SUPREME COURT OF NOVA SCOTIA

Citation: *Oxford Frozen Foods Ltd. v. Nova Scotia (Workers' Compensation Board)*, 2017 NSSC 136

Date: 20170530
Docket: Hfx No. 460266
Registry: Halifax

Between:

Oxford Frozen Foods Limited

Plaintiff

v.

The Workers' Compensation Board of Nova Scotia,
Attorney General of Nova Scotia

Defendants

LIBRARY HEADING

Judge: The Honourable Justice Ann E. Smith

Heard: May 17, 2017, in Halifax, Nova Scotia

Subject: Motion to dismiss judicial review of decisions of the Workers' Compensation Board (WCB)

Summary: On February 9, 2017 Oxford Frozen Foods Limited ("Oxford") filed for judicial review of two WCB decisions. The first was a decision of a WCB Hearing Officer dated December 15, 2016. The second was a December 21, 2016 decision of the Board of Directors of the WBC. Both decisions resulted from

a June, 2016 decision of the Workers' Compensation Appeal Tribunal (WCAT) that found that WCB incorrectly calculated Oxford's 2015 group rating. WCB moved for the dismissal of Oxford's judicial review of these decisions on the basis that they were interlocutory, not final decisions and should not be reviewed by this Court. With respect to the Hearing Officer's decision, the WCB also says that an appeal by Oxford to the WCAT would provide an adequate alternative to judicial review.

Issues: (1) Is an appeal to the WCAT an adequate alternative to judicial review of the two decisions?

(2) Are the decisions interlocutory, and accordingly, not subject to judicial review?

Result: An appeal to the WCAT does not provide an adequate alternative to judicial review of the decisions. The decisions, even if interlocutory, raise issues which got to the WCB's jurisdiction to make decisions. The Court finds there are special circumstances for the Court to review these decisions even if they are interlocutory.

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Heard:	May 17, 2017, in Halifax, Nova Scotia
Editorial Notice:	The cover page of the original decision has been corrected in accordance with the attached erratum, dated **June 2, 2017**.
Counsel:	John A. Keith, Q.C. and Jack K. Townsend, for the Plaintiff Bradley D. J. Proctor, for the Defendant

By the Court:

INTRODUCTION

[1] On February 9, 2017 Oxford filed a Notice of Judicial Review requesting the Court to review two Workers' Compensation Board (WCB) decisions. The first decision was a decision of a WCB Hearing Officer dated December 15, 2016. The second decision was made six days later, on December 21, 2016, by the Board of Directors of the WBC. Both decisions result from a June, 2016 decision of the Workers' Compensation Appeal Tribunal (WCAT) that had found Oxford's group rating for 2015 had been incorrectly calculated by WCB. The WCAT is an independent tribunal which hears appeals from final decisions of the WCB.

[2] WCB moves for an order dismissing Oxford's judicial review on the basis that Oxford should have appealed the Hearing Officer's decision to the WCAT since the WCAT could provide an adequate alternative to judicial review. WCB also says that, in any event, the decision is interlocutory and this Court should not exercise its discretion to review it. A complication arises, however, with respect to appealing the Hearing Officer's decision to the WCAT because of the nature of the decision. The nature of the decision was an adjournment of Oxford's appeal and its referral to the Chair of the Board. Such a decision cannot be heard by the WCAT unless the WCAT determines that the Policy is inconsistent with the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 (the "*Act*").

[3] With respect to the second decision, WCB acknowledges that no appeal lies to the WCAT from a decision of the Board of Directors, but says that the decision is interlocutory and should not be reviewed by this Court.

Legislative Framework

[4] The WCB provides workplace injury insurance to workers and employers in Nova Scotia. Currently, the WCB provides insurance to nearly 19,000 employers throughout the Province. Oxford is one of those employers. Its workers are insured through WCB.

[5] Oxford, like all registered employers, helps fund the cost of the WCB benefits that are provided to injured workers. These funds are collected from employers

through the payment of premiums. Premiums are calculated by applying an assessment rate to an employer's payroll.

[6] The WCB classifies employers by the nature of their business (industry) and assigns an industry assessment rate. An employer's individual rate is adjusted to reflect its individual injury experience.

[7] Given that the issues before the Court involve two WCB decisions, it is useful to refer to the *Act* and examine the kinds of decisions which can be made and if and how those decisions can be appealed.

[8] In general, decisions of the WCB are made pursuant to s-s. 185(1) of the *Act*, which provides as follows:

> 185(1) Subject to the rights of appeal provided in this Act, the Board has exclusive jurisdiction to inquire into, hear and determine all questions of fact and law arising pursuant to this Part, and any decision, order or ruling of the Road on the question is final and conclusive and is not subject to appeal, review or challenge.

[9] Section 197 provides a right of appeal for decisions made under s. 185. Such decisions can be appealed to a WCB Hearing Officer, in accordance with the following provisions:

> 197(1) Any worker or the worker's employer may request that an appeal from a decision made pursuant to Section 185 be heard by a hearing officer.
>
> (2) An appeal pursuant to this Section shall be commenced by filing a written notice of appeal within thirty days of the participants being notified of the decision of the Board pursuant to Section 185.
>
> (3) Subject to Section 199, an appeal pursuant to this section shall be heard by a hearing officer.
>
> …
>
> (7) A hearing officer may adjourn the hearing of an appeal in order to make a reference pursuant to Section 199.
>
> (8) Subject to subsection (7), a hearing officer shall render a decision on an appeal within sixty days of the completion of the hearing.

[10] In turn, a Hearing Officer's decision can be appealed to the WCAT, in accordance with s-s. 243(1) which provides:

> 243(1) Any person entitled to be a participant before a hearing officer may, within thirty days of the participant being notified of the decision of the hearing officer, appeal to the Appeals Tribunal.

[11] Parties may seek leave to appeal WCAT decisions to the Nova Scotia Court of Appeal on questions of law.

[12] When processing an appeal under s. 197, a Hearing Officer "shall postpone or adjourn the appeal and refer the appeal to the Chair" of the Board in the following circumstances, set out in s-s. 199(1):

> 199(1) Where a hearing officer is of the opinion
>
> (a) that an appeal raises an issue of law and general policy that should be reviewed by the Board of Directors pursuant to Section 183; or
>
> (b) that an appeal raises important or novel questions or issues of general significance that should be decided by the Appeals tribunal pursuant to Part II,
>
> the hearing officer shall postpone or adjourn the appeal and refer the appeal to the Chair.

[13] The Chair has the following powers on receipt of an appeal referred pursuant to s-s. 199(1):

> 199(2) The Chair may direct that an appeal referred to the Chair pursuant to subsection (1) be
>
> (a) reviewed by the Board of Directors pursuant to Section 183;
>
> (b) heard and decided by the Appeals Tribunal pursuant to Part II; or
>
> (c) returned to the hearing officer.
>
> 200(1) Where an appeal is brought pursuant to Section 197, the Chair may postpone or adjourn the appeal and direct that the appeal be
>
> (a) reviewed by the Board of Directors, where the Chair is of the opinion that an appeal raises an issue of law and general policy that should be reviewed by the Board of Directors pursuant to Section 183; or
>
> (b) heard and decided by the Appeals Tribunal, where the Chair is of the opinion that the appeal raises important or novel questions or issues of general significance that should be decided by the Appeals Tribunal pursuant to Part II.

[14] The Board of Directors is given the following powers under ss. 201 and 202:

> 201(1) The Board of Directors may adopt and issue a policy pursuant to Section 183 in consequence of any determination made pursuant to Sections 199 and 200.
>
> (2) A policy adopted pursuant to subsection (1) is
>
> (a) effective immediately; and
>
> (b) applicable to appeals that have already been commenced including any appeal adjourned pursuant to Section 199 or 200.
>
> 202 Where an appeal has been postponed or adjourned pursuant to Section 197, 199 or 200, the postponement or adjournment shall not last longer than the earliest of
>
> (a) three months or, where the Board determines that exceptional circumstances exist, not longer than twelve months.
>
> (b) the day the Board issues a policy pursuant to Section 201; or
>
> (c) the day the Board of Directors notifies the hearing officer that the Board will not be issuing a policy pursuant to Section 201.

[15] Section 183 of the *Act* authorizes the WCB to enact binding policies:

> 183(1) For the purpose of this Act, "policy" means a written statement of policy adopted by the Board of Directors and designated by the Board of Directors in writing as a statement of policy, and "policies" has a like meaning.
>
> (2) The Board of Directors may adopt policies consistent with this Part and the regulations to be followed in the application of this Part or the regulations.
>
> …
>
> (5) Until a different policy is adopted, every policy adopted by the Board of Directors pursuant to subsection (2) is binding on the Board itself, the Chair, every officer and employee of the Board and on the Appeals Tribunal.
>
> (5A) Notwithstanding subsection (5), a policy adopted by the Board is only binding on the Appeals Tribunal where the policy is consistent with this Part or the regulations.

[16] The WCB has adopted Policy 8.2.1 "Adjournment and Referral of Appeal by Hearing Officer to Chair of Board of Directors."

[17] Section 4 of Policy 8.2.1 precludes referral decisions by a Hearing Officer to the Chair of the Board from the right of appeal in s-s. 243(1) of the *Act*:

> 4. A reference by a Hearing Officer to the Chair of the Board of Directors pursuant to Section 197(7) and 199 is not a final decision of the Workers' Compensation Board, and therefore is not the subject of an appeal to the Workers' Compensation Appeals Tribunal pursuant to Section 243(1).

[18] As noted above, pursuant to s-s. 183(5A) of the *Act*, policies like Policy 8.2.1 are binding on the WCAT, unless it is established that the policy in question is inconsistent with the *Act*.

BACKGROUND

[19] The dispute between the parties at the heart of this matter is Oxford's appeal from a decision of the WCB's Manager of Business Intelligence, Mr. Brian Field, setting Oxford's WCB rate grouping for 2015.

[20] As set out in Mr. Field's letter dated September 26, 2014 to Jordan Burkhardt, Oxford's Director of Human Resources, WCB Policy 9.3.1R1 is relevant to WCB's rate setting process:

> 1.4 Step 4 – Setting of Rates by Rate Group
>
> Assessment rates are determined for each rate group based on the rate group's five-year accident experience. This is referred to as the rate group's baseline rate.
>
> (emphasis added)

[21] WCB Policy 9.3.3R1 provides that data from five consecutive calendar years will be used in the rate setting process.

> 9.3.3R1
>
> Policy Statement
>
> 1. The data used for rate setting consists of claims costs and assessable payroll of each rate group over a period of five consecutive calendar years.
> 2. The claims cost data used will be the cash costs (actual cash payments on benefits) for the five year period for all claims with accident dates during that period…
> 3. The payroll used in the calculation will be the total assessable payroll on which the assessments are based for the same five years.
> 4. The Board will calculate the claims costs to assessable payroll ratio by assigning a weighting to each of the five years. A greater weight will be applied to the most recent year of costs and a lower weight to the most distant year…
>
> (emphasis added)

[22] However, Mr. Field's September 26, 2014 letter to Mr. Burkhart stated:

> The question we ask ourselves in forming industry groups and rate groups is how much we focus on short-term vs. long-term performance. Our goal is to set rates

> based on what we believe the true level of risk in an industry to be. At the end of the day, in setting 2015 rates, your industry was slotted in a rate group with costs about 1.6 times the provincial average. While that might appear high based on your most recent 5-year period alone, it is not out of line with longer-term performance.
>
> (emphasis added)

[23] On October 30, 2014 Oxford appealed its 2015 rate grouping. In its appeal, Oxford noted that the group rating had resulted in an increase in its WCB rates "despite our performance over the last 5 years fully justifying a rate reduction."

[24] A WCB Hearing Officer denied Oxford's appeal in a decision dated February 23, 2015. Oxford appealed that decision to the WCAT on March 27, 2015. Oxford made written submissions to WCAT in advance of the appeal hearing. WCB chose not to provide written submissions or other material regarding the WCAT appeal.

[25] The WCAT appeal was heard on June 6, 2016. No one attended or appeared on behalf of the WCB.

[26] On June 23, 2016 the WCAT issued a written decision, finding in favour of Oxford. In this decision, the Appeal Commissioner stated as follows:

> I accept the Firm's argument that the Board was limited to looking at five years of data in determining the proper Rate Group. Policy 9.3.3R1, entitled "Data Used in Rate Setting at Rate Group Level", supports this conclusion. It stipulates that the Board will look at claims costs and payroll over a period of five consecutive years. It is the data over those five years that determines the Industry Group's cost experience. This information is the basis for determining if other Industry Groups had similar experience, such that they could be combined in a Rate Group.
>
> The Board's September 26, 2014 decision noted that while the rate "might appear high based on your most recent 5-year period alone, it is not out of line with longer-term performance." (emphasis added) I interpret this language as meaning that factors outside of the relevant 5-year data impacted on the Rate Group choice for 2015. As such, I find this was incorrect.
>
> I do not have sufficient information to provide a specific remedy in terms of a more appropriate Rate Group. The reasons for this are outlined above, and given the lack of information, my alternate choice would be arbitrary.
>
> The appropriate disposition in this circumstance is to return the matter to the Board with a direction to revisit the Firm's Rate Group for 2015, and the other Industry Groups that comprise that Rate Group, and come up with a better Rate Group: one that reflects Industry Groups with similar accident experience, while giving credit to the Firm for a job well done in reducing accident experience.

(emphasis added)

[27] The decision was accompanied by a cover letter which outlined the right of the parties to seek leave to appeal to the Nova Scotia Court of Appeal. The WCB did not seek leave to appeal the WCAT decision.

[28] While there were some initial discussions between the WCB and Oxford as to how to implement the WCAT decision, by at least October 4, 2016, staff at the WCB voiced their opinion to WCB's Executive Committee that the WCAT erred in ruling that the WCB was limiting to using data from the most recent five years in establishing rate groups. This opinion is evident from the content of a PowerPoint presentation given by WCB staff to the Executive Committee on October 4, 2016:

> Rate Group formation does not, as noted by WCAT, have associated policy addressing:
>
> 1) what is meant by "similar accident experience";
> 2) what goes into Rate Group formation; or
> 3) how the WCB decides to move an Industry Group from its current Rate Group.
>
> Only policy 9.3.3R1 Data Used in Rate Setting at Rate Group Level touches on Rate Groups. It is a technical policy that specifies, among other things, that 5 consecutive years of claims costs and assessable payroll will be used to calculate the rate for each Rate Group.
>
> It's possible the lack of policy (or readily available information) on how we establish, monitor, and change Rate Groups led to WCAT reaching (incorrectly) to Policy 9.3.3R1 (emphasis added).
>
> (emphasis added)

[29] WCB staff recommended revisions to Policy 9.3.3R1 to the Executive Committee in response to the WCAT appeal decision and presented the following:

> - OPTION 1: (Oxford agrees to implementation of WCAT decision)
> - Address policy change through 1 stage policy development consultation as part of next policy agenda refresh.
> - Undertake steps to educated (sic) WCAT and the public in the interim around the "policy setting framework".
> - OPTION 2: (Oxford appeals the implementation of the WCAT decision)
> - Start policy development now and it becomes the next topic on the policy agenda

- Consider chair putting the appeal on hold as per section 248

• Next steps:

- Implement Oxford decision

- Monitor outcome of decision

- Prepare draft letter from the Chair to request appeal be put on hold.

(emphasis added)

[30] It is interesting to note that the WCB was considering that the Chair of the Board would put an appeal by Oxford "on hold" before Oxford had even received the Implementation Decision.

[31] Two days after the meeting of the Executive Committee, Mr. Burkhardt received a letter from Mr. Field advising how WCB intended to implement the WCAT decision. This October 6, 2016 "Implementation Decision" shows that the WCB continued to take the position that it could rely upon data older than five years in setting Oxford's rate group, despite WCAT's decision:

> Industry rate calculations, per Board policy, are made using 5 years of data. The formation of rate groups is a process that considers risk over a longer period of time.
>
> (emphasis added)

[32] Oxford's legal counsel wrote to Mr. Field taking issue with what it said was WCB's disregard of the WCAT decision which had accepted Oxford's argument that the WCB was limited to looking at five years of data in determining the proper rate group.

[33] In response, Mr. Field wrote to Oxford's counsel advising that the WCB disagreed with WCAT's decision, had chosen not to appeal that decision and was obligated to implement the decision. Mr. Field stated that his Implementation Decision would "stand as issued."

[34] On November 4, 2016 Oxford initiated an appeal of the Implementation Decision to a Hearing Officer. Among the grounds of appeal was that the WCB "had erred by considering data from a period of greater than five years in setting (Oxford's) new 2015 rate despite a clear ruling from the Tribunal that the WCB is limited to looking at five years of data […]."

[35] An email between WCB staff dated November 17, 2016 with a "re" line of "Oxford Appeal" states as follows:

> As you know, Oxford has appealed our implementation of the WCAT decision on their 2015 rates. We had presented a proposed go forward plan to EC a couple of weeks ago and decided that if/when they appealed we would put this plan in motion. Given that the appeal has now been filed, we will begin…
>
> During the EC discussion Stuart had committed to talk to the Chair about the fact that **the HO decision will be "punted"** to him to allow time for the policy development work. Can you confirm that this has been done?
>
> (emphasis added)

[36] The reference in this email to "Stuart" is to Stuart MacLean, the CEO of the WCB. Oxford contends that this email shows bias on the part of the WCB as well as improper or unlawful delegation or use of statutory authority. It says that the exercise of the Hearing Officer's authority to decide to refer an appeal which raises issues of law and policy to the Chair of the Board was usurped by a decision made by someone other than a Hearing Officer, to "punt" its appeal to the Chair prior to it being considered by a Hearing Officer.

[37] Later in the day on November 17, 2016, counsel for Oxford received correspondence from the WCB Internal Appeals Department acknowledging receipt of Oxford's Notice of Appeal to the Hearing Officer. This letter made no reference to its appeal being "punted" to allow time for the "policy development work", nor any mention that the CEO had "committed to talk to the Chair" of the Board of WCB about the "fact" that the Hearing Officer decision would be punted. Rather, the letter stated that the Hearing Officer "will begin reviewing your Notice of Appeal."

[38] On December 2, 2016 a memorandum from the WCB's Chief Financial Officer to the WCB Governance and Policy Committee was circulated. The Chief Financial officer stated that "If WCAT ends up again considering the correctness of the employers (sic) Rate Group in this latest appeal, this approach could become entrenched in the system […]." The memorandum set out the following recommendations to the Policy and Governance Committee included:

> - As per section 199 – "Referral to the Chair", the Hearing Officer **will** refer the current appeal back to the Chair for the Chair's consideration to be reviewed by the WCB of Directors (sic) pursuant to section 183.

> - Add policy development work on the WCB's rate setting process and associated policies as the next issue on the Revolving Program Policy Agenda to undergo policy development…
> - Limit the scope of the policy revisions to "fixing" the gap in understanding and application of the WCB's long standing rate setting process and policies…
>
> …
>
> - Upon completion of the policy development work, the Chair would then return the appeal to the Hearing Officer for a decision. The Hearing Officer would then take into consideration the new policy language when rendering the decision. This policy would also be binding on WCAT should the appeal proceed to that stage.
>
> (emphasis added)

[39] On December 15, 2016 WCB's Policy and Governance Committee met and passed a motion to initiate "policy development work" on WCB's rate setting and associated policies.

[40] That same day, Karen Webber, a WCB Hearing Officer sent a memorandum to the Chair of the Board of Directors advising that, pursuant to s. 199 of the *Act*, she was "of the opinion that this appeal raises an issue of law and general policy that should be reviewed by the Board of Directors pursuant to s. 183 of the *Act*." She concluded "I am adjourning the appeal and referring it to you."

[41] Also on December 15, 2016, the WCB Board of Directors met and passed a resolution to initiate "policy development work on the WCB Nova Scotia's rate setting process and associated policies."

[42] The Chair of the Board of Directors advised Hearing Officer Webber in a memorandum dated December 21, 2016 that, pursuant to s. 202 of the *Act,* the Board had determined that "exceptional circumstances exist and the adjournment will be for 12 months or the day on which the Board issues a policy, whichever is earliest."

[43] Oxford was notified of these decisions by phone on January 5, 2017, and in writing on January 16, 2017.

[44] On February 6, 2017 Oxford filed a Notice of Appeal of the Hearing Officer's December 15, 2016 decision to refer Oxford's appeal of the Implementation Decision to the Chair of WCB's Board of Directors.

[45] On February 9, 2017 Oxford filed the Notice of Judicial Review which gave rise to this motion. It requests the Court to judicially review both the Hearing Officer's Decision and the Board Decision to adjourn its appeal. Its grounds for review include a denial of procedural fairness, that the two decisions were not made in an independent and impartial manner; i.e., were the result of bias, or improper interference by someone other than the purported decision-makers and were an attempt to abuse the internal appeal procedures under the *Act*.

ISSUES

1. Is an appeal to the WCAT an adequate alternative to judicial review of the two decisions?
2. Are the decisions interlocutory, and accordingly not subject to judicial review?

LAW AND ANALYSIS

(a) Does an appeal to the WCAT provide an adequate alternative to the judicial review of the Hearing Officer's decision to refer Oxford's Appeal to the Board of Directors?

[46] For the reasons which follow, I find that an appeal of this decision to the WCAT does not provide Oxford with an adequate alternative to judicial review.

[47] At the outset it is important to note that Oxford does not dispute that the Hearing Officer had the statutory authority to refer its appeal to the Board of Directors. It contends, however, that at issue is how the WCB exercised its statutory authority. Oxford says that the WCB failed to exercised its statutory duties in a fair, reasonable, and unbiased manner. It says that there was a plan put in place by the WCB to usurp the free exercise of the Hearing Officer's discretion by senior WCB staff which made the adjournment of its appeal to the WCAT a *fait accompli*.

[48] As noted above, WCB Policy 8.2.1, "Adjournment and Referral of Appeal by Hearing Officer to Chair of the Board of Directors" provides that a Hearing Officer's decision to refer an appeal to the Chair of the Board "is not a final decision" and "therefore is not the subject of an appeal" to WCAT.

[49] Section 183 of the *Act* provides that WCB policies are binding upon WCAT, unless WCAT determines that the policy is inconsistent with the *Act*.

[50] What this means is that unless WCAT finds that Section 4 of Policy 8.2.1 is inconsistent with the *Act*, it would have to decline jurisdiction over Oxford's appeal from the Hearing Officer's decision.

[51] Pursuant to *Civil Procedure Rule 7*, Oxford was required to bring its judicial review within 25 clear days of January 6, 2017, the day the decision was communicated to it; i.e., by February 10, 2017. Had Oxford been required to proceed with an appeal to WCAT, and WCAT enforced Policy 8.2.1, dismissing its appeal, Oxford would be time-barred from commencing a judicial review of the Hearing Officer's decision.

[52] The Court of Appeal in *Kingsbury v. Heighton*, 2003 NSCA 80 stated that statutory or other appeals are not adequate remedies to judicial review where they might ultimately result in a missed limitation period for judicial review should appeals "prove fruitless." In *Kingsbury* a police officer was demoted and eventually dismissed by a board of police commissioners. He sought judicial review of both decisions. The board of commissioners contested the judicial review applications on the basis that the officer could have filed a grievance under his collective agreement or appealed to the Police Review Board under the *Police Act*. The Court of Appeal rejected these arguments on the basis that those alternate remedies were not adequate. The Court of Appeal stated at paras. 106-107:

> 106 The respondent did succeed in getting the union to file a grievance, but apparently thought better of pursuing it. Where would it have gotten him? The arbitrator, faced with the decision in *Regina Police Assn., supra*, might decline jurisdiction on the ground that the central character of the dispute was disciplinary and fell under the *Police Act*. The arbitrator might, on the same authority, judge that the ambit of the *Collective Agreement* did not embrace this dispute, citing Art. 2.02 thereof…
>
> 107 An appeal to the Police Review Board could be rejected on the ground that the Board's decision was not within the contemplation of the *Police Act* and the Regulations, and that there was nothing from which to appeal…

[53] I agree with counsel for Oxford that an appeal to the WCAT can only be an "adequate" alternative to judicial review if the WCAT determines that Section 4 of Policy 8.2.1 is inconsistent with the *Act* and determines not to enforce it. If, however, the WCAT determines that the Policy is consistent with the *Act*, Oxford's appeal to the WCAT would be dismissed. Oxford could appeal that decision to the Nova Scotia Court of Appeal, but such an appeal is likely to be on the sole ground of whether the Policy is, or is not, consistent with the *Act*. Oxford would have no

opportunity to bring forward its other issues relating to bias and lack of procedural fairness.

[54] The WCB argues that if the WCAT determines that the Policy is inconsistent with the *Act*, a WCAT appeal is an adequate alternative to judicial review. It says that the WCAT has greater experience and expertise in interpreting the *Act*, than does this Court. I agree with Oxford's submissions that that ignores the fact that Oxford has raised several grounds of review, including lack of procedural fairness, lack of independence, abuse of process, *issue estoppel* and *res judicata*. This Court has equal expertise and arguably greater experience on those issues than does the WCAT.

[55] The WCAT likely has broader remedial powers than this Court on judicial review, since the Hearing Officer's decision would be reviewed on a standard of reasonableness. However, Oxford's grounds of review include issues concerning lack of procedural fairness and bias. Those issues would be reviewed by this Court on a standard of correctness (*Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27, at para. 21).

[56] I conclude that an appeal to the WCAT of the Hearing Officer's Decision does not provide an adequate alternative to judicial review. Policy 8.2.1 precludes the WCAT from hearing an appeal from the Hearing Officer's Decision. If Oxford is unsuccessful in having the WCAT accept that it is not bound by Policy 8.2.1, Oxford would, from a practical perspective, be deprived of the right to seek judicial review because of the passage of the time period for doing so required by the *Civil Procedure Rules*.

(b) Are the Hearing Officer's Decision and the Board Chair's Decision interlocutory, and therefore not subject to judicial review?

[57] Oxford says that, in the circumstances, having its appeal heard by the WCAT will not provide it with an adequate alternative to judicial review because by the time its appeal is eventually heard by the WCAT, the WCB will have enacted a binding policy which will effectively reverse the previous WCAT decision in its favour. It says that the adjournment of its appeal resulted from a plan launched by the WCB to thwart the implementation of its win before the WCAT and that that plan was conducted in a manner which showed bias and lack of fairness in the exercise of the WCB's statutory powers.

[58] It is important to note that Courts will generally exercise their discretion to dismiss a motion for judicial review of an interim or interlocutory decision unless the review is justified by exceptional circumstances. Sara Blake in *Administrative Law in Canada*, 5th ed (Markham, Ontario: LexisNexis Canada Inc., 2011) provides at 239:

> Applications for judicial review filed before the tribunal has completed its proceeding are usually dismissed as being premature. Applications to challenge notices to commence proceedings or interim rulings made by the tribunal, including rulings as to their authority to proceed and constitutional issues, may be dismissed by the courts, if made prior to the conclusion of the tribunal proceeding. Courts prefer to avoid ruling on constitutional issues until absolutely necessary. Even allegations of bias on the part of the tribunal may be dismissed as premature, especially if the allegations have not been put to the tribunal for its ruling, or there is a right of appeal to another tribunal that may not suffer the same bias.
>
> Premature applications are not encouraged because they have the effect of fragmenting and protracting proceedings before the tribunal. They defeat one of the purposes of tribunal proceedings, which his to provide expeditious and inexpensive proceedings to deal with certain types of issues or problems. Often by the end of the proceeding, preliminary complaints are no longer of importance. A party may succeed in the result after having lost a number of preliminary challenges. They also defeat the purpose of the standard of review if the application is brought before there is a tribunal decision to which deference may be accorded. Courts prefer to consider all issues at once, rather than piecemeal, on the basis of a full record of the proceeding before the tribunal and the reasons for decision of the tribunal.
>
> Therefore, to obtain judicial review of an interim or preliminary ruling, the applicant must show exceptional or special circumstances that cannot await the conclusion of the tribunal's proceeding.

[59] Oxford characterizes the Hearing Officer's Decision as "final"; the WBC says the decision is interim or interlocutory.

[60] A test for distinguishing between interlocutory and final decision is formulated by Bateman J.A. in *Sydney Engineering Inc. v. Irving Oil Ltd.*, 1996 NSCA 5 (para. 12):

> It emerges from the cases that the distinction between interlocutory and final orders is not strictly parallel to the distinction between substance and procedure. Pleadings and joinder of claims and parties, for example, are generally regarded as matters of procedure, but orders in such matters can have drastic effects on what and against

> whom a party can claim. **Where such orders have a terminating effect on an issue or on the exposure of a party, they plainly 'dispose of the rights of the parties' and are appropriately treated as final.** Where such orders set the stage for a determination on the merits, they do not 'dispose of the rights of the parties, and are appropriately treated as interlocutory.
>
> (emphasis added)

[61] In the circumstances, I do not have to determine whether the Hearing Officer's decision and the Board Chair's decision are in effect "final" because I have determined to exercise the Court's discretion to hear the judicial review, even if it amounts to review of interlocutory or interim decisions. I find that there are special circumstances in this case which justify judicial review of these decisions, whether they are final or interlocutory.

[62] Although in the context of the review of an interlocutory decision of a human rights board of inquiry, the Nova Scotia Court of Appeal in *Nova Scotia (Environment) v. Wakeham*, 2015 NSCA 114 found that "special circumstances" existed such that an appeal of the interim decision should be heard. At issue in *Wakeham* was a human rights board of inquiry's decision to amend a complaint to allow a new ground of discrimination and to change the date the alleged discrimination took place to many years prior to the date set out in the original complaint.

[63] The Court of Appeal referred to the decision of the Federal Court of Appeal in *Szczecka v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 934 (F.C.A.), Létourneau, J.A.:

> [4] …unless there are special circumstances there should not be any appeal or immediate judicial review of an interlocutory judgement. Similarly, there will not be any basis for judicial review, especially immediate review, when at the end of the proceedings some other appropriate remedy exists. These rules have been applied in several Court decisions specifically in order to avoid breaking up cases and the resulting delays and expenses, which interfere with the sound administration of justice and ultimately bring it into disrepute.
>
> (emphasis added)

[64] In *Insurance Corp. of British Columbia v. Yvan*, 2009 BCCA 279 the Court of appeal stated:

> There is no hard and fast rule that a court will not hear a judicial review petition before a tribunal has rendered its final decision. While that is the general practice,

> there are many situations in which demands of justice and efficiency will weigh in favour of early intervention by the courts. Prematurity is not an absolute bar to judicial review, but a discretionary one…
>
> (emphasis added)

Yuan was followed in *Mzite v. British Columbia (Minister of Public Safety and Solicitor General)*, 2014 BCCA 220. At issue in *Yuan* was whether a judicial review application from a preliminary decision by a human rights tribunal refusing to strike a human rights complaint was premature. The Court in *Mzite* explained (at para. 34) that the factors which had led it to conclude that the application in *Yuan* was not premature included the following:

> a. Hearing the judicial review application would not result in a fragmentation of the administrative proceedings; and
>
> b. The question raised on the judicial review application as closely related to whether the tribunal was acting within its jurisdiction.

[65] At issue in *Mzite* was a preliminary decision by a human rights tribunal to proceed with hearing a late-filed complaint. The respondent sought judicial review of the tribunal's decision; the claimant argued that the decision was interlocutory, and that the application should be dismissed as premature. The reviewing judge allowed the application and set aside the tribunal's decision. The Court of Appeal refused to interfere with this aspect of the chambers judge's decision on appeal, noting that:

> 41 The decision under review was, however, substantive, rather than a procedural decision. The resolution of the question is of significant value to the parties. Its resolution prior to the hearing of the substantive component could potentially result in a saving of significant time and expense on the part of all parties. The decision arose out of a distinct preliminary process and the petition was brought before the substantive hearing had commenced, during an interval in the proceedings. It cannot be said that the petition so interfered with the process of the Tribunal that it ought not to have been heard.

[66] The Divisional Court also raised fairness as a basis for judicially reviewing an interlocutory decision in *McIntosh v. College of Physicians & Surgeons*, 1998 CarswellOnt 4803 (Div. Ct.). In this case, the College failed to give a physician notice of a complaint by a former patient for four and a half years, while the complainant decided whether to pursue the complaint. The College then referred

the matter for a disciplinary hearing. The Court allowed an application for judicial review from the referral decision, notwithstanding that the disciplinary process had not yet been completed, and noted as follows:

> 38 In the case of *Gage v. Ontario (Attorney General)* (1992), 90 D.L.R. (4th) 357 (Ont. Div. Ct.) the Ontario Divisional Court stated in part at p. 553:
>
> > If there is a prospect of real unfairness through denial of nature justice or otherwise**, <u>a superior court may always exercise its inherent supervisory jurisdiction to put an end to the injustice before all the alternative remedies are exhausted</u>**…
>
> 39 I am of the view that this is such a case… (emphasis added).

[67] On judicial review Oxford has raised very significant issues which go directly to the WCB's jurisdiction and authority under the *Act* to make decisions. It alleges on the basis of the various documents referred to above, that the Hearing Officer was effectively stripped of her statutory authority to determine whether to refer Oxford's appeal to the WCAT by other WCB decision makers who had a plan to reverse the effect of the WCAT decision in Oxford's favour – a decision which the WCB chose not to appeal.

[68] I find that judicial review of the Hearing Officer's decision and the Board Chair's decision is appropriate in the circumstances.

CONCLUSION

[69] WCB's motion to dismiss Oxford's judicial review is dismissed with costs payable to Oxford forthwith. If the parties are unable to agree on costs, I will receive written submissions within 30 calendar days of this decision.

Smith, J.

SUPREME COURT OF NOVA SCOTIA

Citation: *Oxford Frozen Foods Ltd. v. Nova Scotia (Workers' Compensation Board)*, 2017 NSSC 136

Date: 20170530
Docket: Hfx No. 460266
Registry: Halifax

Between:

Oxford Frozen Foods Limited

Plaintiff

v.

The Workers' Compensation Board of Nova Scotia,
Attorney General of Nova Scotia

Defendants

Judge: The Honourable Justice Ann E. Smith

Heard: May 17, 2017, in Halifax, Nova Scotia

Counsel: John A. Keith, Q.C., for the Plaintiff
Bradley D. J. Proctor, for the Defendant

Erratum: **June 2, 2017**

Title Page reads:
"**Counsel:** John A. Keith, Q.C., for the Plaintiff"
should read:
"**Counsel:** John A. Keith, Q.C. and Jack K. Townsend, for the Plaintiff"