

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Cape Breton (Regional Municipality) v. Nova Scotia (Human Rights Commission), 2012 NSSC 433

**Date:** 20121213

**Docket:** Syd. No. 407500

**Registry:** Sydney

**Between:**

Cape Breton Regional Municipality

Applicant

v.

Nova Scotia Human Rights Commission, Canadian Union of Public Employees,  
Canadian Union of Public Employees Local 759, Canadian Union of Public  
Employees Local 761, John Hynes, Ralph Gatto, Douglas Foster, Judy Wadden,  
Robert Ballam, Mary Coffin, and the Attorney General of Nova Scotia

Respondents

and

Canadian Union of Public Employees, Local 933

Interested Party

**Judge:** The Honourable Justice Cindy A. Bourgeois

**Heard:** December 3, 2012, in Sydney, Nova Scotia

**Written Decision:** December 13, 2012

**Counsel:** Eric Durnford, Q.C. and Krista K. Smith, for the Applicant  
Lisa Teryl for the Respondent Commission  
Blair Mitchell for the Respondent Douglas Foster  
Susan Coen for the Interested Party  
John Hynes, Ralph Gatto, Judy Wadden, Robert Ballam and  
Mary Coffin, unrepresented and not appearing

**By the Court:**

[1] On September 28, the Cape Breton Regional Municipality (the "CBRM") filed a Notice of Judicial Review, naming the Nova Scotia Human Rights Commission (the "Commission"), John Hynes, Ralph Gatto, Douglas Foster, Judy Wadden, Robert Ballam, Mary Coffin, and the Attorney General of Nova Scotia as Respondents. The Canadian Union of Public Employees, Local 759, was named as an Interested Party.

[2] By way of background, the individual respondents are all former employees of the CBRM, who were required to retire from their employment upon attaining the age of 65. These individuals filed separate complaints to the Commission, alleging discrimination based upon their age. The Commission decided to refer these complaints to a Board of Inquiry under the provisions of the *Human Rights Act*, R.S.N.S. 1989, c. 214.

[3] The Applicant is challenging this decision, and in its Notice of Judicial Review, set out three grounds as follows:

1. The Commission is improperly attempting to re-litigate an issue that already has been fully and finally determined by another Board of Inquiry

appointed by the Commission in *Talbot v. Cape Breton (Municipality)*, 2009 NSHRC 1 ("Talbot"). The Commission played an active role in the Talbot inquiry and did not appeal the Board of Inquiry's decision. The Commission's attempt to re-litigate the same issue against the same respondent is an abuse of process;

2. There is no reasonable basis in law or on the evidence for the Commission's conclusion that an appointment of a Board of Inquiry is warranted in the circumstances. In *Talbot*, the Board of Inquiry found that CBRM's pension plan was *bona fide* and met the test of legitimacy set out in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45; therefore the Board of Inquiry found that CBRM's mandatory requirement that employees retire upon reaching age 65 was within the age discrimination exception in s. 6(g) of the *Human Rights Act*.

3. The decision of the Commission to appoint a Board of Inquiry was made in violation of its duties of due process, natural justice and procedural fairness to CBRM, and otherwise was a decision taken without jurisdiction, or in excess of jurisdiction, by:

- i. Resolving to appoint a Board of Inquiry without first notifying CBRM, or providing it with copies, of the Complaints or the resolution to appoint a Board;
- ii. Not following its own policies requiring that all parties be given an opportunity to provide written comments on whether a Board of Inquiry should be appointed;
- iii. Establishing policies and/or procedures in the handling of Complaints under the *Act* that are inconsistent with the Commission's authority under the *Act*.

[4] A Motion for Directions was undertaken on October 22, 2012 with Justice Patrick Murray, resulting in an Order for Directions for Judicial Review which contained the following provisions:

5. If the Respondent Nova Scotia Human Rights Commission intends to omit any relevant document(s) from the Record on the basis of privilege, then it shall

state over which documents(s) it asserts privilege and provide copies of any such document(s) to the Court and shall identify such document(s) and the basis of the privilege claim in writing to all parties by November 5, 2012;

6. The Record shall consist of:

- (a) The complaint forms of the six complainants;
- (b) All documents that were before the Commission when making its decision to appoint a Board of Inquiry, including minutes of all meetings dealing with that decision;
- (c) The letter of the Commission Chair dated July 20, 2012; and
- (d) Any other document that the Court finds should be included in the Record upon motion of the Applicant or any other party to this matter.

7. Upon reviewing the Record, and after attempting to obtain agreement from the other parties, the Applicant may file an affidavit to supplement the Record.

9. The Court will hear motions from the parties on December 3, 2012 at 9:30 a.m. for the full day at the Sydney Justice Centre regarding the following matters, if such matters cannot be resolved to the mutual satisfaction of the parties in advance of the motion date:

- (a) Who should be named as parties in this proceeding and in what capacity;
- (b) That the Applicant be permitted to amend the Notice for Judicial Review to reflect the Court's ruling with respect to item (a);
- (c) The contents of the Record and any claims made with respect to privilege;
- (d) The contents of the Applicant's affidavit and permission, if requested, to the other parties to file any reply affidavits; and
- (e) Any other matters that may arise, upon proper notice having first been given.

[5] On December 3, 2012, several matters were before the Court, both by way of formal Motion, and otherwise. The Court rendered oral direction in relation to several matters, including:

- a) A motion to add CUPE as well as several individual union locals, as named Respondents, was granted;
- b) A motion to amend the Notice of Judicial Review to reflect the above ruling was granted;
- c) A motion brought by the Commission in relation to the conduct of Mr. Durnford was adjourned without date;
- d) A motion brought by the CBRM seeking a stay was determined to be properly before the Court, but was adjourned to be heard on December 14, 2012, with directions provided regarding the filing of additional motion materials, and that the appropriateness of Ms. Smith's affidavit would be addressed at that time;
- e) The affidavit of Angus Fleming was found to be, pursuant to Rule 7(h) admissible evidence for the purpose of the Review hearing.

[6] At the conclusion of argument, the parties advised the Court that agreement had been reached, subject to the determination regarding a claim of privilege discussed below, as to the contents of the Record, with an "Amended Record" being introduced on consent.

[7] The Court reserved decision on three issues, namely:

- 1) Whether correspondence between Ms. Teryl, Commission counsel and Commission staff was subject to solicitor client privilege, and therefore not to be included in the Record before the Court;
- 2) Whether the affidavit filed by Commission Chair Eunice Harker should be considered as Supplementing the Record;
- 3) Whether the affidavit filed by Kathy MacLeod, national representative with CUPE in the Sydney area office, should be before the Court on the Review hearing.

### **The Claim of Privilege**

[8] As per paragraph 5 of Justice Murray's order, the Commission provided to the Court in a sealed envelope a document purporting to be a legal opinion from Ms. Teryl, to the Commission. The Commission asserted that the document was created by virtue of the solicitor and client relationship between Ms. Teryl and the Commission, and properly excluded. The Commission asserted that the Court should not view the document unless it determined that the privilege was abrogated.

[9] CBRM argued that it did not expect to have disclosed any information that was subject to solicitor-client privilege and that a legal opinion would clearly and

properly be excluded from the Record. It was submitted however, that as Ms. Teryl was an employee of the Commission, the contents of her correspondence may contain material outside of the scope of legal opinion, and may be subject to disclosure. Mr. Durnford indicated his client would have no difficulty with this Court reviewing the correspondence and making a determination.

[10] In the circumstances, and given the order of Justice Murray which in my view contemplates the Court reviewing any filed documents, it was appropriate for the Court to examine the document to determine if the claim of privilege is warranted. I have done so, and am satisfied that the correspondence is, in its entirety, legal opinion, and accordingly privileged. It will not form part of the Record.

### **The Affidavit of Eunice Harker**

[11] Ms. Harker is the Chair of the Commission and filed an affidavit sworn November 20, 2012. An Amended Affidavit, sworn November 29th was subsequently filed, which expanded upon the terms of the original affidavit. In both versions the final paragraph provided:

I swear this affidavit in support of the Commission's motion to have the Court direct Mr. Durnford to have no further contact with the Commission (the Commissioners and CEO) and to complete the Record.

[12] The CBRM argues that the affidavit should be struck in its entirety, as it infringes upon the Commission's obligation to remain neutral, and the affidavit in effect, is an attempt to justify the decision which is now the subject of Judicial Review. Numerous authorities were provided to the Court, suggesting that the providing of evidence by the tribunal whose decision is being reviewed is inappropriate.

[13] The Commission asserted that the purpose of the affidavit was to assure that the Court was fully apprised of the policies of the Commission and it was not an attempt to justify its decision to refer the complaints to a Board of Inquiry. Ms. Teryl did concede that paragraph 19 of the Amended affidavit could be viewed as akin to submissions, and agreed that it should be struck.

[14] Upon the Court seeking clarification, the parties all agreed that when referencing the "Record" in the context of a judicial review, what is intended by that term, is the compilation of all material which was before an administrative



decision maker when it made the decision under review. At the conclusion of submissions, the parties, as noted above, reached agreement and an Amended Record was provided to the Court.

[15] Both versions of the Harker affidavit address concerns regarding Mr. Durnford. As noted above, that motion was found to be more appropriately dealt with outside of the judicial review itself, and the Commission was invited to arrange an alternate date to address that matter. Therefore, the first 10 paragraphs of the Harker affidavit, original or amended, should not be before the Court in the context of the judicial review.

[16] The remaining terms of the amended Harker affidavit were, according to the Commission, intended to supplement the Record. Given that the parties reached agreement regarding the Record, one must question whether given that stated purpose, the Court should even consider the matter. In my view, the terms of the Amended affidavit are more akin to providing argument as to why the Commission felt the referral to a Board of Inquiry was warranted. None of the proposed provisions, other than paragraph 13 of the amended affidavit indicate that the information contained therein, was information before the Commission

when the decision under review was made. If that was the case, the Court may view the information as being a proper addition to the Record.

[17] To the contrary, the provisions of the affidavit as worded appear to be for the purpose of justifying the decision reached. I agree with the submissions of counsel for the CBRM that such does not adhere to the Commission's position of neutrality. It shall be struck in its entirety.

#### **Affidavit of Kathy MacLeod**

[18] The affidavit of Kathy MacLeod was sworn November 22, 2012. It contains information possessed by CUPE and its locals. As such, the determination to be made is not whether it should form part of the "Record" as defined above, but rather, whether it contains evidence that should be considered at the review hearing.

[19] The purpose of the affidavit is two-fold. It is intended to respond to perceived inaccuracies in the affidavit of Ms. Harker, and secondly, it contains evidence which supports an argument that CUPE was not afforded procedural

fairness in terms of the decision to refer complaints involving CUPE members, to a Board of Inquiry.

[20] I conclude that subject to the revisions specified below, the affidavit contains admissible evidence for the purpose of the Review hearing. As paragraphs 4 and 10 were directly in response to the affidavit of Ms. Harker, these provisions are to be struck. Further, paragraph 8 contains a statement, namely "no investigation or attempts to settle the complaints had been made". I agree with the submission of Mr. Foster's counsel, that such is a conclusion which is very much in contention, and is more properly to be determined by the Court upon review. That portion of paragraph 8 is hereby struck.

[21] I would ask that Counsel for the CBRM draft an order to reflect the Court's decision in relation to the above matters, to be circulated to those parties represented by counsel, for comment as to form.

J.