

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF: The Municipal Government Act, SNS 1998, c 18, as amended.

IN THE MATTER OF: An Application by the Municipality of the County Of Pictou, Town of New Glasgow, Town of Pictou and Town of Stellarton for an order for the amalgamation of these municipal units.

**Post-Hearing Submission OF Town of Trenton, Intervenor
March 21, 2016**

To: **Nova Scotia Utility and Review Board**
3rd Floor
1601 Lower Water Street
Halifax, NS B3J 3P6
Attention: Elaine Wagner
Chief Clerk of the Board

And to: **Robert G. Grant**
Stewart McKelvey
Purdy's Wharf, Tower One
PO Box 997, 900-1959 Upper Water Street
Halifax, NS, B3J 2X2
Solicitor for the Applicants

And to: **Dennis J. James**
Patterson Law
10 Church Street, PO Box 1068
Truro, NS B2N 5B9

Submitted by

J. Gregory MacDonald, QC
Goodman MacDonald
PO Box 697, 47 Riverside Street
New Glasgow, NS B2H 5G2
Solicitor for Town of Trenton –Intervenor

Dear Ms. Wagner;

Please consider the within post-hearing submission on behalf of the Town of Trenton (herein TOT) on the issue of post-amalgamation governance as it impacts pre-amalgamation multi-party agreements, boards and commissions.

As the Board is aware, Town of Trenton did not contest the instant Application nor did it offer evidence contrary to the evidence of the Applicants with respect to the ultimate issue before the Board, but sought and was granted Intervenor status on what is a very significant issue to TOT.

HOW DID WE GET HERE ?

1. I refer the Board to the Memorandum of Submissions of the Town of Trenton, Intervenor dated February 25, 2016 filed as hearing Exhibit P- 44 for the history of how this issue came before the Board on this application, the legal arguments set out therein and the oral submissions made on behalf of TOT on this issue at the hearing.
2. Simply stated, there is no reason from a business efficacy standpoint why this matter was placed before the Board by the Applicants in the first place nor why good faith negotiation and discussions among the multiple partners could not have addressed the issue and achieved a rational and fair resolution, or at least set a collaborative process in place to move toward such resolution. The record discloses no such attempt whatsoever on the part of the Applicants to apply principles of good faith and fair dealing with the other parties to the various boards and agreements other than demanding that they accept the Applicants' position.
3. At page 50 of the Application dated August 27, 2015 filed as hearing exhibit P-1 the Applicants state:

...The Applicants will attempt to internally achieve the alteration of the Boards of Governance of the corporate bodies and IMSAs by agreement of the parties. This may involve amending the related constating documents and IMSAs. Subsequent exhibits are to be filed with the NSUARB in this regard...

4. At pages 4-5 of the Applicants' report dated November 20, 2015 filed as hearing exhibit P-15 the Applicants state:

...2.3.7 Post Amalgamation Governance

Agreement has been sought with the other municipal owners/participants, the corporate entities themselves and the Minister of Communities, Culture and Heritage with respect to the Pictou Antigonish Regional Library Board. The Applicants have requested the other municipalities, participants, and the Minister to agree to maintain the pre-amalgamation representation on the Boards should the NSUARB order amalgamation. In the event

agreement cannot be obtained from the other parties, the Applicants will request the NSUARB to Order the maintenance of representation through operation of s. 367(1) (c) MGA and the Board's powers...

5. So let's be clear:

(i) On August 27, 2015 the Applicants undertook to the Board and their fellow contracting partners to internally achieve the alteration of the Boards of Governance by "agreement" of the parties.

(ii) On November 20, 2015 the Applicants informed the Board that "agreement" had been sought with the other municipal owners /participants...Minister of Communities Culture and Heritage with respect to the Pictou Antigonish Regional Library (PARL) *...to agree to maintain the pre-amalgamation representation on the Boards should the NSUARB order amalgamation...* otherwise, failing "agreement", the Applicants will request the Board to so order pursuant to S.367 (1)(c) MGA. Letters among counsel for the Applicants TOT, and Town of Westville filed as hearing exhibit P-41 confirm this stance, i.e. accept the applicants' position or we'll seek an order from the Board accordingly.

6. What happened to the Applicants' undertaking to achieve the resolution of the Board governance issue by agreement? There is no evidence of any attempt to negotiate a resolution of this issue by the Applicants. The correspondence in hearing exhibit P-41 demonstrates the willingness of both TOT and Westville to at least make an attempt at discussing options short of the "my way or the highway" approach of the Applicants. All such attempts were rejected and, given the significance of impact on TOT of the change in Governance sought by the Applicants, TOT had little choice but to seek intervenor status to protect its position, at no little cost to TOT as a result. So much for negotiation/agreement. There is no Provincial Government funding for TOT or Westville to Intervene in this Application.

PARL

7. The Applicants sought the "agreement" of the Minister to their position on this issue re PARL. The Minister's response was clear in that he would provide his consent as along as the other Library Board members agreed. Such agreement was not forthcoming. The Board may well ask what has happened to this issue? It does not re-appear in subsequent submissions by the Applicants.

WHY IS THIS SIGNIFICANT?

8. The Applicants' position is that the order they seek would simply maintain the pre-amalgamation representation on the Boards. An analysis of the Inter Municipal Service

Agreement and the other evidence filed at the hearing confirms that this is patently wrong.

9. It would seem that reasonable good-faith discussions to find a collaborative resolution to concerns of all affected parties could have saved significant time and costs in this matter. A review of the history of this issue will show that both Trenton and Westville have expressed a willingness to negotiate a reasonable resolution that respects the needs and concerns of all parties, and have attempted to initiate discussions towards a resolution. The applicants have, at best, held to a position that is **"our way or we'll go to the Board"**.
10. This intractable position does not demonstrate a co-operative approach to regional vision and management. This is not an issue that needed to end up at the Board for one day of hearings, but it did. Thus Trenton and Westville were levered into putting forward their positions and arguments, and seek Board support to ensure the interests of their citizens are considered in this amalgamation process.
11. In response to a question as to the intent of the asset forfeiture provisions on withdrawal from a service, Mr. Cullen stated that one purpose was to **"force us to work together"**. Under the proposed NM - 4 seat model, this concept would no longer be operable – on the one hand the NM would not be forced to work together while Trenton and Westville would be forced to accept either the decisions of the NM reps or sacrifice their asset values and efficiencies through withdrawal. This means that one party (NM) no longer is compelled to work together, while two are left to accept decisions, rather than to seek cooperation and **the NM 4 seat proposal is thus a fundamental shift in dynamic from the current situation for all parties.**
12. Board member Doehler raised questions as to the "mischief" that Trenton and Westville were attempting to avoid. For the most part his focus was on the budget "mischief", but with respect, the powers and authorities of the PCSSA Board go well beyond budgetary measures and extend to setting of funding allocation formulae, determination of services to be added or discontinued and determination of general operating structures among many.
13. From a purely budgetary focus, the potential "mischief" can extend well beyond "gold-plated trucks". A significant component of the budgetary process includes decisions on the creation, funding and use of reserves for capital and operating purposes (including choices to not maintain reserves). A second significant component is capital asset acquisition and funding – both as to the level and timing of such expenditures and their funding. Both the reserve and capital decisions can be material, and are generally less well defined within the current agreement than the operating budget issues.

14. The “mischief” that Trenton and Westville seek to avoid is not simply a one-sided excessive cost concern, but also inadequate cost management – particularly as it relates to reserve and capital decisions. This can be clearly demonstrated from both perspectives with a simple analysis of existing reserves based on the March 31, 2015 financial statements of the PCSSA which are to be found at hearing exhibit P-40(e). Reserves, if any, are accumulated from the operating budgets through the imposition of user fees above the level necessary to cover the pure operating costs (for example \$1 per ton is required to cover the solid waste costs, levy \$1.10 to allow an accumulation of reserves at the rate of \$0.10 per ton) so this consideration is the real "gold-plated truck". In the Solid Waste operation there are operating reserves of \$500,000 and capital reserves of \$845,000, while the ERECC operation has no reserves. The nature of the assets and operations of the Solid Waste segment are such that capital and operating issues should be relatively stable and predictable, and arguably reserves at the existing levels are adequate or even excessive to reasonable needs, but there is nothing to prevent further accumulations through the annual budgets. On the other hand the ERECC operations and assets are less stable and predictable, and significant unexpected costs can easily arise.
15. Prudent management would indicate that substantial reserves should be in place within this operation. However, prudent management considerations have not always ruled the day and there is no guarantee that such easily stated principles will be adhered to. Experience has shown otherwise. Due to their smaller sized budgets, both Trenton and Westville are less able than the NM to absorb both unwarranted reserve buildups and wild budget fluctuations that could be avoided through appropriately maintained reserves.
16. In his closing statement applicant’s counsel noted that the shared service issue is a prime example of why amalgamation is necessary. He later proceeded to argue that four NM members on a shared service board would represent a variety of communities of interest (rural, urban, etc.) and would **not** necessarily vote as one block. With respect, the underlying premise of this amalgamation application is the need to have one vision and one voice for the region, ergo, this argument is either predicting the failure of the amalgamation to achieve its stated primary goal, or alternatively does nothing to negate the valid concerns of Trenton and Westville.
17. While, on the surface, Trenton and Westville have put forward differing positions and requests, in reality both are looking to the same end result, but have chosen slightly different paths to get there. Both units are prepared to consider and accept a change in governance structure to reflect the historical voting relationships on the board, **provided that appropriate safeguards are in place for the interests of their citizens**. In the absence of constructive proposals from the applicants, Westville has chosen to go directly to the point through proposing amendments to the agreement to provide

appropriate protections. Trenton has requested the status quo of one member-one vote, which obviates the need for any other amendments and provides a continuation of the collaborative model. Trenton, has, however contemplated a potential structural change, with safeguards, through its proposed alternative of deferring decision on this matter, allow for clarification of the ultimate organizational membership and, if necessary, undertake good faith negotiation of structural and protective changes. **Neither Trenton nor Westville have categorically rejected the alteration of voting structures. Both are identifying and attempting to resolve real risks in a good faith manner.**

18. One of the Board members (the Chair perhaps) suggested in a question to counsel for Westville that potential amalgamation presumably would have been in the contemplation of the drafters of the Inter-Municipal Shared service Agreement and that the parties should have anticipated this. A fortiori, the Applicants should have anticipated that the legal result of S367 (1)(c) could well be one new unit, one vote, not the pre-amalgamation status urged by the Applicants. TOT's argument on the interpretation of this section is on record.
19. The applicants place considerable emphasis on the arbitration provisions in the agreement as providing appropriate safeguards. There are obvious negative ramifications of the arbitration process including cost, divisiveness and time delays. Beyond these factors, the resolution of this issue as requested by the applicants has potential negative implications for Trenton and Westville relative to the arbitration process. It would seem that an arbitrator's decision should/would be grounded in part on the facts and intent of the agreement. The applicants are arguing that the basis for a four vote position is, in part, to provide equity vis-à-vis their financial contribution. Acceptance or award of their requested structure, without other protective amendments, would tend to create a framework that recognizes the primacy of financial contributions, which was not intended and which does not exist in the current agreement. This could influence the arbitration decision should it ever be invoked. This is simply not a realistic option.
20. Finally, it would seem that the issue in question is purely hypothetical until such time as the amalgamation issue is finally resolved. In the meantime it is simply an unnecessary and divisive debate. There are three possible outcomes:
 - The amalgamation proceeds as applied for;
 - The amalgamation proceeds with fewer than four amalgamating municipalities, and
 - The amalgamation does not proceed.
21. The concerns of both Trenton and Westville, at least with respect to the PCSSA, are only a clear issue in the event of the first of the three possible outcomes, and potentially

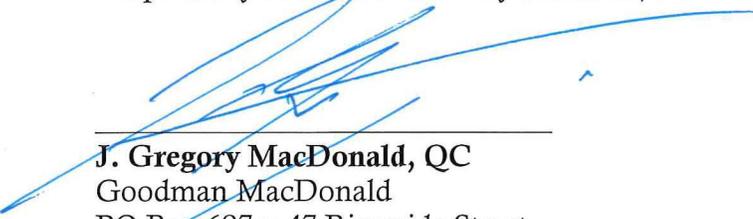
an issue under the second, depending upon whether any, and how many municipalities may withdraw from the process. Under the third, obviously, the issue is extinguished.

22. Under the second, with respect to the PCSW segment, the withdrawal of any one of the applicants would presumably leave the Board composition as three independent municipality reps and three from the NM (assuming the applicants' "status quo" position prevails). This would effectively eliminate the concerns of both Trenton and Westville, since the NM would not be able to cause any action without collaboration of one other member - effectively not a lot different than today. For ERECC, if the withdrawing municipality was any other than the Town of Pictou, a similar result would accrue.
23. It would seem that the most appropriate resolution, (short of confirming that NM would have one representative or amending the agreements as requested by Westville) would be to defer the decision, order good faith negotiation between the non-amalgamating municipalities and the Transition Coordinator (after the amalgamation order is final), and to set a deadline of sometime prior to October 31, 2016 for resolution of the issue or the Board would order a final resolution by that date.
24. To take this one step further the following illustrates the illogic of the applicants "equity" argument. For simplicity, if we assume Stellarton were to withdraw, as can be seen from the attached table the then three independent municipalities would have a combined financial contribution to PCSW of 25.36%, which would give them a combined voting veto through the majority voting requirement and also a contractual veto (>25% contribution) for special resolutions. The scenario is somewhat less skewed for ERECC, but the three independents would still have a majority position with only 41.85% of the funding.
25. Presumably the applicants would accept this "inequitable" structure based on their submissions and requests - in essence they will accept a situation where they contribute 75% but cannot, on their own cause any action, and would therefore have to function in a co-operative decision making structure. Indeed, the current situation has New Glasgow with a single vote (20%) on ERECC matters and yet contributes just under 50% of the funding. Similarly, the County contributes 44% towards PCSW and yet has one vote (17%). **Clearly, if the original intent of the partners was for the impositional voting rights to reflect contributions, the current structure would not have been adopted.**

Pictou County Shared Service Authority									
Funding allocations									
2014-15									
	M Pictou	Trenton	Stellarton	Pictou	Westville	New G	Total	T+W	T+W+S
PCSWMS	43.8	6.17	10.41	8.15	8.78	22.68	99.99	14.95	25.36
ERECC	9.09	8.83	23.92	0	9.1	49.06	100	17.93	41.85

26. With respect, this issue should never have been brought before the Board in this fashion and particularly in the context of this application. The Applicants have cited no precedent for the Board on this issue as there are none and are essentially requesting the Board to exercise its statutory discretion on a matter ...*incidental to the ...amalgamation...* (S363(2) (f) MGA), re-write the multi-party IMSA, and re-structure the various Boards and Commissions, without input from, and against the wishes of their long-term partners, a discretion the Board should graciously decline.

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Respectfully submitted this day of March, 2016


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