SUPREME COURT OF NOVA SCOTIA
Citation: *Polegato and Stanley v. Martell and Marchand*, 2020 NSSC 394

Date: 20200214
Docket: Pt. Hawk No. 489454
Registry: Port Hawkesbury

Between:

Ellen Polegato and Gina Stanley

Applicants

v.

Councillor Alvin Martell and Warden Brian Marchand

Respondents

LIBRARY HEADING

Judge:	The Honourable Justice Patrick J. Murray
Heard:	October 11, 2019, in Port Hawkesbury, Nova Scotia
Written Decision:	February 14, 2020
Subject:	*Municipal Conflict of Interest Act of Nova Scotia*, 1991, c. 6, s. 40.
Summary:	The Respondents filed two motions seeking to dismiss the Application filed against them by the Applicants. Ms. Polegato was not in attendance at the hearing and discontinued her application at that time. Ms. Stanley submitted that her application was properly before the Court and made within 60 "business days", in accordance with the *Civil Procedure Rules of Nova Scotia*. The Respondents submit that the Applicant has not met the burden to show that Application is timely and in compliance

with the *Act.* The Respondents submitted that the Ms. Stanley's Application should be dismissed.

Issues:

1. What is the proper method of calculating the 60 day time period, pursuant to Section 9(4) of the *Municipal Conflict of Interest Act*?
2. Has Ms. Stanley's Application been made in compliance with the limitation period specified in the *Municipal Conflict of Interest Act*?

Result: Court found the Applicant did not met the burden of clearly establishing that her Application conformed with section 9(4) of the *MCIA*.

Court granted the motions filed by the Respondents and dismissed the Application of Ms. Stanley. Respondents sought costs in relation to her Application.

Caselaw: ***MacDonald v. Ford***, 2015 ONSC 4783; ***Scotia Mortgage Corp. v. Chalmers***, 2011 NSSC 339; ***Dennis v. Langille***, 2013 NSSC 42; ***Min. of Community Services v. C.K.Z. and C.L.P.***, 2016 NSCA 61

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Counsel:	Gina Stanley, self represented Richard Norman for the Respondents Councillor Alvin Martell and Warden Brian Marchand

By the Court:

Introduction

[2] This is my decision on two motions for complete or partial dismissal of an Application in Court filed by the Applicants, Ellen Polegato and Gina Stanley, on June 24, 2019, and amended on July 2, 2019.

[3] The Application in Court is made pursuant to the provisions of the *Municipal Conflict of Interest Act*, R.S.N.S. 1989, c. 299. In the Application, it is alleged that the Respondents, Councillor Alvin Martell and Warden Brian Marchand, are in positions of "perceived conflict of interest".

[4] The motions to dismiss the Application were filed by the Respondents on September 12, and September 27, 2019. They were heard at the same time and will be referred to collectively as the "motion". The motion is made pursuant to s. 9(4) of the *Act*, which requires that an application be made "within 60 days after the fact comes to the attention of the applicant" that the *Act* may have been contravened.

[5] The Respondents Mr. Martell and Mr. Marchand submit that the Applicants have not met the burden upon them to show that their application is timely and in compliance with the *Act.*

[6] The Applicants state their application has been filed in compliance within the 60 day time limitation prescribed in the *Act*. They rely on the definition of time contained in Rule 94.02(1).

[7] The proper method of determining "time", they say, is as set out in the *Nova Scotia Civil Procedure Rules*, specifically Rule 94.02.

[8] The Applicants submit that the motion should be dismissed, as in their view, the time period should be calculated using business days and excluding Saturdays, Sundays and holidays

Overview and Procedure

[9] A hearing to organize the application was held on September 13, 2019. The parties were given direction by the Court for the filing of documents. Mr. Martell and Mr. Marchand were to file their notice, affidavits and brief on September 27,

2019. Ms. Polegato and Ms. Stanley were to file their affidavits and brief by October 7, 2019. A reply if any, would be filed by the Respondents by October 15, 2019.

[10] The hearing date for the motion was set for October 22, 2019 in Port Hawkesbury, Nova Scotia.

[11] On October 21, the Court learned that Ms. Polegato would not be attending the hearing in person. She filed her affidavit on October 21, the day before the hearing and the Applicants gave notice that day that they wished to cross-examine the Respondents on their affidavits. The rule requires five days' notice of such intention to the opposing party.

[12] At the hearing, Ms. Stanley was present as were Mr. Martell and Mr. Marchand with Counsel. Ms. Polegato was permitted to appear by phone to discuss whether the motion would proceed, given her absence.

[13] Following a discussion on the record, and having had an opportunity to discuss the matter in private with Ms. Stanley, Ms. Polegato decided to discontinue her application. She withdrew and would not be participating.

[14] Ms. Stanley did proceed with her application, and with responding to the motion on the hearing date. She cross examined Mr. Martell and Mr. Marchand on their affidavits. Their counsel, Mr. Norman, proceeded to cross-examine Ms. Stanley on her affidavit at the October 22, hearing.

[15] The Court reserved decision and set dates for the filing of written briefs. A date was also set for costs submissions in relation to Ms. Polegato's decision to discontinue her application.

Issues

1. What is the proper method of calculating the 60 day time period, pursuant to Section 9(4) of the *Municipal Conflict of Interest Act*?
2. Has Ms. Stanley's Application been made in compliance with the limitation period specified in the *Municipal Conflict of Interest Act*?

Onus of Proof

[16] The burden is on the Applicant to show they have met the qualification, in s. 9(4) of the *Act*, that their application was made within 60 *days after* they became aware of the fact(s) supporting the conflict.

[17] This is confirmed in ***MacDonald v. Ford***, 2015 ONSC 4783, a case relied upon by the Respondents. That case states that if the Applicant meets this requirement, this onus is then shifted to the Respondents to show the application was not filed within the required time period.

[18] The Applicant states this Court need not rely on out of province authority to determine procedures under the legislation of this province, the *Municipal Conflict of Interest Act*. However, while the Applicant, Ms. Stanley takes issue with the ***MacDonald*** case, the onus of proof itself does not appear to be contentious.

[19] This Court is of the view that the burden rests with the Applicant to establish compliance with s. 9(4). This is evident from its wording, and the use of the words, "shall be filed". Meeting the time frame is mandatory.

[20] Although ***MacDonald*** is not binding, it is instructive in respect of the interpretative principles enumerated in paragraphs 73 - 76 therein.

Issue# 1- Proper method of Time Computation – Calendar vs. Business days

[21] Civil Procedure Rule 94 is integral to the interpretation sought by Ms. Stanley, that the 60 days excludes Saturdays, Sundays, and other days when the clerk/prothonotary's office is closed. Rule 94.02 states :

> Time
>
> **94.02 (1)** A period of days in a Rule does not include any of the following:
>
> (a) the day the period begins;
>
> (b) a Saturday and Sunday in the period;
>
> (c) a weekday the office of the prothonotary at Halifax is closed during the
>
> period;
>
> (d) the day on which a thing is required, or first permitted, to be done.
>
> **(2)** A document delivered on a Saturday, a Sunday, or a weekday that the office of the prothonotary is closed is considered to be delivered on the next weekday when the office of the prothonotary is open.

[22] Consequently, the Applicant submits her application is properly before the Court. She submits her application was made within 60 "business days", in accordance with the definition of time in the *Civil Procedure Rules*.

[23] Section 9(4) of the *Municipal Conflict of Interest Act* states:

> **9(4)** An application shall be made within sixty days after the fact comes to the attention of the applicant that the member may have contravened this Act.

[24] In ***Scotia Mortgage Corp. v. Chalmers***, 2011 NSSC 339, A.C.J. Smith (as she then was) held that the fifteen day time period for applying for deficiency judgment in Rule 72.11(3) included Saturdays Sundays and holidays.

> [14] Civil Procedure Rule 94.02(1) is clear. The period of days in a Rule **that permits or requires something to be done <u>in a number of days</u>** does not include Saturdays, Sundays or a weekday when the office of the prothonotary is closed during the period. The question arises – does Civil Procedure Rule 72.11(3), which determines the effective date of a default judgment, permit or require something to be done in a number of days? In my view, it does not. Accordingly, Saturdays, Sundays and holidays are included in the fifteen day period used to calculate the effective date of a default judgment.

[25] The Applicant says that ***Scotia*** should be distinguished, as the facts are too dissimilar for comparison to this case. At the time ***Scotia*** was decided, however, the wording in the Rule did align with the circumstances described in s. 9(4) because it "required something to be done" that being to file an application within 60 days.

[26] It should be noted that the present Rule 94.02, no longer includes the words, "that permits or requires something to be done in a number of days".

[27] This Court finds ***Scotia*** to be instructive in stating that the rule is clear that "the period of days in *a* rule does not include a Saturday or a Sunday... in a period".

[28] In the present case, the period of days is not contained "in a rule*"*, but in a statute. That alone may be determinative of this issue.

[29] The Applicant argues, however, that s. 9(2) is closely aligned with the definition of time in Rule 94.02, as it refers to the rules specifically, when it states the application shall be "pursuant to the rules of court". Thus the Applicant argues, the *Municipal Conflict of Interest Act* specifically contemplated

incorporating the *Civil Procedure Rules* into the procedural requirement for an application under s. 9.

[30] I turn back to Civil Procedure Rule 94. The rule at the outset speaks to how the rules are to be interpreted, Rule 94.01 and 94.02 read as follows:

> General
> **94.01 (1)** These Rules must be interpreted in accordance with the principles for interpretation of legislation.
>
> **(2)** The *Interpretation Act* (Nova Scotia) applies to these Rules, except where a contrary intention appears and except in a Rule that is within the definition of "regulation" in subsection 2(1) of the *Interpretation Act* (Canada).

[31] The rules are clear that the *Interpretation Act* applies to them unless a contrary intention appears.

[32] The Respondents say the *Interpretation Act* applies to the interpretation of the *Municipal Conflict of Interest Act.* Applying ss. 19(k) and 19(l) of the *Interpretation Act*, Martell and Marchand say the proper interpretation of s. 9(4) of the *MCIA* is to include Saturdays, Sundays, and holidays in the 60 day calculation. These sections reads as follows:

> 19(k) where the time limited for the doing of any act expires or falls upon a Saturday or a holiday, the time so limited extends to and the act may be done on the first following day that is not a Saturday or a holiday;
>
> 19(l) where a period of time dating from a given day, act or event is prescribed or allowed for any purpose, the time shall be reckoned exclusively of that day or of the day of the act or event;

[33] Ms. Stanley argues that s. 19(k) and 19(l) do not assist the Respondents. There is no mention of "calendar days", and Section 7(1)(j) for instance, includes Sunday in the definition of holiday. Further, section 9(2) of the *Municipal Conflict of Interest Act* specifically acknowledges the rules of the Court, when bringing an application.

> **9(2)** An application shall be made by originating notice (application *inter partes*) pursuant to the rules of the court.

[34] The modern approach to statutory interpretation requires that the context, purpose, and text of a provision be considered holistically. It does not require a plain, textual ambiguity as a necessary pre-condition to considering the context and legislative purpose. (***Sullivan on the Construction of Statutes,*** Chapter 1.3***)***

[35] The *Municipal Conflict of Interest Act* sets out in precise fashion the meaning of "indirect pecuniary interest" in s. 3, and what constitutes a "deemed pecuniary interest" in s. 4. Section 5(1) lists numerous matters in which a member may have an interest to which the *Act* does not apply. For example, an interest in matters that are "so remote or insignificant in nature that it cannot reasonably be regarded as likely to influence", as stated in s. 5(k).

[36] These provisions underscore the importance of members disclosing matters in which they have a personal economic interest and prohibit members from engaging in the decision making process in respect of matters in which they have an interest. It appears the intent is to require timely applications, within 60 days.

[37] In addition, certain care was taken to include the nature of the proceeding for the Application to determine if a member is in contravention. Section 9(2) stipulates it shall be made by "originating notice application inter parties pursuant to the rules of the court."

[38] The Applicant submits a contextual reading of s. 9(2) establishes that it intended to incorporate the rules and in particular, Rule 94.02. The Respondents submit this refers to the "form" of the application only.

[39] The rules also include a provision that addresses the situation of an application that is referred to in legislation. Rule 94.05 refers to the manner in which a person who is permitted to make an application "may start" the application, namely, "by filing one of the following notices". It reads:

> Application referred to in legislation
>
> **94.05** A person who is permitted or required by legislation to apply to the court or a judge may start the application by filing one of the following notices:
>
> (a) an *ex parte* application, notice of application in chambers, notice of application in court, or notice for judicial review, if the permission or requirement is for an application that is not connected to an existing proceeding;
>
> (b) a notice of motion, if the permission or requirement is for an interlocutory step in a proceeding.

[40] The Respondents argue the Legislation did not take the step of incorporating the definition of time under the *Civil Procedure Rules,* in the MCIA. The *Civil Procedure Rules* have the force of law, as confirmed by s. 47(1) and (3A) of the *Judicature Act*.

> Publication, confirmation and evidence of rules of Court
>
> **47(1)** All rules of Court made in pursuance of this Act shall, from and after the publication thereof in the Royal Gazette, or from and after publication in such other manner as the Governor in Council determines, regulate all matters to which they extend.
>
> …
>
> **(3A)** Notwithstanding subsections (1) to (3) and Section 51, the *Civil Procedure Rules* made by the judges of the Court of Appeal and the Supreme Court on the sixth day of June, 2008, and tabled in the House of Assembly by the Minister of Justice, are hereby ratified and confirmed and are declared to be the *Civil Procedure Rules* of the Court of Appeal and the Supreme Court and shall have the force of law as and to the extent provided in those *Civil Procedure Rules* until varied in accordance with the provisions of this Act.

[41] Rule 94.02 begins with "The period of days <u>in a Rule</u>", and not a period within legislation. Thus, an exception would be required to change a period prescribed in legislation, as was the case with extending the time for appeals.

[42] Rule 94.03 deals with Extension of time in Appeal

> **94.03 (1)** A person who wishes to obtain an extension of a period referred to in Section 50 of the *Judicature Act* may make a motion in an appeal or in reference to an intended appeal.
>
> **(2)** A judge may determine the motion by exercising a discretion similar to that recognized by Rule 2.03, of Rule 2 - General.

[43] This rule is further evidence that the *Interpretation Act* applies to the rules as stated in Rule 94.01, and also to the interpretation of provincial enactments/legislation, unless a contrary intention appears.

[44] The *Interpretation Act* states in section 6 :

> **Application of this Act and judicial rule of construction**
> **6 (1)** Except where a contrary intention appears, every provision of this Act applies to this Act and to every enactment made at the time, before or after this Act comes into force.
> **(2)** Nothing in this Act excludes a judicial rule of construction that is applicable to an enactment and not inconsistent with this Act. R.S., c. 235, s. 6.

[45] In the case of ***Dennis v. Langille***, 2013 NSSC 42, the Court had to interpret the 30 day period to appeal and serve the Notice of Appeal of a Small Claims Court decision. The statute stated the appeal was to be filed and served within 30 days. The appeal was not served until after the 30 days expired. My colleague, the

Honourable Justice John D. Murphy discussed the interaction between the rules and the *Interpretation Act*, at paragraph 11:

> … Traditionally, determining a period of days prescribed for doing something after an event meant counting every day except the day of the event (*Interpretation Act*, R.S. c.235, s.19(l)). However, *Civil Procedure Rules* were revised in 2009 to exclude certain days, including Saturdays and Sundays, from the calculation of time limits. As deadlines for filing and serving many appeals are governed by *Civil Procedure Rules*, some litigants and counsel incorrectly presumed that the longer periods prescribed by the revised Rules applied universally. The time limits in the Act and not the 2009 Rules prevailed when this appeal was launched, but it is noteworthy that had deadlines prescribed by the Rules been operative, the appeal would have been served in time. It is also significant that on May 10, 2012, very shortly following the relevant dates in this case, *Civil Procedure Rule 94.02(5)* was amended to exclude Saturdays and Sundays when calculating time periods for appeals under statutes such as the Act. Accordingly, had the learned Adjudicator's decision been rendered a short time later, the time taken to serve Mr. Dennis' appeal and file proof of service would have been within the prescribed limited. …

[46] This is further supported by the decision in ***Allen v Canada Post Corp.***, 2011 NSCA 72, where our Court of Appeal, referenced the *Interpretation Act* in its calculation of an appeal period based on calendar days prior to the rules being amended to deal with appeals. (See paragraph 41 herein)

[47] For all of these reasons, I am satisfied that the time period in s. 9(4) of the *MCIA* is to be interpreted in accordance with the provisions of the *Interpretation Act*.

Issue # 2 – Has the time requirement in s. 9(4) of the *MCIA* been met ?

[48] The Respondent states that the burden is squarely on the Applicant to establish that her application has been made within 60 days after she became aware of the information forming the basis of the alleged conflicts.

[49] The Respondents say the reasoning in ***MacDonald v. Ford***, supra, is detailed and comprehensive and should be adopted by this Court. I adopt paragraphs 147, 148 and 149 of ***Ford***. Paragraph 149 reads as follows:

> [149] In my opinion, an applicant should explain in his or her application (as was done in the case at bar), when he or she acquired knowledge of the facts of the alleged contravention of the Act, and then the onus is on the respondent to prove that the applicant had actual or constructive knowledge at an earlier time thus making the application untimely.

[50] The Application in the present case did not contain the date by which Ms. Stanley knew of the information. The Applicant stated in her brief filed on October 7, 2019:

> We filed the Notice of Application on June 24th, 2019. According to how time is calculated, our knowledge of the alleged conflicts would of had to occur after March 27, 2019.

[51] The Applicant also stated in her brief:

> …in the six alleged conflicts, there was no time when both of us were aware of the facts outside of the 60 day time limit. In some situations, one of us did or may have known of facts outside the time limit, but not the other.

[52] The Court is now dealing with only Ms. Stanley's application. In her brief of October 7, she states she (as one of the Applicants) was not aware that dates needed to be provided in the affidavits filed with the Notice of Application.

[53] She also stated, that time frames were provided for each alleged conflict, in the Response to Interrogatories (August 20, 2019). Ms. Stanley indicated in her October 7, brief that she knew about some of Mr. Martell's conflicts between April/May, 2019.

[54] In Mr. Martell's affidavit, as Exhibit E, is a letter dated April 16, 2019, sent by the Applicants to four municipal councillors. The letter outlines and attaches as Appendix C, three of the four conflicts alleged in the Application. The letter is signed by both Applicants, including Ms. Stanley.

[55] The Respondent submits that in her answer to interrogatories attached to Mr. Martell's affidavit, Ms. Stanley confirms she was aware of all relevant facts relating to his April 1, 2019, vote on that date, and attended the council meeting.

[56] The Respondents say Ms. Stanley has been vague in her responses as to when she learned of Mr. Martell's alleged conflicts. Ms. Stanley takes issue with this, stating that three of the four alleged conflicts were brought to her attention in early April, but the three additional conflicts relating to Mr. Martell and Mr. Marchand were added following their continued investigation of the potential conflicts in May 2019. It was therefore reasonable for her, Ms. Stanley, said to respond that it was during April and May that she became aware of the facts relating to them.

[57] In relation to Mr. Marchand, Ms. Stanley, says the Responses to the Interrogatories (August 20, 2019) provided time frames for each alleged conflict.

[58] With respect to the Interrogatories, Mr. Martell included Ms. Stanley's answers in his affidavit as Exhibit H. Mr. Marchand's affidavit did not include Ms. Stanley's answers, to which she referred in her brief. It was not his obligation to include them. It was hers.

[59] Among other things, Mr. Marchand stated that his votes, on Municipal matters have been and are a matter of public record, and subject to frequent comment on the relevant Facebook group.

[60] It has been a confusing exercise to determine when the Applicant became aware of the pertinent facts related to these allegations of conflict. Ms. Stanley did not provide any evidence in her affidavit about the date or dates she became aware of the alleged conflicts involving Mr. Marchand. In her October 7, 2019 affidavit she stated:

> 17. I was not aware in 2017 of Mr. Marchand's votes between September 25 and November 27, 2019. (Sic)

[61] This statement pertained to one of the two alleged conflicts involving Mr. Marchand. No mention is made of 2018 or 2019.

[62] The burden is on Ms. Stanley to provide evidence to support her claim, on a balance of probabilities. Evidence must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. (***Min. of Community Services v. C.K.Z. and C.L.P.***, 2016 NSCA 61)

[63] I am aware that this decision does not pertain to the merits, that Ms. Stanley is a self represented litigant, and that she has stated that she relied on conversations with Court administration in relation to the time frame in the rules.

[64] The Respondents, like the Applicants, are entitled to have this matter adjudicated in accordance with the provisions of the *Act*.

[65] In conclusion, I find that the Applicant has not met the onus of satisfying the Court that her application is in compliance with s. 9(4) of the *Act*. I concur with the position of the Respondents, that the appropriate date for the start of the 60 - day period was April 25, 2019.

[66] With respect, the Applicant, Ms. Stanley, has not met the burden of establishing that she became aware of the alleged conflicts after that date.

[67] In her most recent response by brief filed on November 12, 2019, the Applicant stated as follows:

> I take no issue with the Respondents assertion on the evidence that my subjective knowledge was obtained prior to April 25, 2019.
>
> I do, however, take issue with the assertion that my evidence was intentionally vague with respect to dates in order to mislead the Court.
>
> It is acknowledged that I could not provide the specific date upon which I obtained subjective knowledge of all the alleged contraventions of the *MCIA* outlined in this application.
>
> However, I have been repeatedly clear though this application, in my affidavit, my responses to interrogatories, and throughout my cross-examination, that the earliest time frame of which I am certain I obtained subjective knowledge was between April and May 2019.
>
> Given this approximated timeline, I will concede that this Court should consider April 1, 2019, the earliest date upon which I obtained subjective knowledge of these alleged contraventions of the *Municipal Conflict of Interest Act.*

[68] The Respondent's counsel is correct to point out that a statement in a brief is not evidence. However, Rule 20.09 of the *Civil Procedure Rules* states that a party may admit any material fact, and that such an admission maybe made in pleadings, by other writing, orally, at a discovery, or by formal admission under the rule.

[69] The Court accepts the admission of the Applicant, Ms. Stanley, in her final writing to the Court. In accepting her admission, April 1, 2019, precedes April 25, 2019, by more than 3 weeks.

[70] Whether the date of April 1st is used or not, I find the Applicant has not met the burden of clearly establishing that her Application conforms with section 9(4) of the *MCIA*. In the result, the Application of Ms. Stanley is hereby dismissed.

[71] The Motions filed by the Respondents are therefore granted. I will ask for submissions on costs in writing within 30 days.

[72] Order accordingly.

Murray, J.