

March 1, 2016

By E-Mail

Original by Courier

Ms. Elaine Wagner
Nova Scotia Utility and Review Board
Summit Place
1601 Lower Water Street, 3rd Floor
Halifax NS B3J 3P6

Dear Ms. Wagner:

UARB Case No. M07050
Pictou County Amalgamation
Our File Number: 4152433

This is Westville's response to Information Request IR -1 and IR-2 posed by the Applicants to the Towns of Westville and Trenton. This response is on behalf of the Town of Westville.

As to IR-1, the purpose of the evidence filed by the Town of Westville is to outline the concerns from the changes in the governance of the Pictou County Shared Services Authority ("Authority"). The letters filed document Westville's concern about the change from a six member collaborative board to a board where four of six board members, or 67% of the Board, will be filled by the Amalgamated Unit. The financial statements are relevant to demonstrate that they reveal substantial net asset value which is material to the effect of Section 11 (3) and 12 (4) of the Pictou County Shared Services Authority Agreement ("Agreement").

As to IR-2, Westville is requesting changes to the Agreement to respond to the material change in the governing structure as a result of the proposed amalgamation. These are outlined below.

The Town of Westville does not take a position on the Amalgamation application except with respect to its impact on the Pictou County Shared Services Authority ("Authority").

Westville is a member of the Authority and obtain two main services: solid waste management and water treatment services. Westville does not suggest the issue it is raising should have any impact on the main application rather the Town is asking that the Board exercise it's discretionary power pursuant to Sections 363 and 367 of the *Municipal Government Act* ("MGA") to affect a number of clauses in the Pictou County Shared Services Authority Agreement ("Agreement") that sets out the terms of governance and membership rights in the Authority.

The Town's position is that by operation of Section 367 of the MGA, the governance model for the Authority is materially changed. It will no longer be a model of six equally participating municipalities but would become controlled by an Amalgamated Municipality with 4 of the 6 board members or sixty seven (67%) of the voting authority. That scenario is not contemplated by the Agreement nor by the parties when the Agreement was negotiated.

OVERVIEW

The Agreement sets out the following structure for the Authority at Section 5:

5. Governance Structure

(1) The Shared Services Authority shall be governed by a Board of Directors (hereinafter called "the Board") consisting of the Mayors of each of the Towns of New Glasgow, Pictou, Stellarton, Trento, and Westville and the Warden of the Municipality of Pictou County, as appointed by their respective Councils. In the event any Mayor is unwilling or unable to be so appointed, or is unable to act or to continue to act, then the affected Council shall forthwith appoint in place of such Mayor or Warden, its Deputy Mayor or Deputy Warden or such other elected member of Council as shall be determined by Resolution of that Council at its next regularly scheduled meeting following receipt of notice of such vacancy on the Board of Directors of Shared Services Authority.

(2) Except as otherwise specified herein, a quorum of the Board of Directors shall be a majority of its then serving members.

.....

(9) The Board of Directors of Shared Services Authority shall annually select by majority vote from amongst

the Directors a Chair, to hold office for a term of one year. No Director shall hold office as Chair for more than two consecutive years, without the unanimous approval of all Directors.

(10) The Board of Directors shall annually select by majority vote from amongst all other directors a Vice-Chair, who shall act in the absence or incapacity of the Chair upon such terms and conditions and with such authority, if any, as may be determined from time to time by written policy of the Board.

There does not appear to be any question that the new municipal unit will take on the role previously held by the individual municipalities to the application in regard to the Shared Services Agreement.

367(1) Unless the Board otherwise orders

...

(c) where the whole of a municipality is annexed to a municipality or **municipalities are amalgamated**, all of the assets and liabilities of the annexed or former municipalities are vested in the annexing or amalgamated municipality, and the annexing or **amalgamated municipality stands in the place and stead of the annexed or former municipalities.**

Westville is of the view that that the change from a six municipal unit collaborative board to a board where one unit has 67% of the membership. While there is still merit and value to the concept of shared services, Westville must be conscious of the change in the governance.

Westville says of note in the Agreement, the following clauses are indicated:

10. **Financial Considerations**

(3) The Chief Operating Officer shall be responsible to present to the Board a regularly updated Business Plan, not less than annually, that promotes improvement and efficiency in service delivery, asset management and cost allocation, based

upon generally accepted best practices, Municipal financial indicators and benchmarks.

...

(7) The proposed budget from the Chief Operating Officer shall be approved or amended and approved by Special Resolution of the Board of Directors and shall contain an annual assessments for each Participating Municipal Unit.

11. Curtailment/Withdrawal of Shared Services

(2) Subject to Article 2(5), any Participating Municipal Unit shall be entitled to request a curtailment of or withdrawal from any Shared Service being provided to it by Shared Services Authority. The manner and timing of such curtailment or withdrawal shall be negotiated between the Municipality and the Board of Directors, following the analysis and recommendation of the Chief Operating Officer.

(3) The requesting Municipality shall be financially responsible for all direct and indirect costs of such curtailment or withdrawal.

12. Full Withdrawal from Membership

(4) A Municipality that withdraws from the Shared Services Authority **is not entitled to receive any assets of the Shared Services Authority without the unanimous agreement of the remaining Participating Municipal Units and shall be responsible for severance and any other costs imposed by its withdrawal, and for its share of any liabilities of Shared Services Authority existing at the time of its withdrawal.** However, if the withdrawing participating Municipal Unit is required to contribute to Capital Costs as elsewhere herein described, the Capital Costs shall be taken into consideration in settling the price of continued services delivery for required services to the withdrawing Municipal Unit.

JURISDICTION OF THE UARB OVER THE ISSUE

It appears the following sections of the MGA are relevant to the issue of whether the Board can consider the effect of the new municipal unit on existing municipalities specifically as it relates to the Agreement, including

Order for amalgamation or annexation

363 (1) After the application has been heard, the Board may, if satisfied that the order is in the best interests of the inhabitants of the area, taking into account **the financial and social implications of the order applied for**, order an amalgamation or annexation upon such terms as it considers advisable.

(2) The order of the Board for an amalgamation or an annexation shall

...

(f) from time to time **make such determinations**, issue such orders and directions and do, or cause to be done, **all such other matters and things as, in the opinion of the Board, are necessary or incidental** to the annexation or amalgamation.

(3) An order of the Board may

(a) adjust assets and liabilities **among those affected by the order** as the Board considers fair;

...

(5) The Board may make an order granting the whole or part of an application, and **may grant such further or other relief as the Board considers proper**. [Emphasis added]

While there is a dearth of case law on the point, Westville says these sections of the MGA provide the Board with the jurisdiction to consider the impact of the new municipal unit upon the other parties to the Agreement.

The modern approach to statutory interpretation was first described by Elmer Driedger. Driedger's comments are set out in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. page 1:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

This approach was identified as the preferred method of statutory interpretation by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para. 21:

Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter “Construction of Statutes”); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, 1997 CanLII 318 (SCC), [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, 1997 CanLII 377 (SCC), [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, 1996 CanLII 186 (SCC), [1996] 3 S.C.R. 550; *Friesen v. Canada*, 1995 CanLII 62 (SCC), [1995] 3 S.C.R. 103.

Driedger’s modern approach was further explained and developed by Ruth Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. At page 3 of that text, Sullivan states:

At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, the promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms: it is reasonable and just.

Along with being plausible, efficacious and acceptable, an interpretation under the modern approach should be based on the following points (*Sullivan and Driedger on the Construction of Statutes*, 4th ed., at page 195):

- (1) All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.

(2) Legislative purpose should be taken into account in every case and at every stage of interpretation, including the determination of a text's meaning.

(3) In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.

Especially relevant to this case is the fact that Sullivan approves of using the modern approach to assist in determining how to exercise discretion granted by legislation (*Sullivan and Driedger on the Construction of Statutes*, 4th ed., at page 229):

Purposive analysis is also relied on by the courts to guide the proper exercise of discretion.

Further, Sullivan makes it clear that the modern approach encourages the use of other provisions to help inform a provision in question (*Sullivan and Driedger on the Construction of Statutes*, 4th ed., at page 283):

In adopting a contextual approach, the courts focus on any provision or series of provisions that in their opinion is capable of shedding light on the interpretive problem at hand. Looking to other provisions is useful because courts make certain assumptions about the way legislation is drafted.

This harmonious approach also emphasizes the importance of purpose statements when interpreting the meaning of legislation. The importance of purpose statements was discussed by the Supreme Court of Canada in *R v. T.[V.]*, [1992] 1 SCR 749. In that case, Justice L'Heureux-Dubé made it clear that purpose statements are binding statutory provisions. Speaking about the *Young Offenders Act*, Justice L'Heureux-Dubé said:

I am unable to accede to the submission of the appellant that s. 3(1) is merely a 'preamble' and does not carry the same force one would normally attribute to substantive provisions, especially since Parliament has chosen to include the section in the body of the Act.

The reason for considering purpose statements is to ensure that the statute is read in its entire-context in a harmonious way, and with a view to the statute's purpose. In *Willick v. Willick*, [1994] 3 S.C.R. 670, at para. 25:

the objective is to interpret statutory provisions to harmonize the components of legislation inasmuch as is possible in order to minimize internal inconsistency.

As a result of the modern approach to statutory interpretation, the Board may, and indeed should, consider the other sections of the *MGA* when determining how to exercise its discretion under section 363.

The Board agreed that when legislation grants the Board discretion but does not provide for how that discretion should be exercised, then the Board should view its discretion in the context of the legislation itself (*CB v. Nova Scotia (Director of Victim Services)*, 2000 NSUARB 38, at para. 54 – regarding extension of time for an application for compensation under the *Victims' Rights and Services Act*).

In this case, Section 367 is relevant to understanding the discretion to be exercised under Section 363. Section 367 deals directly with the assets and liabilities of the preceding municipal units and the rights of the Amalgamated Unit to stand in their place and stead. There is a presumption unless the Board otherwise Orders. This clearly speaks to the discretion of the Board to alter the presumption of Section 367.

Section 363 is also clear that the Board can affect the distribution of assets and liabilities. Section 363 (5) provides a broadly stated discretion to make grant other relief that the Board considers proper. Westville submits this discretion would include the right to direct alterations to the Agreement to respond to the impact of the amalgamation on the governance of the Authority.

The Board then is provided the discretion to consider the impacts of the Amalgamated Unit on the rights of the Town of Westville under the Agreement. Westville does not seek drastic intervention such as the dissolution of the Authority, redistribution or restriction on the number of Board members that the Amalgamated Unit may have. Westville recognizes the Amalgamated Unit will have the largest investment in the Authority and any changes must be reasonable and proportionate to all interests.

IMPACTS

As a result of the Amalgamation the new Unit will be in a substantially enhanced position. Westville observes this without criticism but is mindful of the implications for its interests. Those implications are in a number of areas but most particular to Westville in the area of financial controls and exit penalties.

Financial Control

Under Section 10 (7) the budget is approved by Special Resolution. Special resolution is defined:

I. (v) **“Special Resolution”** means a resolution which requires approval by a majority of the Directors present at the meeting and eligible to vote and who represent Participating Municipal Units responsible for not less than seventy-five (75) percent of financial contribution to the costs of the services to which the question being considered relates.

With this definition the Amalgamated Unit can unilaterally pass the budget even if Westville and Trenton oppose the budgets. In effect, all financial decisions will be made by the Amalgamated Unit. Westville does acknowledge that the Agreement that requires the Chief Administrative Officer (“CAO”) to engage in a consultation process the decision is still by Special Resolution, which leaves absolute control with the Amalgamated Unit.

Westville uses two services: solid waste (Pictou County Solid Waste Management) and the treatment of waste water (East River Environment Control Centre). It is not hard to envision that the Amalgamated Unit sees an expanding mandate for the Authority otherwise why would the Applicants not seek its dissolution and internalize the services? The Agreement contemplates that services can be added for individual municipal units. The concern that Westville has is that with an expansion of services for the Amalgamated Unit the increased financial burden of administration, unassociated with its services, could be allocated to the two services Westville consumes.

Accordingly, Westville seeks a change in the Agreement so that budgets associated with the services it consumes would require its approval. Specifically, the budget for the Solid Waste Management and the ERECC would require Westville’s consent. This would not interfere with the right of the Amalgamated Unit to manage the Authority generally including the expansion of services it may wish to acquire.

In an exchange of correspondence the Applicants have suggested that Westville is seeking to enhance its position which is incorrect. Rather Westville’s request is a response to the enhanced and absolute authority of the Amalgamated Unit in regards the financial management of the Authority.

Exit Penalties

Sections 11 (3) and 12 (4) provide that in the case of withdrawal from a service or the withdrawal from the Authority itself, then the withdrawing Municipality forfeits its rights to assets but is responsible for cost and its share of liabilities. The clause is significant enough in the framework of a collaborative governance model but in a model that would provide absolute financial authority to the Amalgamated Unit it is troublesome. If left unchanged Westville would be completely subject to the decisions of the Amalgamated Unit and then forced to cede any value in the Authority but retaining liabilities. This is contrasted with Section 12 (5) which addresses mutual dissolution and speaks to an equitable distribution and treatment. Obviously Westville would not seek to recover value unrelated to the services it partakes of but it seeks changes to the Agreement that would preserve its right to recover a share of value.

The financial statements of the Authority reveal a substantial asset value. The statements reveal that the net value of the Solid Waste Management assets is \$4, 790,619 and the net value of the ERECC is \$6,426,133. Westville is not asking that the Board find or determine a value of the assets, rather the point is that the question of the value of assets is not a notional issue according to the Authority's financial statements. As a contributing Municipality, Westville should not be penalized from its share of the value in the event the Amalgamation Unit makes decisions that are detrimental to Westville.

Westville seeks that the Board exercise its discretion to direct changes to the Agreement to relieve Westville of the liability of Sections 11 (3) and Section 12 (4) for the solid waste management assets and the ERECC assets, and to provide that in the event of a withdrawal that Westville's share in the value of assets be recognized in a manner consistent with Section 12 (5).

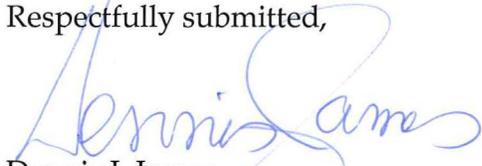
Westville notes that the Applicants will contend that Westville seeks an enhanced position as a result of the Amalgamation. Westville disputes that assertion and says, again, that this is reasonable and necessary to respond to the new, near absolute power of the Amalgamated Unit.

CONCLUSION

Westville seeks that the Board exercise its discretion under Sections 363 and 367 to affect changes to the Agreement as requested by Westville which:

1. Would give Westville the right to a veto over a budget related to the Solid Waste Management and ERECC services;
2. Would relieve Westville from the punitive effect of Section 11 (3) and Section 12 (4).

Respectfully submitted,



Dennis J. James

djames@pattersonlaw.ca

Tel: 902.896.6149

DJJ/ejb

- c. Participants M07050
Client