

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Antigonish (Town) v. Nova Scotia (Utility and Review Board)*,  
2018 NSCA 8

**Date:** 20180130

**Docket:** CA 464607

**Registry:** Halifax

**Between:**

Town of Antigonish

Appellant

v.

Nova Scotia Utility and Review Board, Nova Scotia Power Inc.,  
Shannex Group and Attorney General of Nova Scotia

Respondents

**Judges:** Beveridge, Hamilton, Derrick, JJ.A.

**Appeal Heard:** November 27, 2017, in Halifax, Nova Scotia

**Held:** Appeal dismissed, without costs, per reasons for judgment of  
Hamilton, J.A.; Beveridge and Derrick, JJ.A. concurring.

**Counsel:** Marc Dunning and William Russell, for the appellant  
Colin J. Clarke, Q.C. and Matthew Gorman, for Nova Scotia  
Power Inc.  
S. Bruce Outhouse, Q.C. for the Nova Scotia Utility  
and Review Board (not participating)  
Darrell Dixon for Shannex Group (not participating)  
Edward A. Gores, Q.C. for the Attorney General of Nova  
Scotia (not participating)

**Reasons for judgment:**

[1] The Town of Antigonish (“Town”), on behalf of its electric utility, appeals the May 16, 2017 Order of the Nova Scotia Utility and Review Board, ordering Nova Scotia Power Inc. (“NSPI”), rather than the Town, to provide power to the senior’s care facility (“Facility”) being built by Shannex Group outside the Town’s boundary.

[2] The Town applied to the Board under s. 5(5) of the *Public Utilities Act*, R.S.N.S. 1989, c. 380 (“*PUA*”), for a determination of whether it or NSPI would provide permanent power to the Facility. Its argument before the Board relied heavily on the literal meaning (near, the surrounding area, neighbourhood, proximate to) of the undefined word “vicinity” used in s. 1 of *An Act to Enable the Town of Antigonish to Install an Electric Light and Power Plant and to Borrow Money for Electric Light and Power Purposes*, S.N.S. 1924, c. 67, (“*1924 Act*”), which empowers the Town to provide electricity to the “town and vicinity”.

[3] For the following reasons, I would dismiss the appeal.

**BACKGROUND**

[4] Shannex is constructing a senior’s care facility in Antigonish County, the closest point of which will be less than 100 metres beyond the Town’s boundary. The Facility is outside the 25kV “loop” line (“Loop”) that runs around and through the Town and feeds the Town’s electric substations. The Loop was built by the Town and later sold to NSPI. The Facility is near the Sisters of Saint Martha Motherhouse, which is partly in the Town and partly outside, and is provided electricity by the Town.

[5] In August 2016, Shannex asked NSPI to provide electric service to the site where it is building the Facility. NSPI did so and provided Shannex with a plan for a permanent connection. The Town later sought to permanently provide electricity to the Facility.

[6] NSPI’s Loop is the closest power line to the Facility, running along two sides of the property. NSPI’s plan for the permanent connection was to extend its above-ground line from the south side of Route 337, across that highway and along the proposed driveway from Route 337 to the Facility. This would allow Shannex to light its driveway from the poles carrying this line. The Town, on the other

hand, planned to provide electricity to the Facility by erecting new poles and extending its line behind the Motherhouse and past the cemetery. This would require that its lines cross the Loop. Shannex preferred NSPI's plan which was less costly.

[7] The Town applied to the Board pursuant to s. 55(5) of the *PUA* for a determination of which utility would provide permanent service to the Facility, taking the position that the Facility was in its monopoly service territory since it was in the vicinity of the Town.

### **Statutory Provisions**

[8] Sections 54 and 55 the *PUA* provide:

#### **Condition for construction if similar utility in area**

54 (1) No public utility shall begin the construction of its line, plant or system or any extension thereof in any territory already served by a public utility of like character, without having first obtained from the Board a certificate that the present or future public convenience and necessity require or will require such construction.

(2) The Board shall have power, after a hearing involving the financial ability and good faith of the applicant and the necessity of additional service in the community, to issue such certificate as applied for, or to refuse to issue the same, or to issue it for the construction of a portion only of the contemplated line, plant or system, and may attach to the exercises of the rights granted by said certificate such terms and conditions as in its judgement the public convenience and necessity may require.

(3) Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the Board shall be null and void.

#### **If changes by utility detrimental to other utility**

55 (1) No public utility shall make any extensions to or changes in its line, plant or system which are likely to be detrimental to the service supplied by any other public utility without first giving reasonable notice in writing by prepaid post of the same to the chief office in the Province of such other public utility, and the public utilities directly concerned may agree upon methods and specifications which will, so far as reasonably possible, minimize the detrimental effect on the service of such other public utility.

(2) In the event of the failure of a public utility to comply with the provisions of subsection (1) as to notice or in the event of failure so to agree,

any of the parties directly concerned may make application to the Board for a hearing with respect to the matter in issue.

(3) The Board may, if it sees fit, hold such hearing without public advertisement or notice to any person other than to the parties directly concerned.

(4) After inquiry into the nature of the extensions and changes made or proposed to be made, the Board, subject to such terms and conditions as in the judgement of the Board the circumstances require, may grant or withhold approval or may order such changes as may be just and expedient.

(5) **In the event of a dispute or disagreement between two or more public utilities as to which public utility should serve any particular territory, the Board shall, after each such examination and inquiry as it deems adequate, determine the matter and the Board may, by order, direct which public utility shall serve the said territory.**

(6) Without being limited by the foregoing provisions of this Section, the Board may at any time order a public utility to serve any particular territory not then served, provided, however, that no such order shall be made if, in the opinion of the Board, it would place an unreasonable financial burden on the public utility.

[Emphasis added]

[9] Section 1 of the 1924 *Act* provides:

The Town Council of the Town of Antigonish is hereby authorized and empowered to provide for the Town of Antigonish an electric light and power plant and system, and to operate the same for the purpose of lighting the streets, thoroughfares and public buildings and places of the town and furnishing electric light and power to the citizens and inhabitants of the said town and **vicinity**, and for such purposes to generate or purchase electric light and power, and sell the same, as may be required or expedient.

[Emphasis added]

[10] In addition, the word “vicinity” appears in s. 9 and 11 of the 1924 *Act*:

9. The town council shall have power to make, and from time to time repeal, alter and amend all such by-laws, rules and regulations as shall be deemed necessary for fixing the rate of charges to be paid by the citizens and inhabitants of the town and **vicinity** for private lights, and for electric power, and for the collection thereof; and for the proper management, control and operation of the electric light and power system of the town, acquired and installed under the provisions of this Act; and generally all such other by-laws, rules and regulations as may be found necessary or expedient, from time to time. The council may prescribe penalties

by fine and imprisonment for the violation of such by-laws, and such penalties may be recovered and enforced under the Summary Convictions Act.

11. The town shall have power to sell electricity for any purpose to any person, firm, company or corporation within the Town of Antigonish and its suburbs and **vicinity**.

[Emphasis added]

## Board's Decision

[11] The Board's decision was made by its Chair, Peter W. Gurnham, Q.C. In his reasons, he set out the issue before him, the relevant statutory provisions and the facts he relied on from the material before him, including his site visit. He then accurately stated the principles of statutory interpretation to be applied in determining the meaning of "vicinity" in s. 1 of the 1924 Act:

[37] The word "vicinity" used in the 1924 Act is not defined.

[38] Relevant to the Board's consideration is the *Interpretation Act*, R.S.N.S., 1989, c. 235, and in particular portions of s. 9:

9 (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.

...

(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

[39] Antigonish argued the current approach to statutory interpretation is as set out in *Sullivan on the Construction of Statutes*, 6th Edition:

**§2.1 Introduction.** In the first edition of the *Construction of Statutes*, published in 1974, Elmer Driedger described an approach to statutory interpretation which he called the modern principle:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

In the years following that first edition, the modern principle was frequently cited and relied on, and in 1998, in *Re Rizzo & Rizzo Shoes Ltd.*, it was declared to be the preferred approach of the Supreme Court of Canada. Speaking for the Court, Iacobucci J. wrote:

Although much has been written about the interpretation of legislation ... Elmer Driedger in *Construction on Statues* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone.

Since the *Rizzo* case, Driedger's modern principle has been the starting point for statutory interpretation in innumerable decisions by Canadian courts. ...

**§2.2** The chief virtue of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. In interpreting a legislative provision, a court must form an impression of the meaning of its text. But to infer what rule the legislature intended to enact, it must also take into account the purpose of the provision and all relevant context. It must do so regardless of whether the legislation is considered ambiguous.

[40] NSPI, in its Reply Submission, stated:

In 2010 NSUAR 207 (CanLII), the Board confirmed that it must have regard to section 9(5) of the *Interpretation Act*.

*MacLean v. MacDonald*, 2002 NSCA 30 (CanLII), is instructive on this point. Cromwell, J.A. of the Nova Scotia Court of Appeal stated the following at paragraph 18, which considers the consequences of proposed interpretations as a guiding principle of statutory interpretation:

In attempting to find the correct interpretation of the statutory provisions, the court must 'determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumption and special rules of interpretation, as well as admissible external aids,'; see Ruth Sullivan (ed.), *Driedger on Construction of Statutes* (3rd, 1994) at 131. Having considered these matters, the court should adopt the appropriate interpretation. The appropriate interpretation is one which is plausible in

the sense that it complies with the text of the Act, which is efficacious, in the sense that it promotes the legislative purpose and that is acceptable in the sense that the outcome is reasonable and just; *ibid.* [*the Court's emphasis*]

(Emphasis in Board's reasons)

[12] The Board noted the parties' positions on the meaning of "vicinity": with the Town strongly arguing for the adoption of the literal meaning of "vicinity", and NSPI arguing for a broader interpretation that would provide certainty for future situations, prevent the Town from continually extending its service territory based on proximity to an ever-expanding area and alleviate the more cumbersome and expensive electricity costs to customers that would result from a literal interpretation of "vicinity".

[13] The Board sought input from the parties on the test it should apply to the application before it and noted their positions in its reasons.

[14] NSPI argued that the Town should serve properties within its boundary; NSPI should service properties outside the Town's boundary and outside its Loop; and, with respect to properties just outside the Town boundary but within its Loop, consideration should be given to the convenience of providing service in light of the existing infrastructure and specific customer requirements.

[15] The Town's position was that the Board should first determine in whose service territory the Facility was located and then determine if that utility could meet its obligations to provide the power. It acknowledged that the "factual matrix of the particular situation" had to be considered and argued that its service plan was as convenient as that of NSPI's. It suggested the Board should consider factors such as the financial effect the decision would have on the Town and its allegation that NSPI had not met its obligation to apply for a certificate under s. 54 of the *PUA* or a determination of who should provide power under s. 55(5) of the *PUA*.

[16] The Board noted there were 13 areas where the Town provides service beyond its boundary and found there was no discernible precedent or pattern "to explain which utility ... served which area" (para. 26). He considered this history and the factors provided for in s. 9(5) of the *Interpretation Act*:

[46] The manner in which service from both NSPI and Antigonish has evolved over the years does not provide much assistance to the Board in determining vicinity.

[47] The 1924 Act was drafted in a very different time. Indeed, it appears that initially Antigonish was, in fact, supplying power and energy to NSPI's predecessors – now it is the reverse. What the electrical infrastructure present in 1924 was, which caused the drafters of the legislation to include the word vicinity, is not apparent. The Board suspects that in 1924 the only way citizens in the nearby County could get service was if the Town served them as there was no wide-spread provincial service. That did not happen until rural electrification in the 1930's. What is apparent is that there are today large developments in the County which are easily served by the provincial utility.

[17] The Board noted the broad powers given to it to deal with the issue before it under the *PUA* (s. 62) and indicated it struggled to determine the appropriate test to apply:

[52] The Board recognizes that it must give due consideration to the inclusion of the word “vicinity” in the statute; however, the Board has struggled to find a test to be applied to determine, in a practical way, what considerations it should take into account in determining which utility should service Shannex. The site visit was helpful.

[18] The Board rejected the Town's argument that NSPI had consciously attempted to circumvent ss. 54 and 55 of the *PUA* by supplying power to the Facility without first obtaining a decision from the Board (para. 58). It also rejected the Town's argument that loss of revenue to it should be a factor in the test to be applied (para. 57).

[19] The Board set out the factors it considered relevant in deciding what interpretation of “vicinity” was plausible, efficacious and acceptable as required by *MacLean v. MacDonald*, 2002 NSCA 30:

### **5.2 The 25 kV Loop**

[53] Given the way service has evolved, the Board agrees with NSPI that the 25 kV loop is a useful guide for determining service. The 25 kV loop is used to power all of the substations that service Antigonish. In other words, it brings NSPI power and energy to the Town. The Facility is outside the 25 kV loop – indeed, the loop runs between the Facility and the Motherhouse creating what appeared to the Board to be a natural “electrical” boundary.

### **5.3 Convenience in providing Service**

[54] Based on the site visit, it would appear that it is more convenient for NSPI to service Shannex than Antigonish. As noted by the Board, and by NSPI, the Facility is adjacent on two sides to existing NSPI distribution lines. It is above NSPI's feeder section 4C-424G, and to the right of NSPI's feeder 4C-424.



Antigonish's proposed solution would have required the erection of poles from the west side of the Facility, adjacent to the cemetery and would necessitate the crossing of existing NSPI lines.

[55] While, as pointed out by the Town during the site visit, there are other instances where lines cross, the Board accepts NSPI's submission that line crossings are typically avoided when possible to: maintain clarity of service area; limit potential interaction between distribution lines; and delineate the responsibility for damaged plant. While cost is not determinative, the Board notes that NSPI's proposed solution to service is less costly than the Town's.

#### **5.4 Specific Customer Requirements**

[56] It is clear from the evidence that for whatever reason Shannex prefers to be served by NSPI. While the Board does not see this as a major determining factor, customer convenience and preference is a consideration the Board has taken into account. For example, the NSPI solution allows street lighting using poles that will be placed to provide electrical service to light the roadway entrance to the Facility which appeared to be an important requirement of Shannex and the Sisters.

[20] The Board concluded:

[60] Having regard to the circumstances noted above, the Board has concluded that the Facility is within the service territory of NSPI and that NSPI should provide permanent service, giving most weight to the 25 kV loop as an identifiable boundary and the convenience in NSPI providing service to Shannex. Shannex prefers service from NSPI and the NSPI service is less costly.

#### **Standard of review**

[21] There is no dispute that the standard of review this Court is to apply to the Board's decision is reasonableness.

[22] The Board is a multi-functional board with broad functions, powers and duties imposed on it by a number of statutes, including the *PUA*, under which the Town applied to the Board, *Halifax, (Regional Municipality) v. United Gulf Developments Ltd.*, 2009 NSCA 78, para. 50. As such, the *PUA* is one of the Board's "home statutes", *Robinson v. Nova Scotia Power Inc.*, 2012 NSCA 93, para. 17.

[23] The *1924 Act* is not one of the Board's home statutes, but the interpretation of the word "vicinity" in s. 1 is incidental to the broader issue that was before the Board, namely which utility would provide power to the Facility. Therefore, the

1924 *Act* is closely related the Board's function of determining which utility will provide service.

[24] Thus, in its decision, the Board was interpreting one of its home statutes, the *PUA*, together with a statute closely connected to the Board's function of regulating public utilities in Nova Scotia, the 1924 *Act*.

[25] As stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, para. 54, courts are to give deference where a tribunal is interpreting its home statute and statutes closely connected to its function:

... Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity ...

See also *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, para. 37.

[26] As provided in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, para. 54, the determination of whether the Board's decision is reasonable must be approached as an "organic whole, without a line-by-line treasure hunt for error". We are to consider the reasons together with the outcome to determine whether the decision-making process sufficiently demonstrates the hallmarks of justification, transparency and intelligibility and whether the result falls within a range of possible, acceptable outcomes that are factually and legally defensible.

## **Issue**

[27] The Town argues the only issue in this appeal is whether the Board's decision is unreasonable because it erred in interpreting the word "vicinity" in the 1924 *Act*. I agree with NSPI that the issue is somewhat broader than this because the question the Board had to determine was which utility would provide power to the Facility under s. 55(5) of the *PUA*. Therefore, the issue before us is whether the Board's decision in ordering NSPI to supply the electricity to the Facility is unreasonable.

## **Analysis**

[28] In reaching its decision on which utility would provide electricity to the Facility under s. 55(5), the Board was required to consider the meaning of

“vicinity” in s. 1 of the 1924 *Act* in light of its ordinary meaning, context and purpose.

[29] The Town argues the Board’s decision is unreasonable because it failed to apply the proper principles of statutory interpretation when it interpreted “vicinity”. It says the Board failed to consider the plain and ordinary meaning of “vicinity” and its context. It says the Board improperly considered only irrelevant factors such as: 1. the lack of an historical pattern explaining how the area just outside the Town’s boundary has been served; 2. the existence and location of the Loop feeding the Town’s electric substations; 3. the convenience to the utilities of providing the service; 4. the need to avoid having the lines of one utility cross the lines of another; 5. the cost of electricity to the Facility; 6. Shannex’s preference; 7. the loss of revenue to a utility; and, 8. whether NSPI consciously circumvented s. 54 and 55 of the *PUA*.

[30] I note that, contrary to the Town’s position before this Court that the above eight factors are irrelevant, the Town’s submissions to the Board included arguments that the “factual matrix of the particular situation”, the viability of the proposed servicing plans, the financial repercussions to the Town, the alleged failure of NSPI to make timely applications under s. 54 and 55 of the *PUA* and the convenience of the utilities were relevant considerations for the Board in reaching its decision.

[31] I do not accept the Town’s position that the Board did not consider the plain and ordinary meaning of “vicinity”. It is correct that the Board did not specifically state this in its reasons, but its reasons clearly imply it did consider the literal meaning of “vicinity”. The reasons refer to the fact “vicinity” is not defined in the 1924 *Act* and to the appropriate rules of statutory interpretation including the need to consider the grammatical and ordinary meaning of the word as part of considering the entire context. The Board quoted the dictionary meanings of “vicinity” and made specific reference to the Town’s argument that the literal meaning should decide the issue. We are not to hunt for error line-by-line in the reasons.

[32] I am further satisfied the Board considered the context and purpose as required. The other sections of the 1924 *Act* did not shed light on the meaning of “vicinity”.

[33] With respect to context and purpose, the Board noted that the 1924 *Act* was one of only six that permit towns in Nova Scotia to provide power to their

inhabitants and that the empowering statutes for the other five towns clearly defined the boundary of their jurisdiction without using the word “vicinity”. It noted that other than these six towns, NSPI was the only public utility authorized to provide power throughout Nova Scotia.

[34] It considered how, over the more than ninety years since the 1924 *Act* was enacted, areas in Antigonish County close to the Town boundary had been served to see if there was a pattern that would help in the interpretation of “vicinity” and found there was none (paras. 26, 47).

[35] It considered the circumstances existing at the time the 1924 *Act* was passed and how they differed from the present and what the 1924 *Act* may have been trying to achieve.

[36] After considering the literal meaning of “vicinity” and its context and purpose within the 1924 *Act*, the Board examined how it should be interpreted in the context of the s. 55(5) application before it. It accepted NSPI’s argument that consideration should be given to the existing infrastructure, including the Loop and existing poles, the convenience of providing the power, minimizing the crossing of utility lines, and to a lesser extent cost and specific customer requirements. The Board found its interpretation was plausible, efficacious and acceptable in accordance with the principles of statutory interpretation set out in *MacLean v. MacDonald*.

[37] The Board reached this conclusion after seeking input from the parties on the test it was to apply, giving careful consideration to the factors that should be taken into account as it was the first time that issue was before the Board. The Board has an intimate knowledge of and involvement with the operation of all electric public utilities in Nova Scotia, including the setting of rates, tolls and charges to be paid to them. The setting of such rates, tolls and charges necessitates a consideration by the Board of the costs incurred by the utilities in providing power. These costs, and the eventual rates paid by consumers, would be increased by new infrastructure and by confusion as to which utility was responsible for certain things if lines of different utilities cross. The Board was in the best position to determine what factors were most relevant to the application before it.

[38] To determine if the Board’s decision is reasonable, the Court considers whether the reasons demonstrate the hallmarks of justification, transparency and intelligibility and whether the result falls within a range of possible acceptable outcomes that are factually and legally defensible.

[39] The Board's decision is reasonable. Its reasons are transparent, intelligible and justifiable. They clearly explain why the Board reached the decision it did. The result is within a range of possible acceptable outcomes despite the fact the closest part of the Facility is less than 100 metres from the Town's boundary. The factors, in addition to geographical proximity, that the Board took into account in interpreting "vicinity" and deciding which utility should provide power to the Facility under s. 55(5) (existing infrastructure, convenience, crossing lines, cost of service and customer preference) were appropriate, given the Board's broad responsibility to exercise general supervision over all electric utilities operating as public utilities in the Province.

[40] I would dismiss the appeal without costs.

Hamilton, J.A.

Concurred in:

Beveridge, J.A.

Derrick, J.A.