

Pugsley, J.A. (in Chambers)

The Town of Antigonish (the Town) sells water to the Municipality of the County of Antigonish (the County) pursuant to the provisions of a written Agreement dated January 17, 1995 (the Agreement).

The County, in turn, owns one of the utilities providing water services to approximately 500 residents who live in the so-called fringe area of the Town.

In August of 1995, the County petitioned the Nova Scotia Utility and Review Board (the Board) for an increase in the rates set out in the agreement respecting the supply of water and water services to its customers, including those who lived in the fringe area.

Hearings before the Board commenced on October 24, 1995. A. G. MacDonald, Q.C., (since deceased) appeared on behalf of the Town. The Decision of the Board was rendered on September 27, 1996, setting a revised schedule of rates. An Order of the Board implementing its Decision was issued the same day.

On December 20, 1996, the Town filed a notice of appeal to this Court from the Board's Decision and Order of September 27, 1996.

Section 30(1) of the **Utility and Review Board Act**, 1992 c-11, provides:

An appeal lies to the Appeal Division of the Supreme Court from an Order of the Board upon any question as to its jurisdiction or upon any question of law, upon filing with the Court a notice of appeal within thirty days after the issuance of the Order.

This Chambers hearing is prompted by three separate notices of application, all being heard on June 19, 1997:

- On May 21, 1997 the Registrar of the Court, pursuant to **Civil Procedure Rule 62.17(3)**, gave notice to the Town, and the County, for an Order dismissing the appeal for non-compliance with the **Civil Procedure Rules**;
- On June 2, 1997, the County gave notice that it would apply for an Order dismissing the Town's appeal pursuant to **Civil Procedure Rule 62.11**, and 62.18, on the ground that the Town's notice of appeal was filed more than 30 days after the Decision and Order of the Board, as well as for the Town's failure in failing to comply with **Civil Procedure Rule 62.04** respecting the form and content of the notice of appeal;

- On June 4, 1997, the Town gave notice that it would apply for an Order to extend the time for filing its notice of appeal.

In support of its submissions, the Town filed an affidavit from its Mayor, Ronald F. MacDonald.

The County filed, in support of its position, affidavits from Alan J. Bond, Clerk-Treasurer of the County, and from Heather Robertson, Q.C., Chairperson of the Board.

Neither the Town, nor the County, objected to any of the affidavits tendered and no request was made to permit counsel to cross-examine the deponents of any of the affidavits.

The material parts of Mr. MacDonald's affidavit are as follows:

7. THAT Alexander G. MacDonald has been the Solicitor for the [Town] the past number of years.

8. THAT Alexander G. MacDonald represented the [Town] in these proceedings.

9. THAT I am informed and do verily believe that Alexander G. MacDonald passed away on October 4, 1996.

10. THAT I am now informed and do verily believe that the [Town] had thirty (30) days from the date of the Order to appeal the decision of the Board.

11. THAT in October of 1996 I believed the [Town] had ninety (90) days to appeal the decision of the Board.

12. THAT I believed the [Town] had ninety (90) days to appeal the decision of the Board as a result of a conversation I had with Heather Robertson sometime in October of 1996.

. . .

14. THAT the Decision of the Board, dated September 27, 1996, was not clear to the [Town].

15. THAT by letter dated October 31, 1996 . . . the [Town] wrote to the Board to request clarification of the Decision.

16. THAT the Board wrote to the [Town] by letter dated December 5, 1996 . . . purporting to clarify the Decision of the Board.

17. THAT upon receipt of the December 5, 1996 letter from the Board, the [Town] contacted Duncan J. Chisholm, Barrister and Solicitor, to file the Appeal.

18. THAT the [Town] always intended to appeal the Decision of the Board if the Decision was not clarified to the [Town's] satisfaction.

. . .

24. THAT the purpose of this Appeal is to either:

i) ensure that the supply of water from the [Town] to the [County] was not altered by the decision of the Board; or

ii) if the supply of water the [Town] must provide to the [County] is altered, then the [Town] wishes to appeal this aspect of the Board's Decision.

The affidavit of Chairperson Robertson discloses that she read the affidavit of Mr. MacDonald, that she had discussions with him in October, 1996 concerning the Decision and Order of the Board issued on September 27, but:

THAT at no time during my discussions with Ronald F. MacDonald did I in any way indicate to him that the [Town] had 90 days to appeal from the aforementioned decision.

Alan Bond, Clerk-Treasurer for the County, deposed in part:

6. THAT following the issuance of the decision and orders the County received no indication of any sort from the Town that it was dissatisfied with, or objected to, the Board's rulings.

7. THAT in the fourth week of December, 1996 I was served with a Notice of Appeal in this matter, which had been filed by the Town; I had received no previous notification that an appeal was being considered by the Town.

8. . . . the notice in this matter was filed almost three months after the decision and order in issue, and propounds no error of law or jurisdictional.error.

10. THAT it was my understanding, from reading the notice, that the Town would be seeking leave to proceed with the appeal, but no steps have been taken in this regard. Instead, the Town has filed an Appeal Book and factum.

. . .

14. THAT the notice of appeal does not identify what portion of the order or decision the Board is being challenged, or whether the whole order is in issue. In addition, the notice does not reveal what relief is sought, or in what respect the order would be changed by a successful appeal.

The notice of appeal filed by the Town on December 20, 1996, sets forth the grounds of appeal as follows:

1. THAT the Board erred when it ignored or misinterpreted the Agreement dated January 17, 1995 between the [Town] and the [County] when it:
 - a) ignored or misinterpreted clause 3.04(j) of the Agreement and found that the [County] was entitled to between 120 IGPM and 160 IGPM from the Water

Utility alone and not the Water Utility and Alluvial Aquafier combined;

b) ignored the evidence presented at the hearing when it found that the [County] was entitled to between 120 IGPM and 160 IGPM from the Water Utility alone and not the Water Utility and Alluvial Aquafier combined;

2. THAT the Board erred when it failed to consider all of the evidence and expert's evidence it should have considered.

3. THAT the Board erred when it gave no reasons for the basis of the decision.

The [Town] requests a hearing to determine if the Appeal can proceed despite the fact the Appeal was filed after the expiration of the appeal period, as per Section 30 of the Utility and Review Board Act.

The Town took no action to perfect the appeal other than to file with the Registrar a copy of its factum, dated February 27, 1997.

Issues:

The County initially characterized the issues in this appeal as follows:

- Does the Court have jurisdiction to extend the time limited for filing a notice of appeal in a tribunal appeal?
- If the Court does have that jurisdiction, are there grounds for doing so in this case?
- Is there a basis for quashing the notice of appeal?

First Issue:

With respect to the first issue, upon reviewing the Decision of Justice Bateman, sitting in Chambers, in **Family and Children's Services of Queens County v. L.C.** (1996), 148 N.S.R. (2d) 190, counsel for the County now concedes that the combination of **Civil Procedure Rule 62.34** and s.50 of the **Judicature Act**, enables this Court to extend the time for filing a notice of appeal.

Second Issue:

In **D. G. v Family and Children's Services of Kings County et al** (1994), 133 N.S.R. (2d) 303, Roscoe, J.A., sitting in Chambers, referred to the three-part test that an applicant has to meet in order to satisfy a judge that the time for filing a notice of appeal should be extended.

That test requires the applicant:

- To demonstrate a continuing intention to appeal;
- That there was an arguable ground of appeal;
- That there is a reasonable excuse for the delay in advancing the appeal.

The Town's notice of appeal was filed 84 days after the Decision, and Order, of the Board were filed. Mayor MacDonald was under the mistaken impression he had 90 days within which to file the notice of appeal. This impression arose, apparently, as a consequence of the misunderstanding arising out of a conversation he had with the Chairperson of the Board. The Mayor was not able to discuss the issue with the Town Solicitor in view of Mr. MacDonald's sudden death on October 4, 1996.

The Mayor's position is supported by the letter from the Town Clerk to the Board on October 31, 1996 requesting clarification of the Board's Decision of September 27. A copy of the letter of October 31, 1996 should have been forwarded by the Town to the County. This failure, in part, explains Mr. Bond's declaration in paragraph 7 of his affidavit that he had not received notification prior to the fourth week of December, 1996 that the Town was considering an appeal from the Board's Decision.

It is a fair inference that the Town's continued intention to appeal from the Decision of the Board was dependant upon the Board's response to the letter of October 31, 1996. Once having received the Board's response, the Mayor took appropriate steps to consult a new solicitor to advance the Town's appeal.

With respect to the burden on the Town to establish an arguable ground of appeal, the Town submits that the Board's decision of September 27, 1996, may increase the Town's obligation to supply water to the County or, put another way, the Board's decision does not require the County to develop additional water supply even if it exceeds current volumes supplied under the Agreement. This issue, the Town argues, was not raised in the County's petition of August 22, 1995.

This submission is consistent with the remarks of the Chairman at the commencement of the hearing:

This is a continuation of the sitting of the Nova Scotia Utility and Review Board this time to consider an application by the Municipality of the County of Antigonish on behalf of the Fringe Area Water Utility for an increase in rates for the supply of water and water services to its customers.

I have some concern, in view of counsel's submission, that this Court is being asked to consider grounds of appeal that are dependent upon one interpretation, as opposed to others, of a tribunal's decision. A reasonable resolution might have been accomplished by a joint request from the Town, and the County, to the Board for clarification of the Board's decision. I note the Town takes the position that "it initially attempted to clarify the Board's decision, but was not able to do so to its satisfaction".

In light of the issues involved in this case, and at the present state of these proceedings, I accept the submission of counsel for the Town that the issue raised is an important one. I have already concluded that the Town had a continuing intention to appeal and that it had a reasonable excuse for failing to file the notice of appeal in this Court within the required period.

The three-part test in **D.G. v. Family and Children's Services** may be relieved in those cases where justice demands that the application to extend time be granted (see comments of Coffin, J.A. in **Blundon v. Storm** (1970), 1 N.S.R. (2d) 621 (C.A.); Hallett, J.A. in **Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173, and Bateman, J.A. in **Family and Children's Services v. L.C.**).

I am satisfied that this is a case where the interests of justice require that leave to extend time be given.

Third Issue:

Counsel argues that **Civil Procedure Rule 62.11(d)** allows the Court to quash a notice of appeal because of a failure of the appellant to comply with **Rule 62**. Counsel submits:

There are numerous instances of that failure: the late filing, the uncommunicative and ambiguous contents of the notice, and the non-compliance with service requirements. There should be a point at which the Court should not countenance such disregard for the rules of practice.

While the Town's failure to comply with **Rule 62** is regrettable, I cannot conclude that the County's position has been prejudiced so irrevocably as to require the extreme remedy of quashing the appeal.

Counsel, as well, refers to the failure of the Town to serve the notice of appeal on both the Attorney General of Nova Scotia, and the Board, as required by **Rule 62.03(3)**.

That **Rule** provides in part:

Unless otherwise ordered by a Judge, a notice of appeal in a tribunal appeal shall be served, within the time prescribed by rule 62.03(2) and as prescribed by rule 10.12, on the Attorney General of Nova Scotia and on the tribunal or its chief executive officer and on any other party in the proceedings before the tribunal . . .

A letter was filed on behalf of the Attorney General acknowledging receipt of a copy of the notice of appeal, as well as the Decision and Order of the Board. The letter goes on to advise that the Attorney General would not be represented in this matter.

A letter has, as well, been filed on behalf of the Board advising that it did not intend to participate in the Chambers hearing scheduled for June 19.

In light of this information, it is appropriate and in the interests of justice that leave be granted to extend the time for the service of the notice of appeal on both the Attorney General and the Board. I so order.

Conclusions:

I would dismiss the application brought by the Registrar of the Court, pursuant to **Civil Procedure Rule 62.17(3)**, as well as dismiss the County's application for an Order dismissing the Town's appeal, pursuant to **Civil Procedure Rule 62.11** and **62.18**, and would further dismiss the County's application for an Order to dismiss the Town's appeal for failure to comply with **Civil Procedure Rule 62.04**.

I would grant the Town's application for an Order to extend the time for filing its notice of appeal to December 22, 1996.

I would order that the appeal be set down for hearing on Friday, November 14 at 2:00 in the afternoon, the appeal book to be filed by

Thursday, July 31, the appellant's factum by Friday, August 29, and the respondent's factum by Friday, September 26. If any of these dates are inconvenient for counsel or the parties, I would ask that arrangements be made with the Registrar for a telephone conference.

Costs of all applications shall be costs in the cause.

Pugsley, J.A.

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

TOWN OF ANTIGONISH

Applicant/Appellant

- and -

MUNICIPALITY OF THE COUNTY
OF ANTIGONISH

Respondent

REASONS FOR
JUDGMENT BY:

PUGSLEY, J.A.
(In Chambers)