NOVA SCOTIA COURT OF APPEAL

Citation: *Yarmouth District (Municipality) v. Town of Yarmouth Water Utility*, 2008 NSCA 39

Date: 20080425
Docket: CA 279520
Registry: Halifax

Between:

Municipality of the District of Yarmouth

Appellant

v.

Town of Yarmouth Water Utility

Respondent

Judge(s):	Cromwell, Oland, Fichaud, JJ.A.
Appeal Heard:	November 27, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Oland, J.A.; Cromwell and Fichaud, JJ.A. concurring.
Counsel:	Raymond Jacquard, for the appellant Gregory Barro, for the respondent

Reasons for judgment:

[1] The Municipality of the District of Yarmouth (the "Municipality") appeals a decision of the Utility and Review Board (the "Board") concerning hydrants located in its jurisdiction. For the reasons which follow, I would dismiss its appeal.

[2] In March 2003, the Town of Yarmouth Water Utility (the "Utility") installed and paid for three hydrants along a transmission line. The residents of several properties in the Municipality had had problems with the quality of their drinking water, and the hydrants allowed the semi-annual flushing of the line to rectify that problem. The Municipality neither requested nor was consulted regarding the installation of the hydrants.

[3] The Board sets the rates to be charged by the Utility to its customers. By a decision dated December 23, 2002, it had ordered the apportionment of the fire protection charge between the Town of Yarmouth (the "Town") and the Municipality based on the number of hydrants owned and operated by the Utility in each jurisdiction. The Town's factum set out a useful review of the history of the fire protection charge. After noting that, based on the evidence before it, the Board determined that the percentage of the Utility's assets allocated to fire protection was 39%, it continued:

> The Utility's assets allocated to fire protection include more than just hydrants. In order to fight fires, a water utility must have the capacity to provide water in increased amounts and at increased rates, more capacity than if it was just providing water for household and commercial purposes. To reflect this requirement a fire protection charge is paid to the Utility each year by the municipalities that make use of the water provided by the Utility to fight fires. See *Antigonish (Town of), (Re),* 2001 NSURB 82 (CanLll), paragraph 9:
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> > . . . The 1991 AWWA Manual M1, entitled *Water Rates*, published by the American Water Works Association, says this with respect to fire protection service at p. 21:
> >
> > > *Fire-protection service has characteristics that are markedly different from other types of water service. The service provided is principally of a*

> *standby nature - that is, readiness to deliver relatively large quantities of water for short periods of time at any of a large number of points in the water distribution system while the total annual quantity of water delivered is relatively small.*

The 39% figure was then used to calculate the total fire protection charge, which for the year 2004/05 amounted to $507,200. This amount was ordered to be apportioned between the Town of Yarmouth and the Municipality of the County of Yarmouth based on "the number of hydrants owned and operated by the Utility in each location as of October 1 of the previous year."

As was pointed out at the hearing, the Appellant has chosen not to challenge the method used to apportion the fire protection charge (ie. counting fire hydrants). The Appellant could have chosen to apply to the *Board* to determine a better method to allocation the fire protection charge.

The *Board* has entertained such requests in the past. See *Antigonish (Town of), (Re), supra*. In this decision the *Board* recognized that the fire hydrant count method is one of a number of imperfect ways to allocate the fire protection charge. The *Board* observed the following:

> [91] The Board concurs with Mr. Isenor's observation at the hearing that there is no totally fair way to allocate the total fire protection charge between two municipalities where the utility of one municipality supplies both the water and the storage capacity to fight fires to the water utility in the adjacent municipality. He reviewed the following methods:
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> fire hydrant count
>
> service connection count
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> metered sales
>
> total assessment value
>
> required fire flows

The *Board* further observed the following regarding the difficulties experienced when the fire hydrant count method is used:

[95] All parties are in agreement that whatever method is adopted to determine the County's share of the fire protection charge, the fire hydrant count method (or alternatively, the fire hydrant charge method) should not be one of them. The Board agrees and would make the following comments as to why it agrees.

[96] The use of the expression "hydrant charge" is confusing in that customers tend to forget that the hydrant charge covers more than the cost of the hydrant. AWWA Manual M26, referred to above, puts it this way at p. 9:

> *It should be recognized that the charge per public hydrant connection is simply a method of expressing total annual public fire-protection-related costs on the basis of some measurable unit. It is only incidentally related to the actual number of hydrants.* ***Agencies reviewing proposed fire-service charges sometimes fail to realize that a charge per fire hydrant is not limited to the costs of the hydrant alone, but is due to the total costs allocated to public fire service.***

[97] The Board agrees with this statement and would emphasize that the fire protection charge is in essence a charge for the recovery of the cost of providing a service. While that service is in a sense service to hydrants, that means no more than to say that general water service to individual customers is service to their meters. At most, the use of the term "hydrant charge" is a shorthand way of referring to the fire protection charge. **While hydrants may be used as a unit of measurement for purposes of distributing the fire protection charge, that does not change the essential nature of the fire protection charge.** As pointed out at the beginning of this decision, the provision of fire protection service covers much more than the provision of hydrants. It is to be noted that in its 1980 decision the charge to the County was not called a "hydrant charge". It was correctly described as the "Fire Protection Charge" to the County. **Apart from the actual supply of water needed to fight a fire, the purpose of the fire protection charge to the County is to compensate the Town Utility for providing and maintaining the utility plant necessary to conduct the water to the boundaries of the Fringe Area for purposes of fighting fires.** (emphasis added)

> [98] Furthermore, the Board pointed out at p. 9 of its decision dated September 29, 1999 on an application by the Town of Windsor for rate increases that:
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> > *The Board also has difficulty with fire protection rates being charged on a per-hydrant basis, especially given the growth suggested for the areas of the Municipality, which implies an increase in the future number of hydrants. It has been the Board's experience that fire protection rates charged on a per-hydrant basis often create controversy when the number of hydrants within a Utility's service area changes from that of the date of the Board Order.*

[4] The Town's Fire Department provides fire protection to parts of the Municipality adjacent to the Town, and the Municipality funds 30% of that service's budget. In 2004, the Utility included the three new hydrants in calculating the hydrant rental fee, the rate the Municipality pays pursuant to the Board's 2002 order. That inclusion increased the Municipality's proportionate share of the fire protection charge.

[5] The Municipality applied to the Board pursuant to s. 83(1) of the *Public Utilities Act*, R.S.N.S. 1989, c. 380 (the "*Act*"), claiming that the rate charged was unjust, unreasonable or unjustly discriminatory (s. 87(1)), and that the Utility's installation of those hydrants without its consent or knowledge was an unjust and unreasonable act or service (s. 87(2)). It sought confirmation that the Utility cannot install fire hydrants in the Municipality for fire protection purposes without being contracted by the Municipality, and asked the Board to fix its share of the public fire protection rate to one reflecting the proportionate number of hydrants for which the Municipality has contracted and agreed to be installed in its jurisdiction.

[6] By decision and order dated March 8, 2007, the Board dismissed the Municipality's application. Its order read in part:

> **IT IS HEREBY ORDERED** that the Board finds:

> 1. The Utility has the power to add and repair its infrastructure without seeking permission.
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> 2. Installation of hydrants should be at the request of the Fire Department.
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> 3. The disputed hydrants did provide benefit to the adjacent property owners.
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> . . .
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> 6. The Municipality should have been consulted about the installation of the hydrants.

In its decision, the Board stated that although the Municipality should have been consulted, the fact that its residents receive a fire protection benefit, whether inadvertently or not, is more persuasive than the Municipality's argument that the hydrants should not be included in the count.

[7] While the Municipality listed six grounds in its notice of appeal, several relate to its submissions that the Utility should have obtained its approval prior to the hydrant installation if those hydrants are to be included in calculating the fire protection rate. These I will treat as a single ground in my analysis. In the result, there are four issues for consideration, namely:

1. Whether the Board erred in law by concluding that the installation of fire hydrants in the Municipality should be at the request of the Town's Fire Department;

2. Whether the Board erred in law in making erroneous assumptions from the evidence in relation to the use of an old transmission line in the Municipality's jurisdiction;

3. Whether the Board erred in law in failing to find that the Municipality's permission is first required regarding installation of any new fire hydrants, if they were to count towards the calculation of the fire protection rate; and

4. Whether the Board erred in failing to determine that it is the Municipality's jurisdiction under the *Municipal Government Act*, S.N.S., 1998, c. 18, to provide fire protection for its residents and to determine what level of fire protection to provide.

[8] What the Municipality seeks on appeal is a variation of the Board's order to one directing that the Municipality has absolute jurisdiction over what fire protection it provides to its residents, and stating that only fire hydrants it requested shall count in the calculation of the fire protection rate. It submits that its appeal raises questions as to the fairness and reasonableness of that rate, and contains financial implications which could become significant.

[9] This being an appeal of an administrative tribunal, I begin by determining the appropriate standard of review to apply, where necessary, to the issues. In *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, the Supreme Court of Canada reconsidered the previous standards of judicial review. It established that there are now two standards of review: correctness and reasonableness.

[10] With respect to the reasonableness standard, the Court explained:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[11] Questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues will generally attract a standard of reasonableness: *Dunsmuir* at ¶ 53. The Court provided guidance as to when that standard will be appropriate:

> 55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
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> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> - The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard *(Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.
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> 56. If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[12] With respect to the standard of review of correctness, the Supreme Court of Canada stated in *Dunsmuir*:

> 50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

In ¶ 58, 59 and 61 respectively, it observed that the correctness standard has been found to apply to constitutional questions regarding the division of powers under the *Constitution Act*, 1867, to questions of jurisdiction or *vires*, and to questions

regarding the jurisdictional lines between two or more competing specialized tribunals. The Court stated that:

> 60 . . . courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

[13] The Supreme Court of Canada emphasized that the standard of review analysis is a contextual one. It reiterated that:

> 64 . . . it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[14] I turn then to a determination, where necessary, of the appropriate standard of review, reasonableness or correctness, for the issues on appeal, and to the application of that standard.

[15] The first of the contextual factors calls for an examination of the presence, absence or wording of a privative clause or statutory appeal. The *Act* provides for an appeal to this court, but in limited circumstances. In *Antigonish (County) v. Antigonish (Town)*, [2002] N.S.J. No. 308, this court decided an appeal from a decision of the Board relating to the proportion of the fire protection charge to be paid by the Municipality of the County of Antigonish. In considering the standard of review, Hamilton, J.A. observed with regard to the *Act*:

> [6] In **Sutherland v. Nova Scotia (Director of Victims' Services)** [1998] N.S.J. No. 287; (1998) 170 N.S.R. (2d) 73 Cromwell J.A. said:
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> > ¶ 12 This broad review on appeal to the Board is to be contrasted with the narrow scope of the further appeal from the Board to this

> Court. This appeal, provided for by s. 30 of the Utilities and Review Board Act, S.N.S. 1992, c. 11., is limited to questions of law and jurisdiction. Findings of fact by the Board within its jurisdiction are "binding and conclusive": s. 26 . The Board must be correct on questions of law or jurisdiction, but the role of this Court in relation to its factual findings is limited to errors of fact that are "...so egregious as to amount to errors of law": Nova Scotia v. Research Island AG (1994), 132 N.S.R. (2d) 156 at 158.

[16] The next two factors are the comparative expertise of the tribunal and the court on the appealed or reviewed issues, and the purpose of the governing legislation. In *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.*, [2006] N.S.J. No. 243, Fichaud, J.A. for this court considered those factors from the perspective of utility rating. The following passages from that decision pertaining to the expertise of the Board and the purpose of the *Act* are applicable here:

> [14] Section 44 of the *Public Utilities Act* entitles the Board to fix rates "as it deems just." Section 67(1) quoted earlier directs equal charges for "similar circumstances and conditions" of service and authorizes the Board to enact regulations that define "substantially similar circumstances and conditions." The Board has a standing membership, repeatedly has examined NSP rate applications and has developed a body of governing jurisprudence. Clearly, the Board has more expertise than the court in the architecture of rate-making.
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> [15] In *Nova Scotia (Public Utilities Board) v. Nova Scotia Power Corp*. (1976), 18 N.S.R. (2d) 692 (A.D.), at ¶ 17, Chief Justice MacKeigan summarized the purposes of the *Public Utilities Act*:
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> > 17 The scheme of regulation established by the Act envisages and indeed compels control by the Board of all aspects of a utility's operation in providing a controlled service. Two great objects are enshrined - that all rates charged must be just, reasonable and sufficient and not discriminatory or preferential, and that the service must be adequately, efficiently and reasonably supplied to the public. Almost all provisions of the Act are directed toward securing these two objects - that a public utility give adequate service and charge only reasonable and just rates.
>
> The legislation considered by Chief Justice MacKeigan included ss. 42 and 63(1), the equivalents to the current ss. 44 and 67(1) that are central to this appeal (see *NS (PUB)*at ¶ 15, 28).

[17] Thus the *Act* gives the Board the responsibility and the authority to set the rates charged by a utility. *Dalhousie Legal Aid*, supra at ¶ 18 described the Board's rate-making power as "a core function entitled to deference." The court has considerably less, if any, experience or expertise in this regard. The remedy sought by the Municipality on appeal, namely, a variation of the Board's order to one stating that only fire hydrants it has requested shall be included in calculating the fire protection rate, underlines that its appeal is one which relates to the setting of the rates. These two contextual factors indicate that the Board is entitled to considerable deference on any review of a decision relating, as here, to the rates charged by a utility.

[18] The final contextual factor is the nature of the question, fact, law or mixed fact and law. This factor will be addressed for those issues requiring the determination of the appropriate standard of review and its application.

[19] In my view, the disposition of the first and second grounds of appeal are not dependent on the standard of review. In its first ground, the Municipality argues that the Board erred in law by concluding that hydrants should be installed at the request of the Town's Fire Department. The Board concluded that the Utility had the authority to install hydrants without seeking permission, whether from the Town or the Municipality or otherwise. Whether the Fire Department should be able to request installations does not affect the Board's conclusion that all operating and operable fire hydrants should be included in the count of fire hydrants. I would dismiss this ground of appeal.

[20] In its second ground, the Municipality claims that the Board erred by making erroneous assumptions from the evidence in relation to the use of an old transmission line. In the introductory portion of its decision, the Board recounted how the Utility had responded and upgraded its operations, that one upgrade was a new transmission line, that a transmission line installed in the 1880's was to be abandoned, and that the "Municipality took advantage of this redundancy," converted that line into a distribution line and hooked up adjacent properties. The Municipality alleges that those properties were always hooked up to that old line, and argues that any assumption by the Board that the Municipality "took advantage of [a] redundancy" and caused problems requiring the Utility to install hydrants to flush the line is incorrect.

[21] This ground of appeal is without merit. Even assuming that the brief mention of the Municipality taking "advantage of [a] redundancy" is an inaccurate recounting of events, and that the Municipality made the assumptions alleged, it is clear from a reading of the Board's decision that this played no significant role in the Board's dismissal of the Municipality's application. The Board's reasons make no specific mention of it, nor did it make any finding as to which, if any, entity was responsible for the need for hydrants. Whether or not this could amount to a misapprehension, there exists no basis for inferring that, in its analysis, the Board placed any reliance upon it. I would dismiss this ground of appeal.

[22] In its third ground of appeal, the Municipality alleges that the Board erred in not finding that its prior permission for installation of hydrants was necessary for their inclusion setting the fire protection rate. Subject to s. 293 of the *Municipal Government Act* which is the focus of its fourth ground of appeal and considered later in this decision, there were no statutory provisions, nor any agreements, written or oral, between the Town and the Municipality which the Board was called upon to interpret in order to answer this question. It was asked to determine if the rate charged was unjust, unreasonable or unjustly discriminatory contrary to s. 87(1), and whether the Utility's installation of the hydrants without the Municipality's consent or knowledge was an unjust and unreasonable act or service contrary to s. 87(2) of the *Act*. The question is one of mixed fact and law. This court is to approach mixed questions with a measure of deference.

[23] Having considered all the contextual factors in regard to the question of whether the Utility had to first obtain the Municipality's approval to install hydrants which would be included in the fire protection rate, I am of the view that the appropriate standard of review is that of reasonableness. For the reasons which follow, I am not persuaded that the Municipality has established that the decision of the Board on this ground of appeal does not meet that standard.

[24] In its decision, the Board reviewed the history of dealings between the Utility and the Municipality relating to installation of hydrants in the Municipality, the lack of written agreements, and the wording of the Board's 2002 order regarding proportionate sharing. It was undisputed that the Utility has the authority to install fire hydrants for infrastructure purposes: see, for example, ss. 6 and 9 of the *Act to Incorporate the Yarmouth Water Company*, S.N.S 1879 on the laying and placing of *inter alia* reservoirs, hydrants and pipes as may be necessary

for supplying water. Moreover, the Municipality acknowledged, as the Board found, that the installation of the three hydrants resulted in a fire protection benefit to its residents. The Board's reasons articulate a consideration of the evidence, and a line of analysis which could lead from the evidence to its conclusion to include the hydrants because they provided a fire protection benefit. Its decision on this issue falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at ¶ 47). I would dismiss this ground of appeal.

[25] Finally, the Municipality argues that the Board erred in failing to determine that, under s. 293 of the *Municipal Government Act* (the "*MGA*"), it alone has the jurisdiction to provide fire protection for its residents and to determine what level of protection to provide. That provision reads:

> **Municipal role**
>
> 293 A municipality may maintain and provide fire and emergency services by providing the service, assisting others to provide the service, working with others to provide the service or a combination of means.

[26] Although this question of law was raised before the Board, the Board does not address it in its reasons. Even if a deferential standard of review were called for, it would be impossible to apply here as there is no interpretation or reasoning to which the court could defer. It is therefore necessary to provide our own interpretation of the provision as it applies to this case.

[27] The purpose of the *MGA* is set out in its s. 2:

> **Purpose of Act**
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> The purpose of this Act is to
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> (a) give broad authority to councils, including broad authority to pass by-laws, and to respect their right to govern municipalities in whatever ways the councils consider appropriate within the jurisdiction given to them;
>
> (b) enhance the ability of councils to respond to present and future issues in their municipalities; and

> (c) recognize that the functions of the municipality are to
>
> (i) provide good government,
>
> (ii) provide services, facilities and other things that, in the opinion of the council, are necessary or desirable for all or part of the municipality, and
>
> (iii) develop and maintain safe and viable communities.
> **(Emphasis added)**

[28] For convenience, s. 293 follows:

> **Municipal role**
>
> A municipality may maintain and provide fire and emergency services by providing the service, assisting others to provide the service, working with others to provide the service or a combination of means.

[29] The plain and ordinary meaning of this provision allows a municipality, when it chooses to provide fire services, to do so itself or to do so in concert with the others. According to the evidence before the Board, the Municipality does not provide fire protection services directly to all its residents. As stated earlier, it makes a financial contribution amounting to 30% of the budget for the Town's Fire Department towards having it provide fire protection to parts of the Municipality. The Utility provides and maintains the infrastructure, including hydrants and water pipes, whereby fire protection can be provided to residents of the Municipality. In these circumstances, the Municipality is "assisting" and "working with" others to provide fire services, within the meaning of s. 293 of the *MGA*. Where the Municipality itself did not choose to provide the service, there has been no usurpation of its right to do so. I would dismiss this final ground of appeal.

[30] I would dismiss the appeal and order the Municipality to pay the Town costs of $1,500. plus taxable disbursements.

Oland, J.A.

Concurred in:

Cromwell, J.A.

Fichaud, J.A.