SUPREME COURT OF NOVA SCOTIA

Citation: *Dicks v. Nova Scotia (Elevators and Lifts)*, 2015 NSSC 362

Date: 20151215
Docket: Hfx No. 441246
Registry: Halifax

Between:

Ward Dicks, Ben McIntyre, Dan Vinette, Dave Garriock, Andy Reistetter, and Peter Beerli as trustees for the Canadian Elevator Industry Education Program

Applicant

- and -

The Chief Inspector appointed pursuant to the *Elevators and Lifts Act*, SNS 2002, c. 4

- and -

The Director of Technical Safety Division, Department of Labour and Advanced Education

- and -

Randy Kelly, Nathan McMichael, Craig Longard, Corey Cole, Jonathan McGregor, James Noade

Respondents

Judge: The Honourable Justice Denise M. Boudreau

Heard: December 8, 2015, in Halifax, Nova Scotia

Written Decision Released: December 17, 2015, in Halifax, Nova Scotia

Counsel: Raymond F. Larkin, Q.C., for the Applicant
Alison W. Campbell, for the Respondents Chief Inspector and Director of Technical Safety Division
Nancy F. Barteaux, Q.C., for the individual Respondents

By the Court (Orally):

[1] This matter was commenced by Notice of Judicial Review filed July 9, 2015. At the time this matter commenced, the applicant was the "Canadian Elevator Industry Education Program". By consent, the applicant is now "Ward Dicks, Ben McIntyre, Dan Vinette, Dave Garriock, Andy Reistetter, and Peter Beerli as Trustees for the Canadian Elevator Industry Education Program".

[2] The respondents are the Chief Inspector appointed pursuant to the *Elevators and Lifts Act*, SNS 2002 c. 4; and the Director of Technical Safety Division, Department of Labor and Advanced Education (province of Nova Scotia); and Randy Kelly, Nathan McMichael, Craig Longard, Corey Cole, Jonathan McGregor, and James Noade.

[3] Within the main action, the applicant seeks judicial review of a decision made by the Director, approving an earlier decision made by the Chief Inspector, accepting a training program for elevator mechanics and granting certificates of competency to individuals who had not completed the four-year program provided by the applicant. In fact there were two series of decisions, the first made in respect of James Noade, the second in respect of the other named respondents.

[4] There were four prehearing motions made by various parties, all of which were heard by me on December 8, 2015. Firstly, the applicant sought an extension of time to file the Notice of judicial review in respect of the first decision, which was made earlier in time than the others; secondly, there were two interested companies who sought party status, or in the alternative, intervenor status; and thirdly, the government respondents, supported by the individual respondents, moved for a finding that the applicants do not have standing to bring this application for judicial review. They seek a decision confirming same, on a preliminary basis, before the production of the record and obviously, before the hearing. What follows are my decisions in respect of each of those motions. I shall indicate my decisions in each motion, in turn, in the same order that they were argued.

[5] I wish to first thank counsel for their very able submissions and helpful briefs.

[6] Before dealing with each motion in detail, I will deal with the facts which underpin this entire matter. Rather than repeat the facts three times, I shall outline them once and then proceed to deal with each motion. I would note that the parties have filed affidavit material in all four motions, and all have agreed that any affidavit may be used as evidence in respect of any of the four motions.

[7] I first refer to the statute which governs the parties in the context of this dispute. The *Elevators and Lifts Act,* SNS 2002, at section 5, provides that no person shall construct, alter, repair, maintain, service, inspect, examine or test an elevating device unless that person either holds a certificate of competency issued under the act, or is in training under the supervision of a person who holds such a certificate. The regulations under this act provide further detail. There are three possible classes of certificate established, the highest being a Class A certificate of competency. This certificate allows one to work in respect of all elevating devices. In order to obtain such a certificate, regulation 14 (a) provides that a candidate must "successfully complete a four-year program of practical skills and theoretical training as provided by the Canadian Elevator Industry Education Program or another equivalent educational program acceptable to the Chief Inspector."

[8] The Canadian Elevator Industry Education Program is a trust; its trustees are the applicants herein. They have brought this judicial review on behalf of the program (I shall refer to the applicants as CEIEP in this decision). Briefly, CEIEP provides apprenticeship training in the construction and maintenance of elevating devices, but only for employees in Canada covered by collective agreements negotiated by the International Union of Elevator Constructors. Its trustees

represent both this union, and the companies who are parties to such collective agreements.

[9] As is obvious from the fact that this program is specifically mentioned in the Act, this program is recognized as a standard in the industry, to which other programs must be compared and deemed equivalent before they will be found acceptable.

[10] There are, I am told, other training programs for non-union employees which exist, one through Durham College in Ontario, and another program in the United States.

[11] There was also, until recently, another training program in existence, offered through a facility called the Elevating Devices Training Academy, based in Ontario. Until very recently, I am told, this program was not recognized by any province in Canada as providing appropriate qualification for certification as an elevator mechanic. I do not know if it has not been considered by other provinces, or specifically rejected. It should also be noted that this program, as things currently stand, is no longer being offered and has not been offered since January 2015.

[12] To return to this specific dispute, on or about January 16, 2015, one of the trustees of CEIEP, Ward Dicks, spoke with the Chief Inspector under the *Elevators and Lifts Act* for the province of Nova Scotia, Randall Kennedy. Mr. Kennedy advised Mr. Dicks at that time that he had granted a Class A certificate of competency to an individual who had completed the program provided by the Elevating Training Devices Academy, and had passed the examination prepared by the Chief Inspector. This person had not completed the CEIEP training. It was later discovered that this person was James Noade.

[13] On January 28, 2015 Mr. Dicks wrote to the Minister of Labor and Advanced Education for the province of Nova Scotia, the Hon. Kelly Regan. Mr. Dicks advised her of who he was, and what he had discovered, and indicated his concerns about the quality of the program offered by the Elevating Device Training Academy. He also raised his concerns about mobility agreements, in that persons certified in Nova Scotia would be permitted to work in other provinces. He ended his letter by saying “I would like to see an internal investigation into this matter as the safety of the general public could be at risk.”

[14] Minister Regan responded to Mr. Dicks on March 26, 2015. She indicated that the decision had been reviewed by David Wigmore, Director of Technical

Safety, who was satisfied that the regulations had been met. She invited Mr. Dicks to contact Mr. Wigmore.

[15] The executive director of CEIEP, Patrick O'Neill, contacted Mr. Wigmore by letter on April 20, 2015. He repeated the concerns made by Mr. Dicks to Minister Regan. He did not make any specific requests of Mr. Wigmore but he did outline his concerns. A further letter was sent by counsel for CEIEP, Mr. Larkin, on May 14, 2015, asking Mr. Wigmore to respond to Mr. O'Neill's letter.

[16] Mr. Wigmore responded on June 11, 2015. Among other things, he described the process by which the decision had been made. He stated:

> I reviewed the process and procedure utilized by Mr. Randall Kennedy, Chief Elevator Inspector, to issue the elevator mechanic certificate of competency and was satisfied that this process met or exceeded the requirements under the elevators and lifts general regulations. The Canadian Elevator Industry Educational Program is recognized under the Elevators and Lifts General Regulations as a training standard as well as an equivalency provision. Under the equivalency provisions, the Chief Inspector required the applicant to provide a copy of the training syllabus and examination marks from the training institution and provide a copy of the elevator mechanic passport to verify that the required competency levels were achieved with signoff by a qualified mechanic. The Chief Inspector further required the applicant to successfully pass a provincial certification exam.

[17] Further to that, Mr. Dicks was advised on July 6, 2015 that four more individuals had also received class A certificates of competency, who had not done the CEIEP training. While the affidavit of Mr. Dicks states "four", I note that five

people have been joined to this proceeding as respondents, plus Mr. Noade, so I assume this is a typographical error.

[18] The applicant filed its Notice for judicial review of these decisions, as I have already indicated, on July 9, 2015.

Extension of time

[19] The first motion I will deal with involves the applicants request to extend time for the filing of judicial review. This motion only refers to judicial review of the decision involving James Noade.

[20] Civil procedure rule 7.05(1) provides the deadlines for the filing of a Notice for judicial review. It reads:

> A person may seek judicial review of a decision by filing a notice for judicial review before the earlier of the following:
>
> a) 25 days after the day the decision is communicated to the person;
>
> b) six months after the day the decision is made.

[21] It is acknowledged that in respect of the decisions related to the other individual respondents, the decision was communicated July 6, 2015 and the notice was filed July 9, 2015. This is well within the timelines. However, as I have already described, the decision relating to Mr. Noade was communicated to the

applicant on or about January 16, 2015. Nearly six months had passed before the Notice was filed July 9, 2015. Therefore, the applicant seeks leave of the court to proceed with review of that decision as well.

[22] There are number of cases in this province where the test for extension of time in the circumstances is outlined. I refer to the cases of *Osif v. College of Physicians and Surgeons* 2015 NSCA 46; *Jollymore v. Jollymore Estate* 2001 NSCA 116; *Tibbetts v. Tibbetts* 112 NSR (2d) 173.

[23] The decision to grant an extension of time is discretionary, and the court is instructed to take a flexible approach in assessing the facts, in order to ensure that justice is done. Generally speaking, courts will refer to a three-part analysis, as follows:

1. did the applicant have a bona fide intention to appeal when the right to appeal existed;
2. did the applicant have a reasonable excuse for the delay;
3. are there compelling or exceptional circumstances present which would warrant an extension of time, for example, has a strong case for error been shown, where there are real grounds to believe that a decision should be overturned.

[24] These are perhaps more properly referred to as guidelines. Courts will also consider other factors at play, including the length of the delay, the reason for the delay, the presence or absence of prejudice, the apparent strengths or merit of the proposed legal action, and the good-faith intention to appeal within the appropriate period. Each case is individual, and the importance of any of these factors can vary in any individual case.

[25] I will go through my conclusions in relation to these factors.

[26] In relation to the length of the delay, in this case it is very significant, being practically six months from the date the decision was communicated; in other words, more than five months after the timeline in Rule 7.02 had expired.

[27] I cannot conclude that the applicant had a bona fide intention to appeal during the first 25 days, since nothing was done during that time which would be evidence of that. The only thing done was to contact the minister. This obviously is not done in the advance of an appeal.

[28] The reason for the delay is somewhat related to the question whether the applicant had a true intention to appeal during the 25 day time period. I have already mentioned that the only thing done by the applicant during that period, according to the evidence, was to contact the government minister and seek her

invention. There does not appear to have been any intention shown to appeal the decision through the courts. The applicant acknowledges that it chose to try and address the matter, in its words, "administratively", or as described by the respondents, through political channels.

[29] I do not consider this reason to be a good excuse for having missed this deadline so significantly. I quote from the court's comments in *Rockwood Community Association v. HRM* 2011 NSSC 91: "The 25 day time limit should not easily be displaced without a significant excuse or reason for the delay." I do not consider that what was done here is a reasonable excuse for the delay of 6 months.

[30] In relation to prejudice, I do not consider that a significant factor in this case. The application for judicial review is intended to proceed in respect of the other decisions in any event, and all parties agree that the inclusion of the decision relating to Mr. Noade will not affect this process, except to include him. I see no prejudice to anyone, no matter the decision I make, with the exception I suppose of Mr. Noade himself, in the sense that, if the matter proceeds against him, his certificate is in jeopardy, if the matter does not proceed against him, then it is not. However the question of jeopardy in this context, i.e. the granting of an extension of time, questions whether the delay caused jeopardy. Mr. Larkin made this point and I agree with him. Mr. Noade has been working in the industry, as described in

his affidavit, since he received his certificate. I fail to see any prejudice to him caused by the delay in bringing this application.

[31] Lastly, while the applicant acknowledges many of the inherent difficulties in his application for extension of time, he notes that these factors should pale in comparison to the last factor, which is the strength of his case. In the view of the applicant, there is a strong case to be made that the decision-maker here committed an error, which should be quashed. On that basis, the applicant argues that his request for an extension should be granted.

[32] In relation to this factor: it is acknowledged that this judicial review involves a discretionary decision of an administrative decision-maker within his own statute; according to the Supreme Court in *Dunsmuir*, this would be assessed on a standard of reasonableness. The decision-maker would be afforded a great deal of deference in these circumstances. An applicant seeking a review in such a context always has a difficult case to meet.

[33] Frankly it is not possible for a court, at this early stage, to assess the chances of success to any serious degree. We do not have before us the record that will be required in order to make this ultimate decision; we do not have all of the information before the decision-maker, and his path of reasoning. However, we do

have from his letter, in summary fashion, a sense of the issues he considered before making the decision. It is clear that the Chief Inspector did review the applications and considered them.

[34] In the context of the granting of an extension, I do not see here that the case for error is strong enough to override the other factors. As the matter presently stands, I frankly do not see that it is any more likely that this review will succeed, that not. And I do not see that there are any other compelling or exceptional circumstances here.

[35] Under all the circumstances here, and having reviewed the appropriate test to meet, I find that the applicant has not satisfied me that an extension of time should be granted in the case at bar. The decision with respect to James Noade was communicated to the applicant in January 2015, and the time within which to apply for review of that decision expired 25 days later. The application for review was not made until July 2015. I do not grant that extension of time and therefore the application in respect of James Noade is dismissed.

Adding of parties

[36] I next deal with two further motions before me, the first being from Universal Elevators and Lifts Inc. (Universal) and the second from CKG Elevator

Limited (CKG). Both companies seek party status as respondents in this matter, or in the alternative, intervener status. The applicant CEIEP is opposed to these two parties being granted full party status, and argues that they should be intervenors only, with limitations placed by the court on how they can participate. I note that the respondents, the Chief Inspector, and the Director of the Technical Safety Division, take no position on this motion. The individual respondents support this motion and, in fact, are represented by the same counsel as are both moving parties.

[37] I first refer to the relevant Rules. Rule 7.10 provides:

> 7.10 A judge hearing a motion for directions may give any directions that are necessary to organize the judicial review, including a direction that does any of the following:
>
> …
>
> (7) directs whether there are interested persons who are not parties and, if necessary, adjourns the motion until an interested person is made a party or joins an interested person as a respondent;

[38] At Rule 35.04:

> (1) A party who starts a proceeding for judicial review or an appeal must, unless a judge orders otherwise, name as respondents the decision-making authority, each person who is a party to the process under review or appeal or the process that led to the decision under review or appeal, and any other person required by legislation to be a respondent.

[39] And lastly Rule 35.08:

(1) A judge may join a person is a party in a proceeding at any stage of the proceeding.

(2) It is presumed that the effective administration of justice requires each person who has an interest in the issues to be before the court in one hearing.

(3) The presumption is rebutted if a judge is satisfied on each of the following:

  (a) joining a person as a party would cause serious prejudice to that person, or a party;

  (b) the prejudice cannot be compensated in costs;

  (c) the prejudice would not have been suffered had the party been joined originally, or would have been suffered in any case.

[40] In the case of Universal, I have before me the affidavit of Stephen Noade sworn August 26, 2015. He is the president of Universal. Mr. Noade has been involved in the elevator industry for more than 25 years, and obtained his class A certificate of competency in 1994. He purchased a company and renamed it Universal in 2010. In September 2010 he hired his son James Noade as an apprentice elevator mechanic; at that time James was enrolled at the Elevating Devices Training Academy. He completed the program in November 2014. Universal paid some of James' tuition at that facility, approximately $15,565.

[41] Universal is a non-union company. Stephen Noade states that it has been, and continues to be, very difficult to find Class A elevator mechanics available to work at a non-union company. Universal would like to hire more but they are difficult to find.

[42] At one point there was a discussion about the possibility of Universal's employees joining the union. This did not happen, but it was seriously considered because of the difficulty in finding mechanics available to work in a non-union shop. Interestingly, during these discussions, Stephen Noade states that the union representative appears to have been aware that James Noade was at the Academy, and did not express any concerns.

[43] Stephen Noade further comments that Universal is a small company. If this judicial review was successful and James Noade's certificate was lost, Universal might have difficulty meeting its contractual obligations to third parties. Stephen Noade also notes that Universal will lose the money it invested in James Noade's certification.

[44] I note that since I have not allowed the extension of time in relation to the decision made regarding James Noade, his certificate is no longer in jeopardy within this proceeding. Therefore, the concerns raised by Universal in the preceding paragraph would no longer be applicable.

[45] CKG's evidence was brought by Andrew Gilby, its president. He advises that he experiences the same problems as Universal, in that it is very difficult to find and hire more trained mechanics outside of a union environment. Mr. Gilby

also discussed the matter with Mr. Kennedy, the Chief Inspector, and states that Mr. Kennedy advised him that there was an alternative, at the Academy; and that the Department of Labor was accepting this program, as long as participants also passed a provincial examination. (Mr. Kennedy did not provide an affidavit, and so to be clear, I am not accepting those statements for their truth, merely as narrative for CKG's actions.)

[46] Mr. Gilby states that CKG thereafter made arrangements for seven of its apprentices to enroll in the Academy, and paid $20,000 for each of those apprentices, for a total of $140,000. Five of those have completed their training and continue to work for CKG; they are the other individual respondents. The remaining two have not yet completed the program or written the examination. Mr. Gilby is also concerned about his employees and their certificates, his company would be seriously affected if these employees were lost.

[47] Both Mr. Noade and Mr. Gilby raise concerns for the future. They are concerned that if this judicial review is successful, their companies will continue to have difficulty finding employees.

[48] The Rules, as already noted, presume that all interested parties should be involved in a proceeding. I start with the comments of Justice Rosinski in *Specter v. Minister of Fisheries and Aquaculture, and Kelly Cove salmon*, 2011 NSSC 266, para. 5:

> I conclude that as a matter of law, granting the fullest procedural rights to a potential party is in the interests of justice, unless undue prejudice would result to the existing parties in this appeal.

[49] I also note this quote from *Robichaud v. College of Registered Nurses* 2011 NSSC 379 at para. 12:

> It is not sufficient to be interested in the decision. The party applying for judicial review must have a special, private or sufficient interest in the decision or proceeding. That will be satisfied when that party's rights or obligations have been, are or will be affected more than the general public.

[50] *Robichaud* is a decision regarding the applicant's standing, but I agree that where an outside party also meets this test, it stands to logic that they should be included as a party.

[51] Having considered everything before me and the Rule, I find that, firstly, CKG has an interest in these proceedings. That interest is sufficient to grant them the benefit of the presumption in this matter, making them a respondent in this matter, with all the rights and liabilities associated there with. They are very

significantly affected, in my view, due to the fact that if they lose these employees, their contractual obligations to third parties would be in jeopardy. That is a significant factor in my view.

[52] On the other hand, given that I have dismissed the review of the decision in respect of James Noade, I do not find that Universal is left with a sufficient interest in these proceedings to be made a party. They have no special or particular interest in the remaining decisions that are subject to this court's review, made in July 2015. Obviously if I had included the decision re: James Noade, my conclusion respecting Universal would have been the same as CKG.

[53] Counsel for the applicants, CEIEP, says that the presumption of 35.08(2) should be rebutted here. Their concern is that the addition of either of both parties, will cause extra time and effort for the applicant and the court; for example, additional parties might seek to file additional material.

[54] I have considered that issue, and I do not share it as a concern. Should CKG seek to file additional material, it is premature to assume that that material would not be relevant or useful to the court; that is a decision that would be made at that time. In other words, it is just as likely that the addition of CKG might benefit the proper administration of justice, as a more complete picture might be made out for

the court. On the other hand, if such does cause delay or extra work to the parties, such could be compensated by costs.

[55] Counsel for the applicants is further concerned with the fact that, they believe, these additional parties have no interests separate from the individual respondents. They submit that, practically speaking, they will be facing multiple respondents making the same arguments.

[56] I first note that the Rule does not require that a joining party has to show that their interests are completely different from those of the existing parties in order to be included. I do acknowledge the caselaw provided by the applicant which talks about the risk of multiple parties "piling on" arguments against another; but I disagree that such is the case here.

[57] I disagree that the interests of CKG are the exact same as the individual respondents. They do have some things in common, to the extent that they all seek to have the decision upheld and this training recognized. But I am not prepared to say at this stage that they would have nothing new to offer this court in making its decision. The fact is, CKG has a legitimate interest in this proceeding and should participate. I grant CKG party status as respondent in this matter.

[58] I do not grant party status to Universal. In my view they do not have a remaining interest sufficient to place them within Rule 35.08(2).

[59] Furthermore, I do not see that Universal meets the criteria to be intervenor. I note parenthetically that Rule 7.10, which provides for directions for judicial review, does not appear to make provision for intervenors in judicial review applications; it only refers to interested persons as “parties” or “respondents”.

[60] In any event, assuming that intervenors are possible in such matters, I refer to Rule 35.10:

> 35.10 (1) a person who is not a party to a proceeding and wishes to be joined may move for an order joining the person as an intervenor.
>
> (2) a judge who is satisfied that the intervention will not unduly delay the proceeding, or cause other serious prejudice to a party, may grant the order in one of the following circumstances:
>
> (a) the person has an interest in the subject of the proceeding;
>
> (b) the person may be adversely affected by the outcome of the proceeding;
>
> (c) the person ought to be bound by a finding on the determination of the question of law or fact in the proceedings;
>
> (d) intervention by the person is in the public interest.

[61] While Universal would likely be interested in these proceedings, they do not have a sufficient interest, since they are not affected by the outcome of this hearing. Nor do they meet any of the other criteria I have just listed. Their interest, if they have one, might be towards the future; but that concern is already being brought forward by CKG. I do not find that the intervention of Universal is

necessary in the public interest. CKG is made a party and, I am sure, can and will bring forward any concerns or issues on behalf of non-union companies.

Private Interest Standing

[62] Lastly, the respondents, the Chief Inspector and the Director of the Technical Safety Division, Department of Labor and Advanced Education, have brought a motion seeking an order of dismissal of the judicial review on the basis that the applicant does not have standing.

[63] This was brought as a preliminary motion pursuant to Rule 12 of the Rules of Civil Procedure. In their reply brief, and an oral submission, the respondents amended their motion. They now seek an order simply declaring that CEIEP does not have standing to bring this review, rather than dismissal of the proceeding.

[64] As to this preliminary question, CEIEP responds that the issue of standing should not be dealt with as a preliminary matter, but rather, should be dealt with at the hearing itself.

[65] Rule 12 provides as follows:

> 12.01 (1) A party may, in limited circumstances, seek the determination of a question of law before the rest of the issues in a proceeding are determined, even though the parties disagree about facts relevant to the question.

> (2) A party may seek to have a question of law determined before the trial of an action or the hearing of an application, in accordance with this Rule.
>
> 12.02 A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:
>
> (a) the facts necessary to determine the question can be found without the trial or hearing;
>
> (b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;
>
> (c) no facts to be found in order to answer the question will remain an issue after the determination.

[66] The NS Court of Appeal in *Mahoney v. Cumis Life Insurance* 2011 NSCA 31, described the steps of an analysis pursuant to section 12.02 (a) as follows:

> (1) identify the pure legal question to be determined;
> (2) identify all the facts that are necessary to determine the question of law;
> (3) decide whether all the facts necessary to determine the question of law can be found without the trial or hearing. Within this last step, a judge may not rule on any contested facts that might hinge on testimony at trial.

[67] The question to be determined here is whether the applicant has standing to bring this judicial review. Standing is question of both law and fact, in the sense that it is a legal question that requires a consideration of relevant facts. In my view, it remains a legal question that fits within the allowable Rule 12 questions as defined by the court in *Mahoney*, para. 18:

> [18] …The Rule does not authorize a determination of a question of fact or mixed fact and law, excepting only those facts that scaffold the point of pure law…" (emphasis is mine)

[68] In my view this is also a case that has parallels to the case of *Tissa Amaratunga* 2009 NSSC 260. The question in that case was whether the defendant enjoyed immunity from civil action. Practically any question of law, including the question of immunity, can only be answered by reference to the facts of the case. The evidence before the court in *Tissa* was in the form of an affidavit, setting out the fact that the respondent claimed immunity. That issue was not a foregone conclusion, and needed a decision. The court agreed that this question could be determined in advance of a trial or hearing; and that, in fact, there was a distinct advantage in dealing with this question before the trial on the merits.

[69] In the alternative, even if this matter does not fall strictly within Rule 12, I find that the issue of standing is one which has been properly brought before this court as a preliminary motion to the hearing, on notice to all parties. I find that the Court in appropriate cases would have inherent jurisdiction to deal with such an issue prior to a full hearing on the merits. This would accord with the goal of efficiency in the court process. Obviously, the court could only make preliminary decisions about standing, where the Court was satisfied that it had everything before it that it would need to make this decision. I refer to, as an example, the case of *Solid Waste Association v. HRM* 2005 NSSC 89, where standing was dealt with on a preliminary basis.

[70] Whether the motion is brought under Rule 12, or simply as a preliminary motion, I must first determine: what facts are necessary to determine this question?

[71] To have standing to bring an application for judicial review, a person has a certain test to meet: commonly phrased as a “person aggrieved”. It has also been described as “an interest peculiar to him or herself”, a “more special interest”, and interest “beyond that of the general public”. I refer to the case *Lord Nelson Hotel v. City of Halifax* (1972) 4 NSR (2d) 753 as an example. Many cases and authors both inside and outside Nova Scotia have discussed this test. Furthermore, there must be a correlation between the decision and its effect on the applicant.

[72] In order to make that determination, I will need to look at the circumstances whereby the parties find themselves before this Court.

[73] In my view, the facts that are necessary to determine whether the applicant has standing to bring this application, are essentially, the facts I listed at the beginning of this decision. None of those facts are in any way contested.

[74] It is a fact that CEIEP provides training for employees of elevator companies covered by Canadian collective agreements. It is a further fact that the individual respondents here are not employees of elevator companies covered by Canadian collective agreements, therefore, CEIEP training was not available to them. It is a

further fact that these individuals attended a program then available for non-union employees, at the Elevating Training Devices Academy. It is a further fact that the Chief Inspector of elevating devices for this province, granted Class A certificates of competency to all of these individuals, on the basis of the applications they placed before him. It is also a fact that, due to mobility agreements, these Nova Scotian certificate holders may now move to other provinces.

[75] None of the relevant facts I have described so far are in dispute, and none require a hearing.

[76] There are a few extraneous issues in dispute, but in my view they are not relevant to the decision I am making. For example, there is some question about the applicant's motivation in bringing this application; that is to say, some of the respondents attribute certain motives to CEIEP. That is in dispute. However, the question of motivation is, in my view, completely irrelevant to this proceeding as a whole, and is certainly irrelevant to the issue of standing.

[77] The applicant submits that the decision regarding standing should be left to the hearing itself. In their view, important information is not yet before the court. That important information, they argue, is the record; without the record having been filed, we cannot know the precise material before the Chief Inspector, and the

precise reasons for his decision, nor the reason(s) that it was upheld by the Director of Technical Safety.

[78] The applicant submits that those reasons are necessary to determine the issue of standing. They question, for example, whether the Chief Inspector's decision was based on the completion of an equivalent educational program, or the passing of an examination, or both. I refer to paras. 39 and 40 of the applicant's brief.

[79] I have considered that issue carefully and I make two comments. While it is true that we do not have the complete record filed at this stage, we do have the letter from Mr. Wigmore in June. That letter provides, in admittedly general terms, that the Chief Inspector reviewed the training syllabus, the individuals marks, the individuals passport (which I am told is a log of hours of experience) as well as the passing of a provincial examination. In my view this is enough information, in the context of the present judicial review and the present motion, to determine the question of standing for CEIEP.

[80] In fact, as I discussed with counsel for CEIEP during his submissions, even the relevance of these facts is somewhat tenuous, in my view, to the question of standing. Even if one were to assume for the sake of argument, that the Chief Inspector failed to do his work properly, and issued certificates of competency

when he should not have, does this provide CEIEP with more of an interest in the matter? Does it provide them with a more special interest?

[81] In my view, it adds nothing, since CEIEP's interest would have to exist regardless of the "rightness" or "wrongness" of the decision, or of the considerations going into it. I see no connection from one to the other, and none has been identified to me. Nothing done, or not done, by the Chief Inspector made CEIEP any more or less an "aggrieved party": either they are, or they are not. As a result, I cannot see that any additional facts in relation to the record are necessary.

[82] I also, similarly to the court in *Tissa*, see enormous value in having the question of standing determined on a preliminary basis, in the circumstances. In my view it is properly brought as a preliminary question which can be decided on the basis of the uncontested facts before the court, either through Rule 12, or through a preliminary motion, which I allow.

[83] In relation to Rule 12, it does not permit the dismissal of the application. All I could do is make a finding as to whether the applicant has standing. Counsel for the applicant pointed out in submissions that a declaration of lack of standing would have the same practical effect as a dismissal, and therefore Rule 12 would be an inappropriate proceeding under the circumstances.

[84] In response I note that the *Tissa* case, again, is instructive: in that case the issue of immunity was dealt with in preliminary fashion pursuant to Rule 12. Clearly were the court to decide that the defendant was immune from civil action, the only practical result would be the dismissal of the action. That was not found to be a bar to the court proceeding in this fashion. Similarly, I find it is not a bar here. I will therefore make the decision on standing on a preliminary basis.

[85] I start with this: CEIEP clearly has no direct interest in the decision made by the chief inspector. I don't think there is any dispute that whether this decision stands or is quashed, will have no direct effect on CEIEP. They did not train these individuals, they do not employ these individuals, they lose nothing, they gain nothing.

[86] So if they have no direct interest, what is their (indirect) interest? There was some question as to whether the applicant's interest in this decision was commercial, or a concern about competition. This is specifically denied by the applicant. Students of this other program would not be students of theirs in any event. There is a related question about whether a commercial interest, even if it existed, would be sufficient to provide status to seek judicial review. I refer to the Federal Courts decision in *Aventis Pharma v. Minister of Health* 2005 FC 1396. While the Federal Court's test in relation to standing is somewhat different, I have

found that case helpful when looking at the issue of a "direct interest". In any event, CEIEP denies that their interest is commercial, so I see no need to take that analysis further.

[87] CEIEP has argued that its interest is unique and different from the general public. But having read their brief and having heard the oral argument, with respect, I still am at a loss to articulate what that interest is. CEIEP has not done so, to my satisfaction.

[88] It is true that CEIEP is named in the legislation, but it is merely named as a comparator: meaning a comparison is made between it, and a third-party. I point out that only <u>the third-party</u> is being evaluated. CEIEP is the standard. CEIEP claims that this fact gives it an interest in the decision, but frankly, have not articulated why. When I asked counsel for the applicant during oral argument to identify the interest of CEIEP, he described the concern about mobility, in that these Nova Scotian certificate holders might now move to other areas of Canada.

[89] This may be a concern of theirs, but again, I do not see how this provides an "interest" to CEIEP as is required for standing. To put it a different way: I agree that if there are unqualified elevator mechanics working, that is a concern for all of us. I not been persuaded that CEIEP's interests are especially affected.

[90] That is not to say that CEIEP shouldn't be interested, in the general sense of that word. This is also not to say that CEIEP is a "mere busybody", to use the words of Lord Denning as quoted in the caselaw. CEIEP is, understandably, interested in the training of elevator mechanics generally, and in particular, the certification of elevator mechanics; it is their area of expertise. The legislation in this province specifically directs that any training program must be compared to CEIEP and found equivalent. They are, I suppose, more interested than the average person on the street. That mere fact that they are interested, however, does not mean that they have an "interest".

[91] I quote again from the decision of *Robichaud v. College of Registered Nurses* 2011 NSSC 379 at para. 12:

> It is not sufficient to be interested in the decision. The party applying for judicial review must have a special, private or sufficient interest in the decision or proceeding. That will be satisfied when that party's rights or obligations have been, are or will be affected more than the general public.

[92] Having regard to everything before me, I find that CEIEP does not have private interest standing to bring this judicial review.

Public interest standing

[93] It is CEIEP's submission in the alternative that if they are not granted private interest standing, they should be granted public interest standing to bring this matter forward.

[94] The most recent case dealing with the issue of public interest standing is from the Supreme Court of Canada, D*owntown Eastside Sex Workers v. Canada* 2012 SCC 45. As noted by that court at para. 37:

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts… The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favor of granting standing.

[95] In the case at bar, I first ask myself: is there a serious justiciable issue here?

[96] I have no difficulty agreeing that the question here is justiciable, in that it is capable of being adjudicated.

[97] The more difficult question is whether it is "serious". In this context, "serious" does not necessarily equate with its dictionary definition. The Supreme Court held that in order to be "serious" the question raised must be a "substantial constitutional issue" or an "important one". I note for example the case of *USW v. Canada* 2013 FC 496, where the court noted that the case before it had no

constitutional issues, no charter issues, and no challenges to legislation. The issues before it were simply procedural fairness, as well as the correctness or reasonableness of a decision.

[98] The case at bar is a challenge to a government representative's decision. The decision was a discretionary one, made within the terms of his own home statute. The challenge to that decision would address whether it was made within a range of reasonable outcomes, and the decision-maker would be granted deference.

[99] CEIEP submits that the seriousness of this matter arises, due to the very real concern for public safety. The maintenance and safety of elevators is of crucial importance for the public. That should, CEIEP argues, raise this matter in seriousness, beyond that of another routine governmental decision.

[100] Let me be clear: There is no doubt whatsoever that safe elevators are an important matter of public safety, and that unsafe elevators could have devastating effects to both life and limb. However, and without in any way minimizing the importance of having appropriately trained elevator mechanics, I disagree that the public safety aspect of this issue, elevates it to a public interest standing level.

[101] Many, many, aspects of our lives are matters of public safety. Properly trained mechanics of vehicles are needed to ensure public safety. Properly trained

electricians, carpenters, mechanics for city buses and passenger ferries, all of these are concerns for public safety. Proper manufacturing of prescription drugs, proper manufacturing of appliances, all these also raise issues of public safety. There are countless examples.

[102] All these areas of human activity are also subject to legislation, regulation, and at times, government decision makers. While an unsafe elevator is clearly of enormous public concern, so is an unsafe city bus, or an unsafe drug. That cannot, as of right, be the basis for a claim of public interest standing. If matters of public safety raise the seriousness of the matter to that level required by public interest standing, frankly, the requirement of seriousness will lose its meaning.

[103] The "seriousness", as I understand the requirement in this context, is the seriousness of the legal effect of the question. I disagree that the matter at bar reaches that level.

[104] In relation to the other requirements, given my decision with respect to the first and most important criteria, I do not take this analysis further. I decline to grant public interest standing to the applicant here under the circumstances.

[105] My decision, therefore, is to find that the applicant here does not have either private interest standing or public interest standing in the matter before the court.

[106] I would ask counsel on particular motions to provide me with draft orders.

[107] I leave the issue of costs with the parties. If costs with respect to any of these matters are in dispute, I would ask that the parties provide me with written submissions within a reasonable timeframe.

Boudreau, J.