<u>**SUPREME COURT OF NOVA SCOTIA**</u>
Citation: *Pink v Davis*, 2011 NSSC 237

Date: 20110615
Docket: Hfx No 342580
Registry: Halifax

Between:

Joan E. Pink

Applicant

v.

June Davis *and* ***Allan Davis***,
Municipality of the Region of Queens,
-and-
Nova Scotia Building Advisory Committee

Respondents

Judge: The Honourable Justice Gregory M. Warner

Heard and oral decision: June 15, 2011 at Halifax, Nova Scotia

Written Decision: June 16, 2011

Counsel:

Raymond F. Larkin QC, counsel for Joan Pink ("the Applicant")

Roderick H. (Rory) Rogers QC, counsel for the Municipality of the Region of Queens ("the Municipality")

G. F. Philip Romney, counsel for June and Allan Davis ("the Respondents")

Ryan Brothers, counsel for Nova Scotia Building Advisory Committee ("the Committee")

By the Court:

"Don't throw stones at your neighbours, if your own windows are glass." - Benjamin Franklin

Part I *Overview*

[1] Joan E. Pink (the Applicant) applies for judicial review of a decision of the Nova Scotia Building Advisory Committee (the Committee) for two reasons: (1) the Committee had no jurisdiction to decide an application brought by her neighbours, the Respondents, pursuant to s. 15 of the *Building Code Act (Act)*, to overturn an interpretation of the *Building Code (Code)* made by the Municipality's building inspector respecting issuance of a permit for the Applicant's cottage; and (2) if the Committee had jurisdiction, the Applicant was denied procedural fairness because neither the Respondents nor the Committee notified her of the Respondents' application, or afforded her the opportunity to make submissions.

Part II *Facts*

[2] For over sixty years, the Applicant's family, and now she, have owned a cottage (the Pink Property) at 7476 Highway 3, Summerville Beach, one of the beautiful beaches on the South Shore of Nova Scotia. Unfortunately she and the Respondents are in a dispute about the boundary line between their properties.

[3] The Respondents' property is adjacent and to the rear of the Pink Property. A right-of-way runs from the highway along the length of the Pink Property towards the Respondents'

Property upon which property sit their home and rental chalets. Others utilize this right-of-way to access their properties.

[4] During renovations to the Pink Property, an issue arose between the Applicant and the building inspector for the Municipality (William Leighton) regarding the proximity of the new dwelling renovations, including a veranda, to the right-of-way. The issue was whether the renovations were too close to the right-of-way, given the spatial separation requirements between buildings for fire safety purposes contained in the *Code*. The issue was complicated by the fact that the Applicant and the Respondents were in dispute about the boundary line between their properties and each had a competing survey.

[5] The Municipality issued a Conditional Occupancy Permit in relation to the Pink Property on May 7, 2010, on the condition that (1) the Applicant start a proceeding in the Supreme Court of Nova Scotia to determine the boundary line dispute; and (2) the Permit was valid only for a period of 12 months, such that there must be either a determination of the disputed boundary line by that date, or the Applicants needed to complete certain work related to fire resistance.

[6] Five months later, on October 7, 2010, the Respondents' made an application to the Committee pursuant to s. 15(1) of the *Act* disputing Mr. Leighton's decision on the interpretation of "limiting distance", which formed the basis of his decision to issue the Conditional Occupancy Permit. The Respondents requested a ruling on Article 1.1.3.2 of the *Code*.

[7] Section 14(c) of the Act describes one of the functions of the Committee as hearing "appeals as provided by Section 15". An application pursuant to s. 15(1) is an appeal of a building official's ruling.

[8] The Respondents did not provide notice of this application to the Applicant and submitted that the Applicant did not require notice because "the ruling we are seeking clarification on involves **our** property only and has nothing to do with the permit holders".

[9] The Respondents claimed that the Applicant had "built too close to our property line". The Respondents acknowledged that "even though we are not the permit holders this construction inches from our driveway has greatly affected our home and business".

[10] From October 15, 2010, until December 16, 2010, Mr. Leighton was in e-mail correspondence regarding this application with both the Committee through its Executive Secretary, Ted Ross, and the Respondents. At all times, Mr. Leighton used the same e-mail address for Mr. Ross and the Committee.

[11] On October 25, 2010, Mr. Leighton sent a fax to Mr. Ross attaching an initial handwritten reply to the Respondents' application for a hearing. Attached to the Municipality's first reply was an excerpt from the *Code* and a copy of the property plan.

[12] Mr. Leighton provided a more detailed formal typed reply through Mr. Ross to the Committee (copied to the Respondents) by way of a letter dated October 27, 2010. The Municipality argued that the Committee did not have the jurisdiction to consider the application because the Respondents were not the "owners" for the purposes of s. 15 (1) of the *Act*. The October 27, 2010 submissions also indicated that the Respondents were seeking a determination on a matter involving another property owner yet, to the knowledge of the Municipality, no notice had been provided to Joan Pink of the application. The October 27, 2010 letter also provided more detailed support for the Municipality's interpretation of "limiting distance".

[13] The October 27, 2010 letter from the Municipality was forwarded to Mr. Ross by e-mail on October 28, 2010. A copy was forwarded on the same date by e-mail to the Respondents. The e-mail address used for Mr. Ross and the Committee was the same as that used on all previous e-mail correspondence with Mr. Ross.

[14] The Respondents received the Municipality's letter dated October 27, 2010. On November 1, 2010, the Respondents e-mailed Mr. Ross and Mr. Leighton responding to both of the Municipality's submissions – as evidenced from the topics of their submissions and direct reference to the Municipality's letter to Mr. Ross dated October 27, 2010.

[15] Mr. Ross e-mailed Mr. Leighton and the Respondents on November 2, 2010, acknowledging receipt of the Respondents' e-mail of November 1, 2010. Mr. Ross also requested confirmation of whether the hearing could commence. Mr. Ross e-mailed the parties again on November 12, 2010, requesting confirmation that the Committee had sufficient information to conduct a hearing. The Respondents responded on November 12, 2010, that they were ready to proceed and Mr. Ross e-mailed Mr. Leighton again on November 16, 2010, questioning whether the Committee could proceed.

[16] Mr. Leighton e-mailed Mr. Ross and the Respondents on November 16, 2010, advising that the Municipality was ready for the hearing to proceed based on his earlier correspondence, assuming that the Committee had the Municipality's submission dated October 22, 2010, and the letter dated October 27, 2010. In this e-mail, Mr. Leighton again stated that the Committee had no jurisdiction under s. 15 to consider the application.

[17] The Committee issued its decision on December 15, 2010. The letter dated October 27, 2010, was not considered by the Committee in making its decision although the Committee did consider submissions from the Respondents dated November 1, 2010, which addressed and rebutted Mr. Leighton's letter of October 27, 2010. Mr. Brothers, counsel for the Committee, confirmed this in a letter of February 16, 2011, where he states that Mr. Ross did not receive the Municipality's submission of October 27, 2010, and it was not before the Committee. No explanation was provided in relation to receipt (or non-receipt) of that October 27, 2010, letter from the Municipality.

[18] The Committee determined that it had jurisdiction to deal with the Respondents' application. The decision states:

> The tribunal first address the matter of jurisdiction. The *Building Code Act* states,
>
> > 15 (1) Where a dispute arises between an owner of a building or the owner's agent and a building official respecting the technical requirements of the Building Code or the sufficiency of compliance with such requirements, or respecting an order made by the building officer pursuant to section 12, the owner or the owner's agent may make an application to the Committee for a ruling on the subject-matter of the dispute.
>
> The Tribunal found that there is a dispute between an owner of a building and a building official respecting the technical requirements of the Building Code or the sufficiency of compliance with such requirements.
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> This Application differs from the norm in that the municipality's interpretation interferes with the applicants right of enjoyment of their land, by a ruling made by the building official respecting the location of an addition to a building on an adjacent property. [Emphasis added in the original]

[19] On the substance of the application, the Committee substituted its view of the application of the *Code* for that of the Municipality and directed as follows:

> The Tribunal does not support the position of the Respondent. The Tribunal replaces the decision of the respondent that the limiting distance may be measured to the centre line of the right-of-way, or lane and replaces that decision as follows:
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> > The limiting distance be measured as the distance from an exposing building face to the property line at right angles to the exposing building face.

[20] On December 17, 2010, G. F. Philip Romney, solicitor for the Respondents in other legal proceedings, wrote to the Applicant's counsel in the property litigation, advising of the decision and enclosing a copy.

[21] This was the first that the Applicant knew that an appeal had been made to the Committee or that the Committee had considered an application relating to her property and building.

[22] The Applicant immediately asked that the Committee reconsider its decision. The Committee replied that it had no authority to reconsider its decision.

[23] The Applicant brought this application for judicial review seeking to quash the decision of the Committee and, at the same time, appealed the decision of the Committee, pursuant to s. 16(1) of the *Act*. At the hearing of the motions for directions respecting both proceedings on February 15, 2011, the Court directed that the application for judicial review be heard first and that the motion for directions on the appeal under s. 16 be adjourned. Counsel for the Attorney General and Committee advised they were maintaining a watching brief. A hearing date and deadlines for filing affidavits and briefs were set.

[24] As it did in its October 27, 2010, submission to the Committee, the Municipality supports the Applicant's submission that the Committee had no jurisdiction to hear the Respondents'

request and, if wrong, that the Applicant was entitled to notice and the opportunity to make submissions to the Committee,. In addition, the Municipality asserts that the Committee breached its duty of procedural fairness by failing to consider the Municipality's submissions to the Committee dated October 27, 2010.

[25] The Applicant and the Municipality filed affidavits and written submissions. The deadline for the Respondents to file affidavits or a brief passed. Both the Respondents and the Committee have advised that they would make no submissions nor appear at the hearing. The court advised them that, at the hearing, it would consider the request of the Applicant and the Municipality for costs.

Part III ***Issues***

Issue #1 Did the Committee have jurisdiction to hear the Respondents' application/appeal?

Issue #2 Did the Committee breach the principles of procedural fairness?

Part IV *Analysis*

Issue #1 *Jurisdiction*

Standard of Review

[26] The Supreme Court of Canada revised the law of judicial review and reduced the standards of review for decision of administrative tribunals from three to two in *Dunsmuir v New Brunswick*, 2008 SCC 9. The Court retained the "correctness" standard, but abandoned the standard of "patently unreasonable" and "reasonableness *simpliciter*" in favour of only "reasonableness".

[27] The Supreme Court addressed judicial review of jurisdictional error as follows:

> [29] Administrative powers are exercised by decision makers according to statutory regimes that are not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v Attorney General of Quebec*, [1981] 2 SCR 220, at p. 234; also, *Dr. Q. V College of Physicians and Surgeons of British Columbia*, [2003] 1 SCR 266, 2003 SCC 19, at para 21.
>
> [30] In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" ("Appellate Review: Policy and Pragmatism", in

> *2006 Isaac Pitblado Lectures, Appellate Court: Policy, Law and Practice*, V-1 at p. V-12). In essence, the rule of law is maintained because the courts have the last work on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.
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> . . .
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> [59] Administrative bodies must also be correct in their determination of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definition adopted before *CUPE*. It is important here to take the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal has the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf), at pp. 14-3 to 14.6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v Calgar (City)*, [2004] 1 SCR 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para 5, per Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.
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> . . .
>
> [61] Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. Inc. v Regina (City) Board of Police Commissioners*, [2000] 1 SCR 360, 2000 SCC 14; *Quebec (Commission des droits de la personne et des droits de la jeunesse*) v *Quebec (Attorney General)*, [2004] 2 SCR 195, 2004 SCC 39.
>
> [emphasis added]

[28] These principles were recently were considered by the Nova Scotia Court of Appeal in *Canadian Union of Public Employees, Local 2434 v Port Hawkesbury (Town)*, 2011 NSCA 28, where Justice Fichaud on behalf of the Court stated:

[27] From *Dunsmuir*, I draw the following principles on jurisdictional review:

a) A “true question of jurisdiction” means “whether or not the tribunal had the authority to make the inquiry”, and “whether its statutory grant of power gives the authority to decide a particular matter” (para 59)

b) The concept of decisional jurisdiction that preceded *CUPE v New Brunswick Liquor Corporation*, [1979] 2 SCR 227, is rejected. That former notion could stretch any error along the tribunal’s reasoning path into a jurisdictional impediment to the next analytical step. Then jurisdiction review would elasticize into full appellate scrutiny. *Dunsmuir* forbids that approach.

c) So a truly jurisdictional question means – Is the door of legal authority open or shut to the tribunal’s inquiry on the matter? The decisional reasoning by a tribunal with that authority is not jurisdictional.

d) A jurisdictional issue may arise by either an excess of legal authority or an erroneous refusal to exercise that authority:

> “59...The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction”.

e) Plotting the jurisdictional line between two or more competing specialized tribunals is similarly reviewed for correctness.

f) The Court’s correctness standard for a true jurisdictional issue stems from the superior court’s constitutionally protected function to uphold the application of the rule of law by statutory tribunal, as explained in cases such as *Crevier v Attorney General (Quebec) et al.*, [1981] 2 SCR 220.

g) Correctness applies to a true jurisdictional question without a standard of review analysis. But if the matter is not truly jurisdictional (and is not otherwise excepted from standard of review analysis as explained in *Dunsmuir* – e.g. constitutional issues), then the reviewing court must proceed to the factor-based standard of review analysis.

Jurisdictional Review in this Case

[29] In this case, the Committee was required to determine whether it had the authority under the *Act* to deal with the Respondents' application.

[30] The statutory scheme in the *Act* provides for two avenues to challenge a decision of a building official on the application of the *Code*:

a) Section 15 of the *Act* allows the owner of the building who disputes the decision of a building official respecting the technical requirements of the *Code* or the sufficiency of compliance with those requirements to apply to the Committee for a ruling on the matter; and,

b) Section 16 of the *Act* allows a person who claims to be adversely affected by an order or decision made by a building official to apply to the Supreme Court of Nova Scotia for a hearing and appeal.

[31] The decision as to which route can be taken by an adjacent land owner to challenge the decision of a building official on the application of the *Code* to a building is a pure question of jurisdiction. The Committee had to determine whether its statutory grant of power gave it the authority to decide the matter before it. The question of whether the Respondents' challenge to the inspector's decision should go to the Committee or Nova Scotia Supreme Court is a pure question of jurisdiction.

[32] A statutory body, such as the Committee, when sitting as an appellate tribunal, must be correct in determining true questions of jurisdiction. No standard of review analysis is required

to determine whether a more deferential standard of review must be undertaken. If the Committee did not interpret its grant of authority in s. 15(1) of the *Act* correctly, the decision is *ultra vires*.

Was the Committee's decision on jurisdiction correct?

[33] In their application dated October 7, 2010, the Respondents seek a ruling about an "Order made by the Building Official", in particular, a ruling on Article 1.1.3.2. – Limiting Distance.

[34] In their accompanying letter dated October 7, 2010, the Respondents refer to a complaint they filed with the Region of Queens and Mr. Leighton in 2009, and various oral communication with Mr. Leighton. The Respondents state:

> ... Mr. Leighton refused to make a ruling until the final inspection had been done. When the final inspection had been done he ruled that our driveway is (a street, lane or public thoroughfare in Section 1.1.3.2. of the building code) and that the limiting distance will be measured from the centre of the driveway and not from our property line ...

[35] Based on this explanation of the ruling relating to the final inspection of the Pink Property, the Respondents asked the Committee to give an "independent ruling on this section of the *Building Code*". The Respondents did not provide any documentation with respect to a ruling of Mr. Leighton responding to their "complaint" or their property. At all times, it is clear that the Respondents were concerned with rulings and decisions made by Mr. Leighton and the Municipality in relation to the Pink Property and the issuance of their Occupancy Permit.

[36] The Committee determined that the Respondents were "owners" with respect to the application:

> The Tribunal found that there is a dispute between an owner of a building and a building official respecting the technical requirements of the Building Code or the sufficiency of compliance with such requirements.
>
> This Application differs from the norm in that the municipality's interpretation interferes with the applicants right of enjoyment of their land, by a ruling made by the building official respecting the location of an addition to a building on an adjacent property.

[37] The material portions of the *Act* are:

> 2(o) "owner" includes a person controlling the property under consideration, and also includes *prima facie* the assessed owner of the property whose name appears on the assessment roll prepared in accordance with the *Assessment Act*.
>
> 15 (1) Where a dispute arises between an owner of a building or the owner's agent and an [a] building official respecting the technical requirements of the Building Code or the sufficiency of compliance with such requirements, or respecting an order made by the building official pursuant to Section 12, the owner or the owner's agent may make an application to the Committee for a ruling on the subject-matter of the dispute.
>
> 16(1) Any person who is adversely affected by an order given or decision made by an [a] building official under this *Act*, or by a decision of the Committee may, within thirty days after the order or decision is made, apply to the Supreme Court of Nova Scotia for a hearing and appeal.

[38] As to the proper approach to statutory interpretation, Elmer Driedger wrote: '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 or ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of the Parliament.'

[39] Ruth Sullivan wrote that this sentence incorporates a complex multidimensional analysis. She divided Driedger's principle into three analytical steps. Her description of the three steps is consistent with the approach taken by the Supreme Court of Canada in many decisions after

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27, including *Bell ExpressVu Limited Partnership v The Queen*, 2002 SCC 42; *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54, as well as by the Nova Scotia Court of Appeal in *Cape Breton Regional Municipality v Nova Scotia*, 2009 NSCA 44 and *Coates v CDHA*, 2011 NSCA 4.

[40] I summarize the three steps as:

1. Analysis of the "textual" meaning (that is, the words of the *Act* in their entire context). Sullivan notes that finding the grammatical or ordinary sense of words may involve complex issues of linguistic convention, expression and understanding.

2. Analysis of legislative intent. Legislation has a purpose and is intended to achieve certain goals. Courts must try to identify purposes and goals, as well as the means devised to achieve them.

3. Analysis of established legal norms, as part of the context for reading words in legislation. According to Driedger, there are four kinds of legislative intention: expressed, implied, presumed and declared intention. Presumed intention embraces the evolving legal norms found primarily in the common-law but also in constitutional, quasi-constitutional and international law.

[41] The three analyses are sometimes turned into three questions:

1. What is the meaning of the text?

2. What goals (purposes) and methods did the legislature intend to adopt?

3. What are the consequences of adopting a proposed interpretation?

[42] When applying these analytical steps, the resulting interpretation must be justified in terms of its plausibility (compliance with the text), its efficacy (promotion of the legislative intent) and its acceptability (compliance with accepted legal norms).

First Question: What is the meaning of the text?

[43] A reading of s. 15(1), in its grammatical and ordinary sense, demonstrates that in order to bring an application for a hearing before the Committee, a person must be an owner of a building or the owner's agent with respect to a dispute that has arisen between a building official and the owner about *Code* requirements. The term "owner" is defined in s. 2(o) of the *Act*.

[44] The connection between an "owner" and the control of property "under consideration", is also seen in the definition of "owner" in the *Code* (Article 1.1.3.2.) and in the *Nova Scotia Building Code Regulations*, NS Reg 322/2009 (the "Regulations") (Article 1.3.1.3.).

[45] Based on the definition of "owner" in the *Act* and related legislation, the meaning of "the owner of a building" is that an owner has to be either the person controlling the property "under consideration" by the building official or the assessed owner of the property "under consideration". In this case, the person controlling the property "under consideration" by the Municipality was the Applicant, Joan Pink, and not the Respondents, June and Allan Davis.

Second Question: What is the legislative intent?

[46] An assessment of legislative intent involves an assessment of the scheme and purpose of the *Act* and related legislation, as well as the purpose of the provision in question. This can involve assessment of legislative history and evolution. There has been little relevant evolution in the wording of provisions relating to the Committee. They have been essentially the same since first enacted in the *Building Code Act*, SNS 1986, c. 3.

[47] The wording of s. 16(1) of the *Act* provides clear support for the position that the Respondents are not "owners" entitled to advance a s. 15(1) application to the Committee relating to the Pink Property.

[48] Section 16(1) shows that the intention of the legislature in relation to a s. 15(1) application to the Committee was that only an owner of a building that is subject to a decision of a building official can apply to the Committee. This is based on the very different wording in ss. 15(1) and 16(1) with respect to the authority of the Committee and the Court. The words "[A]ny person who is adversely affected by an order" used in s. 16(1) unequivocally allows any adversely affected person to bring an appeal to the Supreme Court of Nova Scotia. The Respondents, as persons adversely affected by a decision made by a building official respecting the Applicant's building, could have appealed the issuance of the permit under this provision.

[49] By contrast, individuals who are able to bring an application to the Committee under s. 15(1) are restricted to the "owners of a building" where a dispute arises with a building official. Had the legislature intended to broaden the scope of the Committee's jurisdiction "to any person

who is adversely affected by a decision", they could have chosen similar wording to that employed in s. 16(1). (*Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 75)

[50] Taken together, the provisions of the *Act*, in their entire context, read harmoniously with the scheme and object of the *Act* and the related legislation shows that only owners of buildings under consideration by building officials can apply to the Committee for a ruling.

[51] It is noteworthy that the Respondents described themselves in the letter accompanying their application as follows: "Even though we are not the permit holders this construction inches from our driveway has <u>**greatly affected**</u> our home and business." [emphasis added]

Third Question: What are the consequences of adopting the proposed interpretation?

[52] The consequence of the Committee's interpretation regarding its jurisdiction is that any person who is interested or potentially affected by a dispute between a building official and the owner of a building could bring an application before the Committee.

[53] This consequence is not consistent with the legislative intent for at least three reasons: (1) upon a grammatical reading, s. 15(1) applies to owners who dispute a decision or order of a building official in respect of the technical requirements applicable to their own building, (2) upon a grammatical reading, s. 16(1) affords affected parties with an appeal to the Supreme Court of Nova Scotia, and (3) if, for the purposes of s. 15(1), an owner can be someone other than the owner of the building in dispute, then it is illogical that in s. 15(2) the applicant need only to cause notice to be served on the building official and not on the owner to the building in dispute.

[54] Restricting the term "owner" in s. 15(1) to the owner of the building in dispute satisfies the requirement of plausibility, efficacy and acceptability as a legislative choice for accomplishing the purposes of the *Act*.

[55] There is nothing in the wording of s. 15(1) of the *Act* or the broader legislative text that indicates that the Respondents could bring an application to the Committee based on a decision of a building official related to the Pink Property. The Committee's interpretation would allow an adjacent land owner (or presumably even a non-adjacent landowner or party) to bring an application to the Committee about his neighbour's property, without notice to or the opportunity afforded for submissions by the most affected party. The Committee's interpretation is not plausible because it is one that the words of the text cannot reasonably bear. To make an important quasi-judicial determination respecting a person's property, without notice to him or her, is contrary to the most fundamental precept of the rule of law, and of administrative law.

[56] The *Act* does not leave the Respondents without a remedy if they are persons who are adversely affected. Section 16 clearly provides one.

[57] This is not a complicated question of statutory interpretation. To apply under s. 15 to the Committee, a party must be the owner of the building which is the subject of the decision of the building official respecting the technical requirements of the *Code* or the sufficiency of compliance by the owner with those technical requirements to the owner's building.

[58] The owner of the building which was the subject of the building official's decision was the only person who could be an applicant under s. 15(1). She was the person in control of the property and the building under consideration. The only building about which there is a dispute

regarding the technical requirements of the *Code* or the sufficiency of the Applicant's compliance with those requirements is the Pink Property. There is no other building about which there is a dispute regarding the technical requirements of the *Code* or the sufficiency of compliance with those requirements.

[59] Accordingly, the Committee did not have jurisdiction to deal with the application from the Respondents or to make its decision regarding the application of the *Code* to the Applicant's building.

Issue #2 ***Procedural Fairness***

Applicant's Submissions

[60] The Applicant submits the Committee failed to comply with its duty of procedural fairness when it made a decision affecting the Applicant's building without notice to the Applicant and without giving the Applicant an opportunity to be heard.

[61] A decision of an administrative tribunal which may affect the rights, privileges or interests of an individual triggers the application of a duty of procedural fairness. In this case, the Committee made a decision which interpreted the application of the *Code* to the Applicant's cottage on her property.

[62] At a minimum, the Committee had a duty to give the Applicant notice of the application, and an opportunity to make submissions.

[63] The Committee gave no notice to the Applicant and the Applicant had no opportunity to make submissions. Lack of notice was compounded by the failure of the Committee to consider the Municipality's written submissions. The Committee refused to reconsider its decision when this breach of procedural fairness was brought to its attention.

[64] In these circumstances, the Committee did not provide procedural fairness to the Applicant.

Standard of Review for Breach of Procedural Fairness

[65] Where the issue on judicial review is procedural fairness, no standard of review analysis is required and a tribunal is not entitled to any deference in the Court's assessment of the issue. The standard of review is correctness.

[66] For these principles, the Applicant relied upon Justice Fichaud's analysis at pp. 30 to 32 in *Communication, Energy and Paperworkers Union of Canada, Local 141 v Bowater Mersey Paper*, 2009 NSCA 60. What remains for the Court to address is first the content of the Committee's duty of fairness and, second, whether the Committee breached that duty.

[67] The analysis of the standard of judicial review for procedural fairness and the content of the duty of procedural fairness were affirmed and clarified last Friday by the Supreme Court of Canada in *Canada v Mavi*, 2011 SCC 30. From that decision, I glean the following principles:

1) The doctrine of procedural fairness is a fundamental component of Canadian administrative law. (para.38)

2) While the content of the duty of procedural fairness varies with circumstances, the legislative and administrative context, Parliament did not intend that administrative officials be free to deal unfairly with people who are subject to their decisions. (para. 39)

3) A balance must be struck in determining the content of procedural fairness between delay and cost on one hand, and erroneous, incomplete or ill considered findings and exercises of discretion, and the public perception of unfairness, on the other hand. (para. 40)

4) The particular legislative and administrative context is crucial to determining the content of the duty of procedural fairness. (para. 41)

5) A number of factors help to determine the content of the duty of procedural fairness, in each particular legislative and administrative context. Some of these factors were first discussed in *Cardinal v. Kent Institution* [1985] 2 SCR 643; others were explained as a comprehensive but non-exhaustive list in *Baker v.Canada* [1999] 2 SCR 817; many other decisions have provided additional elements.

6) "The simple over-arching requirement is fairness and this central notion of the just exercise of power should not be diluted or obscured by jurisprudential lists developed to be helpful but not exhaustive." (para. 42)

The Contents of the Duty of Fairness in this Case

[68] The Committee's mandate under s. 15 of the *Act* is to make a ruling on the subject matter of a dispute between an owner of a building and a building official on the technical requirements of the *Code* or the sufficiency of compliance with those requirements.

[69] In the context of this case the building about which the official made a decision was the Applicant's building on her property. The Committee rejected the building official's decision concerning the technical requirements of the *Code* and replaced his decision with their own decision regarding the "limiting distance" required by the *Code* between the Applicant's building and the Respondents' property.

[70] Clearly the decision of the Committee affects the Applicant's use of her property and her right to occupy her cottage.

[71] In its seminal *Baker* decision, the Court, after enumerating five non-exhaustive factors, stated at para 28:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[72] In the context of the legislative framework relevant to *Baker*, the Court described the participatory rights of the appellant as the opportunity to put forward in written form the information about her circumstances, not the right to an oral hearing or an interview.

[73] Section 15 of the *Act* provides, in fourteen subsections, the process that governs the Committee's conduct, and establishes the content of its duty of fairness to the owner.

[74] The process prescribed by s. 15 calls for an expeditious hearing and gives considerable discretion to the Committee in how to deal with an application. The process plainly contemplates the right of the owner of the building under consideration to make submissions to the Committee. To make such submissions, the owner would have to receive notice. In this case, the content of the duty of procedural fairness includes notice to the owner of the building under consideration and the right to make submissions under the established procedure in s. 15(4).

[75] The decision of the Committee is obviously important to those affected by it. The Applicant's use of her cottage and indeed her ability to occupy it is at stake.

[76] The Applicant would have a legitimate expectation that the decision of the building official on the application of the *Code* to her cottage would stand unless it was overruled by an appropriate due process.

[77] Taking into account the factors from the *Baker* decision, the Committee had a duty of procedural fairness that included giving notice to the owner of a building about which there has been a determination by a building official on the application of the *Code* and permitting the owner to participate in making the submissions which are called for in s. 15(4) of the *Act*.

Application of the Duty of Fairness in this Case

[78] In this case the building official interpreted the "limiting distance" provisions of the *Code* and applied them in considering the occupancy permit which was granted to the Applicant. The Committee decided to substitute a different interpretation.

[79] This decision very clearly affected the Applicant's interests. It was made without notice to the Applicant and without any opportunity for the Applicant to make submissions.

[80] The failure to give notice to the Applicant was stated clearly in the submissions by the Municipality in its letter of October 27, 2010. The Committee did not consider those submissions although it did consider the Respondents' rebuttal to them.

[81] The Applicant should have had the opportunity to make submissions on a decision affecting her rights and interests in a fair, impartial and open process. She was denied the opportunity to do so. This is clearly a breach of the duty of procedural fairness.

The Municipality's Right to Make Submissions

[82] Based on the only evidence before the court, the Committee's failure to consider the full submissions of the Municipality was the result of an inadequate system for dealing with applications, and/or an error by Mr. Ross. The October 27th letter was sent to the Committee in the same manner as all other communications, which were received. Absent participation by the Committee with respect to its involvement in the procedural fairness issue, the court is left with only the evidence of William Leighton. While it is normal and appropriate that the Committee

would take no part in an appeal of its decision, the Applicant and Municipality's allegation that the Committee's conduct fell below the reasonable standard of care of the Committee in respect of its duty of fairness, should have elicited some factual response as to why the Committee did not consider the Municipality's submissions. By s. 15, the Municipality is entitled to participate and be heard.

[83] The Municipality cites: *Iqbal v Canada*, 2005 FC 1388, and *Menon v Canada*, 2005 FC 1273. In these cases, the decision-maker failed to receive or consider submissions made. While not identical, they are analogous matrices to that of the Municipality in this case,

[84] The Municipality's letter dated October 27, 2010, was sent to Mr. Ross's e-mail address – the same e-mail address used in all other communications amongst Ross, the Davis' and Leighton. The Respondents received from the Municipality the e-mailed letter and forwarded to the Committee a response to the Municipality's October 27th submissions. The letter dated October 27, 2010, could have materially affected the Committee's decision, if it had been considered.

[85] The Municipality had a legitimate expectation that the Committee would follow its stated procedure of considering the submissions forwarded to its attention at the e-mail address for Mr. Ross, the same address Mr. Ross used for his communications with the Municipality and Respondents.

Part V Conclusion

[86] The Respondents were not the owner of the building or property in dispute. They had a clear remedy under s. 16 of the *Building Code Act*. The Committee had no jurisdiction to consider the Respondents' application under s. 15 of the *Building Code Act*. Its decision is *ultra vires*.

[87] If I am wrong, the Committee's decision affected in a fundamental way the interests of the Applicant in respect of her property and building, as well as the interests of the Municipality. The Committee owed a duty of procedural fairness to the Applicant to notify her of the Respondents' application and to afford an opportunity to the Applicant to make submissions. The Committee owed a duty to the Municipality to consider its substantive response of October 27th, 2010, and, in light of the Respondents' response to those submissions, to act with more diligence in determining it had the Municipality's submissions.

[88] It is difficult to comprehend and troubling that the Respondents could, in good faith, assert to the Committee, on October 18th (and again in their November 1st response to the Municipality's October 27th, letter) that its request for a ruling, that clearly affected the Pink Property, "involves **our** property only and has nothing to do with the permit holders".

[89] One of the functions of the Committee is to 'hear appeals as provided by s. 15' (s. 14(c) *Act*). It is bizarre and very troubling that the Committee, a statutory appeal tribunal, would be unaware of one of the most fundamental principles of natural justice, and of administrative law, reflected in the maxim *audi alteram partem*. It failed to give notice to the Applicant and afford her the opportunity to be heard respecting a subject matter in which she had the greatest interest.

[90] Its system for dealing with appeals was either inadequate, or the conduct of its officials was lacking in diligence. It failed to consider the substantive response of the Municipality to the Respondents' application, and, from the Respondents' response to it, failed to recognize what was missing.

[91] As a result of my determination in this proceeding, the Applicant asked that I issue an order dismissing its appeal under s. 16 without costs. I will.

Part VI Costs

[92] The Applicant and the Municipality seek costs.

[93] Costs are in the discretion of the Court, acting judicially. *CPR 77* is the starting point. Case law and texts provide additional guidance.

[94] There are three aspects to the Court's assessment of damages:

1. Against whom should costs be ordered?
2. To whom should costs be ordered?
3. What is the fair quantum?

First Question: Against whom should costs be ordered?

[95] ***Respondents***: Counsel for the Respondents and the Committee filed written submissions. Counsel for the Respondents made additional oral submissions.

[96] The Respondents submit that they should not be liable for costs. They "quite simply . . . requested an interpretation from the Committee on their property . . . they did not request a ruling on Mrs. Pink's property". In addition, "the Committee, not they, should have defended the Committee's interpretation, at no cost to the Respondents. . . If Mrs. Pink should have been advised of the request to the Committee, then either the Committee or the Municipality of the Region of Queens should have advised her."

[97] In oral argument, counsel added that they are not the reason that this proceeding for Judicial Review is before the Court.

[98] These submissions are not factually correct. The Respondents applied under s. 15 of the *Act* – an application identified in s. 14(3) as an appeal – to have the Committee overturn the Municipal building inspector's interpretation of the Code in respect of a permit application by the Applicant respecting her building on her property. While the decision may have affected the Respondents, the application they filed was an appeal of a permit respecting the Pink Property.

[99] The Respondents did more than that. They actually contested the Municipality's submissions to the Committee that the Committee had no jurisdiction to hear the application and that the Applicant was entitled to notice. As incredible as I find it that the Committee agreed with the Respondents' submissions on jurisdiction and procedural fairness, it was the Respondents who, figuratively speaking, threw the stones, and it is they who are liable for the resulting costs.

[100] The costs of this proceeding do not include the cost of the proceeding before the Committee. When the Applicant learned of the decision, it asked the Committee to reopen the matter, and probably correctly, the Committee replied that it was *functus*. The Applicant filed a Notice of Judicial Review under *CPR 7* and an appeal under s. 16 of the *Act*.

[101] The Notice properly named the Committee, the Respondents and the Municipality as respondents. The Committee's Notice of Participation stated that as the decision-making authority it would take no part in the Judicial Review. The Municipality's Notice of Participation supported the Applicant. The Respondents' Notice of Participation, filed on February 1, 2011, set out in detail its opposition to the Motion for Judicial Review and pleaded that the Committee's decision should be upheld.

[102] If the Respondents could plead ignorance of the law at the Committee hearing stage(on the basis that it appears from their communications with the Committee that they were not represented by counsel at that time), they cannot so plead after the Notice for Judicial Review was filed. Legal counsel prepared and filed their Notice of Participation.

[103] I have determined that in respect of both the jurisdictional issue and the issue respecting natural justice that the Committee clearly erred. There is probably no clearer example of a breach of the principles of procedural fairness reported in this jurisdiction. The absence of procedural fairness in this case was so obvious that, when the application was filed, the Respondents should have consented to an order setting aside the Committee's decision.

[104] After the Applicant and the Municipality had filed their affidavits and briefs, the Respondents gave notice that they did not intend to participate in the hearing or file any response.

[105] In two preliminary motions heard in the spring before Justices Robertson and MacDougall, the Respondents maintained their opposition to the Application. This necessitated the affidavits, briefs and this hearing.

[106] It would be unfair to let the Respondents throw stones – not once, but continuously, and escape responsibility for the costs they have caused.

[107] ***The Committee*:** The Committee's brief respecting costs sets out the law. Counsel refers the Court to a frequently quoted passage from **Brown and Evans**, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing: Loose leaf), s. 5:2560. He also cites *Lang v British Columbia*, 2005 BCCA 244 at para. 47, and *Court v Alberta (Environmental Appeal Board*, 2003 ABQB 912 at para. 12. He submits that the Committee did not act with bad faith or with malice. He notes that the members of the Committee are not legal experts and should not be held to that standard. He notes that the Committee took no position with respect to the Judicial Review application.

[108] Counsel for the Applicant and the Municipality acknowledge that awards of costs against administrative tribunals are made only in unusual or exceptional circumstances and then only with caution. They acknowledge that the tribunal's jurisdictional error is not a basis for awarding costs. They acknowledge that the Committee did not act in bad faith.

[109] However, they note that two of the basis relevant to these facts support awards of costs against tribunals are described in **Brown and Evans**. They suggest that (1) where there has been a lack of procedural fairness or "circumstances otherwise contrary to the rules of natural justice"; and, (2) where the tribunal "manifested a notable lack of diligence", costs have been awarded.

[110] In *St. Peters Estates Ltd v PEI*, 1991 CarswellPEI 96 (PEISC) the Court nullified proceedings before the Land Use Commission, but declined to award costs against the Commission. Justice McQuaid set out the principles that are described in **Brown and Evans**. He held that the Commission was not immune to costs but that costs against a tribunal are the exception, not the rule.

[111] He cited, with approval, a 1985 PEI Supreme Court decision as to when costs should and should not be awarded. Costs should not be awarded where the tribunal acted without jurisdiction because of a highly technical or complex legal question which the tribunal, even with "the best available legal advice" might error in respect of; but should be awarded "where the board ought to have known, or failed or neglected to secure common counsel to advise it . . . and proceed[ed] nevertheless . . ."

[112] In *St. Peters Estates*, Justice McQuaid concluded that costs should not be awarded by reason only of a loss of jurisdiction but "where that loss of jurisdiction resulted from conduct on the part of the tribunal which can be held to be . . . otherwise running contrary to the rules of the natural justice, then, unquestionably, costs should be awarded against it." (para. 14). He added at para. 15: "Where the tribunal has acted in good faith and conscientiously throughout, albeit it resulting in error, the reviewing tribunal would not ordinarily impose costs." [emphasis added]

[113] The *St. Peters Estates* principles were recently summarized and adopted in *Kelly v PEI (Human Rights Commission)*, 2010 PECA 6. The Court stated: "... costs should not be awarded ... where a tribunal has proceeded prudently ... On the other hand, where a tribunal ought to have known or has neglected to properly consider a serious jurisdictional question ... or made a clear breach of the rules of natural justice or procedural fairness ... then costs should be awarded against the tribunal ..."

[114] In this case, the Committee committed a clear breach of the rules of natural justice and procedural fairness. If its members were not legally trained, as its counsel submits in its brief, it did not act conscientiously when it failed to secure legal advice that was easily available to it within the Department of Justice.

[115] Absence of legally trained persons on the administrative tribunal is not an excuse for failure to follow simple, and not technical, rules of procedural fairness.

[116] The matrix in this case is one of those exceptional circumstances where the Committee should be liable, in costs, for its significant and unreasonable departure from its duty of procedural fairness.

[117] ***Conclusion.*** I conclude, therefore, that both the Respondents, and the Committee, are responsible for the costs of this proceeding.

Second Question: To whom are costs payable?

[118] It is self-evident that the Applicant is entitled to costs.

[119] The real issue is with respect to the Municipality's claim for costs.

[120] The Municipality is more than an interested bystander or effected party.

[121] In the proceedings before the Committee, it was the respondent. Its submissions to the Committee respecting jurisdiction and notice to the Applicant and in respect to the merits of its interpretation of the Code were rejected by the Committee. It was appropriate that the Municipality take an active role, separate and apart from the Applicant, in challenging the Committee's decision because it was a party to the proceeding before the Committee.

[122] The Municipality is entitled to costs.

Third Question: What is the fair quantum?

[123] The analysis begins with *CPR 77*. *CPR 77.06(3)* provides that party-and-party costs in a proceeding for judicial review shall, unless the judge otherwise orders, be assessed in accordance with *Tariff C*.

[124] A judge has general discretion to order costs as he or she, acting judicially, sees fit. There is no reason to depart from the general rule that costs follow the result (*CPR 77.03(3)*). Tariff C(4) reads as follows:

> When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:
>
> a) the complexity of the matter,
>
> b) the importance of the matter to the parties,

c) the amount of effort involved in preparing for and conducting the application.

. . .

Length of Hearing of Application	**Range of Costs**
. . .	
More than 1 hour but less than ½ day	$750 - $1,000

[125] The hearing was scheduled for one-half day and took a full half-day. The basic range for a Chambers hearing of more than one hour but less than one-half day is $750 to $1,000. In this case, because the hearing continued until after 5:00 p.m., the basic fee should be $1,000.

[126] Based on the enumerated factors, both successful parties seek costs of $1,000 multiplied by 3; that is, $3,000 plus HST plus other disbursements.

[127] Counsel referred the Court to a recent analysis by Justice Moir in *Peach* v *Nova Scotia*, 2010 NSSC 207. Justice Moir's decision dealt with the application of the multiplier to a judicial review. I agree with his two primary precepts:

1. judicial reviews and appeals usually involve more work than is required by an ordinary motion;

2. the language in *Tariff C(4)* does not limit the discretion to multiple the range of costs and courts should consider one of the multipliers in every appeal that clearly involves more work than an ordinary, contested interlocutory motion.

[128] In *Peach*, Justice Moir found that the third enumerated factor in *Tariff C(4)* – the amount of effort in preparing and conducting the hearing, warranted, in that case, a multiplier of three.

[129] Applying the enumerated factors, I find:

(1) *Complexity*: This is not a complex matter, so much so, that reasonable persons should have ended this proceeding in January.

(2) *Importance of the matters to the parties*: The Committee's decision had a significant impact on the interests of the Applicant, including her ability to occupy her property, and upon the manner in which the Municipality carried out its duties under the *Act*.

(3) *Amount of Effort*: The affidavits and briefs were substantial. This application involved three court appearances. This proceeding involved more effort and attendances than the average contested Chambers motion.

[130] I agree with Justice Moir and find that the claims of each of the Applicant and Municipality for costs of $3,000 plus disbursements are reasonable.

[131] For convenience, I order that the Respondents shall pay forthwith to the Applicant her costs in the amount of $3,000 plus HST and other disbursements. I order that the Committee shall pay forthwith to the Municipality its costs in the amount of $3,000.00 plus HST and other disbursements.

J.