S.C.A. No. 02571

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S.; Hallett and Chipman, JJ.A.

BETWEEN:

NORTHSIDE-VICTORIA DISTRICT SCHOOL BOARD Appellant	Eric B. Durnford, Q.C. and Noella Martin for the Appellant
- and -	Lorraine P. Lafferty and Marc J. Belliveau for the Respondent
NOVA SCOTIA TEACHERS' UNION (on behalf of JOHN YORKE) Respondent	
	Appeal Heard: April 1, 1992
	Judgment Delivered: April 1, 1992

THE COURT: Appeal dismissed, per oral reasons for judgment of Hallett, J.A.; Chipman, J.A. concurring and Clarke C.J.N.S. dissenting.

The reasons for judgment of the Court were delivered orally by:

HALLETT, J.A.

This is an appeal from the decision of Roscoe J. dated November 18, 1991 in which she decided that the handwritten notes taken by Professor Thomas A. Cromwell, who acted as the Board of Appeal in a proceeding under the **Education Act**, did not form part of the "record" for **certiorari** purposes.

At issue is the meaning of **Rules 56.07** and **56.08**:

> Endorsement on originating notice
>
> **56.07.**(1) There shall be endorsed upon an originating notice for an order in the nature of certiorari a notice to the following effect, adapted as may be necessary and addressed to a judge, magistrate, justice or justices, officer, clerk or tribunal,
>
> > ' You are hereby required forthwith after service of this originating notice on you to return to the Prothonotary at , Nova Scotia, the judgment, order, decision or reasons for judgment, together with the process commencing the proceeding, the evidence and all exhibits filed, if any, and all things touching the proceeding as fully and entirely as they remain in your custody, together with this notice.
> >
> > Dated at , Nova Scotia, this day of , 19
> >
> > TO: A.B.
> >
> > C.D. of
> > Street,
> > , Nova Scotia
> > Solicitor for the Applicant.'
>
> (2) All things required by paragraph (1) to be returned to a prothonotary shall, for the purposes of an application for an order in the nature of certiorari, be deemed to be part of the record.
>
> Return of lower court
>
> **56.08.**(1) Upon receiving an originating notice so endorsed, the judge, magistrate, justice or justices, officer, clerk or tribunal, shall return

forthwith to the prothonotary the judgment, order, warrant, decision or reasons for judgment, together with the process commencing the proceeding, the evidence and all exhibits filed, if any, and all other things in the proceeding, together with the originating notice served upon him, with a certificate endorsed thereon in the following form,

> ' Pursuant to the accompanying notice I herewith return to this Honourable Court the following papers and documents, that is to say,
>
> (i) the judgment, order or decision (or as the case may be) and the reasons therefor;
>
> (ii) the process commencing the proceeding and the warrant issued thereon;
>
> (iii) the evidence taken at the hearing and all exhibits filed; and
>
> (iv) all other papers or documents in the proceeding.
>
> And I hereby certify to this Honourable Court that I have above truly set forth all the papers and documents in my custody and power in the proceeding set forth in the originating notice.'

(2) If the papers and documents, or any of them, are not in the possession of the person required to transmit them, he shall in lieu of or in addition to the certificate, so state and explain the circumstances.

(3) When the papers and documents have not been received by the prothonotary as provided in paragraph (1), the prothonotary shall return a certificate of the fact to the court.

(4) The return and certificate prescribed in paragraph (1) or (2) shall have the same effect as a return to a writ of certiorari.

(5) The court may dispense with the return of the evidence or exhibits or any part of them.

(6) A copy of this rule shall appear upon or be annexed to the originating notice served upon the judge, magistrate, justice or justices, clerk, officer or tribunal from whom the return is required.

The apparent purpose in requiring notes to be delivered up as part of the record of the proceedings is the assumption that the notes are a record of the evidence taken in the absence of a certified transcript of the proceedings. In

my opinion the notes of a Board member are not a proper record of the evidence as the notes are not a verbatim record of what a witness stated under oath and are therefore likely inaccurate and unreliable. Secondly, the notes may contain tentative observations of the Board member which the Board member may subsequently decided were not well founded. Therefore, the notes could be misleading. Thirdly, the notes of a Board member are personal notations of the member made during the hearing. In short, the notes are a personal and unreliable record of the evidence. As a general rule, handwritten notes would serve no useful purpose for a superior court when reviewing a Board decision.

I would not interpret the words in **Rule 56.08** that require the Board to return not only the evidence and the exhibits but "all other things in the proceeding" to include the notes of a Board member. Those notes are, in a sense, part of the Board's working papers, not very different from drafts of what is ultimately released as the decision or award of the Board. When one looks at the form of the certificate provided in the Rule there is a specific reference to returning the documents that are truly relevant to enable the court to conduct a proper review of the Board's decision. Those documents are the judgment and the reasons, the process commencing the proceeding, the evidence and the exhibits. Then there is a catchall phrase requiring the Board to deliver up "all other papers and documents in the proceeding". In my opinion, the Board member's notes are not papers or documents in the proceeding. At common law, not even the evidence formed part of the record. In **R. v. Northumberland Compensation Appeal Tribunal Ex parte Shaw**, [1952] 1 K.B. 338 at 352; [1952] 1 All E.R. 122 at 131 (C.A.), Lord Denning stated:

> ". . . I think the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them."

What the superior court needs to see are the decision and the reasons in particular, as well as the documents commencing the proceedings before the Board. If available, the court wishes to see a transcript of the evidence and the exhibits. A Board member's notes are not a reliable record of the evidence and although one might say the handwritten notes are "papers" in the proceeding, in my opinion, considering the factors I have mentioned, I would not interpret the word "papers" to include them. The catchall clause was intended to require the delivery up of other papers and documents that were relevant to the proceeding before the Board; not the Board members notes. As a general rule, there is no valid reason that would warrant interpreting **Rules 56.07** and **56.08** to compel a Board member to deliver up his handwritten notes. There could be situations where the notes might be relevant to a review by a superior court, but that should have to be clearly proven before the notes should be ordered delivered up to the superior court. No compelling reason has been advanced in this case. Therefore I would dismiss the appeal.

J.A.

Concurred in:

Chipman, J.A.

CLARKE, C.J.N.S. (dissenting):

The Minister of Education, pursuant to the **Education Act**, R.S.N.S. 1989 c. 136, s. 56(14) appointed Professor Cromwell as a Board of Appeal to hear a dispute concerning a teacher dismissed from his employment by his employer, the appellant school board. Following a hearing lasting three days, at which the evidence of the witnesses was neither recorded or transcribed, Professor Cromwell filed his decision.

Thereafter applications were made to the Chambers judge in the Trial Division for orders in the nature of **certiorari**, one to quash the entire decision and the other to quash it in part. A preliminary issue arose whether Professor Cromwell's handwritten notes made during the hearing form part of the record returnable to the Court pursuant to **Civil Procedure Rules 56.07** and **56.08.** The Chambers judge held they are not returnable because they are not part of the record. The appellant appeals from that decision.

Relevant to this issue are the following provisions of the **Civil Procedure Rules** dealing with **certiorari.**

> Endorsement on originating notice
>
> **56.07.**(1) There shall be endorsed upon an originating notice for an order in the nature of certiorari a notice to the following effect, adapted as may be necessary and addressed to a judge, magistrate, justice or justices, officer, clerk or tribunal,
>
> > ' You are hereby required forthwith after service of this originating notice on you to return to the Prothonotary at , Nova Scotia, the judgment, order, decision or reasons for judgment, together with the process commencing the proceeding, the evidence and all exhibits filed, if any, and all things touching the proceeding as fully and entirely as they remain in your custody, together with this notice.
> >
> > Dated at , Nova Scotia, this day of , 19

TO: A.B.

C.D. of
Street,
, Nova Scotia
Solicitor for the Applicant.'

(2) All things required by paragraph (1) to be returned to a prothonotary shall, for the purposes of an application for an order in the nature of certiorari, be deemed to be part of the record.

Return of lower court

56.08.(1) Upon receiving an originating notice so endorsed, the judge, magistrate, justice or justices, officer, clerk or tribunal, shall return forthwith to the prothonotary the judgment, order, warrant, decision or reasons for judgment, together with the process commencing the proceeding, the evidence and all exhibits filed, if any, and all other things in the proceeding, together with the originating notice served upon him, with a certificate endorsed thereon in the following form,

' Pursuant to the accompanying notice I herewith return to this Honourable Court the following papers and documents, that is to say,

(i) the judgment, order or decision (or as the case may be) and the reasons therefor;

(ii) the process commencing the proceeding and the warrant issued thereon;

(iii) the evidence taken at the hearing and all exhibits filed; and

(iv) all other papers or documents in the proceeding.

And I hereby certify to this Honourable Court that I have above truly set forth all the papers and documents in my custody and power in the proceeding set forth in the originating notice.'

The record reveals that when Professor Cromwell was served with the originating notice (application inter partes), the endorsement described in **Civil Procedure Rule 56.07(1)** was attached.

The words used in the applicable **Civil Procedure Rules** should be given

their plain meaning even though they may seem broad in their scope and reach. The notes are among "all things touching the proceeding . . . in (his) custody" **(Civil Procedure Rule 56.07(1))** and they are "things" required to be returned to a prothonotary as described in **Rule 56.07(2).** In addition they are "papers or documents in the proceedings", the return of which are required of the tribunal and so to be certified by **Rule 56.08(1).**

Proceedings of this nature are unlike those of a Court where the system provides for a recording of the proceedings and permits the subsequent preparation of a transcript. Since, under s. 56(19) of the **Education Act** one half of the fees and costs of the Board is paid by the teacher and the other half by the employer, the parties are able to claim a measure of ownership in the notes.

Whether the notes, in whole or in part, are evidence, is, with respect, a matter to be determined on the main application and not one to be decided here.

The Chambers judge relied on the decision of this Court in **Walker v. Keating et al** (1973), 6 N.S.R. (2d) 1. There the Court held that the handwritten notes of only one member of a three persons panel was not part of the record. This is a different fact situation. Here the **Act** provides a Board of Appeal shall be "composed of one person appointed by the Minister" (s. 56(14)) with the result that there is only one set of notes available as one of the "things in the proceeding". This is more akin to the fact situation in **Construction Association Management Labour Bureau Limited and O'Malley Electric Limited v. International Brotherhood of Electrical Workers, Local 625, Veniot and Minister of Labour** (1983), 58 N.S.R. (2d) 145, where Nathanson, J. held that the notes of a single arbitrator were part of the record.

For the reasons given I would allow the appeal and set aside the order

of the Chambers judge.

C.J.N.S.