**SUPREME COURT OF NOVA SCOTIA**
**Citation: Jones v. Halifax (Regional Municipality)** 2012 NSSC 368

**Date:** 20121003
**Docket:** Hfx. No. 406970
**Registry:** Halifax

**Between:**

Angela Jones

Plaintiff

v.

Returning Officer for the Halifax Regional Municipality and the Chief Administrative Officer for the Halifax Regional Municipality

Defendants

| | |
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| **Judge:** | The Honourable Justice Arthur J. LeBlanc. |
| **Heard:** | October 2, 2012 in Halifax, Nova Scotia |
| **Written Decision:** | November 6, 2012 |
| **Counsel:** | Matthew Moir, for the plaintiff<br>Daniel Campbell, Q.C. for the defendants |

## Overview

[1] This is a decision on an application made by Ms. Jones against the Returning Officer of HRM and the Chief Administrative Officer of HRM. I heard the application yesterday and I am giving you my decision. I reserve the right to correct any grammatical mistakes that may appear in the text and add any additional case authorities, but the substance of the decision will not change.

[2] This is an application for judicial review of two decisions dealing with the candidacy of Ms. Angela Jones in the upcoming municipal elections in Halifax Regional Municipality. The Applicant filed her nomination papers on September 11, 2012, at the office of the Returning Officer. At the time, the Applicant was on parental leave and she told the Returning Officer that she did not need special leave because her parental leave would continue through to the election. The Returning Officer agreed that she was on leave and accepted her nomination.

[3] The following day, September 12, 2012, the Returning Officer contacted the Applicant and advised her that she needed a leave of absence from the Chief Administrative Officer as specified in the *Municipal Elections Act*. Immediately, the Applicant contacted the office of the Chief Administrative Officer requesting a leave of absence effective September 11, 2012. She also notified the Returning Officer of this request. The Chief Administrative Officer refused to grant her leave effective September 11, 2012, claiming that he had no authority to accept such a request or grant such a leave after the nominations had been submitted to the Returning Officer.

[4] On September 13, 2012, the Returning Officer determined that she had no authority to accept Ms. Jones' nomination; she declared Ms. Jones disqualified and removed her from the list of candidates. Ms. Jones now applies to this court for judicial review of both that decision and the decision of the Chief Administrative Officer not to grant leave.

## Issues

[5] At pages 3 and 4 of her brief, the Applicant frames the issues on judicial review as follows:

1. Did the Returning Officer have jurisdiction to revisit her decision to accept the Applicant's nomination? If the Court finds that the Returning Officer lacked jurisdiction, then the Court should set aside the decision.

2. If the Returning Officer did have jurisdiction to revisit her decision to accept the Applicant's nomination:
    a. Is the standard of review for the Returning Officer's second decision one of reasonableness or correctness? and
    b. Was the Returning Officer's decision to reject the nomination reasonable or correct, as the case may be?

3. Did the Chief Administrative Officer have jurisdiction to refuse the Applicant's request for a leave of absence? If the Court finds that the Chief Administrative Officer lacked jurisdiction, then the Court should set aside the decision.

4. If the Chief Administrative Officer did have jurisdiction to refuse the Applicant's request for leave of absence:
    a. Is the standard of review for the Chief Administrative Officer's decision one of reasonableness or correctness? and
    b. Was the Chief Administrative Officer's decision reasonable or correct, as the case may be?

## Standard of Review

[6] In *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9, [2008] 1 SCR 190, the Supreme Court of Canada ruled at paragraph 57 that the standard of review analysis can often be concluded by looking to see whether there is prior jurisprudence on the issue. With respect to this initial step, it is relevant to this application that the Supreme Court in *Dunsmuir* identified at paragraph 59 that true jurisdictional questions always attract the standard of correctness. These types of questions ask whether the Tribunal has the authority to decide a particular matter under its statutory grant of power, and where these questions arise the decision maker "must interpret the grant of authority correctly or its actions will be found to be *ultra vires* or to constitute a wrongful decline of authority" (at para 59). Questions of true jurisdiction are, however, quite narrow, and the Supreme Court cautions that "reviewing judges must not brand as jurisdictional issues that are doubtfully so" (at para 59).

[7] If prior jurisprudence fails to reveal a satisfactory standard of review, Justices Bastarache and LeBel stated at paragraph 64 that the reviewing court must conclude its own analysis which, in part, is as follows:

> The analysis must be contextual … It is dependent on the application of a number of relevant factors including: (1) the presence or absence of a privative clause; (2) the purpose of the Tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal.

[8] In the matter before me, the Applicant and Respondents agree that the standard of review for all issues is correctness, so it is unnecessary to go over the argument in great detail. However, I will go over some of it as I think it helps to clarify the nature of each issue.

[9] **Issue 1**. The Applicant alleges that the Returning Officer was *functus officio* once she accepted Ms. Jones' nomination, and as a result had no continuing authority by which she could reverse her decision. It is therefore a true jurisdictional question which attracts review on the standard of correctness.

[10] **Issue 2(a)**. Should I find that the Returning Officer had jurisdiction, the Applicant nevertheless submits that she made an error in deciding that the Applicant, who was already on parental leave, needed to apply for an additional and concurrent leave of absence under section 17C of the *Act* to come within the section 18(1)(d) exception. This is clearly a question of law and the standard to be applied must be assessed on the contextual factors. I agree largely with the Applicant's position as set out in her brief at pages 10 to 19, but I will not review it in detail because the Respondents agree that the standard here is correctness.

[11] **Issue 3**. Although this ground is framed as a question of jurisdiction, it appears to me that what is actually being alleged here is an error of law when it asserts that the Chief Administrative Officer lacked jurisdiction to *refuse* the Applicant's request for a leave of absence. That question does not raise an issue whether the Chief Administrative Officer had the authority to decide a particular matter; rather, it is alleging that he had no discretion to reach a particular *result* in a matter over which he had authority. That would not necessarily be a jurisdictional

question in the narrow sense defined by the Supreme Court in *Dunsmuir,* and thus does not lead to a correctness standard immediately. It is instead a question of law and the standard of review must be assessed on the contextual factors. Here again, the Respondents have accepted that the standard should be the standard of correctness.

[12] **Issue 4(a)**. I disagree with counsel that this is a question of law. Rather, I believe it is a question of jurisdiction. This ground alleges that the Chief Administrative Officer made a mistake or error when he refused to exercise his discretion in granting a retroactive leave of absence. However, the Chief Administrative Officer's refusal was based exclusively on his determination that Ms. Jones' request fell "outside the parameters of [his] authority under the *Municipal Elections Act*" (emphasis added). It is alleged, therefore, that he wrongfully declined authority, which is a jurisdictional question that attracts the standard of correctness.

**Did the Returning Officer have jurisdiction to revisit her decision to accept Ms. Jones' nomination?**

[13] Both in her brief and at the hearing, the Applicant maintained that the Returning Officer's jurisdiction was exhausted when she accepted Ms. Jones' nomination papers and she therefore had no power to revisit her decision on September 13, 2012. In doing so, the Applicant relies on section 48 of the *Act* as well as the County Court decision of *MacKinnon and MacEachern*, 1980 CarswellNS 118, 48 NSR (2d) 509. Section 48(3) states that a "returning officer shall not reject a nomination paper after he has signed the receipt on the

nomination paper," which the Returning Officer in this case had done on September 11. The Applicant argues that the Returning Officer's function is purely administrative and claims that she did not have jurisdiction either to revisit her decision or to look beyond the technical sufficiency of the documents.

[14] The Respondents, although accepting that the Returning Officer had no jurisdiction to withdraw her acceptance of the nomination papers, states that it is wrong to characterize the September 13 transaction as the Returning Officer withdrawing her acceptance. The Respondents maintain at paragraph 4 of their brief that: "the Returning Officer has not rejected the [A]pplicant's nominating paper contrary to s. 48(3), but rather has learned that Ms. Jones is disqualified to be nominated or to serve." According to the Respondents, the election with Ms. Jones' "name on the ballot would result in the election not being conducted in accordance with the [*Act*] (s.158) or in accordance with the principles of the [*Act*](s.164)," and the outcome of the election would thus be subject to be voided under section 158 of the *Act*. The Respondents rely on several cases where the election had been voided by the inclusion of disqualified candidates on the ballot, and in particular: *Barrington (Municipality) v Hatfield*, 2009 NSSC 68 (CanLII), 275 NSR (2d) 45; *Baxter v White*, 167 NSR (2d) 161, 1997 CanLII 1498 (SC).

[15] It is true that those cases support the argument that the statute can disqualify Ms. Jones independent of any decision of the Returning Officer, but I do not believe that that permits the Respondents to escape the jurisdictional issue that I have to decide today. It must be pointed out that the Returning Officer's acceptance of the nomination has meaningful consequences even if it does not

qualify disqualified candidates, and one of those consequences is to grant a poll under section 56(1).

[16] I refer again to the decision of *MacKinnon*, where the candidate had presented technically sufficient nomination papers to the returning officer, which the returning officer accepted. Subsequently, it came to that returning officer's attention that the candidate had not paid his taxes. He declared the candidate disqualified and his competitor elected. Justice Sullivan ruled that the returning officer had no jurisdiction to do so and that the returning officer should have granted a poll because there is no doubt that the nomination papers satisfied all of the requirements of the *Act*. The Respondents distinguish *MacKinnon*, claiming that that case "involved an irregularity in the nomination papers" and not the candidate's qualifications. Despite this, I am of the view that returning officers have no jurisdiction to determine who is or who is not qualified. This is a question of statutory interpretation and if, as the Respondents admit, the Returning Officer only performs administrative acts and not adjudicative acts, then it is not a determination that the Returning Officer was, by statute, permitted to make.

[17] The Respondents have not commented on section 44(5), which requires that the Returning Officer "not accept the nomination of a person who he knows is not qualified under this *Act* to be elected." However, having accepted the nomination papers of a person whom she thought was qualified to serve under the *Act*, section 48(3) prevents the Returning Officer from subsequently removing Ms. Jones from the list of candidates. Once the Returning Officer officially accepted Ms. Jones as a candidate, she had no choice but to put her on the ballot.

**Did the Chief Administrative Officer have jurisdiction to grant a leave of absence to the Applicant?**

[18] On whether the Chief Administrative Officer had jurisdiction to refuse the Applicant's request for leave of absence, it is necessary to consider the provisions of the *Act*. Section 18(1)(d) of the *Act* states:

> 18(1) No person is qualified to be nominated or to serve as councillor who …
>
> > (d) accepts or holds office or employment in the service of the municipality, or any utility, board, commission, committee or official thereof, to which any salary, fee, wages, allowance, emolument, profit or other remuneration of any kind is attached, for so long as he holds or is engaged in the office or employment unless the person is on leave of absence granted pursuant to subsection 17C(2) ...

[19] Before moving to a consideration of the procedure for issuing a leave of absence under section 17C(2), it is necessary to determine whether such leave of absence is required in this instance due to the fact that the Applicant was on parental leave. Parental leave is granted to employees of the Respondents in accordance with the HRM's Pregnancy, Parental, & Adoption Leave Policy. It is for a maximum of 52 weeks which is made up of 17 weeks of pregnancy leave and 35 weeks of parental leave, the latter being apportioned as appropriate between the parties or spouses. In this instance, the Applicant was scheduled to return to work in mid-November 2012, and therefore would be on leave beyond the election date. The Applicant suggests that since she was on parental leave, she was not "engaged in" employment. She was not scheduled to work and could not be called to work.

She was completely away from work and had no employment responsibilities. As such I would gather that she would not have to attend any seminars, conferences of any nature and kind. Admittedly, she was receiving some employee benefits, mainly contributions to her pension, some of which she would have to reimburse upon her return. The Applicant also maintains that, unlike holding office, which is an ongoing obligation until the end of the term, in this instance there was a break in the employment routine by virtue of the parental leave. The Applicant therefore draws a significant distinction between holding an office and engaging in employment.

[20] The Respondents argue that there is no difference between the two and relies on the case of *Barrington (Municipality) v Hatfield*, 2009 NSSC 68 (CanLII), 275 NSR (2d) 45, where Justice Duncan found that an office holder who had not had any active participation on a committee for some five months was still an office holder and disqualified from being a candidate in the election. At paragraph 21 of their brief, the Respondents take the position that a person on parental leave is still engaged in employment because anything else would lead to the "nonsensical result" that "an office holder would be permanently disqualified, even if he or she was doing no actual work and receiving no actual remuneration [see *Barrington v. Hatfield*] , whereas an employee would be qualified unless actually working." At the hearing, counsel for the Respondents maintained that a person is still an employee whether he is at work or at home on the weekends, summer holidays, and Christmas break. Therefore, if an employee is still an employee on those particular days, there is no distinction to be drawn between those employees and the employees on parental leave.

[21] The Applicant responded to that suggestion by claiming that there was a significant difference between the employee's position suggested by the Respondents and the Applicant's status because someone holding an office could be called back for a meeting at any time, while the Applicant on parental leave could not be recalled. If I adopt the position advanced by the Applicant, this would mean that she does not come within the ambit of section 18(1)(d) of the *Act* and therefore would not require leave under section 17C.

[22] In *Black's Law Dictionary,* a definition I found is as follows:

> "**Engaged in employment**. To be rendering service for employer under terms of employment, and is more than being merely hired to commence work." *Walling v. Consumers Co.*, C.C.A.Ill, 149 F.2d 626, 629.

However, I found no other authority to assist me in defining what is meant by "engaged in employment" and counsel have not submitted any in their briefs or in their argument. The *Barrington* decision, cited by Mr. Campbell on behalf of the Respondents, has no similarity to the circumstances of this case because Justice Duncan was not faced with the issue of whether or not there was parental leave or any other leave. In *Barrington,* the candidate had not sought to obtain any kind of leave including parental leave. One wonders whether the decision may have been different if there had been an issue such as parental leave.

[23] Nevertheless, I find that despite being on parental leave, the Applicant was still an employee of the Respondents throughout the period of her parental leave. Her parental leave was a benefit along with the other benefits. She had a right to return to her employment at the end of the parental leave. I am unable to agree

with the Applicant on this point. Given this context, I believe it is inappropriate to apply what I found to be the dictionary meaning in *Black's Law Dictionary* of "engaged in employment." Therefore, the Applicant is not excluded from section 18(1)(d) of the *Act* and I interpret this provision as meaning that the only leave of absence which cures a disqualification under subsection 18(1)(d) is leave granted under subsection 17C(2).

[24] As a result, it is necessary to go on to consider section 17C. Section 17C(1) provides that:

> 17C(1) A person who is an employee of a municipality, other than the chief administrative officer, and who intends to become a candidate shall take a leave of absence beginning not later than the day the person becomes a candidate.

Despite this language, the Applicant maintains that since the Applicant was on parental leave, there was no need for her to seek additional leave and therefore she should not be included within the section 17C regime. The argument advanced by the Applicant is that section 17C(1) is a discrete regime which only applies to a class of employees who are otherwise disqualified by section 18(1)(d), and that it would be absurd to interpret section 17C(1) as requiring Ms. Jones to take a leave of absence because she was already on a leave of absence. As a result of the Applicant's reasoning, she was not required by section 17C to apply for a leave of absence since she does not fall into either of the classes in subsections (a) or (b) of section 17C(2).

[25] However, I have already decided that section 17C is the only mechanism by which Ms. Jones could escape disqualification under section 18(1)(d). In my

opinion, there is more logic to that than the Applicant's submission that section 17C creates an elaborate multi-part scheme by which almost indistinguishable subclasses of employees access an exemption by slightly different roads. As a result, section 17C(1) must be interpreted as requiring a candidate to take a leave of absence under section 17C(2), not just any leave of absence.

[26] I am also of the view that if somebody is already on leave, such as parental leave in this case, there is no automatic section 17C(2) leave granted by virtue of the other leave. Section 17C(2) provides that:

> A person who:
>
> > (a) is required by subsection (1) to take a leave of absence; or
> > (b) intends to become a candidate and wishes a leave of absence beginning sooner than required by the required leave of absence
>
> shall apply for a leave of absence to the chief administrative officer of the municipality and the leave of absence shall be granted.

It is impossible, in my opinion, to restrict section 17C(2) as requiring a leave of absence from a Chief Administrative Officer only in cases of subsection 17C(2)(b). It covers both the person who is required by section 17(C)(1) to take a leave of absence and also an employee who intends to become a candidate and who desires a leave of absence that begins sooner than that required. In order for the Applicant's argument to have prevailed, the Applicant would have had to satisfy me either that she was not engaged in employment, or that she obtained leave under section 17C(2) automatically. However, upon reading of this provision, it is clear that there is no automatic leave granted to any person. It must be

remembered that leaves are *granted* by the Chief Administrative Officer and are not automatic.

[27] The next question I have to determine is whether the Chief Administrative Officer can grant electoral leave retroactively. The Applicant argues that there is nothing in the legislation imposing a time limit on when the request for electoral leave may be made or when a request for electoral leave may be made. The Respondents counter at paragraph 30 of their brief that:

> The interpretation proposed by the [A]pplicant would permit an employee to be nominated and to run in an election. If elected, the employee could then apply for retroactive electoral leave, and, on the [A]pplicant's interpretation, the CAO would be compelled to grant this retroactive leave, without discretion. However, if the employee was unsuccessful in the election, they might not apply for electoral leave and thus continue to receive the benefits of employment during their candidacy. [emphasis added]

In fairness, I believe this is not the Applicant's position. It must be remembered that the Applicant was on parental leave and was already on that leave before the close of nomination. Her submission would permit only a few people to access post-nomination electoral leave and, if I had accepted her position, it would obviously be necessary for the legislature to make sure that candidates could obtain section 17C leave after their original leave expires.

[28] However, upon a review of the entirety of the provisions relevant to this application, it is impossible to ignore the language "shall be granted" in section 17C(2), which is defined in the present and future tense and not in the past tense. See section 2(1)(b) of the *Act* for the definition of candidate; it does not cover the situation faced by the Applicant.

[29] Although no one has addressed section 164 of the *Act*, I have reviewed it and I do not believe that those provisions are of assistance to the Applicant at this stage. In *Barrington*, Justice Duncan referred to the case of *Warrington v. Lunenburg*, 2006 NSCA 78, 245 NSR (2d) 308, and considered section 164, but in the matter before him he was seized with an application to void an election.

## Conclusion

[30] Consequently, the decision of the Returning Officer to withdraw her acceptance was incorrect, and the decision of the Chief Administrative Officer to deny a retroactive leave of absence is correct.