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NOVA SCOTIA COURT OF APPEAL

[Cite as:Chester District (Municipality) v. Certain Ratepayers of Chester District (Municipality), 000 NSCA 19]

Freeman, Roscoe and Bateman, JJ.A.

BETWEEN:

THE MUNICIPALITY OF THE DISTRICT OF CHESTER Appellant	)	Peter A. McInroy for the Appellant
- and -	)	
CERTAIN RATEPAYERS OF THE MUNICIPALITY OF THE DISTRICT OF CHESTER Respondent	)	Jack A. Innes, Q.C. and Monika Lozinska for the Respondent
	)	Appeal Heard: January 25,2000
	)	Judgment Delivered: January 28, 2000

THE COURT: Appeal dismissed, per reasons for judgment of Freeman, J.A.; Roscoe and Bateman, JJ. A., concurring.

Freeman, J.A.:

[1] This is an appeal from the decision of the Nova Scotia Utilities and Review Board to grant a preliminary order under the **Municipal Boundaries and Representation Act**, R.S.N.S. 1989 c. 298 requiring studies and an eventual hearing to determine whether Polling District 3 of the Municipality of the District of Chester should be incorporated as a town.

[2] The process was set in motion by a petition pursuant to s. 7 of the **Act** signed by 140 ratepayers, which was filed together with a professionally conducted feasibility study on December 4, 1998. Just a day earlier, on December 3, 1998, the **Municipal Government Act**, S.N.S. 1998, c. 18, was given royal assent. It did not come into force however until April 1, 1999, when it repealed the **Municipal Boundaries and Representation Act**.

[3] In its well considered reasons for judgment the Utilities and Review Board devoted considerable attention to the interaction of the two statutes, concluding they were similar in many but not all respects. The ratepayers had acquired vested rights under the former **Act** which survived its repeal pursuant to s. 23(1) of the **Interpretation Act** R.S.N.S., 1989, c. 235. The new **Act** did not apply retroactively or retrospectively to substantive rights acquired under the old, although it would govern after April 1, 1999, if differences in procedure were identified.

[4] In making this determination the Board considered well known principles codified in the **Interpretation Act**, and discussed in **Driedger on the Construction of Statutes** (3rd Ed.) and such cases as **Angus v. Sun Alliance Insurance Co.**, [1988] 2 S.C.R. 256 at p 266; **Gustavson Drilling (1964) Ltd. v. Minister of National Revennue (1975)**, [1977] 1 S.C.R. 271; **Spooner Oils Ltd. v. Turner Valley Gas Conservation Board**, [1933] 4 D.L.R. 545 (S.C.C.) and **Re Teperman and Sons Limited v. City of Toronto** (1975), 55 D.L.R. (3d) 653 (Ont. C.A.). In my view the Board was not in error on these matters.

[5] In particular, s. 7(1) of the old **Act** provides for the process to begin with a petition signed by at least 100 ratepayers. The equivalent provision of the new **Act** refers to “electors” rather than ratepayers.The appellant municipality argued in a preliminary objection that while those who signed the petition were ratepayers, fewer than one hundred of them qualified as electors. I would agree with the Board that the rights acquired by the ratepayers under the old **Act** survive its repeal.

[6] While the Board’s right to dismiss an application for want of merit is implied, if not under the new **Act** then under the Board’s own statute, the appellant argued that s.387(2) of the new **Act** creates a new “reasonable grounds test.”

[7] Section 387(2) provides:

> Where the Board determines that there are no reasonable grounds for the application or there is no reasonable possibility that the application would be granted, the Board may dismiss the application.

[8] The Board specifically found as a fact, for purposes of that section, “that there are reasonable grounds for the application, and a reasonable possibility that the application could be granted.”

[9] The Board complied with a request by the municipality to look at the sufficiency and formality of the documentation filed with the Board to determine if the application complies with s. 7 of the **Act**. It found that the petition and other filed documentation were duly and properly submitted to the Board and complied with the requirements contained in s. 7 of the former **Act**. While the Board’s conclusions are not protected by a privative clause and there is a right of appeal to this court, the sufficiency of the application is within the Board’s core jurisdiction under the **Act** and relates to its control of its own process. Its determination is entitled to deference, but in the absence of identifiable error in this case it is not necessary to measure the standard of deference.

[10] The first ground of appeal is that the Board denied the appellant natural justice by limiting the nature of the evidence it was prepared to deal with on the hearing of the preliminary application. The chairman stated:

> . . . So the Board wouldn’t be prepared to really hear any statements of position or statements of intent or drawing of lines in the sand by either of the respective parties. We don’t think that’s the function of the preliminary hearing. Obviously there will be lots of time to do that at the full hearing. But the preliminary hearing would be limited . . . to issues of procedure.

[11] The Board’s approach is reasonable and consistent with the intent of the legislation. I would dismiss this ground of appeal. I would also dismiss the second

ground which relates to the retrospectivity or retroactivity of the new legislation. This was dealt with above.

[12] The third ground was that some of the petitioners thought the petition related only to a feasibility study and did not know it would be used to apply for a preliminary order. Five asked to have their names deleted. The language of the petition was not so unclear as to create a jurisdictional problem. The Board decided that even if it granted their requests there would still be more than enough petitioners to make the application. I would also dismiss this ground.

[13] The fourth ground was that the Board should have called for studies to determine whether the proposed boundaries were appropriate to a new town. It noted that a 1994 review of municipal boundaries by the Board had found a community of interests in residents of District 3, which was the area considered in documentation comprising the initial application. No other areas had been submitted for consideration by the Board. I am unable to conclude that the Board erred in determining “that this application should proceed on the basis of the area proposed in the documents filed by the applicant ratepayers.” This determination is sufficient to permit the boundary issue to be addressed at the main hearing. I would dismiss this ground of appeal.

[14] I would also dismiss the fifth ground alleging the Board erred in not ordering a plebiscite as part of the preliminary order. The Board concluded that s. 45 of the former **Act** gives it discretion to order a plebiscite. If the new **Act** governed, authority for a plebiscite could be found under a provision for "any other evidence" in s. 387(1)(d) should it become apparent at the main hearing that one was necessary.

> At the present time, the Board does not consider it necessary to make a finding on the need for such a plebiscite, or its jurisdiction to order one. If the issue is considered further at some point in the future, the parties will be given an opportunity to submit written briefs on the matter.

[15] The Board is mindful of the significance of the matter before it:

> In a democratic society, the Board can contemplate few, if any, rights which are ultimately more important that the people's right to participate in choosing their form of government.

[16] It enjoys a discretionary jurisdiction to manage its process subject to the governing statutes so as to ensure a full and fair hearing on the ultimate issue. In interlocutory matters such as this, that do not determine the outcome of the main proceeding, this court should follow the non-interventionist approach which governs in civil appeals. This was expressed by Justice Chipman in **Saulnier v. Dartmouth Fuels Ltd.** (1991), 106 N.S.R. (2d) 425 (N.S.C.A.) as follows, at p. 427:

> The principles which govern us on an appeal from a discretionary order are well-settled. We will not interfere with such an order unless wrong principles of law have been applied or a patent injustice would result. The burden of proof upon the appellant is heavy. **Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331, at 333, and **Nova Scotia (Attorney General) v. Morgentaler** (1990), 96 N.S.R. (2d) 54; 253 A.P.R. 54, at 57.

[17] I would dismiss the appeal with costs which I would fix at $2,000 inclusive of disbursements.

Freeman, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.