



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

**Citation:** *Rowe v. Newfoundland and Labrador*, 2017 NLCA 57

**Date:** October 4, 2017

**Docket:** 201601H0109

**BETWEEN:**

JONATHAN EUGENE ROWE

APPELLANT

**AND:**

HER MAJESTY THE QUEEN IN RIGHT  
OF NEWFOUNDLAND AND LABRADOR

RESPONDENT

**AND:**

NEWFOUNDLAND AND LABRADOR  
LEGAL AID COMMISSION

RESPONDENT

**Coram:** Welsh, White and O'Brien JJ.A.

**Court Appealed From:** Supreme Court of Newfoundland and Labrador  
Trial Division (G) 201601G4405  
(2016 NLTD (G) 155)

**Appeal Heard:** September 14, 2017

**Judgment Rendered:** October 4, 2017

Reasons for Judgment by Welsh J.A.

Concurred in by White and O'Brien JJ.A.

**Counsel for Jonathan Eugene Rowe:** Paul Kennedy and Brittany Whalen  
**Counsel for Her Majesty the Queen in Right of Newfoundland and Labrador:** No One Appearing  
**Counsel for the Newfoundland and Labrador Legal Aid Commission:** Derek Hogan

**Welsh J.A.:**

[1] Jonathan Rowe is charged under section 240 of the *Criminal Code* with being an accessory after the fact to murder. He applied under section 31(3.1) of the *Legal Aid Act*, RSNL 1990, c. L-11, for authorization to select a solicitor in private practice to represent him at trial. That application was refused because the Legal Aid Commission determined that section 31(3.1) did not apply to the offence of accessory after the fact to murder. Mr. Rowe then applied for judicial review of the Commission’s decision. The applications judge dismissed that application, finding that the Commission’s decision was correct.

[2] Mr. Rowe then sought to appeal the decision of the applications judge to this Court. Having missed the period within which to file an appeal, he applied for an extension of time. That application and submissions on the merits of the appeal were heard together.

[3] At the hearing, the application for the extension of time to appeal the decision of Orsborn J. was granted on the basis that the interpretation of section 31(3.1) of the *Legal Aid Act*, including its scope of application in these circumstances, is a matter on which it is helpful for this Court to provide clarification.

**BACKGROUND**

[4] The applications judge summarized Mr. Rowe’s application for judicial review (2016 NLTD(G) 155):

[2] On March 20, 2015, the Newfoundland and Labrador Legal Aid Board (the “Board”) rejected Rowe’s appeal of the decision of the Legal Aid Commission refusing his request for private counsel. The Board ruled that ss. 31(3.1) of the *Legal Aid Act*, R.S.N.L. 1990, c. L-11 (the “Act”) permitted choice of counsel only for the named offences of murder, manslaughter and infanticide.

[3] Rowe has applied for judicial review of the Board's decision, saying that the Board incorrectly interpreted ss. 31(3.1) – specifically that the phrase "... with respect to an offence of murder ..." should be interpreted as including the offence of accessory after the fact to murder. In essence, counsel's argument is that there is a strong factual and statutory correlation between the offences of murder and accessory after the fact to murder, hence "in respect of an offence of murder" means in respect of offences related to murder, including accessory after the fact.

[5] In analyzing the application, the judge turned first to consideration of the standard of review applicable to the Commission's decision. He explained:

[11] Both counsel took the position that the standard of review of the Board's decision is correctness, the issue being one of statutory interpretation and of importance to the legal system as a whole.

[12] As a result the standard of review issue was not argued as fully as I would have liked, particularly since counsel for Rowe conceded, in effect, that the Board's decision reflected one of two reasonable interpretations; in other words, any success for Rowe on review was dependent in the first instance on a review for correctness.

[13] Notwithstanding the position of counsel, I am more inclined to the view that the proper standard of review is reasonableness. The Board is engaged in interpreting its home statute, thus engaging a presumption of review for reasonableness. ...

[6] After discussing relevant factors, the judge concluded that the appropriate standard of review is "likely" reasonableness, but that he was "content" to review the Commission's decision on a correctness standard. Continuing with the judicial review analysis, the judge determined that the Commission had failed to provide reasons for its decision. In the result, he proceeded with the analysis, addressing reasons that could be offered to support the Commission's decision. Based on those reasons, he determined that the Commission's decision was correct and that section 31(3.1) of the *Act* did not apply to the offence of accessory after the fact to murder.

## **ISSUES**

[7] At issue are the standard of review and whether the applications judge erred in assessing the Commission's determination regarding the scope of application of section 31(3.1) of the *Legal Aid Act*.

## ANALYSIS

[8] The Commission undertook an interpretation of section 31(3.1) of the *Act* in order to determine whether Mr. Rowe’s application for legal assistance from a solicitor in private practice should be approved or denied. That decision is the subject of judicial review. While the same provision of the *Legal Aid Act* was considered in *R. v. Pardy*, 2014 NLCA 37, 357 Nfld. & P.E.I.R. 49, the analysis in that case was conducted as an appeal, rather than by means of judicial review, because, in *Pardy*, the question before the Court was an application under the *Criminal Code* for counsel paid for by the Attorney General. That said, the approach adopted in *Pardy* assists in the judicial review analysis.

### Standard of Review

[9] When the decision of a tribunal is under review, the first consideration is a determination of the standard of review. The analytical framework to be applied, discussed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, is summarized in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293:

[22] Unless the jurisprudence has already settled the applicable standard of review (*Dunsmuir*, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness . . . .

[10] That presumption may be rebutted where there are factors calling for a review on a standard of correctness. In the *Edmonton (City)* decision, Karakatsanis J., for the majority, explained:

[24] The four categories of issues identified in *Dunsmuir* which call for correctness are constitutional questions regarding the division of powers, issues “both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise”, “true questions of jurisdiction or *vires*”, and issues “regarding the jurisdictional lines between two or more competing specialized tribunals” (paras. 58-61). When the issue falls within a category, the presumption of reasonableness is rebutted, the standard of review is correctness and no further analysis is required . . . .

[11] For purposes of this appeal, the applicable standard of review has not been settled. In conducting the analysis, a standard of reasonableness is

presumed because the Commission was interpreting its “home statute in the course of carrying out its mandate” (*Edmonton (City)*, at paragraph 26).

[12] At the hearing of the application in the Trial Division, both counsel took the position that a standard of correctness should be applied because the issue was a question of statutory interpretation of importance to the legal system as a whole. That factor is discussed in *Commission scolaire de Laval v. Syndicat de l’enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29. Gascon J., for the majority, explained:

[34] ... The issues in this case are not included in the narrow class of issues identified in *Dunsmuir* for which the applicable standard is correctness. As the Court explained in *Dunsmuir*, that standard can apply to questions of law that are of central importance to the legal system as a whole and are outside the decision maker’s area of expertise (paras. 55 and 60). Such questions must sometimes be dealt with uniformly by courts and administrative tribunals “[b]ecause of their impact on the administration of justice as a whole” (para 60). However, questions of this nature are rare and tend to be limited to situations that are detrimental to “consistency in the fundamental legal order of our country”; [citations omitted].

See also, *Dunsmuir*, at paragraph 60, providing as an example, “complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process – issues that are at the heart of the administration of justice.”

[13] As applied to this appeal, it cannot be said that the interpretation of section 31(3.1) of the *Act* engages a question of law of central importance to the legal system as a whole or having an impact on the administration of justice as a whole. The issue relates to the assessment of legislative language and intention regarding the narrow question of whether certain offences are included in section 31(3.1) for purposes of the provision of legal aid services. It must be remembered that section 31(3.1) does not operate to deny legal assistance to a person accused of being an accessory after the fact to murder. Legal assistance would be provided by counsel employed by the Commission, as is the case with offences other than the three exceptions set out in section 31(3.1).

[14] Further, in conducting the *Dunsmuir* analysis, a consideration of the Commission’s composition, role and responsibilities is relevant. Under the *Act*, the “Newfoundland and Labrador Legal Aid Commission is continued as a corporation”, with a board of commissioners managing the affairs of the Commission (sections 3(1) and (2)). Three of seven commissioners “shall

be appointed from a list of 5 persons to be submitted by the law society” (section 3(3)).

[15] The Commission is required to “take the action that it considers necessary for the establishment and administration of a plan of legal aid for residents of the province” (section 15). In carrying out that function, the Commission has responsibility to establish and maintain a legal aid fund (section 18(1)(a)). Under section 18(1)(c), the Commission “has full authority to administer all the money deposited to the credit of the fund for the purpose of this Act”.

[16] With certain exceptions, legal services are provided by solicitors employed by the Commission (section 31(1)). Exceptions are set out in section 31(3.1), dealing with murder, manslaughter and infanticide, and at issue in this appeal; section 31(5), where the Commission “has insufficient staff” in an area to provide legal services “through a solicitor in its employ”; and section 31(6), where the issue “requires specific competence that the commission is unable to provide through a solicitor in its employ”. Where an exception applies, the recipient of a legal aid certificate may be represented by a solicitor on a panel established under section 33.

[17] It is clear that the legislature intended that the Commission would have responsibility for administering the *Act* in a manner consistent with its mandate to provide legal services as set out in the *Act*. This would involve determining the interpretation and scope of application of its home statute, including sections 31(1) and 31(3.1).

[18] Applying the analysis set out in *Dunsmuir* and *Edmonton (City)*, the conclusion follows that the appropriate standard of review to be applied to the Commission’s decision in this case is reasonableness, not correctness.

#### Adequacy of the Commission’s Reasons

[19] The applications judge also addressed the question of adequacy of reasons provided by the Commission for its decision. I agree with his determination that it was necessary in this case to identify reasons that could be offered to support the Commission’s decision:

[9] The decision is short and conclusory:

Re: Your Appeal to the Appeal Board

After hearing your appeal on March 19, 2015 the Appeal Board has decided not to grant your request for a private counsel. The Appeal Board concluded that section 31(3.1) of the Legal Aid Act is clear and does not permit choice of private counsel in matters other than murder, manslaughter, or infanticide. The Appeal Board is bound by the clear wording of section 31(3.1) of the Legal Aid Act, and therefore, the Appeal Board must deny your appeal. ...

...

[24] The Board made no reference to the ‘in respect of’ phrase in its decision. Indeed, there are no reasons in the decision – simply the conclusion that ss. 31(3.1) is “clear”.

[25] But as noted above, the lack of reasons is not a sufficient basis upon which to overturn a decision of a tribunal such as the Board. The reviewing court is directed to “supplement” the reasons and to consider the reasons “which could be offered in support of a decision” – see *Newfoundland and Labrador Nurses’ Union [v. Newfoundland and Labrador (Treasury Board)]*, 2011 SCC 62] at paragraphs 11-12.

[26] Accordingly, I will go on to consider the matter as if at first instance.

[20] In the result, for purposes of this appeal, the judge’s reasons supporting the Commission’s decision must be reviewed in the context of assessing whether the decision satisfies the standard of reasonableness.

#### Interpretation of Section 31(3.1) of the Act

[21] Applying the standard of correctness to the Commission’s determination that section 31(3.1) did not extend to the offence of accessory after the fact to murder, the applications judge concluded:

[50] To summarize the reasons that “could be offered” in support of the Appeal Board’s conclusion that ss. 31(3.1) is clear and unambiguous – there is no meaningless, superfluous or missing wording; the provision refers to three specific offences in the *Code* with respect to which a person may be entitled to choice of counsel; “with respect to” covers circumstances of arrest, detention or charge and does not modify or expand the enumerated offences; this conclusion is supported by basic principles of statutory interpretation, by the decision of the Court of Appeal in *Pardy*, and by legislative history.

[51] The Board was correct in its determination. ...

[22] I turn, then, to consideration of the applications judge's analysis of section 31(3.1) and the reasons that could be offered in support of the Commission's decision, applying a standard of review of reasonableness, rather than correctness.

[23] Reasonableness as a standard of review is described in *Dunsmuir*:

[47] ... In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible outcomes which are defensible in respect of the facts and law.

[24] For purposes of the analysis in this case, the relevant provisions of section 31 of the *Act* are:

(1) An applicant who is found eligible for legal aid may be provided with the professional services of a solicitor in the employ of the commission.

...

(3.1) Where the application is for legal aid with respect to an offence of murder, manslaughter or infanticide, the applicant may select a solicitor

(a) employed by the commission; or

(b) in private practice in the province whose name is on a panel established under section 33.

(Emphasis added.)

[25] Mr. Rowe submits that the phrase "with respect to" indicates a legislative intention to expand the scope of application of section 31(3.1) to include offences "related" to murder, manslaughter and infanticide. He referred to the interpretation of the language in *R. v. Nowegijick*, [1983] 1 S.C.R. 29, in which Dickson J., for the Court, wrote, at page 39:

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

[26] In my view, that statement is not helpful to the analysis in this case because the interpretation of the phrase depends on the manner in which it is

used, which leads me to the submissions of counsel and the decision of the applications judge.

[27] First, relying on the above statement, Mr. Rowe submits that, if the phrase “with respect to an offence of murder” is limited simply to identifying the specific offence to which the exemption applies, the section could have been drafted more plainly, such as, “Where the applicant for legal aid has been charged with murder”. However, as explained by the applications judge:

[37] Counsel pointed to s. 30 which makes available legal aid to “a person charged with a criminal offence or who is being detained or is under arrest”.

[38] Thus it is not necessary that a charge of (e.g. murder) be laid before an entitlement to legal aid may arise. A person may be detained or under arrest without being charged but, if the detention or arrest is connected to or in relation to an offence of murder, legal aid – and counsel of choice – would be available to an entitled applicant. Thus, said counsel, “with respect to” simply allows for choice of counsel when there is no charge, but there is still a connection between the legal aid application and an offence of murder.

[28] It follows from this aspect of the legislation that a reasonable interpretation of section 31(3.1) is that the phrase “with respect to” is limited to an understanding of the word that it modifies, in this case, murder, rather than as a connector between two related subject matters as was discussed in *Nowegijick*.

[29] Another factor supporting the conclusion that the Commission’s decision was reasonable is a consideration of the offences listed in section 31(3.1) and their inter-relationship. That relationship is addressed in section 662(3) of the *Criminal Code*:

Subject to subsection (4) [concealing the body of a child], where a count charges murder and the evidence proves manslaughter or infanticide but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter or infanticide, but shall not on that count find the accused guilty of any other offence.

[30] In other words, manslaughter and infanticide are included offences when a charge of murder has been laid; accessory after the fact is not. Indeed, accessory after the fact to murder is of a different kind when compared to the offences of murder, manslaughter and infanticide, all of which require direct involvement in a death. The offence of accessory after

the fact to murder arises after a death has occurred where the accused was not involved in the murder itself; it is in the nature of an interference with the administration of justice in the prosecution of offences involving a death.

[31] Further, the applications judge considered the effect on access to counsel under the *Act*, given the Commission's determination not to apply section 31(3.1) to the offence of accessory after the fact to murder. The general principle under the *Act* is that state-funded counsel will be provided by solicitors employed by the Commission. Section 31(3.1) provides a limited exception which permits the choice of a solicitor in private practice. I agree with the applications judge's assessment:

[47] In this case, the object of the *Act* is to set out a process by which those who are entitled may obtain legal assistance at state expense. The mechanism chosen by the legislature to provide the assistance is that of a staff solicitor model with certain specified exceptions (*Pardy*, paras. 57-58).

[48] Reading ss. 31(3.1) harmoniously with the scheme and purpose of the legislation does not require that the limited and specified opportunities for choice of counsel be extended beyond the three specified offences to include other offences that may somehow be related to murder, manslaughter or infanticide. The wording does not require it and, if anything, to interpret the section as including other offences would be contrary to the scheme and purpose of the legislation.

[49] Thus while not directly on point, I do consider the decision in *Pardy* to provide some support for the view that the reference in ss. 31(3.1) to "an offence of murder" refers only to the offence of murder as set out in s. 235 of the *Code* and not to any other specific but unnamed offence that may refer to or be related to murder.

[32] Considering all the above factors, I am satisfied that the reasons that could be offered for the Commission's decision amply support the conclusion that the decision to exclude the offence of accessory after the fact to murder from section 31(3.1) is reasonable.

## **SUMMARY AND DISPOSITION**

[33] The appropriate standard of review to be applied to the Commission's decision in this case is reasonableness. In the absence of reasons given by the Commission, I am satisfied that there are sufficient reasons that could be offered to support the Commission's decision to exclude the offence of accessory after the fact to murder from section 31(3.1) of the *Legal Aid Act*.

For those reasons, I am satisfied that the Commission's decision was reasonable.

[34] Accordingly, an extension of time to file a notice of appeal having been granted, I would dismiss the appeal.

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B. G. Welsh J.A.

I Concur: \_\_\_\_\_

C. W. White J.A.

I Concur: \_\_\_\_\_

F. P. O'Brien J.A.