NOVA SCOTIA COURT OF APPEAL

Citation: *Richmond County (Municipality) v. Nova Scotia (Attorney General)*, 2016 NSCA 11

Date: 20160223
Docket: CA 442005
Registry: Halifax

Between: Municipality of the County of Richmond

Appellant

-and-

Attorney General of Nova Scotia and Nova Scotia Utility and Review Board

Respondents

-and-

Rod Samson, Alvin Martell, Steve MacNeil and Steve Sampson

Intervenors

Judges:	MacDonald, C.J.N.S., Fichaud and Farrar, JJ.A.
Appeal Heard:	January 28, 2016, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Fichaud, J.A., MacDonald, C.J.N.S. and Farrar, J.A. concurring
Counsel:	D. Bruce Clarke, Q.C. and Jennifer Huygen for the Appellant
	Edward A. Gores, Q.C., for Respondent AGNS, not appearing
	Bruce Outhouse, Q.C., for Respondent NSUARB, not appearing
	Rod Samson, Steve MacNeil, and Steve Sampson, Intervenors
	Alvin Martell, Intervenor, not appearing

Reasons for judgment:

[1] On January 28, 2016, this Court heard the submissions and gave judgment from the bench, dismissing the appeal with reasons to follow. These are the reasons.

[2] As prescribed by the *Municipal Government Act*, the Utility and Review Board conducted an octennial review of the number of councillors that are appropriate for the Municipality of Richmond. After hearing evidence and weighing the criteria stated in the *Act*, the Board reduced the number from ten to five.

[3] The Municipality appealed to overturn the Board's ruling and maintain the *status quo* of ten councillors. The question was – Did the Board's ruling offend the standard of review? In the Court's view, the answer was – No.

Background

[4] Since 1994, the Municipality of the County of Richmond ("Municipality") in Cape Breton has had ten councillors, one for each polling district. The Council chooses one councillor to be the municipal warden. There is no at-large vote for a mayor.

[5] Section 369(1) of the *Municipal Government Act*, S.N.S. 1998, c. 18 ("*MGA*") says that, every eighth year, each municipal council "shall conduct a study of the number and boundaries of polling districts in the municipality, their fairness and reasonableness and the number of councillors". Then, according to s. 369(2), the Council must apply to the Utility and Review Board to "confirm or to alter" the number of councillors.

[6] In early 2014, the Municipality retained Stantec Consulting Ltd. ("Stantec") to perform the study. Mr. John Heseltine, a senior planner with Stantec, led the review.

[7] Stantec released a survey, online and in print, with eleven questions to invite the public's input on the Council size and related points, and received 330 responses. Stantec held five public consultation sessions, and interviewed each member of Council. Stantec assembled and analyzed geographic and demographic

data to compare the councillor/population-and-size ratio of Richmond Municipality's Council with those of other municipal councils in the Province.

[8] Stantec's Final Report of October 27, 2014 ("Stantec Report") recommended that the Council adopt one of two options: a seven member Council, one of whom would be the warden, or a five member council plus a mayor elected at-large.

[9] At meetings of October 27, and December 15, 2014, the Council, by a majority, rejected Stantec's recommendations and approved a proposal that the Council size remain at ten with a warden.

[10] The Utility and Review Board ("Board") heard the Council's application under s. 369(2) of the *MGA*. Three Board panelists heard the matter. The Municipality had counsel. Four minority councillors, the intervenors on the later appeal to this Court, provided written submissions. Thirteen members of the public filed letters. A petition signed by 256 supporters of a ten member council was given to the Board.

[11] On March 9, 2015, the Board held a hearing attended by over 50 members of the public. The Board heard testimony from Stantec's Mr. Heseltine, the Municipality's Chief Administrative Officer, three councillors supporting the Council's proposal and the four minority councillors. Eighteen members of the public spoke. The Municipality and minority councillors made submissions.

[12] On May 21, 2015, the Board issued a Decision (2015 NSUARB 139), followed by an Order of July 8, 2015. The Board approved a five member council. The Order appended maps of the five polling districts. The Board adopted the boundary configurations from the five-councillor scenario in the Stantec Report. The Board did not determine whether there should be a mayoralty, as that issue was for Council to decide.

[13] On August 6, 2015, the Municipality appealed to the Court of Appeal. On November 12, 2015, Justice Bourgeois of this Court, in chambers, gave the minority councillors leave to intervene. The intervenors filed a factum and appeared at this Court's hearing to oppose the Municipality's appeal.

Issues

[14] The Municipality's factum states four grounds:

> 1) Did the Board err by failing to determine Richmond County's preferred style of governance? Furthermore, did the Board err by giving insufficient weight to Council's own views of its citizens' desired style of governance in determining the proper size of Council?
>
> 2) Did the Board apply the incorrect legal test by giving too much weight to relative parity of voting power, as compared to other legislated factors, in its determination of the appropriate size of Council?
>
> 3) Did the Board exceed its jurisdiction when it significantly reduced the size of Council, thereby effectively removing from Council the free discretion to decide between a warden or a mayoral system? In the alternative, did the Board err by reaching a result that was not supported by the evidence?
>
> 4) Did the Board err by failing to achieve a Council composition that reflects the common law principles of effective representation?

[15] I will discuss the Municipality's submissions under the umbrella topic – Did the Board's decision to reduce the number of councillors offend the appellate standard of review?

Standard of Review

[16] The *Utility and Review Board Act*, S.N.S. 1992, c. 11, s. 30(1) permits an appeal to this Court "from an order of the Board upon any question as to its jurisdiction or upon any question of law". The Municipality's legal grounds involve the Board's application of the criteria that are set out in the *MGA*.

[17] The Municipality urges a correctness standard to its second ground by characterizing it as of central importance to the legal system. The Municipality's factum (para. 32) says "[t]he correct legal test for the Board to apply in decisions under ss. 368 and 369 must be consistent for all municipal boundary review applications".

[18] I respectfully disagree. Correctness does not govern a tribunal's application of its home statute just because there will be similar cases where the tribunal again applies its home statute.

[19] As I will discuss later, the Municipality submits that *Reference re Provincial Boundaries (Saskatchewan)*, [1991] 2 S.C.R. 158 (*"Carter"*), dealing with s. 3 of

the *Charter of Rights and Freedoms*, affects the interpretation of s. 368(4) of the *MGA*. In *International Association of Fire Fighters, Local 268 v. Adekayode*, 2016 NSCA 6, paras. 29-40, this Court reviewed the authorities respecting when correctness will apply to issues of central importance to the legal system. I won't repeat the analysis here. As explained in *Adekayode*, the use of constitutional principles or *Charter* values to aid statutory interpretation may be of central importance to the legal system. I will apply correctness to the Municipality's submission on *Carter*.

[20] The Municipality submits that its third ground is jurisdictional, to be reviewed for correctness. I cannot agree.

[21] Attracting correctness are "true" jurisdictional issues "in the narrow sense of whether or not the tribunal had the authority to make the inquiry": *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, para. 59. A tribunal with that authority is not reviewed for "jurisdictional" correctness simply because the appellant submits that the tribunal misapplied its home statute along its reasoning path. See: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, paras. 33-39; *Canadian Union of Public Employees, Local 2434 v. Port Hawkesbury (Town)*, 2011 NSCA 28, paras. 26-28, and authorities there cited; *Canadian Union of Public Employees, Local 108 v. Halifax (Regional Municipality)*, 2011 NSCA 41, para. 22; *Coates v. Nova Scotia (Labour Board)*, 2013 NSCA 52, paras. 41-43; *Delport Realty Ltd. v. Nova Scotia (Registrar General of Service Nova Scotia & Municipal Relations)*, 2014 NSCA 35, paras. 18-24.

[22] Sections 368 and 369 of the *MGA* include:

> **368(1)** Upon application, the Board may, by order
>
> …
>
> (b) amend the boundaries of any polling district;
>
> (c) dissolve polling districts;
>
> …
>
> (e) determine the number of councillors for a municipality;
>
> …
>
> **(3)** The Board may make an order granting the whole or part of an application, and may grant such further or other relief as the Board considers proper.

…

> **369(1)** In the year 1999, and in the years 2006 and every eighth year thereafter the council shall conduct a study of the number and boundaries of polling districts in the municipality, their fairness and reasonableness and the number of councillors.
>
> **(2)** After the study is completed, and before the end of the year in which the study was conducted, the council shall apply to the [Nova Scotia Utility and Review] Board to confirm or to alter the number and boundaries of polling districts and the number of councillors.

[23] These provisions gave the Board jurisdiction to make this inquiry. The Board's interpretation and application of the *MGA*, its home legislation for municipal matters, presumptively is subject to reasonableness review by the Court. Nothing has rebutted that presumption.

[24] I will apply correctness to the Municipality's submission on the *Carter* decision. Reasonableness governs the other issues.

[25] *Egg Films Inc. v. Nova Scotia (Labour Board)*, 2014 NSCA 33, leave denied September 25, 2014 (S.C.C.), described the reviewing court's function with the reasonableness standard:

> [26] Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't – What does the judge think is correct or preferable? The question is – Was the tribunal's conclusion reasonable? If there are several reasonably permissible outcomes the tribunal, not the court, chooses among them. If there is only one and the tribunal's conclusion isn't it, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise a discretion, or invites the tribunal to weigh policy. *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, paras. 50-51. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras. 11-17. *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, paras. 20, 31-41. *Coates v. Nova Scotia (Labour Board)*, 2013 NSCA 52, para. 46.

Analysis

[26] The *MGA* prescribes the criteria for the Board's task:

> **368(4)** In determining the number and boundaries of polling districts the Board shall consider number of electors, relative parity of voting power, population density, community of interest and geographic size.

(a) The Board's Application of the Criteria

[27] The Board quoted s. 368(4). Then the Board reiterated its practice: (1) to tolerate a variance of ± 10% from relative parity of voting power; and (2) to require a justification for a variance over ± 10% up to ± 25%, with that justification to address the factors in s. 368(4):

> [115] In 2004, the Board determined that the target variance for relative parity of voting power shall be ± 10% from the average number of electors per polling district. Any variance in excess of ± 10% must be justified in writing. The larger the proposed variance, the greater the burden on the municipal unit to justify the higher variance from the average number of electors.
>
> [116] While the Board will permit variances up to ± 25%, the outer limits of this range should only apply in exceptional cases, where the affected municipality provides detailed written reasons showing that population density, community of interest, geographic size, or other factors, clearly justify the necessity of an increased variance within a polling district. In most cases, however, the Board expects municipalities to meet a target variance of the number of electors in each polling district which is within a ± 10% range of the average.

[28] The Board (para. 121) found "there is strong public support for a reduction in Council size". The Board's decision cites examples. Others appear in the record.

[29] The Board (para. 123) noted, from Stantec's findings, that Richmond's metrics showed significantly more councillors per geographic size and population than most other municipalities in Nova Scotia. Richmond has 929 constituents per councillor compared to a provincial average of 1,554.

[30] In particular, the Board found:

> [136] In this instance, the Board finds that the Municipality has failed to provide an adequate justification for its departure from Stantec's independent recommendations. Further, the Municipality has failed to address the issue of relative parity of voting power.

”’

[139] In the Board's opinion, an important factor in its review of this matter is that the Municipality's application does not comply with the Board's repeated direction to municipal units that variances from the average number of electors per polling district should be within ± 10%. …

[140] … the Municipality has submitted an application in which eight of the ten polling districts exceed the ± 10% guideline. Moreover, several of the polling districts greatly exceed the target variance, with two of the polling districts having a variance of 29% and -29% respectively. Some of the other polling districts are also significantly over the target variance.

…

[143] In the end, the Board is left with an application by Richmond which does not comply, in its present form, with the standards applied by the Board, as required by the *Municipal Government Act*.

…

[145] Accordingly, the 5 member Council is the only option which can both satisfy the ± 10% standard and is able to appropriately reflect communities of interest across Richmond County.

[31] In this Court, the Municipality submits that the Board erred by failing to apply a threshold criterion, not mentioned in the *MGA*, namely the Council's desired style of governance. The Municipality's factum puts it this way:

[42] Governance style and structure, although not expressly enumerated in s. 368(4) of the *MGA*, are fundamental to the determination of the appropriate number of polling districts for any elected institution. …

[43] The two main styles of governance raised in these proceedings are characterized for the purposes of this appeal as: (1) the direct accessibility model; and (2) the executive model. …

…

[50] The term "style of governance" is another way of describing this nuanced social compact. On a municipal boundary review application, the Board must discern the content of that social compact – *i.e.* a municipality's desired style of governance, whether that be the direct accessibility model, the executive model, or any other iteration – before moving on in its analysis.

…

[52] While the Board has wide powers pursuant to the *URB Act* and s. 368(1) of the *MGA*, it is not a party to the social compact between the councillors and residents of Richmond County. To that end, it must give Council's views on the issues of governance style and size of Council substantial weight.

> [53] Richmond County submits that in these circumstances, the Board erred by failing to give weight to Council's determination of its citizens' preferred style and structure of governance.

[32] I respectfully disagree.

[33] The Board balanced the criteria stated in s. 368(4). This was the Board's assignment. The Board's findings, on the balancing exercise, were supported by the evidence, particularly the Stantec Report. The *MGA* neither speaks of a social compact nor designates the *status quo* as a pre-emptive threshold. The *MGA* does not characterize the Council's preferred style of governance as the platform for the Board's application of s. 368(4).

[34] In *Re Halifax (Regional Municipality)*, 2004 NSUARB 11, paras. 107-115, the Board set out principles termed as "Guidance for Future Applications". Those principles have governed later municipal boundary review applications to the Board. For Richmond's application, the Board followed those principles.

[35] In *Re Halifax*, para. 107, the Board said the "starting point" is for the council to determine the desired number of councillors following public consultation. This means the council's preference is the objective of the municipality's application under s. 369(2). It does not mean the council's preference presumptively carries the day under s. 368(4). The Board then explained how "relative parity", from s. 368(4), would apply to the Board's assessment of a municipality's application. Essentially, the Board's flexible margin of variance (± 10%, or up to ± 25% if justified) channels the tolerance for the municipality's indigenous circumstances. A submission about a suggested social compact, as the Municipality urges here, should either address the 10% margin or, if necessary, cite evidence that supports a justification to exceed that margin up to 25%.

[36] In *Re Halifax*, para. 117, the Board rejected the Municipality's proposal because the variances from the threshold for voter parity were excessive and unjustified.

[37] The Board's guidelines are not jurisdictional fetters, as the Municipality suggests. Rather, the Board has assisted municipalities to navigate the *MGA*'s process of periodic review. Yet eight of ten polling districts in the Municipality of Richmond's proposal exceeded the variance, several by a wide margin. The Municipality rejected the recommendations of its consultant Stantec. The Municipality's proposal was a stubborn outlier from the Board's well-known

guidelines, without any apparent justification. The Municipality's submission to this Court offered generalizations. It neither cited support in the record to justify the substantial deviations from voter parity, nor identified any basis to conclude that the Board unreasonably appraised the evidence.

[38] The Board's application of the criteria, its findings and conclusions, occupied the range of permissible outcomes within the Board's discretion under ss. 368 and 369 of the *MGA*.

(b) The *Carter* Principles

[39] The Municipality submits that the Board's decision offended the principles stated in *Carter*. The Supreme Court determined whether variances among the size of voter populations in Saskatchewan violated s. 3 of the *Charter of Rights*. The Municipality cites the passage from the majority's reasons of Justice McLachlin, as she then was:

> What are the conditions of effective representation? The first is relative parity of voting power. …
>
> But parity of voting power, though of prime importance, is not the only factor to be taken into account in ensuring effective representation. …
>
> Notwithstanding the fact that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors.
>
> First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible.
>
> Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.
>
> It emerges therefore that deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced. I adhere to the proposition asserted in *Dixon* [*Dixon v. B.C. (A.G.)* [1989] 4 W.W.R. 393], at p. 414, that "only those deviations should be admitted which can be justified on the ground that they

> contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed." [pages 183-85]

[40] The Municipality does not make a *Charter* argument. Section 3 of the *Charter* doesn't apply to municipal elections. The Municipality cites *Charter* values, *i.e.* the constitutional principle of effective representation, to support its interpretation of the statutory criteria that governed the Board's analysis. As explained earlier, this submission attracts correctness.

[41] The Municipality's *Carter* submission is unpersuasive. Section 368(4), enacted seven years after *Carter*, basically synopsizes *Carter*'s factors for effective representation. The Board's test incorporates the gist of Justice McLachlin's approach - that deviations from voter parity should not be countenanced unless they are justified based on those factors. The Board (para. 155) cited *Carter* as guidance. The Board's interpretation of the *MGA*'s criteria is consistent with *Carter*'s principles.

(c) Mayor or Warden

[42] Lastly, the Municipality submits that the Board has usurped the Municipality's exclusive jurisdiction to decide between a warden model and a mayoralty.

[43] The *MGA* entitles the Council to decide whether to change from a warden model to a mayoral system:

> **12(8)** The council of a county or district municipality may, at any time not less than nine months prior to a regular municipal election, decide that the chair of the council be elected at large, in which case
>
> (a) commencing at the next regular municipal election, a mayor shall be elected at large for the municipality;
>
> (b) every person eligible to vote for a councillor of the municipality is eligible to vote for the mayor;
>
> (c) the total number of council members is increased by one unless the municipality has applied to the Board and the Board has determined otherwise;
>
> …

[44] Stantec's Report had recommended that the Municipality change from ten councillors, one of whom would be the warden, to five councillors plus a mayor. The Board held:

> [111] However, the Board's current review under s. 369 of the *Act* does not provide the Board with jurisdiction to consider a request for a change from a warden to a mayor. Its review in these cases is limited to the determination of the appropriate number of councillors and polling districts, as well as approving polling district boundaries. …
>
> [113] In any event, for the purposes of the *Act*, the position of mayor is not included in the number of councillors and polling districts to be set by the Board and, accordingly, does not fall within the scope of this review conducted by the Board.

[45] In this Court, the Municipality says that, by reducing the number of councillors, the Board effectively has forced the Municipality to become a mayoralty, to increase the elected number, which invades the Council's exclusive jurisdiction under s. 12(8).

[46] I respectfully disagree. The Board (para. 109) quoted s. 12(8) and noted that the decision whether to become a mayoralty is for the Municipality. The Board said it was not determining the warden/mayor issue. The Board confined its ruling to the number of councillors and boundaries of polling districts, as directed by ss. 368 and 369. Whether Richmond should have a warden or mayor remains for Council to decide under s. 12(8).

Conclusion

[47] The Board's decision satisfies the standard of review. I would dismiss the appeal without costs.

Fichaud, J.A.

Concurred: MacDonald, C.J.N.S.

Farrar, J.A.