IN THE SUPREME COURT OF BRITISH COLUMBIA BETWEEN:

WESTBANK FIRST NATION, also known as the WESTBANK INDIAN BAND, as represented by BRIAN ELI, Chief, LARRY DERRICKSON, CLARENCE CLOUGH, DEANNA HAMILTON and WAYNE ELI, Councillors, and the WESTBANK FIRST NATION DEVELOPMENT CO. LTD., formerly known as the WESTBANK INDIAN BAND DEVELOPMENT COMPANY LTD.. PETITIONERS AND: BRITISH COLUMBIA LABOUR RELATIONS BOARD, BRITISH COLUMBIA GOVERNMENT EMPLOYEES' UNION, BRITISH COLUMBIA NURSES' UNION, THE MINISTRY OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA, and THE ATTORNEY GENERAL OF CANADA RESPONDENTS

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE TYSOE

Counsel for the Petitioners: Stan H. Ashcroft

Counsel for the Respondent, British Columbia Labour Relations Board: Joseph J. Arvay, Q.C. and Sharon Lindgren

Counsel for the Respondent, British Columbia Government Employees' Union: Ken Curry

Counsel for the Respondent, British Columbia Nurses' Union: John Rogers

Counsel for the Respondent, the Ministry of the Attorney General of British Columbia: Timothy Leadem

Dates and place of hearing: October 7 and 8, 1997 Vancouver, B.C.

[1] The Petitioners apply pursuant to the Judicial Review Procedure Act to set aside and reverse several related decisions of the British Columbia Labour Relations Board (the "Labour Relations Board" or the "Board"). The principle issue is whether the labour relations for a care facility called the Pine Acres Home operated on one of the reserves of Westbank First Nation falls within provincial or federal jurisdiction. There are preliminary issues as to (i) whether the Petitioners are disentitled to relief under the Judicial Review Procedure Act on the basis of a failure to exhaust all remedies before the Labour Relations Board in a timely fashion and (ii) what facts may properly be considered by the Court on this application.

[2] Before I set out the underlying facts, I propose to review the proceedings leading up to the present application. As there is an issue as to the facts upon which I may rely in reaching my decision, it is convenient to segregate the facts into three categories with reference to various stages of the previous proceedings.

PREVIOUS PROCEEDINGS

[3] In 1987 two employees were dismissed from their employment with Pine Acres Home and they lodged complaints under the Canada Labour Code. An adjudicator was appointed to hear the dispute. A preliminary objection was raised by the employer as to the applicability of the Canada Labour Code. The adjudicator dismissed the preliminary objection, holding that the care facility came under the purview of the federal legislation.

[4] In April 1995 the British Columbia Government Employees' Union and the British Columbia Nurses' Union ("BCGEU" and "BCNU", respectively, and together the "Unions") made application to be certified to represent different bargaining units of employees working at Pine Acres Home. A preliminary issue was raised of whether the operation of the Home fell under provincial or federal jurisdiction for the purposes of labour relations. By decision dated August 9, 1995 (the "Jurisdictional Decision"), Vice-Chair Mullin of the Labour Relations Board ruled that the Home fell under provincial jurisdiction and that the Board had jurisdiction to entertain the applications for certification. It is this Jurisdictional Decision which is the focus of the Plaintiffs' challenge.

[5] By letter dated August 24, 1995 Pine Acres Home requested leave for reconsideration of the Jurisdictional Decision under s. 141 of the Labour Relations Code. The application for leave was refused by Vice-Chair Gordon of the Board on the basis that there was not a good arguable case that might succeed on a ground for reconsideration established by the Board.

[6] On September 7, 1995 Vice-Chair Mullin granted the certifications sought by the Unions.

[7] On December 22, 1995 the Petitioners filed a Petition under the Judicial Review Procedure Act seeking to set aside and reverse the Jurisdictional Decision and the decision granting certifications to the Unions. This Petition contained information which had not been before Vice-Chair Mullin at the time he made the Jurisdictional Decision.

[8] On February 9, 1996 Pine Acres Home applied pursuant to s. 142 of the Labour Relations Code for cancellation of the certifications of the Unions (the "Decertification Application"). The Decertification Application was made after a staff lawyer for the Board advised counsel for the Home of his position that the Board was the appropriate forum to decide whether the certifications should be cancelled on the basis of the additional information contained in the Petition. Counsel for the Home disagreed with this position but made the Decertification Application out of an abundance of caution.

[9] The Petition was heard by Levine J. who dismissed it by Reasons for Judgment dated April 18, 1996. It was her view that the remedy of the Decertification Application was an adequate alternative remedy which should be exhausted at the level of the Labour Relations Board prior to the Court being asked to intervene under the Judicial Review Procedure Act.

[10] Pine Acres Home then continued with the Decertification Application in front of the Labour Relations Board. The application was denied by Vice-Chair Mullin in a decision dated September 10, 1996. He ruled that the additional information put forward by the Home was inadmissible and that it would not have changed the outcome of the Jurisdictional Decision. He also accepted a res judicata argument put forward by the BCGEU.

[11] Subsection 141(5) of the Labour Relations Code provides that an application for leave to reconsider a Board's decision must be made within 15 days of the publication of the reasons for the decision. Pine Acres Home did not make such an application in respect of the denial of the Decertification Application within the 15 day time limit. It requested an extension of time to apply for leave but, by letter dated January 20, 1997, Vice-Chair and Registrar Arthur denied the request because Pine Acres Home had not given a valid explanation for its delay in requesting the extension.

[12] The Petition in this proceeding was issued on March 13, 1997.

UNDERLYING FACTS

[13] The background facts fall into three categories. The first category consists of the facts before Vice-Chair Mullin at the time he made the Jurisdictional Decision. Counsel for Pine Acres Home and the Unions reached agreement on the facts prior to the hearing and the facts were provided to Vice-Chair Mullin through statements of counsel and the provision of documents. Apart from his reliance upon one of the documents, no one is alleging that Vice-Chair Mullin misstated any of these facts in the Jurisdictional Decision. The second category consists of additional facts which were contained in the first Petition heard by Levine J. and which Vice-Chair Mullin refused to admit on the Decertification Application. The third category consists of additional facts before me at the time of the hearing of the second Petition.

(a) First Category of Facts

[14] Pine Acres Home is a long-term care facility which has been owned and operated by the Westbank First Nation since 1983. It is located on one of Westbank First Nations reserves. The Home began as an enterprise owned directly by the Westbank First Nation. In 1985 it was incorporated under the Society Act as the Westbank Pine Acres Society. The Society was dissolved in 1989. The Home was subsequently transferred into the company now known as Westbank First Nation Development Co. Ltd. (the "Company") which had an ability to raise necessary funds for an expansion of the Home. The shares of the Company are held by the Chief and Councillors of Westbank First Nation on behalf of the Band members. The Band Council has at all times been in control of the operation of the Home.

[15] The Home is licenced under the Community Care Facility Act. The licence, issued by the provincial government, is in the name of the Council. The Home is a member of the Health Employers Association of British Columbia and is governed by the Continuing Care Act.

[16] The purposes of the Home are set out in a Mission Statement which was one of the documents provided to Vice-Chair Mullin. It reads, in part, as follows:

> Pine Acres Home is a 46 bed Intermediate Care Facility owned by the Westbank Indian Band. It is licensed under the Community Care Facilities Act to provide safe residential care to communities in the South Okanagan areas as well as the Outlying Satellite Communities.
>
> It recognizes that individuals are members of a larger community with physical, emotional, spiritual and psychosocial needs. It provides care for 42 people at the Personal, Intermediate, and Extended Care levels, and provides care for 20 people in a Special Care unit who have a dementing illness that requires care at the Intermediate and Extended Care levels. Respite placements are provided on a temporary basis for elderly members of families cared for in the Community.

[17] At the time of the adjudicator's decision in 1988, the Home had approximately 20 beds, of which 5 were occupied by non-natives (the maximum allowed under the licence at the time). The Home was operating at a deficit and the Band was subsidizing it at the rate of approximately $7,000 to $8,000 a month. The Band decided to expand the facility to make it economically viable by offering more beds.

[18] Funding for the operation of the Home comes from several sources, including the Band and the Department of Indian Affairs and Northern Development. There is no direct provincial funding but non-native patients are generally covered by the provincial health care plan.

[19] The above facts are facts from the Jurisdictional Decision which I could conveniently summarize. The remaining facts cannot be as easily summarized and I simply quote them from the Jurisdictional Decision:

> The organizational chart of Pine Acres Home indicates that the Administrator of the facility reports to the Westbank First Nation Administrator, Portfolio Head, who in turn reports to the Westbank First Nation.
>
> Pine Acres Home is designed to address the needs of the Westbank Indian Band by providing health services in a culturally appropriate way. For instance, the Westbank Band young people organize a pow wow, at which the Band elders and Pine Acres Home residents attend. The Employer also advises that it is dealing with native people who are not accustomed to being institutionalized or may be resistant to being institutionalized because of previous experiences, such as with residential schools. The Employer's experience is that many of its people will accept a lesser health care, rather than come into an institution. Along with providing health services in a culturally appropriate way, the Employer tries to provide those services which are needed by native people and often not otherwise available. That includes a drug and alcohol counselling program for people over 65, which is funded by the Band. The Employer also provides an avenue for native people who need to do community service, as well as opportunities for summer work and school experience.
>
> The Employer says that it attempts to create employment for Band members among the staff and has done so to the following extent at Pine Acres Home: 33% of the service staff, 53% of the institutional care staff, and 60% of the support staff are Band members. None of the registered nurses are Band members, but a Band member is in training as a nurse. The goal of Pine Acres Home is to create employment opportunity for Band members and First Nations people.
>
> The number of residents at the facility goes up and down. At the time of the application the total was 49, of whom one was a registered member of the Westbank Indian Band, 10 were First Nations people, and three were private paying patients (i.e., not entitled to provincial health care funding). There were 35 non-native British Columbia residents in the facility for whom Pine Acres Home receives payment from the province for services rendered. There was no waiting list for persons to enter the facility.

> The facility has always satisfied the requests of Band members for palliative care. As well, there is a significant number of elderly people on the reserve, as it contains a trailer court and retirement community. The trailer court and retirement community include non-native residents on the reserve. There are 5,000 such non-native residents on the reserve. The Band itself has 500 members, of whom 283 live on the reserve. Pine Acres Home provides service to these Band residents, but also to the non-native residents of the reserve and to the residents in the Kelowna area in general. The Band wishes to run the facility in an economically viable way, largely on the basis of this broader service basis.

[20] Vice-Chair Mullin also made findings of fact based on the agreed upon evidence. He stated that the functional control of Pine Acres Home remains with the Band and he accepted that the facility is in substance controlled and operated by the Council, irrespective of the advent of the Company.

(b) Second Category of Facts

[21] The Petition and supporting Affidavit of Chief Louie in the proceeding heard by Levine J. contained three areas of additional facts.

[22] The first area of additional facts related to the proportion of employees of Pine Acres Home who are First Nations people. The proportion has fluctuated over the years but at no time since the Home opened has the number of full-time native employees been less than 46% of the total number of employees. In his decision dismissing the Decertification Application, Vice-Chair Mullin noted that there appeared to be a large number of part-time employees who were not included in the calculation.

[23] The second area of additional facts related to the proportion of patients of Pine Acres Home who are First Nations people. This proportion has also fluctuated over the years. In March 1984 it was 56% (9 of 15); in March 1988 it was 74% (14 of 19); in March 1995 it was 21% (11 of 51); and in December 1995 (when the first Petition was filed) it was 32% (19 of 59). Vice-Chair Mullin did not believe that these figures advanced the position of the Petitioners. It was also stated in the first Petition that the policy of Pine Acres Home with respect to patients is to give priority to Westbank Band members first, other natives second and non-natives third.

[24] The third area of additional facts related to the Mission Statement quoted in the Jurisdictional Decision. Chief Louie deposed that the Band Council was baffled by where this document may have come from and that it was misleading and did not reflect the true goals and aspirations of the Band Council in relation to Pine Acres Home. He said that the term "community" in the Mission Statement meant native communities. Vice-Chair Mullin had difficulties with Chief Louie's explanation for numerous reasons.

(c) Third Category of Facts

[25] The third category of facts consists of additional facts before me at the hearing of the second Petition. These facts were summarized in the submissions made by the Petitioners' counsel as follows (with my deletion of some of the facts which I believe are duplicative of the facts contained in the first two categories):

> (a) the Band obtained authority from the Department of Indian Affairs and Northern Development to administer its own low rental intermediate care program pursuant to a Band resolution when the Home was first constructed;
>
> (b) the Home was constructed by the Band in 1983 under the direction of the Band Council;
>
> (c) the Home operates on unallocated and unencumbered Band land which is managed by the Band;
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> (d) the Band arranged financing for the construction of the Home;
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> (e) the Band Council selects and employs the administrator of the Home:
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> (f) an information package and letters sent out in 1987 shows that the Home focused primarily on seeking native patients;

(g) the Home has an Indian motif and displays Indian art work;

(h) the Band Council undertook the major tasks in expanding the Home in 1988 and 1989;

(i) the expansion of the Home was partially financed by a contribution agreement with the federal government, which provided for a non-repayable contribution of $400,500 and a repayable contribution of $200,000;

(j) conditions of the contribution agreement included (i) obtaining the support of the Department of Indian Affairs and Northern Development and the B.C. Ministry of Health for the expansion, (ii) obtaining service provider designation from the B.C. Ministry of Health, and (iii) initiating a plan to train and employ native women;

(k) the Band Council undertook an additional expansion of the Home in 1993;

(l) the Band Council continues to deal with funding and servicing for the Home;

(m) in the Band's financial statements, the Home is shown as an non-corporate entity owned and controlled by the Band and any revenue over expenditures is allocated to the Band, not the Company;

(n) the Home became a bona fide public institution under the Excise Tax Act in 1984;

(o) the Home is shown as being operated by the Band for Revenue Canada purposes and is not subject to taxation.

[26] Most of the facts in this category simply bolster Vice-Chair Mullin's finding that the Home is controlled and operated by the Band Council. I accept Vice-Chair Mullin's finding in this regard.

[27] I add that the second Petition also stated that the proportion of native patients in the Home as of the date of the Petition was 32% (19 of 59). The wording of the paragraph in the second Petition containing this information is identical to the wording of the corresponding paragraph in the first Petition heard by Levine J. As counsel did not include this as a fact under the third category, I infer that this was the proportion as of December 1995 (when the first Petition was filed) and that it does not represent the proportion as of March 1997 (when the second Petition was filed).

DISCUSSION

(a) Failure to Exhaust Remedies

[28] The Respondents contend that the Court should exercise its discretion against judicially reviewing the Jurisdictional Decision and subsequent decisions of the Board as a result of the Petitioners' failure to exhaust their alternate remedies in a timely fashion. This is an extension of the argument successfully made by the Respondents before Levine J. that the Petitioners should pursue the Decertification Application at the level of the Labour Relations Board prior to requesting the Court to review the Jurisdictional Decision. The Petitioners did continue with the Decertification Application to the extent of having it dismissed by Vice-Chair Mullin, but they failed to request leave for a reconsideration of the Decertification Application within the time limited for doing so under s. 141 of the Labour Relations Code and their request for an extension of time was refused.

[29] In addition to the decision of Levine J., the Respondents rely on the decision in Carriere v. The Labour Relations Board of British Columbia and the cases referred to therein.

[30] In Carriere, the petitioner was terminated from her employment and her union grieved the termination. An arbitration board dismissed the grievance and the union applied for a review of this decision by the predecessor of the Labour Relations Board. The Board referred the matter back to the arbitration board for further consideration and the arbitration board made a supplementary decision which again dismissed the grievance. Neither the petitioner nor the union applied for a review of the supplementary decision by the Board.

[31] Brenner J. dismissed the petitioner's application under the Judicial Review Procedure Act on the basis that unless there are compelling reasons to the contrary, the Court will not undertake judicial review until available statutory remedies have been exhausted. Relying on the decisions in Adams v. Workers Compensation Board and Findley v. B.C. Labour Relations Board, Brenner J.

held that there was no compelling reason why the petitioner should be entitled to pursue her judicial review proceeding without having exhausted her statutory remedies in a timely fashion. He quoted a passage from the Findley decision to the effect that this principle applies even when the alternate remedy is no longer available because it has become time-barred.

[32] In the course of his Reasons for Judgment, Brenner J. made reference to the decision of the Supreme Court of Canada in Matsqui Indian Band v. Canadian Pacific Limited for the proposition that tribunals do have the power to consider matters of jurisdiction. In that case the Court was considering whether a motions judge had properly exercised his discretion to strike out an application for judicial review on the basis that the applicants had not pursued their jurisdictional challenge through internal appeal procedures. The Court held that the motions judge did err in exercising his discretion because he did not take into account the fact that the internal appeal tribunals lacked sufficient independence and that, if he had taken that fact into account, he would have concluded that the appeal tribunals were not an adequate alternative remedy.

[33] Lamer C.J., who delivered the majority judgment, said the following about the factors to be considered in the exercise of the discretion:

> On the basis of the above, I conclude that a variety of factors should be considered by courts in determining whether they should enter into judicial review, or alternatively should require an applicant to proceed through a statutory appeal procedure. These factors include: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). I do not believe that the category of factors should be closed, as it is for courts in particular circumstances to isolate and balance the factors which are relevant. (p. 31)
>
> In the present case, the nature of the alleged error is jurisdictional. As noted by Lamer C.J. in Matsqui Indian Band, the courts afford little curial deference to decisions of administrative tribunals with respect to their jurisdictional boundaries. The appellate tribunal in the present case was the Board itself.

[34] Another relevant factor is the fact that the Petitioners were refused leave for a reconsideration of the Jurisdictional Decision on the basis that it did not provide a good arguable case on an established ground of Board policy. I have no doubt that if leave for a reconsideration of the dismissal of the Decertification Application had been requested in a timely fashion, it would also have been denied. The denial of the Decertification Application was essentially an affirmation of the Jurisdictional Decision. As leave to reconsider the Jurisdictional Decision was refused, there is no reason to expect that leave to reconsider the dismissal of the Decertification Application would have been granted.

[35] It is my view that the reconsideration mechanism under s. 141 of the Labour Relations Code in respect of the dismissal of the Decertification Application was not an adequate alternate remedy in the circumstances of this case. Therefore, I exercise my discretion in favour of considering the judicial review requested by the Petitioners.

(b) Facts to be Considered

[36] In requesting the Court to consider the jurisdiction of the Labour Relations Board over Pine Acres Home, the Petitioners have put forward numerous facts which were not before Vice-Chair Mullin at the time of the Jurisdictional Decision. The Respondents say that I should only have regard to the facts before Vice-Chair Mullin at that time.

[37] The parties are all in agreement that the standard of review for the Jurisdictional Decision is one of correctness. However, the BCNU argues that findings of fact are not subject to the same standard and that the Court will only interfere if a finding of fact is patently unreasonable. The BCNU also submits that the standard of patent unreasonableness applies to the decision of Vice-Chair Mullin in refusing to admit the additional facts when hearing the Decertification Application.

[38] With respect, I agree with the submission of the Petitioners that the Court may consider the additional evidence. An administrative tribunal either has jurisdiction or it does not. It cannot gain jurisdiction, when it has none, because it has an incomplete or inaccurate understanding of the facts relating to the issue of jurisdiction. The authorities support the proposition that facts extrinsic to the record may be put forward to demonstrate an excess of jurisdiction: see In re McEwen and Battaglia v. Workmenþs Compensation Board.

[39] However, the additional facts which may be considered by the Court must be restricted to facts in existence at the time of the decision of the tribunal. If a tribunal has jurisdiction on the facts which existed at the time of its decision, its jurisdiction cannot be retroactively taken away by facts which occurred subsequent to the decision. In the circumstances of this case, where the Petitioners were required by the Court to pursue the Decertification Application as an adequate alternative remedy and where the Board effectively held that it had jurisdiction when it dismissed the Decertification Application, it is my view that the Court should consider all of the facts in existence at the time of the hearing of the Decertification Application.

[40] The only potential additional fact which was not in existence at the time of the hearing of the Decertification Application was the statement in the second Petition of the proportion of native patients at Pine Acres Home at the date of the Petition. As I indicated above, I infer that this is not a new fact and simply represents the proportion at the time of the first Petition filed prior to the hearing of the Decertification Application. In any event, if it did represent the proportion at the time of the filing of the Petition in this proceeding, I would not consider it.

(c) Jurisdiction of the Board

[41] Counsel were in agreement that the standard of review of the Board's decisions on its jurisdiction is one of correctness and that little or no curial deference should be afforded to the Board. In the Jurisdictional Decision itself, Vice-Chair Mullin acknowledged that the Board had no specialized knowledge or policy expertise on the issue before him.

[42] As the standard of review is one of correctness, it is not necessary for me to review the reasons of Vice-Chair Mullin extensively in order to determine whether he made a specific error. His decisions will be set aside if I reach the opposite conclusion in relation to the jurisdictional issue. Therefore, I do not propose to refer to his reasons in any great detail. His reasoning is summarized in the following passage from the Jurisdictional Decision:

> As a result, even though still owned and operated by the Band Council, Pine Acres Home has broadened its operation and thereby moved into the normal commercial milieu and provision of health care in the province. The primary focus of the operation in terms of its normal and habitual activities does not establish "Indianness", as that term is used in the jurisprudence.

[43] The basic principles in relation to the jurisdiction over labour relations are stated by the Supreme Court of Canada in Northern Telecom Ltd. v. Communication Workers of Canada:

> (1) Parliament has no authority over labour relations as such ... exclusive provincial competence is the rule.
>
> (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
>
> (3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
>
> (4) Thus, ... the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.
>
> (5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.
>
> (6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors;
>
> (p. 13)

To the same effect, see Bell Canada v. Commission de la Sante.

[44] The federal subject that the Petitioners say brings the labour relations of Pine Acres Home under federal jurisdiction is found in s. 91(24) of the British North America, 1867, which gives Parliament exclusive legislative authority over "Indians and Lands reserved for the Indians". Section 81 of the Indian Act empowers band councils to make by-laws to provide for the health of residents on its reserves. In the present case, the Council of Westbank First Nation has not passed any such by-laws but I do not believe that anything turns on their absence.

[45] Counsel referred Vice-Chair Mullin and me to four case authorities dealing with labour relations of enterprises operated by First Nations people. The first and leading authority is Four B Manufacturing Limited v. United Garment Workers of America. In that case, a business of shoe manufacturing was operated on a reserve by mostly First Nations workers was held to be subject to provincial legislation.

[46] Speaking for the majority, Beetz J. summarized the guiding principles and then stated his conclusion as follows:

In my view the established principles relevant to this issue can be summarized very briefly. With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses ...

> There is nothing about the business or operation of Four B which might allow it to be considered as a federal business: the sewing of uppers on sport shoes is an ordinary industrial activity which clearly comes under provincial legislative authority for the purposes of labour relations. Neither the ownership of the business by Indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal permit, nor the federal loan and subsidies, taken separately or together, can have any effect on the operational nature of that business. By the traditional and functional test, therefore, The Labour Relations Act applies to the facts of this case, and the Board has jurisdiction. (p. 1045-6)

Beetz J. went on to say that the result would be the same even if the business had been owned by an Indian (as opposed to a corporation, the shares of which were owned by Indians) and all of the employees were Indian:

> But even if the situation is considered from the sole point of view of Indian employees and as if the employer were an Indian, neither Indian status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc. For this reason, I come to the conclusion that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or Lands reserved for the Indians. (pp. 1047-8)

[47] In Whitebear Band Council v. Carpenters Council of Saskatchewan, the operation in question involved the construction of houses on a reserve by members of the band who were employed by the band council. The Saskatchewan Court of Appeal held that it was a federal operation which did not come under the jurisdiction of the provincial labour relations board. The judgment of the Court was given by Cameron J.A., who reasoned as follows:

> In my opinion, the particular activity in which Whitebear Band Council and its carpenters were engaged ... cannot be separated from the activity of the band council as a whole, isolated and assigned a different character than that of which it forms part - the general function of the band council ... Accordingly, I am satisfied that the construction of houses on the reserve, in the circumstances, is part and parcel of the general operation as a whole of the band council, and cannot properly be removed from that whole and viewed as an ordinary industrial activity in the province and falling under provincial jurisdiction; this, I think, is the error made by the Labour Relations Board. (p. 566)

[48] In Paul Band v. R. the issue was whether employees of a band council who acted as special police constables within the reserve came under provincial labour relations legislation. The Alberta Court of Appeal held that the employees were carrying on the normal operations or activities of the

band council under the authority of the Indian Act which constituted a federal undertaking or business. Thus, the provincial labour relations legislation had no application.

[49] The fourth authority is Sagkeeng Alcohol Rehab Centre Inc. v. Abraham. In that case the employer operated an alcohol rehabilitation centre on a reserve. Only a negligible portion of those admitted to the centre were non-First Nations people. Portions of the programs related to cultural awareness. In holding that the operation was subject to the Canada Labour Code, Rothstein J. said the following:

> The evidence before me indicates that the features of the applicant distinguish it from the facts in Four B, supra. We are not here concerned with an ordinary manufacturing business carried on an Indian reserve. Rather, the rehabilitation centre in question is engaged in the provision of a form of health care service designed and operated to meet the needs of its Indian beneficiaries.
>
> The fact that the rehabilitation centre is organized and operated primarily for Indians, governed solely by Indians, that its facilities and services are intended primarily for Indians, that its staff are specially trained under the [National Native Alcohol and Drug Abuse Program] and receive First Nations training, and that its rehabilitation program, curriculum and materials are designed for Indians, all serve to identify the inherent "Indianness" of the centre and link it to Indians. (pp. 459-60)
>
> ....
>
> The inference that I draw is that, for admission purposes, Indians are given priority over others. The applicant's focus is primarily on Indians and its facilities are available first and foremost to Indians. The question of eligibility for admission therefore, is integrally bound up with Indian status. (p. 461)

[50] Counsel for the Attorney General of British Columbia submitted that if I do not find the Whitebear and Paul Band decisions to be distinguishable, I should conclude that these cases have been implicitly overruled by the decision of the Supreme Court of Canada in R. v. Dick, a case involving the applicability of provincial legislation to Indians.

[51] I do not believe that it is necessary to decide the effect of the Dick decision on Whitebear and Paul Band. All of the cases cited by counsel are distinguishable and were decided on their own particular facts. In Whitebear, Paul Band and Sagkeeng, the Courts found that the operations in question were inextricably linked to "Indians and Lands reserved for the Indians" with the result that they were federal operations.

[52] In Whitebear, the construction of houses on the reserve was conducted exclusively by and for members of the band. The Court found that this activity could not be separated from the operations of the band council as a whole. In Paul Band, the function of the constables was to regulate traffic and to observe law and order on the reserve. The Court held that this was part of the operations of the band council. Finally, in Sagkeeng, the rehabilitation centre was truly designed for Indians. Its function was specifically to assist Indians to overcome their addiction to alcohol and only a negligible portion of the residents of the centre were non-Indians.

[53] In Four B, the Supreme Court of Canada directed that the fundamental issue is whether the business, having regard to the functional test of the nature of the operations, can be characterized as a federal business. In considering the nature of the operations, one must look to the normal or habitual activities, not its exceptional or casual aspects. Taking this into account, it is my opinion that the business of Pine Acres Home cannot properly be characterized as a federal business and, accordingly, its labour relations are governed by the provincial legislation.

[54] The normal activity of Pine Acres Home at the time of the Jurisdictional Decision was to provide intermediate care to residents of the South Okanagan community. While the Home's stated policy has been to give priority to First Nations patients, the percentage of such patients in the Home was only in the range of 21 to 32% in 1995 and there is no evidence that it has been necessary to invoke the policy, at least since the expansion of the Home. In order to make the provision of intermediate care to First Nations people economically viable, the Council of the Westbank First Nation made the decision to expand the Home and make it more available to non-native residents of the South Okanagan community. Unlike the situations in Whitebear, Paul Band and Sagkeeng, the running of the Home goes beyond the governance of band members by the Band Council. The involvement of non-First Nations patients is more than an incidental part of the business.

[55] Although the ultimate goal may be to benefit members of the Westbank First Nation and other First Nations groups, the actual function of the Home is to provide intermediate care to a much wider group, the majority of which are not First Nations people. There is a distinction to be made between the "means" and the "end". While it may be argued that the "end" only relates to First Nations people, the "means" to accomplish the "end" is much broader and relates to a majority of non-First Nations patients. In the Four B case, the purpose of the business was to benefit the Band as a whole to improve their economic position but the means to accomplish this purpose was held not to constitute a federal business. It is the "means", not the "end", which is the relevant consideration under the functional test of the nature of the business.

[56] The Petitioners have attempted to disclaim the Mission Statement relied upon by Vice-Chair Mullin. This attempt was rejected by Vice-Chair Mullin when he dismissed the Decertification Application and I agree with him in this regard. A document which the Petitioners cannot attempt to disclaim is the 1994 annual report of the Westbank First Nation.

[57] The annual report described Pine Acres Home as Phase I of a 5-phase project consisting of a total of 230 units to provide multi-level servicing for the elderly. The report described the overall project as "an integrated Regional health care system" which would be "a viable, private sector solution to the current health care crisis". Reference was made earlier in the report to elderly support programs having reached "a crisis stage within the Okanagan Region". It appears from the copies of the documents provided to the Labour Relations Board that only the first 3 pages of the report (which did not contain any of the above statements) may have been before Vice-Chair Mullin. The entire report was attached to the second Petition. The report as a whole supports the conclusions reached by Vice-Chair Mullin on the basis on the Mission Statement.

[58] As Beetz J. stated in Four B, neither the ownership of the business, nor the employment by that business of First Nations people, nor the carrying on of that business on a reserve, nor federal funding for the business, taken separately or together, have any effect on the operational nature of that business. As in Four B, neither Indian status nor any right closely connected with Indian status of the nature discussed by Beetz J. is at stake in the case at bar. The power to regulate the labour relations of Pine Acres Home does not form an integral part of primary federal jurisdiction over Indians or Lands reserved for Indians.

CONCLUSION

[59] Based on the functional test of the nature of its operations, the business of Pine Acres Home is not a federal business. The present situation falls under the general rule that provincial legislation governs labour relations, as the exception for federal jurisdiction has not been established.

[60] As I agree with the conclusion of Vice-Chair Mullin, I dismiss the Petition with costs to the Respondents.

"D. Tysoe, J."
D. Tysoe, J.