

CANADA

C.AT. No. 2801

PROVINCE OF NOVA SCOTIA

COUNTY OF PICTOU

IN THE COUNTY COURT FOR DISTRICT NUMBER SIX

BETWEEN:

IRENE LEFORT, Secretary of the
Antigonish District School Board
on behalf of the Antigonish District
School Board - APPLICANT

- and -

CLARENCE CAMERON ET AL. - RESPONDENT

- and -

THE ATTORNEY GENERAL OF NOVA SCOTIA - INTERVENOR

HEARD: At Pictou, Nova Scotia, before the Honourable Judge
H. J. MacDonnell, an Additional Judge of the County
Court for District Number Six, on February 28, 1992

DECISION: February 28, 1992 (Orally at end of hearing)

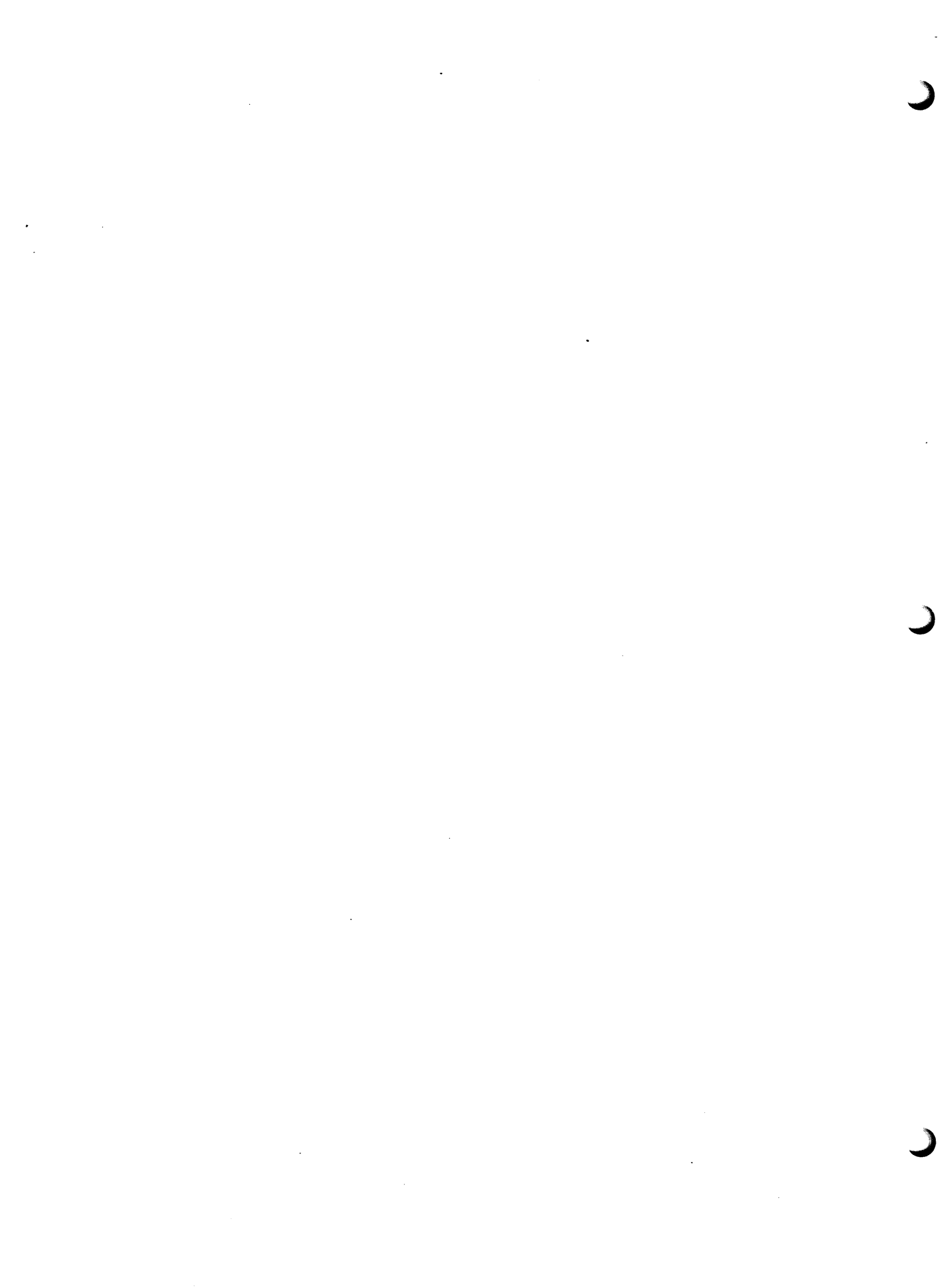
COUNSEL: Arthur W.D. Pickup, for the Town of Antigonish

Daniel MacIsaac, for the Respondent

Donald MacDonald, for the Antigonish District School
Board

Alison Scott, for the Attorney General of Nova Scotia

D E C I S I O N



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Daniel MacIsaac, for the Respondent

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Pictou, Nova Scotia

D E C I S I O N

1992, February 28, MacDonnell, H. J., J.C.C. (Orally):

On behalf of the Antigonish District School Board its
Secretary, Irene LeFort, has filed an Application for a Declaration
as to the eligibility of Clarence Cameron to serve as a member
of the Antigonish District School Board, pursuant to the Municipal
Elections Act, R.S.N.S. 1989, c.300, and the School Boards Act,
S.N.S. 1991, c.6, Sec.10(2), and for a remedy pursuant to Sec-

tions 13 and 158 of the Municipal Elections Act. In support of the Application is Mrs. LeFort's Affidavit, the relevant portions of it read as follows:

3. **THAT** according to the books and records of Antigonish District School Board the Respondent, Clarence Cameron, has been an employee of the Board since September, 1958;

4. **THAT** the Respondent joined the Deferred Salary Leave of Absence Plan in 1984;

5. **THAT** during the current school year from August 1, 1991 to July 31, 1992, the Respondent is a teacher on a Deferred Salary Leave of Absence in accordance with the Nova Scotia Teachers Union Collective Agreement ("Provincial Agreement") Schedule "B". A true copy of Schedule "B" is attached to this my affidavit as Exhibit "A".

6. **THAT** in accordance with the Provincial Agreement, Schedule "B", the year of leave is counted as a pensionable year and a year of service.

7. **THAT** according to the Instructions to Employers Canada Pension Plan Contribution at page 12, a true copy of which is attached to this my affidavit as Exhibit "B" the employer and employee contribution to Canada Pension Plan must be deducted by the Board from the employee's remuneration and remitted to Canada Pension Plan.

8. **THAT** according to the records of Antigonish District School Board to this date the Respondent has not filed a letter of resignation from his position as a teacher with the Board.

9. **THAT** in the circumstances, it is my belief that pursuant to the Provincial Agreement, Appendix B, Article 13, the Respondent is eligible to return to his teaching position on return from leave on August 1, 1992.

10. **THAT** it is my belief that pursuant to the Collective Agreement between Antigonish District School Board and Nova Scotia Teachers Union dated December 12, 1990 (Local Agreement) Article 8, a true copy of which is attached

to my affidavit as Exhibit "C", the Respondent has the same security of position as if on active duty and shall have all benefits reinstated upon return to active duty with the Board.

11. **THAT** I am advised and verily believe that in the Municipal Elections held on October 19, 1991, Clarence Cameron obtained a sufficient number of votes to be elected to the Antigonish District School Board.

The Respondent, Clarence J. Cameron, has filed an Application for Stay in these proceedings, on the grounds that Section 10(2)(e) of the School Board Act S.N.S. 1991, c.6, offends and is contrary to the Canadian Charter of Rights and Freedoms.

The first issue to be decided is:

Is Clarence Cameron, the Respondent, employed in the service of the Antigonish District School Board, as defined by the provisions of Section 10(2)(e) of the School Boards Act.

Sections 10(2)(e) and 15(1)(b) of the School Boards

Act reads:

10(2) No person is qualified to be nominated or to serve as a member of a school board who

(e) accepts or holds office or employment in the service of the school board.

15(1) The seat of a member becomes vacant if the member

(b) acknowledges to the secretary of the school board or is found by a court to have become disqualified to serve pursuant to this Act or the **Municipal Elections Act**;

Section 2(2) of the Municipal Elections Act as amended by Section 41(1), c.6, 1991, reads:

2(2) Subject to the School Boards Act, this Act shall mutatis mutandis apply to the election of any member of a school board as if such member were a councillor.

Counsel for the Antigonish District Board (herein called "the Board") submits that the Respondent, Clarence Cameron (herein called "Cameron") has been an employee of the Board since 1958 as a teacher, and is currently taking advantage of a deferred salary leave plan, being on a leave of absence, which began on August 1st, 1991, and will end on July 31st, 1992. The Board's Counsel points out that under the local Collective Agreement all benefits of a teacher on leave are suspended, and they shall be reinstated when the teacher returns to active duty with the Board. Thus, Cameron retains a contractual relationship with the Board, as to security of tenure, and has the right to return to work with the Board at the conclusion of his leave.

Counsel for the Board further submits that the Agreement between the Antigonish District School Board and the Nova Scotia Teachers Union is applicable to the question before the Court, as it is not inconsistent or in conflict with the provisions of the Collective Agreement between the Minister of Education and the Union.

He refers to the Teachers' Collective Bargaining Act, R.S.N.S. 1989, c.460 pursuant to which both the Minister of Education and the School Boards have authority to conclude agreements with the Teachers' Union. Further, that both Agreements were valid as long as they are not inconsistent, and he quotes Section 3.03 of the Provincial Agreement, which reads:

"In the event that any provision of this Agreement conflicts with any provisions of an Agreement between the Union and the School Board, the provisions of this Agreement shall prevail."

Counsel goes on to point out that the Provincial Agreement dealing with deferred salary leave sets out means of financing a leave of absence, and that the Board has the final say as to granting a deferred salary leave. He quotes Section .05 of the Local Agreement, which reads:

"Approval of individual requests to participate in the plan shall rest solely with the School Board and a refusal by the School Board to approve an application shall be final and non-grievable."

Counsel for Cameron has raised a procedural point, and refers to Section 15(1)(b) of the School Boards Act and to Section 2(2) of the Municipal Elections Act. He submits that this Application should have been made under the appropriate sections of the Municipal Elections Act rather than the School Boards Act. However, Section 2(2) of the Municipal Elections Act as amended by c.6, section 41, 1991, provides that this section of the Municipal Elections Act is subject to the School Boards Act.

I find no merit in the submission that this Application should have been made under the Municipal Elections Act.

Cameron's Counsel submits that his client is on a leave of absence from the Board, in an arrangement pursuant to the Income Tax Act, which permits him to defer seven years employment income over an eight year period. He is not subject to the control of the Board, which is merely a trustee pursuant to the Deferred Salary Leave Plan, to administer his salary. He refers to the requirement of the Board pursuant to the Canada Pension Plan to remit the employee deductions and that the Unemployment Insurance

Commission has not assessed Cameron as an employee, to support his argument that the Board has no control over Cameron, and he is thus not an employee.

On behalf of Cameron, Counsel cites **Montreal v. Montreal Locomotive Works Limited et al.** (1947) 1 D.L.R. 161; **Stevenson, Jordan and Harrison Ltd. v. MacDonald and Graves** (1951) 1 D.L.R. 101, and **Alexander v. M.N.R.** (1970) EX.C.R. 139.

Cameron in his affidavit in support of his Application states that he was a successful candidate representing the Town of Antigonish for a position of School Board member in the election conducted on October 19th, 1991, and that he received 887 votes. He further states that since August 1st, 1991, he had been on deferred salary leave, and although in receipt of cheques from the Board, such cheques were funded by savings made by him over the seven years of employment. He further alleges that the Board handles the salary and income tax deductions as a trustee pursuant to the Deferred Salary Leave Plan, and not as his employer. He admits that a contractual relationship exists between him and the Board in respect to contributions to pension plans, and that the year 1991-1992 is considered a year for pensionable service, but that this does not amount to a contract of employment.

I am unable to find that the rights given under the Income Tax Act to defer salary pursuant to an agreement between an employer and an employee in any way terminates the relationship between the Board and Cameron.

Also, submissions in regard to Unemployment Insurance and Canada Pension Plan deductions have no application to the

relationship between Cameron and the Board. The fact that Cameron is not required to pay unemployment insurance contributions is clearly due to the fact that said contributions had been made in full on his gross salary, and thus if required to continue payments while on leave would have meant a double payment.

Canada Pension premiums are continued to be paid by the Board, which would indicate that an employment relationship still exists between the parties.

As to the various cases cited by Counsel on behalf of Cameron, a perusal of the same indicate that they have no relevance to the present situation. In the present case a negotiated agreement between the Board and Cameron provided for a years leave of absence. Although during this year of absence the Board had no control over Cameron's activities, this does not go to the issue of employer/employee relationship.

To determine the relationship between the Board and Cameron, it is necessary to examine the relevant provisions of both the Contract between the Minister of Education and the Nova Scotia Teachers' Union (herein called "Provincial Agreement") and the Contract between the Antigonish District School Board and the Nova Scotia Teachers' Union (herein called "Local Agreement").

Sections 2(h)(ii) and 2(m) of the Teachers' Collective Bargaining Act, R.S.N.S. 1989, c.460, read:

2(h) "employer" means

(ii) the school board in respect of

(A) sick leave for teachers,

- (B) sabbatical leave for teachers,
- (C) educational leave for teachers,
- (D) pay periods for teachers,

2(m) "professional agreement" means a signed agreement in writing between an employer, on the one hand, and the bargaining agent of the teachers on behalf of the teachers, on the other hand, containing terms or conditions of employment of teachers that include provisions with reference to rates of pay and hours of work;

The Teachers' Collective Bargaining Act provides that both the Minister of Education and individual School Boards have authority to conclude Agreements with the Teachers' Union.

The Provincial Agreement with the Board in Article 3.03 provides that if there is a conflict between the provisions of the Provincial Agreement and a Local Agreement, then the Provincial Agreement shall prevail.

In the Provincial Agreement, the Deferred Salary Leave Plan, as described in Appendix "B", sets out that a teacher who holds a permanent contract with the School Board is eligible to participate in the plan, and describes the manner in which the Application should be made, and the payment formula for the leave of absence, as well as the benefits accruing for the teacher. It is to be noted that this Deferred Salary Leave Plan only applies to a teacher who holds a permanent contract with a School Board.

The Local Agreement, in Article 8, deals with Leave of Absence, including the power of the Board to refuse to grant a leave under certain circumstances, the date when the application for leave should be submitted to the superintendent, and the provisions for a teacher upon return from leave of absence

to be re-instated to his former position provided the position has not been phased out.

Article 8.05 of the Local Agreement reads:

8.05 A teacher on Leave of Absence shall be deemed to have the same security of position as would be the case if that teacher were presently on active duty with the Board.

None of the provisions in the Local Agreement dealing with Leave of Absence conflict with or are inconsistent with the provisions of the Provincial Agreement dealing with deferred salary leave.

The Local Agreement clearly provides that the Board has the final say on the question as to the right of a teacher to grant a leave of absence with deferred salary.

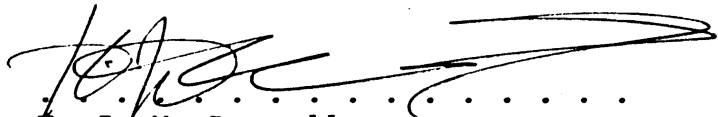
I find that the Board is an employer, and that Cameron is an employee of the Board, under the provisions of the Local Agreement. Although during the years leave of absence Cameron is not under the control of the Board, he is still an employee, entitled to benefit from all of the provisions of the Local Agreement with the Board. Upon his return to active duty, at the conclusion of the year of absence, the Board is responsible to re-instate him to his former position, if not phased out, or re-instate him in another position under the jurisdiction of the Board, with all similar benefits.

I find that the contractual relationship between Cameron as a teacher and the Board had never been severed, and Clarence Cameron is employed in the service of the Antigonish District School Board, as defined by the provisions of Section 10(2)(e) of the School Boards Act.

It will now be necessary to proceed to hear the Application on behalf of Mr. Cameron for a stay of proceedings under the provisions of the Charter.

If the Stay of Proceedings under the Charter Application is not granted, it will be then necessary to consider and hear submissions as to the appropriate remedy, pursuant to the Municipal Elections Act.

The submissions on the above matters will proceed on Friday, March 6th, 1992, at 10 a.m., at the Justice Complex in Pictou.


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H. J. MacDonnell,
An Additional Judge of the County
Court for District Number Six