Big John Holdings Ltd v. Prince Edward Island (Regulatory and Appeals Commission)

Prince Edward Island Judgments

Prince Edward Island Supreme Court - Trial Division

Jenkins J.

Heard: June 21, 1993.

Judgment: September 15, 1993.

No. GSC-12330

[1993] P.E.I.J. No. 147 | 111 Nfld. & P.E.I.R. 297 | 18 Admin. L.R. (2d) 307 | 42 A.C.W.S. (3d) 945

Between Big John Holdings Ltd., applicant, and The Island Regulatory and Appeals Commission, respondent

(9 pp.)

Case Summary

Administrative law — Judicial review — Bars — Appeal available.

This was an application for judicial review of an interim order by the respondent Commission. The interim order dealt with the investigation of possible violations of the motor carrier regulatory regime by the appellant. The applicant sought to nullify the order and prohibit further proceedings on the ground that the respondent had exceeded its jurisdiction. The respondent argued that judicial review was not available as a statutory right of appeal existed.
HELD: The application was dismissed.

There was no absolute bar against an appeal of an interlocutory decision. The existence of a statutory right of appeal did not oust the court's jurisdiction to hear an application for judicial review but it did severely curtail when a judge would exercise his or her discretion in favour of hearing an application. If there were no special circumstances the discretion should be exercised against hearing an application. where a statutory right of appeal existed. Here the statutory appeal was not available as the time period for filing a notice of appeal had passed. The existence of a time period barring the statutory appeal did not constitute special circumstances for proceeding with the judicial review application as the only available remedy.

Cases cited:

Ontario Medical Association et al. v. Miller et al. *(1977), 2 C.P.C. 125* (Ont. C.A). Ontario Medical Association from Hendrickson v. Kallio *(1932) 4 D.L.R. 580* (Ont. C.A.). Re Kolbrich et al. and Minister of Housing *(1978), 20 O.R. (2d) 85* (Ont.H.C.). Hackett, Ex Parte (1882), 21 N.B.R. 513 (N.B.C.A). National Farmers Union v. Potato Marketing Council (P.E.I.), (1989), 74 Nfld. & P.E.I.R.. United Brotherhood of Carpenters and Joiners of America, Local 1388, v. Canadian Paperworkers Union, Local 167, *(1990) 81 Nfld. & P.E.I.R. 40*, P.E.I.S.C.T.D. Maritime-Ontario Freight Lines Limited v. Bourque (E.J.) Transport Limited et al. *(1987) 81 N.B.R. (2d) 94* NBCA. IPX International Ltd. v. Workers' Compensation Board *(1988), 25 B.C.L.R. (2d) 273* (B.C.C.A.) p. 276. Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association of Nipawin et al. (1973) 41 D.L.R. 6 (S.C.C.). McLaine (Eric D.) Construction Ltd. and Zakem v. Community of Southport *(1990), 82 Nfld. & P.E.I.R. 158* (P.E.I.S.C.T.D.). Sterzik and Calgary Police Association v. Beattie, Calgary Chief Police Constable and Calgary Police Service (1985), 62 A.R. (Alta Q.B.) 390, *39 Alta L.R. (2d) 375*. Woodglen & Co. Ltd. and City of North York et al *(1983) 149 D.L.R. (3d) 186*, (Ont H.C.J.D.C.).

Nick Currie

Statutes, Regulations and Rules Cited:

Island Regulation and Appeals Commission Act, R.S.P.E.I. 1990, c. 1-11, s. 13(2). Judicial Review Act, R.S.P.E.I. 1990, c. J-3.

Authors cited:

Garner's Administrative Law, B.L. Jones, 7th edition. Principles of Administrative Law, Jones and de Villars.

Counsel

John L. MacDougall, Q.C., for the applicant. M. Lynn Murray, for the respondent.

JENKINS J.

1 This is an application for judicial review of an Interim Order of the respondent tribunal that was issued on October 20, 1992. The applicant commenced this proceeding on November 13, 1992. The application was scheduled for hearing in December, 1992, and it was adjourned at the instance of the Court. This hearing commenced on June 21, 1993.

2 The respondent conducted a hearing into allegations against the applicant of improper service. The respondent found that documents filed with the respondent in that hearing suggested further allegations that, if proven, would indicate violations of the motor carrier regulatory regime, and accordingly expanded its investigation to include additional specified matters. In the Interim Order the respondent invited the applicant and others to make submissions in response to the additional matters raised, and indicated that upon review of that material "the Commission may render a decision or may request all parties to attend a hearing to answer questions or provide additional evidence".

3 The applicant applied for judicial review of the Interim Order of the respondent on the grounds that the respondent exceeded its jurisdiction in making the order, and that the procedure set out in the order violates the rules of natural justice and procedural fairness. The applicant requests this Court to nullify the respondent's order, prohibit the respondent from proceeding in accordance with that order, and direct the respondent to proceed in a different manner with its investigation.

4 The respondent raised in its factum the issue of whether judicial review is available where a statutory right of appeal exists, and submitted that judicial review is unavailable in these circumstances. The applicant disagreed, and submitted that because the respondent order in question is interlocutory there is no right of appeal, and the only viable option available to the applicant to secure a remedy is judicial review; and in the alternative that if a right of appeal does exist that this is a situation where special circumstances exist so that I should exercise my discretion and proceed with judicial review.

5 As this issue affects jurisdiction I indicated, with consent of counsel, that I would address it at the outset as a preliminary matter.

DECISION

6 I have decided that: (i) the respondent did have a statutory right of appeal; (ii) the subject statutory right does not exclude the jurisdiction of this Court to carry out judicial review; (iii) here, there are no special circumstances to

cause me to exercise my discretion to proceed with judicial review; and, (iv) accordingly, the application should be dismissed. My reasons for this decision follow.

STATUTORY RIGHT OF APPEAL

7 In my opinion, the respondent had a right of appeal to the Appeal Division of the Supreme Court. The Island Regulatory and Appeals Commission Act, R.S.P.E.I., Chapter 1-11 states:

> Sec 13(1): An appeal lies from a decision or order of the commission to the Appeal Division of the Supreme Court upon a question of law or jurisdiction.

8 The applicant submits that the respondent's Interim Order is interlocutory and therefore not appealable. The applicant submits that the statutory right of appeal does not apply to the Interim Order.

9 The Interim Order is interlocutory, both by its title and on its terms. It is styled 'Interim Order'. It states in its text ".. before the Commission can proceed to determine this matter, the Commission feels it necessary to inquire into other allegations raised...." and then proceeds to give directions for the subsequent steps in the proceeding. While interlocutory, the Interim Order is determinative of the procedures to be followed in the continued expanded hearing.

10 I do not accept as an absolute proposition that there is no right of appeal from an interlocutory order. A right of appeal is a statutory right, and the extent of that right depends on the language of the statute. Here, an appeal lies from 'a decision or order' of the respondent 'upon a question of law or jurisdiction'. The interim order is a decision or order. There is no applicable statutory definition of these terms, and I have not found any helpful case law. Black's Law Dictionary includes in the definition of these terms the following:

> Decision - ... a determination of a judicial or quasi-judicial nature.
>
> Order - ... command or direction authoritatively given.

11 Here, the respondent's determination on a motor carrier proceeding affecting the applicant's rights was quasi-judicial in nature; and the direction, while procedural in nature, was authoritatively given. It is worthy of incidental note that the grounds set forward in the application itself, i.e. that in making the Interim Order the respondent exceeded its jurisdiction and violated the rules of natural justice and procedural fairness, would necessarily share that view.

12 The subject right of appeal is broad, allowing appeal on a question of law or jurisdiction. That language appears to me to allow for an 'appeal' from a 'procedural' order of the Commission where the very jurisdiction of the Commission to make that order is questioned.

13 I do not view the case law cited by the applicant as supporting an absolute proposition that an interlocutory order is not appealable. In Ontario Medical Association et al. v. Miller et al. *(1977), 2 C.P.C. 125* (Ont. C.A.), the Court was addressing whether the order appealed from was a real order appealable directly to that Court without leave, or whether it was an interlocutory order and thus only appealable with leave of the Divisional Court. That matter was subject to its own particular statutory regime. The respondent here cited a quotation in Ontario Medical Association from Hendrickson v. Kallio *(1932) 4 D.L.R. 580* (Ont. C.A.):

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties-...

The reference in Hendrickson needs to be addressed in the context of Hendrickson. There, the Court observed that the extent of a right of appeal depends on the language of the statute, and concluded that the cases canvassed in Hendrickson were dealing with procedure on appeals and not dealing with the question of right of appeal. In Re Kolbrich et al. and Minister of Housing *(1978), 20 O.R. (2d) 85* (Ont.H.C.), the Court did say, as the respondent suggests, 'It is our view that appeals from interlocutory orders should be discouraged'. That, however, was in the context of the following preamble:

> .... It seems strange indeed that an appeal should be permitted from an interlocutory order of an administrative tribunal which, in this case, has the power... to make rules governing its practice and procedure .... However, the wording of [the applicable statute] appears to give this right.

14 The following statement in the English text, Garner's Administrative Law, B.L. Jones, 7th edition, p. 108 is also applicable: The right to appeal to a court against a decision of the administration depends, always, on the existence of some statutory provision conferring such a right in the particular circumstance. Rights to appeal are creatures of statute; there are no inherent, common law, rights of appeal. Such conferment by statutes of rights of appeal has not, however, followed any very logical or set pattern. Provision, if any, has been made as has been thought appropriate in each particular instance.

15 There is a significant distinction between 'judicial review' and 'appeal'. In Hackett, Ex Parte (1882), 21 N.B.R. 513 (N.B.C.A.) it was held that certiorari is very different from an appeal: the former is a common law remedy for reviewing the judicial proceedings of inferior tribunals and can only be taken away by express words of a statute, whereas an appeal is not a matter of common right, but is expressly given by statute. Here, however, the Legislature has expressly given appeal rights over questions of jurisdiction, so that the scope of the authority of the appeal tribunal effectively includes the same questions as would judicial review.

JURISDICTION FOR JUDICIAL REVIEW

16 The existence of this statutory right of appeal does not abrogate the right of this Court to hear an application for judicial review. It does severely curtail the instances where a judge would exercise discretion in favour of hearing an application for judicial review, but it does not oust the jurisdiction of this Court.

17 The Judicial Review Act, R.S.P.E.I. 1990, Chapter J-3, stipulates in Section 4(2):

> A judge may make an order pursuant to Section 3 [for judicial review] notwithstanding that the authority of a tribunal could have been the subject of an appeal by the applicant if the order is conditional on the applicant filing with the prothonotary a written waiver of any right of appeal from the tribunal in respect to the matter that forms the basis of his application for judicial review.

18 Here, the applicant has included a written waiver of any right of appeal with its brief on the preliminary issues.

19 Further, and in my view more significantly, there is a common law jurisdiction of this Court to conduct judicial review and issue prerogative writs. That jurisdiction continues to exist notwithstanding the provisions of the Judicial Review Act and the Island Regulatory and Appeals Commission Act. Ordinary courts have since time immemorial asserted their inherent jurisdiction to supervise the legality of government actions taken by government officials, tribunals or delegates. This supervision was facilitated procedurally by development of prerogative remedies: Principles of Administrative Law, Jones and de Villars, p. 9. This remedy is firmly vested in the common law and can only be displaced by express and specific statutory language.

20 This Court fairly canvassed the development and current status of the prerogative writs in National Farmers Union v. Potato Marketing Council (P.E.I.), *(1989), 74 Nfld. & P.E.I.R. 64*. At p. 65-68, C.R. McQuaid, J. concluded that relief by way of an order in the nature of certiorari continues to be alive, well and thriving in this jurisdiction notwithstanding any professed intention of the legislature by the Judicial Review Act to the contrary. His opinion was adopted by Campbell, J. in United Brotherhood of Carpenters and Joiners of America, Local 1388, v. Canadian Paperworkers Union, Local 167, *(1990) 81 Nfld. & P.E.I.R. 40*, (P.E.I.S.C.T.D.), at p. 42. This same principle applies with regard to prohibition. In Garner's Administrative Law, supra, at p. 228, it is stated, with regard to exclusion of judicial review, that it is a cardinal rule of interpretation that access to the Courts in circumstances where such access would otherwise lie is not to be denied eve for the clearest words of the statute.

21 The respondent has cited Maritime-Ontario Freight Lines Limited v. Bourque (E.J.) Transport Limited et al. *(1987) 81 N.B.R. (2d) 94* (N.B.C.A.), where it was held that a court is without jurisdiction to hear an application for

judicial review when there is a statutory right of appeal. While this case is by virtue of its source strongly persuasive, and in the circumstances it does not directly affect the outcome of this case, I consider it to be an overstatement that should not be applied in this jurisdiction. I am unaware whether the applicable New Brunswick judicial review legislation contained a similar provision to our s. 4(2). In any event, the New Brunswick Court rendered its reasons and decision upon consideration of a statutory provision the same as s. 13(1) of the Island Regulatory and Appeals Commission Act 'because of an additional issue that was raised by [one counsel only] in his written submission', without hearing from the other parties, and the decision does not indicate whether there was any analysis of the inherent right of the Superior court to review of governmental actions. In my view, the British Columbia Court of Appeal more accurately stated the jurisdiction of a superior court regarding the right to judicial review in IPX International Ltd. v. Workers' Compensation Board *(1988), 25 B.C.L.R. (2d) 273* (B.C.C.A.) at p. 276. In discussion of the power of the superior court to review the decision of a tribunal protected by a privative clause, the Court of Appeal said:

> The court always has power to set aside a decision made without jurisdiction. If the tribunal has exceeded its jurisdiction the court will intervene and set aside the decision.

22 In Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association of Nipawin et al. *(1973) 41 D.L.R. (3d) 6* (S.C.C.), at p. 11,the Supreme Court of Canada provided this guidance:

> There can be no doubt that a statutory tribunal cannot, with impunity, ignore the requisites of its constituent statute and decide questions anyway it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the public interest.
>
> A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause....

23 In McLaine (Eric D.) Construction Ltd. v. Community of Southport *(1990), 82 Nfld. & P.E.I.R. 158* (P.E.I.S.C.T.D.) Chief Justice MacDonald succinctly addressed both the source of the right and the availability where there exists a statutory right of appeal. He determined that s. 4(2) of the Judicial Review Act is merely a codification of the common law, and that the Court is still bound to determine if there are special circumstances before intervening over an appeal process.

SPECIAL CIRCUMSTANCES

24 In McLaine, Chief Justice MacDonald stated at p. 160:

> Generally, the case law has stated that it is a wrongful exercise of judicial discretion to grant certiorari where an aggrieved person has been given an effective right of appeal, unless, there are special circumstances.

25 In McLaine, there was a request for judicial review in lieu of the alternate route of an appeal to a lay tribunal, the Land Use Commission. In exercising his discretion to entertain the judicial review application, the Chief Justice considered and summarized the case law as indicating that that judicial review will be preferable if the effectiveness of the procedure, its broadness and scope, or its expeditiousness and costs are in favour of judicial review. He referred with approval to the determination in Sterzik and Calgary Police Association v. Beattie, Calgary Chief Police Constable and Calgary Police Service (1985), 62 A.R. (Alta. Q.B.) 390; *39 Alta L.R. (2d) 375*, at pp. 383-384, 'If the scope of the application for a prerogative writ merely duplicates the appeal, discretionary relief may properly be refused. ...' In McLaine, the special circumstance pleaded was, in essence, that complex legal issues could be better adjudicated before a court than before a lay tribunal. That situation does not exist here. Also, the nature of the relief sought by the applicant, prohibition, does not constitute special circumstances, because the Appeal Division has jurisdiction to grant an appropriate remedy within its statutory authority to determine a question of jurisdiction.

PROCEDURE

26 It would appear that a statutory appeal would not be available to the applicant at this time. The Island Regulatory and Appeals Commission Act stipulates at s. 13(2) that the notice of appeal must be filed within 20 days after the decision or order appealed from. In my view, that constraint does not constitute special circumstances that should give rise to the exercise of my jurisdiction to proceed with judicial review. The applicant's notice of application in this matter was filed on November 13, 1992, which was more than 20 days alter October 21, 1992, the date stamp on the respondent's Interim Order. The applicant could have filed a notice of appeal within the appointed time; and, the applicant could have made an early application to the Appeal Division to determine its view of whether the interim order is an order or decision from which an appeal lies under the Island Regulatory and Appeals Commission Act. Also, Chief Justice MacDonald in McLaine gave the following advice on procedure where there is a statutory right of appeal and a party wishes to pursue judicial review (p. 162):

> . . .the proper procedure and, more efficient procedure would [be] for the plaintiffs immediately upon filing the application for judicial review to [make] application to the Court Trial Division to determine whether the Court would hear the application. This would have saved a considerable amount of time and effort if the Court decides it will not hear the application. While such a procedure might not work in all circumstances, I believe it would be proper in most cases.

27 In Woodglen & Co. Ltd. and City of North York et al *(1983) 149 D.L.R. (3d) 186*, (Ont H.C.J.D.C.), at p. 189, where a building owner applied for judicial review following the denial by a building inspector of a building permit, and a right of appeal existed but the owner was outside the statutory time for appeal, the Court determined not to proceed with a judicial review. It was held that such a procedural constraint was not a ground for exercising the Court's discretion:

> As to the exercise of the court's discretion, the only ground suggested is that the applicant would, in a sense, have to start all over again at the beginning in making application to the county court judge and, the time-limit having expired, that he would have to make application for an extension under 5-5. (5) of s. 15.

28 In any event, I observe, albeit as obiter dicta, that it appears unlikely that any injustice will result from the outcome of this application. The applicant has sought review of a procedural order of a statutory tribunal. The Legislature has conferred upon the respondent commission broad authority to decide matters of procedure within the exercise of its jurisdiction. The Interim Order contemplates a further hearing during which the applicant will be given a full opportunity to be heard after which the respondent will undoubtedly issue a decision. The applicant would then have a statutory right of appeal from that final decision on a question of law or jurisdiction.

DISPOSITION

29 Therefore, the application is dismissed.

COSTS

30 With regard to costs, my initial inclination is that here, as ordinarily, costs should follow the case. However, the statutory scheme for judicial consideration of decisions or orders of the respondent commission contemplates the usual practice to be that no costs will be payable by any party. The Island Regulatory and Appeals Commission Act, s. 13(4) states:

> No costs shall be payable by any party to an appeal under this section unless the Appeal Division in its discretion for special reasons so orders.

Therefore, there will be no order as costs.

JENKINS J.

PRINCE EDWARD ISLAND
ÎLE-DU-PRINCE-ÉDOUARD

PLANNING ACT

PLANNING ACT
CHAPTER P-8

INTERPRETATION

1. Definitions

In this Act

(a) "**Commission**" means the Island Regulatory and Appeals Commission established under section 2 of the *Island Regulatory and Appeals Commission Act* R.S.P.E.I. 1988, Cap. I-11;

(b) "**council**" means the council of a municipality;

(b.1) "**Department**" means the Department of Housing, Land and Communities;

(c) "**developer**" means a person who, directly or indirectly, is authorized to apply for approval of a development or subdivision or to enter into an agreement regarding a development or subdivision;

(d) "**development**" means

(i) site alteration, including but not limited to

(A) altering the grade of the land,

(B) removing vegetation from the land,

(C) excavating the land,

(D) depositing or stockpiling soil or other material on the land, and

(E) establishing a parking lot,

(ii) locating, placing, erecting, constructing, altering, repairing, removing, relocating, replacing, adding to or demolishing structures or buildings in, under, on or over the land,

(iii) placing temporary or permanent mobile uses or structures in, under, on or over the land, or

(iv) changing the use or intensity of use of a parcel of land or the use, intensity of use or size of a structure or building;

(e) "**development agreement**" means an agreement between a developer and a council, or between a developer and the Minister, or a tripartite agreement between a developer, a council and the Minister, respecting the terms and conditions under which a development may be carried out;

(e.1) **"development permit"** means a permit issued for a development under the regulations or pursuant to a bylaw but does not include a building permit issued under the *Building Codes Act*;

(f) "**Minister**" means the Minister of Housing, Land and Communities;

Variation of court order

(4) Where a court has made an order pursuant to subsection (1), the court may, on application by the person to whom it is directed or the Crown or the municipality, as the case may be, require the person to appear before it and, after hearing the person and the Crown or the municipality, as applicable, may make an order

(a) changing the original order or the conditions specified in it;

(b) relieving the person absolutely or partially from compliance with any or all of the order;

(c) reducing the period for which the original order is to remain in effect; or

(d) extending the period for which the original order is to remain in effect for an additional period not to exceed one year.

Notice to interested persons

(5) Before making an order pursuant to subsection (1) or (4), the court may direct that notice be given to any persons the court considers to be interested and the court may hear these persons.

No other application without court's permission

(6) Where an application made pursuant to subsection (4) in respect of a person has been heard by a court, no other application pursuant to subsection (4) may be made with respect to the person except with leave of the court. *2023,c.4,s.7.*

27. Protection from personal liability

No proceedings for damages shall be commenced, and no liability shall be found against

(a) the Minister;

(b) a council or a member of a council;

(c) a Chief Administrative Officer; or

(d) an enforcement officer

for any loss or damage caused by anything done or omitted to be done by the person lawfully, in good faith and without negligence in the performance or intended performance of the person's functions or duties or the exercise of the person's powers under this or any other enactment or a bylaw, as the case may be. *1988, c.4, s.27; 2023,c.4,s.8.*

PART V — APPEALS

27.1 Definition

In this Part, "**aggrieved person**" means, in respect of a decision of the Minister under subsection 28(1) or the council of a municipality under subsection 28(1.1),

(a) the applicant;

(b) the Minister;

(c) a municipality affected by the decision;

(d) an individual who in good faith believes the decision will adversely affect the reasonable enjoyment of the individual's property or property occupied by the individual;

(e) an incorporated organization, the objects of which include promoting or protecting

(i) the quality of life of persons residing in the neighbourhood affected by the decision,

(ii) the natural environment in the community affected by the decision, or

(iii) features, structures or sites having significant cultural or recreational value in the community affected by the decision; or

(f) an organization, the majority of whose members are individuals referred to in clause (d). *2023,c.31,s.18.*

28. Appeals from decisions of Minister

(1) Subject to subsections (1.2) to (4), an aggrieved person may appeal, by filing a notice of appeal with the Commission, a decision of the Minister made in respect of an application for

(a) a development permit;

(b) a preliminary approval of a subdivision or a resort development;

(c) a final approval of a subdivision;

(d) the approval of a change of use; or

(e) any other authorization that the Minister may grant or issue under the regulations.

Appeals from decisions of council

(1.1) Subject to subsections (1.2) to (1.4), an aggrieved person may appeal, by filing a notice of appeal with the Commission, a decision of a council of a municipality

(a) that is made in respect of an application by a person under a bylaw for

(i) a development permit,

(ii) an occupancy permit, in relation to a matter under this Act or the regulations,

(iii) a preliminary approval of a subdivision, or

(iv) a final approval of a subdivision; or

(b) to adopt an amendment to a bylaw, including

(i) an amendment to a zoning map established in a bylaw, or

(ii) an amendment to the text of a bylaw.

"bylaw"

(1.2) In subsection (1.1) and subsection (1.4) "**bylaw**" means a bylaw made under this Act.

Notice of appeal and time for filing

(1.3) A notice of appeal must be filed with the Commission within 21 days after the date of the decision being appealed.

Council decision that requires Minister's approval

(1.4) For greater certainty, the 21-day period for filing a notice of appeal under this section commences on the date that the council gave final reading to the amendment to the bylaw.

Elimination of appeal when development approved under *Environmental Protection Act*

(2) Where the Lieutenant Governor in Council has by order declared that

(a) a development for which approval is required under the *Environmental Protection Act* has met all the requirements of that Act and written approval has been given;

(a.1) a development for which approval is required under the *Water Act* has met all the requirements of that Act and written approval has been given; and

[2] Different words, different meaning

The Construction of Statutes, 7th Ed.

Ruth Sullivan

CHAPTER 8 Textual Analysis

PART 1 PRESUMPTIONS ABOUT HOW LEGISLATION IS DRAFTED

§ 8.04 The Presumption of Consistent Expression

[2] Different words, different meaning

Given the presumption of consistent expression, it is possible to infer from the use of different words or a different form of expression that a different meaning was intended. As Malone J.A. explains in *Jabel Image Concepts Inc. v. Canada*:

> When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.[1]

This reasoning was relied on in several Supreme Court of Canada decisions interpreting the insanity defence provisions of the *Criminal Code*. Section 16(1) provides that a person is insane only if he or she is "incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong". In *R. v. Schwartz*, Dickson J. argued that the word "wrong" must mean morally wrong and not illegal because elsewhere in the Code the term "unlawful" is used to express the idea of illegality; by using the word "wrong" the legislature must have meant to express a different idea.[2]

In *R. v. Barnier*[3] the issue was whether the trial judge had erred in instructing the jury that the words "appreciating" and "knowing" in s. 16(2) mean the same thing. Estey J. wrote:

> One must, of course, commence the analysis of a statutory provision by seeking to attribute meaning to all the words used therein. Here Parliament has employed two different words in the critical portion of the definition, which words in effect established two tests or standards in determining the presence of insanity.... Under the primary canon of construction to which I have referred, "appreciating" and "knowing" must be different, otherwise the Legislature would have employed one or the other only.[4]

As this passage from the *Barnier* case indicates, the presumption that using different words implies an intention to express different meanings is often reinforced by the presumption against tautology. In *R. v. Clark*,[5] for example, the issue was whether performing an indecent act in an illuminated room near an uncovered window violated s. 173(1)(a) of the *Criminal Code*. The relevant provisions were in the following terms:

> 150. In this Part,
>
> ...
>
> "public place" includes any place to which the public have access as of right or by invitation, express or implied;

173. (1) Every one who wilfully does an indecent act

(a) in a public place in the presence of one or more persons,

...

is guilty of an offence punishable on summary conviction.

174.(1) Every one who, without lawful excuse,

(a) is nude in a public place, or

(b) is nude and exposed to public view while on private property, ...

is guilty of an offence punishable on summary conviction.

The Supreme Court of Canada held that although the indecent act in question was witnessed by two neighbours who were peeking through their windows into the accused's apartment, the act had not been done in a public place. In reaching this conclusion, Fish J. relied on both the presumption against tautology and the presumption of consistency:

> Section 174(1) makes it perfectly clear that the definition of "public place" in s. 150 of the *Criminal Code* was not meant to cover private places exposed to public view. Were it otherwise, s. 174(1)(*b*) would be entirely superfluous.
>
> Section 150 applies equally to s. 174(1) and s. 173(1)(*a*). If "public place" does not, for the purposes of s. 174(1), include private places exposed to public view, this must surely be the case as well for s. 173(1)(*a*). And I hasten to emphasize that ss. 173(1) and 174 of the *Criminal Code* were enacted in their present form *simultaneously*, as ss. 158 and 159, when the present *Code* was revised and enacted as S.C. 1953-54, c. 51. Parliament could not have intended that identical words should have different meanings in two consecutive and related provisions of the very same enactment.[6]
>
> [Emphasis in original]

The reasoning here is persuasive and is consistent with any purposive or consequential analysis the court might undertake.

Footnote(s)

1 [2000] F.C.J. No. 894, 257 N.R. 193 at para. 12 (F.C.A.). See also *R. v. Carson*, [2018] S.C.J. No. 12, 2018 SCC 12 at para. 33 (S.C.C.); *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] S.C.J. No. 53, 2016 SCC 53 at para. 53 (S.C.C.); *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36 at paras. 81-84 (S.C.C.); *Lukács v. Canada (Transportation Agency)*, [2014] F.C.J. No. 301, 2014 FCA 76 at para. 41 (F.C.A.); *British Columbia (Attorney General) v. Beacon Community Services Society*, [2013] B.C.J. No. 1465, 2013 BCCA 317 at paras. 25-26 (B.C.C.A.); *Swailes v. Insurance Corporation of British Columbia*, [2011] B.C.J. No. 319, 2011 BCCA 95 at para. 16 (B.C.C.A.); *Shier v. Manitoba Public Insurance Corp.*, [2008] M.J. No. 305, 2008 MBCA 97 at para. 52 (Man. C.A.).

2 [1976] S.C.J. No. 40, [1977] 1 S.C.R. 673 at 677-690 (S.C.C.), *per* Dickson J. dissenting; approved by Lamer C.J. for the majority of the Court in *R. v. Chaulk*, [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303 at paras. 88*ff* (S.C.C.). See also *Frank v. The Queen*, [1977] S.C.J. No. 42, [1978] 1 S.C.R. 95 at 101 (S.C.C.), *per* Dickson J.: "I do not think 'Indians of the Province' and 'Indians within the boundaries thereof' refer to the same group. The use of different language suggests different groups."; *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85 at 123-124 (S.C.C.), *per* La Forest J.: "... whenever Parliament meant to include Her Majesty in right of a province, it was careful to make it clear by using explicit terms. In the absence of such specific indication, ... one would expect that an unqualified reference to 'Her Majesty' should be taken as limited to the federal Crown." See also *R. v. Carson*, [2018] S.C.J. No. 12, 2018 SCC 12 at para. 33 (S.C.C.); *Walsh v. Mobil Oil Canada*, [2008] A.J. No. 830, 2008 ABCA 268 at para. 74 (Alta. C.A.).

3 [1980] S.C.J. No. 33, [1980] 1 S.C.R. 1124 (S.C.C.).

4 *R. v. Barnier*, [1980] S.C.J. No. 33, [1980] 1 S.C.R. 1124 at 1135-1136 (S.C.C.). See also *John Doe v. Ontario (Finance)*, [2014] S.C.J. No. 36, 2014 SCC 36 at paras. 24, 53 (S.C.C.); *Marche v. Halifax Insurance Co.*, [2005] S.C.J.

No. 7, [2005] 1 S.C.R. 47 at paras. 93-94 (S.C.C.); *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] S.C.J. No. 31, [1999] 2 S.C.R. 625 at paras. 134-35 (S.C.C.).

5 [2005] S.C.J. No. 4, [2005] 1 S.C.R. 6 (S.C.C.).

6 *R. v. Clark*, [2005] S.C.J. No. 4, [2005] 1 S.C.R. 6 at paras. 50-51 (S.C.C.). See also *R. v. Daoust*, [2004] S.C.J. No. 7, [2004] 1 S.C.R. 217 at paras. 62-63 (S.C.C.); *343091 Canada Inc. v. Canada (Minister of Industry)*, [2001] F.C.J. No. 1327, [2002] 1 F.C. 421 (F.C.A.), leave to appeal dismissed [2001] S.C.C.A. No. 537 (S.C.C.), at para. 50: "... by exempting 'advice and recommendations' from disclosure, Parliament must be taken to have intended the former to have a broader meaning than the latter; otherwise it would be redundant."

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THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket LA14006
Order LA15-02

IN THE MATTER of an appeal by G. Willikers Ltd. of a decision of the Resort Municipality, dated July 22, 2014.

BEFORE THE COMMISSION
on Thursday, the 12th day of February, 2015.

Doug Clow, Vice-Chair
Michael Campbell, Commissioner
Jean Tingley, Commissioner

Order

Compared and Certified a True Copy

Philip J. Rafuse
Appeals Administrator
Corporate Services and Appeals Division

IN THE MATTER of an appeal by G. Willikers Ltd. of a decision of the Resort Municipality, dated July 22, 2014.

Order

Background

The Appellant G. Willikers Ltd. (the Appellant) has filed an appeal with the Island Regulatory and Appeals Commission (the Commission) under section 28 of the ***Planning Act***, R.S.P.E.I. 1988, Cap. P-8, (the ***Planning Act***). The Appellant's Notice of Appeal was received on August 8, 2014.

This appeal concerns a July 21, 2014 decision of the Respondent Resort Municipality of Stanley Bridge, Hope River, Bayview, Cavendish and North Rustico (the Respondent) to deny an application by the Appellant for a transient or temporary use permit to locate a fish truck on the Appellant's property.

On September 8, 2014, the Commission received a letter from Jonathan M. Coady, Counsel for the Respondent. Counsel raised a preliminary issue as to the Commission's jurisdiction to hear the appeal. Counsel's concern was that the application at issue was not one found in the prescribed list contained within section 28(1.1) of the ***Planning Act***.

On September 18, 2014, the Commission received a written submission from the Appellant with respect to the jurisdictional issue. The Appellant submitted that the Respondent's decision was made pursuant to its Zoning and Subdivision Control (Development) Bylaw (2004) (the ***Bylaw***). The Appellant submitted that the Commission had the jurisdiction to hear the appeal as Bylaw was made under the authority of the ***Planning Act***. The Appellant also quoted from the Respondent's decision letter a paragraph outlining a right to appeal to the Commission.

On September 24, 2014, Counsel for the Respondent responded to the Appellant's submission and filed a detailed submission with the Commission.

The Legislation

Germane to the jurisdictional issue is section 28(1.1) of the ***Planning Act*** which reads:

> *28.(1.1) Subject to subsections (1.2) to (1.4), any person who is dissatisfied by a decision of the council of a municipality*
>
> *(a) that is made in respect of an application by the person, or any other person, under a bylaw for*

(i) a building, development or occupancy permit,

(ii) a preliminary approval of a subdivision,

(iii) a final approval of a subdivision; or

(b) to adopt an amendment to a bylaw, including

(i) an amendment to a zoning map established in a bylaw, or

(ii) an amendment to the text of a bylaw,

may appeal the decision to the Commission by filing with the Commission a notice of appeal.

Also germane to the jurisdictional issue is section 4.27 Transient or Temporary Uses of the Respondent's ***Bylaw***.

The Commission's Decision

The Commission finds that it does not have the jurisdiction to hear this appeal for the reasons that follow.

A careful review of section 4.27 reveals a common thread; uses of a temporary or transient nature. There are two classes of such uses set out in section 4.27 of the Bylaw; uses not to exceed 3 days and seasonal uses not to exceed 5 months.

Within section 28.(1.1) of the ***Planning Act***, the only portion dealing with municipal permits as such is "*(i) a building, development or occupancy permit,"*. The Commission is of the view that if the legislature had intended that permits for temporary uses be the subject of an appeal to the Commission, the appeals section of the ***Planning Act*** would have included a reference to temporary uses within the list of municipal decisions that may be appealed to the Commission.

The Commission is a creature of statute obtaining its authority from the legislature. The legislature has established a list of municipal decisions that may be appealed to the Commission. Each item in the list is concerned with development and land use planning. Each enumerated item also reflects development and land use planning from a permanent, or relatively permanent perspective.

In summary, the Commission finds that it does not have the jurisdiction to hear the present appeal as transient or temporary uses are not among the list of appealable decisions set out in s.28(1.1).

NOW THEREFORE, pursuant to the ***Island Regulatory and Appeals Commission Act*** and the ***Planning Act***

IT IS ORDERED THAT

1. The Commission has no jurisdiction to hear the Appellant's appeal.

DATED at Charlottetown, Prince Edward Island, this **12th** day of **February**, **2015**.

BY THE COMMISSION:

(Sgd.) *Doug Clow*
Doug Clow, Vice-Chair

(Sgd.) *Michael Campbell*
Michael Campbell, Commissioner

(Sgd.) *Jean Tingley*
Jean Tingley, Commissioner

NOTICE

Section 12 of the ***Island Regulatory and Appeals Commission Act*** reads as follows:

> *12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written **Request for Review**, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13(1) and 13(2) of the ***Act*** provide as follows:

> *13.(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.*

NOTICE: IRAC File Retention

In accordance with the Commission's Records Retention and Disposition Schedule, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

IRAC141x-SFN(2009/11)

CHAPTER P-8

PLANNING ACT

INTERPRETATION

1. In this Act — Definitions

(a) "Commission" means the Island Regulatory and Appeals Commission established under section 2 of the *Island Regulatory and Appeals Commission Act* R.S.P.E.I. 1988, Cap. I-11; — Commission

(b) "council" means the council of a municipality; — council

(c) "developer" means the owner of lands on which development is proposed; — developer

(d) "development" means the carrying out of any building operation, including excavation in preparation for building, on, over or under land, or the making of a material change in the use or the intensity of the use of any land, buildings or premises, and includes the placing of structures on, over or under land; — development

(e) "development agreement" means an agreement between a developer and a council, or between a developer and the Minister, or a tripartite agreement between a developer, a council and the Minister, respecting the terms and conditions under which a development may be carried out; — development agreement

(f) "Minister" means the Minister of Finance, Energy and Municipal Affairs; — Minister

(g) "municipality" has the same meaning as in the *Municipalities Act* R.S.P.E.I. 1988, Cap. M-13 and includes the City of Charlottetown and the City of Summerside and the Towns of Stratford and Cornwall; — municipality

(h) "official plan" means a plan for a municipality adopted under Part III; — official plan

(i) "planning board" means a planning board or joint planning board appointed under Part III; — planning board

(j) "resident" in relation to a municipality, means a person who has attained the age of eighteen years and is ordinarily resident within the boundaries of the municipality; — resident

(a) on a first conviction, to a fine not exceeding $2,000;
(b) on a subsequent conviction, to a fine of not more than $400 for each day upon which the contravention has continued after the day on which he was first convicted.

Limitation period

(2) Any prosecution for an offence under subsection (1) may be instituted within one year after the time when the contravention occurred. 1988, c.4, s.26; 1994, c.46, s.5 *{eff.}* July 14/94.

Production of permit

27. (1) Where any building or structure is being constructed or other activity performed for which a permit is required under any bylaw or regulation made pursuant to this Act, a person authorized by the Minister or the council may require the person constructing the building or structure or performing the activity to show to him the permit therefor and on failure to do so within one day thereafter, that person is guilty of an offence.

Power of entry

(2) For the purposes of subsection (1), a person authorized by the Minister or the council may enter upon any lands upon which the building or structure is being constructed or the activity performed. 1988, c.4, s.27.

PART V
APPEALS

Appeals from decisions of Minister

28. (1) Subject to subsections (1.2) to (4), any person who is dissatisfied by a decision of the Minister that is made in respect of an application by the person, or any other person, pursuant to the regulations for
(a) a development permit;
(b) a preliminary approval of a subdivision or a resort development;
(c) a final approval of a subdivision;
(d) the approval of a change of use; or
(e) any other authorization or approval that the Minister may grant or issue under the regulations,
may appeal the decision to the Commission by filing with the Commission a notice of appeal.

Appeals from decisions of council

(1.1) Subject to subsections (1.2) to (1.4), any person who is dissatisfied by a decision of the council of a municipality
(a) that is made in respect of an application by the person, or any other person, under a bylaw for
(i) a building, development or occupancy permit,
(ii) a preliminary approval of a subdivision,
(iii) a final approval of a subdivision; or
(b) to adopt an amendment to a bylaw, including
(i) an amendment to a zoning map established in a bylaw, or

STEWART MCKELVEY
LAWYERS • AVOCATS

65 Grafton Street, P.O. Box 2140
Charlottetown PE C1A 8B9 Canada tel: 902.892.2485 fax: 902.566.5283
stewartmckelvey.com

File Reference: SM4014-125

Hilary A. Newman
Direct Dial: 902.629.4590
hnewman@stewartmckelvey.com

September 5, 2025

Via Electronic Mail (mwalshdoucette@irac.pe.ca)

Island Regulatory and Appeals Commission
5th Floor, Suite 501
134 Kent Street
Charlottetown, PE C1A 7L1

Attention: Michelle Walsh-Doucette, Commission Clerk

Dear Ms. Walsh-Doucette:

Re: Appeal #LA25014 – John Carroll v. Resort Municipality

We are writing on behalf of the Resort Municipality of Stanley Bridge, Hope River, Bayview, Cavendish and North Rustico (the "Resort Municipality") in reply to the submissions of the appellant dated September 3, 2025.

A. Rights to Appeal are Statutory Rights

The right to appeal a decision of a public body exists only because some statutory provision confers that right in the particular circumstance provided. Rights to appeal are creatures of statute. There is no inherent or common law right to appeal.

This point was recognized by Jenkins J. (as he then was) in *Big John Holdings Ltd. v. Island Regulatory and Appeals Commission* (1993), 18 Admin L.R. (2d) 307 at para. 14 (P.E.I.S.C. (T.D.)) **[Tab 1]**. As Jenkins J. (as he then was) observed, in order to know whether a right to appeal has been granted, one must examine the particular statutory provision.

B. Planning Act says that Only Certain Municipal Decisions can be Appealed

The *Planning Act,* RSPEI 1988, c P-8 ("*Planning Act*") grants jurisdiction to the Island Regulatory and Appeals Commission ("Commission") to hear appeals from certain decisions made by the council of a municipality. However, that jurisdiction exists only where the conditions set forth in section 28(1.1) of the *Planning Act* are present. One condition precedent to the Commission exercising its appellate jurisdiction is: "*a decision of a council of a municipality (a) that is made in respect of an application by a person under a bylaw for (i) a development permit,*" **[Tab 2]**.

Unless the impugned decision is one of those listed in section 28(1.1) of the *Planning Act*, the Commission is without jurisdiction to hear an appeal under the *Planning Act*. The condition precedent required by the *Planning Act* is not present in this case. The decision at issue was in relation to an application for a temporary use permit. The Legislature has not included this type of decision in its list of appealable decisions under section 28(1.1) of the *Planning Act*.

§8.05 STATUTORY INTERPRETATION

Administrative Law in Canada, 7th Ed.

Sara Blake

Administrative Law in Canada, 7th ed. (Blake) > Part II Review of the Tribunal's Action > Chapter 8 Scope and Standard of Judicial Review

PART II REVIEW OF THE TRIBUNAL'S ACTION

Chapter 8 SCOPE AND STANDARD OF JUDICIAL REVIEW

§8.05 STATUTORY INTERPRETATION

A standard of "robust reasonableness" applies to a decision maker's interpretation of statute. A tribunal does not have free rein to interpret a statute so as to expand its powers or alter the law that was enacted. The legislator expects that its laws will be interpreted in accordance with established principles of statutory interpretation, rather than what the tribunal thinks the law ought to be or what is the right thing to do in the public interest or in its view of practical realities. This serves the rule of law and the principle of democratic accountability. The court reviews the decision maker's interpretation to ensure that it is justified by reference to the text, context and purpose of the provision. These are the established principles of statutory interpretation.[1]

To assist statutory decision makers to meet this standard of review, I offer a basic step-by-step method of statutory interpretation following the Supreme Court of Canada's typical analytical approach.[2] It is a common-sense exercise based on a careful reading of the statute without resort to external sources.

First, analyze the text of the provision and statutory definitions of terms used in the provision. (1) Every word contributes to the meaning. No word is redundant. (2) Words and phrases take their meaning from their context. Carefully review the whole section to discern their meaning. (3) Limits and exceptions prescribed by the section must be given effect. (4) If the statute is enacted in both English and French, review both because the meaning may be clearer in one language than the other. The interpretation must make sense in both language versions.

Second, review the broader context of the provision in the statute as a whole. (1) Are the same terms used elsewhere in the statute? A repeated term has the same meaning throughout the statute and its interpretation must make sense in every provision in which it is used. In contrast, a statutory use of different terms that might have similar meanings indicates that a different meaning is intended by a different legislative choice of words. (2) Do any other provisions apply to the circumstance at issue? An applicable specific provision prevails. A general provision must be interpreted consistently with the specific provision. (3) Are there any provisions that limit the application or reach of the provision at issue or that require a balancing of competing considerations? The meaning given to the provision must respect these limits.[3]

Third, identify the statutory purposes. The Interpretation Acts require that every statute shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.[4] Does the statute contain provisions that describe its purposes? Is there a specific purposes provision in the part of the Act containing the section? (1) Typically, a section of an Act should be interpreted in accordance with the purposes of the section, the purposes of

This statutory direction is further illustrated when one compares s. 28(1) and s. 28(1.1) of the *Planning Act*. While "(*d) the approval of a change of use; or (e) any other authorization that the Minister may grant or issued under the regulations*" are appealable decisions by the Minister under s. 28(1), they are not listed as appealable decisions by the council of a municipality under s. 28(1.1). The Legislature deliberately excluded such approvals from the list of municipal decisions that are subject to appeal by the Commission. This legislative choice must be respected. When a statute uses different words or a different form of expression in relation to the same subject area, that choice is considered to be intentional and indicative that the legislator intended a change in meaning or a different meaning. See Ruth Sullivan, *Construction of Statutes*, 7th Ed. (Toronto: LexisNexis, 2022) at § 8.04 **[Tab 3]**.

C. Commission says that Only Certain Municipal Decisions can be Appealed

In Order LA15-02 **[Tab 4]** the Commission stated that:

> *Within section 28.(1.1) of the Planning Act, the only portion dealing with municipal permits as such is "(i) a building, development or occupancy permit,". The Commission is of the view that if the legislature had intended that permits for temporary uses be the subject of an appeal to the Commission, the appeals section of the Planning Act would have included a reference to temporary uses within the list of municipal decisions that may be appealed to the Commission*.
>
> [emphasis added]

The Commission further observed that each item on the list of municipal decisions that may be appealed to the Commission were concerned with development and land use planning, and that each enumerated item also reflected development and land use planning from a permanent, or relatively permanent perspective. Ultimately, the Commission found that it did not have the jurisdiction to hear the appeal as transient or temporary uses were not among the list of appealable decisions set out in s. 28(1.1) of the *Planning Act*.

D. Submissions

The Commission's decision in Order LA15-02 was made under the *Planning Act* as it read as of February 12, 2015. The *Planning Act* definition of "development" as of February 12, 2015 read:

> *(d) "development" means the carrying out of any building operation, including excavation in preparation for building, on, over or under land, or the making of a material change in the use or the intensity of the use of any land, buildings or premises, and includes the placing of structures on, over or under land;*
>
> *Planning Act,* RSPEI 1988, c P-8 **[Tab 5]**
> (in force between June 28, 2014 and December 1, 2025)

Subsequent amendments have revised the definition of "development" in the *Planning Act* to include the following meaning: *"(iii) placing temporary or permanent mobile uses or structures in, under, on or over the land*". However, this revision which clarifies the definition of "development" cannot be read in isolation from the remainder of the revised definition of "development". The full statutory definition of "development" in the current *Planning Act* reads as follows:

the part of the Act in which it is situated and the purposes of the Act as a whole. (2) The purposes analysis may include consideration of practical realities in the regulated field and the consequences of an interpretation.[5] What was the mischief that motivated the legislature to enact the statute or to enact this section? What societal problem was it enacted to address? (3) However, statutory purposes and practical realities may not override the terms of a statutory provision because not every section is enacted to further the statutory purposes. Some sections are enacted to address competing purposes or to impose limits. The specific words and purposes of a section prevail over inconsistent statutory purposes and the tribunal's view of practical realities.[6]

Fourth, if the section grants discretion, the scope of the discretion — the decision maker's room to manoeuvre — must be determined when applying these established principles of statutory interpretation.[7]

The exceptions that allow resort to interpretive guidance external to the statute are few. (1) Interpretation Acts contain definitions of common statutory terms and other instructions on statutory interpretation. (2) Otherwise, the interpretation of similar terms found in other statutes should not be applied in the absence of their adoption in the statute at issue or other principled reasons to adopt the same meaning.[8] (3) Do not resort to dictionaries, textbooks on statutory interpretation, *Charter* values, international doctrines or other external guides except in the rare case that a full interpretive analysis determines that the statutory language is ambiguous. Most statutory provisions, properly interpreted, are not ambiguous. Rather, they may be deliberately general or vague with the intention that the decision maker will add specifics when applying the principles of statutory interpretation to decide individual circumstances.[9] (4) If proper interpretation leaves doubt as to the statutory purposes or whether a provision is intended to apply to a particular circumstance, there may be resort to government explanatory notes, white papers, commission reports or the Minister's explanation of statutory purposes in Hansard,[10] provided the statute as enacted resulted directly from this source.[11]

To one experienced in the practical realities of the subject governed by the statute, the interpretation must make common sense in light of the text, context and purposes of the statute.

Footnote(s)

1 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at paras. 68, 72, 108-110, 115-124.

2 A good example are the headings in *Canada Post Corp. v. Canadian Union of Postal Workers*, [2019] S.C.J. No. 67.

3 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 110.

4 *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12; *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8; *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10; *Legislation Act*, S.S. 2019, c. L-10.2, s. 2-10; *Interpretation Act*, C.C.S.M. c. I80, s. 6; *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, s. 64; *Interpretation Act*, CQLR, c. I-16, s. 41; *Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 17; *Interpretation Act*, R.S.N.S. 1989, c. 235, s. 9(1); *Interpretation Act*, R.S.P.E.I. 1988, c. I-8, s. 9; *Interpretation Act*, R.S.N.L. 1990, c. I-19, s. 16.

5 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 93; *Canada Post Corp. v. Canadian Union of Postal Workers*, [2019] S.C.J. No. 67 at paras. 54-59; *Canadian Union of Public Employees v. Ontario (Minister of Labour)*,[2003] S.C.J. No. 28.

6 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at paras. 68, 109; *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] S.C.J. No. 27 at para. 42.

7 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at paras. 108-110.

8 *Sticky Nuggz Inc. v. Ontario (Alcohol and Gaming Commission)*, [2020] O.J. No. 4376 (Ont. Div. Ct.).

9 *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43; *Pong Marketing and Promotions Inc. v. Ontario Media Development Corp.*, [2018] O.J. No. 3197 (Ont. C.A.), *per* Miller J.A., leave to appeal refused [2018] S.C.C.A. No. 365.

10 *Dagg v. Canada (Minister of Finance)*, [1997] S.C.J. No. 63 at para. 49

11 *John Doe v. Ontario (Finance)*, [2014] S.C.J. No. 36 at paras 36-39.

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PROVINCE OF PRINCE EDWARD ISLAND
PRINCE EDWARD ISLAND COURT OF APPEAL

Citation: Charlottetown (City) v. Island Reg. & Appeals Com. 2013 PECA 10

Date: 20130801
Docket: S1-CA-1248
Registry: Charlottetown

BETWEEN:

CITY OF CHARLOTTETOWN

APPELLANT

AND:

ISLAND REGULATORY AND APPEALS COMMISSION
AND ATLANTIS HEALTH SPA LTD.

RESPONDENTS

Before: Chief Justice David H. Jenkins
Justice John A. McQuaid
Justice Michele M. Murphy

Appearances:
David W. Hooley, Q.C., and Bria M. Brown, counsel for the Appellant

Kevin J. Kiley, counsel for the Respondent, Island Regulatory and Appeals Commission

Jonathan M. Coady, counsel for the Respondent Atlantis Health Spa Ltd.

Place and Date of Hearing	Charlottetown, Prince Edward Island February 25 and 26, 2013
Place and Date of Judgment	Charlottetown, Prince Edward Island August 1, 2013

Written Reasons by:
Chief Justice David H. Jenkins

Concurred in by:
Justice Michele M. Murphy

Concurring in the result:
Justice John A. McQuaid

incremental nature of development in a CDA, and the wide-ranging array of recently approved developments in the waterfront area: the new convention centre, the new concert site, the adjacent condominium developments east and south of the subject property, the new marina, and change of use of Founders Hall. Indeed, counsel for the City informed the Commission in the City's opening statement on the appeal that the City does not contend that its Director of Planning or the Planning Board were off base with their Recommendations for approval in terms of planning principles. Counsel informed the Commission that the nub of its case is that spot or piecemeal development on the subject property is premature because the City is about to embark on a grand vision for the waterfront, taking a holistic look at the waterfront lands that remain undeveloped. Along with Council's discussion and decision, and the evidence on the planning appeal, this description of the nub of the City's case makes it abundantly clear to me that the Commission well and fully understood that Council did not comply with its bylaws and the source of this error. Council did not follow the process required by the bylaw. It chose to not follow the advice and caution of the Planning Board Chair that it was required by law to process the Developer's application in accordance with the applicable bylaw *before* making any further decisions about a new and revised Waterfront Master Plan.

Hearing and deciding the application anew

[38] In my opinion, it was also within the Commission's mandate to decide the application on its merits. Following a ***Reference*** in 1997, the Court of Appeal held that the Legislature contemplated and intended that appeals under the ***Planning Act*** would take the form of a hearing *de novo*, after which the Commission, if it so decided, could substitute its decision for the one appealed (***Island Regulatory and Appeals Commission (Re)*** , [1997] 2 P.E.I.J. 70.

[39] Following the ***Reference*** case, the Commission formalized a two-part test that summarized its previous analysis of its role. The Commission employs this test as a guideline in determining planning appeals. As it applies to the circumstances of this case, after carrying out step one and quashing the Council decision for failing to follow proper process and procedure, the Commission could and should move forward to step two. Here, the Commission considers whether the City's decision with respect to the proposed rezoning and bylaw amendment has merit based on sound planning principles within the field of land use and urban planning and as enumerated in the Official Plan.

[40] I agree with both the Commission's usual approach where it finds no procedural error, and its approach in this case where it finds procedural error and quashes the decision of a municipal council. As would be expected, the Commission usually employs deference toward planning decisions by Council that are properly made. That approach is consistent with the statutory scheme of the ***Planning Act***. The Legislature vested City Council with responsibility for administration of its Official

§4.01 INTRODUCTION

Administrative Law in Canada, 7th Ed.

Sara Blake

Administrative Law in Canada, 7th ed. (Blake) > Part I Proceedings Before the Tribunal > Chapter 4 Decision-making Powers

PART I PROCEEDINGS BEFORE THE TRIBUNAL

Chapter 4 DECISION-MAKING POWERS

§4.01 INTRODUCTION

An administrative tribunal is created by statute and has only those powers conferred on it by statute.[1] It has no inherent power to undertake proceedings or to make an order that affects a person's substantive rights or obligations. Most Interpretation Acts confer on tribunals all powers that are necessary to enable them to make the decisions and to do the things they are expressly empowered to do.[2] The powers that exist by necessary implication may be deduced from the wording of the Act, its structure and its purpose. A tribunal's powers should be interpreted so as to enable the tribunal to fulfil the purposes of the statute rather than be sterilized by overly technical interpretation,[3] but statutory powers may not be expanded to accomplish what the tribunal thinks it ought to do to further its mandate in the public interest.[4] If a tribunal has broad authority to make any order to remedy a violation of the Act, the remedy must be related to the violation, its consequences and the purposes of the Act.[5]

A tribunal may determine the scope of its own powers and must do so if its authority is questioned. If uncertain, it should invite submissions and make a decision as to whether it has authority. It need not defer the question to a court.[6] The question should be resolved before powers are exercised. If it depends on the facts, a tribunal may reserve its ruling as to the scope of its authority until after hearing the evidence.[7] If a tribunal makes a preliminary ruling that it has jurisdiction, it may reconsider this issue after hearing the evidence.[8]

When making a decision, a tribunal need not state the source of its power. A tribunal may exercise a combination of its powers from different sources without identifying them. All that matters is that the tribunal have authority to act, not that it identify its authority.[9]

If a tribunal does not have power to do what is requested of it, the parties cannot by consent confer power upon it. Lack of power may not be waived, nor may parties by their acquiescence confer on a tribunal a power it does not have.[10] Powers cannot be expanded by contract between the tribunal and the parties it regulates.[11]

If decision-making powers are conferred by statute on a tribunal that does not exist, the Minister responsible for the statute may exercise the powers, provided the procedures prescribed by statute are followed.[12]

An exception to the requirement for statutory authority is the power of government to spend public money. Canadian governments establish and administer many programs without express statutory authority. Many of these programs concern health, welfare and agriculture. Like any private philanthropist, the Crown has the capacity to establish programs for public benefit and to define or restrict the distribution of benefits. The royal prerogative is

also a source of authority to regulate in subject areas not governed by statute, such as national security and the conferral of honours.[13] A program may be changed or cancelled at any time. If no statute governs the field and the program does not affect any person's liberties, legal rights or duties, it is legal.[14] A program implemented by contract may be governed by the law of contract or public law depending on the extent to which the contract is voluntary or mandatory.[15]

Footnote(s)

1 *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] S.C.J. No. 99; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] S.C.J. No. 4 at para. 35; *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 at para. 29.

2 *Interpretation Act*, R.S.C. 1985, c. I-21, s. 31(2); *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 27(2); *Interpretation Act*, R.S.A. 2000, c. I-8, s. 25(2); *Legislation Act*, S.S. 2019, c. L-10.2, s. 2-22; *Interpretation Act*, C.C.S.M. c. I80, s. 32; *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, s. 78; *Interpretation Act*, CQLR, c. I-16, s. 57; *Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 22(*b*); *Interpretation Act*, R.S.N.S. 1989, c. 235, s. 19(*b*); *Interpretation Act*, R.S.P.E.I. 1988, c. I-8.1, s. 24; *Interpretation Act*, R.S.N.L. 1990, c. I-19, s. 22(*b*); *Hillier v. Canada (Attorney General)*, [2019] F.C.J. No. 228 at paras. 33, 36, 39 (F.C.A.); *B.C. College of Optics Inc. v. College of Opticians of British Columbia*, [2016] B.C.J. No. 322 at paras. 56-63 (B.C.C.A.).

3 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] S.C.J. No. 4 at § 2.3.3; *R. v. 974649 Ontario Inc.*, [2001] S.C.J. No. 79 at para. 38.

4 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at paras. 68, 109-110, 120-121; *Florkow v. British Columbia (Police Complaint Commissioner)*, [2013] B.C.J. No. 354 (B.C.C.A.); *1582235 Ontario Ltd. v. Ontario (Ministry of Health and Long-Term Care)*, [2020] O.J. No. 2171 (Ont. Div. Ct.).

5 *Moore v. British Columbia (Education)*, [2012] S.C.J. No. 61; *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] S.C.J. No. 14 at para. 56; *Murdoch v. Canada (Royal Canadian Mounted Police)*, [2005] F.C.J. No. 522 (F.C.).

6 *McLeod v. Egan*, [1974] S.C.J. No. 62; *Toronto (City) v. Goldlist Properties Inc.*, [2003] O.J. No. 3931 (Ont. C.A.); *Nova Scotia (Director of Assessment) v. Homburg L.P. Management Inc.*, [2006] N.S.J. No. 394 (N.S.C.A.); *Retail, Wholesale and Department Store Union, Local 540 v. Saskatchewan (Minister of Labour)*, [1984] S.J. No. 563 (Sask. Q.B.).

7 *Jacmain v. Canada (Attorney General)*, [1977] S.C.J. No. 111; *Gloin v. Canada (Attorney General)*, [1977] F.C.J. No. 248 (F.C.A.); *Union des Employées d'Hotel, Motel et Club v. Québec (Tribunal du Travail)*, [1977] C.A. 337 (Que. C.A.); *New Brunswick Council of Hospital Unions v. New Brunswick (Board of Management)*, [1986] N.B.J. No. 151 (N.B.C.A.); *Newfoundland (Human Rights Commission) v. Newfoundland (Dept. of Health)*, [1998] N.J. No. 129 (Nfld. C.A.); *Sawyer v. TransCanada Pipeline Ltd.*, [2017] F.C.J. No. 727 (F.C.A.).

8 *International Brotherhood of Electrical Workers, Local 1733 v. New Brunswick Power Corp.*, [1994] N.B.J. No. 551 (N.B.Q.B.).

9 *British Columbia (Milk Board) v. Grisnich*, [1995] S.C.J. No. 35.

10 *Pagee v. Manitoba (Director, Winnipeg Central)*, [2000] M.J. No. 180 at para. 10 (Man. C.A.); *Gough v. Peel Regional Police Service*, [2009] O.J. No. 1155 (Ont. Div. Ct.); *Scivitarro v. British Columbia (Minister of Human Resources)*, [1982] B.C.J. No. 1621 (B.C.S.C.).

11 *Ontario (Chicken Producers' Marketing Board) v. Canada Chicken Marketing Agency*, [1992] F.C.J. No. 929 (F.C.T.D.); *Salway v. Assn. of Professional Engineers and Geoscientists of British Columbia*,[2009] B.C.J. No. 1570 (B.C.C.A.). Except Arbitrators: *Hunter Rose Co. v. Graphic Arts International Union, Local 28B*, [1979] O.J. No. 4226 (Ont. C.A.).

12 *Kennibar Resources Ltd. v. Saskatchewan (Minister of Energy and Mines)*, [1991] S.J. No. 164 (Sask. C.A.).

13 *Operation Dismantle Inc. v. Canada*, [1985] S.C.J. No. 22; *Black v. Canada (Prime Minister)*, [2001] O.J. No. 1853 (Ont. C.A.).

14 *Pharmaceutical Manufacturers Assn. of Canada v. British Columbia (Attorney General)*, [1997] B.C.J. No. 1902 (B.C.C.A.); *Bowman v. Ontario (Minister of Children, Community and Social Services)*, [2019] O.J. No. 746 (Ont. Div. Ct.); *Simon v. Metropolitan Toronto (Municipality)*,[1993] O.J. No. 101 (Ont. Div. Ct.); *Skypower CL 1 LP v. Ontario (Minister of Energy)*, [2012] O.J. No. 4458 (Ont. Div. Ct.); *Mital v. Canada (Minister of Health)*, [2015] F.C.J. No. 754 (F.C.), affd [2016] F.C.J. No. 242 (F.C.A.), leave to appeal refused [2016] S.C.C.A. No. 156.

15 *Ferme Vi-Ber inc. v. Financière agricole du Québec*, [2016] S.C.J. No. 34; *Canada (Attorney General) v. Mavi*, [2011] S.C.J. No. 30.

End of Document

Date:19970718
Docket: AD-0706
Registry: Charlottetown

IN THE MATTER of Section 14(1) of the ***Island Regulatory and Appeals Commission Act***, R.S.P.E.I. 1988 Cap. I-11.
IN THE MATTER of the ***Constitution Act***, 1867 and amendments thereto.

Before: Carruthers, C.J.P.E.I.; Mitchell and McQuaid, JJ.A.
Heard: June 23, 1997
Judgment: July 18, 1997

ADMINISTRATIVE LAW - Stated case - S-s.14(1) Island Regulatory and Appeals Commission Act - Jurisdiction of Commission - Constitutionality of ss. 28 and 37 of the Planning Act.

The Court of Appeal in answer to the questions posed to it by the Commission opined that ss.28 and 37 of the ***Planning Act*** were constitutional and that the Commission had jurisdiction to hear appeals pursuant to those provisions.

STATUTES CONSIDERED: Island Regulatory and Appeals Commission Act, R.S.P.E.I. 1988, Cap. I-11; ***Planning Act***, R.S.P.E.I. 1988, Cap. P-8; ***Constitution Act, 1867***;

TEXTS CONSIDERED: Salhany, R.E.: ***Canadian Criminal Procedure***, Canada Law Book Ltd,1968

John A. O Keefe, Q.C., for the appellant, I.R.A.C.
William G. Lea, Q.C., for Respondents, APM Landmark and Prince Edward Holdings Inc.
Roger B. Langille, Q.C., for Respondent, Attorney General
David W. Hooley, for Respondent, City of Charlottetown

Mitchell J.A.:

[1] The Island and Regulatory and Appeals Commission (IRAC) pursuant to s-s. 14(1) of the ***Island Regulatory And Appeals Commission Act***, R.S.P.E.I.1988, Cap. I-11 seeks the opinion of this court on the following questions of law:

1. Is s. 28 of the ***Planning Act***, R.S.P.E.I. 1988 Cap.P-8 inconsistent with the rule of law and therefore unconstitutional?
2. Is s. 37 of the ***Planning Act*** inconsistent with the rule of law and therefore unconstitutional?
3. (a) Are ss. 28 and 37 of the ***Planning Act ultra vires*** the legislature of Prince Edward Island?
(b) Does I.R.A.C. have appellate jurisdiction under ss. 28 and 37 of the ***Planning Act***?
4. Does s. 52 of the ***Constitution Act 1982*** apply to render ss. 28 and 37 of the planning Act inoperative?

[2] The stated case was precipitated by challenges to IRAC's jurisdiction from various parties appearing before it on ***Planning Act*** appeals. On the hearing of the stated case the court heard submissions by counsel for IRAC, the Attorney General of Prince Edward Island and three of the challengers to the Commission's jurisdiction, the City of Charlottetown, APM Landmark Inc. and Prince Edward Holdings Inc.

Relevant Legislation

[3] The following legislative provisions are relevant to the issues raised by the stated case: s-s. 1(a), 2, 28, and 37 of the ***Planning Act***; s-ss.3(1), (9), (11), 5(b), 6(a), 7, 8 of the ***Island Regulatory and Appeals Commission Act***; s-ss. 52(1) and (2) of the ***Constitution Act,1982***, and s-s. 92(13) of the ***Constitution Act, 1867***.

Planning Act

1. In this Act
(a) Commission means the Island Regulatory and Appeals Commission established under section 2 of the ***Island Regulatory and Appeals Commission Act*** R.S.P.E.I. 1988, Cap. I-11; ...

. . . . .

2. The objects of this Act are
(a) to provide for efficient planning at the provincial and municipal level;

(b) to encourage the orderly and efficient development of public services;
(c) to protect the unique environment of the province;
(d) to provide effective means for resolving conflicts respecting land use;
(e) to provide the opportunity for public participation in the planning process.

. . . . .

28. (1) Subject to subsections (2), (3) and (4), any person who is dissatisfied by a decision of a council or the Minister in respect of the administration of regulations or bylaws made pursuant to the powers conferred by this Act may, within twenty-one days of the decision appeal to the Commission.

(2) Where the Lieutenant Governor in Council has by order declared that

(a) a development for which approval is required under the ***Environmental Protection Act*** has met all the requirements of that Act and written approval has been given; and

(b) the right of appeal to the Commission in respect of that development should be curtailed, subsection (1) has no application and there is no right of appeal to the Commission in respect of a decision on that development.

(3) Where a declaration has been made under subsection (2), the Lieutenant Governor in Council shall submit to the next session of the Legislative Assembly a statement of the reasons for making the declaration.

(4) No appeal lies from a decision of the council or the Minister, as the case may be, respecting the final approval of a subdivision where the matters that are the subject of the proposed appeal could have been heard and decided at the stage of preliminary approval.

(5) A notice of appeal to the Commission under subsection (1) shall be in writing and shall state the grounds for the appeal and the relief sought.

(6) The appellant shall, within seven days of filing an appeal with the Commission, serve a copy of the notice of appeal on the council or the Minister, as the case may be.

(7) Subject to adherence to the rules of natural justice, the Commission shall determine its own procedure.

(8) The Commission shall hear and decide appeals and shall issue an order giving effect to its disposition.

(9) The Commission shall give reasons for its decision.

(10) The council or the Minister, as the case may be, shall implement an order made by the Commission.

(11) Where the council or the Minister, as the case may be, fails to implement an order made under subsection (8), the Commission, on its own initiative or the initiative of an interested person, may act in the name of the council or the Minister to implement the order.

. . . . .

37. (1) Any person aggrieved by a decision of a municipality or the Minister to issue or deny a building permit in respect of a major development may appeal the decision to the Commission by notice to the Commission and the council or the Minister, as the case may be, within twenty-one days of the decision or of the publication of the notice under subsection (2), whichever later occurs.

(2) Where a building permit is issued for a major development, the council making the decision or the Minister, as the case may be, shall cause notice thereof to be given in a daily newspaper circulating in the area in which the development is located.

(3) Section 28 applies to an appeal under this section.

Island Regulatory and Appeals Commission Act

3. (1) The Commission shall be composed of

(a) a full-time chairman who shall be the chief executive officer of the Commission;

(b) a full-time vice-chairman, who shall assume primary responsibilities for matters related to land;

(c) one other commissioner;

(d) not more than five part-time commissioners who shall be knowledgeable in one or more of the following areas:

accounting, agriculture, municipal planning, engineering, business, environmental matters, finance, economics, law, utilities, taxation, consumer protection.

. . . . .

(9) Where any matter is before the Commission, the Commission may give directions to the parties with respect to the conduct of the hearing.

. . . . .

(11) For the purpose of discharging his functions, each commissioner may
(a) administer oaths;
(b) certify to official acts;
(c) by subpoena, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and other evidence.

. . . . .

5. The functions of the Commission are . . .
(b) to hear and decide matters relating to land use, to decide upon the disposition of applications respecting the acquisition of land by non-residents and corporations where so required by any Act; ...
6. The Commission has
(a) all the jurisdiction and powers conferred or vested in it by this Act or any other enactment, and all other implied or incidental powers necessary to perform its functions; ...
7. (1) The Commission may
(a) appoint such staff and define their duties;
(b) engage such consultants or other assistants;
as it considers necessary to perform its functions.
(2) The ***Civil Service Act*** R.S.P.E.I. 1988, Cap. C-8 does not apply to any person employed by the Commission.
8. In the exercise of its jurisdiction the Commission
(a) may require a party to provide such records, books or information as the Commission considers necessary to decide the matter in issue;
(b) may decide all matters of procedure not otherwise provided for in the rules made under subsection 3(7) or (8).

Constitution Act, 1982

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
(2) The Constitution of Canada includes
(a) the ***Canada Act 1982***, including this Act;
(b) the Acts and orders referred to in the schedule; and
(c) any amendment to any Act or order referred to in paragraph (a) or (b). . . .

Constitution Act, 1867

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,- . . .
(13) Property and Civil Rights in the Province.

Answers

[4] I begin with question 3.

3. (a) Are ss. 28 and 37 of the ***Planning Act ultra vires*** the legislature of Prince Edward Island?
(b) Does IRAC have appellate jurisdiction under ss. 28 and 37 of the ***Planning Act***?

[5] It is my opinion that the answer to question 3(a) is No. Sections 28 and 37 of the ***Planning Act*** are a valid exercise of the Province's exclusive powers to make laws in matters of property and civil rights in the province under s-s.92(13) of the ***Constitution Act, 1867***.

[6] My answer to question 3(b) is Yes. Both sections authorize appeals to the Commission and that term is defined in s-s.1(a) of the ***Planning Act*** as the Island Regulatory and Appeals

Commission established under s. 2 of the ***Island Regulatory and Appeals Commission Act.*** According to s-s. 5(b) of the ***Island Regulatory and Appeals Commission Act***, IRAC is to hear and decide matters relating to land use, and to decide upon the disposition of applications respecting the acquisition of land by a nonresident and corporations where so required by any Act. Subsection 5(d) of the ***Island Regulatory and Appeals Commission Act*** provides that IRAC is to perform the functions conferred on it by any enactment. In addition, s-s. 6(a) of the same Act provides that IRAC has all the jurisdiction and powers conferred upon it by any enactment, and all other implied or incidental powers necessary to perform its functions. In light of these legislative provisions I do not think there can be any doubt that IRAC has appellate jurisdiction under ss. 28 and 37 of the ***Planning Act***.

[7] I will next deal with questions 1 and 2.

1. Is s. 28 of the ***Planning Act***, R.S.P.E.I. 1988 Cap.P-8 inconsistent with the rule of law and therefore unconstitutional?

2. Is s. 37 of the ***Planning Act*** inconsistent with the rule of law and therefore unconstitutional?

[8] It is convenient to deal with both of these questions together. My answer to each of them is No. Sections 28 and 37 of the ***Planning Act*** are validly enacted provincial legislation. They each clearly provide a specifically defined right of appeal to IRAC: in the case of s. 28, by any person dissatisfied by a decision of a council or the Minister in respect of the administration of the regulations or bylaws made pursuant to the ***Planning Act***; and, in the case of s. 37, by any person aggrieved by a decision of a municipality or the Minister to issue or deny a building permit in respect of a major development.

[9] When one considers the provisions of s. 28 and s. 37 in conjunction with the provisions of the ***Island Regulatory and Appeals Commission Act*** setting forth the composition, functions and powers of IRAC and takes into account that often the appeal will be the first opportunity for all of the interested parties to fully participate, it becomes apparent that the Legislature contemplated and intended that appeals under the ***Planning Act*** would take the form of a hearing ***de novo*** after which IRAC, if it so decided, could substitute its decision for the one appealed. The findings of the person or body appealed from are irrelevant. IRAC must hear and decide the matter anew as if it were the original decision-maker.

[10] The fact that an appellant must state the grounds of appeal and relief sought in writing in order to invoke the appeal procedure does not restrict the jurisdiction of IRAC in hearing or deciding the case. In situations where an appeal is by way of trial ***de novo*** grounds of appeal do not serve the same function as they do for instance in appeals to this court. [See: Salhany, ***Canadian Criminal Procedure***, Canada Law Book Ltd,1968 at pp.203-4.] Their purpose in hearing ***de novo*** appeals is simply to alert the appeal tribunal and parties to the nature of the appellant's complaint with the decision, and the form of redress being sought. However, IRAC does not have unfettered discretion or unbridled power to deal with and decide appeals as it likes. It would be bound to hear, consider, and decide the issues of the case in accordance with the requirements and objects of the ***Planning Act***. It is required by s-ss. 28(7) and 37(3) of that legislation to conduct appeals in accordance with the rules of natural justice and therefore must act judicially. It must give reasons for its decision (s-ss. 28(8) and 37(3) of the ***Planning Act***) and if it exceeds its authority or errs in law it is subject to review by this court by way of an appeal under s. 13 of the ***Island Regulatory and Appeals Commission Act***. All of the forgoing being so, I am unable to conclude that either s. 28 or 37 of the ***Planning Act*** are inconsistent with the rule of law.

[11] The 4th and final questions asks:

4. Does s. 52 of the ***Constitution Act 1982*** apply to render ss. 28 and 37 of the planning Act inoperative?

[12] In view of the answers to the other questions, my answer to this one must be No. Section 52 of the ***Constitution Act, 1982*** does not render ss. 28 and 37 of the ***Planning Act*** inoperative because those provisions are not inconsistent with the Constitution of Canada.

The Honorable Mr. Justice G.E. Mitchell

I AGREE: The Honorable Chief Justice N.H. Carruthers

I AGREE: ___ The Honorable Mr. Justice J.A. McQuaid

THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Edouard
CANADA

Docket: LA01004
Order LA01-04

IN THE MATTER of an appeal by Christopher MacDonald against a decision of the Resort Municipality of Stanley Bridge, Hope River, Bayview, Cavendish and North Rustico, dated April 17, 2001.

BEFORE THE COMMISSION

on Thursday, the 16th day of August, 2001.

Wayne D. Cheverie, Q.C., Chair
Kathy Kennedy, Commissioner
Anne Petley, Commissioner

Order

Contents

Appearances & Witnesses

1. For the Appellant

Counsel:
Sean M. Kelly

Witness:
Christopher MacDonald

2. For the Respondent

Brenda MacDonald

Reasons for Order

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1. Introduction

This is an appeal filed with the Island Regulatory and Appeals Commission (the Commission) by Christopher MacDonald (the Appellant) under section 28 of the ***Planning Act***, R.S.P.E.I. 1988, Cap. P-8 (the ***Act***). By Notice of Appeal (Exhibit A1) dated May 7, 2001, the Appellant is appealing the decision of the Resort Municipality of Stanley Bridge, Hope River, Bayview, Cavendish and North Rustico (the Respondent), dated April 17, 2001, to deny him a development permit to construct an artificial climbing wall and a 12-foot by 12-foot building (the proposed development) on parcel # 723874 (the subject property) located in Cavendish.

After due public notice and suitable scheduling for the involved parties, the Commission proceeded to hear the appeal on July 4 and 18, 2001.

During the course of the public hearing on July 4, 2001, the Appellant requested an adjournment in order to have the opportunity to review the matter and possibly provide additional evidence. The Respondent did not oppose this request. The Commission adjourned the hearing until July 18, 2001, at which time the hearing concluded after hearing the evidence and submissions of the parties.

2. Discussion

The Appellant contends that the Respondent should have issued a development permit for the proposed development. In the Notice of Appeal (Exhibit A1) the Appellant includes the following points as grounds for his appeal:

- The plan for the proposed development exceeds the sewerage servicing requirements of the department of health.

- The Respondent requested a comprehensive site plan from the Appellant for the proposed development and the Appellant complied with this request. According to Appendix “B” of the Respondent's Zoning & Subdivision Control (Development) Bylaw (the Bylaw), the comprehensive site plan must include “an indication that consideration has been given to accommodating the future development of the balance of the site.” The proposed development on the subject property will minimize the impact on the site by using facilities that do not alter the land. The site will be used for the proposed development for a period of 1 to 5 years, after which it will be moved to another location on the subject property to accommodate further development of the subject property by the landowner.

- The waste management system planned for the proposed development will be pumped on a regular (weekly) basis and will pose no health hazards or any other problems such as odor or pests.

During the hearing, the Appellant further expanded upon his position and submitted the following additional points in argument:

- The proposed development is not a development as contemplated by section 9.9 of the Bylaw. Rather, the proposed development is actually a transient or temporary use as considered under section 4.27 of the Bylaw because it would not be attached to the land, cannot sit on the ground during the winter and it will be moved to another portion of the subject property after the first or second summer of operation. The Appellant notes that the Respondent had informed him that the proposed development was a transient or temporary use when he had applied for a development permit for a similar project the previous year.

- The need for washroom facilities is very minimal for the proposed development because customers usually spend an hour or less on the climbing wall. While indoor climbing walls generally have washroom facilities, outdoor climbing walls usually have either portable toilets or no washroom facilities at all. The proposed development would use portable toilets contained within a building, thus exceeding the usual standards of outdoor artificial climbing walls.

- The proposed development would be consistent with section 1.3 of the Bylaw, as it would promote the health, safety, convenience and welfare of the public.

- A variance under sub-section 15.1(2) of the Bylaw could be applied to permit the proposed development to proceed without requiring it to connect to the municipal sewer.

The Appellant requests that the Commission order the Respondent to issue a development permit for the proposed development, as the Respondent erred when it made its decision to deny this permit.

The Respondent expresses the position that it carefully followed the Bylaw when it made the decision to deny a development permit for the proposed development. The Respondent submits the following points in argument:

- The subject property is within the Resort Commercial Zone (RD4). The proposed development falls within the definition of “Development” contained in section 2.25 of the Bylaw and therefore the requirements of section 9.9 of the Bylaw apply to the proposed development.

- The proposed development does not meet the servicing requirements of section 9.9 of the Bylaw. The subject property is within the core area of the municipality and therefore section 9.9 of the Bylaw, in conjunction with Policies PS-1 and PS-2 of the Respondent's Official Plan 1999 (Official Plan), would require the proposed development to be serviced by central sewer services.

- The Appellant applied for a development permit, not a transient or temporary use permit. He appeared before the Respondent and made a presentation indicating that the proposed development was not a transient or temporary use. Even if the proposed development was considered a transient or temporary use, he would have to satisfy the Respondent, pursuant to paragraph 4.27(7)(c) of the Bylaw, that the washroom facilities were adequate before a transient or temporary use permit would be granted.

- The Respondent is not against the concept of the Appellant's proposed development; however in order for a development permit to be issued, the proposed development must comply with the Bylaw generally and section 9.9 in particular.

The Respondent requests that the Commission deny the appeal, as the proposed development does not meet the requirements of the Bylaw that the Respondent acted to uphold when it made the decision to deny a development permit to the Appellant.

3. Findings

Following a careful review of the evidence, the submissions of the parties, and the applicable law, it is the decision of the Commission to deny this appeal. The reasons for the Commission's decision follow.

Appeals under the ***Act*** generally take the form of a hearing *de novo* before the Commission. Authority for this proposition is found in the decision of the Appeal Division of the Prince Edward Island Supreme Court, *In the matter of Section 14(1) of the Island Regulatory and Appeals Commission Act (Stated Case)*, [1997] 2 P.E.I.R. 40 (PEISCAD), where Mitchell, J.A. states for the Court at page 7:

> *When one considers the provisions of s. 28 and s. 37 in conjunction with the provisions of the **Island Regulatory and Appeals Commission Act** setting forth the composition, functions and powers of IRAC and takes into account that often the appeal will be the first opportunity for all of the interested parties to fully participate, it becomes apparent that the Legislature contemplated and intended that appeals under the **Planning Act** would take the form of a hearing **de novo** after which IRAC, if it so decided, could substitute its decision for the one appealed. The findings of the person or body appealed from are irrelevant. IRAC must hear and decide the matter anew as if it were the original decision-maker.*

While the Commission does have the power to substitute its decision for that of the person or body appealed from, such discretion should be exercised with care. The Commission ought not to interfere with a decision only because it disagrees with the result. However, if the person or body appealed from did not follow the proper procedures or apply sound planning principles to the application for a development permit, then the Commission must proceed to review the evidence before it to determine whether or not the application should succeed.

Section 9 of the Bylaw states in part:

> SECTION #9 - RESORT COMMERCIAL ZONE (RD4)
>
> *9.1 GENERAL*
>
> *Except as provided in this Bylaw, all buildings or structures or parts thereof erected, placed or altered or any land used in an RD4 zone shall conform with the provisions of this Section.*
>
> ...
>
> *9.9 SERVICING*
>
> *All developments within an RD4 zone shall either be serviced by central sewer services or shall require installation of an on-site sewage treatment system designed and certified by a qualified engineer licensed to practice in the Province.*

Section 2.25 of the Bylaw defines the term “Development”:

> *2.25 “Development” – means the carrying out of any building, engineering, excavation, dumping, filling or other operations in, on, over or under land, or the making of any material change in the use, or the intensity of use of any land, buildings, or premises without limiting the generality of the foregoing.*

While the Appellant argues that the proposed development is not a development as contemplated by section 9.9 of the Bylaw, but rather a transient or temporary use as considered under section 4.27 of the Bylaw, the Commission notes that the Appellant has applied for a development permit, not a permit for a transient or temporary use. Accordingly, the present appeal is limited to the Appellant's application and the Respondent's decision in response to that specific application. However, even if the Appellant had applied for a permit for a transient or temporary use, the Respondent appears to have the discretion, under sub-section 4.27(7) of the Bylaw, to deny a permit where in the opinion of the Respondent, the washroom facilities are not adequate.

The Commission has reviewed the Appellant's development permit application (Exhibit R7) for the proposed development and notes that it consists of an artificial climbing wall and a 12-foot by 12-foot building. This application also indicates that the purpose of the proposed building is to provide change rooms and washroom facilities consisting of two enclosed portable toilets. The Commission finds that the proposed development includes a “building” and “engineering” (artificial climbing wall) on or over the land. Furthermore, the proposed development can also be characterized as “operations” “on” or “over” land and a “material change in the use” or “intensity of use” of the land.

Accordingly, the Commission finds that the proposed development meets the definition of “Development” under section 2.25 of the Bylaw and therefore section 9.9 of the Bylaw applies to the proposed development.

The Appellant clearly indicated at the hearing that he was not challenging the validity of the Bylaw.

There is nothing before the Commission to suggest that the Respondent is not entitled to enact a bylaw, under the authority of the ***Act***, with stricter standards than the minimum requirements of a provincial

government department or body, such as Environmental Health (Exhibit R3). While the Respondent's bylaws must meet minimum provincial health standards, the bylaws may provide for stricter standards so that the Respondent may also meet the policies and objectives of its Official Plan. The Commission finds that the Respondent applied the Bylaw correctly when it denied the Appellant's application because this application did not comply with the requirements of section 9.9.

The Commission is not aware of any evidence to support a finding that the Respondent failed to apply sound planning principles when making its decision to deny the Appellant's application for the proposed development.

Since the Respondent applied its Bylaw correctly when it made the decision to deny the Appellant's present application for the proposed development, the Commission finds that this appeal must be denied.

4. Disposition

An Order denying the appeal will therefore be issued.

Order

WHEREAS the appellant Christopher MacDonald has appealed a decision made by the Resort Municipality of Stanley Bridge, Hope River, Bayview, Cavendish and North Rustico, dated April 17, 2001 to deny him a development permit for an artificial climbing wall and a 12-foot by 12-foot building;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on July 4, 2001 and July 18, 2001 after due public notice and suitable scheduling for the involved parties;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the ***Island Regulatory and Appeals Commission Act*** and the ***Planning Act***

IT IS ORDERED THAT

1. The appeal is denied.

DATED at Charlottetown, Prince Edward Island, this 16th day of August, 2001.

BY THE COMMISSION:

Wayne D. Cheverie, Q.C., Chair

Kathy Kennedy, Commissioner

Anne Petley, Commissioner

NOTICE

Section 12 of the ***Island Regulatory and Appeals Commission Act*** reads as follows:

> *12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written **Request for Review**, which clearly states the reasons for the review and the nature of the relief sought.

*Sections 13.(1) and 13(2) of the **Act** provide as follows:*

> *13.(1) An appeal lies from a decision or order of the Commission to the Appeal Division of the Supreme Court upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Supreme Court within twenty days after the decision or order appealed from and the Civil Procedure Rules respecting appeals apply with the necessary changes.*