PRINCE EDWARD ISLAND
Regulatory & Appeals Commission
Commission de réglementation et d'appels
ÎLE-DU-PRINCE-ÉDOUARD

Date Issued: February 17, 2022
Docket: LW20001
Type: Roads Act Appeal

INDEXED AS: Jaycee Sabapathy and David Sabapathy v. Minister of Transportation, Infrastructure and Energy

Order No: LW22-001

BETWEEN:

Jaycee Sabapathy and David Sabapathy

Appellants

AND:

Minister of Transportation, Infrastructure and Energy

Respondent

ORDER

Panel Members:

J. Scott MacKenzie, Q.C. Chair
M. Douglas Clow, Vice-Chair
Erin T. Mitchell, Commissioner

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Philip J. Rafuse,
Appeals Administrator
Prince Edward Island Regulatory & Appeals Commission

1. INTRODUCTION

1. On March 5, 2020, Jaycee Sabapathy and David Sabapathy (the "Appellants") filed a notice of appeal under s. 12(1) of the *Highway Access Regulations*[1] with the Commission seeking to challenge a decision by the Minister of Transportation, Infrastructure and Energy (the "Minister") to deny an entrance way permit for PID No. 529461 (the "Property") located on the East Suffolk Extension Road (the "Road") in the settlement of Suffolk, Prince Edward Island.

2. BACKGROUND

2. The Appellants own the Property, and the Property abuts the Road. The Appellants applied to the Minister for an entrance way permit so that they could develop the Property. The Minister denied the entrance way permit and considered the matter closed on February 20, 2020.

3. On May 13, 2021, staff at the Commission facilitated an alternative dispute resolution process with the parties in an effort to resolve the matter or, failing resolution, to narrow the issues on appeal. The parties were not able to resolve the matter.

4. On June 16, 2021, the appeal was heard by the Commission. A decision was reserved following the hearing.

3. WITNESSES

5. The Appellants called one witness at the hearing, David Morris ("Morris").

6. Morris described the distances listed in the *Regulations* as "the limiting factor."[2] Morris also stated generally that, when speaking about the end of a road in practice, it relates to the end of the asphalt as opposed to the end of the legal boundary of the road.[3] In other words, reliance was placed on "the physical evidence on the ground."[4] Morris was clear, however, that the classification of highways is not a decision made by a surveyor.[5]

7. When asked what was meant by the phrase "end of the road" in this particular case, Morris stated that it had to mean the statutory definition of the word "road" and its legal boundaries.[6] In his view, the Road is classified as follows: local class 2 is the paved portion; local class 3 is the next 200 metres; and the remainder is seasonal.[7] In other words, based on his investigation and field work, the portion of the Road abutting the Property is a seasonal highway. Morris also stated that the portion of the Road abutting

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[1] P.E.I. Reg. EC580/95 [*Regulations*].
[2] Transcript at 54.
[3] Transcript at 54.
[4] Transcript at 55.
[5] Transcript at 56.
[6] Transcript at 81.
[7] Transcript at 83-84.

the Property exceeds the standard of other existing roads that have been classified as seasonal.[8]

8. Morris was asked about a road status report that he prepared in 2011. The report included the Road. At that time, Morris classified the portion of the Road abutting the Property as non-essential and not seasonal. However, Morris explained that he was not able to do field work in 2011 as a result of snow and that he "relied on the [*Regulations*] at the time."[9]

9. Morris told the Commission that discretion forms part of the application of the *Regulations*.[10] This discretion was said to have a number of roots, including the physical evidence on the ground, the tolerances related to measurement, the text of the *Regulations*, and other documents like maintenance records. Morris also expressed the view that the *Regulations* were not accurate for a number of reasons, including the manner of measurement, and he agreed that the *Regulations* needed a full assessment.[11]

10. Counsel for the Minister called one witness at the hearing, Alan Aitken ("Aitken").

11. Aitken stated that non-essential highways are unpaved highways that are not listed in the *Regulations*.[12] He stated that all roads listed in Schedule D of the *Regulations* are seasonal highways and, while other roads may look like a seasonal highway or be similar to a seasonal highway, they are non-essential highways if they are not found in the *Regulations*.[13]

12. Aitken stated that the Property is located on a non-essential highway because it is located beyond 1.1 kilometres, being the total of the distances listed in the *Regulations* for the Road.[14] According to Aitken, in reviewing the history of classification for the Road, there was a 0.2 kilometre portion of the Road classified as local class 3 but that portion was later paved.[15] The local class 3 portion of the Road therefore did not really exist anymore.[16] According to Aitken, the seasonal portion of the Road stops 1.1 kilometres from the intersection of the Road and Route 229.[17] Under cross-examination, Aitken confirmed that, in making this determination, he took "into account the qualifier of the distance measurement."[18] Aitken also confirmed that there is some degree of discretion or variation involved in determining the 1.1 kilometre distance.[19] While Aitken agreed that the survey prepared by Morris defined the legal boundaries

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[8] Transcript at 91-93. See also Transcript at 100.
[9] Transcript at 87.
[10] Transcript at 68.
[11] Transcript at 63.
[12] Transcript at 136.
[13] Transcript at 136.
[14] Transcript at 148.
[15] Transcript at 151-152.
[16] Transcript at 152.
[17] Transcript at 173.
[18] Transcript at 221.
[19] Transcript at 210.

of the Road, it did not, according to Aitken, clarify or define the classifications of the Road.[20]

13. Aitken told the Commission that he attended the site and considered the *Regulations* in order to make his decision.[21] Aitken also confirmed that there are no standards for seasonal highways and they are reviewed on a case-by-case basis.[22] Relevant considerations include the maintenance of the road, its width, and the quality of the road.[23] Aitken further noted that changes in the classification of highways are submitted to Executive Council for review and approval.[24]

4. SUBMISSIONS

14. In their notice of appeal and submissions to the Commission, the Appellants seek three main remedies from the Commission:

    (a) First, they ask the Commission to order that an entrance way permit be granted by the Minister.

    (b) Second, they ask the Commission to determine the classification of the portion of the Road that abuts the Property.

    (c) Third, they ask the Commission to review and determine the validity of an unsigned agreement which was proposed by the Minister in relation to the development and maintenance of the Road. The agreement had been proposed by the Minister in an effort to resolve this matter.

15. Only the first remedy is one that may be granted by the Commission. The appellate jurisdiction of the Commission is limited to determining whether the decision made by the Minister to deny an entrance way permit was procedurally fair and supported by the *Regulations*. The other remedies sought by the Appellants are outside the jurisdiction of the Commission.

16. In his submissions to the Commission, the Minister advances three main arguments before the Commission:

    (a) First, the Minister argues that the Commission has no jurisdiction to determine whether an entrance way permit ought to have been granted for the Property because the Minister had no discretion to issue a permit in this case. Section 36 of the *Regulations* prohibited the Minister from granting an entrance way permit for a non-essential highway.

    (b) Second, the Minister argues that the Commission has no jurisdiction to order the classification of a highway, including the Road in this case.

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[20] Transcript at 226.
[21] Transcript at 166.
[22] Transcript at 167-168.
[23] Transcript at 168-169.
[24] Transcript at 179. See also Transcript at 206.

(c) Third, the Minister argues that the Commission, when it does have an appeal that falls within its jurisdiction, it is limited to considering whether the Minister erred in the determination of the available safe stopping sight distance.[25]

17. The Commission agrees with the first and second arguments advanced by the Minister. The classification of highways falls under the jurisdiction of the Lieutenant Governor in Council and not the Commission. However, for the reasons that follow, the Commission is not persuaded by the third submission advanced by the Minister.

5. ISSUES

18. This proceeding before the Commission raises two main questions. The first question relates to the statutory authority of the Commission as an appeal body. The Minister has put in issue the scope of the jurisdiction granted the Commission by s. 12 of the *Regulations*. The second question relates to the merits of the decision made by the Minister in this particular case and whether that decision was supported by the *Regulations*.

6. DISPOSITION

19. For the reasons that follow, the appeal is dismissed. There is no appeal to the Commission under s. 12(1) of the *Regulations* when the Minister has no discretion to issue an entrance way permit. In this case, the Minister was expressly prohibited from granting an entrance way permit. The portion of the Road which abuts the Property is classified as a non-essential highway. The Commission does not have the legal authority to order the classification or reclassification of highways. That authority rests with the Lieutenant Governor in Council. The decision by the Minister to deny an entrance way permit to the Appellants for the Property was also supported by the *Regulations*.

20. However, the appellate jurisdiction of the Commission under the *Regulations* is not limited to considering only whether the Minister erred in the determination of the available safe stopping sight distance. The Commission may hear and decide questions of fact, law, and procedural fairness that arise from a discretionary decision by the Minister to grant or deny an entrance way permit under the *Regulations*. Subsection 12(2) of the *Regulations* limits the grounds of appeal only in cases where the Minister makes his decision pursuant to s. 4 of the *Regulations*. The text, context, and purpose of the *Regulations* support this interpretation by the Commission.

7. ANALYSIS

Classification of highways

21. Much of the evidence placed before the Commission by the parties focused on whether the portion of the Road abutting the Property ought to be classified as a seasonal highway. However, the Commission has no jurisdiction to classify a highway. Section 29(1) of the *Roads Act* states the Lieutenant Governor in Council has the

[25] Written Submissions of the Minister dated September 17, 2020 at paras. 15-16.

exclusive jurisdiction to designate and classify any highway.[26] It is therefore not open to the Commission to designate and classify the Road based on the evidence. The Commission must respect the text of the *Roads Act* and the *Regulations*.

Appellate jurisdiction of the Commission

22. A right to appeal to the Commission is defined by statute or regulation. In other words, if the Commission has not been given appellate jurisdiction by the Legislature or the Lieutenant Governor in Council, then the Commission does not have it. As the Commission has said many times, it is a creature of statute and without inherent jurisdiction.[27]

23. Subsection 12(1) of the *Regulations* states that, when the Minister has discretion to issue an entrance way permit, the decision of the Minister may be appealed to the Commission:

> *12.(1)* ***Where the Minister has discretion to issue an entrance way permit pursuant to these regulations****, a decision of the Minister may be appealed to the Island Regulatory and Appeals Commission, by the applicant.* [emphasis added]

In summary, where there is discretion in the *Regulations* to grant an entrance way permit, an exercise of that discretion can be appealed to the Commission.

24. When the Minister made his decision in this case, s. 36 of the *Regulations* stated as follows:

> *36.* ***The Minister shall not issue an entrance way permit*** *to authorize placement of a new entrance way or a change of use of an existing entrance way* ***to a non-essential highway****.* [emphasis added]

25. The effect of former s. 36 of the *Regulations* was to expressly prohibit the Minister from issuing an entrance way permit for a non-essential highway. When a highway was designated and classified as a non-essential highway, the Minister had no legal authority to grant an entrance way permit by virtue of s. 36 of the *Regulations*. The word "shall" was mandatory in this particular provision. The Minister was therefore subject to an express prohibition under the *Regulations*.

26. When read together, ss. 12(1) and 36 of the *Regulations* result in the Commission having no jurisdiction to hear and determine this appeal. The Minister was specifically prohibited from issuing an entrance way permit. There was no discretion. The decision was therefore not one that could be appealed to the Commission pursuant to s. 12(1) of the *Regulations*.

27. The interpretation of other provisions in the *Regulations* in light of s. 12(1) of the *Regulations* is not presently before the Commission. The *Regulations* and their inconsistent use of the words "may" and "shall" – sometimes in the same provision – are not a model of clarity in regulatory drafting. Nevertheless, in this case, s. 36 of the *Regulations* was a clear and express prohibition on the Minister.

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[26] R.S.P.E.I. 1988, c. R-15.

[27] See e.g. Order LW01-01 and Order LW01-02.

Interpretation of the *Regulations*

28. Notwithstanding the express prohibition placed on the Minister in this case, the parties made lengthy submissions to the Commission regarding the interpretation of the *Regulations*. The words at issue between the parties appear dozens and, in some cases, hundreds of times in the *Regulations*. For this reason, and in the interest of improving consistency in the application of the *Regulations* throughout the province, the Commission has exercised its discretion to address these submissions.

29. Section 17 of the *Regulations* provides that, when an unpaved highway is not designated under the *Regulations*, it is deemed to be a non-essential highway:

> *17. **All unpaved highways or parts thereof not designated** as local highways, scenic heritage roads or seasonal highways **are designated as non-essential highways.*** [emphasis added]

30. In this case, the Road was the subject of four different provisions found in the schedules of the *Regulations*. At the relevant time, those provisions read as follow:

> ***Schedule C-2, Local (Class 2) Highways:***
>
> *1(138.1) East Suffolk Extension Road RI32012: The portion of the East Suffolk Road **commencing at the intersection of Route 229 in the settlement of Suffolk, to the end of the pavement.*** [emphasis added]
>
> *Schedule C-3, Local (Class 3) Highways:*
>
> *1(214.1) East Suffolk Extension Road RI32012: The portion of the East Suffolk Road commencing at a point 0.5 km from the intersection of Route 229, for a distance of 0.2 km.*
>
> *Schedule D, Seasonal Highways:*
>
> *1(214.1) East Suffolk Extension Road RI32012: The portion of the East Suffolk Road commencing at a point 0.5 km from the intersection of Route 229, for a distance of 0.2 km.*
>
> ***Schedule D, Seasonal Highways:***
>
> *1(216) East Suffolk Extension Road RI32012: The East Suffolk Extension Road in the settlement of Suffolk **commencing at a point 0.7 km from the intersection of Route 229 to the end of the road, a distance of 0.4 km.*** [emphasis added]

31. The existence of the identical provision – s. 1(214.1) – in Schedule C-3 and Schedule D of the *Regulations* was the subject of some discussion at the hearing. According to Aitken, the 0.2 kilometre portion of the Road designated as local class 3 was paved in or around 2008 and therefore now forms part of the local class 2 highway designated by s. 1(138.1) in Schedule C-2. In the words of Aitken, the local class 2 highway extends to "the end of the pavement" as per s. 1(138.1). This explanation appears to the Commission to be supported by the measurements recorded in s. 1(214.1) of Schedule C-3 and s. 1(216) of

Schedule D. The surrounding text and context also support this interpretation of the relationship between s. 1(214.1) in Schedule C-3 and s. 1(138.1) in schedule C-2. Section 15 of the *Regulations* describes highways in local class 3 as being "unpaved" and highways in local class 2 as being "paved".

32. Aitken further explained that the presence of s. 1(214.1) in Schedule D was an error confirmed by the Legislative Counsel Office which maintains the *Regulations*. Morris had first identified this error for the Minister and his staff. There was no material dispute between the parties that this duplication was in fact an error, and the Commission accepts this evidence.

33. The main interpretative question before the Commission was the construction of the provisions in the *Regulations* applicable to the Road and, in particular, s. 1(216) in Schedule D. In order to answer this question, the Commission has considered the text, context, and purpose of the provision. For the reasons that follow, the Commission concludes that the seasonal portion of the Road begins at a point 0.7 kilometres from the intersection of Route 229 and continues for 0.4 kilometres or to a point that is 1.1 kilometres from the intersection of Route 229. The portion of the Road that abuts the Property is therefore not a seasonal highway. By the application of s. 17 of the *Regulations*, the Property fronts on a non-essential highway.

(a) First, the purpose of the *Regulations* is to designate and classify the highways in Prince Edward Island. Absent a designation and classification, a highway is deemed to be non-essential. These classifications result in different rights and restrictions in relation to access as well as other statutory limitations in the *Roads Act*, including those around maintenance and liability. Classification is an exercise assigned to the Lieutenant Governor in Council and not the Commission. The Commission must therefore interpret the text used in the *Regulations*.

(b) Second, the text and context of the *Regulations* reveals that the Lieutenant Governor in Council sometimes uses geographic locations or physical characteristics to define the classifications, such as an intersection, the end of the pavement, or the end of the road. The words "pavement" and "road" are not specifically defined in the *Regulations* or the *Roads Act*. The boundaries of these classifications will therefore depend upon hearing evidence from the site or field. In this case, s.1(138.1) in Schedule C-2 states that the local class 2 classification terminates at "the end of the pavement." That point is not in dispute for the purpose of this appeal. The Property does not abut the paved portion of the Road.

(c) Third, the text and context of the *Regulations* also reveals that the Lieutenant Governor in Council sometimes uses points and measurements to define the classifications, such as a point measured from an intersection or a distance of a certain number of kilometres. The boundaries of these classifications will therefore depend upon hearing evidence about these specific distances. In this case, s. 1(216) in Schedule D states that the seasonal classification commences at a point that is 0.7 kilometres from the intersection of Route 229 and terminates at "the end of the road, a distance of 0.4 [kilometres]." The end of the classification is therefore 1.1 kilometres from the intersection. There is

no dispute that the Property is not located within 1.1 kilometres of the intersection of Route 229.

(d) Fourth, the parties disagreed as to the meaning of the words "the end of the road, a distance of 0.4 [kilometres]" in s. 1(216) in Schedule D. The Appellants placed emphasis on the words "the end of the road" to extend the classification according to the evidence of Morris. The Minister placed emphasis on the words "a distance of 0.4 km" to extend the classification to a point that is 1.1 kilometres from the intersection of Route 229. The Commission reads the words together and as a whole. A measured distance is being used to describe "the end of the road." Legal meaning must be given to all of the words used and, when that is done, it is clear that the seasonal classification begins at a point (0.7 kilometres from the intersection of Route 229) and ends at another point (0.4 kilometres from the commencement point or 1.1 kilometres from the intersection of Route 229). In other words, the measured distance of 0.4 kilometres clarifies or particularizes what is intended by the words "end of the road" as that undefined phrase applies to this particular Road. As both Morris and Aitken stated in their evidence, the measurement is a "limiting factor" or "qualifier."

34. Returning to the record, the Commission finds that the Property does not abut the portion of the Road between 0.7 kilometres and 1.1 kilometres from the intersection of Route 229. Beyond the distance of 1.1 kilometres, the Road is not classified in the schedules of the *Regulations*. The portion of the Road abutting the Property is therefore a non-essential highway by operation of s.17 of the *Regulations*.

Updating the *Regulations* and revisiting the classification of the Road

35. The Commission heard evidence from two experienced professionals, Morris and Aitken, about numerous problems with the *Regulations* in terms of errors, inconsistencies, and variations in the language used to classify highways. The rule of law demands that statutes and regulations be accessible to the public and consistent in their application. The Commission urges the Minister to redouble his efforts to improve and modernize the *Regulations*.

36. The Commission also heard evidence from Morris and Aitken as to the standards, or lack thereof, used to classify roads as seasonal highways under the *Regulations*. There was further evidence at the hearing about access being granted to the Road from other points beyond the distance of 1.1 kilometres from the intersection of Route 229, including a property that is apparently used for excavating shale. Lastly, Aitken confirmed to the Commission that he is responsible for making recommendations to the Lieutenant Governor in Council about the reclassification of highways.

37. In light of this evidentiary record, the Commission encourages the Minister and his staff to closely re-examine the Road after the winter season to ensure that it is properly and accurately classified. While the authority to designate and classify highways rests with the Lieutenant Governor in Council, the Commission did not observe much appreciable difference between the quality of the Road at the point of 1.1 kilometres and other points beyond, including the portion of the Road passing by the Property and serving the excavation pit

Grounds of appeal and safe stopping distances

38. While the Commission was without jurisdiction to determine this particular appeal, it does wish to address one submission made by the Minister that has the potential to impact all future appeals to the Commission under the *Regulations*. The Minister submitted that the authority of the Commission to review decisions made by the Minister under the *Regulations* is limited, by virtue of s. 12(2) of the *Regulations*, only to errors in the determination of available safe stopping sight distance. Subsection 12(2) of the *Regulations* reads as follows:

> *12.(2) For greater certainty,* ***where the Minister makes a decision pursuant to section 4****, there is no appeal to the Island Regulatory and Appeals Commission on any grounds other than* ***an error in the determination of available safe stopping sight distance****.* [emphasis added]

39. The Commission does not accept this submission by the Minister for the following reasons.

40. First, it does not reflect the text, context, and purpose of s. 12 of the *Regulations*. The statutory right of appeal is found in s. 12(1), and it extends broadly to decisions when the Minister has discretion "to issue an entrance way permit pursuant to [the] [R]egulations." The purpose of this grant is to ensure that applicants affected by decisions made by the Minister have access to a meaningful right of appeal by the Commission. A limitation is placed on this right of appeal in s. 12(2), but that limitation applies only when the Minister makes "a decision pursuant to section 4" of the *Regulations*.

41. The drafter of the *Regulations* chose different language to define the limitation on the right of appeal. Subsection 12(2) does not speak of having "discretion to issue an entrance way permit pursuant to the *Regulations*" or "a decision pursuant to the *Regulations*." Rather, s. 12(2) of the *Regulations* is limited by its text to "a decision pursuant to section 4." The Minister may refuse an entrance way permit on a number of grounds in the *Regulations* other than those listed specifically in s. 4 of the *Regulations*. If the drafter intended that every appeal to the Commission be limited to errors in the determination of safe stopping sight distance only, then the text of s. 12(2) of the *Regulations* would require amendment in order to express that intention clearly.

42. Second, it is not supported by the *Regulations* when read as a whole. The Minister may refuse an entrance way permit for a number of reasons or grounds in the *Regulations* other than those listed specifically in s. 4 of the *Regulations* (see e.g. ss. 20(1)(a)-(f), 21.3(1)(a)-(d), 21.3(1.1), 21.3(2), 24(a)-(b), or 37(2)(a)-(c) of the *Regulations)*. When those other grounds are invoked by the Minister, s. 12(1) of the *Regulations* makes the decision subject to appeal to the Commission. When the Minister makes a decision based on s. 4 of the *Regulations*, s. 12(2) of the *Regulations* limits the grounds of appeal to an error in the determination of safe stopping sight distance. For example, s. 20(1) of the *Regulations* states that the Minister has the discretion to issue an entrance way permit for a certain portion of an arterial highway; however, it continues and states that no permit can be issued where grounds (a)-(f) are present. A decision made by the Minister pursuant to s. 20 of the *Regulations* involves a measure of discretion and is subject to appeal under s. 12(1) of the *Regulations*.

43. If the interpretation presented by counsel for the Minister was adopted, an applicant denied an entrance way permit on a scenic heritage road because the Minister was not satisfied that one of the grounds in ss. 37(2)(a)-(c) of the *Regulations* were present would be without any meaningful grounds of appeal. When read as a whole, the *Regulations* evince an intention to limit the statutory grounds of appeal only when the Minister has made a decision pursuant to s. 4 of the *Regulations*. Decisions made pursuant to other provisions in the *Regulations* are not so limited.

44. In summary, when the Minister has some discretion to issue an entrance way permit pursuant to the *Regulations*, the decision made by the Minister may be appealed to the Commission. In cases where the Minister makes that decision pursuant to s. 4 of the *Regulations*, the statutory grounds for that appeal are limited to an error in the determination of the available safe stopping sight distance. In cases where the Minister makes the decision pursuant to other provisions in the *Regulations*, the statutory grounds of appeal are not so limited. This interpretation best reflects the text, context and purpose of the *Regulations*, which includes a statutory right of appeal that is intended to be meaningful for applicants affected by decisions made by the Minister under the *Regulations*. It is also an interpretation which gives meaning to all of the textual choices made by the drafter of the *Regulations*.

45. The Commission thanks the parties for their submissions in this matter.

IT IS ORDERED THAT

1. The appeal is hereby dismissed.

DATED at Charlottetown, Prince Edward Island, Thursday, February 17, 2022.

BY THE COMMISSION:

(sgd) J. Scott MacKenzie

J. Scott MacKenzie, Q.C., Chair

(sgd) M. Douglas Clow

M. Douglas Clow, Vice-Chair

(sgd) Erin T. Mitchell

Erin T. Mitchell, Commissioner