Date: 19990303

Docket: CA: 152113
CA: 152110

NOVA SCOTIA COURT OF APPEAL

Cite as Nova Scotia (Labour Relations Board) v. Future Inns Canada Inc., 1999 NSCA 18

BETWEEN:

LABOUR RELATIONS BOARD (NOVA SCOTIA), PETER DARBY, BRUCE ARCHIBALD, LEO MACKAY, SANDRA WHITEHEAD, PAULA WEDGE and DIRKJE JOHNSON Appellants	)	Catherine J. Lunn for the Appellant Board
- and -	)	
FUTURE INNS CANADA INC. Respondent	)	Ian Blue, Q.C. and Blair H. Mitchell for the Respondent
- and -	)	
NOVA SCOTIA FEDERATION OF LABOUR Applicant/Intervener	)	Raymond F. Larkin, Q.C. for the Applicant/Intervener
	)	Application Heard: February 18, 1999
	)	Decision Delivered: March 3, 1999

BEFORE THE HONOURABLE JUSTICE RONALD N. PUGSLEY,
IN CHAMBERS

PUGSLEY, J.A.: (In Chambers)

[1] The Nova Scotia Federation of Labour (the Federation) seeks an order extending the time in which to apply for leave to intervene pursuant to **Civil Procedure Rule 3.03**, and for leave to intervene and present oral argument, pursuant to **Civil Procedure Rule 62.35**, in two appeals to be heard together on May 12th, 1999, at 10:00 a.m.

[2] The appeals are brought by the Nova Scotia Labour Relations Board (the Board), and their individual members at the relevant time, (collectively called the appellants), from a judgment of Justice Tidman of the Supreme Court, in Chambers, on January 8, 1999, wherein he refused an application by the appellants to strike out a statement of claim filed against them by Future Inns Canada Inc. (Future Inns).

Background

[3] The context of this application may be summarized as follows:

- In 1995, the Hotel Employees and Restaurant Employees International Union, Local 62 (the Union) filed unfair labour practice complaints against Future Inns with the Board;
- By decision dated June 19, 1995, the Board determined that Future Inns had committed unfair labour practices, and ordered Future Inns to reinstate and compensate five employees;
- The Board's decision, upon a *certiorari* application, was reviewed and upheld by the Supreme Court of Nova Scotia on August 9, 1996;
- Future Inns appealed to the Court of Appeal, which ordered the Board, by

decision of February 26, 1997, to rehear the unfair labour practices complaint, on the basis that the Board should have given reasons for its decision;

- The Union and Future Inns settled the outstanding matters, and the Board adjourned the hearing;
- On July 31, 1998, Future Inns issued an originating notice and statement of claim against the appellants, seeking monetary damages against them resulting from malice and bad faith on their part;
- On August 14, 1998, the appellants, then represented by one counsel, gave notice of an application for an order pursuant to **C.P.R. 14.25** to strike out the originating notice and statement of claim filed on behalf of Future Inns;
- On October 19, 1998, Future Inns gave notice, in accordance with the **Constitutional Questions Act**, R.S.N.S., 1989, c-89, that, in responding to the appellants' application of August 14, 1998, Future Inns may question the constitutional validity of the combination of s. 16(7) of the **Trade Union Act**, R.S.N.S. 1989, c-475, as amended, and s. 5 of the **Public Inquiries Act**, R.S.N.S., 1989, c-372, on the grounds that if those provisions "must be interpreted to make members of the Labour Relations Board immune from actions based on facts which established malice and bad faith on the part of such members, they remove such members from the curial review of the Supreme Court of Nova Scotia, and have the effect of constituting a section 96 court", and hence were "beyond the constitutional powers of the House of Assembly of Nova Scotia, under the **Constitution Act**".

- In an oral decision of November 16, 1998, (written release - January 8, 1999) Justice Tidman dismissed the application;
- On November 30, 1998, the appellants appealed the decision of Justice Tidman, setting as the grounds for the appeal, that he erred in law by not striking out the statement of claim as disclosing no reasonable cause of action, and further erred by not striking out the statement of claim because the individual defendants were protected by the principle of immunity;
- On February 1, 1999, the Federation served and filed an application for intervention in the appeal;
- Future Inns opposes the application;
- Counsel for the appellants advise they take a neutral position with respect to the application.

Affidavit in Support of Intervention

[4] Rick Clarke, President of the Federation, has deposed in an affidavit, filed in support of the intervener's application, to the following effect:

> 2. The Nova Scotia Federation of Labour (the "Federation") is made up of affiliated trade unions representing most of the organized employees in Nova Scotia, including unions certified to represent employees under the *Trade Union Act*, R.S.N.S. 1989 c.475 as amended.
>
> 3. The Federation represents the interests of its member unions on a provincial level in dealing with government and employers and generally speaks for organized labour in Nova Scotia.
>
> 4. The Federation is regularly consulted by government about legislation affecting organized labour.
>
> 5. The Federation has ongoing and deep involvement in the activities of the Labour Relations Board (Nova Scotia) (the "Board").

6. The Board functions as a tripartite body with panels consisting of members representing employers, employees, and neutral chairpersons. The Federation nominates the employee members of the Board.

7. The unions which are members of the Federation appear as parties on all proceedings of the Board.

8. The unions go to the Board for the adjudication of disputes over the application of the important rights, privileges and obligations accorded to them by the *Trade Union Act*.

9. Through its role as an advisor to government on matters affecting organized labour and as a nominee of members of the Board and through the activities of its member unions, the Federation has acquired a broad knowledge of the purposes, practice and policies which govern the Board.

10. The position of the Federation is that members of the Board are and must be protected against civil actions brought in relation to their conduct as members of the Board.

11. The Federation is concerned that if members of the Board are required to answer civil actions based upon their conduct as members of the Board, the Board will no longer function independently as an adjudicator of disputes under the *Trade Union Act* will suffer which will cause a negative impact on labour relations in Nova Scotia.

12. As a representative of trade unions which appear before the Board and which rely upon the Board for a fair resolution of disputes, the Federation brings a perspective to this appeal which is different from that of any other party to the proceeding.

13. The Federation has, in the past, been recognized as a friend of the Court and granted intervener status by the Nova Scotia Supreme Court, Appeal Division and the Supreme Court of Canada in a matter involving the powers and authority of the Board; ***Labour Relations Board (N.S.) v. Digby Municipal School Board et al*** (1982), 52 N.S.R. (2nd) 181 (N.S.S.C. Appeal Division); (1983), 60 N.S.R. (2nd) 369 (S.C.C.).

14. I have instructed Raymond F. Larkin, Q.C., solicitor for the Federation, to seek leave to intervene in this proceeding as a friend of the Court for the purpose of assisting the Court and to seek leave to file a Factum and present oral argument at the hearing of this appeal.

15. I formed the intention of seeking leave to intervene in the trial of the action started by the Plaintiff/Respondent shortly after learning of the decision of Justice Tidman, dated November 18, 1998. However, I was not aware that a Notice of Appeal from the decision of Justice Tidman had been filed until late in January, 1999.

16. As soon as I learned that a Notice of Appeal from the decision of Justice Tidman had been filed, I instructed counsel to apply to the Court for an Order extending the time in which to seek leave to intervene as a friend of the Court pursuant to Civil Procedure Rule 3.03(1).

Civil Procedure Rule 62.35

[5] The **Rule** provides:

> (1) Any person, including any person who intervened in a proceeding pursuant to Rule 8, interested in an appeal, may, by application in accordance with Rule 62.31 apply to a Judge in Chambers for leave to intervene upon such terms and conditions as the Judge may determine.
>
> (2) An application for intervention shall be filed and served within 20 days after the filing of the notice of appeal.
>
> (3) An application for intervention shall briefly
>
> (a) describe the intervener and the intervener's interest in the appeal;
>
> (b) identify the position to be taken by the intervener on the appeal; and
>
> (c) set out the submissions to be advanced by the intervener, their relevancy to the appeal and the reasons for believing that the submissions will be useful to the Court and different from those of other parties.
>
> (4) An intervener has the right to file a factum.
>
> (5) Unless otherwise ordered by a Judge or the Court, an intervener
>
> (a) shall not file a factum that exceeds 25 pages;
>
> (b) shall be bound by the appeal books and may not add to them; and
>
> (c) shall not present oral argument.

Evidence of Mr. Clarke

[6] Before the Federation commenced its applications, counsel for Future Inns requested an opportunity to cross-examine Mr. Clarke on the contents of his affidavit. I granted the request.

[7] I would summarize Mr. Clarke's evidence as follows:

the Federation sought leave for intervention, as a friend of the Court;

Mr. Clarke acknowledged that in this capacity, a friend “has to be neutral, in the sense that it bears no animosity toward any of the parties”;

in a Press Release issued by the Federation on February 23rd, 1996, Mr. Clarke said:

> Organized labour has absolutely no intention of sitting idly by while the owners/operators of Future Inns continue their unfair treatment of these former employees and their blatant disregard for the laws of this Province;

the Federation “makes presentations to law amendments, to government, we meet with all political parties when we are looking for law amendments”;

The Federation has no political agenda, but is only interested in ensuring that Board members enjoy legal immunity and are protected against civil actions brought in relation to their conduct as members of the Board.

Analysis

[8] In June of 1997, the Rules governing appeals to this Court were amended by the introduction of a new **Rule (62.35)** relating specifically to intervention on appeal.

[9] Prior to that time, applications for intervention at the appeal level were made under **Rule 8**, in combination with **Rule 62.31(1)**, respecting civil appeals, and **Rule 65.03**, respecting criminal appeals.

[10] With respect to **Rule 8**, Justice Bateman noted in **Arrow Construction v. N. S.**

Attorney General (1996), 148 N.S.R. (2d) 392, at 394:

> All provinces in Canada do not have the equivalent of our **Civil Procedure Rule 8**. In those provinces, applications to intervene are determined on common law principles. In particular, British Columbia has no governing Rule. Recognizing that limitation, however, there is guidance to be had in the jurisprudence from other provincial jurisdictions.

[11] **Rule 62.35** is significantly different from the provisions extant in other provinces where intervention, either at the trial, or appellate level, is governed by Rules of Practice.

[12] **Rule 62.35** is also dissimilar to **Rule 8**.

[13] Cases decided in other provinces are, therefore, of limited assistance in the interpretation of **Rule 62.35**.

[14] Indeed, cases decided under **Rule 8** may not be a reliable guide to the interpretation of **Rule 62.35**. (See in particular, **Attorney General v. Beaver** (1984), 66 N.S.R. (2d) 419.)

[15] Prior to June of 1987, applications for an intervention in Nova Scotia fell into one of two categories:

> party interveners, under **Rule 8.01**. This type of intervention may be described as occurring when “individuals or organizations perceive that the outcome of a particular lawsuit is likely to have a direct impact on their well being, usually, but not always in some economic sense”. (*Public Interest*

> *Intervention in the Courts*, Bryden, (1987), 66 Canadian Bar Review, 490 at 494). **Rule 8.01** has been construed liberally in this Province (**Halifax Flying Club v. Maritime Builders Ltd.** (1973), 5 N.S.R. (2d) 364; **MacKeigan et al v. Hickman** (1988), 86 N.S.R. (2d) 1);
>
> *amicus curiae*, under **Rule 8.02.** While **Rule 8.02** is entitled, "Intervener as *amicus curiae*", the **Rule**, itself, speaks of "a friend of the Court for the purpose of assisting it". Professor Bryden describes this situation as occurring "when a disinterested person acts as an *amicus curiae* or a friend of the court in order to bring to the attention of the court some point of law that has been overlooked or some error in the proceedings" (at p. 496).

[16] In dismissing an application by the Civil Liberties Association for leave to intervene, in an action brought by the Attorney General for an interim injunction against the defendant and others for contributing to public nuisance by accosting pedestrians for the purpose of prostitution, MacIntosh, J. construed **Rule 8.02** narrowly, in **Attorney General of Nova Scotia v. Beaver**, when he stated at p. 58:

> The concerns of the Association as set forth in their brief in support of the application are similar to those expressed by the respondents in their respective defences. To allow a non-party to attempt to influence the court's decision would damage at least one of the parties' conception of the Court's impartiality and objectivity.

[17] Generally those who apply for intervention under **Rule 8**, do so for the purpose of becoming a party under **Rule 8.01**, or an *amicus curiae* under **Rule 8.02**.

[18] An application under **Rule 62.35** does not require an applicant to request status in either capacity. In fact, the phrases "*amicus curiae*", or "friend of the court" do not appear in **Rule 62.35**. This is a sensible omission, as the designation of an intervener as a party, or as a friend of the court, each carry with it a certain heritage, that is restrictive. (See Muldoon**,** *Law of Intervention* (1989) Canada Law Book Inc., p.4.)

[19] Professor Bryden writes at p. 496:

> The *amicus curiae* has its origins in English law and the term has traditionally carried with it a connotation of neutrality which is inconsistent with the advocacy role that public interest interveners . . . normally seek to play.

[20] In the present application, for example, Mr. Clarke deposed in his affidavit, in paragraphs 14 and 16, that the Federation sought leave to intervene "as a friend of the Court".

[21] It is evident, however, that the Federation does not propose taking a neutral position if intervention were to be granted. While it does not wish to advance submissions on the narrow issue respecting **Rule 14.25**, it will aggressively submit that Board members, while acting in their capacity as Board members, should be immune from legal action.

[22] I conclude, from the submissions of counsel, that the Federation has amended its application to request intervention as an intervener, rather than as a friend of the court. I do not consider that the use of the phrase "friend of the court" by Mr. Clarke in his affidavit, or his *viva voce* evidence, should confine the scope of the Federation's application as an

intervener, as that term is used in **Rule 62.35.**

[23] There is, however, a third type of situation, which arises when an individual, or organization, “seeking to participate in a law suit is interested less in the outcome of a particular case before the court, than in the legal principles applied, to resolve one or more of the issues that are raised by the case” (Bryden at p. 495). This latter situation is the one under which the Federation wishes to shelter, and the question is whether the wording of **Rule 62.35**, is applicable.

[24] The test to be employed by the judge is implicitly set forth in the words of **Rule 62.35(3)** which requires the applicant to describe its interest in the appeal, identify the position it wishes to take, and set out the relevancy of its submissions to the appeal, and the reasons it believes that the submissions will be useful to the Court, and different from those of other parties.

[25] To these questions, the Federation responds:

- Its interest in the appeal is to address argument to advocate that members of the Board should be protected against civil actions brought in relation to their conduct as members of the Board, otherwise they will no longer function independently as an arbitrator of disputes under the **Trade Union Act**. It is argued that if the independence of the Board is diminished, the legitimacy of the Board and its rulings will be affected. This will have a negative impact on

labour relations in Nova Scotia;

The issues in the appeal are whether the trial judge erred in law by not striking out Future Inn's statement of claim, as disclosing no reasonable cause of action, and, further, by not striking out the statement of claim because the Board and its individual members are protected by the principle of immunity. The Federation's position, it is submitted, is relevant as it represents most of the organized employees in Nova Scotia, and further submits, to the governor-in-council on a regular basis, nominees to be considered for appointment to the Board. The Board is a tripartite Board consisting of members of labour (selected from the pool submitted by the Federation), representatives of management, and individuals who are considered to be neutral. The Federation's position is relevant, it is submitted, as it will address, from its perspective, the importance of the immunity of the Board and its members, and the implications for labour relations in Nova Scotia should the Board and its members be found not to be protected by the principle of immunity;

the Federation's submissions will be useful to the court, as an advisor to government, on matters affecting organized labour, as a nominee of members of the Board, and through the activities of its member Unions. The Federation takes issues with Future Inn's suggestion that the point of view of labour is adequately represented by the Board, maintaining that the Board carries out a quasi-judicial function, whose members act in a neutral manner. The Federation, it is suggested, brings a perspective quite different from that

advanced by the present parties to the proceeding and will advance submissions that will be useful to the Court.

[26] Future Inns submits that the Federation is a political lobbying group, as demonstrated by paragraphs (2), (3), (4) and (9) of Mr. Clarke's affidavit. Its counsel submits Future Inns is uncomfortable with the Federation being joined as an *amicus curiae* as it has not demonstrated a position of neutrality respecting the issues. Reference is made to the comments of Mr. Clarke in the press release of February 23, 1996, which can only be construed, it is submitted, as antagonistic to the position of Future Inns.

[27] The application for intervention should be dismissed, counsel argues, where the intervention is designed to put forward a political agenda. Two cases are cited in support - **Borowski v. Minister of Justice of Canada**; **Canadian Civil Liberties Association et al** (1983), 144 D.L.R. (3d) 657 (Sask. Q.B.) and **Re: Mannion (No. 2)** (1983), 44 O.R. (2d) 37 (Ont. C.A.).

[28] In **Borowski**, the Canadian Civil Liberties Association, and Campaign Life Canada, applied to intervene as *amicus curiae* to present written arguments, and the Canadian Abortion Rights Action League, applied to be joined as a party to fully participate in the litigation.

[29] In rejecting all three applications, Justice Matheson pointed out that there was no legislative foundation, nor any specific Rule of Court in Saskatchewan, providing for

intervention applications of that kind.

[30] He considered, at p. 661, that the application for intervention would be to turn the Court from a judicial body, into a forum “for the advancing of all sorts of political arguments that should form no part of the decision which will ultimately have to be made . . .”

[31] In **Mannion (No. 2)** the Ontario Status of Women Council asked for leave to intervene on an appeal in order to present submissions reflecting the interests of women from a broader perspective than that advanced by the immediate parties.

[32] Associate Chief Justice MacKinnon, in the course of dismissing the application, noted that the applicant had unsuccessfully presented a brief on the subject to the Ontario Legislature. He concluded at p. 38:

> It seems to me that judicial legislation is not the role of the Court and if the Council wishes to see the legislation changed they should continue to press their views on the Government and the Legislature.

[33] These cases, in my opinion, are distinguishable, in light of the broad wording employed in **Rule 62.35**.

[34] There is no requirement, for example, in **Rule 62.35** that an intervener must take a neutral position.

[35] The Federation readily acknowledges that it would not take a neutral position if

intervention were granted, but would strongly urge the principle of immunity should apply to Board members. The Federation is not intervening to advance a particular partisan political position, or to obtain a particular remedy, but rather to assist the Court from a particular perspective. An intervention of this nature, in my opinion, comes within the expansive language of **Rule 62.35.**

[36] The remarks of Associate Chief Justice MacKinnon referred to, as well as remarks of Chief Justice Evans, in **Re Clarke** and **Attorney General of Canada** (1977), 81 D.L.R. (3d) 33, to which I have been directed, were based on considerations applicable to the English *amicus curiae* model, which restricts intervention to situations far narrower than those contemplated by **Rule 62.35**.

[37] Future Inns further submits that the only issue before the Court is a very narrow one, namely, whether Justice Tidman erred in dismissing the appellants' application to strike the statement of claim under **Rule 14.25**. I do not accept this submission. The issue of immunity of Board members is, in my opinion, an issue that might well be considered by the Court. After all, this particular issue prompted Future Inns to give notice on October 19, 1998, in accordance with the **Constitutional Questions Act**, and is also one of the grounds of appeal being advanced by both appellants. Whether it is necessary to consider the immunity issue in order to resolve this appeal is a live issue that should be left for determination by the panel.

[38] Future Inns, as well, submits that if the issue of legal immunity of Board members is considered in the appeal, that issue will be adequately and capably advanced by counsel for the appellants. The Federation, it argues, has no more expertise on these issues than can be summoned from the resources available to all the appellants.

[39] In my opinion, the issue is not one of expertise, but rather whether the interveners can bring a different perspective from the present parties, that will be useful to the Court. On this issue I accept the intervener's submissions.

[40] A review of the only two cases considered under the new **Rule 62.35** by this Court, both by Justice Cromwell, (**Black v. ABN Bank**, March 13, 1998, CA 143934, and **R. v. Regan**, February 3, 1999, CAC 147242) suggests that, in addition to the matters highlighted in **Rule 62.35**, the following factors should be considered on an application for intervention:

(1) *Whether the intervention will unduly delay the proceedings:*

The appeal has been set down for hearing on May 12, 1999. Counsel for the intervener advises that if the application is granted, his factum will be filed within two weeks of the order granting intervention. Counsel for Future Inns has acknowledged that if intervention is granted, especially on limited terms, that the question of delay is not a significant issue;

(2) *The possible prejudice to the parties if intervention is granted*:

While the appeal may take marginally longer because of additional argument, the matter has been set down for a full morning. Intervention is requested on

only one of the two issues before the Court. The intervener has agreed to be bound by the existing record. The intervener's counsel undertakes that he will consult with the appellants prior to the hearing in order to avoid duplication of submissions. The panel before whom the appeal is to be argued has the power to alleviate the negative aspects by imposing a time limit on all oral submissions of the intervener, in the event the panel considers oral submission by the intervener is appropriate.

(3) *Whether the intervention will widen the issues beyond those raised between the parties*:

The intervention, as proposed, is only with respect to the second ground of appeal raised by the appellants.

(4) *The extent to which the position of the intervener is already represented and protected by one of the parties*:

In **Arrow Construction**, decided in February, 1996, before the introduction of **Rule 62.35**, the Construction Association of Nova Scotia was granted a limited opportunity to intervene, pursuant to **Rule 8.01**, in an appeal, ostensibly, involving issues of tort and contract law alone.

Justice Bateman concluded, however, there was an analogy with public law issues in view of statements made by the trial judge "regarding the overall state of the government tendering process" (at 396). The Association had a longstanding interest and expertise in the government tendering process and many of its members did a substantial amount of business through that process.

Justice Bateman noted that in many instances courts were liberal in permitting intervention in cases raising constitutional issues. A similar approach, she concluded, should be taken in cases where “law may be developed which will have an impact upon others in future” (396), provided the proposed intervener has something to add to the proceeding.

Justice Bateman adopted the test proposed by Sopinka and Gelowitz (*The Conduct of an Appeal*, Butterworths, 1993 at p. 185):

> The proposed intervener must convince the Court that it brings something additional to the appeal that the parties may not be able to supply. Often this “something additional” is a different or wider perspective on the issues before the Court on Appeal.

These words are reflected in the language of **Rule 62.35(3)(c)**.

The Federation’s position, in my opinion, is not represented by any of the parties before the court, it has a legitimate interest to advance, and its submission will be useful to the court.

(5) *Whether the intervention will transform the court into a political arena*:

I accept the position of counsel that the Federation is not advocating a “political” resolution of the issue, that the issue on which the Federation requests the opportunity to place submissions before the court is not directly related to the dispute between the immediate parties, but rather concerns “state of the law” issues relating to the independence of the Board, the interests of those who appear before the Board who are concerned with its independence, as well as the interests of the general public and the independence of all administrative tribunals.

(6) *Whether the issue is primarily case specific, or whether it is one that is likely to affect the state of the law*:

The issue, on which the Federation seeks intervention, is not case specific, but is one that is likely to affect the state of the law.

Conclusion

[41] I grant leave to the Federation to intervene on this appeal on the following conditions:

- the Federation will file its intervener's factum no later than March 17, 1999;
- the factum will not exceed 25 pages, including appendices;
- the Federation should be bound by the appeal book and may not add to it;
- the Federation shall not be entitled to costs, either on this motion, or on the hearing of the appeal;
- the time within which the application for intervention should have been filed and served is extended until February 2, 1999;
- the opportunity of the Federation to make oral argument will be within the discretion of the panel hearing the appeal.

Pugsley, J.A.