DECISION DATE: 20000918
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CANADA
PROVINCE OF NOVA SCOTIA

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Nova Scotia Union of Public Employees v. Halifax Regional School Board, 2000 NSSC 121

BETWEEN:

NOVA SCOTIA UNION OF PUBLIC EMPLOYEES

Applicant

- and -

HALIFAX REGIONAL SCHOOL BOARD

Respondent

DECISION

HEARD:	**in Chambers on June 27th, 2000 before the Honourable Justice F.B. William Kelly**
DECISION:	**June 27th, 2000 (Orally)**
WRITTEN RELEASE OF ORAL:	**September 18th, 2000**
COUNSEL:	**Nancy Elliott, for the Applicant** **John C. MacPherson, Q.C., for the Respondent**

Kelly, J.

[1] This concerns an application by a Union for a review of a portion of an arbitrator's decision. It also concerns the Respondent Board's request for leave to seek review of a further portion of that decision after the statutory period of sixty days for bringing such an application has expired.

[2] In 1994 the Civic Workers Union entered negotiations with the Halifax District School Board for a new collective agreement for its janitorial staff. This was the first opportunity for the parties to do so since the expiration of the *Public Sector Compensation Restraint Act*, S.N.S. 1991, c.5. At the time of the 1994 negotiations, the introduction of new rollback/freeze legislation by the provincial government was expected and the parties attempted to negotiate an agreement that they believed would comply with that proposed legislation.

[3] Ken Zwicker, president of the Union requested increased compensation for the janitorial staff. This would require an "opt-out clause" that would provide for a delay in payment of this increased compensation in the hope that it would not violate provisions of the anticipated legislation, should it be enacted.

[4] On June 30, 1994 the *Public Sector Compensation (1994-1997) Act*, S.N.S. 1994, c. 11 came into effect and froze collective agreement compensation plans retroactive to April 29 of that year. Subject to certain exceptions not relevant to this case, the *Act* prohibited wage increases for public employees and rolled back compensation by three percent for three years ending October 31, 1997.

[5] The Union and Board signed an agreement on July 22, 1994 in which a formula for compensation over the period of the wage freeze was negotiated. The money that would have been paid during that period as new increased compensation would instead be paid as a lump sum at the expiry of the *Act*'s application. This was agreed to by Mr. Marriott, then the chair of the Board, in a letter the same day ("Marriott Letter") which states:

> This is to confirm that the Halifax District School Board agrees that the monies (wage increases) that were to have been paid to the employees pursuant to this Collective Agreement in years two and three will be paid to employees as a lump sum payment within fifteen (15) days following the completion of the present legislated Bill No. 52 scheduled to expire on October 31, 1997.
>
> It is also agreed that should the present scheduled expiry date of October 31, 1997, for Bill No. 52 be extended, the previously-mentioned monies and conditions would also be extended to the expiry of such extension.

[6] On October 31, 1997, the freeze period ended. During the interim, Halifax was included into a new municipality with several other municipalities by

provincial statute. The Nova Scotia Union of Public Employees succeeded the Civic Workers Union and a Regional School Board succeeded the District Board.

[7] The new Regional Board did not pay the lump sum as described in the Marriott letter as it believed that, were it to do so, it would be in contravention of the *Act*. The Union claimed its members were entitled to the salary payments promised in the agreement as embodied in the Marriott letter. Both parties here agree the agreement was designed as an attempt to avoid the *Public Sector Compensation Act*.

[8] After some preliminary dispute in this Court and the Court of Appeal as to whether the claim could proceed, the Union filed a grievance that was heard by Mr. Milton Veniot, Q.C.

[9] The Arbitrator made essentially two findings. First, he found that the Marriott letter was contrary to the *Act* because it contravened at least the following four provisions of the *Act*:

> s. 8(1) No compensation plan, whether established before or after the coming into force of this Act, shall be changed between April 29, 1994, and October 31, 1997, inclusive, except as provided by this act.

> s. 8(2) Notwithstanding any compensation plan, there shall not be any increase in the pay rates in a compensation plan between April 29, 1994, and October 31, 1997.
>
> s. 9(1) Effective November 1, 1994, the pay rate for each position covered by a compensation plan shall be reduced by three per cent except as provided by this Section.
>
> s. 12 A compensation plan to which this Part applies, entered into, established or amended at any time, is of no force or effect to the extent that it provides for any pay rates in excess of pay rates permitted by this Act.

[10] The Arbitrator's second finding was that the issue of the entitlement of the grievers to some financial award was not concluded by the first finding referred to above. He found that the grievance was arbitrable and that there was a possibility of providing a remedy on a "restitution" basis. He retained jurisdiction to deal with such matters and invited the Union to determine whether there was a case to be made on that basis.

[11] This second finding has been challenged by the Board in its argument and in its pre-trial brief. The Union has submitted that this finding of the Arbitrator is not properly before the Court on this application and is beyond my jurisdiction.

[12] Mr. MacPherson, for the Board, makes two submissions for my consideration disputing the Union's contention.

[13] First he submits that the scope of the Union's application is broad enough to incorporate the second issue, namely the Arbitrator's finding that some "restitution" entitlement may be available to the Union and that the matter was "arbitrable." He thus alleges that both matters may be heard today.

[14] In the alternative, he submits that the Court may find the Board is entitled to an extension of time under s.16(2) of the *Arbitration Act* in order to formally file an application for judicial review of the arbitrator's "restitution" finding, and, if granted, both matters should be joined in a single hearing. He further submitted that the Board would be prepared to file the necessary documentation within 10 days.

[15] In dealing with the Board's first submission, I agree with the argument of counsel for the Union that their Interlocutory Notice (Application *Inter Partes*) was most specific as to the subject matter of the judicial review. It pleads in paragraph (a) that it challenges the single issue of the finding of the Arbitrator on the legality of the Marriott letter. Specifically it states that the union will be seeking

> (a) an order to quash and set aside *the portion of an arbitration award* dated December 6, 1999 made by Milton J. Veniot, Q.C. Sole Arbitrator, *in which he found that a letter dated July 22, 1994, from E. D. Marriott...* to Ken Zwicker...*was contrary to the Public Sector Compensation Act*...[emphasis added]

[16] I do not agree with counsel for the Board that this specificity is countered by the request to remit the entire matter back to the Arbitrator in the following paragraph of the Originating Notice. The Board's first submission fails.

[17] The second proposal of the Board requires much more consideration. For this purpose, the relevant sections of the *Arbitration Act*, R.S.N.S. 1989, c. 19 provide as follows:

> 15 (2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set aside the award.
>
> 16 (1) In an application to a court or a judge respecting the matters referred to in Section 15, the originating notice shall be issued and served within a reasonable time.
>
> (2) In this Section, "within a reasonable time" means within sixty days after service of a copy of the award of the arbitrator has been made upon the party issuing the originating notice or such longer time as a court or a judge may determine.

These sections require that an application for review be made within the sixty days, which has now passed, or "within a reasonable time."

[18] The argument of the Board is that its application will have been made "within a reasonable time," as its counsel was advised only the day before this hearing that the Union indicated it intended to accept the "invitation" of the

Arbitrator to return to the arbitration to determine the entitlement for a restitution award. However, it further indicated it would do this only if it failed in this review of the determination of the illegality of the Marriott letter.

[19] The Union argues that the Board and its counsel "should" have been aware that the Union would follow this course eventually if it failed in this application. On the other hand, I find some merit in the response of the Board that it would have little reason, particularly within the 60 days after the award, to seek judicial review based on the hypothetical possibility the Union might pursue the alternative. However, I must consider the submission of the parties and the factual circumstances to determine if the proposed application of the Board to add or join the "restitution" issue is made "within a reasonable time."

[20] I have been provided with several cases relating to the late joining of 'new' issues on a judicial review.

[21] In *A.G.T. Ltd. v. Graham et al*. (1997), 142 F.T.R. 185 (F.C.T.D.) the respondent employees had made a complaint under the Canada Labour Code claiming that the employer had failed to pay overtime. The original inspector

rejected the employer's defence to these claims finding that s. 7(1) of the regulations to the Code did not apply. A referee subsequently overturned that decision. The appellant sought judicial review and alleged that it should be allowed to rely on s.170(1)(b) of the Code as a defence. Though this particular provision was not specifically pleaded in the original application for judicial review, Jerome A.C.J. found that he could consider it because the application was broad enough to encompass such a defence and that the rules of court gave him discretion to permit a party to amend an originating notice if it would be just to do so.

[22] *Shubenacadie Indian Band* v. *Canada (Human Rights Commission) et al.* (1997), 154 D.L.R. (4th) 344, 138 F.T.R. 275 (F.C.T.D.) concerned a complaint over the denial of payment of social assistance to non-Indian residents of reserves who were spouses of Indians. The complainant non-Indian spouses were successful before the Canadian Human Rights Tribunal and the Band sought judicial review. Before the Court, the Band brought up three new defences against the complaint. It alleged that Parliament had no jurisdiction over the matter, that s. 25 of the *Charter* protected its decision, and that its decision could be justified as an affirmative action measure under s. 16 of the *Canadian Human Rights Act*. The

court found that, as these were arguments concerning the tribunal's jurisdiction over the complaint, it was appropriate to consider them in the review though they were not brought forward at the tribunal hearing.

[23] *Qikiqtani Inuit Assoc.* v. *Canada (Minister of Indian Affairs and Northern Development) et al.* (1998), 155 F.T.R. 161 (F.C.T.D.) involved judicial review of the Nunavut Water Board's decision to renew a mining company's water licence. The applicant sought review based on two issues. The first concerned compensation guidelines which it brought forward during the late stages of the original decision making process. It introduced its further concerns about sewage only during judicial review. Nonetheless, the court found that it was appropriate to allow the applicant association to raise those issues in the context of the application as the relevant government agencies (Environment Canada, the Department of Fisheries and Oceans and the Department of Indian Affairs and Northern Development) had themselves previously raised those issues.

[24] I take from these decisions that, in a contextually appropriate situation, it is acceptable to consider new jurisdictional grounds in a judicial review and that courts have a discretion to "render effective the substantial law if it would be just

to do so."

[25] I have particularly considered *N.S.N.U., Halifax Infirmary Local* v. *Halifax Infirmary Hospital* (1989), 91 N.S.R. (2d) 384 (S.C.T.D.), where Hallett J., as he then was, discussed the issue of an extension of time to apply for judicial review.

[26] As in this case, the applicable law was the *Arbitration Act*. The applicant Union applied for an extension of time to seek judicial review of an arbitrating board's decision. The board had issued a decision on September 16, 1988 and the Union issued an originating notice seeking to quash the award on December 30, one hundred days after the decision. Hallett J. had to determine whether the application was made "within a reasonable time" as the sixty day limit had passed.

[27] He listed the grounds for such an application at page 389 and commented that the court should consider the following factors:

> (i) that the proceeding to quash was commenced within a reasonable time;
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> (ii) that it is at least arguable that the arbitrator misconducted himself;
>
> (iii) that the applicant had a bona fide intention to make an application to set aside the award within the sixty day period;
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> (iv) that the applicant had a reasonable excuse for the delay in not

> having commenced the proceeding within the sixty day period; and
>
> (v) that the demands of justice require the granting of the extension.
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> If an applicant can meet these requirements, he should be entitled to a hearing without proving that the application involves a very exceptional issue. That requirement, as something over and above the three requirements stated by Mr. Justice Chipman in the Martin case, seems to have been jettisoned by the Appeal Division in favour of a more liberal approach that, in my opinion, should also be applied to applications to extend time under s. 13A [now section 16] of the *Arbitration Act*. Even though the scope of the review itself is limited under Section 13 [now section 15] of the *Act* to determining whether the arbitrator misconducted himself, a party should be entitled to the same considerations on a "timeliness" application as are other litigants in view of the wide discretion given to the Court to extend time pursuant to Section 13A of the *Arbitration Act*. On the timeliness issue, a litigant should not be treated differently simply because he is objecting to an award of a consensual arbitrator and, as a result, the judicial review process is confined within narrower limits than a case on appeal.

[28] Hallett J. denied the application for an extension finding that there was no reasonable excuse for the union's failure to begin the application given the its experience in arbitration. Further, the requirements of justice did not demand the extension as there was an alternate forum for the resolution of the dispute.

[29] I have already discussed the reasons for delay by the Board above and although there is some merit in the Union's position that the Board should have guessed that the Union would accept the Arbitrator's invitation to apply further on the "restitution" issue, I accept that the Board was not informed that this would

actually occur until the day before this hearing.

[30] In considering all the circumstances of this application, I accept that the Board has a reasonable excuse for its delay in applying to have both issues determined together on judicial review, and would have made such an application within the 60 day time period if it had known that the Union was determined to act on the "restitution" matter if it failed on its application for review of the Marriott letter matter.

[31] In addition, Justice Hallett's factors as listed above are all applicable in these circumstances to allow an extension. Here it is the desire of both parties to move expeditiously to conclude their dispute, and it is more probably in the best interests of the parties, the administration of justice, and "the demands of justice" that both issues be heard together - with adequate notice and with proper submissions in advance to the Justice hearing the matter.

[32] I note in support of this that it is acknowledged by counsel that it is a virtual certainty that appeals and applications for review will arise from any finding of the adjudicator if the matter is returned to him.

[33] As well, it is, in my opinion, most practical and sensible to adopt a procedure to join the two matters, particularly so that the parties could have both matters determined by one judge and presumably by one appeal panel.

[34] I therefore grant the Board leave of ten days to apply for judicial review of the second matter so that both matters may be heard together. I wish to follow up with counsel to settle dates and timing so that we can move as expeditiously as possible in dealing with these two issues.

J.