

**ISLAND REGULATORY AND APPEALS COMMISSION**

BETWEEN:

**MATT MACDONALD**

Appellant

and

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

Respondent

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**WRITTEN SUBMISSIONS**

**ON THE QUESTION OF JURISDICTION**

(Rule 41 of the Commission's *Rules of Practice and Procedure*)

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**PART I – PROCEDURAL BACKGROUND**

1. On 11 January 2023, the Minister issued an environmental protection order prohibiting, with certain exceptions, any new coastal or riparian development or erosion control activity in a legislated buffer zone (the “**Moratorium**”).
2. On 8 September 2023, the Appellant filed an application for a Watercourse, Wetland, and Buffer Zone Activity Permit in relation to a property on 3 Colonel Gray Drive.
3. On 28 September 2023, an employee of the Department of Environment, Energy and Climate Action issued a decision on the Appellant’s application. In this decision, the employee stated that the application was denied on the basis of the Moratorium:

*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.*

4. On 6 October 2023, the Appellant filed a notice of appeal from the decision of 28 September. In this notice of appeal, the Appellant indicates that he seeks the following relief from the Commission:

*We want the Minister to allow us to proceed with repairs of our shorefront protection at 3 Colonel Gray Drive.*

5. Between November 2023 and February 2024, the Commission asked the Appellant to clarify his ground or grounds of appeal. The Appellant indicated that his lawyer was preparing a response.
6. On 9 February 2024, the Appellant provided a response to the requests for clarity regarding his ground or grounds of appeal. In this response, the Appellant stated that, having consulted a lawyer, his position is that he meets the requirements for an exception under the Moratorium:

*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.<sup>1</sup>*

7. On 25 March 2023, the parties attended a pre-hearing conference. After this pre-hearing conference, the Minister gave formal notice of his intention to argue that the Commission lacks jurisdiction to hear this appeal.

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<sup>1</sup> Email from the Appellant dated 9 February 2024 [Tab 1 of these submissions].

**PART II - ISSUE**

8. The ultimate issue is whether the Commission has jurisdiction to hear this appeal. In order to resolve this issue, the Commission must answer two discrete questions:
  - (a) the first question is whether the Commission has statutory authority to hear and determine the issue raised by the Appellant; and
  - (b) the second question is whether the Commission has statutory authority to grant the order or relief sought by the Appellant.
9. For the reasons set out below, the answer to both of these questions is no. The Commission does not have statutory authority to hear and determine the issue raised by the Appellant, or to grant the order or relief sought by the Appellant. The Commission therefore lacks jurisdiction to hear this appeal.

### **PART III – ENACTMENTS**

10. It will be helpful to begin by reviewing the enactments that apply most directly to the matter at hand.

#### **A. The Island Regulatory and Appeals Commission Act**

11. The Commission is a statutory tribunal created by subsection 2(1) of the *Island Regulatory and Appeals Commission Act*.<sup>2</sup>

#### **B. The Environmental Protection Act**

12. The *Environmental Protection Act* grants the Minister broad powers “to manage, protect and enhance the environment”.<sup>3</sup>

13. Paragraph 1(s) defines “watercourse” as an area which has a sediment bed.

14. Paragraph 3(e) grants the Minister “exclusive” control over the quality, use, protection or alteration of watercourses.

15. Sections 7 and 7.1 grant the Minister the authority to issue an environmental protection order where the Minister believes on reasonable grounds that an act or omission may be a threat to the environment.

16. Section 29.1 provides that certain orders and decisions may be appealed to the Commission if a specific precondition is satisfied. More specifically, this section provides that certain orders and decisions may be appealed to the Commission “if the regulations indicate that the decision may be appealed to the Commission in accordance with this section.”

*(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.***

*(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;*

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<sup>2</sup> [Island Regulatory and Appeals Commission Act](#), RSPEI 1988, c I-11, s 2(1).

<sup>3</sup> [Environmental Protection Act](#), RSPEI 1988, c E-9, s 3(1).

- (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.***

[emphasis added]

17. Section 32 provides that it is an offence, punishable on summary conviction, to contravene a provision of the *Environmental Protection Act* or the regulations or an order made thereunder:

*(1) Any natural person who contravenes or violates*

- (a) any provision of this Act or the regulations; or*
- (b) any term, condition or provision of any order, including an environmental protection order, license, certificate, approval, permit, endorsement on a permit, permission or other authorization issued under this Act or the regulations,*

*is guilty of an offence and if no penalty is otherwise specifically provided in this Act or the regulations, is liable on summary conviction to a fine of not less than \$200 or more than \$10,000, or to imprisonment for 90 days, or to both, and to pay such restitution as the judge thinks fit to any person aggrieved or affected by the contravention or violation.*

...

[subsection 32(3) sets out similar provisions applicable to corporations]

### **C. The Watercourse and Wetland Protection Regulations**

18. The *Watercourse and Wetland Regulations* are made pursuant to section 25 of the *Environmental Protection Act*.<sup>4</sup>

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<sup>4</sup> [Watercourse and Wetland Protection Regulations](#), PEI Reg EC720/08.

19. Paragraph 1(1)(e) and subsection 3(5) provide that the term “buffer zone” means the 15-metre area next to a watercourse boundary or a wetland boundary.

*1(1)(e) “**buffer zone**” means the 15-metre-wide area referred to in section 3;*

...

*3(5) The land within 15 metres of a watercourse boundary or a wetland boundary referred to in subsections (3) and (4) shall be known as a buffer zone.*

20. Paragraph 1(1)(w) provides that “permit” means “a Watercourse or Wetland Activity Permit or a Buffer Zone *Activity* [*sic*] Permit granted pursuant to section 6, and includes an amended permit and a permit varied or confirmed by the Commission pursuant to section 13”.

21. Paragraph 3(4)(c) creates a prohibition on constructing buildings or structures, including erosion protection works, in a buffer zone. More specifically, this paragraph provides that no person, without a license or a permit, shall do any of the following in a buffer zone:

*construct or place, repair or replace, demolish or remove, buildings or structures or obstructions of any kind, including but not limited to bridges, culverts, breakwaters, dams, wharves, docks, slipways, decks, or flood or **erosion protection works**;*

*[emphasis added]*

22. Subsection 13(2) provides that a person may appeal to the Commission from a decision to refuse, revoke, or amend a permit:

*(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;*

*(b) the refusal of approval of a management plan; or*

*(c) the issuance of an emergency field order*

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

23. Subsection 13(5) sets out the authority of the Commission on an appeal under subsection 13(2). More specifically, this provision provides that the Commission may “vary, confirm or rescind” the decision being appealed.

**D. The Moratorium**

24. The Moratorium is an environmental protection order issued by the Minister under sections 7 and 7.1 of the *Environmental Protection Act*.<sup>5</sup>
25. The Moratorium prohibits any new development or erosion control activities in a buffer zone “by natural persons, corporations or municipalities owning coastal or riparian zone properties in Prince Edward Island.”
26. The Moratorium sets out the structures, persons, and corporations to which it does not apply. Most notably, the Moratorium provides that it does not apply to landowners who have existing infrastructure that is “critical” and that needs to be protected from erosion:

*This Order shall not apply to residential, commercial, institutional, or municipal landowners who have existing critical infrastructure (e.g. dwelling, business, water/wastewater systems, septic system, etc.) and need to protect it from coastal or riparian zone erosion*

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<sup>5</sup> Record at 172. This environmental protection order was published in the Royal Gazette on [4 February 2023](#).

## **PART IV – SUBMISSIONS**

27. The Commission lacks jurisdiction to hear this appeal. The argument in support of this conclusion proceeds in four main parts. The first part notes that the Commission, as a creature of statute, has no inherent jurisdiction. The second part explains that the Moratorium is a discrete legal instrument, separate and apart from the *Watercourse and Wetland Protection Regulations*, that sets out its own legal prohibition on erosion control activities. The third and fourth parts respectively demonstrate that the Commission has no authority to determine the issue raised by the Appellant or to grant the order or relief sought by the Appellant.

### **A. Jurisdiction of the Commission**

28. As a creature of statute, the Commission has no inherent jurisdiction. To the contrary, the Commission only has such jurisdiction as is granted to it by the Legislature.<sup>6</sup>

29. The Commission must consider two questions to determine whether it has jurisdiction to hear an appeal. First, the Commission must consider whether it has statutory authority to hear and determine the issue raised by the Appellant. Second, the Commission must consider whether it has statutory authority to grant the order or relief sought by the Appellant.<sup>7</sup> If the answer to either question is no, the Commission lacks jurisdiction to hear the appeal.

### **B. The Moratorium is a discrete legal instrument**

30. 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. This conclusion follows from a consideration of the following points.

- (a) First, as noted, the Moratorium is – in legal form – an environmental protection order. Under paragraph 32(1)(b) of the *Environmental Protection Act*, any person who contravenes the Moratorium is guilty of an offence punishable by summary conviction.
- (b) Second, the Moratorium does not incorporate by reference the prohibitions that are set out in the *Watercourse and Wetland Protection Regulations*. Instead, the Moratorium sets out its own prohibition on buffer zone development and coastal erosion activities. The wording of the prohibition in the Moratorium is similar, but not identical, to the wording of the prohibitions in the *Watercourse and Wetland Protection Regulations*.
- (c) Third, the Moratorium does not incorporate by reference the exemptions to the prohibitions set out in the *Watercourse and Wetland Protection Regulations*. In

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<sup>6</sup> See, for example, [Clare Fagan v. City of Summerside](#) (CanLII), 2022 PEIRAC 2 (CanLII) at para 14.

<sup>7</sup> [Canada \(Attorney General\) v. TeleZone Inc.](#), 2010 SCC 62 at para 44; [Brian R. MacKay v. Minister of Agriculture and Land](#) (CanLII), 2022 PEIRAC 3 (CanLII) at para 11. Technically, the Commission must also consider whether its statutory authority extends to the parties to the appeal (see [TeleZone](#) at para 44), but that question is not in issue here.



other words, the Moratorium does not provide that a license or permit issued under the *Watercourse and Wetland Protection Regulations* exempts its holder from compliance with the Moratorium. Instead, the Moratorium sets out its own exemptions to its own prohibition.

- (d) Fourth, the Moratorium directly addresses its own applicability to licenses and permits issued under the *Watercourse and Wetland Protection Regulations*. More specifically, the Moratorium – which was issued on 11 January 2023 – provides that it does not apply to licenses and permits issued before 1 December 2022. By inference, this means that the Moratorium does apply to licenses and permits issued after 1 December 2022. In other words, the holder of a license or permit issued after that date is not exempt from the additional requirement of complying with the Moratorium.

- 31. In summary, the Moratorium is a legal instrument unto itself. It is not derivative of the *Watercourse and Wetland Protection Regulations*. A person may be in compliance with one and yet in violation of the other.

**C. The Commission lacks authority to determine the issue raised by the Appellant**

- 32. The Commission must determine whether its statutory authority extends to the issue raised by the Appellant. In making this determination, it will not suffice for the Commission merely to examine the face of the decision identified by the Appellant in the notice of appeal. Instead, the Commission must review the record as a whole in search for the “true nature or essence of the appeal”.<sup>8</sup> This is the only way for the Commission to guard against hearing and deciding issues that fall beyond the Commission’s statutory authority.<sup>9</sup>

- 33. In the matter at hand, a review of the record as a whole indicates that the true nature or essence of the appeal relates to the proper interpretation and application of the Moratorium. This is evident from a consideration, in particular, of the following facts:

- (a) The Appellant’s original application to the Department invoked the language of the Moratorium, stating that the purpose of the proposed activity was to “Repair shore protection to protect critical infrastructure” (emphasis added).
- (b) The Department’s decision of 28 September 2023 expressly turned on the Department’s interpretation and application of the Moratorium, stating that the Appellant’s application was denied “because the moratorium was put in place to address concerns related to development”.
- (c) The Appellant’s ground of appeal expressly challenges the Department’s interpretation and application of the Moratorium, asserting that the Appellant “meet[s] the requirements pertaining to exceptions under the current moratorium instituted by the Minister”

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<sup>8</sup> [Brian R. MacKay v. Minister of Agriculture and Land \(CanLII\)](#), 2022 PEIRAC 3 (CanLII) at para 13.

<sup>9</sup> [Brian R. MacKay v. Minister of Agriculture and Land \(CanLII\)](#), 2022 PEIRAC 3 (CanLII) at para 15.

34. These facts, when considered with reference to the record as a whole, reveal the true nature or essence of the issue raised by this appeal. The Appellant is essentially asking the Commission to review and overturn a decision relating to the interpretation and application of an order issued by the Minister under sections 7 and 7.1 of the *Environmental Protection Act*.
35. The Commission does not have jurisdiction to hear and determine this issue. As noted, 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 to the Commission. In the absence of express statutory authority, the Commission does not have jurisdiction to determine this issue. This conclusion provides a sufficient basis for dismissing this appeal.

**D. The Commission lacks authority to grant the relief sought by the Appellant**

36. The Commission must also consider whether it has statutory authority to grant the relief or order sought by the appellant. If the Commission does not have such authority, it lacks jurisdiction to hear the appeal.<sup>10</sup>
37. The Appellant's notice of appeal sets out the relief that he seeks from the Commission in this appeal:

*We want the Minister to allow us to proceed with repairs of our shorefront protection at 3 Colonel Gray Drive.*

38. The Commission has no authority to grant this relief. The Commission cannot issue an order allowing the Appellant to proceed with erosion control activity at 3 Colonel Gray Drive. This conclusion provides a second, sufficient basis for dismissing this appeal. The reasoning in support of this conclusion is set out directly below.
39. As noted, there are presently two discrete legal instruments that prohibit erosion control activities in legislated buffer zones. First, there are the *Watercourse and Wetland Protection Regulations*, which prohibit any person without a license or permit from constructing or repairing erosion control works in a legislated buffer zone. Second, there is the Moratorium, which prohibits, with certain exceptions, any new development or erosion control activities in a buffer zone "by natural persons, corporations or municipalities owning coastal or riparian zone properties in Prince Edward Island." Under section 32 of the *Environmental Protection Act*, any person who contravenes the regulations or the Moratorium is guilty of an offence punishable on summary conviction.
40. This means that, in order for the Commission to grant an order allowing the Appellant to proceed with erosion control activities, the Commission would be required to issue an order that:

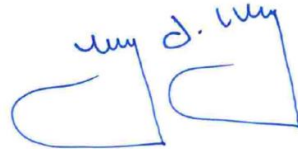
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<sup>10</sup> [Canada \(Attorney General\) v. TeleZone Inc.](#), 2010 SCC 62 at para 44; [Brian R. MacKay v. Minister of Agriculture and Land \(CanLII\)](#), 2022 PEIRAC 3 (CanLII) at para 11.

- (a) exempts, excepts or otherwise protects the Appellant from the prohibition in the *Watercourse and Wetland Protection Regulations*; and
  - (b) exempts, excepts or otherwise protects the Appellant from the prohibition in the Moratorium.
41. But the Commission has no statutory authority to issue an order that would exempt, except or protect the Appellant from the prohibition in the Moratorium. The Commission has no authority, for example, to order the Minister not to enforce the Moratorium. And even if the Commission were to grant the Appellant a license or permit under the regulations, that license or permit would not except the Appellant from the separate prohibition in the Moratorium. The relief sought by the Appellant is therefore beyond the statutory authority of the Commission.

**PART V – RELIEF SOUGHT**

42. For all of the foregoing reasons, the Minister respectfully requests an order dismissing this appeal in its entirety.

A handwritten signature in blue ink, appearing to read "Murray L. Murphy", written over a faint rectangular outline.

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**STEWART McKELVEY**

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PE C1A 1K8

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

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

**From:** [Philip Rafuse](#)

**Sent:** Friday, February 9, 2024 4:34:59 PM

**To:** [Curtis Doyle](#); [Murray Murphy](#)

**Cc:** 'Matt MacDonald'; [Jessica Gillis](#); [Michelle Walsh-Doucette](#)

**Subject:** Matt MacDonald v. Minister of Environment, Energy and Climate Action LEV23001

**Sensitivity:** Normal

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**This is an external email.**

Good afternoon,

Below please find an email from the Appellant.

Sincerely,

Philip



Philip J. Rafuse, LL.B.

Appeals Administrator

T. 902.892.3501

D. 902.368.7850

1.800.501.6268

F. 902.566.4076

[irac.pe.ca/about/contact/](http://irac.pe.ca/about/contact/)

**From:** Matt MacDonald <[matt\\_macdonald@hotmail.com](mailto:matt_macdonald@hotmail.com)>

**Date:** February 9, 2024 at 12:45:13 PM AST

**To:** Philip Rafuse <[PJRafuse@irac.pe.ca](mailto:PJRafuse@irac.pe.ca)>

**Subject:** Appeal

Mr. Rafuse,

I am writing in response to the Minister's request for clarification regarding my appeal to protect my property.

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.

As all parties are aware. The Department has already acknowledged this, in writing, to me personally (correspondence with the Department has been provided).

Further more, I have made several requests to the Department for information pertaining to other exceptions that have been granted under the moratorium. I have yet to receive a response from the Department. The reason for this stems from the fact, that our licensed contractor has made it very clear that many similar applications have been approved and work completed.

From an engineering perspective, it is wholly known to all parties that every single other property along the public access slip, within the estuary has had enhanced protection. This creates an added layer of necessity to carryout improvements to my shore protection, as my property has been placed further at risk.

I would very much like the Department to honour our agreement. I am requesting a permit to protect my property and the critical infrastructure(both public and private) within it.

Regards,

Matt MacDonald

Sent from my iPhone

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