(1), specifically the construction of "industrial establishment" and whether the applicant fall within that definition."

Counsel for the Applicant and Respondent filed an Agreed Statement of Facts in the following form:

" AGREED STATEMENT OF FACTS

1. The Yellowknife District Hospital Society is a non-profit society duly incorporated and carrying on its operations pursuant to the provisions of the Societies Ordinance, R.O.N.W.T. 1974 c. S-10 and true copies of the incorporating documents and Cerfificate of Incorporation of the said Society are annexed hereto and marked Schedule "A" and "B" respectively to this Agreed Statement of Facts.

2. The Yellowknife District Hospital Society under and by virtue of a written Agreement made between it and what is now the City of Yellowknife manages and operates a hospital facility in the City of Yellowknife known as the Stanton Yellowknife Hospital. The said Agreement is scheduled to By-law No. 557 enacted by the then Town of Yellowknife, and a certified copy of the by-law is annexed hereto and marked Schedule "C" to this Statement of Facts.

3. The lands and buildings comprising the Stanton Yellowknife Hospital are owned by and vested in the City of Yellowknife.

4. All persons employed at the Stanton Yellowknife Hospital are in the employ of the Yellowknife District Hospital Society.

5. The said Society is totally funded by the Territorial Health Insurance Service plan, a funding body of the Territorial Government, and is recognized by the Territorial Health Insurance Service as a Territorial Hospital. Territorial Health Insurance Service in turn receives approximately one-half its funding for the Stanton Yellowknife Hospital from the Department of Health and Welfare of the Government of Canada under federal cost sharing programmes.

"6. The Stanton Yellowknife Hospital provides medical care for persons throughout the Northwest Territories regardless of their ability to pay for the services or their location, with approximately 43 per cent of the total patient admissions (this total number of admissions being 2945) having been of patients from outside of Yellowknife.

7. The Stanton Yellowknife Hospital provides a public service to the residents of the Northwest Territories 7 days per week and 24 hours per day."

When this matter first came before me in Chambers Counsel for the Respondent at the time of filing the Agreed Statement of Facts made it quite clear that she was objecting to the jurisdiction of this Court to hear the Application. Learned Counsel for the Respondent raised a preliminary objection to the jurisdiction of this Court on the ground that an Application of this nature should be brought in the Federal Court of Canada. Particular reference was made to Section 18 of the *Federal Court Act*. Learned Counsel for the Respondent raised the same argument that was placed before the Court in the case of *Irwin Pfeiffer and The Commissioner of the Northwest Territories* (unreported judgment dated February 21, 1977.)

During the course of the argument on this preliminary objection it became apparent to me that the rights of some or all of the employees of the Applicant Yellowknife District Hospital Society might be directly affected by these proceedings. Under the circumstances it seemed proper to give such interested parties

an opportunity to be heard on an application of this nature.

Rule 408 provides as follows:

> " Where necessary the court may give directions as to the persons to be served with the originating notice whether those persons are or are not parties."

Pursuant to this Rule I directed that the President or Secretary of the Staff Nurses Association for Registered Nurses and Certified Nursing Assistants be served with a copy of the Originating Notice together with a Notice of the adjourned date of hearing. I further directed that Notice be given to the other employees by publishing a Notice in the local newspapers and by placing a Notice and copies of material on the employee's billboard at their place of work.

On the adjourned date for the hearing of this Application the Staff Nurses Association for Registered Nurses and Certified Nursing Assistants appeared by Counsel and the non-medical members of the Applicant's staff appeared by Counsel. It should be noted that at the time of these proceedings the employees were not represented by a Certified Bargaining Agent as such. The question of the jurisdiction of the Canada Labour Relations Board was an issue in certain other proceedings but the judgment of the Supreme Court of Canada in *Canada Labour Relations Board, Public Service Alliance of Canada v. City of Yellowknife* has now been delivered (unreported March 8, 1977).

Learned Counsel for the non-medical employees and learned Counsel for the Staff Nurses Association for Registered Nurses and Certified Nursing Assistants did not adopt or admit the Agreed Statement of Facts.

Learned Counsel for the Staff Nurses Association for Registered Nurses and Certified Nursing Assistants took no position on the preliminary objection as to jurisdiction raised by Counsel for the Respondent. Similarly learned Counsel for the non-medical employees made no submission with respect to the Federal Court having exclusive jurisdiction.

However, learned Counsel for the non-medical employees raised a further preliminary objection to the jurisdiction of this Court on the basis that Section 3(4) of the *Labour Standards Ordinance* excludes the jurisdiction of this Court on an Application of this nature.

A further objection was made on the ground that this type of proceeding is inappropriate to determine an issue of this nature.

Leave was granted to file written argument to supplement the submissions on the preliminary objections. The Court was asked to deal with the preliminary objections on the footing that if they were rejected, then a further date would be fixed for argument on the merits of the Application.

I accordingly turn to a consideration of the question of jurisdiction of this Court as raised by Counsel for the Respondent. Learned Counsel for the Respondent submitted that the Commissioner of the Northwest Territories must be viewed as the Crown in the right of the Dominion of Canada. The preliminary objection put forward by Counsel for the Respondent may be conveniently summarized as follows:

> The Supreme Court of the Northwest Territories does not have jurisdiction to hear this Application for relief against the Respondents and any such application should have been brought in the Federal Court of Canada because of the provisions of Section 18 of the *Federal Court Act*.

This objection was considered by this Court in *Irwin Pfeiffer and The Commissioner of the Northwest Territories* (unreported February 21, 1977). For the reasons stated in that judgment I dismiss the preliminary objection of the Respondent to the jurisdiction of this Court on this Application.

I now turn to a consideration of the preliminary objections of Counsel for the non-medical employees of the Applicant. These objections may be conveniently summarized as follows:

> (a) The Supreme Court of the Northwest Territories does not have jurisdiction on an application of this nature to determine whether or not the Applicant falls within the definition of "industrial establishment" because Section 3(4) of the *Labour Standards Ordinance* specifically provides that the question or issue shall be determined by the Labour Standards Officer.

(b) In any event the Court should not make any order on an application of this nature because this type of proceeding is inappropriate to determine an issue of this nature, particularly where all interested persons do not accept the factual underpinnings as set forth in the Agreed Statement of Facts.

I turn now to a consideration of the first preliminary objection as raised by Counsel for the non-medical employees. The *Labour Standards Ordinance* Chapter L-1 provides, *inter alia*, as follows:

"3.(1) This Ordinance applies

(a) to employment upon or in connection with the operation of any industrial establishment;

(b) to and in respect of employees who are employed upon or in connection with the operation of any industrial establishment; and

(c) to and in respect of the employers of employees referred to in paragraph (b).

(2) This Ordinance does not apply to or in respect of employees who are

(a) domestic servants in private houses;

(b) trappers and persons engaged in commercial fisheries;

(c) members or students of such professions as may be designated by the regulations as professions to which this Ordinance does not apply; or

(d) managers or superintendents or persons who exercise management functions.

"3.(4) Where there is a dispute as to whether this Ordinance applies in relation to any person or class of persons, the matter shall be determined by the Labour Standards Officer.

33.(1) The Commissioner shall appoint a Labour Standards Officer to administer this Ordinance.

(2) Any decision of the Labour Standards Officer may be appealed to the Commissioner."

It should be noted that Section 3(3) of the *Labour Standards Ordinance* was repealed by Chapter 3 of the 1976 (2nd Session) Ordinances of the Northwest Territories.

From the foregoing statutory provisions it will be seen that where there is a dispute as to whether this Ordinance applies in relation to any person or class of persons, the matter shall be determined by the Labour Standards Officer.

After carefully considering this matter I am of the opinion that this first preliminary objection taken by Counsel for the non-medical employees is a valid one. This Court cannot under the guise of an application under Rule 410 assume a jurisdiction that has been exclusively vested in another tribunal. In my opinion the *Labour Standards Ordinance* has stated in clear and unambiguous language that certain questions under the statute shall be determined by the Labour Standards Officer with a right of appeal to the Commissioner of the Northwest Territories. In coming to this conclusion I refer specifically to the following

statement in Volume 9 of *Halsbury* (3rd Ed.) at page 353 where the learned author states:

> " The right of the subject to have access to the courts may be taken away or restricted by statute, but the language of any such statute will be jealously watched by the courts and will not be extended beyond its least onerous meaning unless clear words are used to justify such extension. A statute may provide that a question in dispute arising under the statute shall be determined by a minister or by a specified tribunal."

This approach is consistent with the views expressed by Chapman, J. in *Department of Health and Social Security v. Walker Dean Walker Ltd.*, 1970 Q.B. 70 where at pp. 78-79 he said:

> " It will be seen that the crucial matter which I have to decide is one of interpretation of the relevant statutory provisions. If, in the action, there is involved "any question arising under the National Insurance Act, 1965, whether the contribution conditions for any benefit are satisfied or otherwise relating to a person's contributions," then it is mandatory that that question must be determined by the Minister: section 64(1)(a); and a reference to the Minister of that question for determination is equally mandatory. Similarly, under the National Insurance (Industrial Injuries) Act, 1965, it is mandatory to refer to the Minister for determination any question as to who is liable to pay contributions.
>
> Mr. Slynn has argued that in each case the words are clear and unambiguous, and plainly cover what is in issue in this case, namely, whether the statutory contri-

"butions have in fact been paid. If a claim for benefit were made there would be, he says, a question whether the contribution conditions are satisfied. In the present case there arises a question otherwise relating to a person's contributions, namely, whether they have been paid; and also a question who is liable for payment of contributions as the employer, namely, are the defendants persons who are so liable, or have they paid: section 35(1)(a). He calls my attention to the Finance Act, 1967, Schedule 12, paragraph 8, which is, he says, albeit it relates only to the S.E.T. element, persuasive as to what Parliament thought it had achieved by section 64(1)(a) of the National Insurance Act, 1965. Paragraph 8 provides:

> ' For the avoidance of doubt it is hereby declared that any question arising under Part IV of this Act, under the principal Act, or under Part VI of the Finance Act, 1966, as to whether, or as to the person by whom, the tax in respect of any person and any contribution week is payable or has been paid shall be treated for the purpose of its determination as being a question such as is mentioned in section 64(1)(a) of the National Insurance Act 1965.'

On the other side Mr. Griffiths has stressed the undesirability of anyone, even (or, perhaps, particularly) a Minister of the Crown, being judge in his own cause. Everyone would agree with that proposition. He has further relied strongly on what was said by Lord Simonds in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260, on the subject of litigants being denied access to the courts. Lord Simonds said, at p. 286:

> ' It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J. called it in *Francis v. Yiewsley and West Drayton Urban District Council* [1957] 2 Q.B. 136, a 'fundamental rule' from which I would not for my part sanction any departure. It must be asked, then, what is there in the Act of 1947 which bars such recourse.'

It is well settled by that speech, and indeed by countless other authorities, that any statute purporting to bar a citizen from the courts is looked at most jealously and construed most strictly. Only very plain and unambiguous words may be accepted as achieving that result.

I fully accept these principles on which the argument of Mr. Griffiths, and the decision of the master before whom this matter first came, are founded. But it seems to me that Mr. Slynn is right here in his contentions that the words I have to construe are plain and unambiguous. Indeed, when one considers the whole framework of this legislation, it is difficult to see how Parliament could really have enacted otherwise. The department, or the Secretary of State, has to administer what is without any question a very complex and comprehensive scheme. There would be endless sources of confusion and doubt if he did not retain sole control over the determination of disputed questions, subject, as is in fact provided, to an appeal on questions of law: see section 65(3) of the main Act, and section 35(3) of the Industrial Injuries Act. If his department were to decide, for example, that benefit could not be paid because the appropriate contributions have not been paid, and concurrently a court were to decide that

> "contributions had been paid, one would simply have a head-on clash between the department and the court, and no means, on the legislation as it stands, of resolving the conflict. This is, of course, no more than a persuasive consideration indicating why Parliament should desire to exclude the jurisdiction of the courts. Even if Parliament did desire to do so, the question still remains whether it has used language apt and adequate and clear enough to achieve that result. In my judgment it has, and accordingly the reference for which the summons prayed should be ordered."

In arriving at this conclusion I have considered the following additional authorities: *Judicial Review of Administrative Actions (3rd)* by De Smith p. 446 et seq; *Silzer v. Rent Appeal Commission*, Saskatchewan Court of Appeal March 21, 1977; *Central Broadcasting Co. v. Hawryluk*, (1975) 4 W.W.R. 15.

Learned Counsel for the Applicant relied heavily on the case of *Klymchuk v. Cowan*, 47 W.W.R. 467. In my opinion this case can be distinguished because it involved an action for declaratory relief against the defendant arising out of cancellation by the defendant of the plaintiff's permit as a used car dealer. In other words the case involves an attack on an order made by an official after he has rendered a judgment.

I turn now to a consideration of the second preliminary objection taken by Counsel for the non-medical employees of the Applicant.

In this particular case learned Counsel for the non-medical employees while making his second preliminary objection did not in any way adopt the factual underpinnings set forth in the Agreed Statement of Facts signed by Counsel for the Applicant and the Respondent. Further learned Counsel for the non-medical employees submitted that an order as asked for on this Application was inappropriate at this time. There is no evidence before the Court that the matter in issue has been placed before the Labour Standards Officer for determination with the right of appeal to the Commissioner of the Northwest Territories. I have no doubt that in most cases the employees or their representatives would want to make representations covering matters which affect conditions of work or any statutory rights that they may have under Federal or Territorial legislation (see *Le Syndicat Catholique des Employes de Magasins de Quebec Inc. v. La Compagnie Paquet Ltee.*, 1959 S.C.R. 206).

In my opinion this objection is also sound. Having regard to the position taken by Counsel for the non-medical employees there is no foundation upon which this Application can be made. In my opinion the principles enunciated by the Ontario Court of Appeal in *Ontario Ltd. v. The Corporation of the Town of Richmond Hill* (unreported February 1, 1977) apply to this application. The effect of this judgment is summarized as follows at p. 61 13 O.R. (2d):

" The Town appeals from an order declaring that certain property owned by the Company is a legal non-conforming use for commercial purposes including use as a medical clinic.

The order was made on a motion brought pursuant to Rule 612. The facts were said to have been agreed upon.

The Court was of the view that the order sought should not have been made under Rule 612. This was not an application where the rights of the parties depended upon the construction of a contract or agreement. Nor was it a matter where the rights of the parties depended upon undisputed facts or the proper inference from such facts. A reference in the statement of facts to the proposed future use of the lands was not sufficient. It is only upon actual existing facts that the Court can declare the rights of the parties, and it cannot be said that, where those facts have not yet occurred, the situation is within the type contemplated by Rule 612. If it were otherwise, a declaration might well preclude any future action by the Town for what would then be a breach of the zoning by-law.

In the result there was no foundation upon which the application could be made and the appeal was allowed."

Having ruled that the two preliminary objections advanced by Counsel for the non-medical employees are valid, I accordingly dismiss this Application. Leave is reserved to Counsel to speak to the matter of costs.

Dated at the City of Yellowknife in the Northwest Territories this 31st day of May, 1977.

C. F. Tallis

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

No. S.C. 3704

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- and -

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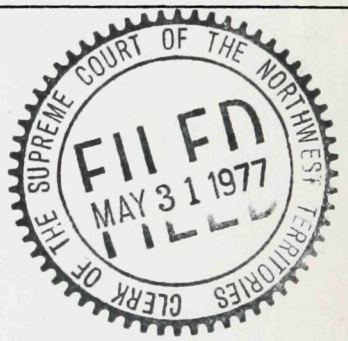

REASONS FOR JUDGMENT OF THE HONOUR
MR. JUSTICE C. F. TALLIS