

NOVA SCOTIA COURT OF APPEAL
[Cite as: **Menzies v. Cape Breton - Victoria Regional
School Board, 2000 NSCA 49**]

Glube, C.J.N.S.; Pugsley and Flinn, J.J.A.

BETWEEN:

GRAHAM MENZIES)	Michael S. Ryan, Q.C.
)	for the appellant
Appellant)	
)	
- and -)	
)	
CAPE BRETON - VICTORIA)	Eric B. Durnford, Q.C. and
REGIONAL SCHOOL BOARD)	Nancy F. Barteaux
)	for the respondent
Respondent)	
)	
)	
)	Appeal heard:
)	April 10, 2000
)	
)	Judgment delivered:
)	April 10, 2000
)	
)	

THE COURT: Appeal allowed matter remitted to Board of Appeal per oral reasons for judgment of Flinn, J.A.; Glube, C.J.N.S. and Pugsley, J.A. concurring.

FLINN, J.A.: (Orally)

[1] On an application by way of *certiorari*, Justice Simon MacDonald quashed a decision of a Board of Appeal constituted under s. 36 of the **Education Act**, S.N.S. 1995-96, c. 1 (“the **Act**”). The Board of Appeal had been constituted to hear the appellant’s appeal of his dismissal, as a teacher, with the respondent School Board.

[2] The Board of Appeal had decided that it had no authority to deal with a preliminary objection of the School Board. The School Board had submitted that the Appeal Board had no jurisdiction to hear the appellant’s appeal, because the appellant failed to fully comply with the notice provisions of s. 36 of the **Act**. Justice MacDonald agreed with the School Board’s position. Justice MacDonald decided that Board of Appeal had no jurisdiction to hear the appellant’s appeal, and he confirmed the School Board’s decision to dismiss the appellant.

[3] The appellant appeals Justice MacDonald’s decision and order.

[4] The appellant, a school teacher for 15 years, was dismissed by the School Board following a meeting of the School Board on July 23rd, 1997.

[5] The appellant has a right of appeal of this dismissal by virtue of s. 36 of the **Education Act**, S.N.S. 1995-96, c. 1 (“the **Act**”). Section 36(1)(b) of the **Act** provides as follows:

Right of Appeal

36 (1) A teacher who is suspended or discharged, or whose permanent contract is terminated, may appeal the suspension or discharge or termination by giving written notice of appeal to the school board and the Minister within twenty days of

.....

(b) any discharge or termination of contract.

[6] The appellant's appeal is heard by a Board of Appeal appointed by the Minister by virtue of s. 36(2) which provides as follows:

Board of Appeal

36 (2) When a notice of appeal is given pursuant to subsection (1), a board of appeal, composed of one person, shall be appointed by the Minister.

[7] The Board of Appeal's powers are set out in s. 36(3) of the **Act** which provides as follows:

Powers of board

36 (3) The board of appeal has the powers of a commission appointed under the *Public Inquiries Act* and shall inquire into the suspension, discharge or termination of a contract and, after hearing the teacher and the school board, make an order confirming, varying or revoking the suspension or discharge or confirming or revoking the termination of the contract.

[8] It is obvious that the purpose of s. 36 is to provide the appellant with a simple alternate dispute resolution mechanism by which he may appeal his dismissal.

[9] Pursuant to s. 36(1) of the **Act**, the solicitor for the appellant gave written notice of appeal to the Minister on the day that the appellant was discharged, namely July 23, 1997. The appellant did not give written notice of appeal to the School Board, although there is some evidence from which an inference could be drawn that the School Board's solicitor, Robert Sampson, was aware that it was the appellant's

intention to advance an appeal in connection with his dismissal. Further, on September 3rd, 1997, Mr. Sampson advised the appellant's solicitor as follows:

Re: Cape Breton - Victoria Regional School Board, N.S.T.U. (Menzies)

Further to our earlier discussions in connection with this above-noted matter, I simply wish to advise that Mr. Eric Durnford, Q.C., solicitor with McInnes Cooper & Robertson, will also be acting on behalf of the School Board as lead counsel in connection with this above-noted matter.

[10] Mr. Donald Matheson, the Director of Human Resources of the School Board, testified that some time during the latter part of September, 1997, he first received a copy of the appellant's notice of appeal dated July 23rd, 1997. It is not clear from whom Mr. Matheson received a copy of this notice of appeal. In any event, there is no evidence that, at that time, the School Board raised any objection in respect of the appellant's notice of appeal.

[11] By letter dated October 2nd, 1997, the Minister of Education appointed Arthur W.D. Pickup, Q.C. as a Board of Appeal, pursuant to s. 36(2) of the **Act**, to hear the appellant's appeal. The parties were notified of Mr. Pickup's appointment. There is no evidence that the School Board, at that time, raised any objection to Mr. Pickup's appointment, nor any objection in respect of the failure of the appellant to fully comply with the notice provisions of s. 36 of the **Act**.

[12] On November 19th, 1997, Mr. Sampson sent a letter to one Stewart Ryder (with a copy to the solicitor for the appellant) in which Mr. Sampson referred to "a pending appeal hearing arising from the termination of Mr. Menzies".

[13] The matter was set down to be heard commencing June 22nd, 1998. It is not clear from the record before us why it took so long to have this matter heard.

[14] The issue, as to the failure of the appellant to fully comply with the notice provisions of s. 36 of the **Act**, was not raised until the opening of the hearing on June 22nd, 1998. In fact, counsel for the School Board, Mr. Durnford, acknowledged before the Board of Appeal, that the failure of the appellant to fully comply with the notice provisions of the **Act** had only been discovered at a “very late hour” the evening before the hearing of June 22nd, 1998, notwithstanding that Mr. Durnford had been preparing the case “for some considerable time”.

[15] It is apparent, in this case, that the requirement of the appellant to give written notice of his appeal to the School Board (in addition to the notice of appeal which had been given to the Minister of Education) was ignored by both the appellant and the School Board. Both parties proceeded, for nearly 11 months, on the assumption that the appeal would go forward, and without any suggestion that there was anything amiss with the process. Further, there is no evidence that the School Board has been prejudiced, in any way, as a result of not receiving the written notice as provided for in s. 36 of the **Act**.

[16] We are of the unanimous opinion that an injustice would result if the School Board, under the particular circumstances of this case, could rely on the failure of the

appellant to fully comply with the notice provisions of s. 36 of the **Act** so as to deprive the appellant of a hearing of his appeal on its merits, whatever those merits may be.

[17] As a result, the appeal is allowed. The decision of Justice MacDonald dated June 30th, 1999, and the Order for judgment dated August 3rd, 1999 (including the provision with respect to costs) are hereby set aside. This matter is remitted to Arthur W.D. Pickup, Q.C., to hear the merits of the appellant's appeal, as directed by the Minister of Education on October 2nd, 1997. In the circumstances, there will be no order as to costs of this appeal.

Flinn, J.A.

Concurred in:

Glube, C.J.N.S.

Pugsley, J.A.