

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

APPEAL

BETWEEN Shirley Clarke **Appellants**

AND Town of Paradise **Respondent**

RESPECTING Order

BOARD MEMBERS Michelle Downey – Acting Chair
Harold Porter
Mary Thorne-Gosse

DATE OF HEARING November 25, 2015

IN ATTENDANCE

Shirley Clarke - Appellant
Alton Glenn – Authority
Ann-Marie Cashin – Authority
Robert Cotter - Secretary to the Eastern Newfoundland Regional Appeal Board
Lindsay Church - Technical Advisor to the Eastern Newfoundland Regional Appeal Board

DECISION

Facts/Background

This appeal arises from the Town of Paradise issuing an order to Clarke's Trucking and Excavating (c/o Shirley Clarke) on November 8, 2013 concerning the expansion of a heavy equipment storage yard and installation of a culvert without permit at 163-165 Paradise Road. The Order required Mr. Clarke to remove all heavy equipment from the area and reinstate it to its original condition. The Order was issued under the authority of section 102(1) of the *Urban and Rural Planning Act, 2000* and noted the development was contrary to section 7 of the Town of Paradise Development Regulations.

In accordance with section 42(4) of the *Urban and Rural Planning Act, 2000*, Mr. Clarke submitted an appeal of Council's Order with the Eastern Newfoundland Regional Appeal Board on November 20, 2013. The Board heard the appeal on August 28, 2014 and deemed the appeal invalid as the appeal was outside the Board's jurisdiction since the appellant failed to supply grounds for the appeal. The Board's decision was subsequently appealed to the Supreme Court of Newfoundland and Labrador. Justice William H. Goodridge determined that the Board erred in declaring the appeal invalid and ordered the Board to proceed with the appeal hearing. The Board met on September 18, 2015 and at the request of the appellant, deferred the hearing.

In accordance with the *Urban and Rural Planning Act, 2000* a public notice of the appeal was published in *The Telegram* on February 11, 2012 and a notice of the time, date, and place of the Hearing was provided to the appellant and authority by registered mail sent on November 5, 2015.

Matters presented to and considered by the Board

Did the appellant comply with the Order?

The appellant indicated at the hearing that he removed the culvert and the heavy equipment as ordered. However, the Town stated that it could not confirm Mr. Clarke's compliance with the Order and requested the Board confirm the Town's Order.

Did the Town have the authority to issue the Order?

The Board accepts that a permit must be issued for all development prior to any work commencing in accordance with section 7 of the Town's Development Regulations. The Board learned that the Town did not issue a permit to Mr. Clarke for the installation of the culvert and the expansion of the heavy equipment and thus accepts that the subject development contravenes section 7 of the Town's Development Regulations. Therefore, the Board found that the Town had the authority to issue the order under section 102(1) of the *Urban and Rural Planning Act, 2000*.

Did the Town issue the Order appropriately?

Yes. The Board concluded that the Order was served in person to Clarke's Trucking and Excavating, in accordance with section 107(1) of the *Urban and Rural Planning Act, 2000*. Section 107(1) states:

Unless otherwise stated in this Act, a notice, order or other document required to be given, delivered or served under this Act is sufficiently given, delivered or served where delivered personally or sent by registered mail addressed to the person at the latest known address of that person.

The Order also noted the appellant's right and process to appeal as per section 5 of the *Minister's Development Regulations, NLR 3/01*.

Where an authority makes a decision that may be appealed under section 42 of the Act, that authority shall, in writing, at the time of making that decision, notify the person to whom the decision applies of the

- (a) person's right to appeal the decision to the board;*
- (b) time by which an appeal is to be made;*
- (c) right of other interested persons to appeal the decision; and*
- (d) manner of making an appeal and the address for the filing of the appeal.*

The Board determined that in accordance with section 109(4) of the *Urban and Rural Planning Act, 2000*, the Town confirmed the Order at the next Council meeting which was held on November 19, 2013.

Conclusion

In arriving at its decision, the Board reviewed the submissions and evidence presented by all parties along with the technical information and planning advice.

The Board is bound by section 42 of the *Urban and Rural Planning Act, 2000* and therefore must make a decision that complies with the applicable legislation, policy and regulations.

Based on its findings, the Board determined that the Town of Paradise had the authority to issue the Order to Clarke's Trucking and Excavating c/o Shirley Clarke and did so in accordance with the Town's Municipal Plan and Development Regulations, 2004 and the *Urban and Rural Planning Act, 2000*. Therefore, the Board will uphold the Order issued on November 8, 2013 concerning the expansion of a heavy equipment storage yard and the installation of a culvert without a permit at 163-165 Paradise Road.

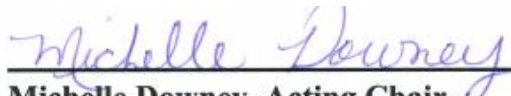
Order

Based on the information presented, the Board orders that the decision made by the Town of Paradise to issue an Order to Clarke's Trucking and Excavating c/o Shirley Clarke on November 8, 2013 regarding the expansion of a heavy equipment storage yard and the installation of a culvert without a permit at 163-165 Paradise Road, be confirmed.

The Town of Paradise and the appellant are bound by this decision of the Eastern Newfoundland Regional Appeal Board.

According to section 46 of the *Urban and Rural Planning Act, 2000*, the decision of the Eastern Newfoundland Regional Appeal Board may be appealed to the Supreme Court of Newfoundland and Labrador Trial Division on a question of law or jurisdiction. If this action is contemplated, the appeal must be filed no later than ten (10) days after the Board's decision has been received by the appellant.

DATED at St. John's, Newfoundland Labrador, this 25th day of November, 2015.



Michelle Downey, Acting Chair
Eastern Newfoundland Regional Appeal Board



Harold Porter, Member
Eastern Newfoundland Regional Appeal Board



Mary Thorne-Gosse, Member
Eastern Newfoundland Regional Appeal Board



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)**

Citation: *Clarke's Trucking and Excavating Ltd. v. Paradise (Town)*,
2015 NLTD(G) 51
Date: April 21, 2015
Docket: 201401G6703

BETWEEN:

**CLARKE'S TRUCKING AND
EXCAVATING LTD.**

APPELLANT

AND:

TOWN OF PARADISE

FIRST RESPONDENT

AND:

**EASTERN NEWFOUNDLAND
REGIONAL APPEAL BOARD**

SECOND RESPONDENT

Before: Justice William H. Goodridge

On Appeal From: August 28, 2014 decision of Eastern Newfoundland Regional Appeal Board

Place of Hearing:

St. John's, Newfoundland and Labrador

Dates of Hearing: February 9 and March 3, 2015

Summary:

An order of the Eastern Newfoundland Regional Appeal Board declaring an appeal invalid is vacated and the Board is directed to proceed with a hearing of the appeal.

Appearances:

William S. Kennedy	Appearing on behalf of the Appellant
Jonathan D. Dale	Appearing on behalf of the First Respondent
No participation by	the Second Respondent

Authorities Cited:

CASES CONSIDERED: *N.A.P.E., Local 3201 v. Newfoundland* (1994), 125 Nfld. & P.E.I.R. 271, 51 A.C.W.S. (3d) 476 (Nfld. C.A.); *N.H.D. Developments Ltd. v. Ontario Regional Assessment Commissioner, Region No. 11* (1980), 118 D.L.R. (3d) 365, 30 O.R. (2d) 689 (Div. Ct.); *Warren, Re*, 1999 NSCA 135; *R. v. Pardy*, 2014 NLCA 37

STATUTES CONSIDERED: *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8; *Development Regulations*, N.L.R. 3/01; *Supreme Court of Newfoundland and Labrador - Court of Appeal Criminal Appeal Rules*, S.I./2002-96, enacted pursuant to section 482 of the *Criminal Code*, R.S.C. 1985, c. C-46

TEXTS CONSIDERED: P.A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, QC: Éditions Y. Blais, 1989)

REASONS FOR JUDGMENT

GOODRIDGE, J.:

INTRODUCTION

[1] This is an appeal from a decision of the Eastern Newfoundland Regional Appeal Board in which the Board deemed an appeal by Clarke’s Trucking and Excavating Ltd., from an order issued by the Town of Paradise, to be invalid.

[2] The Town had ordered Clarke to discontinue certain “development” type activity on its land and to the reinstate the land to its original condition. Clarke attempted to appeal that order but the Board determined, as a preliminary ruling, that the appeal was invalid because Clarke failed to include the grounds of appeal when filing its Appeal Summary Form. Section 42(5)(b) of the *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8 (“*URPA*”) requires that the grounds for the appeal be included. The Town advised the Board that it was willing to waive compliance with section 42(5)(b) but the Board rejected the waiver. The Board did not believe it had authority to accept waiver of a statutory requirement. The Board believed that its jurisdiction to hear the appeal required strict compliance with section 42(5)(b).

[3] Clarke appeals the Board’s preliminary ruling and asks this court to find that the Board erred in law and jurisdiction when it declared the appeal invalid. If this court concludes that there was an error, then Clarke seeks an order compelling the Board to hear the appeal.

ISSUE

[4] The issue is whether the Board erred in declaring the appeal invalid because of Clarke’s failure to set out grounds of appeal with the Appeal Summary Form. The issue will require the court to decide whether the Town can waive compliance with this statutory requirement.

FACTS

[5] Clarke operates a trucking and excavating business from property at 163-165 Paradise Road, Town of Paradise.

[6] On November 8, 2013, a representative from the Town visited the property and observed Clarke doing landscaping-type work on the property. Town officials formed the opinion that the work was an unauthorized “development”, specifically, expansion of a heavy equipment yard. On that same day, the Town served an order on Clarke directing that “heavy equipment be removed ... and the area be reinstated to its original condition.”

[7] On November 12, 2013, Clarke wrote the Town stating, *inter alia*: “we were cleaning up the property ... we have the same piece of land for 50+ years.” The Town replied, *inter alia*: “[I]f you disagree with the order of November 8, 2013, you have until November 22, 2013 to submit an appeal to the Eastern Regional Appeal Board [sic].”

[8] On November 20, 2013, Clarke filed with the Board an Appeal Summary Form, the appropriate filing fee and a summary of the municipal order being appealed. The Appeal Summary Form is a standard pre-printed document supplied by the Department of Municipal and Intergovernmental Affairs to members of the public who wish to appeal municipal orders. Clarke completed the form by filling in the blank spaces but failed to attach a separate listing of the grounds of appeal.

[9] On December 27, 2013, the Town, in reply to a request from the Board, filed various background documents relevant to the appeal. These included, *inter alia*, a November 12, 2013 letter in which Clarke stated that it was merely cleaning up the property and that it had been using the property for 50+ years.

[10] On February 8, 2014, the Board arranged publication of a notice in the local newspaper announcing the pending appeal, and inviting members of the public

affected by the appeal to contact the Board. The notice included a short summary of the facts.

[11] On April 29, 2014, the Board sent a notice to Clarke and the Town announcing the time, date and place for the appeal.

[12] On August 20, 2014, Clarke, through its lawyer, filed its appeal factum. The opening two paragraphs of the factum set out Clarke's grounds for appeal:

1. For the reasons outlined below, the Appellant, Clarke's Trucking and Excavating Limited (Clarke's), submits its operations did not constitute "development" for the purposes of s. 102(1) of the *Urban and Rural Planning Act, 2000* (URPA).
2. Further, for the reasons outlined below, the Appellant submits the Town of Paradise does not have the authority to issue a stop order against Clarke's operations due to the Appellant's Non-conforming Use Rights pursuant to s. 108(1) of the URPA.

[13] On August 28, 2014, the Board convened the hearing, as scheduled, with both parties present. The Chair of the Board raised, as a preliminary issue, her concern that the grounds for appeal were not included with the documents initially filed:

... [A]ccording to the Urban and Rural Planning Act, we do need the summary of the decision, the grounds for the appeal and the required fee. ... clearly we did not receive the grounds of appeal until August 20th. So how can we move forward to hear this appeal without having all of these things as required by the Urban and Rural Planning Act? That's an issue that we have to deal with.

[14] The Town's representative, Alton Glenn, responded by waiving any objection to this irregularity and advising that the Town was prepared to proceed with the appeal on its merits. The Board rejected this waiver and ruled that the appeal was invalid because the grounds of appeal were not included with the documents filed during the 14-day appeal period. The Chair stated:

... We have decided that we are going to deem this invalid. We are bound by the [subsections 42(4) and (5) of the] Urban and Rural Planning Act. It's unfortunate, however, we are going to deem this as invalid.

[15] Section 42(4) and (5), found in Part VI of the *URPA* establishes a 14-day appeal period and outlines the filing requirements for appeals:

- (4) An appeal made under this section shall be filed with the appropriate board not more than 14 days after the person who made the original application appealed from has received the decision being appealed.
- (5) An appeal shall be made in writing and shall include
 - (a) a summary of the decision appealed from;
 - (b) the grounds for the appeal; and
 - (c) the required fee.

POSITION OF THE PARTIES

[16] The Board's position, implicit from its reasons, is that its jurisdiction is derived by statute and its authority to hear appeals is dependent upon compliance with the statute. The failure to include the grounds of appeal, in the Board's view, violates the statute, renders the appeal invalid, and results in loss of jurisdiction.

[17] Clarke's position is that the statutory requirement to disclose the grounds of appeal within the 14 days does not go to the Board's jurisdiction. It is a procedural requirement for the benefit of the Town. It can be waived by the Town without infringing any public right or policy.

[18] The Town's position is that it is still prepared to waive compliance with this statutory requirement and proceed with the appeal, if permitted. However, the Town submits that the Board had no choice other than to dismiss Clarke's appeal because of section 6(5) of the *Development Regulations*, N.L.R. 3/01:

- (5) Where an appeal of a decision and the required fee is not received by a board in accordance with this section and Part VI of the *Act*, the right to appeal that decision shall be considered to have been forfeited.

ANALYSIS

[19] Waiver of a statutory or regulatory requirement is permitted where it is enacted in the sole interest of one individual or of a category of individuals (**N.A.P.E., Local 3201 v. Newfoundland** (1994), 125 Nfld. & P.E.I.R. 271, 51 A.C.W.S. (3d) 476 (Nfld. C.A.) at para. 54). Waiver of a statutory or regulatory requirement is not permitted where it is enacted partially or entirely in the public interest. This principle is summarized by P.A. Côté, in *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, QC: Éditions Y. Blais, 1989) at 207:

An individual may waive the benefit of a right enacted in his favour: *quilibet licet remungiare juri pro se intducto*. An application of this general principle is confined to situations where the statute has been enacted in the sole interest of one individual or of a category of individuals. But it is not possible to dispense with a statute which has been partially or entirely adopted in the public interest.

[20] Section 42(5)(b) of the *URPA* (“... shall include the grounds for the appeal”) is a provision that exists so that the opposing party knows the case to meet and has adequate time to respond. In this case, it is a provision that exists for the sole benefit of the Town, and it is a provision that can be waived by the Town. When such waiver occurs, the failure to include the grounds for the appeal with the Appeal Summary Form does not result in a loss of jurisdiction to the Board. The waiver meant that the filing of the Appeal Summary Form and required fee within the 14-day appeal period effected a valid appeal, in accordance with Part VI of the *URPA*. Section 6(5) of the *Development Regulations* is not engaged. The non-compliance with section 42(5)(b) does not impact the Board’s authority to hear the appeal. The Board’s jurisdiction is derived from section 42(1) of the *URPA* and limits on the Board’s jurisdiction are identified in section 42(2) and (3).

[21] Two court decisions where similar issues arose in the context of municipal appeal board hearings are discussed below. Both court decisions involved non-compliance with a statutory requirement relating to the appeal process, and both resulted in finding that the non-compliance did **not** result in loss of jurisdiction for the board.

[22] In **N.H.D. Developments Ltd. v. Ontario Regional Assessment Commissioner, Region No. 11** (1980), 118 D.L.R. (3d) 365, 30 O.R. (2d) 689 (Div. Ct.), an appellant failed to comply with the service requirement of section 63(6) of the *Assessment Act*, R.S.O. 1970, c. 32. The Ontario Municipal Board held that due to non-compliance with the statute it had no jurisdiction to hear the appeal, even though the party who was not properly served was prepared to waive compliance. Speaking for a unanimous three-judge panel, Southey, J. found that the Board erred in declining jurisdiction and found that that the statutory requirement did not go the Board's jurisdiction. The non-compliance could be waived by the party for whose benefit the provision exists.

[23] In **Warren, Re**, 1999 NSCA 135, the appellant failed to serve the municipality with the Notice of Appeal, in violation of section 86(1) of the *Assessment Act*, R.S.N.S. 1989, c. 23. The municipality waived objection to this irregularity but the Director of Assessments argued that non-compliance with the statute meant that the Board did not have jurisdiction to hear the appeal. Chipman, J.A., speaking for a unanimous Nova Scotia Court of Appeal, rejected that argument and found that non-compliance could be waived by the municipality.

[24] I add that it is not an uncommon practice, in matters before the courts or administrative tribunal, for appeal grounds to be varied by amendment long after the Notice of Appeal has been filed, and long after the appeal period has expired. Typically this is done with consent of the opposing party, and sometimes it is permitted even without consent of the opposing side. This practice is, in substance, no different than adding appeal grounds where none were initially stated. It is not a surprise that the Town had no difficulty consenting to this (waiving compliance with the statute) because it had not been prejudiced by the late disclosure of appeal grounds. The grounds set out in Clarke's August 20, 2014 factum were already known to the Town. The grounds were similar to those identified by Clarke in its November 12, 2013 letter to the Town.

[25] In **R. v. Pardy**, 2014 NLCA 37, we have a recent example where the Newfoundland and Labrador Court of Appeal allowed new grounds to be added in a criminal appeal long after the filing deadline for the Notice of Appeal had passed. Similar to the situation with the *URPA*, the filing procedure for criminal appeals required that the Notice of Appeal set out the ground for appeal. The *Supreme Court of Newfoundland and Labrador - Court of Appeal Criminal Appeal Rules*, S.I./2002-96, enacted pursuant to section 482 of the *Criminal Code*, R.S.C. 1985, c. C-46, require that the notice of appeal be filed within 30 days and that it set out the grounds of appeal. The appellant in **Pardy** raised a new ground of appeal in his factum and sought permission to argue that new ground at the hearing. The Crown objected. At paragraphs 44 and 45 of **Pardy**, Green, C.J.N.L., writing for the majority, stated that there was nothing wrong with arguing grounds for appeal not enumerated in the Notice of Appeal, provided that the opposing parties are not prejudiced:

- 44 ... a notice of appeal is not to be treated as a pleading in the normal sense. It is not meant to precisely define the issues to be argued on appeal in the same way that, say, a statement of claim defines the parameters of the claim being made at trial. It is usually drafted to meet short filing time limits and before the full record of the trial below can be reviewed and carefully analyzed. By the time the factum is prepared and filed the approach to the appeal may well be reshaped and refocused. There is nothing wrong with this, so long as the trial record can support the grounds of appeal being advanced and the opposing parties are not otherwise prejudiced in their ability to respond. Usually, a respondent will have ample opportunity to address the issues as articulated in the appellant's factum.
- 45 I would not be prepared, therefore, to refuse to allow the appellant to raise the issue under contention on the appeal just because it might not fall within a close reading of the grounds of appeal as originally filed. Here, the issue was squarely raised in the appellant's factum and was fully responded to by the respondent. It would be necessary for the respondent to go further and show that an appeal on such a ground would not be appropriate on the appeal record. This is something that the respondent has not done.

CONCLUSION

[26] The statutory requirement under section 42(5)(b) of the *URPA*, requiring an appellant to set out grounds of appeal within the 14-day initial filing period, exists for the sole benefit of the responding party. It can be waived by the responding party without impacting the Board's jurisdiction to hear an appeal. The Town waived compliance with section 42(5)(b) and under the circumstances the filing of the Appeal Summary Form with the required fee was adequate compliance with the *URPA*. Section 6(5) of the *Development Regulations* is not engaged.

[27] Pursuant to section 46 (4) of the *URPA*, I find that the Board erred in declaring the appeal to be invalid. The order of the Board is vacated and the Board shall proceed with a hearing of the appeal.

COSTS

[28] Although Clarke has been successful on this appeal, it would be unfair, and inappropriate, to order the Town to pay costs. I order that each party bear its own costs.

WILLIAM H. GOODRIDGE
Justice

EASTERN NEWFOUNDLAND REGIONAL APPEAL BOARD

URBAN AND RURAL PLANNING ACT, 2000

APPEAL

BETWEEN Clarke's Trucking (Shirley Clarke) **Appellant**

AND Town of Paradise **Respondent**

RESPECTING Order

BOARD MEMBERS Vicki Connolly – Chair
Mary Thorne-Gosse – Member
Bruce Strong – Member

DATE OF HEARING August 28, 2014

IN ATTENDANCE

Alton Glenn – Town of Paradise
Ann-Marie Cashin – Town of Paradise
William Kennedy – Clarke's Trucking
Jillian Hewitt – Clarke's Trucking
Shirley Clarke – Appellant
Keith Clarke – Clarke's Trucking
Don Sears – Clarke's Trucking
Wallace Sparkes – Clarke's Trucking
Robert Cotter - Secretary to the Eastern Newfoundland Regional Appeal Board
Lindsay Church - Technical Advisor to the Eastern Newfoundland Regional Appeal Board

DECISION

Facts/Background

This appeal arises from the Town of Paradise issuing an order to Clarke's Trucking and Excavating (c/o Shirley Clarke) on November 8, 2013 concerning the expansion of a heavy equipment storage yard and installation of a culvert without permit at 163-165 Paradise Road. The Order was issued under the authority of section 102(1) of the *Urban and Rural Planning Act, 2000* and noted the development was contrary to section 7 of the Town of Paradise Development Regulations. The Order required Mr. Clarke remove all heavy equipment from the area and reinstate it to its original condition.

Mr. Clarke filed an appeal of Council's Order with the Eastern Newfoundland Regional Appeal Board on November 20, 2013. There were no grounds of appeal submitted to the Board.

In accordance with the *Urban and Rural Planning Act, 2000* a public notice of the appeal was published in *The Telegram* on February 8, 2014 and a notice of the time, date, and place of the Hearing was provided to the appellant and authority on April 29, 2014.

Legislation, Municipal Plans and Regulations considered by the Board

Urban and Rural Planning Act, 2000

Matters presented to and considered by the Board

Is the appeal valid?

The Board reviewed Part VI, section 42(5), of the *Urban and Rural Planning Act, 2000*. Section 42(5) outlines what is required in order to file an appeal and states:

An appeal shall be made in writing and shall include

- (a) a summary of the decision appealed from;*
- (b) the grounds for the appeal; and*
- (c) the required fee.*

The appellant did not provide the grounds for the appeal as required in section 42(5)(b) and as expressed on the Appeal Summary Form that was submitted to the Board.

Furthermore, the Board reviewed section 42(4) of the *Urban and Rural Planning Act, 2000* which requires an appeal be filed within 14 days. The Board determined that the appellant did not satisfy section 42(5) of the *Urban and Rural Planning Act, 2000*. In accordance with section 6(5) of the Minister's Development Regulations, "[w]here an appeal of a decision and the required fee is not received by a board in accordance with this section and Part VI of the Act, the right to appeal that decision shall be considered to have been forfeited."

Conclusion

In arriving at its decision, the Board reviewed the submissions and evidence presented by all parties along with the technical information and planning advice.

The Board is bound by section 42 of the *Urban and Rural Planning Act, 2000* and therefore must make a decision that complies with the applicable legislation, policy and regulations.

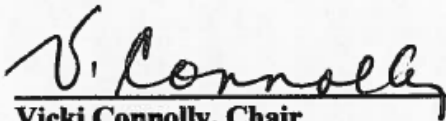
Based on its findings, the Board determined that since the appeal was not filed in accordance with section 42(5) of the *Urban and Rural Planning Act, 2000*, the appeal is deemed invalid.

Order

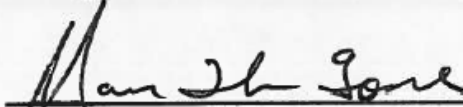
Based on the information presented, the Board dismisses the appeal regarding the Order made by the Town of Paradise on November 8, 2013 concerning the expansion of a heavy equipment storage yard and installation of a culvert without a permit at 163-165 Paradise Road.

The Town of Paradise and the appellant are bound by this decision of the Eastern Newfoundland Regional Appeal Board.

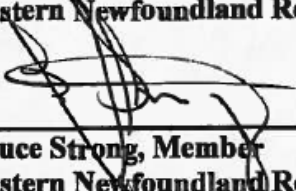
DATED at St. John's, Newfoundland, this 28th day of August, 2014.



Vicki Connolly, Chair
Eastern Newfoundland Regional Appeal Board



Mary Thorne-Gosse, Member
Eastern Newfoundland Regional Appeal Board



Bruce Strong, Member
Eastern Newfoundland Regional Appeal Board