SUPREME COURT OF NOVA SCOTIA

Citation: *Bridgewater (Town) v. South Shore Regional School Board*, 2017 NSSC 25

Date: 20161220
Docket: Bwt No. 457414
Registry: Bridgewater

Between:

Town of Bridgewater

Plaintiff

v.

South Shore Regional School Board

Defendant

Judge: The Honourable Justice Mona M. Lynch

Heard: December 20, 2016, in Bridgewater, Nova Scotia

Written Release: January 30, 2017 (**Orally December 20, 2016)**

Counsel: James C. Reddy, for the Plaintiff
John MacPherson, Q.C. for the Defendant

By The Court:

[1] This is not a decision on the merits of the case. This is not the judicial review that is applied for. It is not a motion for summary judgment, summary judgment is not available on judicial review. There are two motions before me and onus is on the moving party, which is the School Board, on a balance of probabilities.

Two Motions before me:

[2] (a) Motion to dismiss or set aside the request for judicial review because the Town of Bridgewater did not file the Notice of judicial review within the time required by *Civil Procedure Rule* 7.05 which is twenty-five clear days after the decision is communicated.

(b) The other motion is a Motion to Dismiss or set aside the request for judicial review because the Town of Bridgewater does not have legal standing to bring the application for judicial review.

Facts:

[3] I am just going to outline, very quickly, some of the timelines in relation to the matter:

a. On October 28, 2015, the School Board approved a review of the Bridgewater and Parkview family of schools;

b. On May 12, 2016, a report from the School Options Committee to the School Board was presented recommending that grades 10, 11 and 12 move from Bridgewater Jr/Sr High School to Park View Education Centre;

c. On May 16, 2016, concerns were raised about the process of the School Options Committee and the School Board put a pause in place for a review to take place of the process;

d. On July 6, 2016, the review report was submitted to School Board;

e. On September 28, 2016, after considering the review, the School Options recommendation and other material, including staff reports, the South Shore Regional School Board passed a motion: To move the students in Grades 10, 11 and 12 from the Bridgewater Jr/Sr High School to Park View Education Centre when the renovations at Park View were substantially completed, with a target of September 2017;

f. On September 28, 2016, a news release, containing the motion passed, was placed on the School Board website and forwarded to the media. The same day the Mayor of Bridgewater commented on the decision.

g. On October 15, 2106, a municipal election was held, as well as a School Board election, and a new mayor and council were elected for the Town of Bridgewater along with a new School Board;

h. On October 27, 2016, there was a special meeting of the Town Council for Bridgewater and they passed a motion directing staff to file a judicial review of the decision of the School Board to move the students from Bridgewater Jr/Sr High School to Park View Education Centre;

i. On October 27, 2016, the media carried the decision of the Council to seek a judicial review of the School Board's decision;

j. On November 7, 2016, the new Mayor and Council were sworn in and the first meeting of the new Council was held;

k. The Notice for judicial review was filed with the Supreme Court of Nova Scotia on November 10, 2016.

[4] Other facts presented were that the School Board, as indicated this morning, was under financial pressures and the School Board had considered other reports before making their decision.

Issues:

[5] (a) Should the judicial review be dismissed or set aside because of the late filing?

(b) Should it be dismissed or set aside because the Town of Bridgewater does not have standing to bring the judicial review?

Late Filing:

[6] With regard to the late filing *Civil Procedure Rule* 7.05 deals with the filing of judicial review application and it says:

> 7.05 (1) A person may seek judicial review of a decision by filing a notice for judicial review before the earlier of the following:
>
> (a) twenty-five days after the day the decision is communicated to the person;
>
> (b) six months after the day the decision is made.

[7] *Civil Procedure Rule* 2.03(1)(c) deals with the general discretion of a Judge of the Supreme Court and it says:

> 2.03 (1) A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:
>
> (c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

[8] The first question then was when does the period start to run for filing. So, when was the decision of the School Board communicated? The Town of Bridgewater argued that it was not until the whole Council knew, not just the Mayor, although it was clear that the mayor had commented on the decision on the day that it happened, Wednesday, September 28, 2016. As I said, communication, based on the case law, is when the Council knew of the decision, there is no special communication necessary. It is when they know. September 28th is also when the media reported on it and I can accept, as I indicated to counsel in argument, that not everyone would know that night. There could have been at least until October 3rd, but, as I indicated before, that is still out of time. It is clear days and so the Town was between one and four days out of time in filing.

[9] The test for using my discretion under *Civil Procedure Rule* 2.03(1)(c) is set out in the case law. **Jollymore Estate v. Jollymore**, 2001 NSCA 116, a 2001 case from Nova Scotia Court of Appeal cited in **Bellefontaine v. Schneiderman**, 2006 NSCA 96 at para 3:

> (1) the applicant had a bona fide intention to appeal when the right to appeal existed;
>
> (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
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> (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.

There is also a fourth part of that test in the **Jollymore Estate** cited in **Bellefontaine v. Schneiderman** 2006 NSCA 96:

> [4] Where justice requires that the application be granted, the judge may allow an extension even if the three part test is not strictly met. [citation omitted]

[10] They also say that the three-part test has "morphed into being more properly considered as guidelines or factors which a Chambers judge should consider in determining the ultimate question as to whether or not justice requires that an extension of time be granted"**: Farrell v Casavant,** 2010 NSCA 71, para 17; **Deveau v. Fawson Estate**, 2013 NSCA 54 (Chambers), para 15, and authorities there cited.

[11] Also, the court of appeal in **Farrell** set out in para 17 factors to consider.

> [17] From these, and other cases, common factors considered to be relevant are the length of delay, the reason for the delay, the presence or absence of prejudice, the apparent strength or merit in the proposed appeal and the good faith intention of the applicant to exercise his right of appeal within the prescribed time. The relative weight to be given to these or other factors may vary. As Hallett J.A. stressed, the test is a flexible one, uninhibited by rigid guidelines.

[12] In the present case, I find that it is relevant that the lateness was between one and four days. The cases that were provided were dealing with a much longer period than that. There were months delays and certainly, in this case, four days earlier and there would be no such argument could be made. There would be no consideration of the strength of the case or whether the reasonableness standard applied.

[13] I am satisfied that there was a *bona fide* intention to apply for judicial review when the right existed, and that is clear from the Council meeting of October 27, 2016, and that was clearly in the time period when the right existed.

[14] With regard to reasonable excuse, the Board indicates there is no reasonable excuse offered, but I accept that there was some confusion about when the time period started to run. Also, I do not think it is irrelevant that there was an election for both the Town and the School Board in the middle of all of this and that was happening in the midst of the twenty-five days, which is not a long period of time. As counsel for the Town indicated, in legal circles, that is not a long period of time. I am satisfied that there was a reasonable excuse.

[15] As to compelling or exceptional circumstances, and I would look at a strong case. I accept that it is difficult to ascertain a strong case at this point. As Justice Boudreau said in the **Dicks, (Dicks v. Nova Scotia (Elevators and Lifts),** 2015 NSSC 362, para 33), case it is not possible for a court at this early stage to assess the real chance of success. We do not have full argument; we do not have full evidence. I know that standard of review is reasonableness.

[16] The School Board argues with Ontario cases and Newfoundland cases that no there was no duty of fairness if there is no closure of the school. The Town argues in effect, that the High School in Bridgewater is being closed. I would note that some of the cases referred to by the Board were in the 1970's and 80's when the further development of the duty of fairness was not considered. The cases were also interpreting their own legislation and they all go on to say if they were wrong and consider fairness. Our Court of Appeal has discussed the duty of fairness and in the **Jono Developments Ltd. v. North End Community Health Association,** 2014 NSCA 92:

> [41] The reviewing judge correctly identified the principle that no standard of review analysis governs judicial review, where the complaint is based upon a denial of natural justice or procedural fairness. (See for example, **T.G. v. Nova Scotia (Minister of Community Services)**, 2012 NSCA 43, leave to appeal refused, [2012] S.C.C.A. No. 237, at ¶90).
>
> [42] Instead, a court will intervene if it finds an administrative process was unfair in light of all the circumstances. This broad question, which encompasses the existence of a duty, analysis of its content and whether it was breached in the circumstances, must be answered correctly by the reviewing judge (see: **T.G. v. Nova Scotia (Minister of Community Services), supra**, at ¶8; **Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.**,2010 NSCA 19, ¶28; **Nova Scotia**

(Community Services) v. N.N.M., 2008 NSCA 69, ¶40; and **Kelly v. Nova Scotia Police Commission**, 2006 NSCA 27, ¶21-33.

Existence of a duty of fairness

[43] The reviewing judge embarked on a duty of fairness content analysis following **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817 before assessing the threshold issue of whether a duty was owed at all. This omission by the reviewing judge is of little consequence as, for the reasons that follow, I am satisfied that HRM owed a duty of fairness to the Community Groups.

[44] In Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), 2004 SCC 48, the Supreme Court of Canada stated:

> A public body like a municipality is bound by a duty of procedural fairness when it makes an administrative decision affecting individual rights, privileges or interests: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.

[45] The first requirement is that the decision be 'administrative,' as opposed to 'legislative'.

[17] Justice Oland in **Potter v. Halifax Regional School Board**, 2002 NSCA 88, provides a helpful explanation of the distinction:

> [39] […] I have found the following passage from S.A. De Smith's text, *Judicial Review of Administrative Action*, [3rd ed.], 1973 London: Stevens at p. 60 on the distinction between administrative and legislative acts helpful for my analysis:
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> The distinction between legislative and administrative acts is usually expressed as being a distinction between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.
>
> [40] The classification of an act as legislative or administrative is not always easily done. There is a great diversity of administrative decision-making with decision-makers ranging from those primarily adjudicative in function to those that deal with purely legislative and policy matters: see *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, [1992] S.C.J. No. 21 at para 27. Where a particular decision-making power falls on this continuum is a consideration in determining the application and extent of any duty of fairness. […] I agree with Brown and Evans that those

> decisions closer to the "legislative and general" end of the spectrum usually have two characteristics: generality (the power is of "general application and when exercised will not be directed at a particular person") and a broad policy orientation in that the decision creates norms rather than decides on their application to particular situations: see D. Brown & J. Evans, Judicial Review of Administrative Action in Canada, looseleaf (Toronto: Canvasback Publishing, 1998) vol. 2 at para 7:2330. In my view, when the Board decides to close a specific school or specific schools, it is applying, among other things, policy and general considerations but to particular situations. Such decisions are not, in my view, so close to the legislative and general end of the spectrum as to foreclose entirely any duty to act fairly. [Emphasis in original]

So, that is our Court of Appeal's take on fairness. They continue:

> [47] Similarly, the decision to sell the surplus school is a decision related to a particular situation and is not so close to the legislative end of the spectrum to preclude a duty of fairness.
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> [48] Further, it has been recognized that public interest may give rise to a duty of fairness if an applicant has (i) a genuine interest in the matter, (ii) the issue is justiciable, (iii) there is a serious issue to the tried and (iv) there is no other reasonable and effective manner for the issue to be resolved (see Donald Brown & John Evans, *Judicial Review of Administrative Action in Canada*, (loose-leaf (updated May 2013) (Toronto: Canvasback, 1998) at 4-44 and 7-54).

[18] So in this case, that we are talking about here, in Bridgewater and the School Board, I find that the question as to whether there is a duty of fairness is an arguable issue. It could be found that it is not so close to the legislative and general end of the spectrum as to foreclose entirely any duty to act fairly. It is policy considerations and general considerations, but it is to a particular situation.

[19] I also find that there is an argument as to whether it is a *de facto* closure or a reallocation or reorganization. Certainly it is not clear that there is absolutely no duty to act fairly. In this case it is not, as I said, so close to legislative end of the spectrum to preclude a duty of fairness. I agree with the Town that there are arguable issues in this case. I also agree with Justice Boudreau in **Dicks** it is not possible for a court at this early stage to assess the chances of success.

[20] With regard to the length of the delay, as I say it was short, I do not see anything that would prejudice the School Board. They knew at the time the judicial review was going to be made.

[21] The importance of factors vary in individual cases. The test is flexible. I have to balance the relevant factors. The weight given to each varies. It is hard with not having a full hearing on the matter to consider all of the evidence. There is limited evidence, limited hearing, I do find that justice requires the extension of the time be granted for the filing of the Appeal.

[22] As Justice Bateman said in the **Jollymore Estate** at the fourth branch:

> Where justice requires that the application be granted the judge may allow an extension even if the three part test is not strictly met.

Here if it is not exactly met, I do find that the one to four days of delay or lateness would weigh in favour of allowing the extension of time. So, I will grant the extension of time to file.

Standing

[23] With regard to standing both counsel indicated there is two types, private and public. The argument is being made only in relation to the public interest standing. Both counsel refer to the ***Canadian Elevator Industry Education Program v. Nova Scotia (Elevators and Lifts)***, 2016 NSCA 80, where they indicated:

> [49] In contrast with private interest standing, public interest standing is granted by courts on a discretionary basis considering three factors, described by Justice Cromwell in ***Downtown Eastside***:
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> > [2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises ***a serious justiciable issue***, whether the party bringing the action has ***a real stake or a genuine interest in its outcome*** and whether, having regard to a number of factors, ***the proposed suit is a reasonable and effective means to bring the case to court***: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).
> >
> > …
>
> [51] In ***Downtown Eastside,*** Justice Cromwell elaborated on "serious justiciable issue":
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> > [42] To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (McNeil, at p. 268) or an "important

> one" (Borowski, at p. 589). The claim must be "far from frivolous" (Finlay, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in Hy and Zel's, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690).

[24] **Downtown Eastside**, 2012 SCC 45, suggests that the three factors be assessed together, mindful that I am not to examine the merits of the case other than in a preliminary manner. I find in this case the Board is asking me in some of their arguments to essentially decide the judicial review and not to just examine the merits in a preliminary manner.

[25] The Board indicates that if there is no duty of fairness then no arguable case or if no apparent unfairness then there is no arguable case. That is asking me to decide the actual judicial review. I have not had a full hearing on the matter today. The merits are looked at in a preliminary manner.

[26] Here, I have to look at whether there is a serious justiciable issue, an issue which is capable of being decided according to legal principles by a court, which is the definition in the dictionary of justiciable. **Rockwood Community Association v. Halifax (Regional Municipality)**, 2011 NSSC 91, indicates an arguable case. As I indicated, it is not to examine the merits of the case other than in a preliminary manner. Here the Town argues that procedural fairness was not provided in that the School Board did not follow the policy established by the *Education Act* in conducting a school review. The Board argues that the School Board did follow the policy. The MacNeil Review found the procedures were followed, but that does not preclude the Town from arguing before the court. They are arguing that there was a breach of natural justice, a breach of administrative fairness. As they indicate, the MacNeil Review was conducted of the process and it pointed out some issues. I agree that the recommendations from that MacNeil Review go to the Minister, not to the Board. The argument on the other side from the Board is there is no duty of fairness, it was fair and there is no breach natural justice.

[27] Those are justiciable issues that have to be decided after a full hearing. Whether there is a duty of fairness owed, whether procedural fairness was provided, whether *de facto* closure or reallocation or reorganization are all matters that have to be decided. I cannot say that the claim is so unlikely to succeed that it is a foregone conclusion.

[28] With regard to a genuine interest in the outcome of the judicial review, the Town is the representative of their citizens and the citizens are affected. The Town also indicates that there may be an economic impact on the Town resulting from the decision. They own the building and they own the land. I do not have any evidence one way or another as to whether both buildings would remain open, but I do know that the interests of the Town and citizens are affected by the decision.

[29] The third part is to look at the reasonable and effective means. As stated in **Canadian Elevator** quoting Chief Justice Laskin in **Thorson v. Attorney General of Canada,** [1975] 1 S.C.R. 138, at p. 145:

> [. . .] it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.

In that case I would, in today's language, see it is an access to justice issue.

[30] I am supposed to consider that in light of the realistic alternatives to the judicial review in this case and look at all of the circumstances. The Board has suggested that the alternatives would be the parents taking the case, but at this point the parents are out of time, and perhaps that was not done because the Town said that they were making the application for judicial review.

[31] In **Eastside** it indicates it is not a checklist or a technical requirement. There are interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.

[32] As I indicated at the beginning, the onus is on the Board on a balance of probabilities and I do find that the Board has not shown that standing should not be granted.

[33] As I indicated above, justice requires the matter to be heard on its merits. This is the sort of case that needs to go to a full hearing with full evidence so I will dismiss the motions by the Board.

[34] Having said that the matter can go forward I want everyone to understand that this is not a decision on the merits of the judicial review. Judicial reviews are difficult cases to win. It is always difficult when seeking a judicial review because it is a reasonableness standard. The decision would have to be whether or not it is within range of possible, acceptable outcomes defensible in respect of the facts and the law. It does not need to be best outcome. It is whether it is within range and I

am not deciding that today. I am just deciding whether the motions are being granted or not and I dismissed the motions.

[35] I understand from counsel that the costs will be in the cause to be decided later?

Justice Mona Lynch