NOVA SCOTIA COURT OF APPEAL

Citation: *Colchester County (Municipality) on Behalf of Tatamagouche Water Utility v. Wall*, 2018 NSCA 67

Date: 20180725
Docket: CA 472168
Registry: Halifax

Between:

Municipality of the County of Colchester on behalf of Tatamagouche Water Utility

Appellant

v.

Tammie and Blake Wall, and The Attorney General of Nova Scotia, and The Nova Scotia Utility and Review Board

Respondents

Judges: Farrar, Bourgeois and Van den Eynden, JJ.A.

Appeal Heard: May 24, 2018, in Halifax, Nova Scotia

Held: Appeal dismissed without costs to any party per reasons for judgment of Farrar, J.A.; Bourgeois and Van den Eynden, JJ.A. concurring.

Counsel: Dennis J. James, Q.C., Kimberley Pochini and Paul Wadden (Article Clerk), for the appellant
Respondents Tammie and Blake Wall (not participating)
Edward A. Gores, Q.C., for the respondent Attorney General of Nova Scotia (not participating)
Bruce Outhouse, Q.C., for the respondent Nova Scotia Utility and Review Board (not participating)

Reasons for judgment:

[1] On March 9, 2017, the respondents, Blake and Tammie Wall, were served with a notice that, effective December 31, 2017, the Tatamagouche Water Utility would be disconnecting their house from the Utility's water system.

[2] On June 1, 2017, the Walls filed a complaint with the Nova Scotia Utility and Review Board alleging that the Utility had improperly served them with notice. The Walls took the position their water service could not be disconnected without the UARB's approval pursuant to s. 53 of the *Public Utilities Act*, R.S.N.S. 1989, c. 380, as amended.

[3] On November 1, 2017, the UARB heard the complaint. In a decision dated December 14, 2017 (reported as 2017 NSUARB 196), UARB member Richard J. Melanson upheld the Walls' complaint and found that the Utility could not terminate water service without the UARB's approval.

[4] The Utility appealed – naming the Walls, the Attorney General of Nova Scotia and the UARB as respondents. Only the Utility filed a factum and made oral submissions. None of the other respondents participated in the appeal.

[5] For the reasons that follow I would dismiss the appeal.

Background

[6] The Walls reside at civic #3222, Highway 246 in the Municipality of the County of Colchester. In addition to the Walls, two other property owners residing at civic #3203, Highway 246 (Murray MacKay) and civic #3233, Highway 246 (Chris and Wendy MacLean) were served with disconnection notices.

[7] The service boundary of the Utility was not clearly defined until 2001. It includes all of the Village of Tatamagouche, together with any properties outside the Village serviced as of October 2000. This would include all three properties which received disconnection notices.

[8] In 1995, a community fundraising event was undertaken to raise money to install a water line to provide service to Flora Wall, the mother of the respondent,

Blake Wall. Mrs. Wall required a constant flow of water to enable her to receive home kidney dialysis.

[9] In addition to the community fundraising, Mr. MacKay and the then owner of civic #3233 both made financial contributions to the cost of installation of the water line on the understanding that they would be permitted to access it.

[10] In 1995, the water line was installed by an independent contractor and the Wall property and civic #3233 were connected to the Utility's 200 millimetre main line.

[11] The two properties were charged the same rates as other residential customers in the service boundary.

[12] In the fall of 2007, the current owners of civic #3233, Chris and Wendy MacLean, purchased the property and opened a water account. The MacLeans have been charged the same rate as all the residential customers of the Utility. There was no evidence before the UARB that consent was sought from the Walls or the MacKays which would have allowed the MacLeans' connection.

[13] On July 8, 2008, Mr. MacKay (civic #3203) wrote to the Utility requesting that his home be connected to the water line.

[14] Mr. MacKay, in making his request, included a letter from Flora Wall which gave him permission to have access to the water line.

[15] In order to hook up to the water line, Mr. MacKay had to drill under Highway 246 and a brook to extend the service line to his property. In doing so he incurred costs of approximately $6500. The Utility installed the required shut-off valve and meter allowing the MacKay house access to the water system.

[16] In 2014, Flora Wall's husband, Carl, arranged to have his property disconnected from the water line when he moved into a senior's apartment. Flora Wall was deceased by this time.

[17] In 2014, Blake and Tammie Wall decided to construct a new home on the Wall property. On November 12, 2014, the Utility issued a water permit. The application for the permit indicated a new single unit dwelling was being

constructed on the location. The conditions of the issuance of the water permit specified:

1. The County would provide a metered water connection to the property at the curb-stop near the property line;
2. The Walls had to contact the County office for an inspection at the time of hooking up the home water supply to the curb-stop.

[18] The Walls paid a fee of $125 to the Utility for the water permit.

[19] The water connection to the Wall property took place in or around February 2015. The connection was made under the supervision of the Utility. Consent was not sought from the MacLeans nor the MacKays to allow the Walls to be connected.

[20] Following the construction of the Walls' new home, the MacLeans began to report major issues with their water pressure.

[21] In the fall of 2015, a village councillor approached the Walls to advise them the MacLeans were experiencing water issues and inquired whether they would be willing to meet with Michelle Newell, Director of Public Works for the Municipality to discuss possible solutions.

[22] In December 2015, the Utility proposed to install a 200 US gallon storage tank, at the Utility's expense, on the MacLean property with the potential for expansion. While the solution appeared to have been initially accepted by the MacLeans, they subsequently expressed concerns about the potential smell of chlorine; potential water temperature issues; additional power consumption; etc. In an e-mail dated February 11, 2016, the MacLeans said:

> We really don't feel that we should be subject to this. The county should provide the proper service we have been paying for. a.) A new construction should not have been added onto an already strained supply. b) I should not be penalized now for a sub-standard job that was done years ago with regards to the supply line that was put in place at that time. I realize hind sight is 20/20 but it is what it is.

[23] On March 3, 2016, the MacLeans pressed for a response to their concerns. The Utility responded on March 4, 2016:

> We're looking at other options to improve the service, but will take some time. I will know more in the next couple of weeks and can follow up with you then.
>
> Michelle

[24] Between March 3, 2016 and February 7, 2017, additional discussions took place between the Walls, MacLeans and the Utility in an effort to resolve the water flow problems.

[25] At no time did the Utility suggest that it was not responsible for the water line or that the Walls or MacLeans bore the cost of any solution. The correspondence suggested the contrary – the Utility would be responsible for the cost to rectify the problem.

[26] On July 15, 2016, Ms. MacLean sent a strongly worded e-mail to the Utility complaining about a loss of pressure and asking that the matter be "handled once and for all properly".

[27] The Utility, which had been conducting flow tests in the area, wrote to the Walls on July 18, 2016, instructing them to permanently disconnect a booster pump which they had installed to increase water pressure:

> Based on the flow tests we conducted on March 30 within the residences in the area, we have determined that when your booster pump runs, water does in fact stop in the adjacent home, indicating very low pressures in the lines. This can be an issue not only because of the lack of flow, but when water pressure in a line gets very low, it can draw a vacuum and potentially draw in contamination from outside the water pipe, which can be harmful.
>
> If possible, I would like to arrange a time to come out and meet with you again to discuss further. Please let me know if you have any time in the next couple of weeks. <u>In the meantime however, since we are continuing to see large drops in water pressure in this main line in your area, it will be necessary for you to permanently disconnect your pump in order to ensure that we protect the quality of the water for all users</u>.

[Emphasis added]

[28] It is not necessary to detail all of the discussions which took place between the Utility and the MacLeans and Walls. They are outlined in considerable detail in the UARB's decision. However, there were discussions about:

- installing a holding tank in the Walls' basement
- installing a new well on the Wall property
- using an old well on the Walls' property
- installing a storage tank on the MacLean property
- installing a well on the MacLean property.

[29] The Utility also arranged for a private contractor, Hub Well Drilling, to perform pressure tests on an old well on the Walls' property and paid for the testing.

[30] On December 22, 2016, Ms. Newell wrote to the Walls saying:

> As a follow up to our phone conversation last week, I just wanted to touch base and let you know that I will be arranging a Tatamagouche Water Utility Committee meeting early in the new year to discuss this water pressure issue. Because the committee approves all expenditures for the utility, I will need their ok to proceed with any work or any related documents. I will try to update you as soon as I can after that meeting.
>
> [Emphasis added]

[31] There was no suggestion that the resolution of the problem was anything other than the responsibility of the Utility.

[32] The final written correspondence was sent on February 3, 2017, where Ms. Newell provided the Walls with an update:

> Just wanted to drop you a note to update you on things with the water system issues on the 246. Essentially the water pressures still continue to be an ongoing issue. So I have set up a meeting for Tuesday with the Water Utility Committee to discuss expenditures on a few proposed fixes. After that I should be able to update you on the potential drilling of a new well on your property. Also, for your info/records, I am attaching the report we received from the driller on your well test. We have already paid the invoice, so please disregard.
>
> [Emphasis added]

[33] Following the update, Ms. Newell met with the MacLeans on February 7, 2017 and again discussed the possibility of installing a well on their property, but

advised that the matter would need to be discussed in more detail at a Utility meeting.

[34] There was no further communication with the Walls or MacLeans. On March 9, 2017, the disconnection notice was sent. For the first time the Utility advised all three households the water line was considered a private line. The disconnection letter provides, in part:

> This letter is to address the private line that supplies water to your home. As you know, this line was installed to service the property of Flora Wall in 1995 to assist with her dialysis treatment. The Tatamagouche Water Utility (TWU) permitted the line to connect its system in order to supply Ms. Wall water. Two additional properties accessed this private line and have also purchased water from the TWU. The line itself has never been part of the TWU. It was not installed by TWU nor has it been maintained by TWU.

[35] The notice led to the Walls' complaint to the UARB.

[36] As noted earlier, the matter proceeded before the UARB on November 1, 2017. After hearing evidence and submissions from the parties, the UARB concluded that the Utility could not terminate water service on the basis that the water line was a private line. It found the Utility required approval to abandon the line.

[37] It is from that decision the Utility appeals.

Issues

[38] The issues raised by the appellant are:

A. That the Board exceeded its jurisdiction in law:

(i) by determining that the Subject Line was part of the Utility's system, in order to justify the Board's hearing of the complaint;

(ii) by inserting itself into the place of the decision maker, the Utility, in making the Order which compelled the Utility to deliver a service the provision of which it had not previously considered; for which proper consideration was required under the *Public Utilities Act* and the Rules and Regulations set down by the Board by Order, and further, which current level of service they (the Utility) had determined was unsafe; and

(iii) by abrogating the legislated process for expanding the Utility's system in order to include the subject line within the Utility's mandate.

B. That the Board's decision is unreasonable in law because it is not supported by the facts as accepted by the Board at the hearing of the Complaint.

C. That the Board erred in law in determining that the Utility had a positive obligation to notify subsequent property owners on the subject line that the line was private (i.e. not serviced by the Utility).

D. That the Board's decision resulted in a denial of natural justice and procedural fairness to other ratepayers who will bear financial burden as a result of the Board's decision, which decision was made in the absence of proper processes and procedures which are required of the Utility in law and policy to permit such ratepayers proper information and opportunity to be heard.

[39] I will set out the standard of review when addressing the individual grounds of appeal.

A. The Board Exceeded Its Jurisdiction

[40] An appeal lies to this Court on any question of jurisdiction or upon any question of law. Section 30(1) of the *Utility and Review Board Act*, S.N.S. 1992, c.11, s. 1 provides:

> 30 (1) 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.

[41] At the time of the hearing, the UARB indicated to the parties that it had instituted the proceeding pursuant to s. 19 of the *Public Utilities Act* which provides:

> 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.
>
> [Emphasis added]

[42] At the hearing, neither party challenged the UARB's jurisdiction to do so.

[43] On appeal the Utility says that the UARB exceeded its jurisdiction by undertaking the inquiry into the ownership of the water line. It says that the standard of review we ought to apply is correctness relying on *Can-Euro Investments Ltd. v. Ollive Properties Ltd.*, 2013 NSCA 80, which provides:

> [14] This case does not relate to the Board's interpretation of its home (or close to home) statute, nor engage any aspect of its specialized areas of expertise, such that the Board's decision-making would enjoy a tolerance of acceptance along a spectrum defined by the margins of reasonableness. On the contrary, **the issues that arise in this case concern pure questions of jurisdiction, administrative law and procedural fairness. … Thus, the appropriate standard of review for each of these five grounds is one of correctness.** [Citations omitted]

[Emphasis in Appellant's Factum]

[44] *Can-Euro* is clearly distinguishable from this case. The UARB, in this case, was interpreting its own statute, in particular, s. 19 (outlined above) and s. 53 of the *Public Utilities Act* which provides:

> **Abandonment of operating line or works**
>
> 53 No public utility shall abandon any part of its line or lines, or works, after the same has been operated, without notice to the Board, and without the consent in writing of the Board, which consent shall only be given after notice to the city, town or municipality interested and after due inquiry had.

[45] The sole issue before the UARB was whether the Utility could abandon the line to the Wall property without the consent of the UARB.

[46] Both parties called evidence and made submissions on whether the Utility owned the line or it was a private line.

[47] If the Utility owned it, it would have to seek consent of the UARB before abandoning it.

[48] Recently, the Supreme Court of Canada addressed the standard of review in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31. The Court starts its analysis by reiterating there is a well-established presumption that where an administrative body is interpreting its own statute, the standard of review is reasonableness:

> [27] This Court has for years attempted to simplify the standard of review analysis in order to "get the parties away from arguing about the tests and back to arguing about the substantive merits of their case" … To this end, there is a well-established presumption that, where an administrative body interprets its home statute, the reasonableness standard applies. [Citations omitted]

[49] The Court then outlined the circumstances in which the presumption can be rebutted:

> [28] The presumption may be rebutted and the correctness standard applied where one of the following categories can be established: (1) issues relating to the constitutional division of powers; (2) true questions of *vires*; (3) issues of competing jurisdiction between tribunals; and (4) questions that are of central importance to the legal system and outside the expertise of the decision maker (*Capilano*, at para. 24; *Dunsmuir*, at paras. 58-61). Exceptionally, the presumption may also be rebutted where a contextual inquiry shows a clear legislative intent that the correctness standard be applied. [Citations omitted]

[50] In this case, the UARB was called upon to characterize the nature of the complaint before it and determine whether the Utility required its consent before it could abandon the water line. This falls squarely within its statutory mandate and there is a presumption of deference.

[51] The appellant has not rebutted that presumption.

[52] The Court in *Canada (Human Rights Commission)* goes further and suggests that there are very few questions of jurisdiction, concluding its standard of review analysis as follows:

> [41] <u>The reality is that true questions of jurisdiction have been on life support since *Alberta Teachers*. No majority of this Court has recognized a single example of a true question of *vires*, and the existence of this category has long been doubted</u>. Absent full submissions by the parties on this issue and on the potential impact, if any, on the current standard of review framework, I will only reiterate this Court's prior statement that it will be for future litigants to establish either that the category remains necessary or that the time has come, in the words of Binnie J., to "euthanize the issue" once and for all (*Alberta Teachers*, at para. 88).

[Emphasis added]

[53] To the extent that there may be true questions of *vires* still in existence, this case is not one of them.

[54] I will now turn to the appellant's argument under this ground of appeal.

[55] In its factum, the Utility says that the UARB exceeded its jurisdiction in three ways:

> i. by determining that the Subject Line was part of the Utility's system, in order to justify the Board's hearing of the complaint;
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> ii. by inserting itself into the place of the decision maker, the Utility, in making the Order which compelled the Utility to deliver a service the provision of which it had not previously considered; for which proper consideration was required under the Public Utilities Act and the Rules and Procedures set down by the Board by Order, and further, which current level of service they (the Utility) had determined was unsafe; and
>
> iii. by abrogating the legislated process for expanding the Utility system in order to include the Subject Line within the Utility's mandate.

[56] As I have already indicated, this is not a case of jurisdiction. Therefore, I will address the Utility's complaints on the basis that it is arguing the UARB erred in law.

[57] The only real question of law that arises on these facts is whether the UARB properly interpreted s. 19 of the *Act* allowing it to embark on the inquiry which it undertook.

[58] The appellant suggests that the UARB erred in determining the subject line was part of the Utility system in order to justify the UARB's hearing of the complaint. That is stating the issue in the reverse of how the UARB characterized it. It did not need to determine that the water line was part of the Utility's system before embarking on that inquiry. It relied on s. 19 which allowed it to investigate any matter relating to a public utility. Indeed, the inquiry was just that: whether the line was part of the Utility's system. As stated earlier, no one at the hearing really took issue with the UARB's ability to do so.

[59] The Utility also suggests that the UARB has crossed the line between being a regulator and involving itself in the management of the Utility thereby abrogating the legislated process for expanding the line.

[60] Leaving aside the fact that this argument was not made to the UARB, with respect, I disagree. All that was being asked of the UARB was to determine who the owner of the line was. If the UARB determined that the Utility was the owner of the water line, the only consequence was that it would have to seek consent of the UARB to abandon it. This was not a situation where the UARB was inserting itself into the place of the Utility. It was simply deciding whether the Utility had accepted ownership of the line. Nor was it requiring the Utility to make expenditures. The UARB had significant evidence before it about the conduct of all of the parties in determining that the Utility had assumed ownership of the line. After reviewing the evidence in detail, the UARB concluded:

> [125] Specific examples of the conduct, arising from the water pressure issues which arose in 2015, consistent with the Utility's ownership of the Subject Line, are:
>
> * Offering to install a storage tank at the MacLean property;
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> * Offering to pay for the cost of a new well on the Complainants' property;
>
> * Paying for the Hub Well Drilling pressure testing at the Complainants' property.
>
> [126] None of the foregoing would be the Utility's responsibility if the Subject Line did not belong to the Utility. In fact, if the Subject Line were a private line, one would expect the Utility to require the owners of the line to sort out water usage amongst themselves, to ensure there was sufficient flow, which did not compromise the Utility's system; failing which, the Utility would be in a position to act.
>
> [127] The Board notes the exchanges between Ms. Newell and the Complainants became somewhat more formal after Ms. Newell had made contact with Board staff, in an email exchange, in November, 2016, to discuss the matter.
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> [128] It is clear, however, that Board staff expressed no binding opinion on the matter, and suggested that if there was no clear evidence the Utility had formally accepted the Subject Line, ownership might have to be resolved before the courts. Given the complaint before the Board, this determination now falls to this Board member.
>
> [129] After the email exchange with Board staff, the Utility did not clearly spell out its position that the Subject Line was private until the notices of termination were issued. Rather, the correspondence with the Complainants focussed on the need to obtain approval for expenditures, which would not be unusual in the context of the Utility's ownership of the Subject Line.

> [130] In the final analysis, based on a consideration of the totality of the evidence, the Board finds that the Utility's course of conduct from the time the Subject Line was installed, up to the time the notices of termination were issued, leads to the conclusion that it is more likely than not that the Utility accepted the Subject Line as its own, and the Board so finds.
>
> [131] Therefore, the Utility cannot abandon service to the three customers without applying to the Board, and receiving the Board's approval to do so.

[Emphasis added]

[61] I am satisfied that reading the UARB's reasons together with the outcome that the result falls within the range of possible outcomes (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, ¶14). I understand how and why the UARB came to the conclusion it did.

[62] What the Utility really takes issue with is the UARB's finding that the water line was part of its system. Absent an error of law or excess of jurisdiction relating to that finding, it is a finding of fact for which there is no appeal to this Court (see ¶66 *infra*). I am not satisfied the appellant has identified any error of law in the process taken by the UARB in its interpretation of its own statute and the conclusion it reached.

[63] Finally, the Utility recognized what the consequences of the UARB's decision would be if it was found it owned the line. The UARB sets out the Utility's position in its decision:

> [134] The Utility has indicated that if the Board were to find that the Subject Line is owned by the Utility, it will apply to the Board to abandon this part of its system.

[64] I would dismiss this ground of appeal.

B. The Board's decision is unreasonable in law because it is not supported by the facts as accepted by the Board at the hearing of the Complaint

[65] Although the Utility characterizes this as a question of law, it is really a question of fact. Essentially, the Utility is asking us to review the evidence and come to a different conclusion than the UARB.

[66] The UARB's findings of fact made within its jurisdiction are binding and conclusive and no appeal lies to this Court (see *Can-Euro Investments Ltd. v. Nova Scotia (Utility and Review Board)*, 2008 NSCA 123, ¶24).

[67] There was evidence before the UARB upon which it could come to the conclusion which it did. I would dismiss this ground of appeal.

C. The Board erred in law in determining that the Utility had a positive obligation to notify subsequent property owners on the subject line that the line was private (i.e. not serviced by the Utility)

[68] It is not necessary to address the standard of review with respect to this issue simply because the UARB made no such finding. In fact, it found the opposite. It agreed with the Utility that not advising new customers they were accepting services on a private line did not mean that the subject line belonged to the Utility. It was simply one factor it considered in coming to its decision:

> [121] The Board agrees with the Utility that not advising new customers they are accepting service on a private line does not, in and of itself, prove that the Subject line belongs to the Utility. It is, however, evidence that can be considered as part of a pattern of conduct which sheds light on a situation that lacks formal documentation.

[69] I would dismiss this ground of appeal.

D. The Board's decision resulted in a denial of natural justice and procedural fairness to other ratepayers who will bear financial burden as a result of the Board's decision, which decision was made in the absence of proper processes and procedures which are required of the Utility in law and policy to permit such ratepayers proper information and opportunity to be heard

[70] This issue raises a question of procedural fairness, as such, a standard of review analysis is not triggered. The UARB is not entitled to any deference on the assessment of its procedural fairness (*New Scotland Soccer Academy v. Nova Scotia (Labour Standards Tribunal)*, 2010 NSCA 43, ¶15).

[71] The Utility argues that because this involves a significant expenditure by the Utility which could negatively impact the ratepayers in Colchester County, the ratepayers were entitled to procedural fairness and a right to be heard.

[72] With respect, this ground of appeal does not arise on the facts of this case. First of all, the UARB did not find that the Utility would have to make any expenditure with respect to the line. The only determination was that before the Utility could abandon the line it needed to obtain the consent of the UARB.

[73] Secondly, it was never suggested to the UARB that there were other interested parties who ought to receive notice of the hearing.

[74] Finally, if the Utility applies to the UARB to abandon the line, the UARB can determine, at that time, who should receive notice of the proceedings.

[75] I would dismiss this ground of appeal.

Conclusion

[76] I would dismiss the appeal without costs to any party.

Farrar, J.A.

Concurred in:

Bourgeois, J.A.

Van den Eynden, J.A.