



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *Penney v. Newfoundland and Labrador*
(*Service NL*), 2017 NLCA 25

Date: April 13, 2017

Docket: 201601H0096

BETWEEN:

KARLA PENNEY

FIRST APPELLANT

AND:

JAMES PENNEY

SECOND APPELLANT

AND:

SERVICE NL

FIRST RESPONDENT

AND:

EASTERN REGIONAL APPEALS BOARD

SECOND RESPONDENT

AND:

PLEMAN HIGDON

INTERVENOR

Coram: White, Harrington and Hoegg JJ.A.

Appealed From: Eastern Regional Appeals Board

Appeal Heard: December 14, 2016

Judgment Rendered: April 13, 2017

Reasons for Judgment by White J.A.

Concurred in by Harrington and Hoegg JJ.A.

Counsel for the First and Second Appellants: Kate O'Brien

Counsel for the First Respondent: Philip Osborne

Counsel for the Second Respondent: No Appearance

Counsel for the Intervenor: Self-represented

White J.A.:

[1] From the style of cause in this matter, this appears primarily to be a dispute between Karla and James Penney (the “Penneys”) and the Newfoundland and Labrador Minister of Service (“Service NL”). In reality, this case concerns a new development in a conflict between the Penneys and their neighbours, the Higdon.

[2] The issue of whether this Court or the Trial Division has jurisdiction to hear the appeal is engaged. The resolution of the merits of this appeal will have to wait for another day as, for the reasons that follow, I have concluded that the jurisdiction to hear the appeal lies with the Supreme Court Trial Division.

BACKGROUND

[3] The Penneys and the Higdon have lived next to each other in New Harbour, NL for some time. In 2007 or 2008, Pleman Higdon, an intervenor in this appeal, began building a retaining wall along the boundary of the Penney and Higdon lots. In 2012-2013 Mr. Higdon began building a shed adjacent to the retaining wall. The Penneys complained to Service NL that Mr. Higdon was building both structures without the proper permits. After these complaints, Mr. Higdon applied for and was granted the permits by Service NL on December 17, 2013.

[4] The Penneys challenged the decision of Service NL by bringing an appeal to the Eastern Regional Appeals Board (the “Board”). The appeal was dismissed on March 6th, 2014. The Penneys then sought to appeal the

decision of the Board. A proceeding was launched in the Trial Division of the Supreme Court. However on the date the appeal was set to be heard, the Justice of the Trial Division before whom the parties appeared raised a jurisdictional issue with them. He queried whether the applicable legislation created a right of appeal of the Board's order to the Supreme Court Trial Division or to the Court of Appeal. The parties agreed to adjourn the matter to investigate the jurisdictional issue. They then applied to have the appeal transferred to this Court.

[5] Based on the agreement of the parties that this Court had jurisdiction, the Court permitted the transfer. However, the jurisdictional question arose again. To facilitate the expeditious resolution of the matter, the Court agreed to hear submissions on the issues of jurisdiction and the merits together.

ISSUES

[6] While the Penneys have raised several arguments concerning the merits of the appeal, these reasons deal with only one issue: is it the Supreme Court Trial Division or the Court of Appeal which has the jurisdiction to hear an appeal from a Regional Appeals Board constituted under the *Urban and Rural Planning Act, 2000* in a matter to which the *Protected Road Zoning Regulations* also apply?

ANALYSIS

[7] This matter is governed by the *Urban and Rural Planning Act, 2000*, SNL 2000, c. U-8 (the "*URPA, 2000*") and the *Protected Road Zoning Regulations*, CNLR 996/96 (the "*Regulations*").

[8] The *URPA, 2000* provides for appeals from decisions of the Board in section 46, which states:

Appeal to court

46. (1) A decision of a board may be appealed to the court not later than 10 days after that decision has been received by the appellant....

Section 2(e) provides that: "court" unless the context indicates otherwise, means the Trial Division".

[9] This Court has now decided several times that the word "court" in section 46(1) means Trial Division: *Mugford v. Clarke's Beach (Town of)*, 2002 NLCA 64, 217 Nfld. & P.E.I.R. 322 at para. 4; *Paradise (Town) v.*

Parsons, 2003 NLCA 42, 229 Nfld. & P.E.I.R. 223 at para. 16; *Sun Life Assurance Co. of Canada v. St. John's (City)*, 2006 NLCA 62, 261 Nfld. & P.E.I.R. 55 at para. 33.

[10] However, where a matter is also subject to the *Regulations*, section 15(4) thereof appears to contemplate an appeal to the Court of Appeal:

Right to appeal

15. ...

(4) The decision of the appeal board shall be communicated in writing to the appellant and the authority, and is final and binding upon all parties subject only to an appeal to the Court of Appeal on a question of jurisdiction or a question of law.

[11] Given that the *URPA, 2000* and the *Regulations* seem to create rights of appeal to different courts, the question arises as to which court has the jurisdiction to hear this appeal.

[12] The Penneys and Service NL now agree that the appeal lies to this Court. They have filed a joint submission arguing that, because section 2(e) of the *URPA, 2000* provides that the meaning of the word “court” in section 46 may be modified by its context, the decisions of this Court which find that it means Trial Division are distinguishable. The proposition is that the *Regulations* indicate a different context in this case and, in situations to which the *Regulations* apply, the word “court” in section 46 means Court of Appeal.

[13] Despite the parties’ agreement, the argument that the meaning of the word “court” in section 46 changes from case to case is not sustainable on the basis of the principles of statutory interpretation.

[14] The word “court” is a defined term in the *URPA, 2000*. Terms are defined in a statute for the purpose of giving the term a consistent and stable meaning in all matters to which the statute applies. As Ruth Sullivan in *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at page 62 explains:

The legislature dictates that for the purpose of interpreting certain legislation, the defined term is to be given the stipulated meaning....

Sullivan continues at page 65 (footnotes omitted):

Statutory definitions are binding to the extent indicated by the definition itself. Most definitions apply throughout the Act in which they appear, which ensures that the defined term has the same meaning throughout unless the drafter makes a mistake. Sometimes definitions are limited to a part or division, or one or more sections....

[15] That is not to say that statutory definitions cannot themselves introduce ambiguity or create legal requirements the application of which will be different in different cases. For example, when reviewing the definitions section of the *URPA, 2000*, it is clear that whether or not a given object is a “building” (section 2(c)) or a “development” (section 2(g)) within the meaning of that statute will depend on individual circumstances because those definitions set out several legal standards the application of which is influenced by particular facts. However, it is also clear that the legal standards created by those definitions are to be imported into every section which references them and applied throughout the statute.

[16] By contrast the definition of the word “court”, as already noted, provides that “unless the context indicates otherwise, means the Trial Division”. As noted above, the Court has previously decided that “court” in section 46 means Trial Division. The parties argue, however, that the presence of the word “context” in the definition of “court” creates a flexible standard and the application of the *Regulations* to this case constitutes a context that was not present when the Court previously decided that “court” in section 46 means Trial Division. The parties thus contend that the definition of “court” in section 46 can, in this case, mean the Court of Appeal.

[17] In order to determine whether, in light of the application of the *Regulations*, the context of section 46 indicates “court” can, in this case, mean Court of Appeal, it is necessary to employ the principles of statutory interpretation. The approach to the interpretation of provincially enacted statutes is explained by Green J.A. , as he then was, in *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124, leave to appeal to SCC refused, 29390 (March 20, 2003) at paras. 19 and 22:

19 The starting point for interpretation of any statute enacted by the legislature of this province is the legislature’s own directive to the courts as found in s. 16 of the *Interpretation Act*:

Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation or provision according to its true meaning.

...

22 Instead of mandating some fictionalized search for a collective "legislative intention", s. 16 directs the court to consider every provision "remedial" and to interpret it so that it "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. The end result is to arrive at a "true" meaning. That inevitably requires an examination of more than the bare words of the legislative enactment that is in issue, no matter how clear or unambiguous they may at first blush appear. The surrounding text, the interrelation of other related statutes, the social and legislative context in which the provision was enacted, and other extrinsic aids are all sources to be consulted in this exercise. Obviously, if the bare words of the relevant provision appear to be straightforward and seem on their face to admit of only one meaning, they may end up controlling the result, but even in such a case, it is not sufficient to stop the interpretive exercise at this "plain" meaning; s. 16 requires that at the very least this plain meaning be given a "reality check" by being tested against other relevant sources of meaning to ensure that there is not some nuance or variation in the normal or apparent meaning that might indicate a different meaning in the particular context under consideration. "True" meaning is not plain meaning; it is a conclusion arrived at by reconciling all the appropriate indicators of meaning that the court is directed to consider.

[18] In Chapter 11 of the *Construction of Statutes* Sullivan explores what constitutes the "context" of a statutory provision. While the text indicates that context is a vague and malleable term, it includes the immediate context (the language of the particular section); the statute as a whole, including related regulations; the statute book and related legislation; the common law; international law; the external context; and extrinsic aids. Courts in this province have adopted Sullivan's definition of "context". For example, in *Wnek v Witless Bay (Town)*, 2003 NLSCTD 17, 222 Nfld & P.E.I.R. 149 at para 21, Mercer J., as he then was, referenced several aspects of Sullivan's definition when dealing with a matter to which the *URPA, 2000* applied.

[19] The context of any given word in a statute includes the statute as a whole and all related regulations, thus the *Regulations* have always formed part of the “context” of section 46 of the *URPA, 2000*, even in previous cases when the Court was not dealing with a matter specifically governed by them. The previous cases are not therefore distinguishable nor has there been any suggestion they were wrongly decided. “Court” in section 46 is the Supreme Court Trial Division in every case to which that section applies.

[20] Further, in *Archean Resources* it is clearly stated that interpreting a statutory provision requires determining the objective of the act. As previously explained, the *Regulations* were enacted under former legislation, the *Urban and Rural Planning Act*, RSNL 1990, c.U-7, which did allow for a right of appeal to the Court of Appeal. However, the former legislation was specifically repealed and replaced by the *URPA, 2000*. When introducing the bill that eventually became the *URPA, 2000* in the House of Assembly, the Minister of Municipal and Provincial Affairs stated that the establishment of the new right of appeal to the Trial Division furthered the purpose of the legislation which was to create a streamlined approach for dealing with land use planning in the province:

....In terms of clarifying provincial land use policies, the policy statements, both municipal and regional, as well as provincially initiated planning, will be required to conform to policy set out in the bill. According to the scope, and within the scope of streamlining time frames, the bill provides an appeal period of fourteen days after the municipality makes its decision. Appeal of this appeal board decision can be made within ten days to the Trial Division of Supreme Court, and the delegation by a council or regional authority to a staff member has the ability to approve or refuse the classes of applications. *Again, this is a streamline approach.*

(Newfoundland and Labrador, Legislative Assembly, *Hansard*, 44th Leg, 2nd Sess, Vol. XLIV, No. 25 (11 May 2000))

(Emphasis added.)

[21] Thus the object of the *URPA, 2000* is clearly to create a right of appeal of Board decisions to the Trial Division, not the Court of Appeal. Regulations occupy a secondary status and cannot force an interpretation of their enabling statute which is contrary to its purpose and legislative objective.

[22] In light of the interpretation of “court” in section 46 in previous Court decisions and the object of the *URPA, 2000*, it is my view that section 46 of

the *URPA, 2000* and section 15 (4) of the *Regulations* are in conflict and it is not possible to reconcile them. Section 15(4) of the regulations purports to reference a right of appeal to the Court of Appeal, a right not provided, and not intended to be provided, for by the *URPA, 2000*. As this Court stated in *Council of Independent Community Pharmacy Owners v. Newfoundland and Labrador*, 2013 NLCA 32, 337 Nfld & P.E.I.R 129 at para. 23:

In *Shoppers Drug Mart Inc. v. Ontario*, supra, the Court of Appeal reversed a decision by the Divisional Court (2011 ONSC 615). In doing so, the Court did not take issue with the following passage from the Divisional Court's decision (at paragraph 32):

The executive branch of government has no inherent legislative power; it has only that power that is delegated to it by statute. Therefore, the scope of the regulation-making power is limited by the scope of the power delegated under the legislation. Once the purpose of the legislation is established, and its language is interpreted consistently with that purpose, the regulations are required to be authorized by the enabling statute and to be consistent with that purpose. This is a pure question of law. The Lieutenant Governor in Council is either empowered to enact the regulation or he is not. If the regulations do not meet these criteria for validity, then they are ultra vires and cannot stand. There is not, at that stage, any question of deference.

[23] The *Shoppers Drug Mart* case referenced by this Court was later affirmed by the Supreme Court of Canada in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R 810.

[24] The *Regulations*, being subordinate legislation, cannot create a right of appeal to the Court of Appeal, where the *URPA, 2000* creates no such right, and in fact indicates that the right of appeal is to another court. Section 15 (4) of the *Regulations* is therefore ultra vires and there is no right of appeal to this Court.

[25] Additionally, section 30 (1)(a) of the *Interpretation Act*, RSNL 1990, c. I-19 states:

30. (1) Where an Act or enactment is repealed in whole or in part and other provisions are substituted by way of amendment, revision, or consolidation

(a) all regulations made under the repealed Act or enactment shall remain in force in so far as they are not inconsistent with the substituted Act or enactment until they are annulled or others made in their stead; and

...

As stated previously, section 15(4) of the *Regulations* is inconsistent with section 46 of the *URPA, 2000*, thus section 15 (4) of the *Regulations* is no longer in force.

[26] This appeal lies properly to the Trial Division.

CONCLUSION

[27] This Court has no jurisdiction to hear the appeal. Accordingly, it is not necessary to pronounce on the merits. The matter should be transferred back to the Trial Division of the Supreme Court. I note that other jurisdictional issues may arise such as whether the appellants are “aggrieved” persons who have a right of appeal to the Board and the Court within the meaning of section 42 of the *URPA, 2000*, or whether their appeal raises any question of law or jurisdiction. Those questions may properly be dealt with by the Trial Division.

[28] As this was a novel issue, and as both the Penneys and Service NL submitted that this Court has jurisdiction, there should be no order as to costs.

C. W. White J.A.

I Concur: _____

M.F. Harrington J.A.

I Concur: _____

L.R. Hoegg J.A.