



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

Citation: *Consumer Advocate v. Board of Commissioners of
Public Utilities*, 2021 NLCA 50

Date: October 7, 2021

Docket Number: 202101H0026

BETWEEN:

CONSUMER ADVOCATE

APPLICANT/APPELLANT

AND:

BOARD OF COMMISSIONERS OF
PUBLIC UTILITIES

FIRST RESPONDENT

AND:

NEWFOUNDLAND POWER INC.

SECOND RESPONDENT

Coram: Goodridge J.A.

Court Appealed From: Board of Commissioners of Public Utilities,
Order No. P.U. 12 (2021)

Application Heard: September 21, 2021

Judgment Rendered: October 7, 2021

Counsel for the Applicant/Appellant: Sarah G. Fitzgerald

Counsel for the First Respondent: J. Michael Collins

Counsel for the Second Respondent: Liam P. O'Brien

Authorities Cited:

CASES CITED: *Consumer Advocate v. Newfoundland Power Inc.*, 2003 NLCA 58; *Consumer Advocate v. Newfoundland Power Inc.*, 2006 NLCA 20, 255 Nfld. & P.E.I.R. 234; *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.); *Capital Cities Communications Inc. v. Canadian Radio-Television & Commission*, [1978] 2 S.C.R. 141 (S.C.C.); *Friends of the Oldman River Society v. Canada*, [1992] 1 S.C.R. 3 (S.C.C.); *Labrador (City) v. Newfoundland & Labrador Hydro Inc.*, 2004 NLCA 61, 241 Nfld. & P.E.I.R. 81; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.); *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.); *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650.

STATUTES CONSIDERED: *Public Utilities Act*, RSNL 1990, c. P-47, sections 20, 99, 118.

REGULATIONS CONSIDERED: *Board of Commissioners of Public Utilities Regulations*, NLR 39/96, sections 3, 14, 15, 22.

OTHER: *Capital Budget Application Guidelines*, 2007.

Goodridge J.A.:

[1] This is an application of the Consumer Advocate seeking leave to appeal an order of the Board of Commissioners of Public Utilities (Board) that approved capital expenditures proposed by Newfoundland Power Inc. (Respondent). The proposed appeal claims that the Board exceeded its jurisdiction, and breached its duty of procedural fairness, in granting the order without following the proper procedures. There are three proposed grounds set out in the Notice of Appeal:

1. Board exceeded its jurisdiction by proceeding under *Capital Budget Application Guidelines*, 2007, that had not been approved by the Lieutenant-Governor in Council;

2. Board erred in law (breached its duty of procedural fairness) when it proceeded under the *Guidelines*, and dispensed with a public hearing;
3. Board erred in law (breached its duty of procedural fairness) when it followed a mixture of procedures under both the *Board of Commissioners of Public Utilities Regulations*, NLR 39/96, and the *Guidelines*.

BACKGROUND

[2] The order that the Consumer Advocate seeks to appeal, P.U. 12 (2021), approved the Respondent's capital budget application for the replacement of a computerized customer service system (CSS). This was a proposed capital expenditure of \$31.6 million over three years. The existing CSS was past its expected service life, and becoming obsolete.

[3] The Consumer Advocate does not dispute that the Board has authority to approve the proposed capital expenditure but says that the Board was obliged to follow the procedures set out in the *Regulations* when considering that proposal, and failed to do so. The Consumer Advocate argues that the Board exceeded its jurisdiction and breached its duty of procedural fairness by not following the *Regulations* and instead, following the procedures set out in the *Guidelines*.

[4] The *Guidelines* are policy approved by the Board to provide direction as to the general administrative process for handling of capital budget application filings made to the Board. The *Guidelines* were not submitted for approval by the Lieutenant-Governor in council, and the Board maintains that such approval was not required. The *Regulations* were submitted to, and approved by, the Lieutenant-Governor in Council under section 20 of the *Public Utilities Act*, RSNL 1990, c. P-47, and have the force of law.

REQUIREMENT TO OBTAIN LEAVE

[5] An appeal of a decision of the Board requires leave from this Court. The statutory right of appeal, and the requirement to obtain leave, are set out in the *Public Utilities Act*:

99.(1) An appeal lies to the Court of Appeal from an order of the board upon a question as to its jurisdiction or upon a question of law, but the appeal can be taken only by leave of a judge of the court, given upon an application presented within 15

days after the making of the decision and upon the terms that the judge may determine.

[6] Leave may be granted only in respect of a question as to the jurisdiction of the Board or a question of law. Further, leave may be granted only where the intended appellant shows a reasonably arguable case for success on appeal, see *Consumer Advocate v. Newfoundland Power Inc.*, 2003 NLCA 58, at paragraph 3, and *Consumer Advocate v. Newfoundland Power Inc.*, 2006 NLCA 20, 255 Nfld. & P.E.I.R. 234, at paragraph 10. It is not contentious that the grounds of the proposed appeal raise questions as to the jurisdiction of the Board and law. Accordingly, the granting of leave in this matter depends on whether the Consumer Advocate has shown a reasonably arguable case for success on one or more of the proposed grounds of appeal.

ANALYSIS

(1) BOARD EXCEEDED ITS JURISDICTION

[7] The Consumer Advocate submits that any rule or regulation of the Board must be approved by the Lieutenant-Governor in Council pursuant to section 20 of the *Public Utilities Act*, that the *Guidelines* qualify as a rule or regulation, that the *Guidelines* were not approved by the Lieutenant-Governor in Council, and that the Board exceeded its jurisdiction by acting pursuant to the *Guidelines*. Section 20 of the *Public Utilities Act* provides:

20. The board may make, revoke and alter rules and regulations for the effective execution of its duties and of the intention and objects of this Act, and the regulations of the practice and procedure with regard to the matters over which it has jurisdiction and the rules and regulations, when approved by the Lieutenant-Governor in Council, shall have the force of the law.

[8] A regulator like the Board may, as a matter of sound administrative practice, and without any specific legislated authority, issue guidelines, provided that they do not contradict an existing statutory provision or regulation: *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, at 6-7 (S.C.C.); *Capital Cities Communications Inc. v. Canadian Radio-Television & Commission*, [1978] 2 S.C.R. 141, at 170-171 (S.C.C.); *Friends of the Oldman River Society v. Canada*, [1992] 1 S.C.R. 3, at 35 (S.C.C.). In *Labrador (City) v. Newfoundland & Labrador Hydro Inc.*, 2004 NLCA 61, 241 Nfld. & P.E.I.R. 81, at paragraph 17, this Court recognized that developing policy, such as guidelines, plays a role in the Board's performance of its duties: "Policy, both that imposed by legislation and that developed by the Board, plays a major role in the Board's

performance of its duties”. In this case, in addition to the common law authority allowing the Board to develop policy and guidelines, the Board has legislated authority, pursuant to subsection 3(2) of the *Regulations*. That legislated authority allows the Board to “dispense with, vary or supplement” the procedures prescribed by the *Regulations* as it considers necessary:

3(2) In any application or other proceeding, the board may dispense with, vary or supplement any provisions of these regulations on those terms as the board considers necessary.

[9] The *Guidelines* supplement provisions within the *Regulations* by adding detail as to the content of the capital budget application filings and the general timelines for completion of steps contemplated in the *Regulations*. By way of example, sections 14 and 15 of the *Regulations* grant the Board discretion to permit “information requests”, and discretion to set a time limit for response. The *Guidelines* supplement those provisions by specifying the date for filing of “information requests”, and the time limit for response. Nothing in the *Guidelines* preempts any required procedural step set out in the *Regulations*; nothing in the *Guidelines* contradicts an existing statutory provision or regulation; and nothing in the *Guidelines* eliminates or reduces discretion granted to the Board under the *Public Utilities Act* or the *Regulations*.

[10] The Board has authority (jurisdiction) to issue the *Guidelines* and act pursuant to the *Guidelines* even though they were not approved by the Lieutenant-Governor in Council.

[11] On this first proposed ground of appeal, that the Board exceeded its jurisdiction by acting pursuant to the *Guidelines*, the Consumer Advocate has failed to show a reasonably arguable case for success.

(2) BOARD BREACHED ITS DUTY OF PROCEDURAL FAIRNESS BY DISPENSING WITH A PUBLIC HEARING

[12] On January 6, 2021, after hearing submissions, the Board decided that there would be no public hearing, stating that it was satisfied that the written review process allows a full opportunity to gather information and challenge the Respondent’s capital budget application. The Consumer Advocate submits that a public hearing was required in this context and that the Board’s decision to dispense with a public hearing, and its failure to identify a threshold that would trigger a public hearing, amounts to a breach of its duty of procedural fairness.

[13] The Respondent disagrees, and says there was a fair and open procedure, appropriate to this decision, with an opportunity for those affected to put forward their views and evidence fully. A public hearing was not required to achieve procedural fairness.

[14] There is no requirement for a public hearing under the *Public Utilities Act*, the *Regulations* or the *Guidelines*. It is a matter within the Board's discretion, subject only to the requirement that the Board meets its duty of procedural fairness to the parties. The concept of procedural fairness is variable, and its content is determined in the specific context of each case (*Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at 682 (S.C.C.)). All of the circumstances must be considered in order to determine the content of the duty of procedural fairness. The content does not always require a public hearing.

[15] *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), discussed the content of the duty of procedural fairness in the context of whether a public (oral) hearing was required for a 'compassionate' application seeking exemption from a deportation order. L'Heureux-Dubé J., writing for the majority, determined that lack of an oral hearing, in those circumstances, did not constitute a breach of the duty of procedural fairness. She gave the following non-exhaustive list of factors that are relevant to determining the content of the duty of procedural fairness in a given set of circumstances (paragraphs 23-28):

1. nature of the decision being made and the process followed in making it;
2. nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
3. importance of the decision to the individuals affected;
4. legitimate expectations of the party challenging the decision; and
5. choices of procedure made by the administrative agency.

[16] I apply these five factors to the current matter.

Nature of the Decision

[17] The nature of this capital budget decision is regulatory supervision of the Respondent as a public utility. The process followed by the Board does not closely parallel the process for judicial decision-making. Unlike in the judicial process, the Board's process allows it to make its own inquiries, and obtain disclosure directly from the Respondent of any information necessary to its decision.

Nature of the Statutory Scheme

[18] As noted above, the statutory scheme, permits, but does not require, a public hearing.

[19] The statutory scheme includes an appeal process, as we have here.

Importance of the Decision

[20] The Board's decision to approve this capital budget has a financial impact on the individual ratepayers, but it is a relatively minor impact. A cost recovery over the life of the CSS would be less than \$1 per month per ratepayer. In that regard, the impact and importance of the decision to the individuals affected is low.

Expectations of the Party Challenging the Decision

[21] The legitimate expectation of the Consumer Advocate, based on history, is that there would be written submissions without a public hearing. That has been the past practice for capital budget applications. The *Guidelines* indicate that proceeding with a public hearing for capital budget applications of this magnitude "is determined by the Board, upon request or on its own motion". Section 22(a) of the *Regulations* indicates that the Board may dispose of a matter on the basis of the written documentation.

[22] A public hearing is possible, but it is not an expectation.

Choices of Procedure Made by the Administrative Agency

[23] The Board has broad discretion as to choice of procedure (under sections 20 and 118 of the *Public Utilities Act* and sections 3 and 22 of the *Regulations*), and has authority to dispense with, vary, or supplement any procedural step provided in the *Regulations*. In addition, the Board has significant expertise in the regulation of utilities and in evaluating applications of this nature. In *Baker*,

L'Heureux-Dubé J. said that important weight must be given to this last factor, choice of procedures, where a board has expertise and has been granted authority by legislation to choose its own procedures:

[27]... [T]ake into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances ... While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints ... (citations omitted)

[24] Abella J. writing for the majority in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, repeated this same quote from *Baker*, and stated:

[231] Considerable deference is owed to procedural rulings made by a tribunal with the authority to control its own process. The determination of the scope and content of a duty to act fairly is circumstance-specific, and may well depend on factors within the expertise and knowledge of the tribunal, including the nature of the statutory scheme and the expectations and practices of the Agency's constituencies. ...

[25] The Board has authority to choose its own procedures, and has expertise in determining what procedures are appropriate. In these circumstances, both *Baker* and *VIA Rail* suggest considerable deference to the Board's decision to dispense with the public hearing. Indeed, none of the five factors from *Baker*, in the current context, supports the argument that the Board's duty of procedural fairness, in responding to the capital budget application and making its decision, required a public hearing.

[26] The Board's choice of procedure allowed for an open and transparent process, appropriate to the capital budget decision, with reasonable opportunity for those affected, including the Consumer Advocate, to participate. Page three of the January 6, 2021 decision dispensing with a public hearing summarizes the Board's rationale for dispensing with a public hearing:

While the Board agrees with the Consumer Advocate that the CSS project deserves careful scrutiny, the Board is satisfied that the written review process allows a full opportunity to gather information and challenge Newfoundland Power's proposals in relation to this project. The Consumer Advocate submitted that it is necessary to hear directly from EY [Ernst & Young LLP] and set out a number of specific issues to be addressed. The Board believes that it is important that the parties have a full opportunity to question the expert whose reports were filed in support of the application but it is not necessary that a [public] hearing be held to gather this information. This information can be obtained through the filing of RFIs [requests for

information] or where appropriate through the technical conference process. EY did not participate in the technical conference which, combined with follow-up RFIs, would have provided the opportunity for the full exchange of information in relation to the expert reports filed in support of the Application and documentation of this information on the record. To provide the opportunity for full information exchange, the Board will allow the filing of further RFIs.

[27] The Consumer Advocate's participation included open access to the application and supporting documents, attendance at a technical conference on the CSS project with Board staff present, opportunity to gather information (the Consumer Advocate made 125 requests for information to the Respondent), motions on specific issues, and written submissions to the Board on the main issue of approval. The Consumer Advocate had the opportunity, with the other parties, to put forward his position and relevant evidence supporting that position.

[28] The five factors discussed in *Baker*, and in particular, the considerable deference owed to the Board in the current context as to its choices of procedure, do not favour the argument of the Consumer Advocate that a public hearing is required to achieve procedural fairness. In addition, there is no obligation on the Board to set a fixed threshold for applications that warrant public hearing. The decision to dispense with a public hearing is discretionary and the threshold will change depending on the facts and circumstances of each case.

[29] On this second proposed ground of appeal, that the Board breached its duty of procedural fairness when it dispensed with a public hearing and failed to set a clear threshold, the Consumer Advocate has failed to show a reasonably arguable case for success.

(3) BOARD BREACHED ITS DUTY OF PROCEDURAL FAIRNESS BY MIXING PROCEDURES UNDER THE *REGULATIONS*, WITH PROCEDURES UNDER THE *GUIDELINES*

[30] The Consumer Advocate submits that the Board breached its duty of procedural fairness by mixing procedures under the *Regulations*, with procedures under the *Guidelines*. In particular, the Consumer Advocate says that the Board switched over from the process set out in the *Guidelines*, to the process set out in section 22(b) of the *Regulations*, when it allowed the Consumer Advocate to file supplementary information requests.

[31] Contemporaneous with its decision dispensing with the public hearing, the Board allowed the Consumer Advocate to make supplementary information requests to the Respondent. The Consumer Advocate says that, while supplementary information requests may be permitted under the *Regulations*, it was not part of the step-by-step procedure set out in the *Guidelines*. The effect of the switch from the procedure in the *Guidelines* to the procedure in the *Regulations*, according to the Consumer Advocate, is that the Respondent was given a second chance to demonstrate the necessity of the CSS, and that the Consumer Advocate was prejudiced.

[32] I am satisfied that there was no mixing of procedures. The *Regulations* apply throughout this capital budget application. As was stated above, nothing in the *Guidelines* preempts any required procedural step in the *Regulations*; nothing in the *Guidelines* contradicts an existing statutory provision or regulation; and nothing in the *Guidelines* eliminates or reduces authority or discretion granted to the Board under the *Public Utilities Act* or *Regulations*.

[33] The *Guidelines* supplement provisions within the *Regulations* by adding detail as to the application content and the general timelines for completion of steps contemplated in the *Regulations*. The *Guidelines* do not displace the *Regulations* or vary any procedural step contemplated under the *Regulations*. The Board had authority to allow the supplementary information requests under subsection 22(b) of the *Regulations*, and the effect of exercising that authority was to increase procedural fairness for the Consumer Advocate. There was no obligation on the Consumer Advocate to file the supplementary information requests, but it was an available option and the Consumer Advocate elected to exercise that option.

[34] On this third proposed ground of appeal, that the Board breached its duty of procedural fairness by mixing procedures under the *Regulations* with procedures under the *Guidelines*, the Consumer Advocate has failed to show a reasonably arguable case for success.

DISPOSITION

[35] The application for leave to appeal is denied. The Consumer Advocate, as the intended appellant, has not demonstrated a reasonably arguable case for success on any of the three proposed grounds of appeal.

[36] The Respondent is entitled to its costs on this application, based on Column III. The Board did not seek costs, and accordingly, will bear its own costs.

W. H. Goodridge J.A.