Date: 1997 08 29
Docket: CV 06956

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NORTHWEST TERRITORIES TEACHERS' ASSOCIATION

Applicant

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES, THE COMMISSIONER IN COUNCIL OF THE NORTHWEST TERRITORIES, AND JOHN TODD, IN HIS CAPACITY AS FINANCE MINISTER AND CHAIRMAN OF THE FINANCIAL MANAGEMENT BOARD FOR THE GOVERNMENT OF THE NORTHWEST TERRITORIES

Respondents

Application for declaratory relief with respect to interpretation of newly-enacted provisions of the ***Public Service Act*** and Minister's decision made thereunder. Application granted in part.

Heard at Yellowknife, Northwest Territories on June 3-4, 1997

Reasons filed: August 29, 1997

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

Counsel for the Applicant: Barrie Chivers

Counsel for the Respondents: Karan M. Shaner

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Respondents

REASONS FOR JUDGMENT

[1] In this proceeding challenge is made to certain amendments to the ***Public Service Act***, R.S.N.W.T. 1988, ch.P-16 that were enacted by the Legislative Assembly of the Northwest Territories in 1996 and also to the exercise of authority by the Minister of Finance pursuant to the new statutory provisions. It is a multi-faceted challenge, and these Reasons deal with each aspect in turn.

Background

[2] The applicant is an employees' association with statutory authority to bargain collectively on behalf of teachers employed by the Government of the Northwest Territories. Teachers constitute a separate bargaining unit of government employees pursuant to s.41 of the ***Public Service Act***. The collective bargaining scheme which governs the employer (i.e. Government of the Northwest Territories) and the teachers (and also employees in two other bargaining units) is, and was, contained in the ***Public Service Act***.

[3] There was a collective agreement in force between the employer and the applicant in 1996 at the time of the legislative amendments. That agreement is dated July 19, 1994, its commencement date was September 1, 1994, its expiry date was August 31, 1996. By article 30.06 of the collective agreement, it was to continue to be in effect during negotiations for its renewal and until a new agreement became effective.

[4] Prior to the 1996 amendments, the provisions of the ***Public Service Act*** required the parties to the collective bargaining process to bargain in good faith with a view to reaching mutual agreement on the terms and conditions of a collective agreement. If the parties were unable to reach agreement on any term or condition, they could refer that matter to a mediator who could make recommendations to them for a resolution of their differences. Where the mediation process was unsuccessful, the parties were required by the Act to submit the matter to arbitration, without stoppage of work. The arbitrator's decision was binding on the parties and was deemed by the Act to be part of the collective agreement.

[5] The 1996 amendments, in summary,

(a) repealed those provisions requiring that disagreements arising during the negotiation of a new collective agreement be referred to binding arbitration,
(b) enacted provisions that
    (i) gave the right to strike to employees in the bargaining unit, and
    (ii) gave the Minister the authority to change terms and conditions of employment in circumstances where there is no longer a collective agreement in effect, and
(c) expressly provided that article 30.06 and its equivalent article in two other collective agreements were to have no force or effect.

[6] The amendments became law on February 21, 1996.

[7] The collective bargaining process for negotiation of a renewal of the collective agreement between the Minister and the applicant (which was to expire August 31, 1996) commenced on January 31, 1996 when the Minister gave statutory notice under the Act for collective bargaining to commence. The parties exchanged bargaining proposals on April 1, 1996 and bargaining sessions occurred on certain dates in April, May and August of 1996. On August 29, 1996, the unresolved issues were referred to a mediator under the mediation provisions of the Act (as amended). The mediator issued his report containing his recommendations to the parties on October 21, 1996.

[8] By letter of December 6, 1996, the Minister purported to change the terms and conditions of employment of the teachers in the bargaining unit by exercising the authority granted to the Minister in the 1996 amendment to the Act.

[9] As it is essentially section 41.04 of the Act in particular, and the Minister's exercise of authority under that section, which are under attack in this proceeding, the words of that impugned section are here set forth:

> 41.04(1) Where notice to bargain collectively has been given, any term or condition of employment applicable to the employees in the bargaining unit in respect of which the notice was given that may be embodied in a collective agreement and that was in force on the day the notice was given shall remain in force, whether or not the collective agreement is still in effect, and shall be observed by the Minister, the employees' association and the members of the bargaining unit, except as otherwise provided by any agreement that may be entered into by the Minister and the employees' association, until
>
> (a) a new collective agreement that applies to the bargaining unit has been concluded by the parties; or
>
> (b) the following conditions have been met:
>
> (i) 21 days have elapsed since a mediator was appointed under section 41.1,
> (ii) an essential services agreement is in effect, and
> (iii) there is no longer a collective agreement applying to the bargaining unit in effect.
>
> (2) The Minister may change any term and condition of employment applicable to the employees in a bargaining unit
>
> (a) by concluding a new collective agreement that applies to the bargaining unit; or
>
> (b) where notice to bargain collectively has been given,
>
> (i) 21 days have elapsed since a mediator was appointed under s.41.1,
> (ii) an essential services agreement is in effect, and
> (iii) there is no longer a collective agreement in effect that applies to the bargaining unit.

[10] I turn now to each facet of the challenge made by the applicant.

Impermissible Delegation of Legislative Power

[11] The first ground of attack upon the 1996 amendment is founded in the assertion that the amendment is void as constituting an unauthorized delegation of a legislative power.

[12] The Parliament of Canada in the ***Northwest Territories Act*** R.S.C. 1985, ch.N-7, gave to the Legislative Assembly of the Northwest Territories the legislative power regarding "property and civil rights" in these Territories, and did not expressly authorize a delegation of that power. The applicant argues that the Legislative Assembly exceeded its authority, and thus the 1996 amendment is *ultra vires*.

[13] In my view, the Legislative Assembly in enacting the 1996 amendment did not exceed the authority conferred upon the Legislative Assembly by the ***Northwest Territories Act*** to enact legislation with respect to property and civil rights (or more particularly, legislation with respect to the employment of persons in the public service of the Government of the Northwest Territories).

[14] The subject matter of the ***Public Service Act*** is employment in the public service of the territorial government. The Act provides, *inter alia*, that the Minister is charged with the management and direction of the public service. The Minister (i.e. the Minister of Finance and Chairman of the Financial Management Board) is very much the dominant and central authority throughout the statute. It authorizes the Minister to hire (i.e. appoint persons to positions in the public service) and to fire (i.e. discipline, suspend, dismiss, etc.) employees. It places certain limits (procedural and otherwise) on the exercise of those powers of the Minister. The statute also places limits on certain activities (e.g. political activities) of employees. The Minister is authorized to enact regulations for carrying out the purposes of the statute.

[15] One segment of the statute purports to establish a collective bargaining regime within the public service. It establishes three particular bargaining units within the public service (one such unit being teachers) and designates a specific employees' association for each one of those units. The applicant here is named as the employees' association for the teachers' bargaining unit.

[16] It is legislative change to this segment of the statute (sections 41-48) which has led to this proceeding. Prior to the 1996 amendments, the statute provided for a process that generally can be described thus:

a) The Minister, on behalf of the government, was authorized to bargain collectively with an employees' association regarding terms and conditions of employment within the bargaining unit.

b) The Minister and employees' association were required to bargain in good faith.

c) The Minister, on the recommendation of Executive Council, was authorized to enter into a collective agreement with an employees' association which agreement was then binding on the Government of the Northwest Territories, the employees' association, and the members of the particular bargaining unit.

d) Failing the reaching of an agreement on any term notwithstanding the good faith bargaining process, the Minister and the employees' association were compelled to submit unresolved issues to arbitration, without any work stoppage, and the arbitrator's award was deemed to be part of the collective agreement.

[17] The 1996 amendment constitutes a substantive change in this process, or at least in part of this process. In the event of a failure to negotiate a collective agreement through good faith bargaining, the parties are not compelled to submit the unresolved matters to compulsory and binding arbitration; however, the parties are to have recourse to the services of a mediator whose role is to attempt to resolve the differences and/or encourage the parties to resolve those differences. More importantly, under the new regime the Minister is authorized, in circumstances when no collective agreement has been negotiated and there is no early resolution via mediation, to unilaterally set, or change, the terms and conditions of employment of the employees in the bargaining unit. Also, in those same circumstances, the amendment grants to the employees, with some exceptions, a (new) right to strike.

[18] With these changes, the entire process in this particular segment of the Act can now be generally described thus:

a) The Minister, on behalf of the government, is authorized to bargain collectively with an employees' association regarding terms and conditions of employment within the bargaining unit.

b) The Minister and employees' association are required to bargain in good faith.

c) The Minister, on recommendation of the Financial Management Board, is authorized to enter into a collective agreement with an employees' association which agreement is binding on the Government of the Northwest Territories, the employees' association, and the members of the particular bargaining unit.

d) Failing the reaching of an agreement on any term, notwithstanding the good faith bargaining process, the Minister and the employees' association may appoint a mediator whose role is to attempt to have the parties resolve their differences and to make non-binding recommendations to the parties.

e) Twenty-one days after the appointment of a mediator, the Minister is authorized to unilaterally set, or change, the terms and conditions of employment of the employees in the bargaining unit.

f) Twenty-one days after the appointment of a mediator, the employees in the bargaining unit, with certain exceptions, can participate in a legal strike.

[19] It is said by the applicant that the playing field for the new collective bargaining regime is not level, that it is considerably tilted in favour of the employer. It is said that the very notion of collective bargaining is emasculated by the 1996 amendments. But that is not the point here, in this aspect of the applicant's challenge. The question here is whether the Legislative Assembly unlawfully delegated its own legislative law-making powers to the Minister in authorizing the Minister to unilaterally set the terms and conditions of employment in certain circumstances. In my respectful view it has not done so.

[20] All legislative authority with respect to the Northwest Territories resides in the Parliament of Canada, pursuant to s.4 of the ***Constitution Act, 1871***. Parliament has, in the ***Northwest Territories Act***, R.S.C. 1985, ch.N-7, delegated a great deal of that plenary legislative power to the elected Legislative Assembly of the Northwest Territories. Section

16 of the ***Northwest Territories Act*** provides that the Legislative Assembly may enact statutes for the Government of the Northwest Territories in relation to certain specified subjects, including "property and civil rights" in the Territories. I view the subject matter of the ***Public Service Act***, the employment of persons in the public service of the Government of the Northwest Territories, as being clearly within the ambit of s.16 of the ***Northwest Territories Act.***

[21] There is no express provision in the ***Northwest Territories Act*** authorizing the Legislative Assembly to delegate its powers to another body or tribunal. Yet, one can readily imply such an authorization by reviewing the list of subjects enumerated in s.16 of the ***Northwest Territories Act***, (subjects which are within the legislative competence of provincial legislatures pursuant to s.92 of the ***Constitution Act, 1867***) and by considering the complexity of enacting laws, both general and specific, within those subject areas in modern-day Canada. The sheer magnitude of the business of government, the technical nature of much government activity, the need for flexibility and quick government action or response to changing circumstances all mean that not everything can be dealt with in "parent" legislation. I therefore conclude that notwithstanding that the ***Northwest Territories Act*** is merely a delegation of legislative authority from the Parliament of Canada to the Legislative Assembly of the Northwest Territories, the Legislative Assembly itself, in turn, may delegate its power to a subordinate official or tribunal. See *R v Lynn Holdings Ltd.* (1969) 68 W.W.R. 64 (Yukon Mag.Ct.); *R v Chamberlist* (1970) 72 W.W.R. 746 (Yukon C.A.), and Jones and de Villars *Principles of Administrative Law* 2nd ed., p.83.

[22] In any event, I do not view the impugned s.41.04(2) of the ***Public Service Act*** as a delegation of <u>legislative</u> power to the Minister. The Minister is indeed granted certain legislative power in another segment of the Act - s.49, the regulation-making provisions. Yet, in the main, it is <u>administrative</u> authority which is delegated to the Minister throughout this statute. He/she is given the entire management and direction of the public service. He/she can hire, fire, grant leaves of absence, etc. He/she is authorized to negotiate collective agreements with employees' associations as a representative of the Government of the Northwest Territories. He/she can establish the terms and conditions of employment of those within a bargaining unit in one of two ways pursuant to s.41.04(2):

> 41.04(2) The Minister may change any term and condition of employment applicable to the employees in a bargaining unit
>
> (a) by concluding a new collective agreement that applies to the bargaining unit; or

> (b) where notice to bargain collectively has been given,
>
> (i) 21 days have elapsed since a mediator was appointed under section 41.1,
> (ii) an essential services agreement is in effect, and
> (iii) there is no longer a collective agreement in effect that applies to the bargaining unit.

[23] In so acting, the Minister is not enacting legislation, parent or subordinate. The Minister is simply carrying out the administrative functions necessary to give effect to the statute. In acting under either paragraph (a) or paragraph (b) of subsection 41.04(2), the Minister is not legislating, is not changing any law or statute, as was indeed the situation in an important case relied upon by the applicant, *Re: Manitoba Government Employees' Association and Government of Manitoba* (1977) 79 D.L.R.(3d) 1 (S.C.C.).

[24] The Minister, in acting under s.41.04(2), is not exercising any decision-making power vested solely in the Legislative Assembly. There has been no improper delegation. It is not the Minister who has radically changed the collective bargaining regime for teachers and other public sector employees -- it is the Legislative Assembly itself.

[25] I am therefore unable to declare s.41.04(2) to be null and void on account of impermissible subdelegation.

Invalidity by Virtue of Inconsistency with *Canadian Bill of Rights*

[26] The applicant seeks a declaration that s.41.04(2) of the ***Public Service Act*** is invalid because of its inconsistency with the ***Canadian Bill of Rights***, in particular s.1(a) and s.2(e).

[27] The provisions of the ***Canadian Bill of Rights*** *R.S.C. 1985 (Appendix III)* relied upon are:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
> . . .
>
> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the ***Canadian Bill of Rights***, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
> . . .
>
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
>
> 5(3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

[28] By virtue of s.4 of the ***Constitution Act, 1871***, all legislative authority with respect to the Northwest Territories resides in the Parliament of Canada (though much of that legislative authority has been delegated to the Legislative Assembly of the Northwest Territories pursuant to the ***Northwest Territories Act*** R.S.C. 1985, ch.N-27, as discussed earlier in these Reasons). Thus the ***Canadian Bill of Rights*** applies to statues enacted by the Legislative Assembly of the Northwest Territories. See an earlier decision of this Court in *Canada Tungsten Mining Corporation v Northwest Territories (Department of Municipal and Community Affairs)* [1993] N.W.T.R. 242. The contrary view expressed in *Re: Branigan and Yukon Medical Council* (1986) 26 D.L.R. (4th) 268 (Yukon S.C.) is, in my respectful view, incorrect. Also, see *R v Drybones* (1969) 9 D.L.R.(3d) 473, at p.480 (S.C.C.).

[29] The applicant submits that a teacher in the public service in the Northwest Territories is an "individual" who has a property interest in his/her wages and benefits already earned and in the continuation of those wages and benefits pursuant to the collective agreement in place and the applicable law. The applicant further asserts that the enjoyment of these property interests of the teacher cannot be taken away or diminished other than by due process of law, otherwise there is an inconsistency with the provisions of the ***Canadian Bill of Rights*** and the statutory enactment is inoperative and invalid.

[30] I am required to address the issue of standing in this challenge under the ***Bill of Rights***, as this was raised by the respondents. It is not the applicant's property interests which are purportedly at risk of being deprived without due process. The applicant is not directly affected by the impugned legislation. The applicant acknowledges that it is the property interest of the teacher in the public service which it submits is detrimentally affected by the 1996 amendment, and that it is due process to the teacher which is afforded by the ***Bill of Rights*** in this regard.

[31] In previous Court decisions, it has been held that corporate entities such as the applicant cannot claim protection of rights and freedoms afforded individuals in the ***Canadian Bill of Rights***. See *Canadian Council of Churches v Canada* (1992) 88 D.L.R. (4th) 193 (S.C.C.) and *Smith Kline and French Laboratories Ltd. v A.G. of Canada* (1985) 24 D.L.R.(4th) 321. In the *Council of Churches* case, the Supreme Court of Canada considered the increasing recognition of the importance of public rights in our society and the need to grant public interest standing, or status, in certain circumstances. Yet it is stated that there should be no blanket approval to all who wish to litigate an issue. The Court stated, at p.204:

> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant.

The Court then stated that there are three aspects to the test for public interest standing:

> First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or, if not, does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the Court?

[32] In seeking to assert a challenge within these proceedings that is based on s.1(a) of the ***Bill of Rights***, the applicant seeks public interest standing under the *Council of Churches* test. In my view, the applicant meets the first and second aspects of the test. It has raised a serious issue as to the invalidity of the subject legislation, and it clearly has a genuine interest in that issue. Yet it is the teacher (or other individual public service employee) whose property interests are allegedly being deprived without due process, and there is nothing to prevent the individual employee or employees from asserting a legal

challenge in the courts, if that is the case. It has not been shown that the legislation is immune from challenge by private litigants.

[33] I am compelled in these circumstances to follow precedent and deny standing to the applicant for any challenge based on s.1(a) of the ***Canadian Bill of Rights***, the applicant not being an "individual".

[34] There remains, then, the attack on the legislation as being inconsistent with s.2(e) of the ***Bill of Rights***.

[35] Section 2(e) applies to a "person" with "rights and obligations". The applicant relies on the definition of person in the federal ***Interpretation Act***, R.S.C.1985, ch.I-21, which states that "person" includes a corporation. The applicant is a corporation.

[36] On behalf of the applicants, it is submitted that in enacting the 1996 amendment and thereby repealing the compulsory arbitration provisions of the statute, the Legislative Assembly has deprived the applicant the fundamental right to a fair hearing before any determination of its rights and obligations.

[37] I note that in its submissions based on the ***Bill of Rights*** the applicant assails not only the 1996 amendment itself but also certain activities of governmental officials in administering the law both prior to and subsequent to the amendment. The manner in which a law is administered can clearly serve no relevancy to the determination of whether it is rendered inoperative by reason of the ***Canadian Bill of Rights***, as that is a pure question of law to be determined by interpreting both the text of the statute in question and the ***Canadian Bill of Rights***. See *Smith Kline and French Laboratories Ltd. v A.G. of Canada*, *supra*, at p.352.

[38] Looking, then, solely at the legislation itself, in particular s.41.04(2) which it is alleged is inconsistent with s.2(e) of the ***Bill of Rights***, I have not been convinced that there are any rights and obligations of the applicant being deprived by virtue of that subsection. It is submitted that s.41.04(2) allows the indefinite suspension of the entire collective bargaining process. I cannot agree. Any action taken by the Minister pursuant to the Minister's authority under s.41.04(2) does not, and cannot, terminate the obligations of the parties to bargain collectively in good faith pursuant to s.41.01(2) of the Act.

[39] In *Re: Singh and Minister of Employment and Immigration* (1985) 17 D.L.R.(4th) 422, the Supreme Court of Canada stated that s.2(e) of the ***Bill of Rights*** can

only be invoked when the person's rights and obligations were to be determined under the statutory provision in question. I reiterate that there is no such determination being made under s.41.04(2) of the ***Public Service Act*** with respect to this applicant. The applicant has failed to satisfy the Court of the applicability of s.2(e) of the ***Bill of Rights*** to s.41.04(2) of the ***Public Service Act*** so that the Court might search for an inconsistency between these provisions.

[40] With respect, the applicant overstates the case when it suggests that s.41.04(2) allows the "annihilation" of the collective bargaining process and that there are no "limits" on the Minister's authority under s.41.04(2). The Minister's exercise of s.41.04(2) authority does not terminate the obligation of the parties to bargain collectively in good faith. The statute places limits on when and in what circumstances the Minister can act under s.41.04(2). The employees in the bargaining unit can exercise their collective right to strike in response to the Minister's decision. Any action of the Minister that purports to be contrary to the statute or contrary to law is, of course, subject to review by the Court (as is occurring in this very proceeding).

[41] It is not unusual for a labour relations regime to provide for a management prerogative, in certain circumstances, to change the terms and conditions of employment upon the expiry of a collective agreement. It is seen as part of a balancing between the powers of an employer and those of a union. See *CAIMAW v Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 at pp. 1009-1012.

[42] It is for the legislature, not the Court, to make a policy choice in the exercise of its legislative authority derived from the ***Northwest Territories Act***. In our democratic society, elected legislatures must have the power to make policy choices. The Court ought not be too quick to deny that power of the legislature to make policy choices by invoking the provisions of the ***Canadian Bill of Rights***. In a decision made twenty-five years ago, in dealing with a challenge to certain new provisions in a federal statute, a challenge based on the ***Bill of Rights***, Chief Justice Laskin stated:

> Assuming that "except by due process of law" provides a means of controlling substantive federal legislation -- a point that did not directly arise in *R v Drybones* -- compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the ***British North America Act, 1867*****.** Those

> reasons must relate to objective and manageable standards by which a Court should be guided if scope is to be found in s.1(a) due process to silence otherwise competent federal legislation.
>
> *Curr v The Queen* (1972) 26 D.L.R.(3d) 603 at pp.613-614.

[43] I therefore find that the 1996 amendment, and in particular s.41.04(2) granting certain authority to the Minister, is *intra vires* the Legislative Assembly of the Northwest Territories. That does not mean, of course, that the Minister's exercise of that authority is not subject to scrutiny by this Court on a judicial review.

Minister Must Act by Regulation or Other Statutory Instrument

[44] As stated thus far in these Reasons, I find that the 1996 amendment to the ***Public Service Act***, in particular s.41.04(2), is *intra vires* the Legislative Assembly of the Northwest Territories, and constitutes valid legislation in accordance with its terms. I now deal with submissions of the applicant which impugn the Minister's actual exercise of authority under s.41.04(2) on December 6, 1996.

[45] Subsection 41.04(2) provides that the Minister may change any term or condition of employment for employees in a particular bargaining unit after a collective agreement has expired, and when certain specific circumstances exist. The subsection does not state the manner in which the Minister may so act. In the case which has led to these proceedings, the Minister acted under s.41.04(2) by sending a letter or letters to the employees' association, which documents contained the details of the changes purportedly made by the Minister. The applicant submits that this manner is ineffective, improper and not authorized, and that the Minister must make any such change by enacting a regulation pursuant to s.49 of the ***Public Service Act*** and that in any event the Minister must comply with the provisions of the ***Statutory Instruments Act***, R.S.N.W.T. 1988, ch.49 (supp.). This latter statute requires that regulations and other statutory instruments made under the authority of a statute be transmitted to the Registrar of Regulations for registration and publication in the ***Northwest Territories Gazette***.

[46] Section 49 of the ***Public Service Act*** provides as follows:

> 49(1) The Commissioner, on the recommendation of the Minister, may make regulations for carrying the purposes and provisions of this Act into effect and, without restricting the generality of the foregoing, may make regulations

(a) prescribing the positions in portions of the public service other than departments in respect of which the Minister may authorize the person holding the position to exercise and perform the Minister's powers, functions and duties under paragraph 4(b);

(b) respecting procedures or policies to evaluate positions in the public service and to establish groups of positions;

(c) respecting a procedure to determine, or considerations to be followed in determining, rates of pay and other remuneration that is in addition to pay for positions in the public service;

(d) respecting the payment of acting pay where an employee is required to perform for a temporary period the duties of a person occupying a higher position, the amount of or method of determining the amount of acting pay and the circumstances and conditions under which it may be paid;

(e) respecting procedures for establishment and approval of

(i) positions in a department or other portion of the public service, and
(ii) the addition of positions to or the deletion of positions from a department or other portion of the public service;

(f) establishing the Staffing Appeals Committee;

(g) respecting extensions of the probationary periods of employees;

(h) prescribing a method for determining the effective date of an appointment to the public service;

(i) respecting resignations of employees;

(j) respecting the lay-off of employees and the appointment of a person laid off to a position in the public service;

(k) prescribing the category of restricted employees for the purposes of section 34;

(l) concerning any other matters relating to section 34 not referred to in paragraph (k);

(m) respecting leaves of absence;

(n) respecting when employees, by reason of special circumstances or the nature of their duties, must perform the duties of their position on a holiday;

(o) respecting retirement from positions in the public service;

(p) prescribing the oath referred to in section 39;

(q) respecting hours of work, attendance and other matters relating to the performance of duties;

(r) respecting the selection, appointment and conditions of employment of employees and the pay and other remuneration in addition to pay payable to employees;

(s) respecting the holding of offices or positions outside the public service by persons employed in the public service;

(t) providing for the resolution of disputes arising out of any matter governed by this Act or the regulations, whether by way of grievance, appeal or otherwise; and

(u) for any purpose for which regulations are authorized to be made.

[47] It is clear that what is contemplated in s.49 is the enactment of rules or regulations of general application. This regulation-making power is permissive and not mandatory. For example, the Commissioner might exercise the power in paragraphs 49(1)(q)(r) and (t) to make rules or regulations regarding the terms and conditions of employment, performance of duties, pay and other remuneration, resolution of disputes, etc. with respect to employees generally in the public service (e.g., those to whom no collective agreement or bargaining unit is applicable). The power granted to the Commissioner (and indirectly, the Minister) in s.49 is a power of a legislative nature.

[48] This legislative power in s.49 is quite different than the power or authority granted or delegated to the Minister in those sections of the Act concerning the collective bargaining

process (ss.41-48 of the Act). Those sections of that Act assign administrative powers to the Minister; e.g., the Minister is authorized to negotiate, and enter into, collective agreements with one or more of the three employees' associations established in s.41, on behalf of the government as employer. The Minister is also authorized to change any term or condition of employment applicable to employees in those bargaining units, when no collective agreement is in place and when certain time periods and other prerequisites have been met. There is no legal requirement for the Minister to document each of these specific administrative decisions in a regulation or formal statutory instrument. The legislature's reason for granting power to the Minister in this part of the Act is not to make rules of general application, but to make administrative decisions on behalf of the government as employer. Each subject matter of the s.41(2), s.41.01, s.41.04, s.41.1 and s.42.2 powers granted to the Minister is an individual or specific concern, unique to the temporal situation and bargaining unit in question, and not of general application. The exercise of those powers (specifically the s.41.04(2) power) has no effect beyond that felt by the employees in the bargaining unit in question. In these circumstances, neither the regulation-making power in s.49 of the Act nor the ***Statutory Instruments Act*** is applicable. These are administrative decisions taken by the Minister in a specific case on a specific occasion, as authorized by the legislature. The impact of the Minister's decision under s.41.04(2) does not extend to an undetermined number of persons, a characteristic indicative of an instrument of a legislative nature, per *Reference re Language Rights under the Manitoba Act, 1870* (1992) 88 D.L.R.(4th) 385 (S.C.C.). The Minister's decision applies only to teachers in the public service of the Government of the Northwest Territories.

[49] In all of the circumstances, I find that the Minister's decision, contained in the December 6, 1996 letter and related documents, does not come within the statutory definition of either "regulation" or "statutory instrument" in the ***Statutory Instruments Act***.

Impermissible Subdelegation of s.41.04(2) Authority to Chairman of Financial Management Board and/or to Director of Labour Relations and Compensation

[50] As stated earlier, the Minister's purported exercise of the power delegated to him in s.41.04(2) of the Act is contained in the December 6, 1996 letter addressed to the employees' association. That letter is on the stationery of the Financial Management Board Secretariat of the Government of the Northwest Territories and is signed by Herb Hunt, Director of Labour Relations and Compensation. The first sentence states the very purpose of the letter, and the details follow. That sentence reads:

> The Chairman has directed that changes be made to the terms and conditions of employment for teachers, pursuant to s.41.04(2) of the ***Public Service Act***...

[51] One would have thought that the Minister, in exercising a statutory authority of such consequence, would sign the letter himself, and, indeed, describe himself as Minister rather than as Chairman of the Financial Management Board.

[52] It is acknowledged by the parties to this proceeding that the respondent John Todd is both Minister of Finance and Chairman of the Financial Management Board. He is the Minister responsible for the ***Financial Administration Act***, R.S.N.W.T. 1988, ch.7, (pursuant to which both the Financial Management Board and the Financial Management Board Secretariat are established) and is the Minister responsible for the ***Public Service Act***. Evidence presented on the hearing of this application indicates that the Minister who is the Chairman of the Financial Management Board is also the Minister responsible for the ***Public Service Act***.

[53] It is argued that in the circumstances presented by the December 6, 1996 letter, there has been an unlawful subdelegation of the Minister's s.41.04(2) authority to the Chairman of the Financial Management Board. Inasmuch as the Minister and the Chairman, in this context, are clearly one and the same person, I cannot find that there has been any such subdelegation.

[54] Further, it is submitted that as it is Mr. Hunt who sent the subject letter to the employees' association, there has been an unlawful subdelegation of the Minister's s.41.04(2) authority to Mr. Hunt in his capacity as Director, Labour Relations and Compensation, Financial Management Board Secretariat. On a plain reading of the December 6, 1996 document, I cannot agree. The document is clear that it is the Minister who made the decision. Mr. Hunt was merely the messenger who communicated the decision.

[55] In summary, then, as surprising as it is to find such "discrepancies" as a) the reference to Chairman instead of Minister, and b) the communication emanating from the Financial Management Board Secretariat rather than the Minister's office, (considering the importance of the Minister's decision), I find that both are matters of form only and do not amount in substance to any improper or unlawful subdelegation.

Retroactive Operation of s.41.04(2) Authority

[56] In order to address the next aspect of this application, I return to the precise wording of s.41.04 of the Act:

> 41.04(1) Where notice to bargain collectively has been given, any term or condition of employment applicable to the employees in the bargaining unit in respect of which the notice was given that may be embodied in a collective agreement and that was in force on the day the notice was given shall remain in force, whether or not the collective agreement is still in effect, and shall be observed by the Minister, the employees' association and the members of the bargaining unit, except as otherwise provided by any agreement that may be entered into by the Minister and the employees' association, until
>
> (a) a new collective agreement that applies to the bargaining unit has been concluded by the parties; or
>
> (b) the following conditions have been met:
>
> (i) 21 days have elapsed since a mediator was appointed under section 41.1,
> (ii) an essential services agreement is in effect, and
> (iii) there is no longer a collective agreement applying to the bargaining unit in effect.
>
> (2) The Minister may change any term and condition of employment applicable to the employees in a bargaining unit
>
> (a) by concluding a new collective agreement that applies to the bargaining unit; or
>
> (b) where notice to bargain collectively has been given,
>
> (i) 21 days have elapsed since a mediator was appointed under section 41.1,
> (ii) an essential services agreement is in effect, and
> (iii) there is no longer a collective agreement in effect that applies to the bargaining unit.

[57] With respect to the "conditions" or dates referred to in paragraph (b) of both subsections, the evidence and representations before me indicate the following:

(i) The mediator was appointed on September 3, 1996. Thus the 21-day period elapsed on September 24, 1996.

(ii) On or before October 10, 1996, the parties reached agreement that no essential services agreement was required. The specific date is not provided.

(iii) The previous collective agreement dated July 19, 1994 ceased to be in effect on September 1, 1996, by operation of law. (i.e., the amendment to the statute on February 21,1996).

[58] Thus, the earliest date that the three conditions were met was September 24, 1996, and possibly it was as late as October 10, 1996. For purposes of these Reasons I use the October 10, 1996 date.

[59] I turn first to subsection 41.04(1). The statute here provides that "any term or condition of employment" in the July 19, 1994 collective agreement that was in force on January 31, 1996 (the date the Minister gave notice to bargain collectively), e.g. rates of pay, benefits, etc., remained in force until October 10, 1996. That those terms and conditions remained in force until October 10, 1996 is quite clear from a plain reading of the words of subsection 41.04(1).

[60] Now, to subsection 41.04(2) and the authority granted to the Minister to change the terms and conditions of employment of the teachers in the bargaining unit. For the same reasons, it is equally clear that the earliest date that the Minister could unilaterally set the terms and conditions of employment was October 10, 1996. Indeed, he did not do so, or purport to do so, until December 6, 1996.

[61] It is my understanding from the evidence and representations before me that in the period from September 1, 1996 to October 10, 1996 and beyond, i.e. to December 6, 1996, the teachers in the bargaining unit continued to perform their duties in accordance with the terms and conditions of the July 19, 1994 collective agreement and, in turn, the employer continued to pay wages and benefits to those employees in accordance with the July 19, 1994 collective agreement. Services were performed, and payment was made for those services. It is only reasonable to presume that the terms and conditions of the expired collective agreement were continuing to govern the relationship between employer and employees, on a day-to-day basis.

[62] When the Minister changed the terms and conditions of employment on December 6, 1996, as authorized by 41.04(2), he purported to make those changes not as of December 6, 1996 but retroactively to September 1, 1996 (or to the start of the teacher's 1996-97 academic year, if earlier than September 1, 1996).

[63] The applicant submits that the Minister acted unlawfully in purporting to change terms and conditions of employment retroactively, and seeks a declaration from this Court accordingly.

[64] It is trite to say that the Minister in acting pursuant to s.41.04(2) could only do what the legislature authorized him to do pursuant to that subsection. The issue then becomes whether it was the intention of the legislature in s.41.04(2) to authorize the Minister to change terms and conditions of employment retroactively. Did the legislature intend that s.41.04(2) operate retroactively?

[65] There is a strong presumption that legislation is not intended to have a retroactive application. The general rule is that a statute is not to be interpreted as having retroactive operation unless such a construction is expressly or by necessary implication required by the words of the statute. *Gustavson Drilling (1964) Ltd. v Minister of National Revenue* [1977] 1 S.C.R.271.

[66] In s.41.04(2) of the ***Public Service Act***, there are no express words authorizing the Minister to change terms and conditions of employment retroactively, nor can any such interpretation be found by implication. The contrary is the case. Reading both subsections of s.41.04 together, it is clear that the legislature intended that the terms and conditions of a collective agreement would continue, until changed either by a new consensual collective agreement or by unilateral action of the Minister. This means that the intention of the legislature was that the Minister, when he acted under 41.04(2), was to act prospectively.

[67] There are good reasons for the presumption against retroactive application of a law. These are stated in the text *Driedger on the Construction of Statutes* (3rd ed.), at p.513 as follows:

> Because a retroactive law applies to past events, its practical effect is to change the law that was applicable to those events at the time they occurred. To change the law governing a matter after it has already passed violates the rule of law. In fact, it makes compliance with the law impossible. As Raz points out, the fundamental tenet on which the rule of law is built is that in order to comply with the law, or rely on it in a useful way, the subjects of the law have

> to know in advance what it is. By definition, a retroactive law is unknowable until it is too late.
>
> No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is not only arbitrary but also unfair. Even for persons who are not directly affected, the stability and security of law are diminished by the frequent or unwarranted enactment of retroactive legislation.
>
> In short, retroactive legislation is undesirable because it is arbitrary and because it tends to be unfair. It upsets plans and undermines expectations and it may impose penalties or other disadvantages without fair warning. It is helpful to have these reasons for disliking retroactivity in mind when considering whether a particular application of legislation should be condemned as retroactive.

[68] The legislature did not authorize the Minister to exercise his s.41.04 authority retroactively.

[69] As stated earlier, by virtue of the express words of subsection 41.04(1), the previous terms and conditions of the teachers' employment continued in force until October 10, 1996. The Minister cannot act under subsection 41.04(2) such as to thwart the express intention of the legislature in subsection 41.04(1).

[70] More generally, in the period September 1, 1996 to December 6,1996, each teacher performed duties and was paid for that performance in accordance with the previous contract or agreement. For the Minister to change the terms and conditions of employment during that period *ex post facto* is to apply the s.41.04(2) authority retroactively, an application not intended by the legislature.

[71] For these reasons I find that the Minister's decision of December 6, 1996 is invalid insofar as it purports to change terms and conditions of employment prior to December 6, 1996. It can only have immediate effect.

[72] In this segment of the applicant's submissions, the applicant also relied on another rule of statutory interpretation -- the presumption that the legislature does not intend legislation to apply so as to interfere with vested rights. In the context of the Minister's decision of December 6, 1996 under s.41.04(2) which is under attack in this aspect of the application, I do not find that the presumption against interference with vested rights is

particularly helpful or applicable, given my analysis in the few preceding pages of these Reasons. In my view, each teacher had vested rights of two types during the relevant time frame. The teacher had ongoing "vested rights" by virtue of the previous collective agreement; however, those expired on August 31, 1996. Those rights were no longer "vested" by virtue of the collective agreement provisions. Secondly, the teacher had vested rights from September 1, 1996 to whenever paragraph (b) of subsection 41.04(1) was triggered (i.e., October 10, 1996). Those rights were vested by virtue of s.41.04(1). However, on October 10, 1996, those rights ceased to be "vested" by virtue of subsection 41.04(1). From October 10, 1996 the teachers did not have "vested rights" -- instead there was, in my view, a day-to-day *quid pro quo*; i.e., services rendered for payment of wages and benefits (which by implicit agreement was identical to the previous arrangement). The Minister's decision on December 6, 1996 had an immediate effect, a prospective effect, but it cannot be said to have affected or interfered with vested rights existing on December 6, 1996.

[73] In responding to this particular aspect of the applicant's application; i.e., an attack on the Minister's decision of December 6, 1996, the respondents also raised a preliminary objection regarding the timeliness, or lack of timeliness, of the application. As this is an application for judicial review of the Minister's decision, Part 44 of the Rules of Court apply. Pertinent excerpts are:

> 594(1) An application for judicial review shall be commenced by originating notice.
> . . .
>
> 596(1) Unless otherwise provided by statute, where the relief sought in an application for judicial review is an order to set aside a decision or act, the originating notice shall be filed and served within 30 days after the decision or act to which it relates.
>
> (2) Unless an enactment otherwise provides, the Court may extend the time for bringing an application for judicial review before or after the expiration of the 30 day time limit set out in subrule (1).

[74] The originating notice in the within proceeding was filed and served March 21, 1997. In the originating notice, the applicant sought, *inter alia*, a declaration that the Minister could not retroactively change terms and conditions of employment pursuant to s.41.04(2). (In its filed brief and in oral submissions of counsel, the applicant also seeks, collaterally, an order quashing the actions of the employer on February 21, 1997 and

thereafter, in reducing teachers' pay cheques to recover alleged overpayments for the period September 1, 1996 to February 21, 1997 -- and I shall deal with that request for a quashing order below). The respondents submit that the application is out of time by virtue of Rule 596(1) and further, that the Court should not grant an extension of time under Rule 596(2).

[75] I note that there is case authority to the effect that Rule 596(1) is not applicable to an application for declaratory relief (as opposed to an application for an order "setting aside" a decision). See *Dwyer v College of Physicians and Surgeons* (1989) 98 A.R. 81.

[76] In considering whether to grant an extension of time, I cannot overlook the fact that the actual disadvantage to each teacher which flowed from the Minister's decision on December 6, 1996 only started occurring on February 21, 1997 when the pay cheques were reduced; i.e., only thirty days prior to the commencement of these proceedings.

[77] There is also evidence that on December 13, 1996, the applicant notified the employer that it challenged the Minister's right to make the December 6, 1996 decision. An intent to challenge or appeal a decision which intent is formed and clearly expressed within the limitation period is an important factor to consider in the determination of whether to grant an extension of the limitation period. See *U.N.W. v N.W.T.P.C.* [1994] N.W.T.J. No.59.

[78] An additional factor of significance exists here inasmuch as this attack on the Minister's decision of December 6, 1996 is only one part of the overall application in this proceeding, which application includes requests which challenge the validity of the statute itself, requests to which the 30-day limitation period does not apply.

[79] In all of these circumstances, I exercise my discretion by granting an extension of time to the applicant under subrule 596(2), should subrule 596(1) apply and should such extension be necessary.

[80] As mentioned the applicant seeks, in addition to the declaration sought and discussed above, an order quashing or setting aside the deduction from teachers' pay cheques on February 21, 1997 and thereafter. Inasmuch as I have ruled in favour of the applicant on the retroactive nature of the December 6,1996 decision, I fail to see the necessity of a further order flowing therefrom. It adds nothing. The Minister's decision of December 6, 1996 is invalid, not *in toto*, but insofar as it purports to alter the terms of conditions of employment prior to December 6, 1996.

Continuation of the Terms and Conditions of the July 19,1994 Collective Agreement

[81] In paragraph G of its originating notice of motion, and in its filed brief, the applicant seeks a further declaration that "until such time as the Minister properly promulgates legally binding and effective changes to terms and conditions of employment applicable to teachers in the bargaining unit, the terms and conditions embodied in the Collective Agreement dated July 19, 1994 continue to apply".

[82] For reasons mentioned earlier in these Reasons, this part of the application must fail.

[83] Earlier in these Reasons, I have ruled:

a) the Minister is not required to enact a regulation under s.49 in exercising s.41.04(2) authority;

b) the ***Statutory Instruments Act*** is not applicable to the Minister's decision of December 6, 1996;

c) there was no unlawful delegation of the Minister's s.41.04(2) authority to either the Chairman of the Financial Management Board or the Director of Labour Relations and Compensation, Financial Management Board Secretariat;

d) the Minister's decision of December 6, 1996 was a lawful exercise of the Minister's authority pursuant to s.41.04(2); however, that decision was invalid insofar (and only insofar) as it purports to alter the terms and conditions of employment prior to December 6, 1996.

[84] As the Minister has acted to change the terms and conditions of employment applicable to teachers in the bargaining unit, it cannot be said that the terms and conditions embodied in the Collective Agreement dated July 19, 1994 continue to apply.

Other Specific Requests for Declaratory Relief

[85] Next, I deal with the following additional declarations sought by the applicant in this proceeding:

(1) a declaration that terms and conditions of employment imposed by the Minister pursuant to s.41.04(2) of the ***Public Service Act*** do not constitute a "collective agreement" within the meaning of the Act;

(2) a declaration that the document attached as Exhibit M to the affidavit of Patricia Thomas sworn March 19, 1997 and entitled "Terms and Conditions of Employment Between the Northwest Territories Teachers' Association and the Chairman of the Financial Management Board for the Government of the Northwest Territories: Expires August 31, 1999" is not a "collective agreement" within the meaning of the ***Public Service Act***.

(3) a declaration that the imposition of terms and conditions of employment by the Minister pursuant to s.41.04(2) of the ***Public Service Act*** does not terminate the obligation of the parties to bargain collectively in good faith pursuant to s.41.01(2) of the Act.

(4) a declaration that the imposition of terms and conditions of employment by the Minister pursuant to s.41.04(2) of the ***Public Service Act*** does not foreclose the right of employees in the subject bargaining unit to strike, subject to s.42(2) of the Act.

[86] The respondents, in their filed brief, state their agreement with the thrust of the contents of the declarations sought above. These particular matters are not in dispute, they say. Their counsel accordingly submits the declarations are unnecessary.

[87] The applicant, in turn, persists in seeking these aspects of the declaratory relief sought. It points to Exhibit M to Ms. Thomas' affidavit, a lengthy document which purports to contain the terms and conditions imposed by the Minister on the teachers in the bargaining unit on December 6, 1996. It notes that that document is framed as an "agreement" rather than a Ministerial pronouncement. A review of the document indicates that its contents refer to the document as being an agreement. Its contents are open to the interpretation that it purports to close off the collective bargaining process until 1999. The Minister's document belies the position taken by his counsel in these proceedings.

[88] In all of the circumstances, I see no reason not to grant these heads of declaratory relief, the merits of which are uncontested.

Ultra Vires **Because of Unreasonableness**

[89] The applicant in its filed brief added one final ground of attack on the 1996 amendment. It submits that both the impugned s.41.04 itself, and the actual imposition of terms and conditions on December 6, 1996, are *ultra vires* because of unreasonableness. The applicant cites as case authorities the decisions in *Kruse v Johnson* [1898] 2 Q.B.9 and *R v Bell* (1979) 98 D.L.R.(3d) 255 (S.C.C.) and also refers the Court to a discussion on the topic in Holland and McGowan, *Delegated Legislation in Canada*, at pp. 224-229.

[90] I am not satisfied that unreasonableness exists as an independent head of judicial review of delegated legislation, apart (possibly) from municipal by-laws.

[91] With respect to the Minister's decision of December 6, 1996, as I have discussed earlier in these Reasons, this was the exercise of administrative power and not delegated legislative power in any event.

[92] With respect to s.41.04 itself, I have dealt earlier in these Reasons with the applicant's more particular allegations of shortcomings in the legislation, which allegations I would equate with the applicant's submissions under "unreasonableness". As the authors Holland and McGowan point out, "unreasonableness" is really only a generic term for other, more particular, substantive faults.

[93] It is not unreasonable for the Legislative Assembly to make a policy choice that is within its legislative authority derived from the ***Northwest Territories Act***. The Legislative Assembly is not compelled to select any particular scheme to govern the collective bargaining process.

Summary

[94] For the foregoing reasons, an Order will issue granting the following declaratory relief:

> (a) the Minister's decision of December 6, 1996, pursuant to s.41.04(2) of the ***Public Service Act***, is invalid insofar as it purports to change terms and conditions of employment of teachers in the bargaining unit retroactively; i.e., prior to December 6, 1996.

(b) terms and conditions of employment imposed by the Minister pursuant to s.41.04(2) of the ***Public Service Act*** do not constitute a "collective agreement" within the meaning of the Act;

(c) the document attached as Exhibit M to the affidavit of Patricia Thomas sworn March 19, 1997 and entitled "Terms and Conditions of Employment Between the Northwest Territories Teachers' Association and the Chairman of the Financial Management Board for the Government of the Northwest Territories: Expires August 31, 1999" is not a "collective agreement" within the meaning of the ***Public Service Act***;

(d) the imposition of terms and conditions of employment by the Minister pursuant to s.41.04(2) of the ***Public Service Act*** does not terminate the obligation of the parties to bargain collectively in good faith pursuant to s.41.04(2) of the Act;

(e) the imposition of terms and conditions of employment by the Minister pursuant to s.41.04(2) of the ***Public Service Act*** does not foreclose the right of employees in the subject bargaining unit to strike, subject to s.42(2) of the Act.

[95] The remaining requests for declaratory relief in the originating notice of motion are denied.

[96] Counsel have yet to address costs. They may do so by written submissions to be filed with the Clerk within 30 days of the date of filing of these Reasons.

J.E. Richard,
J.S.C.

Dated at Yellowknife, Northwest Territories
this 29th day of August 1997

Counsel for the Applicant: Barrie Chivers
Counsel for the Respondents: Karan M. Shaner

CV 06956

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NORTHWEST TERRITORIES TEACHERS' ASSOCIATION

Applicant

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES, THE COMMISSIONER IN COUNCIL OF THE NORTHWEST TERRITORIES, AND JOHN TODD, IN HIS CAPACITY AS FINANCE MINISTER AND CHAIRMAN OF THE FINANCIAL MANAGEMENT BOARD FOR THE GOVERNMENT OF THE NORTHWEST TERRITORIES

Respondents

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