

LEGISLATIVE ASSEMBLY OF THE
NORTHWEST TERRITORIES
6TH COUNCIL, 38TH SESSION

TABLED DOCUMENT NO. 15-38

TABLED ON JANUARY 23, 1969

TABLED DOCUMENT NO. 15STATE OF THE CIVIL LAW IN THE NORTHWEST TERRITORIES
AT THE BEGINNING OF 1969

When I was asked by your Mr. Sinclair to speak to you this evening I was hard put to come up with a subject to talk about--at least something new. A Judge has to be careful in his public pronouncements--as much as possible he should refrain from getting involved in things of a political or controversial nature and I did not think you wanted something of a purely legal nature.

What then could I talk about that may interest a group of businessmen. The subject I propose is to attempt to forecast some of the problems that face us, you and me, in respect to the administration of Justice in 1969 and the years to follow as to the Civil Law--and how these problems may affect the business and general community.

When the Honourable Mr. Justice Sissions began his hectic and important eleven years as the first Judge of the North he was forced to literally build a complete system for the handling of criminal cases (for the most part) in a community just coming out of the fur-trading period or as some people term it--just emerging into the new era of civilization. With great fortitude and perseverance and I should add foresight he got a system of itinerant Courts functioning and working. In collaboration with him you were fortunate to have to have Magistrate Phinney and now Magistrate Parker--both of whom in their own way did and continue to contribute to and make the system work.

This is what I inherited when I took over from Judge Sissons in the fall of 1966. I don't say the battle of making the criminal law work in this area is over--but it is certainly made easier by the contributions of these men.

Today however, we are about to embark on a new battle--the battle involving the civil law--to put it another way the administration of the civil law as it affects individuals, property, and commercial contracts.

In the last two years my Clerk reports a steady increase in the filings in civil actions and in sheriff's work--seizures etc.

With the Capital here now and with the consequent increase in population, the ever increasing mineral development, the ever-rising tempo of oil exploration, I see for this area of Canada a repetition of what I saw happen in Alberta during the last 25 years where I began the practice of law handling cases involving farm mortgages, tractor repairs, and so on and ended my days as a lawyer arguing cases involving gas franchises, breaches of trust agreements in the millions of dollars--and believe you me the law cases reflect the economy and business world. Over the years you can almost plot the business and social problems by the cases reported in the law reports.

You just get one or two oil findings or gas showings along the Mackenzie or in the Arctic Islands and you won't know this country. Even now with just the transfusion to business caused by the Government coming and by exploration for minerals the increased tempo of business in every phase is outstanding. Barring some economic cataclysm you have every right to expect the most exciting era of all time ahead of

you now in this North country.

But along with the emergence of Government buildings, high rise apartments, pipelines, major mineral developments, and so on, will emerge all the complicated problems that come and still are coming to places like Alberta. And of course these problems are reflected in the Courts where people such as yourselves find it necessary at times to turn for solutions.

As these developments take place the Government will become more and more involved. Gas franchises will have to be registered to protect the consumers, zoning by-laws and development by-laws, expropriations of property, just to mention a few things, will all become the order of the day. The mere fact that the Companies Ordinance (one of your Government's most important pieces of legislation) has been passed helps to bring business here--instead of keeping it in Alberta or B.C. or Ottawa.

Undoubtedly you can expect more litigation attacking Municipal or Government legislation, more constitutional cases as people--you people--feel frustrations or injustices foisted upon you by these new developments.

More people also mean more complicated estates to resolve, more and varied contracts re. homes, car financing, and so on, not to mention the domestic problems that you can expect.

As businessmen you will say well so what--surely this is for the lawyers.

If you do--I say you are totally wrong--the civil legal problems of a community are your direct concern and only incidentally are they the concern of the lawyers.

Do you realize that except for a few federal statutes such as the Banking Act and the Bankruptcy Act and except for a small volume of Territorial Ordinances--there is a 100-year vacuum in the Northwest Territories in our civil law.

Let me first explain and then illustrate:

The Northwest Territories Act of 1952 became our constitution in 1955. By Section 13 of that Statute the Commissioner in Council among other things was given the power to legislate on:

- (1) direct taxation
- (2) municipal institutions
- (3) licencing of businesses and trades
- (4) property and civil rights
- (5) administration of justice
- (6) matters of alimony
- (7) education
- (8) roads, etc. on public lands
- (9) matters of merely local or private nature

By section 17 of the same Statute the criminal and civil law of England as of July 15, 1870 shall be in force until altered or repealed.

Now sometime I invite you to glance over the list of Ordinances that have been passed. Considering the newness of this Territory and the short time you have had elected members in your Council the list is pretty substantial. But it only covers the bare bones of what you will need, and one must not take from my words here a criticism of anyone. That is not what I am doing at all. After all legislation must come gradually as the need arises and as the legislative body finds it necessary to meet requirements. I am tonight merely trying to forecast what I think you will need--to govern your business behavior and other actions as the tempo of things increases.

What I mean to say is that if my forecast--as to the economic expansion which appears imminent proceeds--then your legislation will have to expand to keep up.

There are five large volumes of statutes in Alberta to cover essentially the ground that is going to have to be covered here. Not to mention a book-shelf full of regulations under those statutes.

Until the legislative gap is filled by enactment by your Council--and the same can be said for Municipal Governments as well--you business people are going to find your contracts, commercial problems and so on resolved on English law of 1870 or earlier.

In Ontario for example there has been a continuous development of provincial legislation since Confederation--an attempt to keep up with the community need. In Alberta the same since 1905. But what is equally important--this legislation has been tested during that period by hearings in the Courts--by judicial interpretation--to put it another way the provinces have built up a large body of case law that assists their lawyers in drawing of contracts, wills, in the handling of problems, in the advising of clients.

Here you don't have the legislation to start with and as to case law and judicial interpretation you have very little if anything to go on. The provincial cases are of little help because they usually hinge on their particular legislation.

Between us, Judge Sissons and I to date, have only had occasion to interpret about a dozen pieces of civil legislation.

At this point, to express it another way--almost every time I hear a civil case now--and we are getting more and will get more--my judgment settles a new point--helps to fill the void--but it is a real void.

Now for some examples: And in giving these examples I am going to pose the problem but not attempt to give the answer--the answer may come some day after a court hearing.

1. LABOUR

It will be interesting indeed when the first major strikes and other problems that usually are associated with labour problems emerge as they are bound to. It may be that they will have to be settled on the basis of laws more than 100 years old, on statutes passed in England at the commencement of the Industrial Revolution--statutes bearing dates such as 1812, 1845 and so on.

2. BUSINESS IN GENERAL

If the mineral development--precious metals, oil and gas, continues you should find new types of business concerns coming in. To mention only a few--Trust

Companies, new types of finance companies, credit unions, and so on. Again none of these were known in 1870.

In Alberta for example each municipality a few years ago tried to tax the multi-million dollars worth of equipment found on well sites, pipelines and so on. A tremendous source of income in taxing this type of personal and other property is emerging--the question is, how will you get at it here. One of the solutions was the Alberta Mobile Construction Equipment Licencing Act. I was the unsuccessful lawyer whose loss of a case brought about the legislation. Just as my clients had to find out the hard way some of you gentlemen or some municipality in the years ahead may find yourselves in the same position.

3. CONTRACT LAW

As the onslaught of new types of business has taken place most Governments in the provinces have found it necessary to pass statutes to cover Frustrated Contracts, Guarantees, Fraudulent Preferences, and so on. As you sell more products or extend more credit you will find that collections are not so easy here now--a Small Debts Act may be necessary as in Alberta. Possessory Liens Acts and Securities Acts are two more that I think of here.

4. LEGAL RIGHTS

We are way behind here. Take the big income group here--the Territorial Government Civil Servants. If some of them refuse to pay debts how can you make them pay. Alberta found it advisable to pass a special statute called the Civil Service Garnishee Act.

And how do you sue your Government--if it breaks a contract with you or if one of its vehicles runs over you? In Alberta, for example, there is a Petition of Right Act permitting a subject to sue the Province.

For years lawyers acting for mortgage companies worried about the legality of your provincially incorporated Companies operating up here but fortunately this has been cleared up by the new Companies Ordinance. This illustrates the type of problem ahead and also how your Local Government faces up to it when required.

5. MOTOR VEHICLES

More and new highways are bringing their problems. An outsider without Insurance runs over you and you and you are injured for life. Should you have an Unsatisfied Judgment Act?

6. REAL PROPERTY

I can see a great many new situations arising here. Construction of pipelines, highways, and so on brings with the development more sophisticated problems relating to property, ownership and damages. There is no real legislation here to cover expropriation, nothing to cover the situation where a pipeline wants to pass through or under your property. It is true that as yet most land is Crown land but more people are acquiring free hold every day. It has taken Alberta years to catch up with the oil business--Right of Entry Arbitration Acts to permit oil wells to be drilled on private property, Pipeline Acts and so on. And what about Real Estate Agents and contracts relating to their commissions and so on. Again

at the moment we in the Territories are faced with a Federal Statute covering our real property but your legislators are trying to mesh Territorial legislation into the Federal Statute, e.g. Mechanics Liens. Ask yourself if a pipeline company from Texas doesn't pay you, can you file a lien on the pipeline? The answer might upset you.

7. MATRIMONIAL.

When it comes to the ordinary rights as between husband and wife and parent and child it may surprise you to learn that if you and your wife have a fight over who gets the child the Court probably has to apply some old English statute that was passed when women were treated as chattels and children sometimes came under the Courts of Chancery. Think back to the stories of Dickens you read in school and you will get the picture. Once the new Divorce Act came in, in 1968 it wiped out the old Matrimonial Causes Act which was a good thing for Canada. But it had the indirect effect of probably wiping out Judicial Separation Actions. The time undoubtedly has arrived when the void should be filled by Domestic Relations Acts, Infants Acts, and so on.

Just the other day I ran into the problem of how to enforce payment of alimony where I had granted a divorce under the new Divorce Act. There was no power. I am pleased to report that I notice that an Alimony Enforcement Ordinance has been proposed for this Session--it will cure this anomaly.

Again it is encouraging to see by the local press that Mr. Searle, the local Councillor, is asking for Expropriation and Domestic Relations Acts, and so on. Also for a committee to advise on legislation. This is good and to be encouraged.

And may I pause here and say something about lawyers and legislation. In my experience the community is often suspicious and skeptical when they see members of the legal fraternity asking for changes in the laws. They are wont to say the lawyer is trying to get more business and so on. I am not going to say that lawyers are any more perfect than anyone else, but I am going to say that when a lawyer comes forward and suggests changes in the laws that will give you better protection, and that will clarify your legal rights and position--you should listen because this is the lawyer's specialty, he knows what you need. And more important--the more clearly your rights are set out in modern legislative form the less it will cost you in the long run if you happen to run afoul of the law.

In my position as your Judge--I sometimes, probably correctly, am accused of acting as an ombudsman--when I see specific problems, as in the alimony case I just referred to, I take upon myself to advise the Commissioner, or his legal adviser, Frank Smith, or the Bar Association--suggesting a change--and usually something is done.

Also as I pronounce judgments on some of these things as they come before me I try to bridge the gap as much as possible. But judge-made law is the slow way and of course the expensive way because in each case it usually means that the unsuccessful party must pay for the education if we can call it that.

And then there is the physical problem of handling civil lawsuits in such a large area. Let us say that a merchant in Hay River wants to sue a man in Cambridge Bay and the witnesses to prove the case are in Hay River, Inuvik, and Coppermine. What is the fair way to handle it, remembering that unlike a

criminal case, the parties to a civil lawsuit are expected to pay their own expenses including the hiring of their lawyers and the production of their own witnesses. Remember also that the legal center is at Yellowknife and the only real court room and law library--if you can properly use these terms--are at Yellowknife. And remember also that as yet there has been no awareness shown by the authorities in Ottawa that there is such a problem. But perhaps we are lucky here because so far it has given me a free hand and this is what I needed.

So far this is the formula I use. I direct that generally the case should be heard where the defendant is located--i.e. the fundamental rule in law is the plaintiff shall seek out his defendant. Since Yellowknife is the legal center I consider it only fair that the plaintiff pay his way to Yellowknife--as well as the expenses of his witnesses to the same center--but the Court carry he, witnesses and lawyer to Cambridge Bay or wherever the defendant is. In a case I am on now, two hearings in over a year have been held--as witnesses have become available at Inuvik--and the case will be completed probably by the Court going to Tuk or Paulatuk to hear witnesses there. This is not a perfect system but until someone can show me a better one at least we are getting the work done.

I could speak for hours of other similar problems already emerging but assume you have heard far too much. Then there is the tremendous problem of how our original Canadians who haven't the money but many of whom have civil legal rights, how can they be given the remedy that is their right. At the moment I use the lawyers who are appointed to do criminal cases on circuit to do these cases but there is a limit to how much non-paying or underpaying work a profession, no matter how willing, can be asked to do. If doctors and druggists don't have to supply services free, if merchants aren't expected to feed people and provide fuel free why is the legal profession to be considered in any different way.

May I close by reading two excerpts from my Hay River Report which expresses to some extent my feelings.

"It is quite clear from the evidence before this Commission that even in Hay River which is not too far removed from Yellowknife or Edmonton, the difficulties being experienced by ordinary people in getting legal help or work done on matters such as probate of wills, conveyances of property and similar things are causing distress.

Whether some form of Civil Legal Aid should be provided for by one or other of the governments in the Territories is not for me to say. Both magistrate and judge while on circuit try to allow solicitors travelling as defence counsel time to see private clients and do civil work other than court work when it can be fitted in.

What is really needed however is easier and more frequent access to members of the legal fraternity by the public so that causes of actions such as negligence actions, and similar types of action, are not lost by delay. The only way I can see this need satisfied to some extent is to increase the remuneration to be paid to lawyers retained on criminal cases and make it part of the terms of the retainer while they are on circuit that when the criminal work is done the lawyer is to consider that his services are to be still available for consultation on civil and quasi-civil matters.

It is observed that Magistrate Parker and I have already undertaken to assist in this regard by holding meetings after court in remote communities if requested, at which the functions of the court and a general review of legal problems will be explained to any members of the public who may be interested.

R E C O M M E N D A T I O N

44. That police officers and government administrators throughout the Northwest Territories be circulated on a regular basis by their respective departments and told that if they know of any people with possible legal problems, or hear of any such problems, they should advise the Clerk of Court at Yellowknife so that if the matter requires court attention it can be checked out on the next appearance of the court party."

To conclude I wish to re-affirm that my talk here tonight is not intended to be critical of anyone or in any sense political--my whole objective is to attempt to make a reasonable forecast--based on personal experience and observation--in the hope that you, the leaders of this community will perhaps by now knowing a little more, will assist your legislators to push some of the needed reforms through.

W. G. Morrow.

Board of Trade Meeting,
Yellowknife, N.W.T.,
January 22, 1969.