

Opening Statement

By: J. Scott MacKenzie, Q.C., Chair Island Regulatory and Appeals Commission

To: Standing Committee on Natural Resources and Environmental Sustainability

Thursday, February 18, 2021

Thank you for the invitation to speak to the Committee today.

I am Scott MacKenzie, Chair and CEO of the Island Regulatory and Appeals Commission.

I am joined by Doug Clow, Vice-Chair of the Commission and the Commissioner primarily responsible for matters related to land.

I have prepared an opening statement and, following that statement, I will deliver a presentation to the Committee in response to its invitation.

INTRODUCTION

The Commission is an independent, quasi-judicial, statutory tribunal that is responsible for administering a number of provincial statutes.

The Commission regulates auto insurance, electricity, municipal boundaries, water and sewer utilities, petroleum, waste management, and land protection.

The Commission also adjudicates hearings in these fields and decides appeals in the areas of land use planning, tax, environmental protection, and residential tenancies.

The integrity of this administrative system, and the fairness and confidence of the parties participating in that system every day, depends upon the neutrality, impartiality and independence – both real and perceived – of the Commission.

Independence is an essential ingredient that must be safeguarded daily.

CREATION AND FUNCTION OF THE COMMISSION

The Commission – and its independence – is created by the Island Regulatory and Appeals Commission Act.

Unlike many other public officials, the chair and chief executive officer, vice-chair and full-time commissioners of the Commission are vested with security of tenure.

The Commission is responsible for making its own rules of procedure.

Each Commissioner must also arrange their private affairs in a way that enhances public confidence in the independence of the Commission.

The annual expenses of the Commission are covered by assessments levied to and borne by the utilities, industries and other persons who are subject to its supervision and control.

The Commission also levies assessments against the Government to cover the costs of its operations, for example activities that are carried on primarily for the benefit of Government and the general public, such as the Office of the Director of Rentals and the Appeals Division.

A decision made by the Commission can be reviewed only by the Prince Edward Island Court of Appeal.

The Commission presents an annual report to the Minister of Education and Lifelong Learning, who tables the report in the Legislature.

The Minister of Education and Lifelong Learning is responsible for questions related to the operations of the Commission.

In other words, the Commission reports to the Legislature through the Minister of Education and Lifelong Learning.

The Minister of Education and Lifelong Learning was chosen to perform these functions because the Minister and her delegates are not subject to oversight and scrutiny by the Commission.

This choice ensures the impartiality and independence of the Commission from other ministries whose decisions are subject to oversight by the Commission.

LANDS PROTECTION ACT

The Minister of Agriculture and Land is responsible for the administration of the Act.

The Minister may conduct an investigation.

The Minister may also authorize a person to conduct an investigation.

The Commission has various roles under the Act, including as an advisor to Executive Council, and may also conduct an investigation.

For example, the Commission may hold a formal hearing under the Act.

However, the most common role for the Commission is making recommendations in confidence to Executive Council about the disposition of applications made under the Act.

Recommendations must be based on guidelines and policies established by Executive Council.

The Executive Council is the decision-maker under the Act and may adopt policies regarding the ownership or use of land.

PROCEDURAL FAIRNESS

One of the basic and foundational duties of the Commission is its duty of procedural fairness.

Whenever the Commission is making a decision that affects the rights, interests, or privileges of an individual or corporation, it owes a duty of fairness to that party.

Also, when the Commission is giving advice or making a recommendation to a Minister or to Executive Council, and a decision will be made based on that advice or recommendation, the Commission has a duty of fairness to the affected party or parties.

The content of that duty varies from case to case; however, at a minimum, it includes notice to the party, an opportunity for the party to be heard, and the right of the party to have its case decided impartially and independently by the Commission.

This duty of procedural fairness means that the Commission and its Commissioners, including myself, must refrain from making public comments about any pending or future case.

This restraint ensures that the Commission will not be challenged later by a party on the grounds that it is no longer impartial or independent.

DUTY OF RESERVE

As quasi-judicial officials vested with adjudicative functions, we also have a duty of reserve.

The duty of reserve requires a Commissioner abstain from speaking in public about topics that might eventually become a matter of dispute before them.

This duty of reserve extends to political matters, controversial subjects, pending cases, deliberations involving the Commission, ongoing legal proceedings involving the Commission, and topics that may come before the Commission in the future.

There is an outright prohibition about commenting on such matters.

A quasi-judicial official, by their action and speech, cannot jeopardize their own independence or that of their Commission.

Since the Commission speaks only through its judgments, it is axiomatic that the Commission cannot comment on them elsewhere.

As is often said, the decision speaks for itself.

To ensure that we safeguard this neutrality, which is vital to the integrity of the Commission as an independent tribunal, you will understand that I must refrain from expressing views on certain matters that have been, are, or may be before the Commission.

It will also be inappropriate for me to comment on any particular case that is presently before the Commission or subject to legal proceedings involving the Commission.

In summary, I am under an obligation of reserve with respect to certain matters, and I trust the Committee will understand this imperative.

GOVERNMENT POLICY

There is also longstanding convention against quasi-judicial officials commenting on the meaning or effect of provisions in a piece of legislation that the tribunal may be called upon to interpret in the future.

An independent tribunal and its members also must refrain from commenting on the merits of government policy.

This practice prevents the impartiality of the official from being called into question in the event that they are later asked to apply those policies or to interpret those provisions in a case.

In other words, an official must not be asked to comment on matters that may then disqualify the official in a subsequent proceeding before the Commission.

Independent officials do not comment on the policy of government. Rather, they interpret and apply the law – good or bad – as they find it.

While a tribunal may desire a newer or clearer law, that is a function assigned to legislators like you.

DELIBERATIVE PRIVILEGE

The next item I would like to speak about is deliberative privilege.

Deliberative privilege attaches to all matters – including written and oral discussion – that is at the heart of, or integral to, the decision-making process of a tribunal like the Commission.

The purpose of the privilege is to protect the integrity of the decision-making process and prevent that process from being penetrated or influenced by others.

Members of the Commission, including myself, must protect this privilege and refrain from discussing internal deliberations and discussions that have led, or will lead, to decisions by the Commission.

INDEPENDENCE

As I mentioned earlier, the Commission is an independent tribunal created by the Island Regulatory and Appeals Commission Act.

This independence is found in our enabling legislation and recognized at common law.

Independence refers to the relationship between the Commission and others, including the other branches of government.

Independence is structural in nature and the most common challenge faced by the Commission.

This independence is necessary to protect the capacity of the Commission to make impartial, objective and evidence-based decisions, including decisions that may be adverse to the Government or parties related to Government.

This independence also contributes to public confidence in the administrative systems operated by the Commission.

When a decision-maker like the Commission exercises quasi-judicial or adjudicative functions, the expected standard of independence is very high.

To safeguard this independence, the Commission expresses itself only through its reports, orders, and decisions.

Commissioners like myself cannot defend themselves or set the record straight. We must speak through the reasons in our decisions.

The Committee must therefore understand that I will be refraining from expressing views on matters that have been, are, or may be before the Commission.

CRITICISM

While reviewing the transcript of the meetings of the Committee and statements to the media by some members of the Committee before appearing today, I was very troubled by some of the comments made about the Commission and its legal status relative to the Committee.

It will come as no surprise to you that – as a regulator and adjudicator making independent decisions that impact the lives of Islanders each and every day – the Commission is not a stranger to criticism.

There are generally three main reasons for this type of commentary.

First, the very nature of regulation and adjudication means that certain individuals and companies will be unhappy.

Second, the independence of the Commission and the legal reasons for that independence are not well understood.

Third, the Commission, by virtue of the legal constraints upon it, is not able to defend itself publicly.

In speaking with officials leading provincial regulatory Boards and Commissions across the country, I have been advised by all of them that they are not called upon, and do not appear before, committees of the legislatures in their provinces to be questioned about the functions assigned to, and discharged by, their tribunals.

Questions regarding the operations of those tribunals are generally directed to the Minister that has been assigned responsibility for reporting about them to the Legislature.

My hope is that this introductory summary about the legal principles that apply to the Commission and its Commissioners will be helpful to the Committee and others in understanding the independence and legitimate functions of the Commission.

SCOPE OF APPEARANCE

With these legal principles in mind, I turn to the invitation from the Committee to speak about the general procedure for investigations conducted by the Commission under the Lands Protection Act.

This general procedure for investigations is published on the website for the Commission and available to the public. I look forward to discussing it with you.

I thank the Committee for its invitation and appreciate your respect for the independence and impartiality of the Commission and its Commissioners.

This concludes my opening statement, and I will move to my slideshow presentation.