

ISLAND REGULATORY AND APPEALS COMMISSION

BETWEEN:

MATT MACDONALD

Appellant

and

**MINISTER OF ENVIRONMENT, ENERGY
AND CLIMATE ACTION**

Respondent

**REPLY SUBMISSIONS OF THE RESPONDENT
ON THE QUESTION OF JURISDICTION**

The Appellant is challenging a decision made under the Moratorium

1. The Appellant misconstrues the Minister’s description of the Appellant’s position. Contrary to the Appellant’s assertion, the Minister does not argue that the Appellant is seeking to review or challenge the Moratorium itself.¹ Instead, the Minister argues that the Appellant is seeking to appeal a determination made under the Moratorium.²

¹ Appellant’s written submissions on the question of jurisdiction at para 7: “The Minister’s submission takes issue with the language used by the Appellant in challenging the Decision, suggesting that the Appellant is seeking to review environmental protection order [sic] rather than the denial of the permit application.” [emphasis added].

² Minister’s written submissions on the question of jurisdiction at para 35: “There is no provision in the regulations indicating that a decision relating to the interpretation and application of an extant order may be appealed to the Commission.” [emphasis added].

Keizer helps to illustrate the Minister's argument

2. The Appellant argues that, if the Commission had jurisdiction in *Keizer*, it must also have jurisdiction here.³ But this is not so. *Keizer* actually helps to illustrate why the Commission does not have jurisdiction in the instant case
3. In *Keizer*, the Minister decided not to issue a permit under the *Watercourse and Wetland Protection Regulations*. In making this decision, the Minister referred to a document other than the Regulations themselves. This other document was entitled "Watercourse and Wetland Alteration and Buffer Zone Policy".⁴ It was, as its name suggests, a simple statement of policy.⁵
4. There is a material difference between a policy and the Moratorium:
 - (a) A policy has no independent legal force. A policy merely sets out the Minister's interpretation of the rules located in the Act and the Regulations. Under the *Environmental Protection Act*, a person cannot be prosecuted for violating a policy *per se*.
 - (b) The Moratorium, by contrast, has independent legal force. The Moratorium sets out legal rules independent from those in the Act and the Regulations. Under the *Environmental Protection Act*, a person can be prosecuted for violating the Moratorium *per se*.⁶
5. The Commission had jurisdiction in *Keizer* because the true nature or essence of the appeal involved the interpretation of the Regulations with reference to the relevant statement of policy. By contrast, the Commission does not have jurisdiction here because

³ Appellant's written submissions on the question of jurisdiction at para 9.

⁴ [Mark Keizer v. Minister of Environment, Energy and Climate Action](#), 2023 PEIRAC 10 (CanLII) at para 54.

⁵ This policy is located at Tab 4c of the Record prepared by the Minister in appeal LEV22001. This record is accessible online at https://irac.pe.ca/wp-content/uploads/Record.Of_.Minister.Aug_.1.2022.pdf [Accessed 21 May 2024]

⁶ This point is addressed at paragraph 30 of the Minister's written submissions on the question of jurisdiction: "The Moratorium is not a mere policy statement or interpretive aid. It is, rather, a discrete legal instrument that sets out an enforceable legal prohibition."

the true nature or essence of the appeal is the interpretation and application of the Moratorium itself.⁷

Scope of appellate rights under the *Environmental Protection Act*

6. The Appellant asserts that the Minister presented an “incorrect characterization” of the appellate rights created by the *Environmental Protection Act*.⁸ In support of this assertion, the Appellant draws attention to the fact that the Minister’s submissions on the question of jurisdiction do not reproduce subsection 29.1(2) of the *Environmental Protection Act*.
7. But subsection 29.1(2) of the *Environmental Protection Act* allows a person to whom an order is issued to appeal the order itself:

Right of appeal to Commission

(2) A person to whom an environmental protection order is issued by the Minister or an environment officer under subsection 7(2) or 7.1(2) may, within 21 days from the date the environmental protection order is served on the person, **appeal the environmental protection order** by serving a notice of appeal on the Commission.

[emphasis added]

8. The Minister did not reproduce this provision because the Appellant did not provide any indication that he intends to attempt to appeal the Moratorium itself. The Appellant indicated, instead, that he intends to appeal a decision made by the Minister under the Moratorium:

⁷ The Commission also lacks jurisdiction because it does not have the authority to grant the relief sought by the Appellant: see paras 36 to 41 of the Minister’s written submissions on the question of jurisdiction.

⁸ Appellant’s written submissions on the question of jurisdiction at para 13.

After consulting my lawyer and engineer we are maintaining our position which is; I meet the requirements pertaining to exceptions under the current moratorium instituted by the Minister.⁹

Statement by Departmental employee

9. The Appellant notes that the Departmental employee who issued the decision of 28 September 2023 indicated that this decision could be appealed to the Commission.¹⁰ But this statement by the employee cannot confer jurisdiction on the Commission.
10. All parties agree that the Commission only has such jurisdiction as is granted to it by the Legislature.¹¹ The question is therefore whether the present appeal falls within the Legislature's grant of jurisdiction to the Commission. The parties, by their statements or otherwise, can no more confer jurisdiction than they can remove it.¹²

ALL OF WHICH is respectfully submitted this 21st day of May, 2024.



STEWART McKELVEY
65 Grafton St, Charlottetown,
PE C1A 1K8

Murray L. Murphy, KC, CPHR
J. Curtis Doyle

Telephone: 902.629.4558
Facsimile: 902.566.5283
mmurphy@stewartmckelvey.com
cdoyle@stewartmckelvey.com

**Counsel for the Minister of Environment,
Energy and Climate Action**

⁹ Email sent by the Appellant on 9 February 2024, which was appended to the Minister's written submissions on the question of jurisdiction.

¹⁰ Appellant's written submissions on jurisdiction at para 6.

¹¹ Appellant's written submissions on jurisdiction at para 11.

¹² See, for example, [Sedgwick v Edmonton Real Estate Board Co-Operative Listing Bureau Limited \(Realtors Association of Edmonton\)](#), 2022 ABCA 264 (CanLII) at 71.