

NOVA SCOTIA COURT OF APPEAL

Citation: *Unama'ki Board of Police Commissioners v. Canadian Broadcasting Corporation* , 2003 NSCA 86

Date: 20030908

Docket: CA195728

Registry: Halifax

Between:

Unama'ki Board of Police Commissioners, Chapel Island
Band Council, Eskasoni Band Council, Membertou Band
Council and Waycobah Band Council

Appellants
(Respondents to Application)

v.

John Chesal, of the Canadian Broadcasting Corporation
CBC Radio and the Attorney General of Nova Scotia

Applicant/Respondents
(John Chesal, Applicant)
(AGNS, Respondent to Application)

Judge: The Honourable Justice M. Jill Hamilton

Application Heard: August 28, 2003, in Halifax, Nova Scotia, in Chambers

Held: Application dismissed, without costs.

Counsel: David G. Coles, for the Applicant, John Chesal
Edward A. Gores, for the Respondent, AGNS
Bruce H. Wildsmith, Q.C., for the Appellants Unama'ki
Board, Chapel Island, Membertou and Waycobah,
not appearing
Charles Broderick, for the Appellants,
Eskasoni Band Council, not appearing

Decision:

[1] This was an application by one of the respondents, John Chesal, to strike out ¶'s 58 to 61 inclusive of the factum filed by his co-respondent, the Attorney General of Nova Scotia. In the alternative Mr. Chesal seeks to have the whole of the Notice of Contention filed by the AGNS struck out on the basis it does not comply with **Civil Procedure Rule 62**.

[2] I am not satisfied I have jurisdiction as a judge sitting in chambers to either strike ¶'s 58 to 61 of the AGNS's factum or to strike the whole of his Notice of Contention. Considering the decision of Justice Hallett in **Future Inns Canada Inc. v. Labour Relations Board (N.S.)** (1996), 154 N.S.R. (2d) 358 (C.A.), these matters seem more substantial than the matters **Civil Procedure Rule 62** indicates are to be dealt with by a chambers judge. However, in light of my decision that the application should be dismissed even if I have jurisdiction, it is not necessary for me to decide this issue.

[3] Mr. Chesal argues that the paragraphs he seeks to have removed from the AGNS's factum are improper for a party who has filed a Notice of Contention, since they seek to have the trial judge's decision reversed. Mr. Chesal argues that a party who files a Notice of Contention must seek to have the decision of the trial judge affirmed, rather than take the position the AGNS states is his position in this case, neither seeking confirmation nor reversal of the decision.

[4] The appellants did not appear at the hearing, but in writing some took the following position:

As I understand the situation, Mr. Gores filed the Notice of Contention under Rule 62.09 (1)(a) on the basis, not that the "judgment appealed from should be affirmed on grounds other than those given by the court appealed from", but rather that "the judgment appealed from should be varied in any event". Mr. Gores principal point is that a wrong test was applied, and his purpose in the Notice and Factum is to argue that a different test should be applied by the Court of Appeal "in any event".

Thus, as I read his Factum, Mr. Gores is arguing for that different test, and submitting that this Honourable Court should, if the different test is adopted,

apply it to the evidence in the record. He is neither saying the different test leads to a different result, nor that the decision appealed from should be affirmed. In other words, he is neither supporting the Appellants nor the Respondent Chesal in the final outcome.

[5] The AGNS takes the position that it is clear from his factum, including ¶'s 58 to 61 inclusive, that he is not asking this court to either reverse or confirm the decision of the trial judge. He agrees his wording in the first sentence of ¶ 59 may be confusing as to whether he is seeking a reversal of the trial judge's decision. He confirms he was not and is not intending to argue that the trial judge's decision should be reversed, and agrees that he will make this clear to the panel orally at the hearing.

[6] Having read the whole of the AGNS's factum, I am satisfied it will be clear to the panel hearing the appeal that the AGNS is not seeking to have the trial judge's decision reversed or confirmed. It is clear from the AGNS's factum that he is seeking to have the panel find that the test applied by the trial judge was wrong, to apply the correct test to the facts as found, and either confirm or reverse his decision accordingly. The AGNS has indicated he will make this position clear to the panel orally at the hearing. I am satisfied he will do this as an officer of the court. The position taken by the AGNS in its factum is an appropriate one for a party who files a Notice of Contention, and does not turn him into a co-appellant as argued by Mr. Chesal.

[7] Mr. Chesal argues he has been prejudiced by not knowing the AGNS's argument set out in ¶'s 58 to 61 of his factum, until after Mr. Chesal's factum was filed. He argues this has prevented him from responding to it in writing. I find this argument difficult to understand given that the correctness of the test applied by the trial judge was raised as the second argument in the appellants' factum. However, to avoid any possibility of prejudice to Mr. Chesal resulting from the fact his factum and the AGNS's factum were ordered by the court to be filed on the same day, I order that Mr. Chesal may file with the court, on or before September 15, 2003, a short response to the argument he feels has been made by the AGNS in ¶'s 58 to 61 that differs from the second argument made in the appellants's factum.

[8] Accordingly, I dismiss the application without costs, as the AGNS indicated he is not seeking costs.

Hamilton, J.A.