



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Asphalt Product Industries Inc. v. Come By Chance (Town)*,
2026 NLSC 103

Date: August 27, 2026

Docket: 202101G6500

BETWEEN:

**ASPHALT PRODUCT INDUSTRIES
INC.**

APPELLANT

AND:

**TOWN COUNCIL OF THE TOWN OF
COME BY CHANCE**

RESPONDENT

Before: Justice Philip Osborne

On Appeal From: A Decision of Eastern Regional Newfoundland Appeal Board pursuant to s. 46 of the *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8, File # 15-006-067-047 dated the 18th day of November, 2021.

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: December 8, 2025

Summary:

The Court allowed the appeal by Asphalt Product Industries Inc. and remitted the matter back to the Eastern Regional Newfoundland Appeal Board because the Board failed to provide reasons addressing key arguments about the Town's authority to issue a removal order and allegations of bad faith. The

Court rejected API’s procedural fairness argument concerning the omission of an index from the appeal package.

Appearances:

John C. Taylor-Hood	Appearing on behalf of the Appellant
Robert Bradley	Appearing on behalf of the Respondent

Authorities Cited:

CASES CONSIDERED: *Oleynik v. Law Society of Newfoundland and Labrador*, 2026 NLCA 15; *Paradise (Town) v. Newfoundland and Labrador (Eastern Regional Appeal Board)*, 2010 NLTD 116; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65

STATUTES CONSIDERED: *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8; *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1; *Town of Come By Chance Development Regulations*, N.L.R. 3/01, created under the authority of the *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8

REASONS FOR JUDGMENT

OSBORNE, J.:

INTRODUCTION

[1] Asphalt Product Industries Inc. (“API”) appeals a decision of the Eastern Regional Newfoundland Appeal Board (the “Board”) that found the Town of Come By Chance (the “Town”) was justified and acted in accordance with the applicable legislation when it issued an order (the “Removal Order”) requiring API to remove a barricade to the local marina that API erected without a permit.

[2] API argues that the Board erred in law in finding the Town had authority to issue the Removal Order because: 1) the Town lost jurisdiction to issue the Removal

Order when this Court issued interim orders related to the barricade; 2) the Town lacks authority to regulate the barricade because, according to API, the marina is an illegal development; and 3) the Town lacks authority because the decision was made in bad faith or for an improper purpose. API further argues that it was denied procedural fairness because the Board failed to provide, as part of the appeal package distributed to the parties, an index that was in the Board's possession.

[3] For the reasons that follow, I would allow the appeal in part and remit the matter to the Board for reconsideration with directions to provide reasons addressing the Town's authority to make the Removal Order and to determine API's allegations that the Town failed to act in good faith or acted with an improper motive. I would dismiss the procedural fairness ground of appeal.

BACKGROUND

[4] The conflict underlying the issues is rooted in a contest between API and the Town related to vehicle access to the marina in Come By Chance.

[5] API maintains a liquid asphalt operation on waterfront property it asserts it owns in the Town of Come By Chance. API states it was granted the property, including the water lot, subject to an easement in favour of persons who have vessels or watercrafts at the floating wharves on the property. API asserts that the easement provides a right of foot access by land to the floating and private wharves.

[6] After API, without a permit, erected a barricade restricting vehicle access to the property, the Town commenced an action in Supreme Court seeking a permanent injunction prohibiting API from erecting a barrier across the roadway. The Town also sought an interim injunction granting the same relief pending a determination of the action.

The April Interim Order

[7] The first interim order was issued during the Covid shutdown in 2020. In April 2020, Justice Marshall issued an interim order (the “April Order”) stating in part that, as the Court was only hearing urgent matters, and as the application raised both urgent and non-urgent matters, she was only deciding the urgent matter related to whether the barricade prohibits emergency access to the marina. She ordered:

1. The barricade in place must be of a nature to permit emergency access to the marina including at least that the fence/gate must be wide enough for emergency vehicular access if such vehicles can travel on the road, and at the very least, emergency services must also have ready access to any lock key or codes and any other requirements of those responsible for providing fire and emergency services;
2. This Order is made without prejudice to any party proceeding on the remaining issues raised by the injunction application, including any issue of whether any barricade should lawfully be there, and whether vehicular access should be permitted;
3. For clarity, this is an interlocutory order and is made pending any further order of this court in this matter, including but not limited to, appearances which may be required in the event emergency services remain impeded;

...

The Varied Order

[8] In October 2020, Justice Stack varied the April Order (the “Varied Order”) to provide the barricade in place must be at least 20 feet wide to allow passage of emergency vehicles. Justice Stack also varied the April Order by providing certain access requirements, including providing certain persons with vehicle access. The Varied Order otherwise confirmed the April Order. The parties agreed that the Varied Order would remain in place pending the resolution of the Town’s request for a permanent injunction.

Town's efforts to expropriate

[9] On November 24, 2020, the Town offered to purchase a portion of the property from API, however, API rejected the Town's offer.

[10] While the Interim Orders were still in effect, on November 24, 2020, the Town's solicitor wrote to the Minister of Environment, Climate Change and Municipalities (the "Minister") requesting an expropriation of a portion of the property.

[11] In June 2021, the Department forwarded to the Town's counsel, an Approval to Expropriate a portion of the property consisting of the road to the wharf, which the Town served on counsel for API.

[12] On June 25, 2021, API advised the Minister of the ongoing litigation and Court Orders. The Minister then rescinded the Approval to Expropriate as the Minister "was unaware of the ongoing litigation between the Town and API and, in particular, that an interim order had been issued by the Court pending final resolution of the dispute".

[13] API states that the Town sought to have the Department reconsider the expropriation on the basis of misrepresentations made by the Town to the Department.

Town's issuance of the Removal Order

[14] On December 9, 2020, the Town issued the Removal Order. At the time, the Town noted that API modified the barricade on several occasions and took the position that the barricade constituted a development. As developments require a permit and API had not applied for a permit, the Town issued the Removal Order

pursuant to s. 102(1) of the *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8 (the “Act”) requiring API to remove the barricade within 15 days.

[15] API appealed the Town’s decision to issue the Removal Order to the Board.

FIRST-LEVEL APPEAL

[16] API appealed the Removal Order to the Board on the following grounds:

1. The gate is authorized by two Orders of the Supreme Court of Newfoundland and Labrador and is therefore outside of the Board’s jurisdiction; and
2. The Board should overturn the Order as an attempt to remove a lawfully placed structure.

[17] The core planks of API’s submissions to the Board concerned the effect of the Court Orders on the Town’s authority to issue the Removal Order, the lack of authority caused by API’s assertion that the marina is an illegal development, and the Town’s alleged bad faith and improper motive.

[18] The issues of whether the Court Orders deprived the Town of authority to issue the Removal Order was specifically flagged in the Technical Report prepared for the Board. The Technical Report stated as the Appellant asserts the gate is authorized by two Orders of the Supreme Court, that preliminary arguments with respect to the Board’s jurisdiction will be required.

[19] API made a 14-page supplemental submission to the Board on the issue of improper motive and bad faith. API pointed to several instances of what it

characterizes as misrepresentations made by the Town to the Minister for the purpose of attempting to gain authorization to expropriate land from API. API argued that the evidence presented demonstrated that the Town issued the Removal Order in bad faith and for the improper purpose of trying to acquire vehicle access to the marina.

THE BOARD'S DECISION

[20] The Board noted its role is to determine if the Town acted in accordance with the *Act* when it issued the Removal Order to API.

[21] The decision summarizes API's presentation at the hearing and noted API asserted that the Town was acting in bad faith and with ulterior motives when issuing the Removal Order. The Board also noted API's position was that the Court Orders recognized the existence of the gate and that the Removal Order was rendered invalid as a result of the Court Orders.

[22] The Board noted the Town's position was that it did not act in bad faith, and that the core issue was that the gate was erected without a permit and that the *Act* and regulations give the Town the authority to issue the Removal Order.

[23] The Board found the gate was a development, and because API did not have a permit, the Town had the authority to issue the Removal Order.

[24] The Board stated:

After reviewing the information presented to this Board, the Board concludes that the Authority was justified and acted in accordance with the *Urban and Rural Planning Act, 2000*, and the Town of Come by Chance Development Regulations when, on December 9, 2020, it issued to Asphalt Products Industries Inc. an Order to "*pull down, remove, and destroy the barricade on Wharf Road, and restore the site to its original state within 15 days of service of the Order.*"

[25] API appeals the Board's decision to this Court on the grounds that the Board erred in law or jurisdiction with respect to its finding that the Removal Order was enacted with authority and that API was denied procedural fairness because the appeal package it was provided did not contain an index that was provided to the Board by the Town.

ISSUES

[26] The issues on appeal to this Court can be stated as:

1. What is the standard of review?
2. Did the Board err in finding that the Town was justified and had authority to issue the Removal Order? This issue considers API's arguments that:
 - a. The Town lacked authority because of the Interim Court Orders;
 - b. The Town lacked authority because of what API characterizes as the marina being an illegal development; and
 - c. The Town lacked authority because it acted in bad faith and with an improper motive when it issued the Removal Order.
3. Did the Board breach its duty of procedural fairness by failing to include an index of documents in the appeal package it circulated to the parties?

1. Standard of Review

[27] This appeal is brought pursuant to s. 46(2) of the *Act*, which is restricted to questions of law or jurisdiction. As a statutory appeal, the appellate standards of review apply. To determine whether there were errors in law, the standard is correctness. Whether there was a duty of procedural fairness owed to API or whether there was a denial of procedural fairness is also assessed on the standard of correctness (*Oleynik v. Law Society of Newfoundland and Labrador*, 2026 NLCA 15, at para. 9).

2. Did the Board err in finding that the Town was justified and had authority to issue the Removal Order?

2.a) Effect of Interim Orders on Town's Authority

[28] API does not dispute that the legislation grants the Town the ability to issue Removal Orders, including in situations where there was no permit obtained. However, API submits that, by hearing the Application and issuing Interim Orders, this Court assumed exclusive jurisdiction over the continued existence of the gate and thereby ousted the Town's jurisdiction to regulate the barricade or issue any Removal Order. API argues the Court Orders are "plain and clear" that, subject to further Court Order, the barricade could remain in place. API argues that Removal Order is the Town engaging in a course of conduct that contravenes the Orders.

[29] API argues that when the Town decided to go to Court to seek an injunction prohibiting API from blocking access to the marina, that the Town attorned to the Court's jurisdiction.

[30] API argues that as the Supreme Court is the appellate body of the Board pursuant to section 46 of the *Act*, the Board has no jurisdiction to hear or adjudicate a matter that has been subject to an Order from the Court.

[31] Notwithstanding that the Technical Report alerted the Board that it must hear preliminary arguments with respect to jurisdiction, the decision did not expressly address the issue of whether the Court Orders affected the Town's authority to regulate the barricade. Although the Board's conclusion that the Town acted in accordance with the *Act* and Development Regulations implicitly reflects a finding that the Town possessed the requisite authority, the reasons do not explain why or how the Board reached that conclusion. As this was one of the core issues raised by API in its appeal to the Board, the reasons should demonstrate that the Board heard, considered and decided this issue.

[32] I express no final view on the merits of API's argument. I note only that it is not immediately apparent that the Court Orders are as "plain and clear" as API suggests in authorizing or permitting the barricade. Rather, on their face, the Orders appear to place limits on the nature and size of the barricade and appear to be directed to ensuring emergency access to the marina pending the determination of the underlying litigation. Nor is it clear that the Court could take jurisdiction on itself to permit the development. The *Act* and Regulations indicate a legislative intention that it is the Town who should regulate local development.

[33] In the April Order, Justice Marshall specifically stated that she was only deciding the urgent matter related to whether the barricade prohibits emergency access to the marina.

[34] The Varied Order did not appear to permit the development. While the Varied Order amplified the April Order, indicating minimum access requirements, and providing certain persons with vehicle access, the Varied Order otherwise confirmed the April Order.

2.b) Effect of legality of marina on Town's authority to issue Removal Order

[35] Before the Board, API argues that the marina itself is an illegal development as it was not a permitted use under the Town's Development Regulations when it was constructed, and therefore, the Town has no authority to issue a Removal Order

to allow access to a development that is illegal. Based on this premise API argues the Board's decision to find that the Town had authority is an error of law.

[36] I am not aware of any authority that supports this argument.

[37] On this appeal, the Town argued that API could not raise the issue of the Court Orders or the Town's ability to regulate the barricade due to what API described as an illegal marina as the Town characterized the arguments as engaging in questions of mixed fact and law. While I agree that if the Board made a finding that the marina was either legal or illegal, it is possible that the finding may be beyond the scope of this statutory appeal, however, the issue raised by API before the Board was regarding if the Town had authority to make the Removal Order in light of what API argued was an illegal development. While the Board found that the Town had authority to issue the Removal Order, it did not address API's arguments. If the Board considered those arguments, procedural fairness required, in the context of this case, that it explain why they were rejected.

2. c) Did the Town lack authority because of bad faith or improper motive?

[38] API's submissions to the Board enumerated what it described as evidence of the Town's bad faith and improper motive underlying the Town's decision to issue the Removal Order. API's submissions included what API described as misrepresentations to the Minister to get authorization to expropriate part of the property from API, including statements to the Minister to the effect that:

- Without expropriation, emergency vehicles are prevented from responding to an emergency at the marina. API states that this was untrue, as at the time, the Varied Order was in place allowing for emergency vehicle access.
- API made the barrier more permanent and replaced several of the boulders with a gate. API states that the gate was installed in response to the Town's concerns about emergency services access and was modified in accordance with the Court Orders.

- The Town seeks to maintain and/or construct a public highway to the marina. API states that the road is not a public highway.
- The Town states that the marina is a recreational facility. API argues that the marina exists in violation of the Town's Development Regulations.
- The Town failed to alert the Minister to the ongoing litigation or Interim Orders.

[39] API argued before the Board that the misrepresentations when viewed together with the legal action taken against API, the appeals to the provincial government, and attempts at expropriation, support that the Town's real purpose in issuing the Removal Order was not the control of its Development Regulations, but for the improper purpose of trying to force API to grant the Town a right of vehicle access by land to the marina. API argues that this demonstrates that the Town acted with bad faith or an improper motive in issuing the Removal Order. API argues that the Board's failure to recognize bad faith and improper motive on behalf of the Town is an error of law.

[40] I agree with the Town's submission that as the decision to issue a Removal Order is a discretionary decision of the Town, except in certain circumstances, the Board is not permitted to substitute the exercise of its own discretion for that of the Town. However, API's allegations formed a substantial component of API's appeal before the Board. If the Board accepted that the Town has failed to act in good faith or that the Town acted with an improper motive, it is capable of fitting within the circumstances that the Board may interfere with a discretionary decision (*Paradise (Town) v. Newfoundland and Labrador (Eastern Regional Appeal Board)*, 2010 NLTD 116, at para. 30).

[41] Although the Board concluded that the Town had authority and acted in accordance with the legislation, it did not address or make explicit findings regarding API's allegations that the decision to issue the Removal Order was motivated by bad faith or an improper motive. It is open to the Board to determine whether or not the

Town acted in bad faith or with an improper motive, however, the Board must articulate in its reasons what decision it has made.

[42] The matter must therefore be remitted to the Board to reconsider and provide reasons addressing these issues considering the foregoing comments.

3. Did the Board breach its duty of procedural fairness by failing to include an index of documents in the appeal package that it circulated to the parties?

[43] Prior to the hearing before the Board, an appeal package was provided to the parties. The package did not include a document entitled "List of Documents," which had been prepared by counsel for the Town.

[44] API states that it subsequently obtained the document through a request made under the *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.

[45] API submits that the document was not disclosed before the Board rendered its decision and argues that the Board may have relied upon it in reaching that decision. According to API, this failure deprived it of a fair, impartial, and open hearing. API therefore asks this Court to set aside the Board's decision and remit the matter to the Board with directions to disclose the document.

[46] In determining whether the procedures followed by the Board satisfied the duty of procedural fairness, I have considered the principles summarized by the Court of Appeal in *Oleynik* at paragraphs 10 to 12. I also recognize that the factors identified in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, at paragraphs 23 to 27 are not exhaustive and that the content of the duty of fairness must be assessed in light of all the circumstances.

[47] The omitted document was simply an index identifying the following four documents:

- Submissions of the Town of Come By Chance in respect of a previous appeal;
- Notice of Discontinuance;
- Consent Order; and
- Council Minutes dated December 8, 2020.

[48] During oral submissions, API acknowledged that each of these four documents had been included in the appeal package provided to the parties. The only omission was the index itself. Counsel for API was unable to identify any way in which the absence of the index affected its ability to present its case or any additional submissions it would have made had the index been disclosed. Nonetheless, API maintained that the omission alone was sufficient to invalidate the Board's decision because it gave rise to prejudice.

[49] Having considered all the circumstances, I am satisfied that the Board complied with its duty of procedural fairness in this regard. The duty of fairness is flexible and context-specific. Although the index itself was omitted from the appeal package, each of the documents identified in it was provided to the parties and forms part of the Joint Appeal Record before this Court. API therefore had all of the material that was before the Board, knew the case it had to meet, and has identified no prejudice arising from the omission.

[50] I therefore dismiss this ground of appeal.

DISPOSITION

[51] The principle that individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC

65, at para. 127). The concept of responsive reasons is inherently tied to this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually listened to the parties (*Vavilov*, at para. 127). The *Act* requires formal reasons to be provided, and the Board did provide written reasons. The *Act* does not require the Board to make an explicit finding on every argument or on every element of its final conclusion, however, API's main arguments before the Board, including that the Town lacked jurisdiction and authority, and that the Town was acting in bad faith and with improper motives, were not accounted for in the Board's decision. The decision fails to address the core planks of API's appeal to the Board. Because the Board did not address issues that were central to the appeal before it, this Court cannot properly determine whether the Board's conclusions were legally correct. The matter must therefore be remitted to the Board to decide those issues.

[52] For these reasons, the appeal is allowed. The matter is remitted to the Board for reconsideration and for the provision of reasons that address the issues identified in this judgment.

COSTS

[53] API is awarded costs of this appeal on a Column III basis.

[54] Order Accordingly.

PHILIP OSBORNE
Justice