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Docket: 14/19 & 14/21
Citation: *The Consumer Advocate v. The Board of
Commissioners of Public Utilities*, 2015 NLCA 24

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

BETWEEN:

THE CONSUMER ADVOCATE as represented
by THOMAS J. JOHNSON APPELLANT

AND:

THE BOARD OF COMMISSIONERS OF
PUBLIC UTILITIES FIRST RESPONDENT

AND:

NEWFOUNDLAND AND LABRADOR
HYDRO SECOND RESPONDENT

AND:

NEWFOUNDLAND POWER INC. THIRD RESPONDENT

AND

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THE CONSUMER ADVOCATE as
represented by THOMAS J. JOHNSON SECOND RESPONDENT

AND:

NEWFOUNDLAND POWER INC. THIRD RESPONDENT

Coram: Welsh, Rowe and Harrington JJ.A.

Court Appealed From: Newfoundland and Labrador Board of
Commissioners of Public Utilities
(Order No. P.U. 9 (2014))

Appeal Heard: February 19, 2015
Judgment Rendered: May 6, 2015

Reasons for Judgment by Rowe J.A.
Concurred in by Welsh and Harrington JJ.A.

Counsel for The Consumer Advocate: Thomas Johnson Q.C. and Raman
Balakrishnan
Counsel for The Board of Commissioners of Public Utilities: Jackie Glynn
Counsel for Newfoundland and Labrador Hydro: Geoffrey P. Young
Counsel for Newfoundland Power Inc.: Liam O'Brien

Rowe J.A.:

BACKGROUND

[1] This appeal comes directly to this Court pursuant to section 99 of the *Public Utilities Act*, RSNL 1990, c. P-47 (“*PUB Act*”), leave to appeal on a question of jurisdiction or law having been granted by Green C.J.N.L.

[2] The appeal relates to Order No. P.U. 9 (2014) arising from an April 9, 2014 decision of the Board of Commissioners of Public Utilities (“PUB”). That decision related to Order in Council O.C. 2013-089, dated April 4, 2013, made pursuant to the *Electrical Power Control Act, 1994*, SNL 1994, c. E-5.1.

[3] The Order in Council directed the PUB to distribute a surplus in the Newfoundland Power Rate Stabilization Fund. The issues in this appeal relate to whether the PUB made an error of jurisdiction or law in its decision giving effect to the Order in Council.

FACTS

[4] Newfoundland and Labrador Hydro (“Hydro”) is a provincial Crown corporation. The Consumer Advocate is a representative of the interests of customers of both Newfoundland Power and Hydro, other than its industrial customers. The Consumer Advocate is appointed pursuant to section 117 of the *PUB Act*. Newfoundland Power is a privately-owned electrical utility regulated (as is Hydro) by the PUB.

[5] Hydro generates power on the island of Newfoundland and in Labrador. It generates power for the island grid; it also generates power for isolated communities on the island and in Labrador. Newfoundland Power generates a small amount of power on the island; this power is fed into the island grid. Newfoundland Power does not operate in Labrador. In Labrador, Hydro purchases power from Churchill Falls Labrador Corporation, which power is utilized in the vicinity of Labrador City-Wabush and Happy Valley-Goose Bay.

[6] Transmission of power on the island grid from sites of generation to where it is distributed locally is carried out by Hydro. Local distribution of power taken from the island grid is done largely by Newfoundland Power and to a lesser extent by Hydro. There are other generators of power on the island which sell power to Hydro for use on the island grid. These independent generators are not relevant for this appeal.

[7] Much of Hydro’s power generation on the island is from hydro-electricity. Hydro also has a small amount of wind generation capacity. Finally, Hydro operates several thermal generation facilities on the island, the largest being at Holyrood. Power produced by Hydro, as well as power generated by Newfoundland Power and by independent generators, feeds the island grid. As well, in isolated communities on the island and in Labrador, Hydro operates diesel generation facilities that feed only consumers in the immediate area; they are not connected to any grid.

[8] In order to smooth out fluctuations in Hydro’s revenue requirements (and, by extension, the price of electricity) pursuant to a directive from the provincial government, a Rate Stabilization Plan (“RSP”) was established.

[9] The RSP provided a fund that accumulated or was drawn down to cover the difference between the forecast cost of Hydro’s thermal generation

for the island grid and the actual cost of that generation. The difference is a function of three factors:

- (1) the price per unit of fuel consumed in thermal generation;
- (2) the output from hydro-electric facilities on the island (the more power they produce, the less that needs to be generated thermally and vice versa); and
- (3) the demand for power (the greater the demand, the more that is generated thermally and vice versa).

[10] For example, a high price for fuel, plus low output from hydro-electric facilities, along with higher demand for electricity would result in a draw on the RSP; by contrast, a low price for fuel, plus high output from hydro-electric facilities, along with lower demand for electricity would result in funds accumulating in the RSP. A combination of these factors has led to a very considerable surplus accumulating in the RSP.

[11] The PUB sets rates for the following groups of ratepayers:

- (1) Newfoundland Power customers (all on the island grid), plus Hydro customers on the island grid,
- (2) Hydro's industrial customers on the island grid,
- (3) Hydro's customers in the Labrador City-Wabush and Happy Valley-Goose Bay areas, and
- (4) Hydro's customers in isolated communities on the island and in Labrador.

[12] The power for groups (1) and (2) is generated (in part) from Hydro's thermal production. The power for group (3) is generated at Churchill Falls. The power for group (4) is generated by local diesel facilities.

[13] As a reflection of the foregoing, electricity rates for power for groups (1) and (2) have been set, in part, to provide contributions to the RSP. Customers in groups (3) and (4) (as part of their power rates) have not been called upon to contribute to the RSP. This is logical, as neither group (3) nor group (4) receives any power from Hydro's thermal facilities, as group (3) and group (4) are not on the island grid.

[14] To repeat, customers in groups (1) and (2) have paid into the RSP; customers in groups (3) and (4) have not.

[15] There is a further complication. Newfoundland Power's customers (all of whom are on the island grid) and non-industrial customers of Hydro who are on the island grid both pay the same rates for power. The logic of this is that, all being on the island grid, they all draw from a common pool of power. However, for historical reasons, Newfoundland Power's customers tend to be in larger urban centres, while Hydro's non-industrial island grid customers tend to be in smaller, more remotely located communities. As a result, the cost of transmission and distribution of power (rather than its generation) is lower for the more densely located Newfoundland Power customers than it is for the less densely located Hydro non-industrial island grid customers. As both groups of customers pay the same price for power, but the costs associated with providing power to Newfoundland Power's customers are lower than the costs associated with providing power to Hydro's non-industrial island grid customers, in effect, Newfoundland Power's customers subsidize Hydro's non-industrial island grid customers. This pattern of subsidization flows inevitably from a differing cost structure, but a common price structure.

[16] In 2010, Hydro applied to the PUB to change the RSP rules as they related to "allocations" to the RSP by Hydro's island industrial customers and by other customers. By Order No. P.U. 25 (2010), the Board denied the application, deciding that it had no jurisdiction to make the "re-allocation" order that Hydro had requested.

[17] Hydro and the Consumer Advocate appealed that decision to this Court. In June 2012, the Court allowed the appeal on the basis that the Board was mistaken in its view that it had no jurisdiction under the *Electrical Power Control Act* to grant the order that Hydro had requested. *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2012 NLCA 38, 323 Nfld. & P.E.I.R. 127.

[18] This was followed in April 2013 by Order in Council O.C. 2013-089 and the PUB Order No. P.U. 9 (2014), giving effect to the Order in Council (both referred to above in para. 2).

[19] Order in Council O.C. 2013-089 (as amended by O.C. 2013-207) directed the PUB to establish an RSP surplus refund plan. This refund was

to be comprised of two components. One was a refund of \$49 million to Hydro's island industrial customers. They are to receive their refund by means of rate adjustments over three years. This component of the RSP surplus refund plan is not in dispute; thus, Hydro's island industrial customers will not factor in the analysis that follows. The second component was a refund of the balance of the RSP surplus, \$112.6 million, to "ratepayers"; they are to receive their refund by means of "direct payments or rebates". This case is about who those "ratepayers" will be.

[20] This second component of the RSP surplus refund plan was described in paragraphs 6 and 7 of the Order in Council:

6) Newfoundland and Labrador Hydro's General Rate Application process shall include a Rate Stabilization Plan surplus refund plan to ratepayers. The refund plan shall comprise direct payments or rebates to ratepayers and shall not be in the form of an electricity rate adjustment. This refund plan will exclude Island industrial customers who will receive Rate Stabilization Plan surplus funds through the three year phase-in of new rates. The Board of Commissioners of Public Utilities shall make the final determination on the details of the refund to remaining ratepayers;

7) Newfoundland Power's portion of the Rate Stabilization Plan Surplus shall be distributed as a direct payment or rebate to its ratepayers and shall not be in the form of an electricity rate adjustment; and

(Emphasis added.)

[21] In hearings before the PUB on the RSP surplus refund plan, various parties took differing positions as to which ratepayers should receive the refund of the \$112.6 million.

[22] Hydro and the Consumer Advocate took the position that Hydro's island grid customers and Newfoundland Power's customers (all on the island grid) should receive the refund, but not Hydro's isolated (diesel generation) customers on the island or in Labrador, nor Hydro's customers in Labrador who received electricity from Churchill Falls (i.e. those in the vicinity of Labrador City-Wabush and Happy Valley-Goose Bay). Put another way, Hydro and the Consumer Advocate took the position that only customers on the island grid should receive the refund. Their rationale was simple: these were the only customers who had paid into the RSP; neither the island isolated customers nor any customers in Labrador had done so.

[23] Newfoundland Power took a similar position, but with an important variation. They agreed with Hydro and the Consumer Advocate that only island grid customers should receive a refund, but they wished to further restrict the refund to Newfoundland Power customers on the basis that their customers had (in effect) been subsidizing Hydro's island grid customers.

[24] In its decision Order No. P.U. 9 (2014), the PUB accepted neither view. Rather, it took the position that the wording of the Order in Council referred to Newfoundland Power's ratepayers (paragraph 7) and Hydro's ratepayers (paragraph 6) which meant all of Hydro's customers, not just those on the island grid. Thus, the PUB decision directed there be a refund from the RSP to customers on the island and in Labrador who had never paid into the RSP. The foregoing PUB decision is the subject of this appeal.

ISSUES

[25] Did the PUB commit a jurisdictional error?

[26] If not, was the PUB decision unreasonable?

[27] If the PUB decision was unreasonable, what should be the remedy?

STANDARD OF REVIEW

[28] In *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, this Court conducted "a standard of review analysis in accordance with [*Dunsmuir*] and subsequent cases, to determine the scope of review that this Court may undertake" (para. 70).

[29] The Court stated, in para. 71:

As *Dunsmuir* pointed out, it is not necessary to undertake a full standard of review analysis if prior "jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (paragraph 62). It is only when the inquiry into existing jurisprudence "proves unfruitful" that the court must proceed to a full analysis of the factors identified in *Dunsmuir* that make it possible to identify the proper standard of review.

[30] The Court concluded that such a "full standard of review analysis" was needed and carried out the analysis. That analysis having been carried out, it need not be repeated here, but rather can be relied upon in this appeal.

[31] The Court’s analysis made clear that the correctness standard should apply only to questions of jurisdiction, “general law” or “a constitutional issue” (para. 86). (The interpretation of the Order in Council, while a question of law, is not one of “general law” as the Supreme Court of Canada used that phrase in *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, 1 S.C.R. 160, para. 37.) Thus, in this appeal for the issue of jurisdiction the standard of review is correctness and for other issues the standard of review is reasonableness.

JURISDICTION

[32] Hydro, the Consumer Advocate and Newfoundland Power (the “three parties”) all submit to this Court that the PUB failed to exercise its jurisdiction when it interpreted the Order in Council. They submit a failure to exercise jurisdiction arose because the PUB interpreted the Order in Council “without proper regard to the contextual reality”.

[33] But, that is not a question of *vires*. The PUB did not fail or refuse to interpret and apply the Order in Council. Rather, it did so, but arrived at a result other than the one sought by the three parties.

[34] This is in marked contrast to the 2012 decision, where the PUB took the view (at a preliminary hearing) that it had no jurisdiction to grant the order that Hydro had requested. This Court characterized the PUB’s decision as “wrongful decline of jurisdiction”. See *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, para. 90-95.

[35] No such refusal or failure to grant an order exists here. Nor has the PUB said that it lacks jurisdiction to interpret and give effect to the Order in Council. To the contrary, it has rendered a decision for that purpose.

[36] What the three parties are calling on this Court to do is to mischaracterize as a jurisdictional question one that relates instead either to the process of making a decision or the substantive content of the decision. Such a mischaracterization would constitute the error warned against by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 59.

REASONABLENESS OF THE DECISION

[37] The reasonableness standard was set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, para. 47-48. It was further commented on in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, 3 S.C.R. 708. A decision can be unreasonable where the tribunal was not “alive to the question at issue” (*Nurses' Union, supra*, para. 26).

[38] The three parties urged upon this Court that the PUB’s decision is unreasonable in that the PUB failed to give effect to “public utility regulatory principles” in its decision to provide all ratepayers with a rebate said to be based on the “plain meaning” of the Order in Council. Their arguments are multi-faceted. It is not necessary to have regard to the full scope of their arguments in order properly to decide this case.

[39] Rather, the case can be decided having regard to that aspect of Hydro’s argument (at para. 57 *et seq.* of its Factum) relating to the wording of the Order in Council, in particular the meaning of “refund”.

57. There is a crucially important element in the Order in Council that the Board failed to consider. Paragraph 6 of the Order in Council contains four sentences. Each of the four sentences contains the word “refund” in the context of making payments to ratepayers. The choice of the word “refund” cannot be ignored. It cannot reasonably be assumed to be an accidental choice of words. However, the Board did not consider whether it might be a term of art or at least a word that should be read together with the other words in the Order in Council to assist in deciding upon its meaning. Hydro submits that the use of the word “refund” is not just very helpful in interpreting the Order in Council, it is dispositive of the issue that was before the Board and which is before the court in this appeal.

58. An authoritative dictionary definition of the word refund is instructive. In the *Shorter Oxford English Dictionary*, ‘refund’ is defined as follows:

1. To pour back, pour in or out again; ... b. to give back, restore ... 2. To make return or restitution of (a sum received or taken); to hand back, repay, restore ... 3. To reimburse, repay (a person) ... 4. To make repayment ...

The Shorter Oxford English Dictionary, Volume II (Clarendon Press: Oxford)

Appellants’ Joint Book of Authorities, Tab 4.

59. In each case, the definition includes the concept of paying back. Its derivation is to restore or to pour back. It is not a synonym of disbursement, disgorgement or distribution. Hydro submits that it pertains to putting people back in the place they should have been in had they not been overcharged.
60. Even if the Board's "plain meaning" approach is taken, it is not possible to reconcile its interpretation of the Order in Council with the words that appear in it; doing so would require that the word "refund" be read out of all four sentences in paragraph 6 of the Order in Council. The word "refund" was given no analysis or treatment in the decision. That very word defines or limits the class of customers – its definition is to recompense for an overpayment. If no overpayment was made by a class of customers, that class of customers is by definition excluded from eligibility for the refund payment. It efficiently and completely answers the point to be determined, as posed by the Board: "If it was the intent of Government that only certain customers are entitled to the surplus refund this could have been clearly stated."

The Board Decision, Order No. P.U.9(2014), page 11, lines 29-31

Appeal Book, Tab 2, stamped page 37

[40] I would, as well, note the interpretation given to "refund" in *Nova Petrochemicals Ltd. v. Bayer AG*, 2011 ONSC 4372, 339 D.L.R. (4th) 108:

31 According to the Concise Oxford Dictionary, the noun "refund" means "a refunded sum of money." The verb "refund" means "pay back money to". The origin of the word is from the Middle English, in the sense of "pour back", from Old French, *refonder*. The term therefore has, at its essence the notion of returning funds, that is to say, returning funds to the one that originally paid them. That is at the heart of the term.

32 This interpretation is confirmed when I look at the definition of the noun "refund" in *Black's Law Dictionary* [Seventh Edition, West Group, St. Paul, Minn., 1999]. There, the noun is defined as:

The return of money to a person who overpaid; or

The money returned to a person who overpaid.

[41] In its decision, the PUB concluded that all ratepayers could receive a rebate, i.e. a partial repayment of the amount they had paid for power. But, reading the Order in Council it is clear that the rebate is a modality, a means to give effect to the purpose of the plan, which was to provide a refund from

the RSP. The PUB failed to address the following issue: while a ratepayer can receive a rebate of an amount paid for power, can they receive a refund from the RSP when they have never paid into it? It was unreasonable for the PUB to interpret “ratepayers” without having regard to the issue of whether the range of such persons was limited by the purpose set out in the Order in Council of providing a refund from the RSP.

[42] Put another way, the PUB did not consider whether the purpose of establishing a plan for refunds from the RSP necessarily limits the range of ratepayers who will receive a rebate to those who have paid into the RSP. This issue is pivotal to the interpretation of the Order in Council. Yet, the PUB did not address it. In this sense, the PUB was not “alive” to a critical issue and, thus, its decision was unreasonable.

REMEDY

[43] Having decided that the PUB’s decision was unreasonable, I turn now to the issue of remedy. In particular, should the matter be remitted to the PUB for reconsideration or should this Court make a decision on the merits?

[44] This Court addressed the issue in *Vinland Resources Limited v. Mineral Claims Recorder*, 2008 NLCA 12, 274 Nfld. & P.E.I.R. 66:

[48] ... [T]he final question to be considered is whether the matter should be remitted to the Board, as ordered by the Trial Division judge. Counsel for Phelps-Dodge, Noranda and the Mineral Claims Recorder submitted that this Court can and should make a final decision on the merits because, as a matter of law, there is only one possible result.

[49] Generally, where a tribunal has jurisdiction to determine an issue, the courts will not undertake that role. However, there are limited circumstances in which this Court will decide the merits of a matter rather than remit it to the tribunal. In *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, the Supreme Court of Canada declined to remit the issue to the tribunal because, as stated by Iacobucci J., for the Court, at page 216, the issue was:

... a question of law for which there is an inevitable answer with which we agree. ...

Iacobucci J. cautioned, at page 229, that a decision not to remit a matter to the tribunal, but for the Court to make a final determination, is an exceptional remedy, not to be applied broadly.

[50] In *Giguère v. Chambre des Notaires du Québec*, [2004] 1 S.C.R. 3, Deschamps J. outlined the limited circumstances in which the Court would substitute its decision for that of an administrative tribunal. Deschamps J., in dissent, though not on this point, summarized:

[66] A court of law may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily. It must have serious grounds for doing so. A court of law may render a decision on the merits if returning the case to the administrative tribunal would be pointless: [authorities cited]. ... The courts may also intervene in cases where, in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable. ...

[45] In light of what has been set out above concerning “refund”, there is only one possible answer to the question, “can those who never paid into the RSP receive a refund from it”: the answer is that they cannot. Only those who paid into the RSP can receive a refund from it.

[46] This limits the ratepayers who are to receive a rebate to Newfoundland Power’s customers and Hydro’s island grid customers; it excludes Hydro’s customers in Labrador and Hydro’s off-grid customers on the island as they never paid into the RSP.

[47] There is a corollary to this, one that disposes of the position taken by Newfoundland Power that only its customers should receive the rebate. Given that “refund” defines the range of ratepayers who are to receive a rebate and given that Hydro’s island grid customers paid into the RSP, then it necessarily follows that Hydro’s island grid customers should receive a rebate, just as Newfoundland Power’s customers should.

[48] The notion of subsidization of Hydro’s island grid customers by Newfoundland Power’s customers (referred to in para. 15 above) is simply irrelevant to the matters at issue, the key to which is giving proper effect to “refund”. Thus, Newfoundland Power’s argument (that Hydro’s island grid customers are to be excluded from those to receive the rebate) fails.

[49] Many particulars relating to the rebate remain to be determined. Those are matters for the PUB to decide, having regard to what has been set out above.

CONCLUSION

[50] The PUB decision was made within its jurisdiction. However, the PUB decision was unreasonable. Accordingly, the PUB decision is quashed.

[51] This Court interprets the Order in Council such that the refund in the form of a rebate is to be made to Newfoundland Power's customers and to Hydro's island grid customers. For other issues, the matter is referred back to the PUB for its consideration.

[52] There is no order as to costs.

M. H. Rowe J.A.

I Concur: _____

B. G. Welsh J.A.

I Concur: _____

M. F. Harrington J.A.