IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Renaud v. Nova Scotia (Attorney General), 2005 NSSC 226

Date: 20050812
Docket: SH 227488
Registry: Halifax

Between:

Claude Renaud, Keith Coughlan, Blair David, Julien Comeau and Margaret McKee, on their own behalf and on behalf of all Halifax Regional Municipality residents who are entitled to minority language education rights pursuant to s. 23 of the Charter of Rights and Freedoms

Applicants

- and -

The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia

Respondent

- and -

The Halifax Regional School Board, a body corporate

Intervenor

- and -

The Conseil Scolaire Acadien Provincial, a body corporate

Intervenor

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: July 29, 2005, in Halifax, Nova Scotia

Counsel: Michael Wood, Q.C. , for the Applicants
Alec Cameron, for the Respondent - AGNS
J. Rene Gallant, for the Intervenor - Halifax Regional School Board
Noella Martin, for the Intervenor - Conseil Scolaire Acadien Provincial

By the Court:

[1] The applicants have filed an Originating Notice (Application *Inter Partes*), alleging that section 530 of the *Municipal Government Act* (the *Act*) – which permits "supplementary funding" by the Halifax Regional Municipality of schools run by the Halifax Regional School Board in the former cities of Halifax and Dartmouth – violates section 23 of the *Charter of Rights and Freedoms*, which sets out the right to minority language education. The applicants claim to be entitled parents under section 23 of the *Charter*. The Halifax Regional School Board (the Board) and the *Conseil Scolaire Acadien Provincial* (the *Conseil*) are intervenors.

[2] This interlocutory application is brought by the Board, which argues that the matter should be continued as an action. Neither the respondent Attorney General nor the intervenor *Conseil* object to proceeding by way of application.

The Application

[3] In an Originating Notice (Application *Inter Partes*) filed August 4, 2004, the parents – applicants in the main application – seek the following relief:

> (a) a declaration that s. 530 of the *Municipal Government Act*, S.N.S. 1998, c. 18, is unconstitutional and "of no force and effect" pursuant to ss. 23 and 52 of the *Charter of Rights and Freedoms*;
>
> (b) an Order pursuant to s. 24 of the Charter of Rights and freedoms "reading in" the entitlement of Conseil scolaire acadien provinciale schools in the Halifax Regional Municipality to supplementary funding equal to Halifax Regional School Board schools under s. 530 of the *Municipal Government Act* pursuant to s. 24 of the *Charter of Rights and Freedoms*;
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> (c) in the alternative, an Order pursuant to s. 24 of the *Charter of Rights and Freedoms* "striking down" s. 530 of the *Municipal Government Act*; and
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> (d) such other remedy, including general damages, as This Honourable Court considers appropriate and just in the circumstances pursuant to s. 24 of the *Charter of Rights and Freedoms*.

[4] Essentially, section 530 of the *Act* allows the Halifax Regional Municipality ("the Municipality") to provide supplementary funding to the Board, in addition to funding provided by the provincial government under the *Education Act*:

> **Funding of Halifax Regional School Board**
>
> 530 (1) The council of the Halifax Regional Municipality shall provide to the Halifax Regional School Board at least the amount of additional funding that was provided to the Halifax District School Board in the fiscal year beginning April 1, 1995, to be used solely for the benefit of the area that was formerly the City of Halifax.
>
> (2) The guaranteed amount payable pursuant to subsection (1) shall be recovered by area rate levied on the assessed value of the taxable property and business occupancy assessments in the area that was formerly the City of Halifax.

> (3) The council of the Halifax Regional Municipality shall provide to the Halifax Regional School Board at least the amount of additional funding that was provided to the Dartmouth District School Board in the fiscal year beginning April 1, 1995, to be used solely for the benefit of the area that was formerly the City of Dartmouth.
>
> (4) The guaranteed amount payable pursuant to subsection (3) shall be recovered by area rate levied on the assessed value of the taxable property and business occupancy assessments in the area that was formerly the City of Dartmouth.
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> (5) Subject to subsection (6), the amounts guaranteed pursuant to subsections (1) and (3) may not be decreased by more than ten per cent of the amounts specified in subsections (1) and (3), respectively, in any year, beginning in the fiscal year commencing April 1, 1996.
>
> (6) The council of the Halifax Regional Municipality and the Halifax Regional School Board may agree to reduce the amount of the guarantees at a faster rate than is permitted pursuant to subsection (5).
>
> (7) Funding provided pursuant to this Section is in addition to funding provided pursuant to the Education Act. 1998, c. 18, s. 530.

[5] Section 23 of the *Charter* provides parents and children of entitled parents the right to education in the language of the minority:

> 23. (1) Citizens of Canada
>
> a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
>
> b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the

> language of the English or French linguistic minority population of the province,
>
> have the right to have their children receive primary and secondary school instruction in that language in that province.
>
> (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.
>
> (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
>
> a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
>
> b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

[6] The essence of the parents' argument is that section 530 does not provide the *Conseil* with special funding, but only requires the Municipality to provide additional funds to the Board. As such, they argue, section 530 is invalid, as it does not provide similar funding to the *Conseil*. In support of their position the applicants filed affidavits in which each of them indicated that they are a resident of the Municipality, that they pay municipal taxes for

supplementary education funding and that they have children who attend, or have attended, schools run by the *Conseil*. They claim the matter can be determined by way of application.

[7] The Board has filed affidavits of Carole Olsen, Superintendent of Schools for the Board; Richard Morris, Director, Financial Services for the Board; and Debra Barlow, a Board member. The position of the Board on the main application is that the schools administered by the *Conseil* do not provide "a lesser standard of education nor less equitable programs and services than students of the [Board] as a result of the existence of supplementary funding." Referring to the information contained in the Barlow, Olsen and Morris affidavits about the background of supplementary funding and the provincial education funding system in general, the Board says the proceeding "will result in the submission of hundreds of documents, numerous witnesses and expert evidence in order to determine the legal issues raised by the Application.

[8] The Board also suggests that the applicants have failed to distinguish between supplementary funding authorized by the Municipal Government

Act and that established by motion of the Municipality, raising, it says, additional factual and legal issues. For all these reasons, the Board says the matter should proceed by way of action, not application.

[9] The parents respond that the issues on the application are narrower than claimed by the Board, involving a challenge to legislation, and that any disputes of facts that do arise can be dealt with by the Chambers judge. They also state that the issues raised by the Board having to do with comparative expenditures of different school boards do not fall within the scope of the application as framed.

The *Civil Procedure Rules*

[10] Rule 9.02 provides for certain proceedings to be commenced by way of Originating Notice (Application) rather than Originating Notice (Action):

> 9.02. A proceeding, other than a proceeding under Rule 57 and Rules 59 to 61,
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> (a) in which the sole or principal question at issue is, or is likely to be, a question of law, or one of construction of an enactment, will, contract, or other document;
>
> (b) in which there is unlikely to be any substantial dispute of fact;

> (c) which may be commenced by an originating application, originating motion, originating summons, petition, or otherwise under an enactment;
>
> shall be commenced by filing an originating notice (application inter partes) in Form 9.02A in a proceeding between parties, and by an originating notice (ex parte application) in Form 9.02B in an ex parte proceeding.

[11] This application is brought under Rule 37.10(e), which allows the Court to order that a proceeding commenced by application be continued as an action:

> 37.10 On a hearing of an application, the court may on such terms as it thinks just,
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> * * *
>
> (e) notwithstanding rule 9.02, order the application to be continued in court as if the proceeding had begun by an originating notice (action) and order the notice and affidavits to stand as pleadings, with liberty to any party to amend or add thereto or apply for particulars thereof, and to give any other direction as is applicable....

[12] Rule 37.09 describes how evidence may be received on an application:

> 37.09 (1) Evidence on a hearing may be given,
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> (a) by an affidavit or statutory declaration made pursuant to Rule 38;
>
> (b) by a statement of facts agreed upon in writing by all the parties;
>
> (c) with leave of the court, by any witness in person;

> (d) by any evidence obtained on discovery and admissible under the applicable rule.
>
> (2) Where there is or may be a dispute on a hearing as to the facts, the court may, before or on the hearing, order that the application shall be heard on oral evidence, either alone or with any other form of evidence, and may give such other directions relating to any pre-hearing procedure and the conduct of the application as it considers just. [E. 28/4(3)]
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> (3) The attendance of any witness and the production of any document on a hearing may be compelled by a subpoena as provided in rule 31.24 with any necessary modification. [E. 32/7]
>
> (4) The court may order that all or part of an application be conducted by means of a telephone or video conference. [Amend. 05/02]
>
> (5) Rules 18 to 26 on discovery procedures shall, with any necessary modification, apply to an application.

[13] The Rules generally apply to applications commenced under Rule 9.02: Rule 37.18. This includes the right to production of documents, discoveries and interrogatories (see also Rule 37.09(5)). These “pre-trial” procedures are therefore available to the parties to an application *inter partes*.

Issue

[14] The issues, as framed by Rule 9.02, are:

> (1) Is "the sole or principal question at issue ... or is [it] likely to be, a question of law, or one of construction of an enactment..."?
>
> (2) Is there "unlikely to be any substantial dispute of fact"?

Arguments

[15] The Board argues that unless the proceeding continues as an action – with statements of claim and defence, discoveries, production of documents, and so on – it will not be in a position to make full answer and defence. In other words, the Board will not be able to fully advance its interpretation of section 530 of the *Municipal Government Act*, particularly its argument that section 530 complies with section 23 of the *Charter*. The Board claims that the broader issues of comparative funding among school boards are relevant to the question of whether there is equality of educational quality, facilities and programs. The Board also claims that there may be disputes of fact with respect to the residency of the applicants, some of whom it says may not pay the tax provided for in section 530 of the ***Act***.

[16] The respondents maintain that they have the right to have their application heard, and that the applicant intervener does not have the right to change the nature of the application.

[17] In its submissions the Board goes into some detail on the proper approach to s. 23, stating that "an understanding of how to interpret and apply the Section 23 right is critical to understanding that this application is much more than a simple interpretation of an enactment, and will raise significant factual matters that will be in dispute." Based on the caselaw on s. 23 – principally *Mahe v. Alberta*, [1990] 1 S.C.R. 342 – the Board argues that the question is "whether the funding being provided to the [*Conseil*] ... is at least equivalent on a per student basis to the funds allocated to the [Board] and other school boards in the Province of Nova Scotia, and whether that level of funding is appropriate in order to provide minority language instruction for the particular number of students involved." Both the *Conseil* – as intervenor – and the respondents disagree, arguing that the issue is a well defined question that can be decided on affidavit evidence. The respondents point out that it will be open to the respondents to introduce

further affidavit evidence, subject to relevance, which would be decided by the Chambers judge.

[18] The Board has the onus of proving that the parents should not be permitted to bring the proceeding as an application under Rule 9.02: *Cameron v. Nova Scotia (Attorney General)*, [1997] N.S.J. No. 429 (QL) (S.C.) at para. 6. In *Cameron* the respondents applied to have an application continued as an action on the basis that there would be substantial factual disputes. The applicants were seeking a declaration that they were entitled to have certain medical procedures covered under the *Health Services and Insurance Act* and that the denial of coverage violated s. 15 of the *Charter*, as well as the *Canada Health Act*. The applicants also sought an order in the nature of mandamus directing the Minister of Health to establish a tariff to cover the treatments and an order for indemnification under section 24 of the *Charter*, as well as punitive damages. The respondents argued, among other things, that there would be substantial disputes of fact as to the medical necessity of the procedures; that the applicants had sought extensive document production; that four days had been set aside for the matter; that there would be disputes of fact as to whether the applicants' s. 15 equality

rights had been violated; and that the facts upon which the applicants relied to claim punitive damages would be disputed. The applicants argued, among other things, that the facts relating to *Charter* issues could be dealt with by affidavit. Hamilton J. (as she then was) held that the respondents had an arguable issue that the applicants had to prove the medical necessity of the procedures, or that the respondents had the right to challenge their medical necessity. In addition, referring to the respondents' argument that there were substantial facts in dispute, Hamilton J. said, at paras. 19-22:

> ¶ 19 [...] The claims of the applicants are very broad and general. They claim far more than reimbursement for their past treatments. The applicants' argument that the respondents cannot question the medical necessity of the treatments they have already received deals only with a small part of the claim set out in their originating notice. It does not address the respondents' ability to argue the issue of medical necessity for future treatments for others or for the applicants themselves.
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> ¶ 20 This concern alone may have been enough for me to come to the decision I have come to.
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> ¶ 21 I note that the matter in the case of Eldridge v. British Columbia (Attorney General) [1997] S.C.J. No. 86, referred to me by the applicants, proceeded by way of trial, not application.
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> ¶ 22 The applicants' main argument against the granting of the order sought by the respondents was that there would not be substantial facts in dispute because the respondents do not have the right to make the applicants prove medical necessity for the treatments they already received or to challenge the medical necessity of the treatments the applicants already received. The applicants did not argue

> that there would not be substantial issues of fact to be determined if the medical necessity of the already received treatments is in issue. The report and letters from the doctors submitted by the applicants deal with a number of facts including medical necessity, the effectiveness of the treatments and the cost of the treatments. Mr. Cameron's letter to me of October 3, 1997 indicates he was submitting Dr. Wrixon's letter for the purpose of showing the propriety of the IVF treatment and the consensus of opinion of the staff at the Grace with respect to the propriety of this treatment for male infertility. This is also some evidence that there are facts in dispute.

[19] In *Davis v. Nova Scotia (Department of Transport)* (1988), 85 N.S.R. (2d) 81 (S.C.T.D.) the matter involved the determination of the status of a road. On the day the application was to be heard, numerous interested non-parties appeared. Davison J. held that it was apparent from the affidavits that there were substantial issues of fact and stated that the estimated time for the application – three and one-half days – made a Chambers hearing impractical. He ordered that the matter proceed as an action.

[20] *Dorey v. Honkong Bank of Canada* [1991], N.S.J. No. 272 (QL) (S.C.T.D.) involved an application to determine the validity of a letter of credit. Goodfellow J. noted that the applicant’s affidavits included

"numerous beliefs and allegations ... to support his request for a declaration that the letter of credit is void and unnegotiable." He continued:

> Before me Mr. Dorey's counsel, I think in recognition of the numerous areas of dispute raised by such stated beliefs and allegations, asked this court to continue the matter as a chambers matter limited to the application of what is advanced, in his view, as undisputed breaches of the I.C.C. Uniform Rules, which rules are incorporated specifically in a letter of credit from the Canadian Imperial Bank of Commerce to The Hong Kong Bank of Canada.
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> It seems to me, that in making a determination, even on such a limited basis, the court is not going to be able to avoid issues of the kind raised by Mr. Dorey's application, such as: failure to take reasonable care, failure of alleged duties to consult, whether notice was required to other than Three Brooks Development Corporation Limited of the increased indebtedness, the allegation of materially varied terms and conditions, whether the bank has acted in good faith, etc., etc.
>
> In my view, the applicant, The Hong Kong Bank of Canada has satisfied the court that the court should not, In Chambers, render a decision on the construction of documents where the court concludes that the rights of the parties depend on questions of fact which are in dispute, and where the decision of the court does not necessarily finally determine the rights of the parties and effectively bring litigation between them to an end. [p. 4.]

[21] In *4C Concerned Citizens of Cumberland County v. Cumberland (County)*, [1997] N.S.J. No. 165 (QL) (S.C.) the respondent had allowed an area of the County to be used as a landfill. A citizens group claimed that resolutions authorizing the landfill were *ultra vires* the enabling statutes. The

County applied to have the application converted to an action. Gruchy J. concluded that the matter should proceed as an action. He said:

> ¶ 25 At the present time neither the resolutions nor the context of those resolutions are before me. I have concluded that an examination of the resolutions, absent their context, might not be sufficient for a court to determine whether they were authorized by the enabling statutes. The factual context of the resolutions may well require examination by the court and I cannot conclude that it is unlikely that there will be a substantial dispute of fact. Indeed, such a dispute appears probable.

[22] Additionally, there were issues of fact with respect to the status of certain "Draft Guidelines and the degree of public consultation required or carried out" (para. 26), as well as likely factual disputes relating to the possible application of the doctrine of legitimate expectations (para. 27). Gruchy J. noted that the question was not the complexity of the matter, but the nature of the litigation (para. 29) and concluded that "the issues between the parties are not sufficiently precise or sharp to permit an orderly trial" (para. 31). He directed that the matter proceed as an action.

[23] In *Haupt v. Eco-Nova Multi-Media Productions Ltd.* [2000] N.S.J. No. 414 (QL) (S.C.) the plaintiff had applied for delivery of stock footage allegedly being held by the defendants, pursuant to an agreement between

the parties. Davison J. held that the appropriate procedure was an application for recovery of property or replevin under Rule 48. He also commented on the requirements of Rule 9:

> ¶ 9 Documents which commence a proceeding such as those referred to in Civil Procedure Rule 9 must have a degree of precision to advise the other parties and the court of the nature of the proceeding, the remedy sought and the statute, rule or law which permits the court to grant such a remedy. The originating notice (application inter partes) does not make reference to a Civil Procedure Rule but does state the application is for delivery of possession of the stock footage. The written memorandum of the plaintiff started with the advice the application for possession was "brought by way of originating notice (application) pursuant to Civil Procedure Rules (sic) 9.02".

[24] Moir J. commented in a similar vein in *Edwards v. McNeil* (2002), 211 N.S.R. (2d) 41 (S.C.):

> [9] Finally, even if it could be said with confidence that this dispute is unlikely to give rise to any substantial dispute of fact, the commencing documents do not meet minimum safeguards for procedural fairness where rights are sought to be finally determined by application rather than trial. The commencing documents "must have a degree of precision to advise the other parties and the court of the nature of the proceeding, the remedy sought and the statute, rule or law which permits the court to grant such a remedy." *Haupt v. Eco-Nova Multi-Media Productions Ltd. et al.* (2000), 190 N.S.R. (2d) 274 (S.C.) at para. 9. Since proceeding by way of originating notice (application) seeks to deprive the defendants of the procedural protections of trial process, the originating documents, in this case the amended notice and the affidavit of Mr. Edwards, ought to give at least as much information as pleadings would have provided as regards the cause of action Mr. Edwards asserts against the defendants....

[25] In *Mitchell v. Regional Administrative Unit 3* (1986), 60 Nfld. & P.E.I.R. 1; [1986] P.E.I.J. No. 59 (QL) (P.E.I.S.C. – Gen. Div.) the proceeding involved an application for an order under s. 24(1) of the *Charter* declaring that a "first come, first served" French-immersion student registration procedure was contrary to s. 15 of the *Charter*. The respondent, seeking to have the proceeding changed to an action under a Rule virtually identical to Nova Scotia's Rule 9.02, raised issues of policies regarding teacher hiring, classroom space, busing of students and previous registration procedures. The Court held that there was no difficulty in hearing the matter by way of Application rather than Action. It was possible to issue a declaratory judgment with the need for a trial. Mullally J. said:

> The plaintiff here seeks a declaration that the procedure of the defendant is contrary to his equality rights under the Charter. Because this is a question of law, in which there is unlikely to be any substantial dispute of fact, then the action may be commenced by filing an originating notice (application inter partes) as the plaintiff has done.
>
> The real dispute here is the effect of such a judgment. Because many parties will be affected certainly notice of hearing, and a chance to participate, needs to be given to a number of parties. Included in these would be the boards of trustees of the other regional administrative units, the P.E.I. Teachers' Federation and representatives of parents whose children presently attend French Immersion classes as well as parents of school children generally. [QL version at p. 10].

[26] Even where there is a dispute of fact, that, in and of itself, does not render the application route objectionable, because it may involve a dispute of facts in the construction or interpretation of an enactment: see *Goodman Rosen Inc. v. Sobeys Group Inc.*, [2002] N.S.J. No. 551 (S.C.) (QL) at paras. 13-14 and *Winlow v. ACF Equity Atlantic Inc.*, [2003] N.S.J. No. 321 (S.C.)(QL) at para. 23. Nor does the fact that a matter may involve multiple parties, intervenors, issues of education funding and the *Charter* exclude the application route: see, for instance *Adler v. Ontario* (1996), 140 D.L.R. (4th) 385 (S.C.C.), where the issue of state funding for religious schools was litigated under the *Charter*.

Conclusions

[27] I am satisfied that the principal issues in this matter are questions of law; I am also satisfied that no substantial dispute of fact is likely to arise. I am not convinced that there are likely to be relevant facts that cannot be introduced through affidavit; there is not likely to be any need for the Chambers judge to make findings of fact on disputed evidence, or findings of credibility. The fact that factual material, even factual material of some

complexity, will be placed before the Chambers judge does not rise to the level of a "substantial dispute of fact." I am also satisfied that the issue – the validity of section 530 of the *Municipal Government Act* in view of section 23 of the *Charter* – is set out with sufficient precision.

[28] This application deals with education funding. It affects the students enrolled in schools administered by both the Board and the *Conseil*. It is a significant question for the applicants whether they are entitled to additional funding. In my view, the issue is an important one, but not one of such a nature that it cannot be resolved as an application. This will not only permit the issue to be addressed, but will also allow the question to come before the Court in a timely manner. This is significant, because, should the Chambers judge find that there is a *Charter* violation, the deprivation would affect the children attending the *Conseil* schools. This factor gives the determination of the issue some urgency.

[29] I believe this conclusion is also consistent with Rule 1.03: "The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding." Should a substantial dispute of fact arise, of course, it is

open to the Chambers judge to continue the matter as if it had been commenced by Originating Notice (Action), pursuant to Rule 37.10(e).

[30] I am confident that any factual dispute that might arise in this case can be adequately addressed in the course of a hearing. The exchange of affidavits – and the availability of cross-examination and other pre-hearing procedures – ensures the full disclosure of the parties' positions. As to the question of whether all of the evidence submitted by the parties is relevant to the issues on the application, that is a matter for the Chambers judge.

[31] I do not agree with the Board's submission that the fact that this matter will consume at least four days of court time should provide further reason to make it a trial. The time to be consumed, in itself, is not a sufficient reason to proceed by way of action. In *Doucet-Boudreau v. Nova Scotia (Department of Education)* (2000), 185 N.S.R. (2d) 246, another s. 23 application, the application was heard over three to four days, and had been scheduled for up to eight days.

[32] I am likewise not convinced that the fact that there is a claim for damages on the application requires that it be continued as an action. I pointed out to counsel in the hearing that such a remedy is unusual in s. 23 *Charter* applications (although not excluded, and this comment should not be taken as a denial of the remedy). On a review of the affidavits, I do not see a basis for a claim of bad faith, which would make a damages claim more plausible. In any event, such an allegation would be against the Attorney General, not the intervenor Board.

CONCLUSION

[33] Accordingly, I dismiss the Board's application to have the proceeding converted to an action.

[34] If the parties are unable to agree on costs within the next 30 days, I ask that they provide me with their written submissions prior to September 30, 2005.

J.