# NOVA SCOTIA COURT OF APPEAL

**Citation:** *East Hants (Municipality) v. Nova Scotia (Utility and Review Board)*, 2020 NSCA 41

**Date:** 20200514
**Docket:** CA 486756
**Registry:** Halifax

**Between:**

Municipality of the District of East Hants

Appellant

v.

Nova Scotia Utility and Review Board, F.H. Development Group Inc., and the Attorney General of Nova Scotia

Respondents

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| **Judge:** | The Honourable Justice Van den Eynden |
| **Appeal Heard:** | November 21, 2019, in Halifax, Nova Scotia; final submissions January 15, 2020 |
| **Subject:** | *Public Utilities Act*, ss. 18 and 19; municipal law; administrative law; jurisdiction; standard of review; water utility; |
| **Summary:** | The respondent developer (FH) and appellant Municipality were negotiating a water service issue that arose during FH's application for subdivision approval. FH needed to provide water services to its proposed lots and wanted to directly connect laterals, at no cost, to the Municipality's new water transmission main. During their negotiations, the Municipality offered to allow a direct connection if FH paid $78,600. This amount represented FH's avoided cost of constructing its own water transmission main. FH objected to the amount, and during the subdivision approval process, FH filed a complaint with the Board under ss. 18 and 19 of the *Public Utilities Act.* The Municipality said it was not acting as a public utility and |

the Board had no jurisdiction over subdivision matters apart from the appeal provisions in the *Municipal Government Act*. The Board determined it had jurisdiction, adjudicated the complaint, and found the Municipality's proposed charge was unauthorized. The Municipality appealed.

**Issues:**

(1) Did the Board exceed its jurisdiction (authority) in determining the complaint?
(2) Did the Board err in concluding the proposed charge was unauthorized?

**Result:**

The appeal is allowed on the first ground which is dispositive of the appeal. The order of the Board is set aside. The Board erred in law by incorrectly concluding it had authority over the complaint. The Board's powers are limited to those expressly or implicitly conferred on it by statute. While the Board has authority to oversee public utilities, the Municipality was acting within its role over subdivision matters and not as a public utility when it proposed the charge to FH. At this stage, short of the statutory appeal provisions, the Board had no authority to inject itself into the subdivision approval process.

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| | |
|---|---|
| **Judges:** | Van den Eynden, Hamilton and Scanlan, JJ.A. |
| **Appeal Heard:** | November 21, 2019, in Halifax, Nova Scotia |
| **Final Submissions:** | January 15, 2020 |
| **Held:** | Appeal allowed, per reasons for judgment of Van den Eynden, J.A.; Hamilton and Scanlan, JJ.A. concurring |
| **Counsel:** | Geoffrey Saunders, for the appellant<br>Bruce Outhouse, Q.C., for the respondent Nova Scotia Utility and Review Board (not participating)<br>Kevin Latimer, Q.C., for F.H. Development Group Inc. (not participating)<br>Edward A. Gores, Q.C., for the Attorney General of Nova Scotia (not participating) |

**Reasons for judgment:**

## Overview

[1] The dispute underlying this appeal relates to a complaint FH Development Group Inc. ("FH") filed against the Municipality of the District of East Hants ("Municipality") under the *Public Utilities Act*, R.S.N.S. 1989, c. 380 (*PUA*). The two parties were trying to resolve a water service issue that arose during FH's subdivision approval application process. During negotiations, FH complained to the Nova Scotia Utility and Review Board ("Board") about the Municipality pursuing a proposed charge to resolve their dispute. Against the Municipality's objections over jurisdiction, the Board entertained and adjudicated the complaint—finding the Municipality's proposed charge was unauthorized.

[2] The Municipality now appeals the decision of the Board. The primary challenge is on jurisdictional grounds; the secondary challenge relates to the Board's interpretation of the governing legislative framework.

[3] The Municipality claims the Board exceeded its jurisdiction because subdivision approval is in the primary domain of the Municipality. Regulating public utilities is the domain of the Board. The Municipality says it was acting in its capacity as a municipality under the subdivision application process, not as a public utility. It argues the Board had no jurisdiction to rule on the proposed charge and its interpretation and application of the statutory framework is flawed.

[4] After we heard the appeal, the Supreme Court of Canada released decisions material to a key issue in this appeal—whether the applicable standard of review this Court must apply when examining the Board's determinations is reasonableness or correctness.

[5] Consequently, we invited and received additional submissions from the appellant on *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66; and *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67.

[6] The appellant was the only party who participated in the appeal and made submissions. The respondents chose not to play an active role.

[7] The Board had to be correct in both the exercise of its jurisdiction and its interpretation and application of the relevant legal principles. In my view, the Board exceeded its jurisdiction.

[8] I would allow the appeal on this dispositive ground. My reasons follow.

**Issues**

[9] The appeal raises these issues:

(a) Did the Board exceed its jurisdiction (authority) in determining the complaint?

(b) Did the Board err in concluding the proposed charge was unauthorized?

**Standard of Review**

[10] This appeal falls under s. 30(1) of the *Utility and Review Board Act*, S.N.S. 1992, c. 11 (*URBA*), which 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.

[11] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court of Canada determined appellate standards of review should be applied in statutory appeals. The majority stated:

> [37] […] [W]here the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. **Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen***, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. [...]
>
> [Emphasis added]

[12] The first issue concerns the Board's jurisdiction (authority) to determine the complaint. The second issue is also a question of law—specifically statutory and by-law interpretation. Consequently, the appropriate standard of review is correctness.

**Background**

[13] To understand the issues, some background is needed.

[14] The respondent, FH wanted to subdivide and develop a parcel of lands it owned within the Municipality of East Hants. Subdivision approval from the Municipality is a prerequisite to development.

[15] FH applied to the Municipality for tentative subdivision approval. The proposed development was for residential lots, and FH wanted to provide water to the lots by connecting to the Municipality's water services. FH's application envisioned connecting water service laterals for lots in the proposed subdivision directly to a transmission water main which was to be constructed by the Municipality.

[16] On behalf of its water utility, the Municipality had earlier applied to and received approval from the Board to extend its water transmission main. The purpose of extending the transmission main was to improve the security of water service as the system had outgrown its previous flow design.

[17] The approved extension would pass through the lands FH wanted to subdivide. If not for the extension passing through FH's lands, FH would have had to build a separate distribution system in order to service all the lots in its proposed subdivision development. In other words, FH could avoid having to incur the costs of installing its own distribution system for lots in the subdivision if it could connect water service laterals directly to the new transmission main. Although the precise amount of savings to FH was never resolved, the magnitude of its avoided cost of installing its own distribution system was in the estimated range of $78,600.

[18] FH offered to install the new transmission main at the same cost as the winning bidder in the Municipality's public tender and to grant a water service easement over the main to the Municipality. The Municipality declined this offer, proceeded to expropriate FH's land, and installed the transmission main using its own contractors.

[19] I will review the specific Subdivision By-Law later. For now, I note the by-laws required an agreement between the Municipality and FH because water services were available on the property to be subdivided. To this end, the Municipality and FH began negotiations with a view to reaching an agreement on water services.

[20] During their negotiations, the Municipality offered to allow direct connection of service laterals to the transmission main if FH paid $78,600, representing FH's avoided costs. FH wanted to directly connect service laterals to the transmission main at no cost.

[21] The parties' negotiations were aborted by FH. Notwithstanding, that no charge had been imposed, and before the Municipality decided on FH's subdivision application, FH filed a complaint with the Board. The complaint was filed against the Municipality's Water Utility under ss. 18 and 19 of the *Public Utilities Act*, alleging the proposed charge of $78,600 was not permitted.

[22] The Municipality claimed the Board's jurisdiction was limited to investigating the actions of the East Hants Water Utility and the dispute with FH fell outside of the Board's oversight functions.

[23] Specifically, the Municipality said the Board had no jurisdiction to rule on the charge the parties were trying to resolve because the Municipality was: (1) acting in its capacity as a municipality under authority of the *Municipal Government Act*, S.N.S. 1998, c. 18 (*MGA*), the Subdivision By-Law and in the context of the subdivision approval process; and (2) not acting in its capacity as a public utility.

[24] Even the Board questioned its jurisdiction over FH's complaint and invited submissions on this point. Notwithstanding the jurisdictional objections advanced by the Municipality, the Board seized jurisdiction over the complaint and dealt with it on its merits. Ultimately, the Board decided the proposed charge was not authorized and issued an order to that effect (2019 NSUARB 27).

[25] The Municipality viewed the Board's intervention as an encroachment on its powers under the *MGA* to determine subdivision applications and outside the scope of the Board's authority to resolve.

[26] As noted, this Court only received submissions from the appellant. FH elected not to participate in the appeal, advising the Registrar there was no longer a

live financial dispute between the parties over the proposed charge; however, FH understood the appellant Municipality wished to pursue the appeal to argue the Board's jurisdiction in such matters. In light of financial matters having been resolved respecting FH's complaint, FH took no interest in the outcome of the appeal.

[27] The Board and the Attorney General of Nova Scotia also provided notice that they would not be participating in the appeal.

[28] I will address the Board's findings and supplement background as needed in my analysis.

## Analysis

*Did the Board exceed its jurisdiction (authority) in determining the complaint?*

[29] FH filed its complaint under s. 19 of the *PUA*, which provides:

> **Summary investigation by Board**
>
> 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]

[30] The attention of the *PUA* is squarely on public utilities. Section 18 provides:

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

[31] The question to be answered is did the Board exceed its jurisdiction in adjudicating FH's complaint? In my opinion, the answer is yes. The Board exceeded its jurisdiction and the resulting order must be set aside.

[32] In arriving at this conclusion, I considered the following:

- What are the statutory limitations on the Board's authority?
- Are water utilities a distinct entity over which the Board exercises oversight?
- Do all water services fall within the scope of the *PUA* or a municipal water utility?
- Is a municipality exercising its mandated functions in the context of a subdivision matter a public utility?
- Did the Board properly consider whether it had authority/jurisdiction before adjudicating the merits of the complaint?

*What are the statutory limitations on the Board's authority?*

[33] As established in *Vavilov*, the Board's determination of its jurisdiction over the complaint, which arose during FH's subdivision application, must be correct. Did the Board have the authority to entertain the complaint? To answer the question, it is logical to begin by examining the source of the Board's power.

[34] The Board is a creature of statute, created under the *URBA*. It must obtain its jurisdiction and powers from enabling legislation. In *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, 2015 NSCA 43, this Court said:

> [23] In my view, the Board got it right. It is a creature of statute and its jurisdiction is limited to the parameters of the enabling legislation. [...]

[35] Similarly, this Court in *Nova Scotia (Attorney General) v. Nova Scotia (Utility and Review Board)*, 2019 NSCA 66, (citing McLachlin, C.J.C., in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43) said:

> [49] The Chief Justice then considered the role of an administrative tribunal – i.e. the British Columbia Utilities Commission [...]:
>
> > [60] [...] A tribunal has only those powers that are expressly or implicitly conferred on it by statute. [...]

[36] Even the Board has acknowledged the limitations of its powers and the need for statutory authority before granting orders. In *Re Nova Scotia Power Inc*., 2004

NSUARB 118, the Board recognized its need for statutory authority when determining its jurisdiction to entertain a complaint. The Board said:

> [21] In terms of the Board's authority under the Act [*Public Utilities Act*], it is clear to the Board that the Act's primary purpose is to provide for fair and equitable treatment of customers by public utilities and to set rates for customers of public utilities which are just and reasonable and based on financially sound prudent expenditures.
>
> [22] After a close review of the Act, and in particular the sections noted in the submissions, the Board finds that its statutory authority does not include advance approval of proposed contracts which involve operational expenditures for energy supply.
>
> [Emphasis added]

[37] Also, in *Methot (Re)*, 2017 NSUARB 197, the Board similarly stated:

> [96] The Board is not a Court. Its authority or jurisdiction is granted by legislation. This means the Board may only consider and/or perform tasks the legislation says it can do. Consequentially, it does not have the ability of a Court to consider all of the issues between the parties.
>
> [97] Under the *Utility and Review Board Act*, S.N.S. 1992, c. 11 as amended (*UARB Act*), the Board has sole jurisdiction to decide the cases and matters conferred upon it (s. 22(1)), by approximately 33 mandates, including the *MGA*. Under the *MGA*, the Board hears appeals.
>
> [Emphasis added]

[38] Although this Court overturned *Methot* on appeal, no issue was taken with the above passage (*Kings County (Municipality) v. Methot*, 2019 NSCA 21).

[39] Picking up on the Board's recognition that it hears appeals under the *MGA*, the Municipality aptly points out that the Board's oversight role does not extend to the conduct of a municipality's subdivision process except as provided by ss. 247, 250 and 251 of the *MGA*. Those relevant provisions instruct:

> **Appeals to the Board**
>
> **247 (3)** The refusal by a development officer to
>
> (a) issue a development permit;

> (b) approve a tentative or final plan of subdivision or a concept plan, may be appealed by the applicant to the Board.
>
> [...]
>
> **Restrictions on appeals**
>
> **250 (3)** An applicant may only appeal a refusal to approve a concept plan or a tentative or final plan of subdivision on the grounds that the decision of the development officer does not comply with the subdivision by-law.
>
> [...]
>
> **Powers of Board on Appeal**
>
> **251 (1)** The Board may
>
> (a) confirm the decision appealed from;
>
> (b) allow the appeal by reversing the decision of the council to amend the land-use by-law or to approve or amend a development agreement;
>
> (c) allow the appeal and order the council to amend the land-use by-law in the manner prescribed by the Board or order the council to approve the development agreement, approve the development agreement with the changes required by the Board or amend the development agreement in the manner prescribed by the Board;
>
> (d) allow the appeal and order that the development permit be granted;
>
> (e) allow the appeal by directing the development officer to approve the tentative or final plan of subdivision or concept plan.
>
> (2) The Board shall not allow an appeal unless it determines that the decision of council or the development officer, as the case may be, does not reasonably carry out the intent of the municipal planning strategy or conflicts with the provisions of the land-use by-law or the subdivision by-law.
>
> [Emphasis added]

[40] The Municipality takes the position the Board has no jurisdiction to intervene in subdivision matters outside of the scope of these provisions. In its appeal factum, the Municipality said:

> [45] […] In this specific case, FH had appeal rights to the Board if its subdivision application was turned down as a result of its refusal to agree to the

> proposed charge, under s. 247(3), 250 (3) and 251 (1) and (2) of the MGA . […] The Board's oversight role does not extend to the conduct of a municipality's subdivision process except as specially provided by Sections 247 and 250 of the MGA.

*Are water utilities a distinct entity over which the Board exercises oversight?*

[41] It is important to understand the distinct functions of a municipal water utility (a public utility) and the Board's oversight of those functions. Some municipalities have separate incorporated water utility bodies (such as Halifax Regional Water Commission). Other municipalities, such as the appellant, do not.

[42] The *PUA* defines "public utility" as:

> 2(e) "public utility" includes any person that may now or hereafter own, operate, manage or control
>
> […]
>
> > (iv) any plant or equipment for the production, transmission, delivery or furnishing of … water … either directly or indirectly to or for the public, […]

[43] In *County of Antigonish (Municipality) (Re)*, 2007 NSUARB 138, the Board considered the issue of a municipality "wearing two hats"—as both the municipality and the owner of the water (public) utility. The Board said a municipality and its water utility must be treated as separate legal entities. The Board explained:

> [7] Factors that may relate to the issue of whether there are separate legal entities in a technical legal perspective under other aspects of the common law are not determinative of the proper interpretation to be given to the *PUA*.
>
> […]
>
> [25] In reading the *PUA* as a whole and giving it a broad and liberal interpretation, the Board finds the *PUA* directs the Board to regulate the services of a water utility and to set just, fair and undiscriminatory rates which the utility must collect. <u>For the purposes of the administration of the water utility, the *PUA* requires the Board to separate the water utility from its municipal owner in all respects, including all assets, services and expenses that are utilized to provide the water utility services.</u> The assets of the Municipality that are not used for the purposes of the water utility are not permitted to be included in its rate base nor are general expenses not related to the water utility's services permitted to be

> included either. Conversely debts that are not related to the operation of the water utility cannot be deducted or offset from its revenue or its rates.
>
> [Emphasis added]

[44] The Municipality expressed to the Board and to this Court in the circumstances of this case it never acted as a "public utility" as defined in the *PUA*. Specifically, it was not acting as an owner, operator or manager of any plant or equipment for the transmission of water. Rather, throughout its dealings and negotiations with FH in the subdivision approval process, it was always acting as a municipality pursuant to its obligations and authority under the *MGA* and related Subdivision By-Law. As will become evident in my analysis, there is considerable merit to this submission.

[45] It appears the Board conflated the Municipality's subdivision functions with its separate functions as a water utility. As the Board has said in *County of Antigonish (Municipality) (Re)*, the two hats worn by the Municipality are, in fact, distinct.

*Do all water services fall within the scope of the PUA or a water utility? Is a municipality exercising its mandated functions in the context of a subdivision matter a public utility?*

[46] These two questions can be examined together. The *PUA* does not grant the Board jurisdiction over all aspects of water services. Nor do all water services fall within the scope of a municipal water utility (a distinct operation as discussed above). It is apparent that the Municipality itself, not acting as a water utility, retains some authority related to water services. These provisions of the *MGA* and the Subdivision By-Law demonstrate this point:

- Section 66(1) of the *MGA* authorizes the Municipality to borrow money for water systems.
- Section 81(1)(c) of the *MGA* authorizes council to make by-laws imposing charges for the municipal portion of the capital cost of installing a water system. Such by-laws do not require Board approval (s. 81(7)).
- Section 274(2)(a) of the *MGA* authorizes a municipal planning strategy to include provisions for infrastructure charges for new water

systems in a subdivision by-law. These charges do not require Board approval (s. 274(10)).

- Section 275(1)(d) of the *MGA* authorizes broad authority to a municipality to enter into infrastructure charges agreements.

- Sections 81(7) and 274(10) of the *MGA* effectively remove by-laws and charges described therein from Board oversight. In the event of conflict with the *PUA*, these express provisions supersede (see s. 117(1) of the *PUA*).

- Sections 11.1 and 11.2 of the Subdivision By-Law requires an agreement between the Municipality and a developer where water services are available. (Such is the case here thus a water services agreement between the Municipality and FH was required.)

- By-Law F-100, the "Local Improvement Charges By-Law", empowers the Municipality to impose local improvement charges, which include its portion of capital costs of installing a water system, upon owners of real property in an area where such improvements are carried out and establishes how the Municipality imposes, fixes and enforces payment of charges for local improvements. Section 4 of the By-Law levies a charge upon the owner of real property situated in whole or in part within an area where a local improvement has been carried out by the Municipality.

- Section 14.1(e) of the Subdivision By-Law stipulates that agreements may contain reasonable provisions with respect to any matter relating to the Subdivision By-Law and the servicing of land.

- Section 65(av) of the *MGA* (in force at the pertinent time) is a catch-all provision authorizing counsel to expend money for a broad range of expenditures within its purview, one of which would be water systems.

[47] The Municipality has generous powers and tools at its disposal when it comes to recovering water utility costs. Viewed through this lens, the Municipality's interactions with FH seem like a legitimate exercise of its authority to recover such costs.

[48] Although the Subdivision By-Law does not explicitly authorize/describe the subject charge under negotiation at the time the complaint was filed, the Municipality says: (1) the type of agreement it was negotiating with FH was not prohibited; (2) the By-Law contemplates the Municipality asking FH to pay a charge for connecting to water services; and (3) the By-Law does not restrict what the "reasonable provisions" of the agreement can be. I agree.

[49] The Municipality has many obligations under the *MGA*, one of which is determining subdivision applications. Surely it cannot be said that the Municipality is operating as a water utility when it is acting within the scope of this unrelated function under the *MGA*. As will be discussed later, developers such as FH who feel aggrieved by decisions made by a municipality during a subdivision application process have certain remedies—but those remedies do not include making a complaint to the Board under the guise the Municipality is acting as a water utility.

[50] It is clear from the record the Municipality did not seek to nor could it impose an agreement on FH, in which it would be required to pay the proposed charge of approximately $78,600. Rather, it was a matter of negotiation and, if agreed, the Subdivision By-Law authorizes them to enter into such an agreement.

[51] The Municipality argues it must be able to negotiate with developers with a view to resolving water services agreements, related costs contributions and other matters that arise during its subdivision mandate. Understandably, the Municipality views this Board's decision as a serious encroachment on the Municipality's authority and obligation to govern. It is concerned that negotiations with developers during the subdivision approval process will be thwarted by complaints being entertained by the Board through the vehicle of the Board's oversight functions regarding water utilities.

[52] Having reviewed the spheres of responsibility and distinction between a water utility and a municipality executing subdivision responsibilities, I turn to the next consideration.

*Did the Board properly consider whether it had authority/jurisdiction before adjudicating the merits of the complaint?*

[53] Although the Board turned its mind to its jurisdiction, with respect, the analysis was materially flawed. The Board never asked itself the proper question

that would have permitted it to conduct the correct analysis of its jurisdiction. It started off—and remained—on the wrong foot.

[54] As noted, the Board is a creature of statute. Its jurisdiction is limited to the parameters of the enabling legislation and only those powers that are expressly or implicitly conferred on it by statute. FH filed a complaint against the appellant Municipality's water utility under s. 19 of the *PUA*. The Board should have interpreted this provision to determine whether the complaint fell within its jurisdiction. It did not.

[55] For convenience, I reproduce s. 19:

> 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

[56] It is important to note that while s. 19 allows the Board to investigate it does not grant the Board any specific authority to take action against any entity under investigation. That authority must be found elsewhere in the *PUA.* This Court's decision in *Born with Three Thumbs v. Middleton (Town) Water Utility*, 2001 NSCA 88 is to that effect.

[57] I recognize that ss. 116(1) and (2) of the *PUA* provide that the powers of the Board shall be interpreted liberally in order to accomplish the purposes of the *PUA*. In addition to specific powers, the Board has implied and incidental powers related thereto. However, there must still be statutory power given to the Board that anchors its jurisdiction over FH's complaint.

[58] Here, the Board did not identify any statutory authority granting it jurisdiction to decide the subject matter of the complaint. Nor could it, as none exists.

[59] The Board did comment (at ¶48 to 52 of its decision) on the *PUA* framework which governs a water utility and its operations. However, none of the provisions cited, setting out the scope of the Board's authority, encompass the approval of terms sought by a municipality in an agreement with a developer, pursuant to the subdivision terms under the *MGA* or the Subdivision By-Law.

[60] The role and the purpose of the Board under s. 19 of the *PUA* is to investigate public utility injustices. It cannot be said that the Board has the implicit authority to intervene in the subdivision approval process, which by its very nature includes negotiations of agreements between developers such as FH and the Municipality.

[61] What then did the Board do to try and find jurisdiction? Before answering, the following informs how the Board lost focus on the proper questions to determine jurisdiction.

[62] The Board found it to "be in the interest of justice" to solve the dispute and said that if it did not do so now, the matter might come back before the Board through an "appeal" process. Essentially, the sentiment was: "better just deal with it now". The Board said:

> [69] The Board notes that in an appeal of a development officer's decision, the Board would have to go through the same analysis to determine if a denial, on the basis of the failure to agree to an infrastructure agreement which includes the Proposed Charge, was in accordance with the *Subdivision Bylaw*. Given the extensive arguments made on this point in this proceeding a determination of the issue at this stage is appropriate.
>
> [...]
>
> [74] The Board generally does not issue decisions which are declaratory in nature. In the particular circumstances of this case, the Board finds it is in the interests of justice that a determination be made in relation to the Complaint, […]:
>
> - The parties have expended considerable time and effort, and presumably costs, to advance their positions. A failure to issue a substantive decision on the merits of this matter would not be appropriate.
>
> [Emphasis added]

[63] Resolving disputes is a laudable objective, but the Board must first have jurisdiction to do so. The Board's power to intervene in the midst of a subdivision approval process must be expressly or implicitly conferred on it by statute. That is not the case here.

[64] Instead of asking itself the correct question—what is the statutory source of its power—the Board concluded that its jurisdiction (which it never defined) was not ousted. This was an error.

[65] The Board reasoned the proposed charge that arose during negotiations of a water service agreement tied to FH's subdivision application was: (1) not authorized by the *MGA* or the Subdivision By-Law; (2) thus, not a matter within the authority of the Municipality; and (3) therefore, the jurisdiction of the Board was not ousted. The Board said:

> [66] In order to determine if the *PUA* has any application, the Board must analyze whether in fact the Proposed Charge relates to a potential infrastructure agreement, as envisaged by the *MGA*, and the *Subdivision Bylaw*, in order to determine if s. 274(10) of the *MGA* is applicable. […]
>
> [67] In the circumstances of this case, keeping in mind municipal powers must be broadly interpreted, the Board is satisfied, based on a purposive analysis of the relevant provisions as a whole, that neither section s. 275 of the *MGA*, nor s. 14 of the *Subdivision Bylaw*, can reasonably be said to authorize the Proposed Charge [...]
>
> [Emphasis added]

[66] The Board reached this conclusion while at the same time making this contradictory conclusion:

> [67] [...] In its submission on jurisdiction, MEH said it could have imposed a local improvement charge applicable to the property under Bylaw F-100. While this may be the case, at this time, this has not occurred and therefore no impact on the Board's analysis.

[67] Here, the Board is expressly recognizing a mechanism under the *MGA* for the Municipality to impose the charge, but says that was not relevant because the Municipality had yet to extract by compulsion what it was trying to do through negotiations with the developer FH.

[68] Jurisdiction is a prerequisite for Board intervention. Here, the Board considered whether its jurisdiction had been displaced—but never identified the origin of its authority over the subject matter of the complaint to begin with. Its starting presumption was incorrect.

[69] The appellant Municipality said it this way:

> 62. The Board ought to have stayed within the scope of its authority under s. 19 of the PUA and limited its investigation to the actions of the Utility. Instead, the Board started its analysis by investigating the actions of the Municipality in the subdivision approval process. It was off track from the start.

[70] Based on the helpful guidance of *Vavilov*, we know the interpretive exercise that boards should undertake:

> [120] […] the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.
>
> [121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior-albeit plausible-merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse engineer" a desired outcome.
>
> [Emphasis added].

[71] The Board's jurisdiction assessment is reverse engineered. The Board's approach is noticeably at odds with its decision in *Re Nova Scotia Power Inc.*, 2004 NSUARB 118. In that case, the Board concluded that it did not have the statutory jurisdiction to determine a complaint over price and conditions set out in Nova Scotia Power Inc.'s solicitation:

> [22] After a close review of the *Act* [*Public Utilities Act*], and in particular the sections noted in the submissions, the Board finds that its statutory authority does not include advance approval of proposed contracts which involve operational expenditures for energy supply.

[72] Similarly in *Northern Construction Enterprises*, *supra*, the issue was whether, on an appeal of a development officer's decision to refuse a development permit, the Board had jurisdiction to determine the legality of the land use by-law. The Board found it did not. That decision was upheld on appeal. The Board's jurisdiction was limited to determining whether the development officer's decision reasonably carries out the intent of the municipal planning strategy or conflicts with the land use or the subdivision by-laws. The Board had no jurisdiction to

determine the legality of the by-laws, because there was no specific statutory authority allowing it to do so (*Northern Construction Enterprises*, at ¶24).

[73] In summary, in both *Northern Construction Enterprises* and *Re Nova Scotia Power Inc.*, the Board was cognizant of its obligation to look to the enabling statute for it jurisdiction. That did not occur in this case.

[74] In effect, what the Board did here was to pre-empt any appeal before there was any rejection of the subdivision application—something it cannot do. The Board's limited authority respecting such appeals is set out in ¶39 above.

[75] I will address another erroneous statement of the Board which it seemed to rely upon in seeking to find jurisdiction. The Board said:

> [66] In order to determine if the *PUA* has any application, the Board must analyze whether in fact the Proposed Charge relates to a potential infrastructure agreement, as envisaged by the *MGA*, and the *Subdivision Bylaw*, in order to determine if s. 274(10) of the *MGA* is applicable. This necessarily leads the Board to examine whether there is a viable argument that the Proposed Charge is authorized by these sources. If this analysis is not done, the regulatory regime, and the Board's oversight role, could be compromised by a municipality's mere assertion that this is the case.
>
> [Emphasis added]

[76] As to the Board's concern that its "oversight role, could be compromised", not so says the Municipality, explaining:

> [45] […] The Board expresses concern that its oversight role may be compromised by a municipality's mere assertion that its actions are justified by the MGA or its Subdivision By-Law. With respect, that is simply not the case. The Board's oversight role is with respect to utilities and rate payers and that role is not compromised by the actions of a municipality operating pursuant to the provisions of the MGA and its by-laws. People affected by such actions are granted relief elsewhere. In this specific case, FH had appeal rights to the Board if its subdivision application was turned down as a result of its refusal to agree to the proposed charge, under s. 247(3), 250 (3) and 251 (1) and (2) of the MGA . Generally speaking, the actions of municipalities can be challenged by judicial review pursuant to Rule 7 of the Civil Procedure Rules. The Board's oversight role does not extend to the conduct of a municipality's subdivision process except as specially provided by Sections 247 and 250 of the MGA.

[77] The Board made a similar error in *Methot, supra*, when this Court also addressed the Board's concern over limiting landowners' rights and the need to

guard against a municipality acting inappropriately. There, as here, the Board's concern with its oversight role failed to consider appeal rights under the *MGA* and/or relief by judicial review. These rights cannot be passed over, even if doing so is more expedient. The Board can only exercise the power it is given by statute.

[78] The Board's determination of jurisdiction here would permit it to inject itself into negotiations between the parties relating to subdivision matters—however, absent an appeal, the Board has no oversight function. Said differently, the Board cannot do indirectly what it cannot do directly.

[79] For the foregoing reasons, I am satisfied that the Board's determination of its jurisdiction was not correct. I would allow this ground of appeal and set aside the Board's order.

*Did the Board err in concluding the proposed charge was unauthorized?*

[80] Although I have serious concerns with the Board's interpretation and application of the Municipality's governing framework, I need not examine this issue. The success on the jurisdictional ground is dispositive of the appeal. The fact that I have not addressed this ground should not be taken as any endorsement of the Board's reasoning. Nothing further needs to be said about this alleged error.

**Conclusion**

[81] The Board erred in law by concluding it had authority to determine the complaint filed by FH. I would allow the appeal on the first dispositive ground and set aside the Board's order. As this was a tribunal appeal, no costs were sought. None are ordered.

Van den Eynden, J.A.

Concurred in:

Hamilton, J.A.

Scanlan, J.A.