CA 165302

NOVA SCOTIA COURT OF APPEAL

Cite as: Born With Three Thumbs v. Middleton (Town) Water Utility, 2001 NSCA 88

Roscoe, Flinn and Oland, JJ.A.

BETWEEN:

THE TOWN OF MIDDLETON WATER UTILITY, a water utility as defined in the *Public Utilities Act* and **THE TOWN OF MIDDLETON**, a body corporate under the provisions of the *Municipal Government Act*

Appellants

- and -

NOVA SCOTIA UTILITY AND REVIEW BOARD, a body corporate under the *Utilities and Review Board Act*, and **ARDY BORN WITH THREE THUMBS**

Respondents

REASONS FOR JUDGMENT

Counsel: W. Bruce Gillis, Q.C. for the Appellants
Richard J. Melanson for the Respondent Board
Ardy Born With Three Thumbs in Person

Appeal Heard: March 23, 2001

Judgment Delivered: May 23, 2001

THE COURT: The appeal is allowed without costs and the order of the Board is set aside as per reasons for judgment of Roscoe, J.A.; Flinn and Oland, JJ.A., concurring.

ROSCOE, J.A.:

[1] This is an appeal from an order of the Nova Scotia Utility and Review Board (the Board) dated July 7, 2000 which ordered the appellant Town of Middleton Water Utility (the Utility) to restore water service to the respondent's residence. The only issue before the court is whether the Board had the jurisdiction to make the order.

Background

[2] The appellant, the Town of Middleton Water Utility, is a public utility as defined by and subject to the **Public Utilities Act**, R.S.N.S. 1989, c.380, as amended. The other appellant, the Town of Middleton (the Town), owns the Utility. Ms. Ardy Born With Three Thumbs (the respondent) is a resident of the Town and has, at various times over several years, been a customer of the Utility. The respondent's claim to be entitled to an Aboriginal right to the water, and thus exempt from paying the water rates charged by the Utility, has led to a series of disputes between her and the Town. Attempts by the Utility to collect the water rates charged to the respondent have resulted in the Utility shutting off the respondent's water service on three occasions. After one such occasion, the respondent was charged with and later convicted of pointing a firearm and threatening a police officer. As a result of the ongoing clashes between its employees and the respondent, the Utility installed a water shut off valve across the street from the respondent's property.

[3] On September 21, 1999, the respondent wrote to the Board complaining of the Town's threat to shut off the water and asked the Board to advise the Town of her constitutionally protected right as an Aboriginal person to have a free supply of drinking water. In response to a telephone inquiry from the Board, in a letter dated September 27, 1999, the Town advised the Board of the procedures it followed and the various notices given to the respondent of the consequences of continued non-payment of the water bill.

[4] On October 4, 1999, the Town wrote to the Board setting out the history of the dispute with the respondent and requesting authority to permanently terminate her water service. The Town Clerk indicated that when Town employees attended at the respondent's property to shut off the water, they found that concrete had

been poured into the pipe leading to the shut off valve. It was necessary to dig up the street to effect repairs to the water service. The Town sent the respondent an additional bill in the amount of $417.27 representing the costs of the repairs and indicated that there would be a further charge of $654.91 in order to reconnect the service in the future. By a further letter sent on October 8, 1999, the Town advised the Board that it had disconnected the respondent's water supply, and although the outstanding bill for water had been paid, the additional costs of the repairs to the system remained outstanding. The Town Clerk stated:

> The Town is aware that Ms. Three Thumbs has hired a well drilling contractor and is in the process of having a well drilled and connected to her residence and it appears unlikely that she will pay the amounts due the Utility for these damages which, in accordance with the Town's Utility Regulations, provides authority for continued refusal of service by the Town and it may, therefore, not be necessary to request authority from the Board for permanent shut-off status on this property.
>
> Please table the requested authority for permanent shut-off status, per the Town's letter of October 4, 1999, pending any further request filed by the Town on this account.

[5] On November 18, 1999, the respondent wrote to the Board complaining that her water service had been terminated despite the fact that the outstanding water bill had been paid. She requested that the water be turned back on. The next day, the Utility wrote to the Board asking it to reactivate the earlier request for authority to permanently terminate water service to the respondent.

[6] As a result of the complaint by the respondent and the request from the appellants, Board staff reviewed the matter. On February 7, 2000, the Board wrote to the parties advising that it had concluded that the Utility had acted in accordance with its rules and regulations when it shut off the water because of the unpaid water bill. With respect to the additional charges to the respondent, it stated:

> However, the Board does not believe it is appropriate for the Utility to hold the complainant responsible for the cost of excavation of the shut off valve and subsequent work on the site to prepare for future reconnection of service. While the Utility may believe that the complainant is responsible for the damage to the shut off valve, it is the Board's understanding that no legal action has been initiated by the Utility in this regard. As a monopoly providing an essential service to customers, the Middleton Water Utility has a duty to serve customers, and is not entitled to withhold service in order to collect a debt when it has not

> been established through any legal process that the debt is owed. In the absence of satisfactory evidence that the complainant is responsible for the costs incurred by the Utility, it is premature, in the Board's view, for the Utility to bill the complainant for these costs.

[7] The Board also advised the Utility that in its view the Utility did not have the authority to permanently disconnect services to the respondent. It suggested that it might be feasible to request police protection if the safety of the Utility's workers was a concern. It also noted that the Utility was authorized by its regulations to request a deposit equal to estimated billings for a period of six months. The Board's letter concluded:

> In view of the circumstances involved in this case, the Board believes that it is reasonable for the Utility to require a deposit in accordance with the provision noted above, along with the $10 reconnection fee provided for in the regulations, prior to the reconnection of water service to these premises.

[8] Neither the respondent nor the Town replied or took any action following that letter until May 23, 2000 when the respondent again wrote to the Board complaining that the Utility had not reconnected her water, and asking the Board to order the Utility to waive the requirement for a deposit. She expressed fears that her well was contaminated and renewed her claim to have an Aboriginal right to the water. This letter was not copied to either the Utility or the Town.

[9] In response to the respondent's letter of May 23rd, the Board issued the order dated July 7, 2000, which is the subject of this appeal. The order recites the respondent's letter of complaint dated November 18, 1999, the investigation by the Board and the respondent's letter of May 23, 2000 and concluded:

> Pursuant to the powers of the Board under the **Public Utilities Act, IT IS THEREFORE ORDERED**, that the Utility restore water service to the Complainant's residence in accordance with the terms set out in the Board's February 7, 2000 letter.

[10] In response to the order, the Town Clerk wrote to the Board on the same date, indicating that it wished ". . . to clarify the details set out as conditions for reconnection of water to subject property". Several issues needing clarification were set out, including that there was no contract for service as required by the Utility's regulations, that the property had been sold at a tax sale and the new

owner was not the resident, that a water meter had been removed from the property and not returned to the Utility as requested, that there was still an outstanding account, and no deposit had been paid. As well, the clerk advised that the Utility's regulations prohibited cross connections, and therefore they would require certification from a qualified plumber that the well service had been properly removed, in order to prevent water from the well entering the Town's water supply. Finally, there were issues concerning the safety of the Utility's workers and questions about responsibility for the extra cost for their protection or the hiring of independent contractors to do the reinstallation. The letter concluded:

> Since, under provision of OH & S [Occupational Health and Safety Regulations], where workmen are not required to enter areas where there is a risk of injury to themselves, the enforcement of collection becomes a problem. Is the Board now ordering provision of free water to Ardy Born With Three Thumbs?
>
> I would appreciate receiving clarification on all these points as soon as possible, to address any possible requests for service from Ardy, as we understand she now has a fully functioning water supply that is not a health risk to her family.

[11] The Town did not receive any reply from the Board. On August 3, 2000, the Town and the Utility filed a notice of appeal from the order dated July 7, 2000.

Issues

[12] The appellants state three issues in their factum:

1. Is there any jurisdiction afforded the Board to make an Order of the type appealed from?

2. If there is, could the Order be made without a Hearing?

3. If so, did the Board err in holding that the Utility was obliged to restore water service in the circumstances of this case?

[13] Although the Attorney General and the Board were served with the notice of appeal, neither had indicated any intention to participate in the appeal. In response to a request from the court, counsel for the Board filed a factum and attended the hearing of the appeal to address the jurisdictional issues raised by the appellants.

[14] The respondent, in her factum and oral presentation, did not comment on the

jurisdictional issues, but instead asked the court to declare that she is entitled to an Aboriginal right of access to drinking water. However, since the order subject to appeal does not decide or otherwise involve that issue, that question is not properly before this court.

Analysis

[15] A review of the **Public Utilities Act** and the **Utility and Review Board Act,** S.N.S. 1992, c. 11 indicates that while the Board has broad authority to investigate or inquire into the type of complaint made by the respondent in this case, and the power to make an order to reconnect water service in some circumstances, for reasons which I will develop, in my opinion the Board lacks jurisdiction to act on the results of its investigation as it did in this case without giving notice to the Utility, and allowing the opportunity to be heard and to respond to the complaint. It is the second issue raised by the appellants that requires intervention of the court.

[16] The Board acquires its jurisdiction to supervise the Utility and inquire into its operation from s. 18 of the **Public Utilities Act** (**PUA**):

> 18 The Board shall have the general supervision of all public utilities, and may make all necessary examinations and inquiries and keep itself informed as to the compliance by the said public utilities with the provisions of law and shall have the right to obtain from any public utility all information necessary to enable the Board to fulfil its duties.

[17] Section 19 of the **PUA** provides authority to summarily investigate a matter, as it did in this case after receiving the complaint from the respondent:

> 19 Whenever the Board believes that any rate or charge is unreasonable or unjustly discriminatory, or that any reasonable service is not supplied, or that an investigation of any matter relating to any public utility should for any reason be made, it may, on its own motion, summarily investigate the same with or without notice.

[18] Section 46 confers jurisdiction to compel compliance with the **PUA** and other legislation, by stating:

> 46 The Board shall have power, after hearing and notice by order in writing, to require and compel every public utility to comply with the provisions of this

> Act and any municipal ordinance or regulation relating to said public utility, and to conform to the duties imposed upon it thereby by the provisions of its own charter, if any charter has or shall be granted it, provided, that nothing herein contained shall be held to relieve any public utility or its officers, agents or servants, from any punishment, fine, forfeiture or penalty for violation of any such law, ordinance, regulation or duty imposed by its charter, nor to limit, take away or restrict the jurisdiction of any court or other authority which now has or which may hereafter have power to impose any such punishment, fine, forfeiture or penalty.
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> [emphasis added]

[19] Section 47 provides further jurisdiction for the Board to inquire into "any neglect or violation" by the Utility of any applicable laws and regulations and s.80 provides the power to inspect and order production of the books and other documents maintained by the Utility and to examine an employee of the Utility under oath. Likewise, ss. 33 and 51 of the **PUA** obligate a utility to assist and co-operate in the course of an investigation by the Board and to furnish information as requested. Section 79 states that the Utility itself may make a complaint about any matter affecting its own service.

[20] Section 82 allows the Board "with or without notice" to the Utility to make an order appointing a person to make an investigation into or test the services supplied by the Utility. Section 83 provides that upon the complaint to the Board by a municipal corporation or any five persons, the Board shall proceed, "with or without notice", to investigate as it deems necessary, and may order changes in the rates or regulations as it deems just ". . . but no such order shall be made or entered by the Board without a public hearing or inquiry first had in respect thereof." The following sections provide:

> 84 The Board shall, prior to such formal hearing, notify the public utility complained of that a complaint has been made, and after reasonable notice has been given, the Board may proceed to set a time and place for a hearing and an investigation as hereinafter provided.
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> 85 (1) The Board shall give the public utility and the complainant, if any, ten days notice of the time and place when and where such hearing and investigation will be held and such matters considered and determined.
>
> (2) Both the public utility and complainant shall be entitled to be heard and shall have process to enforce the attendance of witnesses.

[21] Further authority to intervene after an investigation is conferred on the Board by s. 87:

> 87 (1) If upon any investigation the rates, tolls, charges or schedules are found to be unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of this Act, the Board shall have power to cancel such rates, tolls, charges or schedules, and declare null and void all contracts or agreements in writing or otherwise, to pay or touching the same, upon and after a day to be named by the Board, and to determine and by order fix, and order substituted therefor, such rate or rates, tolls or schedules as shall be just and reasonable.
>
> (2) If upon such investigation it shall be found that any regulation, time schedule, act or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of any of the provisions of this Act, or if it is found that reasonable service is not supplied, the Board shall have power to determine and substitute therefor such other regulations, time schedules, services or acts and to make such order respecting any such changes in such regulations, time schedules, services or acts as shall be just and reasonable.

[22] Sections 88 and 89 provide authority to convene a formal hearing after summary investigation:

> 88 (1) If after making any summary investigation, the Board becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested a statement notifying the public utility of the matters under investigation.
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> (2) Ten days after such notice has been given the Board may proceed to set a time and place for a hearing and an investigation as in this Act provided.
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> 89 Notice of the time and place for such hearing shall be given to the public utility and to such other interested persons as the Board shall deem necessary, as provided in this Act, and thereafter proceedings shall be had and conducted in reference to the matter investigated in like manner as though a complaint had been filed with the Board relative to the matter investigated, and the same order or orders may be made in reference thereto as if such investigation had been made on complaint.

[23] The **Utility and Review Board Act** also authorizes the Board to inquire into matters within its jurisdiction (s.15), but there does not appear to be any

jurisdiction to order a utility to do anything as a result of an investigation or as a result of an application without first having a hearing.

[24] Counsel for the Board acknowledges that the Board in this case was not exercising jurisdiction pursuant to ss.79 or 83 of the **PUA**. He also agrees that the s. 47 investigative powers of the Board are linked to s. 46 which requires a formal hearing process. He has referred to the Rules for the Regulation of Practice and Procedure, which are regulations made pursuant to the **PUA**, and particularly Rule III and Rule IV(10):

> Rule III
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> 1 Unless otherwise provided by law applications to the Board shall be by petition or notice in writing, divided into paragraphs and numbered consecutively, setting forth clearly and concisely in ordinary language, the nature of the application and the relief or remedy sought, and may be in the form set forth in the Schedule "A" hereto, or to the like effect.
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> 2 Upon the presentation of such application the Board shall consider whether or not in its judgment the same is of such a nature as *prima facie* to admit of relief, or to justify redress under the law. For this purpose, the Board may make such *ex parte* investigation as it may deem proper. If the Board is of the opinion that the application is not of the nature described, then the Board shall notify the complainant or his solicitor to that effect, and opportunity may be given the complainant to amend his complaint within a specified time. If in such event the complaint is not amended so as to set forth a cause which in the judgment of the Board *prima facie* admits of relief or justifies redress, then the same shall be dismissed by the Board.
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> 3 If the Board or any acting commissioner is of opinion that such complaint, either as originally filed or as amended, is of such a nature as *prima facie* to admit of relief or to justify redress, as aforesaid, then an order shall be made as of course, directed to the person, firm or corporation complained of, and requiring that the matter complained of be satisfied, or that the complaint be answered in writing within ten days from the service of said order, provided however, that the Board in its discretion may prescribe a less period of time for satisfaction or answer. Such order, together with a copy of the complaint, shall be served on the person, firm or corporation complained of by letter mailed to his or its last known or registered address, or in any manner in which service is authorized to be made by these rules or the *Public Utilities Act*.

4 If such person, firm or corporation shall satisfy the subject matter of such complaint, before the time allowed in the order for satisfaction or answer, then he or it shall notify the Board to that effect. In such event, the Board shall thereupon transmit a copy of such notice to the complainant or his solicitor, and no further action need be taken.

5 If satisfaction be not made as aforesaid, than [then] the person, firm or corporation complained of, must, within the time specified in the order, file an answer to the complaint and serve a copy thereof upon the applicant or his solicitor.

6 If satisfaction be not made as aforesaid, then after the expiration of the time allowed for answer and whether the answer has been filed or not, the Board shall determine whether or not relief should be granted, and for this purpose may make such investigation and hold such hearings as it may deem necessary.

7 The Board shall then make and file an order either dismissing the petition, or directing the person, firm or corporation complained of to satisfy the cause of complaint in the manner specified by the Board.

. . .

9 Any party shall be entitled to raise by answer or reply any point of law, and any point of law so raised shall be disposed of by the Board at the hearing. Provided that by consent of the parties or by order of the Board or the application of either party, the same may be set down for argument and disposed of at any time before the hearing.

. . .

Rule IV

. . .

10 In all cases in which the Board is authorized by law to make investigations of its own motion, it may, if it deems proper, conduct its investigations *ex parte* and without notice to the person, firm or corporation concerned. Before passing any final order, however, the Board shall in such cases formulate a complaint, setting forth fully and clearly the acts, omissions or matters which are the subject thereof, and a copy thereof, together with an order of the Board directed to the person, firm or corporation complained of, and requiring that the matter complained of be satisfied, or that the complaint be answered within twenty days from the service thereof, or within such less times as the Board may prescribe, shall be served on the person, firm or corporation complained of, in any manner authorized by law, and thereafter the proceedings shall be such as are set forth in Rule III so far as the same are applicable.

[25] Counsel for the Board submits that the Board acted under either s. 19 or s. 88 of the **PUA** when it investigated the complaint from the respondent and that by sending the letter dated February 1, 2000, it was acting under the authority of Rule IV(10). It is submitted that the July 7, 2000 order was made pursuant to Rule III(3).

[26] I would agree that the Board had the power to investigate the complaint received by the respondent by invoking s. 19 which gave it authority to investigate a matter relating to a public utility on its own motion, and that it was not necessary to give the Utility notice of the investigation. I will discuss the s. 19 process further after considering whether s. 88 is applicable.

[27] I would not agree that the procedure invoked by the Board in this case was an application of s. 88. Section 88 specifically requires notice and a hearing. Although s.87 is one of the sections which indicates that an order may be made by the Board, that section, when read in the context of the whole part of the **PUA** entitled "Procedure and Practice" which begins at s. 80 and continues to s.100, in my opinion, does not either stand alone or provide authority to order a utility to reconnect service without first having a formal hearing. The legislative scheme of that part proceeds as follows:

> the Board may initiate the process by inspecting the documents of the Utility (s. 80);
> or by appointing a person to investigate the service (s. 82);
> or, if a complaint is received from five people or a municipality, the Board shall investigate and may make an order after a public hearing (s. 83).
>
> Prior to the formal hearing referred to in s. 83, the Board must give the Utility notice of the complaint (s. 84); and
> notice of the hearing and <u>investigation</u> (s. 85(1));
> at which the Utility has the right to be heard (s. 85(2)).
>
> Notice of a hearing of an application to change a utility's rates must be advertised in a newspaper (s. 86);
> and if upon <u>any investigation</u> the rates are unjust or in violation of the **Act**, the Board has the power to order a change in the rates (s. 87(1));

> or, if upon such investigation, an act or service complained of is unjust, the Board may order a change (s. 87(2)).
>
> If, after making a summary investigation, the Board is satisfied that a formal hearing is necessary, it shall notify the Utility (s. 88(1)); and after ten days set a time and place for the formal hearing (s.88(2)).

The balance of the part, commencing with s. 89, deals with the formal hearing process.

[28] To review, in this case, the Board investigated the matter after receiving the respondent's initial complaint in September, 1999. Then it sent the letter in February, 2000, advising that the disconnection was proper but the charge relating to repairing the shut off valve was not. The Board expressed its belief that a deposit would be reasonable. Next, without further investigation or hearing, the Board made the July 7, 2000 order requiring reconnection. If the order was intended to be further to the process outlined above, beginning at s. 80, it was improperly made without notice of the investigation and hearing and the right to be heard as required by either s. 85 or s. 88.

[29] Returning to the submission that the investigation was pursuant to s. 19, as indicated, that section does permit the Board to investigate whether reasonable service is supplied by the Utility. The submission by counsel for the Board is that following a s. 19 investigation, the Board may, by applying Rules IV(10) and III(6), cited above:

> . . . formulate a complaint and require that the matter be satisfied or that the complaint be answered within a time prescribed by the Board and issue an order in this regard. Whether or not an answer is filed by the Utility, it is submitted Rule III(6) allows the Board discretion as to whether or not to hold hearings and the form any such hearing will take. Rule III(6) also gives the Board jurisdiction to make a final order in relation to the subject matter of the complaint.
>
> Therefore, the Board submits there is a statutory jurisdiction and a legislative process whereby it can make an Order of the type in issue without recourse to a hearing.

[30] Counsel for the Board conceded in his oral argument that if the **PUA** requires a hearing before an order of the type under appeal, that the rules cannot

circumvent that requirement.

[31] There are, in my opinion, substantial problems with the submission that Rules IV(10) and III(6) were engaged in this case. First, the Board did not "formulate a complaint". The letter to the Utility dated February 7, 1999, could not, on any reasonable reading of it, be considered to be a complaint setting forth fully and clearly the acts complained of, together with an order of the Board requiring that the matter be satisfied or be answered within 20 days, or such other time prescribed. The letter simply advised of the Board's conclusion that the disconnection was allowed, that the charge for repairs was not, and that requiring a deposit would be "reasonable". Even if the letter was intended to be either the formulation of a complaint or an order, it did not, as proposed by Rule IV(10), require anything to be satisfied or answered within any specified time.

[32] Another difficulty with the suggestion that the process utilized was pursuant to Rules IV(10) and III(6), is that Rule III(3) contains similar language to Rule IV(10), and indicates that if an order is made, the Utility would be given an opportunity to answer the complaint within 10 days. If the July 7th order was pursuant to Rule III(3), then the Utility did answer the complaint by its letter of the same date. Rule III(6), in the event that an answer is filed, would require the Board to ". . . make such investigation and hold such hearings as it may deem necessary". The Board should not have proceeded by making an order pursuant to Rule III(7) without a hearing because the letter from the Utility raised significant issues that needed clarification. The letter from the Utility raised points of law, requiring, at the very least, interpretation of its regulations respecting contracts of service and cross connections. Therefore, Rule III(9) would demand that the Board have a hearing before disposing of the matter.

Conclusion

[33] In the circumstances of this case, the **PUA** does not confer jurisdiction on the Board to order the Utility to reconnect the respondent's water service without first giving the Utility an opportunity to be heard, and in my opinion, neither do the rules bestow any jurisdiction to proceed without a hearing. The Board exceeded its jurisdiction by ordering the reconnection without providing the Utility an opportunity to present its case at a hearing of the Board. It is not necessary to deal with the arguments concerning the rules of natural justice or the third ground of

appeal.

[34] The appeal should be allowed and the order of the Board dated July 7, 2000, should be set aside. There should be no order of costs.

Roscoe, J.A.

Concurred in:

Flinn, J.A.

Oland, J.A.