

**NOVA SCOTIA COURT OF APPEAL**  
**Citation: *Curves for Women New Glasgow Ltd. v.***  
***Nova Scotia ( Finance)*, 2007 NSCA 105**

**Date:** 20071107  
**Docket:** CA 274846  
**Registry:** Halifax

**Between:**

Curves for Women New Glasgow Limited

Appellant

v.

Nova Scotia (Minister of Finance)

Respondent

**Judges:** Roscoe, Hamilton, Fichaud, JJ.A.

**Appeal Heard:** September 17, 2007, in Halifax, Nova Scotia

**Held:** Appeal dismissed as per reasons for judgment of Hamilton, J.A.; Roscoe and Fichaud, JJ.A. concurring.

**Counsel:** Linda Hupman, for the appellant  
Heidi Schedler, for the respondent

**Reasons for judgment:**

[1] The appellant, Curves For Women New Glasgow Ltd., appeals the August 11, 2006 decision of Justice Hilroy S. Nathanson, as he then was, reported at 2006 NSSC 229, (2006) 247 N.S.R. (2d) 227. The judge held that the appellant's notice of appeal from the Nova Scotia Minister of Finance's refusal to grant it a Certificate of Eligibility for the Nova Scotia New Small Business Tax Deduction had been filed out of time and he refused to extend the time for filing.

[2] On March 31, 2004 the appellant, using the Nova Scotia Department of Finance form, applied for a Certificate of Eligibility with respect to its fiscal year ended September 30, 2003. On the same day the appellant's sole shareholder, officer and director, Karen Archibald, spoke with Gordon Jacobson, Review Officer, Revenue and Fiscal Transfers with the Department, who told her the appellant was not eligible for a Certificate. She wrote to Mr. Jacobson asking for reconsideration. Mr. Jacobson confirmed the appellant's ineligibility to Ms. Archibald by letter dated July 8, 2004.

[3] On July 14, 2004, Ms. Archibald wrote to Bruce Hennebury, Executive Director, Fiscal and Economic Policy of the Department, requesting a reconsideration. She emailed him on August 31, 2004 reminding him that she was waiting for a response to her July 14 letter. On August 31, 2004 Mr. Hennebury wrote Ms. Archibald, noting that he considered her July 14 letter to be an appeal of the Department's earlier decision and indicating that he reviewed the appellant's application and was satisfied the appellant was not eligible for the Certificate.

[4] By letter dated February 21, 2005, Ms. Archibald requested clarification of the Department's position in case she wanted to appeal its decision. Nancy McInnis Leek, Executive Director, Fiscal and Economic Policy with the Department, responded by letter dated March 2, 2005, confirming that the appellant was ineligible for the Certificate.

[5] On April 7, 2005 Ms. Archibald wrote Ms. McInnis Leek requesting that she "review the proposed ineligibility of (the appellant) under the new business tax holiday prior to a formal appeal" and setting out lengthy reasons in support of her argument that the appellant was eligible. By letter dated June 16, 2005, Ms. McInnis Leek acknowledged receipt of the appellant's "appeal", indicated the

Department had once more reviewed its application and confirmed that it was not eligible.

[6] On October 13, 2005 the appellant filed a notice of appeal with the Nova Scotia Supreme Court appealing what it characterized as the June 16, 2005 Nova Scotia Minister of Finance's decision that the appellant was not eligible for the tax holiday:

TAKE NOTICE that pursuant to sections 42 and section 64, **the appellant appeals to the Supreme Court of Nova Scotia from the decision of the Minister of Finance dated the 16<sup>th</sup> day of June 2005** that the appellant is not eligible for a deduction under The Nova Scotia Corporate Tax Holiday.  
(Emphasis added)

[7] The respondent, the Nova Scotia Minister of Finance, filed its reply to this notice of appeal on December 13, 2005 and provided a copy to the appellant. In paragraphs 17, 19 and 20 he challenged the court's jurisdiction to hear the appeal on the basis that the appellant's notice of appeal had not been filed in time:

17. By letter dated and mailed on June 16, 2005 to Ms. Karen Archibald, Ms. McInnis Leek, on behalf of the Respondent, confirmed that neither Curves-New Glasgow nor Curves-Glace Bay were eligible for the New Small Business Tax Deduction Certificate, pursuant to the operation of s.42(7) of the [**Nova Scotia Income Tax Act**, [ R.S.N.S. 1989, c.218 ("**Provincial Act**")]]....

...

19. By operation of s.64 of the [**Provincial Act**], the appeal provisions, s.169, of the **Federal Act** [referring to the **Canadian Income Tax Act**, R.S.C. 1985, c.1,(5th Supp)] apply for the purposes of the [**Provincial Act**]. Section 169 of the **Federal Act** requires a taxpayer to commence an appeal within 90 days from the day notice has been mailed to the taxpayer that the Respondent has confirmed the assessment or reassessment.

20. The Respondent states the Appellant is time-barred by operation of the [**Provincial Act**] and the **Federal Act** in respect of the present appeal. Section 169(1) of the **Federal Act** provides that "no appeal may be instituted after the expiration of 90 days from the day notice has been mailed to" the Appellant by the Respondent, and the Respondent states the 90 days were spent before the Appellant commenced the within appeal.

[8] The appellant did not apply for an extension of time to file its notice of appeal prior to the hearing before the judge on April 24, 2006.

[9] At the outset of the hearing the judge suggested to Ms. Archibald that the appellant should retain a lawyer to represent it because of the complexity of the issues being raised. Ms. Archibald refused indicating she could represent the appellant given her extensive knowledge of the Nova Scotia and Federal income tax regimes:

THE COURT: ... this is a...a technical matter and you might be well advised to consider getting a lawyer to represent the company rather than trying to do it yourself, even if you're allowed to. Do you understand what I mean?

MS. ARCHIBALD: I do, My Lord. I have...**I am a certified general accountant. I do feel strongly, if the Court allows me to represent the Appellant, that I do have the knowledge and the insight into income tax law, Nova Scotia income tax law, federal income tax law,** and I have read...I'm familiar with the spirit and intent of the law. I have read the cases that I think will prove my case. ... I...if the Court so allows, I would be comfortable representing the Appellant in this case, but I understand what you're saying, My Lord, ...

...

THE COURT: ...I'm not sure that I agree with you. And have you ever gone through a Court case before? Have you ever conducted a Court case before?

MS. ARCHIBALD: I have never conducted a...

THE COURT: Well, I can't imagine why you can say you'd be comfortable. Would you go into an operating room and operate on a person if you were...if you weren't a doctor?

MS. ARCHIBALD: No, I wouldn't.

THE COURT: Well, I mean there's not much difference in...in theory between going into a courtroom and...and trying to act, you know, as a lawyer. It's not as simple as it seems on the surface.

MS. ARCHIBALD: I realize that. **And you have to know, My Lord, that I am not just somebody who has come in off the street, not cognizant of the laws**

**that affect business. I have been in business most of my professional career. I have practiced in tax law. When I did practice as an accountant, I practiced solely in commodity taxes. I have been to...I have been through a Court case very closely under the Income Tax Act many years ago up through the Tax Court of Canada, and the [Appellate] Court, the Federal [Appellate] Court. Now, we did have McCarthy Tétrault representing us, but I did understand all the issues.**

(Emphasis added)

[10] The judge then heard the parties' arguments as to whether he had jurisdiction to hear the appeal, whether the appellant's notice of appeal was filed on time. The Minister argued the position set out in its reply that the judge had no jurisdiction because the appellant's notice of appeal was not filed within 90 days after June 16, 2005, the date the last letter was mailed to Ms. Archibald. During his argument the Minister referred to s.169 of the **Federal Act** which limits the time for appealing a decision of the Minister. At that point the judge asked Ms. Archibald if she had read this section. She confirmed that she had and was prepared "to respond to the time limit issue":

THE COURT: ... Ms. Archibald, have...you've read...you've seen this section, I presume.

MS. ARCHIBALD: Yes, I have.

THE COURT: Thank you.

MS. ARCHIBALD: **And I'm prepared to respond to...**

THE COURT: All right.

MS. ARCHIBALD: **...the time limit issue.**

(Emphasis added)

[11] Ms. Archibald's argument was that the judge had jurisdiction to hear the appellant's appeal because the 90 day time limit did not start to run on June 16, 2005 but sometime in July or August 2005 when she said she had spoken with Ms. McInnis Leek on the telephone:

MS. ARCHIBALD: **...I want to argue to this Court that June 16th, 2005, wasn't the date that started the 90 days.** In the summer of 2005, after I

received that letter, I spoke to the executive director, Nancy McInnis-Leek, who was the last person that notified me on June 16th, 2005, that I wasn't eligible. During that summer, I thought perhaps it best that I speak to somebody ourselves that could make a bearing decision on this. I have tried to obtain my phone records for the Courts, but my telephone system called Tagline is still in their vault trying to retrieve them. I know that the conversation happened in July or August of 2005 because I was on my cell phone at Shortt's Lake and the reception is very bad at the lake, and in the middle of our conversation, it went dead. When the cell phone went dead, that was when I decided, "Okay, that's a sign. I've got to go to Court if this is going to go anywhere. It's time that I file a formal Notice of Appeal," but...

THE COURT: So when did...what...is that what you're saying is the...

...

**MS. ARCHIBALD: It was either July or August while I was at my cottage when I had the last discussion with Nancy McInnis-Leek from the Department of Finance regarding this issue, and it was at that time that I decided that my conversation was futile, that I had to proceed to Court.**

(Emphasis added)

[12] In addition, Ms. Archibald raised for the first time, that if the judge found that the appellant's notice of appeal was filed out of time that the appellant was seeking an extension of time to file its notice of appeal. No affidavit was filed in support of this oral application.

[13] The Minister responded to the appellant's application for an extension of time pointing out that the technical requirements of s.167 of the **Federal Act**, the section permitting a taxpayer to apply for an extension, had not been met and suggesting the Minister was prejudiced by such a late application without evidence, denying him an opportunity to properly respond to the application with appropriate evidence.

[14] Ms. Archibald then asked the judge to put off dealing with the appellant's application for an extension of time until some time in the future when the appellant would file a formal application for an extension and reargue its case. The judge declined on the basis it was too late in the proceeding for this and adjourned the proceeding to decide whether the appellant's notice of appeal was filed on time and, if not, whether he would grant an extension to file.

[15] As indicated in paragraph [1] above, his later written decision held that the appellant's notice of appeal was filed out of time and that he was not prepared to grant an extension of time.

[16] Section 167 of the **Federal Act**, incorporated by reference into the **Provincial Act**, provides that a taxpayer may apply for an extension of time to file its notice of appeal and sets out the procedure to be followed and the factors to be taken into account on such an application:

167. (1) Where an appeal to the [Nova Scotia Supreme Court] has not been instituted by a taxpayer under section 169 within the time limited by that section for doing so, the taxpayer may make an application to the Court for an order extending the time within which the appeal may be instituted and the Court may make an order extending the time for appealing and may impose such terms as it deems just.

(2) An application made under subsection 167(1) shall set out the reasons why the appeal was not instituted within the time limited by section 169 for doing so.

(3) An application made under subsection (1) shall be made by filing [with the prothonotary of the Nova Scotia Supreme Court], in accordance with the provisions of the [Nova Scotia **Civil Procedure Rules**], three copies of the application accompanied by three copies of the notice of appeal.

(4) The [Nova Scotia Supreme Court] shall send a copy of each application made under this section to the office of the [Attorney General of Nova Scotia].

(5) No order shall be made under this section unless

(a) the application is made within one year after the expiration of the time limited by section 169 for appealing; and

(b) the taxpayer demonstrates that

(i) within the time otherwise limited by section 169 for appealing the taxpayer

(A) was unable to act or to instruct another to act in the taxpayer's name, or

(B) had a *bona fide* intention to appeal,

(ii) given the reasons set out in the application and the circumstances of the case, it would be just and equitable to grant the application,

(iii) the application was made as soon as circumstances permitted, and

(iv) there are reasonable grounds for the appeal.

[17] In deciding that the appellant's notice of appeal was filed out of time the judge agreed with the Minister that the 90 day time period commenced on June 16, 2005, the date the last letter was mailed to Ms. Archibald. He rejected Ms. Archibald's argument that it began sometime in July or August 2005 when she had her alleged telephone conversation with Ms. McInnis Leek.

[18] In refusing the appellant's application for an extension of time, the judge noted the appellant had not fulfilled the requirements of s.167(2) or (3). He also referenced the lack of evidence before him and found that the appellant had not shown a *bona fide* intention to appeal, had not demonstrated that it appealed as soon as circumstances permitted and that it would not be just and equitable to grant the application.

[19] In his decision the judge referred several times to the provisions of the **Financial Measures (2000) Act**, S.N.S. 2000, c.4. Both parties agree these references were wrong and should have been references to the **Provincial Act**. I agree. As will appear from my reasons, the erroneous reference to the **Financial Measures (2000) Act** had no impact on the judge's reasoning or on the issues before this Court on the appeal.

[20] The appellant did not argue before this Court that the judge erred in refusing to adjourn the proceeding after argument to allow it to reapply for an extension in writing and reargue its application at some future time. Hence the two issues before us are: Did the judge err in finding that the appellant's notice of appeal was filed out of time or in refusing to grant an extension of time?

[21] The issue of whether the notice of appeal was filed late is an issue of statutory interpretation to which the standard of correctness applies; **Central Halifax Community Assn. v. Halifax (Regional Municipality)**, 2007 NSCA 39, [2007] N.S.J. No 135 (Q.L.), 253 N.S.R. (2d) 203, at para 17. The extension of time issue involves the exercise of the judge's discretion commanding deference unless he made an error in legal principle, a palpable and overriding error of fact or



if the decision gives rise to a patent injustice; **Cluett v. Metro Computerized Bookkeeping Ltd.**, 2006 NSCA 84, [2005] N.S.J. No 179 (Q.L.), at para. 17.

[22] The appellant argued that the judge erred in finding that its notice of appeal was filed out of time on two bases. First, it argued that Ms. McInnis Leek's June 16<sup>th</sup> letter was ineffective to start the 90 day period running because it was not signed by the Minister. Second, it argued that the June 16 letter was ineffective because it did not clearly state that it was the Minister's **confirmation** that the appellant was ineligible for the Certificate. Neither of these arguments were made before the judge.

[23] With respect to its first basis, the appellant argued that it was only the Minister himself, not Ms. McInnis Leek, who had the authority to reject its application because there was no evidence the Minister had delegated his authority to her as he could have done pursuant to s.42(3) of the **Provincial Act**.

[24] The appellant has not satisfied me that the June 16 letter was ineffective because it was not signed by the Minister. Delegation of a Minister's authority can be implied. In **BM Enterprises Ltd. v. Canada (Minister of National Revenue)**, [1992] 3 FC 409, Reed, J. of the Federal Court, Trial Division held that to require the Minister to undertake personal responsibility for all authorities under an Act would lead to great inefficiencies. The court held the Minister in that case was not personally required to review and sign off on all notices being issued pursuant to an Act unless the Act specifically required it. In support of this conclusion it cited the following excerpt from **Re Golden Chemical Products Ltd.**, [1976] 2 All ER 543 (Ch Div) at p. 547 at p. 415:

(1) As a general rule a Minister is not required to exercise personally every power and discretion conferred on him by an Act. It is otherwise if there is a context in the Act which shows that the power is entrusted to the Minister personally. (2) As a general rule, it is for the Minister or his appropriate officials to decide which of his officers shall exercise a particular power. (3) Unless the level at which the power is to be exercised appears from the Act, it is not for the courts to examine the level or to enquire whether a particular official entrusted with the power is the appropriate person to exercise that power. (4) As a general rule, officers of a government department exercise powers incidental and appropriate to their functions. **In the absence of a statutory requirement, it is neither necessary nor usual for specific authority to be given orally or in writing in relation to a specific power.** (5) Constitutionally there is no delegation by a Minister to his officers. When an officer exercises a power or

discretion entrusted to him, constitutionally and legally that exercise is the act of the Minister.[Underling in original, bolding added]

[25] I adopt this reasoning.

[26] As to its second basis, the appellant argued that s.169 of the **Federal Act** provides that the 90 day period begins to run from the date the Minister mails his **confirmation** to the taxpayer, and that here the June 16 letter did not clearly state that it was the Minister's confirmation.

[27] For the most part the written communications between the appellant and the Department took the form of letters as there were no prescribed forms for the Minister to refuse an application for a Certificate of Eligibility, for a taxpayer to object to such a refusal or for the Minister to confirm or vary his position subsequent to a taxpayer's objection, the necessary prerequisites to an appeal of the Minister's decision to the Nova Scotia Supreme Court. It is a reasonable inference from reading these letters that both parties understood that the Minister refused to grant a Certificate to the appellant because its interpretation of the legislation was that the appellant was ineligible for one, that Ms. Archibald on behalf of the appellant disagreed with this interpretation and sought a reconsideration by the Minister several times and that the Minister confirmed his position more than once, including in the June 16 letter.

[28] The wording of the appellant's notice of appeal suggests it understood the June 16 letter to be the Minister's confirmation giving it the right to appeal the decision to the Nova Scotia Supreme Court:

TAKE NOTICE that pursuant to sections 42 and section 64, the appellant appeals to the Supreme Court of Nova Scotia **from the decision of the Minister of Finance dated the 16th day of June 2005** that the appellant is not eligible for a deduction under the Nova Scotia Corporate Tax Holiday. [emphasis added].

[29] Considering the letters and the wording of the notice of appeal which were before the judge, I am satisfied the judge did not err in concluding that the June 16 letter was the Minister's confirmation.

[30] Accordingly, I am satisfied the judge did not make an error in law in concluding that Ms. McInnis Leek's June 16 letter started the 90 day appeal period

running so that the appellant's notice of appeal was filed out of time when it was filed on October 13, 2005.

[31] The second issue raised by the appellant is whether the judge erred in not exercising his discretion to extend the time to file its notice of appeal. Section 167(5)(b) of the **Federal Act** sets out what a taxpayer must demonstrate in order for a judge to grant an extension:

(5) No order shall be made under this section unless

...

(b) the taxpayer demonstrates that

(i) within the time otherwise limited by section 169 for appealing the taxpayer

(A) was unable to act or to instruct another to act in the taxpayer's name, or

(B) had a *bona fide* intention to appeal,

(ii) given the reasons set out in the application and the circumstances of the case, it would be just and equitable to grant the application,

(iii) the application was made as soon as circumstances permitted, and

(iv) there are reasonable grounds for the appeal.

[32] The appellant argued that the judge erred in applying s.167(5)(b). It argued the judge should have drawn inferences in its favour as to its *bona fide* intention to appeal, whether it had made its application to extend as soon as circumstances permitted and whether it was just and equitable to grant the extension.

[33] The only evidence before the judge on the appellant's application for an extension was the correspondence between the parties from March 31, 2004 to June 16, 2005. Thus there was no evidence before the judge relevant to s.167(5)(b)(i) which directs the judge to consider the 90 day period following the June 16 letter when considering whether the appellant was unable to act or to instruct another to act in its name to file a notice of appeal on time or whether the appellant had a *bona fide* intention to appeal.

[34] Under s.167(5)(b)(ii) the judge is to consider the reasons set out in the extension application and the circumstances of the case to determine if the applicant has demonstrated that it would be just and equitable to grant the extension.

[35] For this purpose the judge had before him the appellant's oral application in which Ms. Archibald stated that the correspondence between herself and the Department between March 31, 2004 and June 16, 2005 indicated that the appellant had a *bona fide* intention to appeal and her bald statement that it would be just and equitable to grant the extension. The additional circumstances he knew were that Ms. Archibald felt she could represent the appellant on its appeal before him including the preliminary issues, despite his initial suggestion that it retain counsel, because of her extensive knowledge of tax law; that the correspondence confirmed Ms. Archibald's familiarity with tax law; that the notice of appeal specifically referred to the June 16 letter as giving rise to the appellant's right of appeal; that the appellant did not file its notice of appeal on time; that this deficiency had been brought to the appellant's attention no later than when the Minister's reply was filed on December 13, 2005; that the appellant did not apply for an extension until the hearing and that no evidence was presented in support of its application to address the factors he had to consider under s.167(5)(b).

[36] There was no evidence that the appellant made its application for an extension as soon as circumstances permitted, the factor referred to in s.167(5)(b)(iii).

[37] The judge did not deal with s.167(5)(b)(iv) in his decision. He did however indicate at the hearing that he felt the appellant's case may have merit.

[38] The appellant has not satisfied me that the judge made an error in legal principle or a palpable and overriding error of fact in refusing to grant the extension. He had to consider the provisions of s.167 in light of the minimal evidence before him which gave no indication of why the notice of appeal was not filed on time. It would not have been appropriate for the judge to speculate why this was. He did not ignore or misapprehend the little evidence before him.

[39] Nor has the appellant satisfied me that this decision gives rise to a patent injustice. The patent injustice suggested by the appellant is that the appeal will not

be decided on its merits as a result of the judge's decision. This argument could be made any time such an extension is refused. While it may be desirable that cases be decided on their merits, it is also desirable that time limits and statutory procedures be adhered to and that court proceedings are conducted efficiently and not ignored by one party so that litigants' and judicial resources will not be wasted and courts may serve all persons who wish to come before them.

[40] As admitted by the appellant, this is an area in which the judge had a broad discretion. While any judge on this panel may have exercised his or her discretion differently, it is not for us to substitute our opinion for the judge's absent an error in principle of law, a palpable and overriding error of fact or a patent injustice. As indicated, I am not satisfied there was any such error here.

[41] Accordingly, I would dismiss the appeal, replace the references in the judge's decision to the **Nova Scotia Financial Measures (2000) Act** with references to the **Nova Scotia Income Tax Act** and order the appellant to pay costs to the respondent in the amount of \$300 plus disbursements, which is the amount sought by the respondent.

Hamilton, J.A.

Concurred in:

Roscoe, J.A.

Fichaud, J.A.