Docket No.: CA 165399
Date: 20000914

NOVA SCOTIA COURT OF APPEAL

[Cite as: Tri-County District School Board v. Nova Scotia (Utility and Review Board), 2000 NSCA 102]

Bateman, Flinn and Oland, JJ.A.

BETWEEN:

THE TRI-COUNTY DISTRICT SCHOOL BOARD

Appellant

- and -

NOVA SCOTIA UTILITY AND REVIEW BOARD and ATTORNEY GENERAL OF NOVA SCOTIA

Respondents

REASONS FOR JUDGMENT

Counsel:	John C. MacPherson, Q.C., and Nancy F. Barteaux, for the appellant
	No one appeared for the respondents
Appeal Heard:	September 12, 2000
Judgment Delivered:	September 14, 2000
THE COURT:	Appeal allowed per reasons for judgment of Flinn, J.A.; Bateman and Oland, JJ.A. concurring.

FLINN , J.A.:

[1] At the conclusion of the hearing of this appeal this court issued an order allowing this appeal, without costs, and setting aside the decision and order of the Nova Scotia Utility and Review Board (URB) dated July 25, 2000. This court further ordered that the matter be remitted to a differently constituted URB for a rehearing. At that time counsel were advised that the court would provide written reasons for its decision as soon as possible. These are those reasons.

[2] The appellant school board, as it is required to do under the provisions of s. 43 of the **Education Act**, S.N.S. 1995-96, c. 1, made application to the URB to "confirm or change the number and boundaries of the electoral districts in the school districts or school region" and, resulting from that determination, to determine the number of school board members to be elected in October 2000. The school board, in its application, requested the URB to maintain the status quo; namely, to confirm the present arrangement of eight school board members from the seven existing electoral districts, with one of those electoral districts having two members.

[3] After hearing representations from the appellant, several school board members, and the Warden and Clerk-Treasurer of the District of Clare, the URB rejected the appellant school board's submission, and decided that there would be eight electoral districts each electing one school board member.

[4] The URB, at the request of the Municipality of the District of Clare (which, heretofore, had not been a separate electoral district) decided that Clare should be one of those eight electoral districts, electing its own school board member.

[5] The appellant appeals the decision of the URB and advances several grounds of appeal; namely, that the URB:

(a) breached the rules of natural justice when it failed to allow the Tri-County District School Board (the "School Board"), adequate time to consider and respond to new information involving up-to-date voting statistics which the NSURB provided to the School Board the day prior to the hearing;

(b) breached the rules of natural justice when it made a determination with respect to the appropriate number of electoral districts, school board members and boundaries of the determined districts prior to hearing the parties;

(c) breached the rules of natural justice when it failed to refer its suggestions as to districts, members and boundaries back to the School Board for further consideration pursuant to the NSURB's own procedures;

(d) exceeded its jurisdiction when it failed to consider the factors set out in s. 44(3) of the *Education Act;*

(e) exceeded its jurisdiction when it failed to follow its own guidelines with respect to the appropriate variation in average number of voters for use in reviewing the number and boundaries of municipal polling districts;

(f) rendered a patently unreasonable decision when it found that the Municipality of the District of Clare was entitled to have all of its polling districts within one electoral district and by placing inappropriate emphasis upon that factor and insufficient weight upon the requirements set out in Section 44(3) of the Act.

[6] The appellant gave notice of this appeal to the URB, the Attorney General of Nova Scotia and the Municipality of the District of Clare. None of the respondents appeared at the hearing of this appeal, nor did any of the respondents file a factum. Counsel for the Municipality of the District of Clare, by letter, referred this court to its submissions before the URB which submissions have been noted.

[7] In considering this matter the URB is required, under s. 44(1) of the **Education Act** to "make such decision as in its opinion is just, and it is not restricted to the proposal advanced by the school board in its application." Further, in making its decision, the URB is required, under s. 44(3) of the **Education Act** to give consideration to five matters, namely:

> (a) subject to subsection 13(6), ensuring as nearly as practical equal numbers of electors in each electoral district;
>
> (b) population density;
>
> (c) distribution of the school-age population;
>
> (d) the principal language of instruction of the school board and language of instruction of the school population in areas of the district; and
>
> (e) any other relevant matter that in the opinion of the Utility and Review Board affects the necessity, expediency or justice of the order sought.

[8] In a decision of the URB dated May 14, 1997, **Re Southwest Regional School Board** (of which the districts comprised in the present application were, at that time, a part) being decision No. NSUARB-SB-96-06, the Board said the following concerning what must be its primary consideration in matters such as this, at p. 3 of the decision:

> A review of past municipal polling district and school board electoral district decisions shows that the primary consideration in these reviews has been voter equality. In emphasizing the need to achieve relative parity of voting power the Board has been influenced by recent court cases and provincial legislation.

[9] The URB referred to the decision of the Supreme Court of Canada in **Reference re Provincial Electoral Boundaries (Saskatchewan)** [1991], 2 S.C.R. 158, as well as a report of the Provincial Electoral Boundaries Commission of Nova Scotia, and the Board said further at p. 7:

> As stated above, the Board is of the opinion that the primary consideration in setting the boundaries of the electoral districts should be equality of voting population subject to a ± 25% variation to recognize differences in population density, community of interest considerations and geography. Where a municipal unit does not come within the ± 25% variation factor then, wherever feasible, it should be combined with portions of adjacent municipal units to create an electoral district of the appropriate size.

[10] In other words if, for example, the total number of voters in the various municipal polling districts which comprise the area served by the school board amount to 40,000; and if, for example, there are to be eight electoral districts with one school board member from each district, then each district should comprise 5,000 eligible voters, subject to the variation (± 25%) which the URB referred in its prior decision.

[11] This principle of voter parity (subject to a ± 25% variation) was reiterated by the URB in this case. The URB said, in its decision, at p. 11 - 12:

> The Board has determined that a variation of ± 25% is the appropriate guideline to use in reviewing the number and boundaries of the municipal polling districts. **Section 44(3)(a)** of the **Education Act** directs the Board to give consideration to "ensuring as nearly as practical equal numbers of electors in each electoral district", thus the Board believes that it is appropriate to use the same ± 25% variation from the average number of voters in considering the electoral districts of the regional or district school boards. The Board does not consider itself absolutely bound by the ± 25% factor, however, **any departure from this guideline must be well justified in the circumstances**. (emphasis added)

And further:

> While reasonable departures from the ± 25% guideline may be justified in a few instances, the Board is of the opinion that for the most part the other factors enumerated in s. 44(3) can be adequately recognized and accommodated within the guideline.

[12] In deciding that Clare should be one of the eight electoral districts, entitled to its own school board member, the URB used the following figures: There were 46,336 eligible electors in all of the municipal polling districts which comprised the area served by the

appellant school board. The average number of electors for eight districts was calculated to be 5,792. The URB then used the number of 7,405 as the number of eligible electors in Clare, which represented only a 27.8% variation from the average number of electors per electoral district.

[13] The problem with this analysis by the URB is that there was evidence before the URB that there are considerably less than 7,405 eligible voters in the District of Clare. Some background facts are necessary to understand how this can be so.

[14] As a result of amendments to the **Education Act (supra)** passed in 1996, provision was made from the establishment of a French school board to provide a French-first-language program to the children of "entitled parents." The Board is known as the Conseil Scolaire Acadien Provincial (CSAP). The CSAP is elected by "entitled persons" at the same time as the regularly scheduled election for school boards (s. 13(1)). An "entitled person" may vote in an election for the CSAP or for another school board but cannot vote in the same election for both (s. 13(2)).

[15] An "entitled person" is defined in s. 3(i) as follows:

> 3(i) "entitled person" means an entitled parent or a person who, not being an entitled parent, would be an entitled parent if the person were a parent.

[16] An "entitled parent" is defined in s. 3(h) as follows:

> 3(h) "entitled parent" means a parent who is a citizen of Canada and

> (i) whose first language learned and still understood is French.
>
> (ii) who received his or her primary school instruction in Canada in a French-first-language program, or
>
> (iii) of whom any child has received or is receiving primary or secondary school instruction in Canada in a French-first-language program.

[17] There was evidence before the URB, in this case, from the 1997 school board election, that of the 7,405 eligible electors in Clare, 5,000 of those eligible electors were "entitled persons" who were entitled to vote for the CSAP, or the school board but not both.

[18] There was further evidence before the URB, in this case, that in the range of 80% of those entitled persons in Clare would have voted for CSAP; and, therefore, not be eligible to vote for the school board member.

[19] It appears that the URB ignored this information in reaching its decision, in that it is not mentioned in the URB's decision. Nor did the URB otherwise reduce the number of eligible electors in Clare (7,405) to account for CSAP election.

[20] Indeed, in its earlier decision, the URB specifically anticipated that there would be a reduction on account of the CSAP participation. In **Re Southwest Regional School Board (supra)** the URB said the following at p. 7-9 of its decision:

> There is an additional factor to which the Board must give some consideration. The Province has established the Conseil scolaire acadien provincial which has jurisdiction throughout the Province as the seventh school board. The members of the Conseil acadien are to be elected by entitled persons. Entitled persons are free to choose to vote in either the Conseil acadien election or the appropriate regional school board election, but not both. Entitled persons do not have to make their choice until the date of the election. At this time there is no clear indication as to exactly how many entitled persons there are in the Province nor how many of them will choose to vote in the Conseil acadien election.

> The co-ordinators have used the voter statistics for the last municipal elections in making their applications. Some co-ordinators have also attempted to account for the number of voters who may chose to vote for the Conseil acadien. The numbers which they have used are not consistent with the numbers used by the Co-ordinator for the Conseil acadien.
>
> The **Education Act** requires all the school boards to apply to the Board in 1999 to confirm or change the number and boundaries of the electoral districts. **Once the elections have been held in 1997, there will be information on the number of entitled persons who chose to vote in the Conseil acadien election and that information can be used in making the new applications.** In the meantime, the Board will look at each of the applications before it to determine if it is appropriate to reduce the number of voters by estimating the number of entitled persons who will choose to vote in the Conseil acadien election. (emphasis added)
>
> **In the case of the Southwest Regional School Board there is strong support for estimating the number of entitled persons who will vote in the Conseil acadien election. There are large numbers of entitled persons in both the District of Clare and the District of Argyle. The numbers used in the application identified 6238 voters in Clare and 3994 voters in Argyle as entitled person. None of these voters were included in the calculation of the number of voters in each of the proposed electoral districts. The Board suspects that some of these voters will opt to vote in the Southwest Regional School Board election.** (emphasis added)

[21] In the matter before this court there was no accommodation by the URB for the fact that the number of eligible electors in Clare would be materially reduced as a result of the large numbers of persons entitled in that district. The failure of the URB to take this into account is significant in this case. If 5,000 of the 7,405 eligible electors in Clare are "entitled persons", then the figure which the URB should have used, as the eligible electors for Clare, is 2,405 plus those of the 5,000 entitled persons who would vote in a school board election and not for the CSAP. If only 20% of the 5,000 entitled persons would vote in the school board election (as appears to have been the case in 1997) then the total eligible voters in Clare would be 3,405 (2,405 plus 1,000).

[22] If, therefore, Clare has only 3,405 eligible electors (instead of the 7,405 which the URB used in its calculations) the District of Clare would be at variance with the average

number of electors per electoral district by 4l%. This is substantially in excess of the URB's ± 25% guideline, which the URB itself has set in order to insure relative voter parity. No reason is advanced in the decision of the URB that would justify such a substantial departure from that guideline.

[23] As a result of this decision, the District of Clare is entitled to its own electoral district in which to elect a school board member, while, at the same time, its eligible electors are markedly fewer than the average number of eligible electors in the other seven districts. This result is contrary to, and well in excess of, the URB's guideline, which the URB has set in order to comply with the voter parity provisions of s. 44(3) of the **Education Act**. Absent a compelling reason justifying this substantial departure from the guideline, I agree with counsel for the appellant that this decision of the URB produces a result which is patently unreasonable and must be set aside.

[24] In **Re Provincial Electoral Boundaries (Saskatchewan) (supra)** Justice McLachlin (as she then was) said the following at p. 183-84 [S.C.R.] concerning the meaning of the right to vote:

> What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.

[25] The consequences of the decision of the URB in the matter before this court is that the votes of the eligible electors in the other seven districts which are served by the

appellant school board, are diluted. The result is uneven and unfair representation, and cannot be allowed to stand.

[26] Having come to this conclusion, it is not necessary that I deal with the other grounds of appeal advanced by the appellant.

Flinn, J.A.

Concurred in:

Bateman, J.A.

Oland, J.A.