NOVA SCOTIA COURT OF APPEAL
Citation: ***Paradise Active Healthy Living Society v. Nova Scotia (Attorney General)***, 2013 NSCA 9

Date: 20130123
Docket: CA 393959
Registry: Halifax

Between:

Paradise Active Healthy Living Society (PAHLS)

Appellant

v.

The Attorney General of Nova Scotia representing
Her Majesty the Queen in Right of the Province of Nova Scotia

Respondent

Judges:	Oland, Beveridge and Bryson, JJ.A.
Appeal Heard:	November 20, 2012, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Oland, J.A.; Beveridge and Bryson, JJ.A. concurring
Counsel:	W. Dale Dunlop and Ian Gray (Articled Clerk), for the appellant Alexander M. Cameron, for the respondent

Reasons for judgment:

[1] The appeal concerns the development and use of a rail bed on Crown lands which runs through the village of Paradise in Annapolis County. The Paradise Active Healthy Living Society ("PAHLS") appeals the order of Coughlan, J. issued on May 3, 2012 which dismissed its application for certain declaratory relief. The Province has filed a Notice of Contention setting out additional grounds to uphold the order. For the reasons which follow, I would dismiss the appeal.

[2] In his decision reported as 2012 NSSC 99, the judge set out the facts which led to the application before him. I will recount only the most relevant particulars.

[3] In 2002, the Province obtained title to an abandoned railway corridor in the Counties of Annapolis, Digby and Yarmouth. The Annapolis Country Trails Society ("ACTS") applied to the Province for a letter of authority to develop and maintain that rail bed as a continuous multi-use trail extending from the Kings County line to the Digby County line, which would encompass Annapolis County. The trail would be open to use by all-terrain vehicles and snowmobiles.

[4] ACTS followed the Province's Rails to Trails policy which sets out a trail planning process to be followed by trail proponents. The policy includes, among other things, public consultation and meetings. During that process, it became evident that there was a divide between those who favoured motorized use and those who did not. Many from Paradise came forward to oppose a motorized trail in their community. These included landowners who live adjacent to the railway corridor.

[5] In a letter dated August 23, 2005, the then-Minister of the Department of Natural Resources stated that if ACTS was approved to develop the trail, it would be with the provision that the section in Paradise be non-motorized. In January 2006, he gave a two-year time frame for development of an alternate route which could be used by ATVs and snowmobiles. None was identified. So in January 2008 the Province erected barriers and posted signs prohibiting the use of motorized vehicles in the portion of the rail bed within Paradise.

[6] ACTS did obtain a letter of authority on October 28, 2005. However, it was only for a 15.4 km portion of the railway corridor to the east of Paradise. The letter of authority did not include any of the rail bed within Paradise or beyond.

[7] The matter remained highly contentious. Proponents of a motorized trail continued their efforts. PAHLS was incorporated in 2008. One of its purposes was the promotion of opportunities that encourage activities which rely solely on personal effort, such as walking, jogging, cycling and cross-country skiing. PAHLS notified the Province that it intended to apply for a letter of authority for non-motorized use of the trail within Paradise.

[8] The Premier at the time wrote to the Minister that he had given his word to the MLA for Annapolis County that the issue would be re-opened. The Province hired Jim Neale of Peak Performance Consulting Services towards resolving the use of the railway corridor through Paradise. He proposed community consultation sessions in the Paradise Community Centre with adjacent landowners, individuals who support motorized use, individuals who were against such use, and members of the broader community not represented by any of those interest groups. But in the end, Mr. Neale did not consult with those who opposed motorized use. On the advice of its counsel, PAHLS refused to participate in the process which it considered unfair. As a result, no one came to the session the consultant arranged for those against motorized use. Various property owners, including a number of adjacent landowners, did sign statements opposing motorized use, which were provided to Mr. Neale. However, the consultant had advised PAHLS' counsel repeatedly that if the group boycotted the meetings, their voice would be absent from his report.

[9] The report Peak Performance delivered to the Province stated that a clear majority of participants had opted for immediate opening of the rail corridor in Paradise and working to develop a multi-use trail. On October 8, 2008 the Province removed the barriers and the signs that had posted that section as non-motorized.

[10] PAHLS applied to the court for a determination of the legal status of the rail bed in Paradise and sought an order in the nature of declaratory relief. Following a summary judgment application by the Province and the withdrawal by PAHLS of one issue, the initial six issues were reduced to three.

[11] Before the judge, the first two issues were framed thus:

> 1. Did a consultation conducted by the Department of Natural Resources leading up to the grant of a Letter of Authority to the Annapolis County Trails Society constitute a

> legal process that determined the future usage of that portion of an abandoned rail bed that runs through the village of Paradise?
>
> 2. What is the legal status of the consultation conducted by the Department of Natural Resources after the grant of the Letter of Authority referred to above and did such consultation follow the policy guidelines established for rails to trails?

[12] The oral and written submissions PAHLS made to the judge in support of its application for declaratory relief pointed to the lobbying by motorized use proponents and political pressures that led to reconsideration of the initial decision to close that portion of the trail to motorized use. They also alleged exclusion in the period up to the consultative process conducted by Mr. Neale, and inherent unfairness in that process as designed.

[13] The judge's decision with respect to the first two issues did not delve into those submissions. Instead, the judge focussed on the Province's rights as a landowner. With respect to the first issue, he wrote:

> [26] The Department had input from residents of Paradise and others before the decision was made to prohibit use of motorized vehicles on the railroad corridor within the village of Paradise. Prior to that decision being made there was no Letter of Authority which dealt with the railroad corridor within Paradise. The Minister of Natural Resources made the decision concerning the use of Crown land and prohibited by notice use of motorized vehicles on the railroad corridor within Paradise. The action was the Minister controlling the use of Crown land - the right of an owner of real property concerning the use of its real property, a decision an owner has the right to make.

And with respect to the second, more contentious question regarding the second consultation, the judge reasoned:

> [28] There was no letter of authority issued by the Province concerning the abandoned railroad corridor within Paradise prior to the Province's decision to allow the use of motorized vehicles on the railroad corridor. The Province continued to be lobbied concerning the use of the railroad corridor. The Province decided to allow the use of motorized vehicles on the railroad corridor. It was a decision of the owner of real property regarding the use of its property.

The judge determined that there was no factual basis established for the court to deal with the third issue. He dismissed the application.

[14] In its Notice of Appeal, PAHLS set out two grounds of appeal. It submits that the judge erred by failing to provide adequate reasons in addressing the second question or, alternatively, he interpreted the *Crown Lands Act*, R.S.N.S. 1989, c. 114 (the "*Act*") in a manner that would produce an absurd result. In response, the Province filed a Notice of Contention. It says that the judge's decision should be confirmed for two additional reasons, namely that the affidavit material filed by PAHLS is, in whole or part, inadmissible and so cannot be relied upon in support of the appeal, and because the second issue is in the nature of a request for an opinion and thus is not justiciable.

[15] Although its Notice of Appeal faulted the judge for failing to provide adequate reasons and in interpreting the *Act*, PAHLS did not really pursue these points either in its factum or in oral submissions before this court. Instead, it strenuously argued that, in essence, the issue to be addressed was whether the judge's decision deprived it of the reasonable legal expectation that as the result of the initial extensive public consultation in accordance with the Rails to Trails policy the directive to close a certain portion of the rail bed to motorized vehicles would be binding for a significantly longer time.

[16] With respect, the issue as framed on appeal in no way corresponds with the pleadings seeking declaratory relief raised on the application, the submissions made to the judge, his decision, or the grounds as set out in the Notice of Appeal to this court. There was no reliance on the doctrine of legitimate expectations when PAHLS addressed the judge in writing or orally and, consequently, no mention of it in his decision. Nevertheless, PAHLS made it the centrepiece of its appeal and claims that the judge erred.

[17] I will begin with a summary of the relevant legislation, and then deal with the arguments made by PAHLS on appeal and in its Notice of Appeal.

[18] It is uncontested that the abandoned railway corridor is Crown lands pursuant to s. 9 and as defined in s. 3 of the *Act*. Pursuant to s. 5, that land is under the administration and control of the Minister of Lands and Forests:

> **5** The Minister has supervision, direction and control of
>
> . . .

> (b) the administration, utilization, protection and management of Crown lands, including
>
> (i) access to and travel on Crown lands,
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> . . .
>
> but not including land owned or claimed by the Province specifically under the jurisdiction of another member of the Executive Council or a department, branch or agency of the Government other than the Department.

[19] The Minister can post notices prohibiting entry or activity on Crown lands:

> **38 (1)** A person who without legal justification or without the permission of the Minister or a person authorized by the Minister, the proof of which rests upon the person asserting justification or permission,
>
> (a) enters upon Crown lands where entry is prohibited by notice;
>
> (b) engages in an activity which is prohibited on the Crown lands by notice; or
>
> (c) dumps or deposits materials on or over Crown lands or causes, suffers or permits material to be dumped or deposited on or over Crown lands,
>
> is guilty of an offence.

[20] The judge relied on these provisions in determining that, absent any applicable letter of authority, the Minister had the right to control the use of Crown lands, including prohibiting or allowing motorized uses.

[21] On appeal, PAHLS argues that it "legitimately expected that the placement of barricades at both ends of the Paradise portion of the abandoned DAR rail bed ought to have been more than an interim solution." It relies on *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 which affirmed that every administrative decision that affects the rights, privileges or interests of an individual attracts the duty of fairness. That decision set out several factors to be considered in determining the content of the duty of fairness which is to be decided in the specific context of each case.

[22] One of these factors is the legitimate expectations of the party challenging the decision. The Supreme Court of Canada stated that:

> 26 … If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: … This doctrine, as applied in Canada, is based on the principle that the 'circumstances' affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

PAHLS also refers to *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, at ¶ 16 and *Smith v. Canada (Attorney General)*, 2009 FC 228, at ¶ 42.

[23] PAHLS points out that the Rails to Trails policy had been followed before the Minister's initial decision to prohibit motorized use of the trail. It submits that this decision having been reached after that lengthy process, it had a legitimate expectation that the use would not be changed for a much longer time than was the case here.

[24] PAHLS' reliance on the doctrine of legitimate expectations to reverse the Minister's decision and to appeal the judge's decision is misguided. It side-steps the fact that, as *Baker* explained in describing its purpose, the duty of fairness pertains to <u>procedural</u> fairness. In speaking of the factors to be used to determine the duty of fairness in particular circumstances, Justice L'Heureux-Dubé stated:

> 22 … I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

She reiterated at ¶ 26 that "… the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain" and elaborated:

> 28 … The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[25] See also *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504:

> [68] Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite. See *Mount Sinai Hospital Center*, at paras. 29-30; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 78; and *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C. R. 539, at para. 131. It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking: Brown and Evans, at pp. 7-25 and 7-26.

and *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43, leave denied by Supreme Court of Canada, [2012] SCCA No. 237 at ¶ 161-165, 172-173.

[26] This is not a case where clear, unambiguous and unqualified representations were made and then not fulfilled. The Province gave no representations by word or conduct that a change in the use of the railway corridor could only come about by way of strict adherence to the Rails to Trails policy.

[27] PAHLS and those who opposed motorized use of the trail were given an opportunity to make their case fully. Mr. Neale dedicated one of the consultations in Paradise specifically for those who opposed such use. He was prepared to hear their views and incorporate them in the report to the Province. PAHLS knew that in order for its position to be taken into account, participation in the consultative process was essential. Instead, it chose not to participate. Had it done so, it could, for example, have advised how many people it represented and eliminated or reduced the aspects it found troublesome. The consultative process provided a means for input into a decision that would affect its members' interests. Having chosen not to appear, PAHLS cannot complain that it was not consulted. Its expectation that the barricades would have stayed up longer than they did is not an expectation of procedure, but of substance, to which the doctrine of legitimate expectations does not apply. In these circumstances, there can be no breach of that doctrine.

[28] I turn then to the appellant's argument regarding insufficient reasons PAHLS submits that factual errors and errors in law made by the motions judge amount to an insufficiency of reasons. It relies on *S.R. v. Nova Scotia (Community Services)*, 2012 NSCA 46 which set out the law surrounding sufficiency of reasons. However, none of the complaints it raises prejudiced its legal right to an appeal or prevented this Court from conducting a meaningful appellate review.

[29] PAHLS says that although the judge identified the *Act*, he failed to consider the *Trails Act*, R.S.N.S. 1989, c. 476 and its Regulations, and the Rails to Trails policy concerning the process leading to the development, management and maintenance of recreational trails on abandoned railway corridors acquired by the Province. It argues that that procedure is "mandatory", and the Province was required to follow the Rails to Trails policy on any reconsideration of its initial decision to prohibit motorized use of the rail bed in Paradise. In support of its position, PAHLS points to *North End Community Health Association v. Halifax (Regional Municipality)*, 2012 NSSC 330. There, when its Council sold a surplus school property to a developer, the Municipality failed to follow its own procedure regarding the sale of public property. Non-profit groups which had participated in the bidding process sought judicial review. Justice A. David MacAdam determined that the Council owed a duty of fairness to the applicants and was required to act in good faith and to observe its own procedures, as enacted. Since it had failed to meet this duty, its decision was quashed.

[30] PAHLS' argument that statute and regulation make it clear that the Province could only change the use of the railbed after following the Rails to Trails policy cannot be sustained. According to s. 3(i) and 5, the *Trails Act* only applies to a trail designated by the Governor-in-Council. Only one trail has been designated; that trail is in Queens County, not Annapolis County; and it is not this railway corridor. As a result, that statute and its regulations do not apply to this situation.

[31] Moreover, whether pursuant to the *Act* the Minister approves of a particular entry or use of Crown lands is a discretionary decision. The Supreme Court of Canada in *Mount Sinai Hospital Center, supra*, stated:

> 56 The Court noted in *Baker v. Canada, supra, per* L'Heureux-Dubé J., at para. 53, that ordinarily ministerial decisions of a discretionary nature have been accorded a very high level of deference, citing *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, at pp. 7-8. At para. 56, L'Heureux-Dubé J. states:

> The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options.

[32] It is not essential to endorse the reasoning in the *North End Community Health Association* decision upon which PAHLS relies. I need only observe that there the *Halifax Regional Municipality Charter* provided that the Council shall make decisions in the exercise of its powers and duties in accordance with any policy adopted by the Council. The procedure for the disposal of surplus school properties had been approved by council and also continued under the municipal *Charter*.

[33] Here, however, the Rails to Trails policy is merely a policy. Policies do not have a legally binding character. In *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, McIntyre J., for a unanimous Court, stated that the Minister's policy guidelines could not fetter the exercise of his statutory discretion: "The discretion is given by Statute and the formulation and adoption of general policy guidelines cannot confine it" (pp. 6 & 7). He continued:

> ... To give the guidelines the effect contended for by the appellant would be to elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion. Le Dain J. dealt with this question at some length and said, at p. 513:
>
> > The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion (see *British Oxygen Co. Ltd. v. Minister of Technology* [1971] A.C. (H.L.) 610; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* [1978] 2 S.C.R. 141, at pp. 169-171), but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion (see *Re Hopedale Developments Ltd. and Town of Oakville* [1965] 1 O.R. 259).

[34] The non-binding nature of policies is also discussed in D.J.M. Brown & J.M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf, Vol. 3, (Toronto: Canvasback, 2012) at pp. 12-39 – 12-43, p. 15-45. See also *R. v. Beaudry*, 2007 SCC 5, at ¶ 45, *Harnum v. Canada (Attorney General)*, 2009 FC 1184 at ¶ 38, 39, and *Jivalian v. Nova Scotia (Community Services)*, 2013 NSCA 2 at ¶ 30-31.

[35] Moreover, it appears from a reading of the Rails to Trails policy that it was developed by the Province to put in place procedures to be followed by trail proponents, such as municipalities and/or community based trail groups, interested in taking on primary responsibility for development, management and maintenance of abandoned railway corridors. Here, it was not a trail proponent, but the Province which sought resolution of the issue of the railbed in Paradise.

[36] In these circumstances, it is not essential that I respond to PAHLS' argument that the Province could provide "no clear reason" why the Rails to Trails approach was not followed a second time. However, I observe that the judge had affidavit evidence that the proponent-based Rails to Trails consultation was considered to be inadequate to deal with the polarized situation which had developed in Paradise.

[37] PAHLS argues that several sentences in the judge's decision demonstrate factual error. In the third sentence, the judge stated that "The abandoned rail corridor passing through the community has been developed as a trail which allows the use of motorized off-highway vehicles". No trail has ever been developed in Paradise; rather, the barriers and notices were removed. However, I am not persuaded that this misstatement in recounting the factual background affected the judge's appreciation of the matter before him, or had any determinative effect on his analysis.

[38] In ¶ 11, the judge stated that "PAHLS did not apply for a Letter of Authority for the railroad corridor within the village of Paradise". PAHLS points out that, according to the record, it notified the then-Minister in March 2008 that they were registering their intention to begin the process of applying for that document. While that is correct, in the end PAHLS did not move its application forward. Consequently, the judge's statement is not incorrect.

[39] PAHLS also submits that the judge made factual errors concerning the letter of authority that did issue. In ¶ 24 of his reasons, he stated that the only letter of authority issued "which included that portion of the abandoned railroad corridor within the village of Paradise was issued November 3, 2008 to Annapolis Valley Trails Coalition to 'carry out construction and safety measures related to the creation of a multi use trail …' " on that railbed in Paradise, and that it expired on December 31, 2009. However, here it is PAHLS which is in error. The evidentiary record supports these facts surrounding the November 3, 2008 letter of authority.

[40] PAHLS attacks the judge's reasons as insufficient pointing out that the recounting of the facts, statement of the issues and relevant portions of the *Act* consumed the first 22 paragraphs of a 33 paragraph decision. I agree that the judge's reasons are short. However, the fact that he did not deal with the conspiracy theory put forward by PAHLS or all of its submission does not mean that he did not grasp the issues or that his decision was wrong. He held that the Minister's decision was "a decision of the owner of real property regarding the use of its property." PAHLS does not cite any authority that such a determination is reviewable by a court of law on any standard.

[41] In its submissions to this court, PAHLS did not raise its second ground of appeal regarding the interpretation of the *Act*. Consequently, I need not consider it.

[42] Having reviewed the record and considered the written and oral submissions on behalf of the parties, I am unable to identify any error committed by the trial judge in disposing of the application before him which would attract appellate intervention. I need not deal with the issues raised in the Notice of Contention.

[43] I would dismiss the appeal and order the appellant to pay the respondent costs of $750 inclusive of disbursements.

Oland, J.A

Concurred in:

Beveridge, J.A.

Bryson, J.A.