SUPREME COURT OF NOVA SCOTIA

Citation: Cape Breton (Regional Municipality) v. Nova Scotia (Human Rights Commission), 2013 NSSC 41

Date: 20130131
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 933, 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

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: December 14, 2012, in Sydney, Nova Scotia

Written Decision: January 31, 2013

Counsel: Eric Durnford, Q.C. and Krista K. Smith, for the Applicant
Lisa Teryl for the Respondent Commission, not appearing
Blair Mitchell for the Respondent Douglas Foster
Susan Coen for the Canadian Union of Public Employees, and locals, not appearing but providing written submissions
John Hynes, Ralph Gatto, Judy Wadden, Robert Ballam and Mary Coffin, unrepresented and not appearing
The Attorney General of Nova Scotia not appearing

By the Court:

INTRODUCTION

[1] On June 27, 2012, the Nova Scotia Human Rights Commission (the "Commission") referred six complaints, all received from former employees of the Cape Breton Regional Municipality ("CBRM"), to a single Board of Inquiry ("BOI"). All of the complaints alleged that the CBRM had discriminated against the employee contrary to the *Human Rights Act*, R.S.N.S. 1989, c. 214, by virtue of imposing a forced retirement upon attaining the age of 65.

[2] The CBRM as well as the Canadian Union of Public Employees and several of its locals (collectively referred to herein as "CUPE"), take issue with the appropriateness of the referral decision. The CBRM brought an application seeking judicial review of the referral decision, and in the interim, a stay of the referral decision. The CBRM, again supported by CUPE, wishes to stay the activities of the BOI until such time as the outcome of the judicial review is determined.

[3] This decision addresses the appropriateness of the stay. This request was opposed by the Respondent Douglas Foster, one of the complainants. None of the other named parties advanced a position on the stay motion.

[4] After having heard arguments on December 14, 2012, and mindful that the BOI was to commence its work within a week, the parties were advised that the motion was granted, with written reasons to follow. These are those reasons.

BACKGROUND

[5] On September 28, 2012, the CBRM filed a Notice of Judicial Review, naming 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. In its Notice of Judicial Review, the CBRM challenged the Commission's decision to refer the complaints to a BOI, on the following grounds:

> 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 fides* 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 the 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*.

[6] Following a Motion for Directions, a number of procedural matters were addressed on December 3, 2012, including naming CUPE and several individual locals as Respondents, as well as determining the proper usage of affidavit evidence at the judicial review hearing, scheduled for February 26 and 27, 2013. The outcome of the December 3rd motions are outlined in a decision reported as 2012 NSSC 433.

[7] The motion for a stay pending judicial review was heard on December 14, 2013. As noted above, the CBRM's motion is supported by CUPE. The Respondent Foster opposes the motion. The Commission and other named parties did not advance a position.

POSITION OF THE PARTIES

The Applicant CBRM

[8] The Applicant CBRM has two primary arguments regarding the appropriateness of the Commission's decision to refer the various complaints to a BOI. Firstly, it is submitted that the Commission did not undertake the necessary steps required before a referral decision was made, and as such, denied the CBRM of procedural fairness, amounting to a denial of natural justice. Secondly, it is alleged that the very issue referred to the BOI has already been conclusively determined, and as such, a new inquiry would constitute an abuse of process.

[9] On the procedural argument, the CBRM submits that it was not advised of the complaints prior to the referral being made, or offered the opportunity to attempt to effect settlement, or make submissions regarding the referral. It is submitted that this is contrary to the *Act*, the Regulations made thereunder, and the Commission's own policies.

[10] In particular, it is alleged that the Commission failed to abide by the requirements of Section 29 of the *Act*, which provides:

> 29 (1) The Commission shall inquire into and endeavour to effect a settlement of any complaint of an alleged violation of this *Act* where
>
> > (a) the person aggrieved makes a complaint in writing on a form prescribed by the Director; or
> >
> > (b) the Commission has reasonable grounds for believing that a complaint exists.
>
> (2) Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.
>
> (3) Notwithstanding subsection (2), the Director may, in exceptional circumstances, grant a complainant an additional period of not more than twelve months to make a complaint if to do so would be in the public interest and, having regard to any prejudice to the complainant or the respondent, would be equitable .

[11] In addition to the procedural requirements set out in the *Act* and Regulations, the Commission has a number of written policies, the following of which are relevant to the instant Application:

> Policy 2.4 states that the Commission's mandate is to *investigate and try to resolve complaints.*
>
> Policy 5.4 states: "Commission staff will recommend complaint file outcomes, either dismissal or referral to a Board of Inquiry for unresolved disputes. *Parties will have an opportunity to provide comments on these recommendations before the decision is made.*"
>
> Policy 5.5.8 states: "Commission staff may recommend in writing that Commissioners refer a complaint to a Board of Inquiry under s. 32A of the *Act* to determine if discrimination has occurred. *Parties will have an opportunity to comment on the recommendation.* This recommendation will be made within 14 days of a completed Resolution conference.
>
> Policy 7.4 states: "The parties to a complaint have a right to comment in writing on a recommendation to close or refer a file to a board of Inquiry."
>
> Policy 7.5.1 states: "Parties will have 21 calendar days to provide their written comments on a recommendation."

[12] Because of the failure of the Commission to notify the CBRM of the complaints, or provide an opportunity for input prior to the referral decision being made, CBRM submits that the Commission exceeded its jurisdiction in making the referral and as such the BOI is not properly constituted.

[13] As noted above, the CBRM submits that undertaking an inquiry in relation to four remaining complaints would amount to an abuse of process. All four complainants have alleged that the CBRM's requirement that they retire at 65 is discrimination contrary to s. 5(1)(d) and (h) of the *Act*. It reads:

> 5(1) No person shall in respect of
>
> (d) employment;
>
> discriminate against an individual or class of individuals on account of
>
> (h) age;

[14] The CBRM asserts that it has already been determined that the municipality's requirement that employees retire at 65 is an exception to the above provision, as it is pursuant to a "bona fide pension plan", as contemplated in s. 6(g) of the *Act*. It provides:

> 6. Subsection (1) of Section 5 does not apply
>
> > (g) to prevent, on account of age, the operation of a bona fide pension plan or the terms or conditions of a bona fide group or employee insurance plan;

[15] The CBRM has two pension plans, a "Defined Benefits Plan" and a "Defined Contribution Plan", both of which require members to retire at age 65. The CBRM submits that the Defined Benefits plan was found by a BOI in 2009 to fall within s. 6(g) and that the reasoning in that decision (reported as *Talbot v. Cape Breton (Municipality)* 2009 NSHRC 1, is equally applicable to the Defined Contribution Plan.

[16] As the *Talbot* decision was not appealed, CBRM submits that to re-litigate the four remaining complaints would amount to an abuse of process. It is clear that s. 6(g) will apply in all four current complaints, and the referral to a Board of Inquiry was unwarranted and unnecessary given the determination made in *Talbot*.

[17] The CBRM anticipated, correctly, that the Respondent Foster may rely upon the recent decision of the Supreme Court of Canada in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission),* 2012 SCC 10 ("HRM"), in support of his position that this Court should take a "hands off"

approach to questioning the Commission's referral decision. The CBRM submits that the *HRM* decision does not apply in the present circumstances, and it should not create a bar to this Court either considering the merits of the judicial review, or the present motion for a stay.

[18] The CBRM argues that the circumstances before the Court meet the requirements for a stay, as established in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 (SCC). To determine whether an interlocutory injunction (or in this instance a stay) is appropriate, the Court must address the following considerations:

1. Is there a serious issue to be tried?
2. Will there be irreparable harm occasioned to the applicant should the stay not be granted?
3. What, as between the parties, is the balance of convenience?

[19] The CBRM submits that all three factors should be determined in its favour.

The Respondent CUPE

[20] As noted above, CUPE supports the CBRM's motion for a stay. Not appearing at the motion hearing, CUPE's Counsel filed written submissions in support of a stay.

[21] CUPE submits that the *HRM* decision does not preclude this Court from considering the appropriateness of a stay. It is submitted that the practical and theoretical concerns expressed by the Court, simply do not exist in the present case. Further, the present matter can be distinguished on the basis that arguably, the Commission here has failed to meet its statutory obligations, prior to making a referral resulting in procedural unfairness to CBRM and CUPE.

[22] It is further submitted that once the Court applies the *RJR MacDonald* criteria, a stay is clearly warranted. Both the procedural concerns and abuse of process arguments give rise to a serious issue to be tried. It is further submitted that an abuse of process gives rise to irreparable harm not only to the parties involved, but to the public.

[23] In terms of the balance of convenience, CUPE submits that the Court should consider the time from between the filing of the complainants (the earliest being in January 2010, two in 2011, and three in 2012), and the Commission proceeding to act on same.

The Respondent Foster

[24] The Respondent Foster asserts that this Court should be neither undertaking a judicial review, nor entertaining a motion for a stay, based upon the directive contained in *HRM*, and other authorities. It is asserted that it is premature for this Court to intervene, but should rather, permit the BOI to do its work, which when concluded, may be subject to a fuller and more meaningful review.

[25] Even if this Court proceeds to consider the motion for a stay, the Respondent Foster submits that the CBRM has failed to meet the three-part test for a stay, certainly in relation to his own complaint, as well as the others.

[26] As to the procedural fairness argument, the Respondent Foster submits that the Commission had no obligation to attempt settlement or even investigate the

complaint. It is submitted that the referrals in this instance were not governed by s. 29 of the *Act* as submitted by CBRM, but rather by s. 32A which provides:

> 32A (1) The Commission may, at any stage after the filing of a complaint, appoint a board of inquiry to inquire into the complaint.
>
> (2) A board of inquiry shall not be composed of more than three members.
>
> (3) No member, officer or employee of the Commission, and no individual who has acted as an investigator in respect of the complaint in relation to which the board of inquiry is appointed, is eligible to be appointed to the board of inquiry.
>
> (4) A member of a board of inquiry is entitled to be paid such remuneration and expenses for the performance of duties as a member of the board of inquiry as may be determined by the Governor in Council.
>
> (5) Where a board of inquiry is composed of more than one member, the Commission shall designate one of the members to chair the board of inquiry. 1991, c. 12, s. 6; 2007, c. 41, s. 9.

[27] In his written submissions, Counsel for the Respondent Foster explains:

> Section 32A does *not* restrict the Commission to the choice of only referring a Complaint to a Board of Inquiry following investigation and attempt to settle under Section 29(1). Rather, *in addition* to this option, this Section also authorizes a referral *directly* to a Board of Inquiry without investigation or attempt to settle.

[28] It is asserted that "the role and duty of the Commission changes – as do its jurisdictional and procedural fairness responsibilities – depending under which subsection it is acting for any particular function."

[29] Further, the Respondent Foster asserts that given the safeguards built in to the jurisdiction and scope of authority of a BOI, there is no real fear that the CBRM will suffer from any practical denial of natural justice. The Board, who will ultimately determine whether the complaints have merit, is required to give "full opportunities to all parties to present evidence and make representations" (s. 34(2)), and has powers analogous to this Court.

[30] It is submitted that the BOI has full jurisdiction to hear the arguments being advanced, including abuse of process and the assertion that the Commission denied the CBRM procedural fairness in making the referral decision.

[31] If the Court proceeds to consider the stay motion, the Respondent Foster asserts that CBRM fails to meet all three criteria required by *RJR MacDonald*. It is asserted that the CBRM's arguments have no merit, there is no irreparable harm, and it is he who will suffer the greatest inconvenience by delaying the work of the BOI.

ISSUES TO BE DETERMINED

[32] Based on the above, the Court must address two issues:

1. Initially, does the *HRM* decision preclude the Court from considering a stay motion?

2. If the answer to the above inquiry is "no", then is a stay warranted in the present circumstances?

[33] Prior to embarking upon addressing the above issues, it may be helpful at this juncture to review the Court's authority to consider the motion before it.

[34] Civil Procedure Rule 7.28 specifically contemplates a motion for a stay being undertaken in the context of a judicial review. It provides:

> 7.28 (1) A judge may stay a decision under judicial review or appeal and any process flowing from the decision until the determination of the judicial review or appeal.
>
> (2) A motion for a stay must be made at the same time as the motion for directions, unless a judge orders otherwise.
>
> (3) The motion must be made by notice of motion in accordance with Rule 23 - Chambers Motion, although it is mentioned in the notice of appeal or notice for judicial review.
>
> (4) A judge may grant an interim stay until the hearing of a motion for a stay.
>
> (5) The judge may grant any order, including an injunction, as may be necessary to effectively stay a decision.

[35] It should be noted that CBRM did not, as contemplated by Rule 7.28(2) seek a stay at the time it filed its motion for directions. Based on the circumstances before it, this Court previously determined it was appropriate for the motion to be brought.

Does the HRM decision preclude the Court from considering a stay motion?

[36] Without doubt, there are obvious similarities between the present circumstances and that in *HRM*. There, a complainant alleged that the funding arrangement for French language schools in Halifax, discriminated against him and his children based upon their Acadian ethnic origin. After investigating the complaints, the Commission requested a board of inquiry be appointed.

[37] The Halifax Regional Municipality applied for judicial review of the referral decision and at the hearing, a Supreme Court judge set aside the referral and prohibited the board of inquiry from proceeding. Both at the Court of Appeal and before the Supreme Court of Canada, it was determined that the judge's intervention at the early stage of the referral decision was inappropriate.

[38] Both the hearing judge as well as the Halifax Regional Municipality in its arguments before the Supreme Court relied upon *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756 "for the proposition that neat and discrete points of law on which referral decisions rely are reviewed for correctness by the courts and that such review may occur before the administrative tribunal itself has addressed the issue."

[39] Cromwell, J. writing for a unanimous court indicated that although *Bell, supra* still stood for the proposition that referral decisions are subject to judicial review, its precedential value otherwise, was eroded. While recognizing early intervention is still possible, the Court directed that courts should exercise restraint, writing:

> 36 While such intervention may sometimes be appropriate, there are sound practical and theoretical reasons for restraint: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at s.540; P. Lemieux, Droit administratif: *Doctrine et jurisprudence* (5th ed. 2011), at pp. 371-72. Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes: see, e.g., *Szczecka v. Canada (Minister of Employment and Immigration)* (1993), 170 N.R. 58 (F.C.A.), at paras. 3-4; *Zündel* (1999), at para. 45; *Psychologist Y v. Board of Examiners in Psychology*, 2005 NSCA 116, 236 N.S.R. (2d) 273, at paras. 23-25; *Potter v. Nova Scotia Securities Commission*, 2006 NSCA 45, 246 N.S.R. (2d) 1, at paras. 16 and 36-37; *Vancouver (City) v. British Columbia (Assessment Appeal Board)* (1996), 135 D.L.R. (4th) 48 (B.C.C.A.), at paras. 26-27; *Mondesir v.*

> *Manitoba Assn. of Optometrists* (1998), 163 D.L.R. (4th) 703 (Man. C.A.), at paras. 34-36; U.F.C.W., *Local 1400 v. Wal-Mart Canada Corp*., 2010 SKCA 89, 321 D.L.R. (4th) 397, at paras. 20-23; *Mullan* (2001), at p. 58; *Brown and Evans*, at paras. 1: 2240, 3: 4100 and 3: 4400. Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal, [page384] particularly when asked to review a preliminary screening decision such as that at issue in *Bell* (1971).

[40] Notwithstanding the caution expressed by Cromwell, J, I cannot accept the Respondent Foster's submission that *HRM* precludes a reviewing court, in advance of hearing a full judicial review, from granting a stay of a referral decision.

[41] I reach this conclusion based on a number of considerations. Primarily, *HRM* expressly recognizes that judicial intervention to review referral decisions remains an option, albeit one which a Court should consider carefully. The approach endorsed by Cromwell, J, and the formulation put forward for use by reviewing Courts was focused upon the review hearing itself. It did not address directly interim remedies, such as a stay. Perhaps of greatest significance in my view is the direction provided to reviewing courts at paragraph 53 of the decision:

> 53 I conclude that in reviewing the Commission's decision to request appointment of a board of inquiry to inquire into these complaints, the reviewing court should ask itself whether there is any reasonable basis in law or **on the evidence** to support that decision. (Emphasis added.)

[42] As will be discussed further below, a Court on a motion for a stay is not to delve too deeply into the merits of the matter. The Court looks to whether there is an "arguable" issue to be tried, without reaching conclusions on the evidence. On a stay motion, the evidence is mostly untested, and may not be complete. Evidentiary conclusions are properly left for a hearing on the merits. Given this, it does not seem reasonable for this Court to reject the availability of an interim remedy at a stage when all of the evidence may not be before the Court.

[43] Although the significance of the *HRM* decision will undoubtedly return when the Court undertakes the review hearing, it does not preclude this Court assessing whether a stay is otherwise warranted.

Is a stay warranted in the circumstances?

[44] To answer the above, it necessitates a return to the three-part test enunciated in *RJR MacDonald, supra*.

Serious Issue to be tried

[45] Subject to two narrow exceptions, it is recognized that in determining whether a serious issue exists, a judge should not engage in an extensive review of the merits. At paragraphs 54 and 55, the Court in *RJR MacDonald, supra* states:

> 54 What then are the indicators of "a serious question to be tried"? there are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case….
>
> 55 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[46] In a recent decision, *Delorey v. Strait Regional School Board* 2012 NSSC 227, Justice Murray was asked to consider whether the above factor required an applicant to establish a "strong *prima facie* case". In declining to apply such a standard, he writes:

> 52 In Metz, the Court stated there must be a real merit to the claim being advanced before a public authority is "prevented from acting". As stated the Board concedes the Applicants' claim is neither frivolous or vexatious, meaning there a serious issue to be tried. "Real merit" may be different from a serious question to be tried, in terms of the burden. Certainly it is a question of degree. Arguably determining whether a strong *prima facie* case exists may require a preliminary attempt at determining the outcome. I have not been provided with a Nova Scotia case where the higher burden of strong *prima facie* has been applied.

> 53 A more in depth analysis is necessary to determine whether there has been any breach of the duty of fairness. I therefore heed the caution not to attempt to "predict the outcome".

[47] I agree with Justice Murray's approach, and accordingly now turn to assess whether the CBRM's grounds for review are "frivolous and vexatious".

[48] I am satisfied that the CBRM has, both with its procedural fairness and abuse of process arguments, raised issues which are not frivolous, but will require, based on a fuller review of the evidence, careful consideration by the Court. As is clear from the submissions of both the CBRM and the Respondent Foster, this Court will need to consider the interplay of s. 29 and 32A of the *Act*, Regulations and policies of the Commission. A real issue exists as to whether or not the Commission was, without advising and consulting the CBRM, able to make the referral as it did.

[49] The above consideration will also lead the Court to address whether or not a board of inquiry has the ability to determine the procedural appropriateness of the referral made to it. The CBRM argues, based on certain authorities, that a board of inquiry has only the jurisdiction to address the merit of complaints, nothing more.

The Respondent Foster argues to the contrary. Clearly, there is a live issue to be determined.

[50] In his arguments, the Respondent Foster has made strong submissions why the existence of the *Talbot* decision, does not give rise to an abuse of process. The success of those submissions remain to be seen, after a full consideration at the review hearing. At this stage, I am satisfied that there is some basis for the CBRM to raise an allegation of abuse of process.

Irreparable Harm

[51] The Court in *RJR MacDonald, supra* describes the "irreparable harm" factor as follows:

> 63 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> 64 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. …

[52] Justice Sharpe in *Injunctions and Specific Performance*, looseleaf (Toronto, ON: Thomson Reuters Canada Limited, 2012) describes "irreparable harm" as follows:

> An essential factor in determining the appropriateness of an interlocutory injunction is "irreparable harm", a phrase familiar in equity jurisprudence. The remedies of Chancery were traditionally withheld, unless the plaintiff could show that the ordinary legal remedy in damages would be inappropriate or inadequate. In the context of preliminary injunctive relief, the phrase is given a more specific meaning, namely, that the plaintiff, before the trial, must show an immediate risk of harm that will occur before the case reaches trial and that cannot be compensated or remedied other than through the granting of an interlocutory injunction. …

[53] The CBRM alleges that it will, if a stay is not granted, suffer irreparable harm in two respects:

1. Should the Board of Inquiry render preliminary rulings on the issues that form the grounds of the Application for Judicial Review, then the Application maybe rendered moot; and

2. Continuing to proceed with Boards of Inquiry subjects the Applicant to an abuse of process, which cannot be compensated by damages.

[54] The CBRM asserts that not only is the judicial review being rendered moot a real probability should a stay be granted, that outcome is purposefully being

orchestrated by the Commission. The amended affidavit of Krista Smith, affirmed December 7, 2012, contains the following assertions:

> 6. I attended the motion for date and directions on October 22, 2012, which was conducted by teleconference.
>
> 7. At the motion for directions, Justice Murray asked Mr. Durnford, on behalf of CBRM, when he expected the parties would be ready for the judicial review hearing.
>
> 8. Mr. Durnford responded that, subject to the views of counsel for the Commission, he assumed the Commission would await the Court's process and would not seek nomination of Board(s) of Inquiry until the Court proceeding was completed.
>
> **9.** Lisa Teryl, counsel for the Commission, responded that Board(s) of Inquiry had already been nominated. Ms. Teryl further indicated that the Commission intended to ask the Board(s) of Inquiry to hear and decide as preliminary issues the very issues before the Court on the judicial review application herein. **Ms. Teryl indicated that the intention was to try to render CBRM's application for judicial review moot before it could be heard and decided by the Nova Scotia Supreme Court.**
>
> 10. Prior to October 22, 2012, neither CBRM nor its counsel had any knowledge that Board(s) of Inquiry already had been nominated.
>
> 11. Prior to October 22, 2012 neither CBRM nor its counsel had any knowledge that the Commission intended to request that the Board(s) of Inquiry hear and decide matters in advance of the Court's hearing of CBRM's Application for Judicial Review. (Emphasis added)

[55] As has been recently noted by Farrar, J.A. in *Chase v. Northern Construction Enterprises Inc.*, 2012 NSCA 123, rendering an appeal moot may constitute irreparable harm but such a conclusion is not automatic. The same reasoning should apply in the context of judicial review.

[56] This Court clearly has jurisdiction to consider the arguments being advanced by the CBRM on the judicial review. It remains to be seen whether or not this matter is one which falls within the ambit of the *HRM* decision, or is a case where this Court can and should intervene. It is troubling that one party would attempt to render this Court's involvement moot before the merits can be fully considered.

[57] It is further submitted by CBRM that exposing it, and the other parties to an abuse of process is the type of harm which cannot be compensated in damages. It is a harm which has an impact beyond just the parties, but to the broader administration of justice.

[58] In my view, reaching a conclusion of irreparable harm, does not require an analysis of various factors in isolation, but can be cumulative in nature. In the present instance, I am satisfied that the CBRM (and CUPE) would suffer irreparable harm if the BOI proceeded and determined the issues in contention, prior to this Court undertaking the judicial review. Given that the CBRM has argued the BOI lacks jurisdiction to address its procedural fairness argument, proceeding forward without a determination of that very issue is fraught with difficulty.

Balance of Convenience

[59] The considerations of irreparable harm and balance of convenience tend to overlap. A finding of irreparable harm will weigh heavily when considering the conveniences as between the parties.

[60] In the present instance, if some or all of the CBRM's arguments are found to be ultimately correct at the review hearing, to permit a BOI to proceed in the interim would subject it to an unwarranted procedure, subject to further appeal. If the Respondent Foster's submissions are found to have merit at the judicial review, then he and the other complainants have been subjected to a few months delay to re-initiate the BOI process.

[61] In my view, the balance of convenience tips in favour of the CBRM.

Conclusion

[62] This Court will in the near future, be considering the merits of the CBRM's application for judicial review. At this stage, the Court is satisfied that

notwithstanding the able submissions of the Respondent Foster as to the ultimate merits, the test for a stay has been met.

[63] Costs will be addressed at the conclusion of the judicial review.

J.