Date: 20150626
Docket: 14/24
Citation: *Trimart Investments Limited v. Gander (Town)*, 2015 NLCA 32

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR COURT OF APPEAL

BETWEEN:

TRIMART INVESTMENTS LIMITED

BLAINE HEARN and MELANIE HEARN

RICHARD W. FREAKE

TONY'S DRY CLEANERS LIMITED

MCCURDY ENTERPRISES LIMITED APPELLANTS

AND:

THE TOWN OF GANDER RESPONDENT

Coram: Rowe, Harrington and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 200701T1167

Appeal Heard: February 17, 2015
Judgment Rendered: June 26, 2015

Reasons for Judgment by Hoegg J.A.
Concurred in by Harrington J.A.
Separate concurring reasons by Rowe J.A.

Counsel for the Appellants: Annette M. Conway and Kelly C. Hopkins
Counsel for the Respondent: Jonathan D. Dale

Hoegg J.A.:

INTRODUCTION

[1] The Respondent, the Town of Gander (the Town) is a statutory body incorporated under the *Municipalities Act, 1999*, SNL 1999, c. M-24 (the *Act*). The Appellants, Trimart Investments Limited, Blaine Hearn and Melanie Hearn, Richard W. Freake, Tony's Dry Cleaners Limited, and McCurdy Enterprises Limited (the Appellants), are commercial real property owners whose properties abut parking lots owned by the Town.

[2] The Town applied under Rule 38 of the *Rules of the Supreme Court, 1986* for determination of whether certain sections of the *Act* authorized it to charge the Appellants for snow clearing, repaving, and general maintenance including repairing potholes, line painting, sweeping and grading (the described work) of parking lots and service roads adjacent to their properties. The matter was heard on the basis of an Agreed Statement of Facts.

THE APPLICATIONS JUDGE'S DECISION

[3] The Applications Judge (the Judge) ruled that both subsections (1) and (2) of section 149 of the *Act* gave the Town authority to charge the Appellants for the described work respecting the parking lots, but not the service roads.

[4] Section 149 of the *Act* reads as follows:

> (1) A council may assess its cost or a portion of its cost, together with financing charges, upon real property that is directly benefited by a public work of the council, including
>
> > (a) the construction of water lines, sewer lines, storm systems and the service connections of storm systems; and
> >
> > (b) the construction of curbs, gutters, sidewalks or streets or the upgrading or paving of streets,
>
> and this cost shall be known as "the local improvement assessment".
>
> (2) Where a public work of a council or an action of a council on or off a real property designed to

(a) develop municipal services; or

(b) expand the capacity of municipal services;

makes that real property

(c) capable of being developed;

(d) have an increased density of potential development; or

(e) have an enhanced value,

that council may impose a charge on that real property to be known as a "service levy."

(3) A service levy shall not exceed the cost or estimated cost, including financing charges to the municipality of improving or constructing the public works referred to in subsection (2) that are necessary for the real property to be developed in accordance with the standards required by the council and permitted by that council on that real property.

[5] Section 150 of the *Act* sets out the method by which property owners will be assessed for local improvement assessments and service levies.

[6] The Judge ruled that subsection 149(1) of the *Act* authorized the Town to charge the Appellants for the described work as a local improvement assessment. In so ruling, he found that the work was "public work" within the meaning of subsection 149(1) and that it "directly benefitted" the Appellants. The Judge stated at paragraph 33:

> [33] The work in question is a "public work" within the meaning of section 149(1) of the Act which directly benefits the defendants' real property. It provides year round parking which neither of the defendants otherwise would have. In fact, without the municipal parking lots, the defendants would be in violation of the Town's Development Regulations, 2009 to 2019 passed pursuant to section 35 of the *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8, which requires businesses to provide a certain number of parking spaces based on their gross floor area. I reject the defendants' argument that the work intended by section 149(1) is *sui generis*. …

[7] At paragraph 43, the Judge summarized his conclusion respecting the Town's authority to charge the Appellants under subsection 149(1):

> [43] In my respectful view, on a broad and purposive interpretation of section 149(1) of the *Act* and related statutes, the Town has the authority to charge the

> cost of snow clearing, maintenance and repaving of the municipally owned parking lots in question to the defendants as a local improvement assessment on the basis of the frontage of their respective property on the parking lots abutting their properties.

[8] The Appellants had also argued that the Town was discriminating against them by charging them for the described work. The Judge was not persuaded. He said:

> [39] Far from being discriminatory against the defendants, as alleged by them, I find that the failure of the Town to charge the defendants as they have for the service provided would discriminate against other commercial tax payers. There are two other commercial shopping malls in the Town the owners of which also pay real property and business taxes and who have parking lots open to the public but which are maintained and cleared of snow by them. It is true, as submitted by the defendants, that these malls own the parking lots and therefore have a capital asset. However, I find that this does not have a meaningful bearing on the issue before me as all the Town is doing is recovering the cost of providing a service on an annual basis (or periodic basis in the case of paving or repaving of the parking lots); a cost which the defendants would have to incur if they owned the parking lots themselves.

[9] In ruling that subsection 149(2) authorizes the Town to charge the Appellants for the described work as a service levy, the Judge stated:

> [53] Again on a broad and purposive interpretation of the legislation, I am satisfied that the Town has complied with this provision. The Town assessed the levy on the defendants' real property based on the frontage of the respective properties on the relevant parking lot as a percentage of the entire property benefited by the service. In my view, by providing municipal parking lots, the Town has benefited the defendants' real property (if even only indirectly) and has made capable or increased density of development in the area of the Town in question, particularly since the defendants have no frontage on a highway without the parking lots and are not otherwise in compliance with the Town's Development Regulations to provide a specific number of parking spaces, without which the businesses in their properties could not operate.
>
> [54] I am therefore satisfied that the Town also (or alternatively) has the authority to charge the defendants for the services provided as a service levy pursuant to section 149(2) of the *Act*.

THE APPEAL

[10] The Appellants argue that neither subsection 149(1) or (2), when read in its grammatical and ordinary sense within the intent, scheme and object of the *Act*, authorizes the Town to charge the Appellants for the described work.

ISSUES

[11] While the principal issue on appeal is whether section 149 authorizes the Town to impose charges on the Appellants for the described work, the Appellants argue that the Judge specifically erred by:

1) applying the definition of "public work" from the *Public Tender Act* to section 149 of the *Act*; and

2) finding that the described work is public work that directly benefits the Appellants' properties so as to justify the imposition of local improvement assessments under subsection 149(1).

[12] The Appellants also argue that the Judge erred in finding that the Town is not discriminating against them.

[13] With respect to subsection 149(2), the Appellants say that the Judge erred in finding that the snow plowing, repaving and general maintenance of the parking lots was "public work" that was "designed to develop municipal services" and that gives "the [Appellants'] real property an enhanced value," thereby qualifying it for the imposition of a service levy.

STANDARD OF REVIEW

[14] The principal issue raised in this appeal is a matter of statutory interpretation. Matters of statutory interpretation are questions of law which attract the correctness standard of review, as was recently confirmed by the Supreme Court in *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 at paragraph 33. More specifically, this appeal involves interpretation of a municipal statute, which was at issue in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485. In *United Taxi*, the Supreme Court stated that correctness is the reviewing standard when an

appeal concerns whether an action by a municipal government is *intra vires* its enabling legislation.

JURISPRUDENCE

[15] The seminal case on the interpretation of municipal legislation is *United Taxi*. *United Taxi* concerned the vires of a by-law enacted by the city of Calgary ("Calgary") which froze the number of taxi plate licenses to be issued by the city. The by-law had been enacted under a section of new enabling legislation which granted it broad authority to enact by-laws respecting generally defined matters. The Court ruled that Calgary had the authority to enact the by-law to freeze the number of taxi licenses as part of its power to regulate the licensing of taxies which it had been doing under the old legislation. In so ruling, the Court described the approach to be taken to the interpretation of municipal legislation:

> [6] The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp. 244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo*, *supra*, at para. 18. …
>
> . . .
>
> [8] A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. The contextual approach requires "the words of an Act … to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". …

[16] In *Stuckless (A.L.) and Sons Ltd. v. Newfoundland & Labrador (Minister of Forest Resources and Agrifoods)*, 2005 NLCA 11, 244 Nfld. & P.I.I.R. 298 (*Stuckless*), this Court took the same approach to interpreting a section of the provincial *Forestry Act*, RSNL 1990, c. F-23. In *Stuckless*, Mercer J.A. stated that the plain language of a statute is to be read "in [its] entire context and in [the] grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of [the legislature] …" (paragraph 56).

[17] The importance of considering context and the purpose of the legislation when interpreting legislation had been expressed by Green J.A. in *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124 (*Archean*) at paragraph 22, some years earlier. In *Archean*, Justice Green (as he then was) explained that a legislative provision is remedial in nature and must be interpreted in a manner that:

> [22] "best" ensures the attainment of its 'objects' according to its 'true' meaning. This requires a consideration … as an integral part of the interpretive exercise of the problem or 'mischief' to which the legislature directed its legislative act as a remedy and then the drawing of an inference, based on the language of the whole enactment and the court's general knowledge of the state of the pre-existing law and any information as to the broad social context in which the legislative act occurred, as to what, broadly speaking, the object or objects of the legislative act must have been. …

[18] It is helpful to recognize that although *United Taxi*, like this case, involved whether a municipality was empowered by its legislation to take certain actions, the statutory provisions purporting to authorize the respective municipal actions are quite different. In *United Taxi*, the impugned by-law freezing the taxi licenses was enacted pursuant to a grant of broad authority over generally defined matters. In this case, the impugned section of the statute, section 149, authorizes specific municipal actions in specifically defined circumstances. This difference is not to say that the approach to the interpretation of section 149 of the *Act* should not be broad and purposive; rather, it is to say that the section must be interpreted in a broad and purposive manner having regard to its plain language and entire context and "in the grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of [the legislature]" (*Stuckless*, paragraph 8 and *United Taxi*, paragraph 5*).*

[19] A broad and purposive approach to interpretation of municipal legislation does not mean that a municipality can accord itself authority to take actions which fall outside of its statutory grant. A municipality is a creature of statute and has only the authority conferred on it by its enabling legislation (*R. v. Greenbaum*, [1993] 1 S.C.R. 674, page 687, and *Conception Bay South (Town) v. Dawe*, [2001] NFCA 19, 205 Nfld. & P.E.I.R. 258, paragraph 110). It can only exercise powers which are explicitly authorized or found to be authorized after determining the true meaning of the legislation. If authorization for the municipal action is not

found in the statute, properly and purposively construed, then the action will be held to be *ultra vires* the municipality and will not be permitted.

[20] Accordingly, when the authority of a municipal statute purporting to authorize a municipal action is questioned, the impugned provision of the statute must be examined in the manner explained in *United Taxi* at paragraphs 11 and 12, *Stuckless* at paragraph 56 and *Archean* at paragraph 22 to ascertain whether it actually does authorize the municipal action.

THE LEGISLATION

[21] The *Act* has 423 sections divided into 18 defined parts. The sections within each Part relate to matters with which each Part is concerned. Section 149, included in paragraph 4 above, and section 150 are two of seven sections found in Part VI, which is entitled "Assessments and Levies". Part V of the *Act* deals with "Taxation," Part VII deals with "Services," including parking which is addressed by section 169, and Part IX is composed of 17 sections under the heading "Council Matters."

ANALYSIS

Does the definition of "public work" from the *Public Tender Act* apply to section 149 of the *Act*?

[22] There is no definition of "public work" in the *Act*. However, there is a definition of "public work" in section 2(f) of the *Public Tender Act*, which the Judge applied to the term "public work" in section 149 of the *Act*.

[23] The definition of "public work" in the *Public Tender Act* reads:

> (f) "public work" means the construction, extension, enlargement, repair, maintenance or improvement at the expense of a government funded body of a building, structure, road or other work, whether of the preceding kind or not, in, under or over real property and includes the acquisition by a government funded body by purchase, lease or otherwise of a public work specifically constructed for the purpose of that acquisition;

[24] The definition of public work in the *Public Tender Act* includes works that extend, enlarge, repair, maintain and improve, as well as works that construct and build. By applying this broad definition of "public work" to section 149, the Judge was able to fit "plowing, repaving and general maintenance" of the parking lots within the definition, which in turn enabled

him to find that the described works were "public works" within the meaning of section 149 of the *Act*.

[25] The Judge relied on section 214 of the *Act* to justify his application of the *Public Tender Act* definition of "public work" to section 149, saying that the legislature had intended the *Public Tender Act* definition to so apply. As indicated above, section 214 is in Part IX of the *Act*. Part IX deals with miscellaneous matters of concern to a municipal council, like "Conflict of Interest," "Remuneration and Expenses," "Public Tender Act," "Plebiscites" and the like. Section 214 of the *Act* reads:

> The execution of public works, the acquisition of goods or services and the leasing of space by a council shall be in accordance with the *Public Tender Act* and in this section, "public works" and "goods or services" have the same meaning as in that Act.

[26] Section 214 of the *Act* requires municipalities to comply with the *Public Tender Act* when executing public works or acquiring goods or services and leasing space. The objective of public tendering is business efficacy and integrity in the tendering process. Public tendering provides for a competitive bid process in the awarding of contracts for government work and for fair treatment of bidders who compete for government work (*Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116, paragraph 32 and *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 paragraphs 67 and 71).

[27] In my view, the definition of "public work" in the *Public Tender Act* is necessarily broad so as to prevent municipal governments from escaping compliance with the *Public Tender Act* in expending public funds when awarding municipal government work. While the meaning of "public work" in the *Public Tender Act* is necessarily broad for the purposes of awarding municipal work, it does not necessarily follow that such a broad meaning applies outside of the public tendering context.

[28] Section 214 of the *Act* states that the definitions of "public works" and "goods and services" from the *Public Tender Act* apply "in this section". Each of the parties maintains, and I agree, that the legislature is presumed to avoid superfluous or meaningless words, and that every word in a statute is presumed to make sense and to have a specific role to play in advancing its legislative purpose (Ruth Sullivan, *Sullivan on the Construction of Statutes*,

5th ed. (Markham: LexisNexis, 2008) at pages 2010-2013). It follows that inclusion of the words "in this section" in section 214 must have some meaning and purpose for being there.

[29] On their face, the words "in this section" suggest that the *Public Tender Act* definition of "public work" is to be used only for the purposes of section 214 to further the legislative objective of ensuring that municipalities comply with the *Public Tender Act*. If the *Public Tender Act* definition of "public work" were meant to apply to sections of the *Act* other than section 214, presumably the legislature would not have included the words "in this section" in the text of section 214. The interpretative aid "to express one thing is to exclude others" supports this interpretation. Conversely, if the legislature had intended that the definition of "public work" in the *Public Tender Act* were to apply to other parts and sections of the *Act*, presumably it would have specifically said so. In this regard, the words "in this section" in section 214 of the *Act* are to be contrasted with the wording in paragraphs (d) and (l) of section 2 of the *Act*, entitled "Interpretation," which adopt the definitions of "city" and "highway" from other statutes and direct those definitions to apply to the whole *Act*. Section 2 of the *Act* defines many words and terms used in the *Act* but notably does not include any reference to the *Public Tender Act* definition of "public work." These distinctions in legislative language respecting applicability and their different placements in the statute support the interpretation that the legislature intended the definition of "public work" in the *Public Tender Act* to apply only for the purposes of section 214, that is public tendering.

[30] Part VI of the *Act* relates to *assessments and levies* that a municipality is authorized to pass on to property owners. Section 149 of the *Act* sets out the circumstances when that can be done by specifying the type of work justifying the imposition of local improvement assessments and service levies if certain criteria are met. The thrust of Part VI of the *Act* is to enable a municipality to pass on to real property owners and developers the value of the benefits the municipality has bestowed on the real property, and each of the seven sections in that Part concerns when such assessments and levies are justified and how they are to be collected. No provision in Part VI of the *Act* or any criteria referenced in section 149 has any connection to public tendering.

[31] Finally, if the term "public work" in section 149 were meant to include all of the public works described or capable of being included in the definition of "public work" from the *Public Tender Act*, owners of real

property in all municipalities could potentially be regularly and continuously assessed for sweeping, plowing and repairing the streets which their properties abut, in addition to paying applicable property and business taxes. This is the logical extension of the Town's argument, which the Judge accepted. In my view, that result is untenable and one which the legislature could not have intended by enacting sections 149 and 214 of the *Act*.

[32] In the result, the plain words of section 214 of the *Act*, read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, show that the definition of "public work" from section 2(f) of the *Public Tender Act* does not apply to the term "public work" in section 149 of the *Act*. Accordingly, the judge erred in law in so finding.

[33] There remain the questions of whether the snow plowing, repaving and general maintenance of the parking lots can be said to be "public work" within the meaning of section 149(1) without the assistance of the *Public Tender Act* definition and whether the "public work" directly benefits the Appellants' properties so as to justify the imposition of a local improvement assessment under subsection 149(1), and whether the public work or an action of council is designed to develop municipal services that make the Appellants' properties have an enhanced value so as to justify the imposition of a service levy under subsection 149(2).

Does subsection 149(1) of the *Act* authorize the Town to impose charges on the Appellants for the described work?

[34] Subsection 149(1) requires two criteria to be met in order for the Town to impose a local improvement assessment on the Appellants:

1) the snow plowing, paving and general maintenance of the parking lots must be "public work" within the meaning of the section; and

2) the Appellants' real properties must be "directly benefitted" by the "public work".

"Public Work"

[35] Paragraphs 149(1)(a) and (b) of the *Act* describe two categories of public work which qualify for "local improvement assessment[s]." One of

the categories relates to the construction of water and sewer lines and storm systems, and the other category relates to the construction of curbs, sidewalks and streets. Routine maintenance or works of a minor or incidental nature are not contemplated in either category. While the two categories cannot be said to exhaust the kinds of public works which could qualify for local improvement assessments, they both denote work involving substantial capital construction and they both imply that the work is a one-time project as opposed to an ongoing one. The public work in both categories is in the nature of infrastructure whose character is capable of transforming an abutting property of a certain value into a more valuable property. The construction of water and sewer lines connecting a property to municipal water and sewer systems or the extension or paving of a street are examples which come to mind.

[36] The nature and underlying character of snow plowing, repaving and generally maintaining by relining them and fixing potholes is quite different. It is maintenance of a minor nature that is routine and ongoing and that keeps existing infrastructure in working order. By nature and character it does not fit into the categories of work contemplated by subsection 149(1). Neither should it, for the thrust of Part VI of the *Act* is to enable a municipality to recover costs expended for substantial transformative work from real property owners whose land is benefitted. More particularly, the thrust of section 149(1) enables a municipality to recover its capital costs associated with constructing new infrastructure on a one-time basis. Incidental costs related to general maintenance are met through general taxation, as is the case for all owners of real property in the Town. Accordingly, the snow plowing, repairing and general maintenance including repairing potholes, line painting, sweeping and grading is not public work within the meaning of subsection 149(1).

"Direct Benefit"

[37] Section 149(1) of the *Act* stipulates that the public work must "directly benefit" a property before the costs of the work can be passed on to an owner as a local improvement assessment.

[38] The meaning of a "direct benefit" justifying the imposition of a local improvement tax by a municipality has a long jurisprudential history. The issue was considered in *Toronto (City) v. Canadian Pacific Railway* (1896), 26 S.C.R. 682. In that case, Toronto had attempted to assess property owners for costs related to subway work. In finding that the subway work

was not a local improvement but work undertaken for the benefit of the whole city, Gwynne J. explained the basis for a municipally imposed local improvement tax:

> … The tax which in a case of local improvement they are authorized to impose is a special rate, to be assessed upon real property specially "benefited" by a work, proportional to the "benefit" conferred by the work upon the lands assessed. …

(Page 689)

[39] The Supreme Court again considered the justification for local improvement assessments in the oft-quoted case *City of Montreal v. Bélanger* (1900), 30 S.C.R. 574. In *Bélanger*, the Court found that properties on one side of a street did not benefit from its widening at the same rate as properties on the other side of the street, so the assessments should not be the same. Taschereau J. explained, at page 578, that "[t]he policy of taxation of this nature rests upon the enhancement of the value of the properties resulting from the local improvement that necessitated it …"

[40] In *Hillier v. Regina (City)*, [1932] W.W.R. 561 (Local Government Board), property owners appealed a city court's decision respecting assessments imposed as local improvement assessments on several grounds. In allowing the property owners' appeal, the Saskatchewan Local Government Board explained the difference between special assessments and general taxes, saying at paragraph 11:

> Special assessments imposed for local improvements, unlike general taxes, are based upon benefits to the property against which they are assessed, arising from its increased value in consequence of the improvement. Special Assessments are founded upon the principle of equivalents; that is, the burden of a special assessment to be equivalent to the special benefit to the particular property assessed.

The Board went on to say at paragraph 15:

> … Where the work is for the general public benefit the cost of same is paid by the city at large from general taxes and not by special assessments.

[41] The same reasoning was applied in *Re Campbell et al. and City of Regina* (1969), 6 D.L.R. (3d) 456, CarswellSask 121 (CA). In *Campbell*, Regina had attempted to impose a local improvement tax on residents whose properties abutted streets being paved and widened and whose adjacent

sidewalks were being replaced. The residents objected. The trial judge ruled that the work did not serve to enhance the value of the adjacent properties. In upholding the trial judge's reasoning, Hall J.A. for the Saskatchewan Court of Appeal stated:

> [13] … It has long been recognized that the basis upon which special assessment against the abutting property owners is justified is that their property is specially benefited by the work and thus enhanced in value.

Justice Hall went on to adopt the statements made by the Chairman of the Local Government Board, who described the basis for local improvement assessments as "arising from [an] increased value in consequence of the improvement" and stated:

> [w]here the work is for the general public benefit the cost of same is paid by the city at large from general taxes and not by special assessments. If we were to eliminate the principle of special benefits … nothing would remain to justify special assessments (paragraphs 16 and 17).

Justice Hall concluded that the policy established in *Bélanger* was a fair and equitable one which had been consistently applied by courts and municipalities since the case was decided.

[42] The *Bélanger* reasoning was also applied in *Lehr v. Bassano (Town)*, [1972] 4 W.W.R. 452 (Alta. Q.B.). In *Lehr*, the Town had sought to impose charges on property owners for costs related to renewing its old and worn out water system. In holding that the Town could not charge the adjacent property owners for the cost of such replacement work, the Court found that the work was not in the nature of a local improvement, and that the charges were not authorized to be paid for under a special assessment on either a frontage or special benefit basis. In *Lehr*, Milvain C.J.T.D. referred to *Bélanger* and *Campbell*, and explained that it is the underlying character or nature of a special benefit to the owner of an abutting property which enables the cost of the work to be assessed as a local improvement.

[43] Established case law shows that the imposition of a local improvement assessment is a one-time special assessment of an amount equivalent to the cost of work which benefits a real property by increasing its value.

[44] In this case, the Judge found that the described works directly benefitted the Appellants' properties by providing year-round parking

without which the Appellants would be in violation of the Town's Development Regulations requiring businesses to provide parking. The Judge also found that the parking lots were highways by definition, and that the Appellants' properties abutted highways so as to attract the local improvement assessments.

[45] I agree that the parking lots are highways by definition and that they provide the Appellants' properties with access to the Town's road system. Most prospective property owners, let alone commercial property owners, would not purchase real property which was landlocked. Nor is it likely that the Town would have permitted the Appellants' properties to be constructed unless there was access to the Town's road system.

[46] The Judge's statement that the Appellants would be in violation of the Town's parking by-laws which require businesses to provide parking based on their gross floor area is not a valid reason for concluding that the Appellants' properties are directly benefitted by the described work. It must be remembered that the Town permitted the strip malls to be constructed in their existing locations sometime prior to 1982 according to the submissions of counsel. Whether parking requirements were addressed at that time is unknown. But in any event, the by-laws referenced by the Judge were not in force until April 23, 2010, many years later, and do not appear to have been meant to apply to existing buildings.

[47] It is also important to recognize that the availability of nearby year-round parking to the businesses operating out of the Appellants' properties should not be confused with an increase in the value of the Appellants' real properties.

[48] In this case, there was no evidence or acknowledgement that the Appellants' real properties increased in value as a result of the snow plowing, repaving and general maintenance of the parking lots. In most cases these works are too small in scale and too temporary in effect to affect property values.

[49] If the Town stopped maintaining the roads altogether, abutting properties might eventually be reduced in value. But the absence of that reduction is not a direct benefit which increases the value of abutting real property. Put another way, basic maintenance of public highways is expected and factored into property values for taxation purposes. While the initial construction of the parking lots may have been a direct benefit to the

property owners, no broad and purposive interpretation of section 149(1) can convert routine work like fixing potholes, snow plowing and painting lines on the lots into a direct benefit that increases the value of the Appellants' properties.

[50] Given that the described work is not public work which directly benefits the Appellants' real properties; it does not qualify for the imposition of a local improvement assessment under subsection 149(1).

[51] Accordingly, subsection 149(1) does not authorize the Town to impose charges on the Appellants for the described work.

DISCRIMINATION

[52] The Appellants argue that the Judge erred in failing to find that the Town's treatment of them is discriminatory. While not necessary to the disposition of the appeal, analysis of this issue is helpful to understanding the unique context of this case. The Appellants argue that owners of commercial property abutting other Town streets are not assessed and charged for plowing, repaving and generally maintaining them. I cannot say it better than the Appellants did at paragraph 113 of their factum:

> [113] As a result of the appellants being charged for the snow clearing, paving and maintenance of the Parking Lots, they have suffered a pecuniary disadvantage. Not only are the Appellants paying property and business taxes for the Town's services, which should include snow clearing, paving and maintenance, the Appellants are being charged additional amounts for services that should come from the Town's general revenues. These are charges that other real property owners, including commercial business owners who abut onto publicly owned streets are not being required to pay.

[53] The Appellants also argue that they do not own the parking lots, and that therefore they should not be charged for costs associated with maintaining them. They say that the parking lots are capital assets owned by the Town.

[54] There is no dispute with respect to the Judge's finding that the parking lots in this case are "highways" which connect the Appellants' properties to the Town's road system. In this respect, the parking lots are like other Town streets, which are highways by definition, that connect other properties in the Town with the Town's road system. Most Town streets have abutting properties, both commercial and residential, and many of those streets

permit parking alongside. The owners of those abutting properties are not directly assessed for the costs associated with repaving, plowing and generally maintaining those streets or the portions of them that abut their properties. Presumably those costs are paid for out of the Town's general revenues on the understanding that routine maintenance of the Town's streets is for the benefit of the whole Town. The Town has not shown that the parking available in the subject parking lots is meaningfully different from the alongside parking abutting other Town properties. Both parking in the lots and alongside the streets is available to owners and patrons of abutting and non-abutting commercial enterprises as well as to residents of the Town and other members of the public.

[55] The Appellants also argue that they should not have to pay to maintain property they do not own. In this regard, the Appellants have been compared to owners of commercial properties in other strip malls located in the Town whose parking lots are maintained by their owners.

[56] There is a significant difference between the Appellants and the other commercial property owners who pay to maintain their parking lots. The Appellants do not own the parking lots abutting their properties, whereas the other commercial property owners do own their parking lots. The other owners are free to use their property for other purposes within the limits of the law, free to charge for parking on their lots, and free to sell their property if desired.

[57] In this case, the Town owns the parking lots abutting the Appellants' properties. The parking lots are capital assets of which the Town is the legal and beneficial owner. The Town is free to charge for parking, to reconfigure the lots and to use the parking spaces as it sees fit, although I would not say that the Town is free to close the highway aspect of the parking lots. On the other hand, the Appellants are most certainly not free to charge for parking in the Town's lots, to alter their configurations or to sell the parking lots they have been paying to maintain.

[58] The Town has been contracting out the snow plowing, repaving and general maintenance of the parking lots and invoicing the Appellants these costs proportionately to their frontage. The Town does not add any charges for its related administrative work. It is worth noting that whether the plowing, repaving and maintenance of the parking lots is performed by contractors or by the Town's own workforce, the cost is calculable and capable of division and assessment. The fact that the Town chooses to

contract out the maintenance of the parking lots has no bearing on whether the Town is entitled to assess the Appellants.

[59] In my view, the Town is treating the Appellants differently than it treats other owners of commercial property abutting Town streets, and is therefore discriminating against the Appellants by charging them for services other property owners do not have to pay. This does not mean that a municipality cannot discriminate among property owners if it has a valid reason for doing so.

Does subsection 149(2) of the *Act* authorize the Town to impose charges on the Appellants for the described work?

[60] The Judge also found that the Town was authorized to impose charges for the described work on the Appellants as a service levy under subsection 149(2) of the *Act*. He reasoned:

> [46] The criteria for imposing a service levy are different than those for a local improvement assessment. The service for which the municipality may impose a levy may be either a public work or "an action of a council" and the service may be performed "on or off a real property". There is no requirement that the public work or action "directly" benefit any real property, however it must be "designed" to develop "municipal services" or expand the capacity of municipal services. In addition, the work or action must make a particular real property capable of being developed, have an increased density of potential development or have "enhanced value". The Town relies on the services in question being designed to develop municipal services (the municipal parking lots) which they submit give the defendants real property an enhanced value. I agree.

[61] In short, the Judge found that the described work was public work designed to develop the parking lots which are a municipal service that gives the Appellants' real property an enhanced value.

[62] The described work is not public work within the meaning of subsection 149(2) for substantially the same reasons as it is not public work within the meaning of subsection 149(1). That said, the Judge's interpretation of subsection 149(2) requires additional comment.

[63] The purpose of section 149(2), consistent with its placement in Part VI of the statute, is to enable a municipality to pass on the costs of work designed to develop property to developers or owners of property benefitting from the development. The plain wording of section 149(2) states that in order for the Town to impose service levies on the Appellants, the described

work (the repaving, plowing and general maintenance of the parking lots) must be designed to develop or expand the capacity of municipal services.

[64] While the existence of the parking lots may be able to be characterized as a municipal service, and their initial construction may have been designed to develop municipal services so as to attract a one-time service levy (just as the construction of the parking lots may have initially attracted a one-time local improvement assessment), the maintenance of the parking lots throughout the year cannot be said to be designed to develop them. The parking lots are what they are; they are already developed. There is no suggestion – let along agreed evidence – of any development hinging on or associated with them. Plowing the lots, fixing their potholes, and repainting their lines is ordinary maintenance which enables their use as they exist. As well, the language of subsection 149(2), like that of 149(1), as well as the language of subsection 149(3), contemplates that service levies are to be imposed on a one-time basis, not on an ongoing *ad infinitum* basis.

[65] Neither have the Appellants' properties been shown to have an enhanced value due to the plowing and maintenance of the parking lots. In this regard, the jurisprudence does not distinguish between the meanings of the terms "enhanced value" and "increased value" (see *Bélanger* at pages 575 and 578), and I do not see a material difference.

[66] In the result, the Judge erred in law in interpreting the described work as being designed to develop municipal services and in applying a misapprehended legal meaning of "enhanced value" to the evidence. A broad and purposive interpretation of section 149(2) cannot convert repairing potholes and removing snow into work which is designed to develop a municipal service or enhance the value of the Appellants' properties.

[67] Accordingly, section 149(2) does not provide the Town with the authority to impose the costs for the described work on the Appellants as a service levy.

DISPOSITION

[68] In the result, the Judge erred in law in holding that the Town was authorized to charge the Appellants for repaving, plowing and generally maintaining the parking lots abutting their properties. Neither subsection

149(1) nor (2) gives the Town the authority to impose charges on the Appellants for these works.

[69] Accordingly, I would allow the appeal. As requested by the Appellants, I would issue the following declaratory order:

> Section 149 of the *Municipalities Act, 1999* does not give the Town of Gander the authority to levy charges upon owners of commercial real property for the costs incurred by the Town to repair, repave, clear snow from, or otherwise maintain a municipally owned parking lot.

COSTS

[70] I would award the Appellants their column 3 costs for one counsel both here and in the court below.

_____

L.R. Hoegg J.A.

I Concur: _____

M.F. Harrington J.A.

Separate Concurring Reasons by Rowe J.A.

[71] I have read the reasons of my sister Hoegg. I agree with her in the result. I would adopt her statement of the facts, including the litigation history. I agree that the applications judge erred in law by importing the definition of a public work from the *Public Tendering Act* into the interpretation of section149 of the *Municipalities Act*.

[72] I would adopt the definition of "public works" in *Black's Law Dictionary*, 9th ed.:

> Structures (such as roads or dams) built by the government for public use and paid for by public funds.

This accords with the definition set out in the *Shorter Oxford English Dictionary*, 6th ed.:

> Construction or engineering projects carried out by and for the state on behalf of the community.

In short, public works are infrastructure built by or on behalf of a government.

[73] Gander is seeking to recover the costs of maintaining the parking lot and access roadways adjacent to the Appellants' commercial premises. While the parking lot and the access roadways are public works, their maintenance is not. The specialized definition of public works in the *Public Tendering Act* does not apply so as to change this.

[74] My analysis regarding section 149 differs from that of my colleague. In my view, what is needed is a close reading of section 149, in light of the facts of this case. I do not rely on the cases urged on us by counsel as they deal with issues different from those in this case and with factual contexts dissimilar to that here.

[75] As I will set out, section 149 is about recovery of capital costs, while Gander is seeking to use it to recover operating costs, i.e. not the cost of constructing the parking lot and access roadways, but rather the cost of maintaining them. This distinction needs to be viewed in the context of the general structure of municipal finances. Revenues from property taxation, user fees and licencing fees, plus grants from the provincial and (recently) federal governments pay for almost all municipal public works and services. An exception is where the construction of public works is for the particular benefit of certain land owners. In that case, s. 149 provides a means for the municipality to recover its capital costs of providing the public works (infrastructure) from the benefiting land owners.

[76] The interpretation of a statute being a question of law, reviewable on the standard of correctness, based on the analysis set out below, I would hold that the applications judge fundamentally misconstrued section 149 and, accordingly, his decision should be set aside.

LOCAL IMPROVEMENT ASSESSMENT

[77] Subsection 149(1) reads:

> A council may assess its cost or a portion of its cost, together with financing charges, upon real property that is directly benefited by a public work of the council, including

> (a) the construction of water lines, sewer lines, storm systems and the service connections of storm systems; and
>
> (b) the construction of curbs, gutters, sidewalks or streets or the upgrading or paving of streets,
>
> and this cost shall be known as "the local improvement assessment".

[78] Water and sewer services, paved streets, as well as curb and gutter make development of land possible and, thereby, increase its value. Subsection 149(1) is a means for municipalities to recover the capital costs of providing such infrastructure from owners of the land so benefitted.

[79] This is clear also from the wording of s.150 (1)-(3), which provides for sharing the costs of construction among land owners based on the frontage of the benefitted properties.

> (1) Local improvement assessments made under subsection 149(1) shall be assessed according to the frontage of the real property abutting the highways directly benefited by the public work.
>
> (2) The amount of the local improvement assessment against each portion of real property shall bear the same ratio to the total cost to the council of the public work, together with financing charges, that the frontage of that portion bears to the total of the frontages to be assessed.
>
> (3) Where the portion of real property to be assessed is a corner lot or an irregularly shaped lot, the council may consider the length of frontage for local improvement assessment purposes to be more or less than the actual frontage directly benefited by the public work.

[80] The facts of this case do not fit within the circumstances dealt with in s. 149(1). This is not a situation where Gander is seeking to recover its capital costs for servicing raw land, thereby allowing it to be developed; nor is it one where the municipality seeks to recover the capital costs relating to taking land suitable for non-intensive development (e.g. wells, septic fields, un-paved roads and roadside ditches) and making it suitable for more intensive development by constructing new infrastructure that provides a full range of urban services. Accordingly, no “local improvement assessment” can be made by Gander on the Appellants.

[81] My reasoning here differs from that of my colleague. She concludes that the Appellants do not "directly benefit" from Gander's maintenance of the parking lot and access roadways (paragraph 51). I disagree.

[82] On the facts of this case, it is plain and obvious that the Appellants do directly benefit. The parking lot and access roadways are immediately adjacent to the Appellants' commercial premises. For a strip mall, such adjacent parking is critical; without it the Appellants' enterprises would suffer and quite possibly fail. If the premises are not owned by the company operating the commercial enterprise, but rather by a real estate company, rents to that company would be greatly diminished (if the premises could be rented at all) if adjacent parking was not available.

[83] One need only think of the aftermath of a snow storm, when access of any sort to the Appellants' premises would be cut off. The premises would be essentially worthless in the winter months if Gander did not clear away the snow. The same is true, although not in so immediate a way, if the parking lot and access roadways were not maintained, but rather were to become increasingly dilapidated and, finally, unusable. Their maintenance, winter and summer, clearly directly benefits the Appellants.

[84] For me the critical point is not whether the Appellants directly benefit from the provision of parking and access roadways. This they clearly do. Rather, for me the critical point is that s. 149(1) is a means for the municipality to recover its capital costs for construction of infrastructure that benefits specific land owners. Here, Gander is seeking to recover maintenance costs, rather than capital costs. But, s. 149(1) is not about recovering maintenance costs; it is about recovering capital costs.

[85] Thus, while I came to the same conclusion as does my colleague that s. 149(1) does not provide a basis for cost recovery by Gander from the Appellants, we reach that conclusion for different reasons.

SERVICE LEVY

[86] Subsections 149(2) and (3) read:

> (2) Where a public work of a council or an action of a council on or off a real property designed to
>
> > (a) develop municipal services; or

(b) expand the capacity of municipal services;

makes that real property

(c) capable of being developed;

(d) have an increased density of potential development; or

(e) have an enhanced value,

that council may impose a charge on that real property to be known as a "service levy".

(3) A service levy shall not exceed the cost or estimated cost, including financing charges to the municipality of improving or constructing the public works referred to in subsection (2) that are necessary for the real property to be developed in accordance with the standards required by the council and permitted by that council on that real property.

[87] Subsection 149(2) deals with enhanced municipal services that make land more valuable by making the land capable of being developed or more densely developed or (otherwise) have enhanced value. This is reflected, as well, in s.150(4).

A service levy imposed under subsection 149(2) shall be assessed on the real property based upon the

(a) amount of real property benefited by the public work related to the total of the real property that is benefited; and

(b) density of development made capable or increased by the public work.

[88] Subsection 149(3) provides for up to full cost recovery from land owners of the cost of "improving or constructing the public works" involved in providing the enhanced services referred to in s.149(2)(a) and (b), which enhanced services result in the benefits to landowners referred to in s.149(c), (d) and (e). Note the correspondence between s.149(2)(c) and s.149(3)(a), as well as that between s.149(2)(d) and s. 149(3)(b).

[89] The facts of this case do not fit within the circumstances dealt with in s.149(2)-(3). While Gander by repairing, repaving and clearing snow from the parking lot and access roadways in question has incurred costs, these costs are not such as are contemplated by s.149(3), those being capital costs to improve or construct a public work in order to provide enhanced

municipal services referred to in s.149(2). Thus, Gander cannot impose a "service levy" on the Appellants.

[90] My colleague has concluded (at paragraph 67) that the maintenance of the parking lot and access roadways do not cause the Appellants' property to "have an enhanced value." For reasons that parallel what I set out above concerning "directly benefit," I would disagree.

[91] Maintenance of the parking lot and access roadways enhances the value of the Appellants' premises in that the absence of such maintenance would lead to a serious decline in the value of the Appellants' premises (as commercial enterprises or as rental properties).

CONCLUSION

[92] The foregoing analysis does not bar Gander from seeking to obtain cost recovery for the benefits it confers on the Appellants. Rather, it is to the effect only that s. 149 cannot be used to achieve such cost recovery.

[93] In light of the foregoing, I do not need to deal with the discrimination issue. In the event that Gander seeks by other means to achieve cost recovery, that issue might need to be dealt with.

[94] I would allow the appeal and award costs to the Appellants here and in the Trial Division.

_____

M. H. Rowe J.A.