

ISLAND REGULATORY AND APPEALS COMMISSION

BETWEEN:

MATT MacDONALD

APPELLANT

AND:

MINISTER OF ENVIRONMENT, ENERGY AND CLIMATE ACTION

RESPONDENT

**WRITTEN SUBMISSIONS ON THE QUESTION OF JURISDICTION
PREPARED ON BEHALF OF THE APPELLANT**

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Part I – Overview

1. These written submissions are filed in response to the submissions on the question of the jurisdiction of the Island Regulatory and Appeals Commission (the “Commission”) filed on behalf of the Minister of Environment, Energy and Climate Action (the “Minister”).
2. The Appellant respectfully submits that the Commission is granted the authority to hear this appeal by virtue of the *Environmental Protection Act*, RSPEI 1988, c E-9 (the “Act”) and the *Watercourse and Wetland Protection Regulations*, PEI Reg EC720/08 (the “Regulations”). Correspondingly, the Commission is also granted the authority to grant the relief sought by the Appellant through the Act and the Regulations.

Part II – The Record Read as a Whole

3. In determining whether the Commission has the statutory authority to hear and decide the issues raised by the Appellant, the Commission must “examine the record as a whole to ascertain the true nature or essence of the complaints raised by the Appellant.”¹ Through this investigation, the Commission must then “determine whether the appeal raises issues that fall within its jurisdiction to hear and decide.”²
4. The Appellant filed a notice of appeal on October 6, 2023, in response to a decision of the Minister dated September 28, 2023 (the “Decision”). The Appellant applied for a Watercourse, Wetland and Buffer Zone Activity permit. The Decision of the Minister communicated, in part, the following:

*Please be advised that the above-noted application for shoreline protection has been **DENIED**. The application has been denied because the moratorium was put in place to address concerns related to development in the coastal zone and the portion of your property on 3 Colonel Gray Drive falls under its guidance.*

5. The Appellant’s application for a permit was refused, based on the rationale that the moratorium issued on January 11, 2023, prohibited such work as was requested from being carried out.
6. It may be assumed that, at the time of the Decision, the Minister was of the opinion that the Decision was one that was appealable under the authority of the Act and the Regulations. The Decision advised that the denial of the Appellant’s permit application may be appealed to the Commission, specifically stating that:

Pursuant to Section 13 of the Watercourse and Wetland Protection Regulations, Environmental Protection Act, R.S.P.E.I. 1988, Cap. E-9 this decision of the Minister may be appealed to the Island Regulatory and Appeals Commission within 21 days of the receipt of this letter.

¹ *Brian R. MacKay v Minister of Agriculture and Land*, 2022 PEIRAC 2 (CanLII) at para 10.

² *Ibid* at para 13.

7. The Minister's submission on the question of jurisdiction argues that the environmental protection order issued on January 11, 2023, is a distinct legal instrument, separate from the Regulations. 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 rather than the denial of the permit application.
8. The Appellant submits that the heart of this appeal is the refusal by the Minister of the Appellant's permit application for shoreline protection. The application or interpretation of the moratorium was the stated rationale for the denial of the permit, but the Decision being appealed is the refusal of the Watercourse, Wetland, and Buffer Zone Activity Permit application that was filed by the Appellant on September 8, 2023.
9. Analogously in *Mark Keizer v Minister of Environment, Energy and Climate Action*, 2023 PEIRAC 10 (CanLII), Mr. Keizer's application for a Watercourse, Wetland and Buffer Zone Activity Permit was denied, with the Commission finding that the Minister's denial was based on the interpretation and application of a ministerial policy.³ There is no indication in the *Keizer* record that there was ever any question as to the Commission's jurisdiction to hear and decide the appeal of the permit refusal simply because the stated rationale for the decision came from a document separate from the Act or Regulations.
10. In the following section, these submissions will focus on the statutory framework that permits the Commission to hear and decide this appeal and grant the relief being sought by the Appellant. The sections of the Act and Regulations that grant the Commission the authority to hear and decide appeals on refusals of permits will be highlighted. If, in the alternative, the Commission is of the opinion that the true nature and essence of the Appellant's appeal relates to the environmental protection order, the section of the Act that grants the Commission the authority to hear and decide appeals on environmental protection orders is also included for the Commission's review.

Part III – The Commission has the Authority to Hear the Appeal

11. The Appellant agrees with the Minister that the Commission only has such jurisdiction as is granted to it by the Legislature.⁴ The Appellant, however, disagrees that the Minister's decision to refuse the Appellant's permit application is outside of the powers conferred on the Commission through the Act and the Regulations.
12. The Minister suggests that environmental protection orders enacted pursuant to sections 7 and 7.1 of the Act are unreviewable by the Commission as:

³ *Mark Keizer v Minister of Environment, Energy and Climate Action*, 2023 PEIRAC 10 (CanLII) at para 59 [Keizer].

⁴ The Minister's Written Submissions at para 28 citing *Clare Fagan v City of Summerside*, 2022 PEIRAC 2 (CanLII) at para 14.

*[Section 29.1 of the Environmental Protection Act provides that certain orders and decisions may be appealed to the Commission if the regulations so indicate. There is no provision in the regulations indicating that a decision relating to the interpretation and application of an extant order may be appealed by the Commission.]*⁵

13. The above is an incorrect characterization of the different rights of appeal available to aggrieved parties under the Act and the Regulations. The Minister's written submissions fail to include all pathways of appeal to the Commission. While the Minister includes subsections 29.1(3) and 29.1(4) of the Act, the Minister has not included subsection 29.1(2) in its written submissions. The three separate and distinct categories of appeal are:

Right of appeal to Commission

29.1(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.

Idem

29.1(3) A person to whom an order is issued by the Minister or an environment officer under the regulations may, within 21 days from the date the order is served on the person, appeal the order by serving a notice of appeal on the Commission, if the regulations indicate that the order may be appealed to the Commission in accordance with this section.

Idem

29.1(4) A person who is aggrieved by a decision of the Minister or of any officer or employee of the Department

(a) to refuse that person a permit, endorsement on a permit, variance, exemption or other authorization that may be issued under this Act or the regulations;

(b) to revoke or amend a permit, endorsement on a permit, variance, exemption or other authorization held by that person under this Act or the regulations; or

(c) to refuse to approve a management plan or a material stewardship plan proposed by that person under the regulations, or to revoke or amend a management plan or a material stewardship plan of that person after it was approved,

may, within 21 days from the date the decision is served on the person, appeal the decision by serving a notice of appeal on the Commission, if the regulations indicate that the decision may be appealed to the Commission in accordance with this section.

⁵ The Minister's Written Submissions at para 35.

14. The Appellant submits that the issue at the heart of this appeal is the Minister's refusal of a permit, which is appealable to the Commission pursuant to subsection 29.1(4) of the Act and the corresponding subsection 13(2)(a) of the Regulations. Subsection 13(2)(a) of the Regulations state:

Notice of appeal

(2) A person may, within 21 days of

(a) the refusal, revocation or amendment of a permit, grass headland variance, grass headland exemption, or authorization;

[...]

appeal the same by filing a notice of appeal with the Commission, in the form prescribed by the Commission.

15. The Act and the Regulations explicitly contemplate a right of appeal to the Commission on the issue raised by the Appellant as it relates to the Minister's Decision. The true essence of the issue raised by the appeal being a review of the Minister's refusal of a Watercourse, Wetland and Buffer Zone Activity permit.
16. If, however, the Commission is of the opinion that the issue at appeal is the environmental protection order enacted pursuant to sections 7 and 7.1 of the Act, the Commission would still have the jurisdiction to hear and decide appeals relating to environmental protection orders due to the jurisdiction granted to the Commission by subsection 29.1(2) of the Act.
17. The right of appeal found in 29.1(2) and its interpretation is, and must be, separate and distinct from the interpretations of 29.1(3) and 29.1(4), respectively. The Minister is conferred the power to enact an environmental protection order under sections 7 or 7.1 of the **Act**. Equally, the Commission is conferred the power to review an environmental protection order enacted pursuant to sections 7(2) and 7.1(2) by the provisions of the **Act**, not the Regulations. Subsection 29.1(2) indicates that an order made under the Act has a right of appeal that is born from the Act, independent of the Regulations.
18. The right of appeal found in 29.1(3) relates to an order made pursuant to the Regulations, not the Act. As such, the parameters of review are outlined within the Regulations. A review of the environmental protection order by the Commission does not require any indication from the Regulations as suggested by the Minister at paragraph 35 of its written submissions. The environmental protection order is reviewable by virtue of subsection 29.1(2) of the Act, as it was made pursuant to the Act, not the Regulations.
19. The Appellant submits that the Commission has the authority to hear and decide the Appellant's appeal by the jurisdiction granted within subsection 29.1(4) of the Act and subsection 13(2)(a) of the Regulations. If, in the alternative, the Commission is of the opinion that the environmental protection order is the essence of this appeal, then the Commission would still have jurisdiction to hear and decide an appeal of the environmental protection order pursuant to subsection 29.1(2) of the Act.

Part IV – The Commission has the Authority to Grant the Relief Requested

20. The Appellant is requesting that the Commission varies, or in the alternative, rescinds the decision or order being appealed. The Commission possesses the authority to make an order that grants the relief that the Appellant seeks through subsection 29.1(12) of the Act and subsection 13(5) of the Regulations. Specifically, those subsections state:

Environmental Protection Act

29.1(12) The Commission may vary, confirm or rescind the order or decision being appealed.

Watercourse and Wetland Protection Regulations

13(5) The Commission may vary, confirm, or rescind the decision being appealed.

21. The Commission is thus statutorily permitted to vary, confirm, or rescind an order or decision that is appealable under the provisions of the Act and is also statutorily permitted to vary, confirm, or rescind a decision that is appealable under the provisions of the Regulations. The relief sought by the Appellant is within the scope of the powers conferred on the Commission by the Legislature.


Part V – Conclusion

22. When reviewing a recent permit refusal of the Minister, the Commission in the *Keizer* order expressed its concern “about the appearance of arbitrariness and subjectivity that accompanies these discretionary permitting decisions.”⁶ It is thus imperative that these types of decisions of the Minister are transparent, reasonable, and reviewable.

23. While the Minister has taken the position that the Commission does not have the jurisdiction to hear and decide the appeal, the Minister has failed to submit that another forum would be more suitable. To argue that the interpretation of an order and its influence on the Minister’s decision makes that decision unreviewable by the Commission undermines the authority and framework conferred to the Commission by the Legislature.

24. The Appellant requests that the Commission proceeds with hearing and deciding this appeal, as it is statutorily enabled to do.

25. All of which is respectfully submitted this 15th day of May, 2024.



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⁶ *Keizer*, *supra* at para 60.