



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

Citation: *Consumer Advocate v. Board of Commissioners of
Public Utilities*, 2022 NLCA 39

Date: June 21, 2022

Docket Number: 202201H0001

BETWEEN:

CONSUMER ADVOCATE

APPLICANT/APPELLANT

AND:

BOARD OF COMMISSIONERS OF
PUBLIC UTILITIES

FIRST RESPONDENT

AND:

NEWFOUNDLAND POWER INC.

SECOND RESPONDENT

Coram: Welsh J.A.

Tribunal Appealed From: Board of Commissioners of Public Utilities,
Order No. P.U. 22-09-2021
Order No. P.U. 6-10-2021

Appeal Heard: April 7, 2022

Judgment Rendered: June 21, 2022

Reasons for Judgment by: Welsh J.A.

Counsel for the Applicant/Appellant: Bernard M. Coffey QC

Counsel for the First Respondent: J. Michael Collins

Counsel for the Second Respondent: Liam O'Brien

Authorities Cited:

CASES CITED: *Consumer Advocate v. Board of Commissioners of Public Utilities*, 2021 NLCA 50; *Buckle v. Newfoundland and Labrador Board of Commissioners of Public Utilities*, 2022 NLCA 28; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147; *Weir's Construction Limited v. Warford (Estate)*, 2018 NLCA 5, 2 C.A.N.L.R. 482; *66202 Newfoundland and Labrador Inc. v. Municipal Assessment Agency*, 2019 NLCA 1, 4 C.A.N.L.R. 1; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *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 41, 99, 100; *Electrical Power Control Act*, 1994, SNL 1994, c. E-5.1, sections 3 and 4; *Assessment Act*, 2006, SNL 2006, c. A-18.1, section 39.

RULES CONSIDERED: *Court of Appeal Rules*, NLR 38/16, rules 31(2), 10(2).

Welsh J.A.

[1] This is an application by the Consumer Advocate for leave to appeal an order of the Board of Commissioners of Public Utilities regarding the Board's approval of a proposed capital expenditures budget submitted by Newfoundland Power Inc.

BACKGROUND

[2] Newfoundland Power is required to submit to the Public Utilities Board annually an application for approval of its proposed capital expenditures for improvements or additions to its property for the following year. The application must include an estimate of contributions the company intends to demand from its customers (*Public Utilities Act*, RSNL 1990, c. P-47, section 41).

[3] On May 18, 2021, Newfoundland Power submitted its 2022 capital budget application to the Board. On May 27, 2021, the Consumer Advocate, participating in the proceedings as an intervenor representing the interests of Newfoundland Power's rate payers, requested that the Board conduct an oral hearing for the purpose of considering Newfoundland Power's application. The Board refused that request. The Consumer Advocate seeks leave to appeal that decision.

[4] An appeal of a decision of the Board may be taken to this Court on a question of law or jurisdiction, subject to obtaining leave of the Court (*Public Utilities Act*, section 99). The basis for the appeal for which the Consumer Advocate seeks leave is set out in the application for leave to appeal:

That the Board erred in law and jurisdiction by proceeding with the 2022 Capital Budget Application of [Newfoundland Power Inc.] without conducting an oral hearing, thereby breaching the Board's duty of procedural fairness and thereby offending the principles of natural justice

[5] The Consumer Advocate's position is that the Board's decision not to hold an oral hearing prevented the Advocate (1) from calling a witness to testify particularly regarding alternative solutions to Newfoundland Power's proposed capital expenditures, and (2) from cross-examining Newfoundland Power's witnesses. In response, the Board submits that the parties had the opportunity to obtain information and state their positions by means of exchanges of written requests for information, thus negating the need for an oral hearing which would be costly and not in the public interest.

[6] In order to obtain leave to appeal, the Consumer Advocate must establish that the appeal involves a question of law or jurisdiction, and that there is a reasonably arguable case for success on appeal (*Consumer Advocate v. Board of Commissioners of Public Utilities*, 2021 NLCA 50, at paragraph 6; *Buckle v. Newfoundland and Labrador Board of Commissioners of Public Utilities*, 2022 NLCA 28, at paragraphs 35 to 40).

ISSUES

[7] The following issues are addressed:

(1) Is the judge hearing this application for leave bound by an earlier decision of another judge of the Court;

(2) For purposes of the leave application, what is the appropriate role of the Board; and

(3) Does the appeal raise a question of law or jurisdiction, and if so, is there a reasonably arguable case for success on appeal?

ANALYSIS

Whether an Earlier Decision of a Single Judge is Binding

[8] The Board submits that the decision made by a single judge in the application for leave to appeal in *Consumer Advocate v. Board of Commissioners of Public Utilities*, 2021 NLCA 50, is “binding” authority which must be followed on this application. I do not accept that proposition.

[9] A decision of a single judge of this Court is not “binding” on another judge of the Court. Clearly, the Court strives to maintain consistency in decisions. However, where a difference in view on an issue arises between two judges, each sitting alone, a review may be requested pursuant to rule 31(2) of the *Court of Appeal Rules*, NLR 38/16, which provides:

Where an application is heard and disposed of by a single judge, the matter may, with leave of the Chief Justice, be reheard by a panel of the Court.

[10] This rule is consistent with the principle that decisions of this Court are made by panels with a minimum of three judges. While applications are generally heard by one judge, provision is made for determination by a panel of three in appropriate circumstances. To bind the members of the Court with the decision of one judge runs counter to the principle on which the Court operates.

Role of the Board

[11] The Consumer Advocate submits that the Board, as the author of the decision and order under appeal, properly has only a limited role in the application for leave and the appeal. Rule 10(2) of the *Court of Appeal Rules* provides that “where the order under appeal involves an order or decision of a tribunal, ... the tribunal may participate in the appeal to the extent permitted by the Court.”

[12] In *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147, Rothstein J., for the majority, discussed factors that

may be helpful in the exercise of the Court's discretion in determining the role of the tribunal:

[59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, ... are relevant in informing the court's exercise of its discretion:

(1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.

(2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.

(3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[13] The above principles were discussed by this Court in *Weir's Construction Limited v. Warford (Estate)*, 2018 NLCA 5, 2 C.A.N.L.R. 482, at paragraphs 37 to 41. In particular:

[39] Principles underlying these factors, discussed by Rothstein J., include balancing "the importance of having a fully informed adjudication of the issues before the court" with "the importance of maintaining tribunal impartiality" (paragraph 48). Reference is also made to the principles of finality and impartiality. Finality refers to "the principle whereby a tribunal may not speak on a matter again once it has decided upon it and provided reasons for its decision" (paragraph 49). Impartiality arises where the matter may be remitted to the tribunal for further consideration.

[14] *Weir's Construction* was a workers' compensation case which involved the adjudication of the rights of adversarial parties. In that context, the Court held that, in general, the Commission's role "has been restricted to providing the court with an explanation regarding such matters as its process or procedures" (paragraph 40).

[15] In *66202 Newfoundland and Labrador Inc. v. Municipal Assessment Agency*, 2019 NLCA 1, 4 C.A.N.L.R. 1, at paragraphs 15 to 19, the principles

discussed in *Ontario (Energy Board)* are addressed in the context of municipal tax assessment. This is an example where the statute specifically provides for participation in an appeal by the decision-maker. In particular, pursuant to section 39(4) of the *Assessment Act, 2006*, SNL 2006, c. A-18., “A commissioner may be represented by counsel and heard on an appeal under this section.”

[16] Under the *Public Utilities Act*, the Board has the right to receive notice of an application for leave and, if granted, to receive notice of the appeal (sections 99(2) and 100(1)). However, there is nothing in the *Act* regarding participation by the Board as a party in the application for leave or the appeal.

[17] The absence of a party to oppose the Consumer Advocate’s position is not a consideration in this case. Newfoundland Power is named as a respondent in the appeal, and is available to oppose the Consumer Advocate’s application for leave. The Board concedes in its factum that Newfoundland Power “has the knowledge and expertise to respond to the Consumer Advocate’s arguments”. However, counsel for the Board characterizes this as a neutral factor, with the main focus of the analysis being considerations related to the regulatory and supervisory roles of the Board.

[18] The beginning point is the legislated mandate of the Board. Section 4 of the *Electrical Power Control Act, 1994*, SNL 1994, c. E-5.1, provides:

In carrying out its duties and exercising its powers under this Act or under the *Public Utilities Act*, the public utilities board shall implement the power policy declared in section 3, and in doing so shall apply tests which are consistent with generally accepted sound public utility practice.

[19] The power policy set out in section 3 of that *Act* deals with rates to be charged for the supply of power, distribution of power within the Province, emergencies related to the supply of power, designation of essential employees, and planning for future power supply for the Province.

[20] Under the *Public Utilities Act*, the Board has “general supervision of all public utilities” and the “duty to enforce [the *Public Utilities Act*] as well as all other laws relating to public utilities” (sections 16 and 17).

[21] In *Ontario (Energy Board)*, Rothstein referred to a similar broad mandate exercised by the tribunal in that case, including:

[61] ... Among its many roles: it licenses market participants, approves the development of new transmission and distribution facilities, and authorizes rates to be charged to consumers. In this case, the Board was exercising a regulatory role by setting just and reasonable payment amounts to a utility. This is unlike situations in which a tribunal may adjudicate disputes between two parties, in which case the interests of impartiality may weigh more heavily against full party standing.

[22] Where a tribunal is permitted to participate by making submissions on the substance or merits of an appeal, Rothstein J. went on to address the types of arguments that may properly be made, cautioning:

[69] I am not, however, of the opinion that tribunals should have the unfettered ability to raise entirely new arguments on judicial review. To do so may raise concerns about the appearance of unfairness and the need for tribunal decisions to be well reasoned in the first instance. I would find that the proper balancing of these interests against the reviewing courts' interests in hearing the strongest possible arguments in favour of each side of a dispute is struck when tribunals do retain the ability to offer interpretations of their reasons or conclusion and to make arguments implicit within their original reasons: ...

[23] In *Ontario (Energy Board)* Rothstein J. concluded that the Board, which was exercising its regulatory power, should be permitted to make submissions on the merits of the appeal:

[70] In this case, I do not find that the Board impermissibly stepped beyond the bounds of its original decision in its arguments before this Court. In its reply factum, the Board pointed out – correctly, in my view – that its submissions before this Court simply highlight what is apparent on the face of the record, or respond to arguments raised by the respondents.

[24] As applied to this application, the following factors lead to the conclusion that the Board should be granted the opportunity to participate by making submissions on the question of leave, consistent with the above caution expressed by Rothstein J.

[25] The Board's review of Newfoundland Power's proposed capital expenditures for 2022 engages its regulatory and supervisory authority under its legislated mandate. The Consumer Advocate is participating as an intervenor, representing the interests of rate payers. This is not an adversarial contest between parties. Rather, the matter involves an assessment of issues relevant to the Board's pursuit of its mandate to implement the Province's power policy and to supervise Newfoundland Power as a public utility.

[26] Further, in this case, unlike the situation where the parties present evidence and the tribunal hears submissions and renders a decision, the Board took an active role in assessing Newfoundland Power's capital expenditures budget by engaging its own expert, making requests for information, and facilitating the exchange of information among the Consumer Advocate, Newfoundland Power and the Board.

[27] In the result, I am satisfied that the Board's participation by making submissions on the merits of the Consumer Advocate's application for leave will provide the Court with the strongest arguments on each side of the question, taking account of the role of the Board in the exercise of its regulatory and supervisory authority without prejudicing or disadvantaging the participation and role of the Consumer Advocate.

The Application for Leave

[28] Section 99(1) of the *Public Utilities Act* provides for an appeal of a decision of the Board to this Court:

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, ...

[29] In this case, the appeal, which is brought on the basis of procedural fairness and breach of the principles of natural justice, satisfies the first component of the analysis, that is, the issue involves a question of law (*Consumer Advocate*, 2021 NLCA 50, at paragraph 6). The Consumer Advocate must also demonstrate that there is a reasonably arguable case for success on appeal.

[30] The grounds on which the Consumer Advocate submits that he will rely to establish a denial of procedural fairness are: (1) the Board refused to direct an oral hearing; (2) the Board failed to identify the threshold that would trigger an oral hearing; and (3) the Board failed to give adequate reasons for denying an oral hearing.

[31] In refusing the Consumer Advocate's request for an oral hearing, the Board explained, at page 3 of its written decision:

Capital budget applications have, in recent years, been addressed through fully public and transparent written hearing processes. Through this process the Board, the Consumer Advocate and other interested parties use the documentary evidence, utility

presentations, technical conferences and written requests for information (RFIs) to understand and test the proposals set out in a capital budget application. After this full exchange of information the parties submit written submissions for the Board's consideration. The Board believes that this written hearing process provides a fair and reasonable opportunity for participation in capital budget applications for the Consumer Advocate and other interested persons and provides effective and efficient oversight of utility capital expenditures. The use of written processes is a common feature of Canadian public utility regulation.

[32] Further, the Board dismissed the Consumer Advocate's submission that oral testimony and cross-examination are a necessary component of procedural fairness, explaining, at page 4 of its decision:

The written process allows for questions to be posed in relation to any aspect of the evidence and for the responding party to provide a complete answer which addresses all aspects relating to the questions posed and considers the input of relevant staff and experts. To the extent that there are additional questions that arise from a response these can be addressed through additional written information requests. The Board has found that written questions and responses are the best way to test the evidence filed in a capital budget application. The evidence normally consists of detailed technical information and reports prepared by engineering, accounting, financial and IT professionals within the utility or who were engaged by the utility. Often there are individuals in addition to the person presenting the evidence who had a role in the preparation of the evidence. The credibility of the person presenting evidence is rarely an issue for the Board in a capital budget application. ...

... The Board also believes that the written process has afforded the Consumer Advocate a full opportunity to understand the nature and scope of the proposals and to test the evidence filed. ...

[33] The Board refused the subsequent request of the Consumer Advocate to reconsider its decision, explaining, at page 2 of its decision:

... The Consumer Advocate's request reiterates and elaborates on the arguments made in the original request for a hearing and does not set out new facts or circumstances which justify a reversal or change or modification of the Board's decision.

[34] In submitting that there is a reasonably arguable case for success on appeal, the Consumer Advocate refers to the discussion in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraphs 23 to 28, in which L'Heureux-Dubé J., for the Court on this point, enumerated a non-exhaustive list of factors relevant to assessing the content of the duty of procedural fairness required in a particular situation:

- (1) The nature of the decision being made and the process followed in making it;
- (2) The nature of the statutory scheme and the provisions of the legislation under which the decision-maker operates;
- (3) The importance of the decision to the individuals affected;
- (4) The legitimate expectations of the person challenging the decision; and
- (5) The choices of procedure made by the decision-maker “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” (*Baker*, at paragraph 27).

[35] As discussed above, a review of Newfoundland Power’s capital expenditures budget engages the regulatory and supervisory roles of the Board. The statutory scheme does not require an oral hearing. The Board has taken an active role in the process, making requests for information, and facilitating the exchange of information among the Consumer Advocate, Newfoundland Power and the Board. Further, while Newfoundland Power’s proposed budget of \$109,651,000 involves a significant expenditure, the amount to be recovered from the rate payers will be spread among Newfoundland Power’s customers.

[36] In assessing whether there is a reasonably arguable case for success on appeal, of particular importance is the Board’s discretion regarding the choice of procedure. In discussing this factor in *Baker*, L’Heureux-Dubé J. explained that, while the Board’s ability to choose its own procedure is not determinative, “important weight must be given to the choice of procedures made by the agency itself and its institutional constraints” (*Baker*, at paragraph 27). See also *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at paragraph 231.

[37] In this case, the Board gave comprehensive reasons for choosing a written procedure rather than an oral hearing for the purpose of assessing Newfoundland Power’s application. The Board is authorized to choose its own process and has expertise in assessing Newfoundland Power’s annual capital expenditures budget. As stated by Goodridge J.A. in dismissing the Consumer Advocate’s application for leave to appeal in *Consumer Advocate v. Board of Commissioners of Public Utilities*, 2021 NLCA 50:

[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. ...

...

[28] The five factors discussed in *Baker*, and in particular, the considerable deference owed to the Board in the current context as to the 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 a 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.

[38] In the circumstances of this case, in light of the above considerations, including the comprehensive reasons in the Board's decision to refuse to hold an oral hearing, the Consumer Advocate has not demonstrated that there is a reasonably arguable case for success on appeal.

SUMMARY AND DISPOSITION

[39] In the result, I am satisfied that:

(1) I am not "bound" by the decision in *Consumer Advocate v. Board of Commissioners of Public Utilities*, 2021 NLCA 50, being a decision of a single judge of this Court;

(2) The Board may participate in this application by making submissions on the merits of the Consumer Advocate's application for leave; and

(3) While the proposed appeal raises a question of law, there is no reasonably arguable case for success on appeal.

[40] Accordingly, I would dismiss the Consumer Advocate's application for leave to appeal. Given the nature of the proceedings, I would order the parties to bear their own costs of this application.

B.G. Welsh J.A.