



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

Citation: *Service NL v. Penney*, 2019 NLCA 27

Date: May 2, 2019

Docket Number: 201801H0001

BETWEEN:

SERVICE NL

APPELLANT

AND:

KARLA PENNEY

FIRST RESPONDENT

AND:

JAMES PENNEY

SECOND RESPONDENT

AND:

EASTERN REGIONAL APPEAL BOARD

THIRD RESPONDENT

AND:

PLEMAN HIGDON

FOURTH RESPONDENT

Coram: Green, Welsh and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201401G1538

Appeal Heard: October 24, 2018

Additional Written Submissions: February 28, 2019 and March 29, 2019

Judgment Rendered: May 2, 2019

Reasons for Judgment by: Welsh J.A.

Concurred in by: Green and O'Brien JJ.A.

Counsel for the Appellant: Philip Osborne

Counsel for the First and Second Respondent: Robert Bradbury and
Gobhina Nagarajah

Counsel for the Third Respondent: No Appearance

Counsel for the Fourth Respondent: Self-Represented

Welsh J.A.:

[1] Pleman Higdon applied to Service NL and was granted a permit for an accessory structure that he had built on his property. Karla and James Penney, owners of adjoining property, appealed the granting of the permit to the Eastern Newfoundland Regional Appeal Board, submitting that Mr. Higdon had failed to obtain the required permit prior to building and that the structure did not comply with the relevant *Regulations*. The Board dismissed their appeal, having determined that Service NL had authority to issue the permit approving the structure.

[2] The Penneys appealed that decision to the Supreme Court, General Division. The judge on the appeal concluded that the Board's decision was flawed and that it was necessary to remit the matter to the Board for reconsideration. Service NL appeals that decision.

BACKGROUND

[3] The property on which the accessory structure is located is not all on one level. Part of the structure is situated on the higher, front portion of the property and part on the lower, back portion. As described in the judge's oral decision:

... So it appears [the structure] has two levels. The lower level is accessible by a door and a garage door opening onto the back [lower] lot. The upper level is accessible by a door and another garage door which opens onto the front [higher] lot.

[4] Viewed from the higher level, being the front of the property, the building appears to be a one-storey structure. Viewed from the lower level on the back of the property, the structure appears to have two levels. This configuration led to a dispute between the parties as to whether the structure met the single-storey requirement set out in the *Protected Road Zoning Regulations*, CNLR 996/96.

[5] On appeal, the judge concluded that the Board's decision did not meet the standard of reasonableness, and that it, therefore, must be set aside. He explained, in his oral decision:

Now, I have reviewed the decision of the Board on this issue. It cited some definitions found in the dictionary and the regulations, [it] did not explain how those definitions when applied to the facts of this case enabled it to reach its conclusion that the shed was compliant. It did not assess and determine the established grade which was a critical part of determining the height of the building in the regulations. That would also have enabled it to make a determination of whether the shed was in excess of one storey above the established grade. It did not address the issue of whether the established grade in this case was the lower grade of Mr. Higdon's back lot or the higher grade of his front lot. It did not address the issue of whether the storeys comprising a structure built on two levels would be accounted from the upper level or the lower level, and these are not complex issues. They are decisions within the expertise of the Board. It could have undertaken this kind of analysis, but it did not, and as a consequence, these neighbours have no finality on this issue at this point.

In my view, the reasons provided failed to meet the standard of reasonableness and therefore the decision is flawed. ...

So, in accordance with section 46(4) the Board shall reconsider the issue of whether the shed exceeded one storey and provide reasons which follow an analytical framework consistent with my reasons today. ...

ISSUES

[6] At issue in this appeal is whether the judge in the Court appealed from erred (1) in his assessment of the Board's decision given the restriction of the appeal to a question of law or jurisdiction, and (2) in determining that the Board's decision did not meet the standard of reasonableness.

ANALYSIS

[7] An appeal of the Board's decision to the Supreme Court, General Division on a question of law or jurisdiction is authorized by section 46 of the *Urban and Rural Planning Act, 2000*, SNL 2000, c. U-8, which provides:

(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.

(2) An appeal of a decision of a board under subsection (1) may be made on a question of law or jurisdiction.

(3) A board may be represented by counsel and heard on an appeal under this section.

(4) The court shall either confirm or vacate the order of the board and where vacated the court shall refer the matter back to the board with the opinion of the court as to the error in law or jurisdiction and the board shall deal with the matter in accordance with that opinion.

(Emphasis added.)

I note that section 15(4) of the *Protected Road Zoning Regulations*, which provides for an appeal of a Board's decision directly to the Court of Appeal, has been found by this Court to be of no force and effect (*Penney v. Service NL*, 2017 NLCA 25, at paragraph 25).

[8] The Penneys proceeded in the Supreme Court by specific reference to section 46, filing a "Notice of Appeal" in which they "appeal from the decision and order of the Eastern Regional Appeals Board (the "Board") dated March 20, 2014". Grounds were listed for the proposed appeal, alleging errors of law:

1. That the Board erred in law in confirming the December 17, 2013 decision of Service NL to approve an application for development of [an] accessory building ... at a mixed zoned property along Route 80 in New Harbour, NL;
2. That the Board erred in law in the interpretation of the *Protected Road Zoning Regulations* CNLR 996/96 (the "PRZR") and the *Development Regulations* ...;
3. That the Board erred in law in failing to conclude that the accessory building approved for development did "exceed a single storey in height" contrary to section 2 of the mixed zone table of the *PRZR*;
4. That the Board erred in law in failing to conclude that the decision of Service NL to approve an application for development of an accessory building which did "exceed a single storey in height" was contrary to section 2 of the mixed zone table of the *PRZR*, and *ultra vires* Service NL;
5. That the Board erred in law in failing to conclude that the accessory building ... did not comply with the National Building Code of Canada as required by section 22 of the *PRZR*;

6. That the Board erred in law in failing to conclude that the decision of Service NL to approve an application for development of an accessory building ... which did not comply with the National Building Code of Canada was contrary to section 22 of the PRZR, and *ultra vires* Service NL; ...

[9] Submissions on the appeal turned on the meaning of “a single storey” under the *Protected Road Zoning Regulations*. The first two grounds are, in fact, a more general statement of the third ground. The fourth ground simply states the same issue, with reference to the resulting decision as being outside the Board’s jurisdiction. As to the fifth and sixth grounds of appeal, the Board found that the National Building Code was not relevant for purposes of the analysis. In the result, the focus of the appeal is the Board’s interpretation of “a single storey”.

[10] I turn, then, to the threshold established by section 46 of the *Act*, that is, does the appeal raise a question of law or jurisdiction? In the Court appealed from, in his oral decision, the judge did not address which, if any, grounds of appeal would satisfy this threshold requirement. He simply applied a standard of reasonableness to the Board’s decision based on the principles set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraphs 51 to 64. This resulted in error insofar as the analysis requires the appellate judge to determine first whether the issue raises a question of law or jurisdiction.

Jurisdiction

[11] Beginning with the question of jurisdiction, in *Dunsmuir*, Bastarache and LeBel JJ., for the majority, explained:

[59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. ... “Jurisdiction” is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction. ...

[12] In this case, the Board clearly had jurisdiction to determine an appeal against Service NL’s issuance of a permit for the accessory building. Mr. Higdon’s property is located within an area designated under the *Protected Road Zoning Regulations*. Service NL is the authority designated by the minister to administer those *Regulations*. When Service NL became aware that Mr. Higdon had built an accessory structure on the property, he was advised that he required

a permit (section 6 of the *Protected Road Zoning Regulations*). The application was made and, on December 17, 2013, Service NL issued the permit after determining that the building complied with the *Regulations*.

[13] Pursuant to section 15(1) of the *Protected Road Zoning Regulations*, the Board had authority to hear the appeal from the decision of Service NL, which is the designated authority:

A person may appeal a decision of the authority to the appropriate appeal board as established and defined under section 7 of the [*Urban and Rural Planning Act, 2000*].

[14] Further, it was within the Board's authority to confirm the issuance of a permit by Service NL after the accessory building had been constructed. This follows by virtue of the application of section 18(1) of the *Protected Road Zoning Regulations* which provides for such a remedy where a builder has failed to obtain a permit prior to commencing work:

Where a violation has occurred, the authority shall notify the developer of the nature of the infraction and shall prescribe remedial action.

[15] The Board's conclusion endorsing the remedy of issuing the permit after the structure was completed was accepted by the judge in the Court appealed from and was not an issue in this Court.

[16] It follows that the decision of the Board does not raise a question of jurisdiction for purposes of an appeal to the court pursuant to section 46 of the *Act*.

Question of Law

[17] The next step in the analysis is to determine whether the appeal of the Board's decision raises a question of law. The grounds of appeal in the notice of appeal filed by the Penneys (paragraph 8, above) focus on whether the accessory structure meets the regulatory requirements. However, the judge in the Court appealed from approached the appeal from a broader perspective, that is, whether the Board had failed to provide sufficient reasons for its decision. I am satisfied that the grounds of appeal advanced by the Penneys are subsumed under the judge's consideration of the sufficiency of the Board's reasons.

[18] Sufficiency of reasons is properly characterized as a question of law (*Newfoundland and Labrador (Minister of Justice) v. Critch*, 2007 NLCA 10, 263 Nfld. & P.E.I.R. 60, at paragraph 18). It follows that adequacy of the

Board's reasons provides a basis on which to proceed with the appeal under section 46 of the *Urban and Rural Planning Act, 2000*.

Standard of Review

[19] In determining the standard of review to be applied to the Board's decision, in *Dunsmuir*, at paragraphs 60 and 61, Bastarache and LeBel JJ. identified particular circumstances when a question of law will attract a standard of review of correctness. Such exceptions are not engaged in this case. Questions of law of general application to the legal system as a whole and outside the Board's expertise, complex common law rules and conflicting jurisprudence, decisions of competing specialized tribunals, and similar issues do not arise on the facts of this case.

[20] Rather, the standard of review of a question of law in the circumstances of this case falls to be assessed using the analytical framework set out in *Dunsmuir*, employing the criteria summarized at paragraph 64. The result of that assessment is a standard of review of reasonableness.

[21] In reaching that conclusion, an important consideration is the limited authority of the court under section 46(2) of the *Act*. In particular, the court on appeal is restricted to considering questions of law or jurisdiction and the only remedy available if an error is found is to remit the issue to the Board (section 46(4) of the *Act*). There is no authority to substitute the court's decision for that of the Board. This indicates a legislative intention that the Board shall make the final decision when exercising its mandate to review the decision of an authority regarding local development issues, including issuing development approvals, issuing or revoking development permits, and issuing stop work orders (section 42(1) of the *Urban and Rural Planning Act, 2000*).

[22] In summary, the Board's decision engages a standard of review of reasonableness given the purpose for which the Board has been established, the nature of the questions it is required to decide, and the expertise developed by the Board in making such decisions by applying the relevant legislation and regulations.

Sufficiency of Reasons – Principles of Law

[23] The focus of this appeal is the sufficiency of the reasons provided by the Board for its decision. Principles applicable to assessing the sufficiency of reasons are discussed in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708:

[16] ... In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[17] The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

...

[26] In this case, the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes. ...

[24] Where it is submitted that the reasons are insufficient, the court must consider not only the reasons that are offered, but also the reasons "which could be offered in support of a decision" (*Dunsmuir v. New Brunswick, supra*, at paragraph 48; *Newfoundland and Labrador Nurses' Union, supra*, at paragraph 12).

[25] Further, in applying a reasonableness standard, it is important to recognize that a question being considered by the Board may lend itself to more than one result, that is, the question "may give rise to a number of possible, reasonable conclusions" (*Dunsmuir*, at paragraph 47). As discussed in *Dunsmuir*, at paragraph 47, a court reviewing a tribunal's decision is "concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

Sufficiency of Reasons – Application of the Law

[26] In this case, the judge in the Court appealed from concluded that the Board did not provide sufficient reasons for its decision. The judge did not go on to consider whether the Board's reasons provided a sufficient basis to allow the Court to supplement the reasons in order to determine whether the Board's decision falls within a range of acceptable outcomes. It is necessary, then, to review the reasons offered by the Board.

[27] In reviewing the decision of Service NL to issue the permit on the basis that the accessory structure met the requirements of the *Protected Road Zoning Regulations*, the Board relied on section 2 of the *Regulations* under the heading "Light industrial" in Schedule A, which provides:

Accessory structures may conditionally be permitted but shall not exceed a single storey in height, shall be clearly incidental and complementary to the use of the main buildings in character, use and size, and shall be contained on the same lot.

(Emphasis added.)

The application of this provision is based on characterization of the property as falling within the mixed zone table in Schedule A (section 6(2) of the *Regulations* and the mixed zone code in Schedule A).

[28] In determining whether the accessory structure met the single-storey requirement under the *Regulations*, the Board specified the resources on which it relied:

In the absence of a definition of “storey” in the [*Protected Road Zoning Regulations*], the Board referred to the *Dictionary of Canadian Law* (2nd ed.), which defines a “storey” as follows: “[a] division of a building between a floor, not below the grade level of the surrounding ground, and the floor or roof next above.” Section 4(1)(d) of the Development Regulations (NLR 3/01) outlines how the height of a building is established, and states:

“building height” means the vertical distance, measured in metres from the established grade to the

(i) highest point of the roof surface of a flat roof,

(ii) deck line of a mansard roof, and

(iii) mean height level between the eave and the ridge of a gable, hip or gambrel roof, and in any case, a building height shall not include mechanical structures, smokestacks, steeples and purely ornamental structures above a roof;

The Development Regulations (NLR 3/01) also define how the established grade is determined, and state:

“established grade” means,

(i) where used in reference to a building, the average elevation of the finished surface of the ground where it meets the exterior or the front of that building exclusive of any artificial embankment or entrenchment,
or

(ii) where used in reference to a structure that is not a building, the average elevation of the finished grade of the ground immediately

surrounding the structure, exclusive of any artificial embankment or entrenchment;

The Board considered the above noted definitions and accepts that the accessory structure, when measured from the established grade, is one (1) storey.

...

The Board accepts that the existing development complies with the [*Protected Road Zoning Regulations*] and is satisfied that the accessory structure complies with the conditions included in the Mixed zone of the [*Protected Road Zoning Regulations*], and states:

Accessory structures may conditionally be permitted but shall not exceed a single storey in height, shall be clearly incidental and complementary to the use of the main buildings in character, use and size, and shall be contained on the same lot.

...

Furthermore, the Board accepts that in accordance with Section 22 of the [*Protected Road Zoning Regulations*], Service NL deferred compliance with the National Building Code of Canada to the applicant. The Board heard no evidence to clearly demonstrate that the accessory structure and retaining wall were built contrary to the National Building Code of Canada.

...

In arriving at its decision, the Board reviewed the submissions and comments presented by all parties, along with the *Protected Road Zoning Regulations*, the Ministerial Development Regulations, the *Dictionary of Canadian Law* (2nd ed.), and the technical information and planning advice.

Based on its findings, the Board determined that Service NL had the authority to issue a permit for the purpose of an accessory building and a retaining wall located along Route 80 in New Harbour, and exercised its authority in accordance with the *Protected Road Zoning Regulations*.

[29] Having identified the resources on which it relied to make its decision, the Board did not elaborate on how the definitions were applied to the facts of this accessory structure. Because the reasons are skeletal in nature, it is appropriate to review not only the reasons that are offered, but also those which could be offered in support of the decision.

[30] The word “storey” is not defined in the *Protected Road Zoning Regulations*. Accordingly, to assist in determining whether the structure

exceeded a single storey, the Board considered the definition of “storey” in the *Dictionary of Canadian Law*, which defines storey as a “division of a building between a floor, not below the grade level of the surrounding ground, and the floor or roof next above”. Applying this definition, the inference follows that the Board used the grade level of the front, upper level of the lot as the reference point. A photograph from this perspective, entered as an exhibit, shows a single storey structure that would comply with this definition.

[31] The Board also referred to the definitions of “building height” and “established grade” in the *Development Regulations*, NLR 3/01, enacted under the *Urban and Rural Planning Act, 2000*. The *Development Regulations* can do no more than serve as an interpretive tool because they do not apply in a location that has been designated under the *Protected Road Zoning Regulations*. Further, in using the *Development Regulations* as an interpretive tool, I note that the above phrases are not, in fact, found in the applicable regulations, the *Protected Road Zoning Regulations*. The latter *Regulations* refer to a structure that “shall not exceed a single storey in height”, and which “shall be clearly incidental and complementary to the use of the main buildings”, without reference to measurement from a particular grade.

[32] While the *Development Regulations* do not apply in locations covered by the *Protected Road Zoning Regulations*, in the absence of a definition in the applicable *Regulations*, the Board turned for assistance to definitions in the *Development Regulations*. The definition of “building height” refers to measurement from “the established grade”, which is defined in section 4(1)(g):

(i) where used in reference to a building, the average elevation of the finished surface of the ground where it meets the exterior or the front of that building exclusive of any artificial embankment or entrenchment;

[33] The inference follows that, in applying this definition in order to assist in its interpretation of “a single storey” in the *Protected Road Zoning Regulations*, the Board accepted that the accessory structure was a single storey in height measured from the finished surface of the ground where it meets the front of the structure, as seen in the photograph that shows the front, upper level of the lot as the reference point, and that no artificial embankment or entrenchment was involved.

[34] Before the Board and in the Court appealed from the Penneys submitted that the definition of “established grade” from which to measure the height of the accessory structure was relevant and that the definition was not satisfied because fill was added in order to level the ground in front of the accessory

structure. This, the Penneys submitted, amounted to an “artificial embankment”, and resulted in error by the Board.

[35] I do not accept this submission. It is apparent from the questions asked by the Board, the photographs, the record, and its decision that the Board must have decided that having to add some fill to level the ground did not take away from the character of the established grade, insofar as it was relevant.

[36] In addition to the resources cited above, the Board stated that it had considered the submissions of the parties and the technical information and planning advice provided to it. The Board did not refer to the definition of a “storey” in the National Building Code of Canada, which the Penneys submit is incorporated by reference into the *Protected Road Zoning Regulations*. To the extent that the National Building Code may be relevant, it relates to construction standards. Section 22(1) of the *Regulations* provides:

A building shall not be constructed except in accordance with the standards prescribed by the National Building Code of Canada and ancillary codes, or other standards of construction approved by the Lieutenant-Governor in Council.

“Storey” is defined in the Code to mean:

... that portion of a building that is situated between the top of any floor and the top of the floor next above it, and if there is no floor above it, that portion between the top of such floor and the ceiling above it.

[37] In addressing the relevance of the National Building Code, the Board stated:

The Board heard arguments from the [Penneys] suggesting the subject development did not comply with the National Building Code of Canada. The Board acknowledges that Service NL indicated in the permit that both the accessory structure and the wall were required to conform to the National Building Code of Canada. Furthermore, the Board accepts that in accordance with Section 22 of the [*Protected Road Zoning Regulations*], Service NL deferred compliance with the National Building Code of Canada to [Mr. Higdon]. The Board heard no evidence to clearly demonstrate that the accessory structure and retaining wall were built contrary to the National Building Code of Canada.

[38] While it was open to the Board to consider the definition found in the National Building Code, the *Regulations* do not adopt that or any other definition of a storey. Indeed, it is apparent that the Board did not consider the Code to be of assistance in interpreting the meaning of “a single storey” in the context of issuing a permit under the *Protected Road Zoning Regulations*. The

decision not to consider the definition in the Code is not a basis on which to conclude that the Board's decision was unreasonable.

[39] In reviewing the decision of the Board, read as a whole, I turn again to the decision in the *Nurses' Union* case where the Court reiterated:

[15] ... This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[40] As applied to this case, the above discussion relies on inferences that follow from the record considered by, and the decision of, the Board. The analysis does not involve this Court substituting its own reasons or decision. Rather, the Board's reasons allow this Court to understand why the Board made its decision, permitting the Court to determine whether the Board's conclusion falls within the range of acceptable outcomes.

[41] In the result, I am satisfied that, with the inclusion of the above supplemental explanation, the Board provided a sufficient basis for its determination that the accessory structure in this case satisfies the requirements of the applicable *Protected Road Zoning Regulations*.

[42] While there may be other possible, reasonable interpretations of "a single storey" as applied to this accessory structure, the Board's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at paragraph 47). There is a reasonable basis on which to conclude that the accessory structure did not exceed a single storey in height.

Costs

[43] I am satisfied that, in the circumstances, the parties should bear their own costs in this Court and in the Court appealed from. While Service NL was ultimately successful, it is apparent that this protracted appeal, requiring an interim decision of this Court regarding jurisdiction, was pursued because of its general application to future decisions to be made under the *Act* and *Regulations*.

SUMMARY AND DISPOSITION

[44] In summary, an appeal under section 46 of the *Urban and Rural Planning Act, 2000* may proceed only on a question of law or jurisdiction. In this case, there is no basis on which to conclude that the Board lacked jurisdiction to decide the appeal from Service NL's decision to issue the permit for the

accessory structure. However, the question as to the sufficiency of the Board's reasons provides the necessary question of law.

[45] Reasonableness is the standard of review to be applied to the question of the sufficiency of reasons. While the Board's reasons lack detail, its reference to resources on which it relied to interpret the meaning of "a single storey", together with the factual context provide a basis on which the Court may supplement the Board's reasons in order to conclude that the Board's decision affirming Service NL's issuance of the permit is a possible, acceptable outcome defensible in respect of the facts and law.

[46] In the result, I would allow the appeal and affirm the decision of the Board. I would order the parties to bear their own costs in this Court and in the Court appealed from.

B. G. Welsh J.A.

I Concur: _____

J. D. Green J.A.

I Concur: _____

F. P. O'Brien J.A.