CITATION: Mayburry Inc. v. Iafano, 2014 ONSC 6074
DIVISIONAL COURT FILE NO.: DC-13-120
DATE: 20141021

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Hambly, D. Brown and Gilmore JJ.

BETWEEN:	)	
	)	
Mayburry Inc.	)	*B. Kelly*, for the Appellant
	)	
Appellant	)	
	)	
– and –	)	
	)	
Maria Iafano, Statutory Director, Ontario Electrical Safety Code	)	*D. Pugen and M. DeMeo*, for the Respondent
	)	
Respondent	)	
	)	**HEARD at Brampton:** October 21, 2014

D. Brown J.

Statutory Appeal from the Review Panel of the Electrical Safety Authority

[1] The appellant, Mayburry Inc., is a licensed electrical contractor which performed electrical work at a building in Waterloo. While performing the work Mayburry disconnected and electrical panel and then reconnected it to the power supply source without obtaining authorization from the Electrical Safety Authority. That led an ESA inspector to issue a Notice of Defect to Marbury citing its violation of Rule 2-012 of the Ontario Electrical Safety Code (the "Code"). Mayburry filed with ESA a request to review the decision to issue the notice and, on July 5, 2013, the respondent, Maria Iafano, a Director under the Ontario Electrical Safety Code, upheld the validity of the notice.

[2] Mayberry then appealed that decision to the Review Panel of the Electrical Safety Authority. By decision dated September 13, 2013, the majority (2) of the Review Panel confirmed the decision of the respondent to uphold the notice.

[3] Mayberry now appeals the Review Panel's decision pursuant to s. 12(1) of the *Electricity Act*, S.O. 1998, c. 15, Sch. A, which permits an appeal from a decision of the Review Panel to this Court "on any question that is not a question of fact alone".

II. Background Facts

[4] The background facts are not in dispute. Mayburry Inc. is a licensed electrical contractor. The respondent was a director appointed by the ESA for purposes of the Code.

[5] On June 7, 2013, Mayburry applied to the ESA for a permit to perform electrical work at a building in Waterloo, Ontario. The work included disconnecting an electrical installation – a 100 Amp panel – from the source of electrical supply provided by the local distributor, Waterloo North Hydro.

[6] Regulations under the *Electricity Act* require that every act in connection with the "use of electricity in Ontario" must be done in compliance with the Electrical Safety Code.[1] Part VIII of the *Electricity Act* deals with "Electrical Safety" and it provides that the ESA:

> may issue such orders relating to work to be done, or the removal of things used, in the installation, removal, alteration, repair, protection, connection or disconnection of any of the works, matters and things mentioned in subsection (1) as the Authority considers necessary or advisable for the safety of persons or the protection of property and, in any such order or after having made it, the Authority may order any person to cease and desist from doing anything intended or likely to interfere with the terms of the order.[2]

[7] On June 11, 2013, Dave Yaremy, an inspector with the ESA, visited the worksite and discovered that Mayburry had installed a panel and reconnected it to the power source without an ESA connection authorization. Yaremy thereupon issued a Hazardous Defect Notice citing a violations of Rule 2-012 of the Code.

[8] A person named in a Defect Notice may apply to the Director of the ESA for a review of the order and the Director may confirm, amend or rescind the ESA's order or make whatever other decision that the Director deems appropriate.[3]

[9] Mayburry sought such a review of the Defect Notice and by reasons dated July 5, 2013, the respondent Director confirmed the Defect Notice. The respondent wrote in her decision:

> Based on the information provided, the appellant undertook a panel upgrade/replacement at the location and in doing so disconnected the installation from a source of supply. The

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[1] O. Reg. 164/99, s. 2.
[2] *Electricity Act*, 20. 113(11).
[3] O. Reg. 187/09, s. 9.

> new panel was then re-connected to the supply without a connection authorization issued by the ESA; resulting in a violation of Rule 2-012(1) (connection authorization) of the OESC.
>
> …
>
> As such, the notice of deficiency was appropriately issued to the electrical contractor (Mayburry Inc) who re-connected the panel to the supply without a connection authorization at [the worksite] which resulted in the violation of Rule 2-012 (connection authorization) of the OESC.

[10] Regulations made under the *Safety and Consumer Statutes Administration Act, 1996*, entitle a person named in a Director's decision to appeal to the Review Panel, which consists of a panel of not more than three persons appointed by the ESA. The Review Panel possesses the power to confirm, amend or rescind the decision of the Director, or make whatever other decision that the Review Panel deems appropriate.[4]

[11] Mayburry appealed to the Review Panel which conducted a hearing based upon written submissions. In a decision released September 13, 2013, the majority of the panel determined that the Defect Notice was valid and dismissed Mayburry's appeal.

[12] As disclosed in the reasons of the majority and the minority, the appeal turned upon the interpretation of Rule 2-012 of the Code dealing with "Connection Authorization" which provides as follows:

> (1) Where any electrical installation or part thereof to which electrical power or energy has not been previously supplied is made in or upon any land, building or premises, or subject to Subrule (2), where any electrical installation or part thereof has been disconnected or cut off from any service or other source of supply *under this Code*, no supply authority, contractor or other person shall connect or re-connect the installation or part thereof to any service or other source of supply unless
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> (a) the installation and all related work have been inspected in accordance with the procedures in Rule 2-004 by an inspector; and
>
> (b) a connection authorization has been issued by the inspection department with respect to the installation.
>
> (2) Where a connection authorization in Subrule (1) has been issued to a supply authority, it is valid for the connection of a service for a period of up to six months from the date of issue.

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[4] O. Reg. 187/09, s. 10.

> (3) Where any electrical installation or part thereof has been disconnected or cut off from a source of supply by a supply authority for six months or less for non-payment of rates or because of a change of occupancy of premises, the supply authority may reconnect the installation or part thereof without obtaining a connection authorization. (emphasis added)

[13] The majority engaged in an extensive interpretation of Rule 2-012, identified several possible interpretations of the Rule, observed that "each of the potential interpretations is problematic in their own way", but concluded that the phrase "under this Code" in Rule 2-012(1) applied "broadly to the entire work surrounding the disconnection, such that all disconnections require reconnection authorization". That led the majority to conclude:

> [T]his Review Panel has determined that Subrule 2-012(1) applies broadly to all disconnections at the point of connection to the supply authority, regardless of the method or reason for that disconnection.
>
> Accordingly, since the Applicant does not dispute that the electrical panel was disconnected from the power supply, or that the power supply was reconnected prior to inspection and the appropriate authorization, the Applicant breached Rule 2-012. There is no evidence before this Review Panel to suggest that the work performed by the Applicant is captured under any of the exceptions; therefore, the Notice issued is valid.

[14] In his decision the minority member of the Review Panel acknowledged that "each of the potential interpretations is problematic in their own way", but he concluded that the proper interpretation of Rule 2-012 would require a connection authorization in a smaller number of circumstances:

> [M]y determination is that the phrase "under this Code" applies narrowly to the method of disconnection, such that Subrule 2-012(1) only applies where there was a disconnection pursuant to an order or violation of the Code, or where the disconnection occurs up to the line terminals of the main switch. While this interpretation requires some inferences with respect to the drafters' intentions, it is my view that it best aligns with the Code's objectives and a fair reading of the Rule.
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> …
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> The broad interpretation favored by the majority captures too many actions that do not need further inspection. It would be a waste of time and resources to conduct authorizations in the circumstances, and therefore is not likely what the drafters had intended.
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> Given the foregoing, it would be my determination that Subrule 2-012(1) applies narrowly only to installations in new premises and those disconnections that were the result of an order or violation pursuant to the Code, and those disconnections that occur prior to the line terminals of the main switch.

III. Applicable Standard of Review

[15] Mayburry submitted that the decision of the Review Panel should be reviewed on a standard of correctness; the Respondent submitted that the appropriate standard was reasonableness.

[16] Both parties agreed that no prior jurisprudence had considered the appropriate standard of review for a decision of the Review Panel of the ESA. As a result, this Court must conduct the contextual analysis directed by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.[5]

[17] Decisions of the Review Panel are not protected by a privative clause and are subject to a statutory right of appeal. Section 12(1) of the *Electricity Act* permits appeals of Review Panel decisions to this Court on "any question that is not a question of fact alone", thereby allowing appeals not only on questions of law, but also on questions of mixed fact and law. Section 12(3) permits this Court to confirm or alter the decision, refer the matter back to the Review Panel or "make whatever other order that the judge sees fit". In sum, the first factor in the Dunsmuir analysis points away from a deferential standard of review.

[18] That said, the scheme created by the *Electricity Act* vests in the ESA broad authority to ensure compliance with the Electrical Safety Code, including issuing orders concerning the connection or disconnection of things which the ESA "considers necessary or advisable for the safety of persons or the protection of property". The *Electricity Act* and the *Safety and Consumer Statutes Administration Act, 1996* place the enforcement and review of such safety-oriented orders in the ESA, the Director and the Review Panel. The issue of electrical safety, including how to ensure the safe connection and disconnection of equipment to power supplies, is a highly technical area in which the Review Panel has expertise. Those factors point strongly to a deferential standard of review.

[19] The nature of the question at issue before the Review Panel involved the interpretation of its "home statute" – the Electrical Safety Code is recognized as the applicable set of electrical safety rules for Ontario by regulation made under the *Electricity Act* and the Code is part of a comprehensive regulatory scheme to protect the public.[6] As was stated in *Dunsmuir*:

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[5] 2008 SCC 9, para. 64.
[6] *Osiris Inc. v. International Edge Inc.*, [2009] O.J. No. 3916 (S.C.J.), para. 33.

> Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity.[7]

That approach was re-inforced recently by the Supreme Court of Canada in *McLean v. British Columbia (Securities Commission)*.[8] That case involved a statutory appeal (albeit with leave) from a decision of the British Columbia Securities Commission involving the interpretation of a limitation provision in its home statute. The Supreme Court of Canada re-iterated that an administrative decision maker's interpretation of its home or closely-connected statutes should be presumed to be a question of statutory interpretation subject to deference on judicial review.[9]

[20] Although certain categories of questions continue to warrant review on a correctness standard and the presumption can be rebutted through a contextual analysis, those conditions do not exist in the present case. The issue before the Review Panel did not involve one of general law which was of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise. On the contrary, it involved a highly technical question of where to draw the line for purposes of determining whether an electrical installation had been "disconnected" from a power supply. The nature of the question at issue strongly points to a deferential standard of review.

[21] Further, in the *McLean* case the Supreme Court of Canada specifically commented, in the context of a statutory appeal, on the issue of the applicable standard of review in circumstances where a tribunal was faced with competing interpretations of its home statute:

> In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations (*Dunsmuir*, at para. 47; see also *Construction Labour Relations v. Driver Iron Inc.*, [2012] 3 S.C.R. 405). Indeed, that is the case here, as I will explain in a moment. The question that arises, then, is *who gets to decide among these competing reasonable interpretations?*
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> The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* — not the courts — to make. Indeed, the

[7] *Dunsmuir*, para. 54.
[8] 2013 SCC 67
[9] *Ibid.*, paras. 21 and 22.

> exercise of that interpretative discretion is part of an administrative decision maker's "expertise".[10]

[22] When considered together, the *Dunsmuir* factors lead to the conclusion that the applicable standard of review of the decision of the Review Panel is reasonableness.

IV. Application of the Standard of Review

[23] The selection of reasonableness as the applicable standard of review really decides this appeal. As stated in *Dunsmuir*:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[11]

[24] In their reasons the majority engaged in a detailed consideration of the various possible interpretations of Rule 2-012 of the Code. Their reasons displayed justification, transparency and intelligibility within the decision-making process.

[25] Did their decision fall within a range of possible, acceptable outcomes which were defensible in respect of the facts and law? In *McLean* the Supreme Court of Canada stated:

> [T]he appellant's burden here is not only to show that her competing interpretation is reasonable, but also that the Commission's interpretation is *unreasonable*. And that she has not done. Here, the Commission, with the benefit of its expertise, chose the interpretation it did. And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review — even in the face of a competing reasonable interpretation.[12]

So, too, in the present case, Mayburry has not demonstrated that the decision of the majority of the Review Panel was unreasonable.

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[10] *Ibid*., paras. 32 and 33.
[11] *Dunsmuir*, para. 47.
[12] *McLean*, para. 41.

[26] Both the majority and the minority acknowledged that each interpretation of Rule 2-012 contained its own difficulties. Each was a possible interpretation of ambiguous regulatory language. In reaching its conclusion the majority conducted an analysis which followed the approach set out in the modern principle of statutory interpretation by reading the statutory words in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislator.[13] The majority carefully considered the language of the Rule (Decision, paras. 19 to 31), the relationship between the various interpretations and the objectives of the Code (Decision paras. 25, 27, 30 and 32), as well as the intentions of the drafters of the Code (Decision, para. 33).

[27] The interpretation adopted by the majority would cast a wider net for the requirement to obtain a connection authorization after disconnection of an electrical installation from a power supply. Mayburry submitted that the broad interpretation adopted by the majority would lead to an absurdity by requiring connection authorizations in unnecessary situations. That such a result would be absurd is not apparent by reference only to the language and objective of the Code, and the appellant did not file any evidence before the Director or the Review Panel to demonstrate that such a broad interpretation would create absurd consequences for the electrical installation industry. The highly technical nature of the connection issue does not permit this Court to speculate or take judicial notice of the likely extent of the "on-the-ground" consequences of the majority's interpretation. To the contrary, given that the Code is designed to ensure the safe installation and operation of electrical equipment and the larger power system, it could hardly be said that the majority's broad interpretation was inconsistent with the objectives of the Code or unreasonable. I therefore conclude that the decision of the majority most certainly fell within a range of possible, acceptable outcomes defensible in respect of the facts and law in the present case.

[28] Finally, I would observe that the highly technical nature of the interpretation dispute in this case illustrates the institutional limits of the Courts and the reason for a deferential standard of review in appropriate cases. Judges of this Court are not electrical safety experts. When faced with an interpretation by an expert tribunal which promotes the safe operation of the electrical system, the judicial standard of reasonableness necessarily drives a deferential result. If the practical costs of the majority's interpretation of the connection authorization requirements of Rule 2-012 of the Code are too onerous for the electricity and construction industries, it is always open to the Canadian Standards Association and the ESA to adopt different, clearer language for Rule 2-012.

V. Conclusion

[29] For these reasons, Mayburry's appeal is dismissed.

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[13] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, para. 26.

[30] Mayburry shall pay the respondent its costs of this appeal fixed at $3,000.00.

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D. Brown J.

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Hambly J.

_____
Gilmore J.

Released: October 21, 2014

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Hambly, D. Brown and Gilmore JJ.

BETWEEN:

Mayburry Inc.

Appellant

– **and** –

Maria Iafano, Statutory Director, Ontario Electrical Safety Code

Respondent

REASONS FOR JUDGMENT

D. Brown J.

Released: October 21, 2014