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CA 157285

NOVA SCOTIA COURT OF APPEAL

[Cite as: Nova Scotia Police Review Board v. Nova Scotia (Attorney General), 1999 NSCA 151

Glube, C.J.N.S.; Freeman and Flinn, JJ.A.

BETWEEN:

NOVA SCOTIA POLICE REVIEW BOARD Appellant	)	R. Lester Jesudason for the appellant
- and -	)	
ATTORNEY GENERAL FOR NOVA SCOTIA, Representing Her Majesty the Queen in Right of The Province of Nova Scotia as represented by the Public Prosecution Service Respondent	)	Edward A. Gores for the respondent Third Party not appearing
- and -	)	
RANDALL WALTER MOORE Third Party	)	Appeal heard: November 23, 1999 Judgment delivered: December 3rd, 1999

THE COURT: Appeal allowed in part per reasons for judgment of Flinn, J.A.; Glube, C.J.N.S. and Freeman, J.A. concurring.

FLINN J.A.:

[1] The Nova Scotia Police Review Board (the Review Board) appeals from a decision of Justice Oland of the Supreme Court, in Chambers. Justice Oland quashed a decision of the Review Board to issue a subpoena to Alana Murphy, a Crown attorney, requiring Ms. Murphy to appear, and testify, at a Review Board hearing. Further, Justice Oland granted a declaration respecting the Review Board's authority to issue a subpoena to any Crown attorney, in circumstances where the Attorney General is not a party to the proceedings.

[2] The background facts which give rise to this appeal are not complex. In 1998, the Review Board, empowered by the provisions of the **Police Act**, R.S.N.S. 1989, c. 348, convened a hearing into a complaint against two constables of the Halifax Regional Police Force. The complaint, by the third party Randall Moore, related to the entry into the complainant's premises by the two constables on July 7, 1997.

[3] At the request of counsel for the complainant, and over the objections of counsel for the Crown, the Review Board issued a subpoena compelling Ms. Murphy to attend and give testimony at the hearing. Ms. Murphy, in her capacity as a Crown attorney, had, at the time of the incident which gave rise to the complaint, been consulted by the two constables concerning the propriety of the constables entering the complainant's premises without the complainant's permission. The actual timing of that consultation is not clear, however, that is not relevant for the purpose of this appeal.

[4] Following the hearing of a certiorari application by the Crown, the Chambers judge quashed the decision of the Review Board, to issue the subpoena in question, on four alternative bases. The Chambers judge decided that:

1. The Review Board erred in determining that the Crown does not have the right, on the basis of Crown immunity, to refuse to comply with the subpoena issued to Ms. Murphy.
2. The Review Board erred in its interpretation of the law respecting solicitor client privilege.
3. The Review Board failed to consider and determine whether the testimony sought from the Crown attorney relates to the investigation before it.
4. The Review Board did not establish, in its decision, a sufficient link of relevance between the evidence sought from Ms. Murphy and the complaint of Mr. Moore.

[5] At the request of the Crown, the Chambers judge also granted a declaration that the Review Board "..... does not have the legislative authority to issue a subpoena to a Crown attorney where the Attorney General is not a party to the proceeding before the Board."

[6] The complainant, at whose request the subpoena was issued by the Review Board, has not appealed the decision of the Chambers judge. This appeal was launched by the Review Board itself.

[7] The Review Board does not challenge the second, third and fourth alternative bases upon which the Chambers judge quashed its decision to issue the subpoena in question. Counsel for the Review Board admits, frankly, that to do so would be to defend the correctness of its own decision. It is not appropriate for an administrative tribunal to be separately represented on an appeal from its decision unless a challenge is made to the tribunal's jurisdiction. **(CAIMAW v. Paccar of Canada Ltd.,** [1989] 2 S.C.R. 983; and **Jennifer's of Nova Scotia Inc. v. Clark,** (1994), 136 N.S.R. (2d) 110 (C.A.)). The conclusions of the Chambers judge, with respect to the issue of solicitor and client privilege and the issue of relevance, do not give rise to grounds of appeal based on jurisdictional error. Therefore, this Court would not hear the Review Board on these issues.

[8] However, the Review Board does challenge:

1. the determination of the Chambers judge to quash the Review Board's decision on the basis of Ms. Murphy's Crown immunity; and
2. the declaratory relief which the Chambers judge granted.

[9] Counsel for the Review Board submits that these two determinations by the Chambers judge raise issues which go to the jurisdiction of the Review Board. To that extent, he submits, the Review Board has the right to challenge those conclusions on appeal to this Court.

[10] I do not agree with counsel for the Review Board that the conclusion of the Chambers judge (to quash the Review Board's decision on the basis of Ms. Murphy's Crown immunity) raises an issue which goes to the jurisdiction of the Review Board. The Chambers judge clearly came to this conclusion on the basis of the particular circumstances that were before her.

[11] In reaching her conclusion, the Chambers judge referred to the cases of **Thornhill v. Dartmouth Broadcasting Ltd.** (1981), 45 N.S.R. (2d) 111 (N.S.S.C.), **Constable Gardiner and Constable Hanson v. New Cap Inc.** (1997), 11 C.P.C. (4th) 397; **Canada Life Assurance Co. v. Nova Scotia (Minister of Municipal Affairs) et al.** (1996), 158 N.S.R. (2d) 363 (N.S.C.A.) and the decision of the Supreme Court of Canada in **Keable and Quebec (Attorney General) v. Canada (Attorney General) et al.** (1978), 24 N.R. 1. The Chambers judge considered these cases as authority that the Crown, and officers and agents of the Crown, are not compellable to appear for discovery unless the Crown is a party to the proceeding.

[12] The Chambers judge then examined the circumstances before her to determine if the attendance of Ms. Murphy, before the Review Board, was in the nature of a discovery. She said:

> ..... the Board has demonstrated that in order to define the issues before it and to make its determinations, it is willing or finds it necessary or appropriate to follow up all aspects of a complaint. Such a broad-ranging approach characterizes a proceeding as one in the nature of discovery.

> According to its decision, the Board wants to hear the testimony of the Crown Attorney on her advice as to the legality of entry and the reasons for the disposition of charges against the suspect who claimed he had been in the Moore apartment. The proposed questioning of the Crown Attorney for such purposes illustrates the wide-ranging nature of the hearing. Further, any examination of her would encompass what might be relevant, as opposed to what is relevant, to the complaint. Such broad questioning is in the nature of discovery and a Crown agent cannot be compelled to submit to discovery. .....
>
> ..... The Crown Attorney has a legitimate expectation that she will be subjected to a "fishing expedition" and there is some reality to the concern that her examination could become a discovery.

[13] The conclusion of the Chambers judge (that Ms. Murphy's attendance at the Review Board hearing would involve her in broad questioning in the nature of discovery, and, therefore, she is not compellable to appear for discovery unless the Crown is a party to the proceeding) is not a conclusion which goes to the Review Board's jurisdiction. It is a conclusion based upon the principles of law as enunciated by the Chambers judge, and upon a factual analysis of the circumstances in which this particular Crown attorney found herself.

[14] Since this conclusion does not involve an error of jurisdiction, it is not an appropriate matter for the Review Board to be addressing on this appeal. Further, since the complainant has not appealed the decision of the Chambers judge, it is not necessary for this Court to consider the correctness of that decision on the issue of Ms. Murphy's Crown immunity.

[15] The declaratory relief which the Chambers judge granted is, however, a different matter.

[16] In addition to ordering that the Review Board's decision, to issue the subpoena to Ms. Murphy, be quashed, the Chambers judge, at the request of the Crown, granted the following declaration with respect to the Review Board's authority:

> **IT IS HEREBY DECLARED** that the Board does not have the legislative authority to issue a subpoena to a Crown Attorney where the Attorney General is not a party to a proceeding before it.

[17] At the commencement of the hearing of this appeal, the panel, firstly, invited submissions on the position taken by the Crown that this Court should not hear this appeal because it is moot. The Crown argues that since the Review Board does not challenge the quashing of the subpoena on the basis of relevance and solicitor and client privilege, that no benefit can be derived from the hearing of this appeal. The subpoena will not be issued to Ms. Murphy in any event.

[18] After hearing submissions from counsel, the panel decided that the appeal of the Review Board, with respect to the declaration which the Chambers judge granted, is a matter which goes to the jurisdiction of the Review Board. The panel agreed to hear submissions with respect to that declaration.

[19] The appropriateness of a claim for declaratory relief was considered by this Court in the case of **Whynot v. Nova Scotia,** (1988), 86 N.S.R.(2d) 50. In addressing the issue, Justice Jones quoted at length from the decision of the Supreme Court of Canada in **Operation Dismantle v. The Queen**, (1985), 18 D.L.R.(4th) 481, as follows:

In **Operation Dismantle v. The Queen**, 18 D.L.R. (4th) 481 Dickson, J. in delivering the majority judgment in the Supreme Court of Canada stated at p. 492:

> "The reluctance of courts to provide remedies where the causal link between an action and the future harm alleged to flow from it cannot be proven is exemplified by the principles with respect to declaratory relief. According to Fager, The Declaratory Judgment Action (1971), at p. 5:
>
> > 'The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.
> >
> > Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief.'
>
> Similarly, Sarna has said, 'The court does not deal with unripe claims, nor does it entertain proceedings with the sole purpose of remedying only possible conflicts' (*The Law of Declaratory Judgments* (1978), at p. 179).
>
> None of this is to deny the preventative role of the declaratory judgment. As Madame Justice Wilson points out in her judgment, Borchard, *Declaratory Judgments*, 2nd ed. (1941), at p. 27, states that:
>
> > "...no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest of right of his has been placed in jeopardy or grave uncertainty..."
>
> None the less, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this court stated in **Solosky v The Queen** (1979), 105 D.L.R. (3d) 745, 50 C.C.C. (2d) 495, 119801 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative. In Solosky one of the questions was whether an order by a director of a prison to censor correspondence between the appellant inmate and his solicitor could be declared unlawful. The dispute had already arisen as a result of the existence of the censorship order and the declaration sought was a direct and present challenge to this order. This court found that the fact that the relief sought would relate to letters not yet written, and thereby affect future rights, was not in itself a bar to the granting of a declaration. The court made it clear (at p. 754 D.L.R., p. 832 S.C.R.), however, 'that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise.

(emphasis added)

[20] Once the Chambers judge had quashed the decision of the Review Board (to issue the subpoena to Ms. Murphy), it was neither necessary, nor desirable, to grant additional declaratory relief.

[21] Further, and of more significance, are the far ranging terms of the declaration which was granted. The declaration, as to the Review Board's authority, extends well beyond the factual situation which was before the Review Board. It provides, in effect, that the Review Board has no jurisdiction to issue a subpoena to any Crown attorney where the Attorney General is not a party to the proceeding before it.

[22] Counsel for the Crown acknowledged that there could be cases where a Crown attorney is a compellable witness before a Review Board hearing. That would clearly be so if the Crown attorney had relevant evidence with respect to a matter in which the Crown attorney was not acting in the course of his or her duties as an agent of the Crown. Counsel submits, however, that the Court should view the terms of the declaration in the context of the whole of the decision of the Chambers judge, and thereby restrict the declaration's application to circumstances such as those which were before the Chambers judge. I do not accept that submission. The declaration stands alone as the first operative paragraph of the Order which was granted by the Chambers judge. Further, the Crown's submission - to restrict the declaration's application to circumstances such as those which were before the Chambers judge - begs the question: why have the declaration at all, if it accomplishes nothing more than the order

to quash accomplished? That is, precisely, why the additional declaratory relief is not necessary in this case.

[23] In my opinion, the Crown did not have the right to request the declaration that was granted in this case, and the Chambers judge erred in granting that declaration. As a result, I would allow the appeal in part. I would strike out the declaration which the Chambers judge granted in the first operative paragraph of her Order dated July 14, 1999.

[24] Neither party requested costs on this appeal. The Chambers judge ordered the Review Board to pay to the Attorney General costs of $950.00. I understand that the

Attorney General does not intend to pursue those costs. I would make no order as to costs on this appeal.

Flinn, J.A.

Concurred in:

Glube, C.J.N.S.

Freeman, J.A.