NOVA SCOTIA COURT OF APPEAL
Citation: *Miner v. Kings (County)*, 2017 NSCA 5

Date: 20170117
Docket: CA 451529
Registry: Halifax

Between:

Russell "Bret" Miner and Marjorie Jean Miner
Appellants/Respondents by Cross-Appeal

v.

The Municipality of the County of Kings and
Glooscap First Nation Economic Development Corporation
Respondents

Judges:	Bourgeois, Saunders and Van den Eynden, JJ.A.
Appeal Heard:	November 8, 2016, in Halifax, Nova Scotia
Held:	Appeal dismissed, cross-appeal allowed, per reasons for judgment of Bourgeois, J.A.; Saunders and Van den Eynden, JJ.A. concurring
Counsel:	Douglas Lutz and Jillian D'Alessio, for the appellants/respondents by cross-appeal Jonathan G. Cuming, for the respondent Municipality Jason T. Cooke and Keith Lehwald, for the respondent Glooscap/appellant by cross-appeal

Reasons for judgment:

[1] The appellants, Russell Miner and his mother, Marjorie Jean Miner, are residents of the Municipality of the County of Kings. They own property located on the Ben Jackson Road in Lockhartville.

[2] The Glooscap First Nation Economic Development Corporation (Glooscap) also owns land on the other side of Ben Jackson Road, adjacent to Highway 101, which it would like to commercially develop. In pursuit of that goal, in May 2015, Glooscap submitted a planning application to the Municipality. It sought to have its land rezoned from Forestry (F1) to Highway Commercial (C11).

[3] At the conclusion of the process that flowed from the application, the Municipality passed two resolutions. The first served to rezone Glooscap's land from (F1) to (C11) as requested, referred to as a land use bylaw map amendment. The second resolution served to amend the land use bylaw to permit additional uses not previously allowed in (C11) zones. This change was made by way of a land use bylaw text amendment. At that time, besides the newly created (C11) zone on the Ben Jackson Road, only one other (C11) zone existed in the Municipality – in the hamlet of Avonport.

[4] In October 2015, the appellants filed a Notice for Judicial Review pursuant to s. 189 of the *Municipal Government Act*, S.N.S. 1998, c. 18 (*MGA*), seeking to have the two amendments quashed on the basis of illegality. The focus of their challenge later became solely the bylaw text amendment. The matter was heard by Justice C. Richard Coughlin on April 1, 2016.

[5] Both the Municipality and Glooscap participated as respondents and vehemently opposed the position advanced by the appellants. In addition, Glooscap argued that the appellants ought not to be granted standing to advance an application for judicial review. In an oral decision rendered April 7, 2016, and subsequently released as 2016 NSSC 163, the reviewing judge concluded the appellants did have standing to bring the matter before the court, but he ultimately dismissed their application.

[6] The appellants now appeal that dismissal. Glooscap filed a narrow cross-appeal, submitting that the reviewing judge erred in granting standing in the first instance. The Municipality filed a Notice of Contention requesting the decision under appeal be affirmed. It takes no position on the issue of standing.

Background and Decision under appeal

[7] Both in the court below, and before us, the appellants assert that the text amendment to the land use bylaw should be deemed illegal pursuant to s. 189 of the *MGA* due to a lack of procedural fairness. The appellants assert that proper notice was not provided in accordance with the Municipality's *Public Participation Policy*, and as such, the text amendment cannot stand.

[8] For context, it is helpful to set out the particular portions of the *Public Participation Policy* which anchor the appellants' submission. The policy sets out 21 steps, the most relevant being:

> 1. Applicant discusses with planner;
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> 2. Application submitted with the signature or written authorization of a landowner;
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> 6. Notice sent by staff to owners located within 500' of the property for which the amendment has been requested, advising of PIM (public information meeting);
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> 7. If a PIM is required by this policy, PIM ad is placed on County website and in a local paper;
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> 15. First reading by Council;
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> 17. Public Hearing notice sent to owners located within 500' of the property for which the amendment has been requested.
>
> 18. Ad placed in local paper;
>
> 19. Public Hearing held by Council.

[9] There has never been an issue that the appellants received all required notices under the *Public Participation Policy*. Mr. Miner, in particular, took advantage of the available opportunities to express his views with respect to the amendment being considered. The appellants concede that they have been treated with procedural fairness by the Municipality in the process giving rise to the amendment they now challenge. Their complaint is that the Municipality failed to treat landowners within 500 feet of the (C11) zone in Avonport with procedural fairness, as they did not receive the type of notice specified in steps 6 and 17

above. Those owners would have only received notice by virtue of the posting on the municipal website and newspaper advertisements.

[10] In the court below, the respondents advanced multiple arguments, most focusing on the appropriateness of the process utilized by the Municipality. Extensive argument was advanced with respect to the interpretation and impact of the *Public Participation Policy*. In short, Glooscap and the Municipality submitted that a proper interpretation of the policy did not require direct notice to landowners in Avonport; and, in the alternative, that failure to provide direct notice would be a procedural irregularity which s. 189(2) of the *MGA* specifies does not give rise to an illegality.

[11] As referenced earlier, Glooscap also raised the issue of the appellants' standing. Both Glooscap and the appellants made extensive submissions to the reviewing judge on that issue. The reviewing judge was provided with authorities relating to the granting of standing under s. 189 of the *MGA*; and, more generally, authorities with respect to public interest standing.

[12] With respect to standing, the reviewing judge concluded:

> [19] The issue of whether Mr. and Ms. Miner have standing has been raised.
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> [20] Section 189(1) of the *Municipal Government Act* provides "a person" may apply to quash a bylaw. The record shows Mr. Miner received notice of the rezoning of 410 Ben Jackson Road which was sent to owners of property within 500 feet of the rezoning. No party objected to Ms. Miner being an applicant. I find Mr. and Ms. Miner are residents and ratepayers of the Municipality of the County of Kings and have standing pursuant to s. 189 of the *Municipal Government Act*.
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> [21] In dealing with an appeal from a dismissal of applications to quash a bylaw in giving the Ontario Court of Appeal's judgment in *Galganov v. Russell (Township)*, 2012 ONCA 409, Weiler, J.A., addressed the standing of an individual who operated a business in the Township stating:
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> > On appeal, there is no question as to Brisson's standing to apply to quash the bylaw; he operates a business in the Township.

[13] The reviewing judge then proceeded to note that the procedural fairness concerns raised by the appellants had nothing to do with their treatment, but rather the landowners in Avonport. He dismissed the application for judicial review, and noted:

> [25] Mr. and Ms. Miner received notice of the general changes to the Highway Commercial (C11) zone, attendance at the Public Information Meeting, received the notice of public hearing dated July 8, 2015 and notice of public hearing published in the *Valley Harvester* newspaper. Mr. and Ms. Miner were accorded full procedural fairness with relation to the bylaw in question.
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> [26] They do not argue that they were not accorded procedural fairness. They have no basis to seek to quash the bylaw.
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> [27] The request for judicial review to quash the bylaw is dismissed.

[14] The reviewing judge did not address the substantive arguments advanced by the parties with respect to the alleged illegality of the bylaw text amendment.

Issues

[15] In their Notice of Appeal, the appellants advanced three specific allegations of error. In oral submissions, the appellants confirmed that the issues they sought to advance on this appeal were confined to the following:

> The Chambers Judge erred in failing to address the argument of prima facie illegality in his decision to dismiss the application to quash the by-law pursuant to section 189 of the *Municipal Government Act*;
>
> and
>
> In response to the cross-appeal of Glooscap the Appellants argue they have standing both on the grounds accepted by the Chambers Judge and on other grounds.

[16] As will become apparent, the issue of standing is dispositive of this appeal. If the appellants were improperly granted standing, they had no right to advance any substantive issues in the court below, or on appeal.

[17] In my view, the issues to be determined on appeal are as follows:

1. What standard of review applies to the reviewing judge's determination that the appellants had standing?
2. Did the reviewing judge err in granting standing?
3. Should standing have been granted to the appellants on the basis of considerations other than those stated by the reviewing judge?

Analysis

What standard of review applies to the reviewing judge's determination that the appellants had standing?

[18] Two preliminary observations inform the standard of review analysis. Firstly, although framed as an appeal of a judicial review, it is important to note that the court below was not tasked with reviewing a previous decision on standing. The reviewing judge made a determination of the appellants' standing to bring a judicial review at first instance. As such, the standard of review normally associated with an appeal of a judicial review decision is not applicable here.

[19] Secondly, the identification of the appropriate standard of review is also informed by how the reviewing judge reached the conclusion now under appeal. Both before the court below and on appeal, the appellants assert two sources of standing. They say that s. 189 of the *MGA* gives them standing as of right. Alternatively, they claim that they should be given the opportunity to challenge the Municipality's action on the basis of public interest standing. The appellants were clear that they do not claim any direct or private interest standing in the matter, other than what arises based upon their interpretation of s. 189.

[20] It would appear from the reviewing judge's reasons, that the granting of standing was solely based upon the appellants' claim under s. 189(1), and his interpretation of that legislative provision. The reviewing judge did not engage in an analysis of the appellants' claim that they had public interest standing. Nor did he address the position advanced by Glooscap that a consideration of whether to grant the appellants standing under s. 189 of the *MGA*, necessarily included a consideration of common law principles.

[21] Had the reviewing judge reached his conclusion on the basis of public interest standing, it is clear that such a decision is owed considerable deference. The standard of review engaged by the granting or denial of public interest standing was articulated by the British Columbia Court of Appeal in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439 (aff. 2012 SCC 45) as follows:

> **37** The order denying the appellants public interest standing was made in the exercise of discretion by the judge. In *Canadian Council of Churches v. Canada*, Justice Cory observed at pp. 252-3:

> ... The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nevertheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.
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> **38** Being an order made in the exercise of discretion, the order appealed attracts considerable deference from this Court. As a general proposition, we may interfere with discretionary decisions of the trial court only when this Court considers the judge acted on a wrong principle, or failed to give sufficient weight to all relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1*; Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14; *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6.

[22] Findings of standing as of right do not attract the same deferential approach. The British Columbia Court of Appeal noted the distinction between the two sources of standing:

> **23** The difference between private interest standing and public interest standing may be explained generally as the difference between standing as a matter of right arising from a direct relationship between the person and the state, and standing granted by a court in the exercise of discretion in a situation where, by definition, that direct relationship is lacking. **The difference is reflected in the role of this Court in reviewing the judge's order on these two related, but separate, issues, and the conclusion on private interest standing may attract, by virtue of the different relationships at issue, a lesser level of deference than does the order on public interest standing**. Broadly speaking, it seems to me that the basis for private sector standing admits of little scope for the exercise of discretion, and little deference need be given to a judge of first instance by a reviewing judge. Where the state engages a person in a court process, under legislation, that person may challenge the constitutional validity of the legislation as part of making full answer and defence, or of defending an action. The principle is inextricably entwined with s. 52(1) of the *Constitution Act*. **The question for this Court is whether the judge was correct in denying private interest standing.** (Emphasis added)

[23] In my view, whether a party has standing as of right, either by statutory means or otherwise, is a question of law; or, depending on context, a question of mixed fact and extricable principle of law. As such, a decision to grant standing on such basis is reviewable on a correctness standard.

Did the reviewing judge err in granting standing?

[24] As noted earlier, the reviewing judge granted standing solely on the basis of s. 189 of the *MGA*. At this juncture, it is helpful to turn to the provision, which reads in its entirety:

> **Procedure for quashing by-law**
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> 189 (1) A person may, by notice of motion which shall be served at least seven days before the day on which the motion is to be made, apply to a judge of the Supreme Court of Nova Scotia to quash a by-law, order, policy or resolution of the council of a municipality, in whole or in part, for illegality.
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> (2) No by-law may be quashed for a matter of form only or for a procedural irregularity.
>
> (3) The judge may quash the by-law, order, policy or resolution, in whole or in part, and may, according to the result of the application, award costs for or against the municipality and determine the scale of the costs.
>
> (4) No application shall be entertained pursuant to this Section to quash a by-law, order, policy or resolution, in whole or in part, unless the application is made within three months of the publication of the by-law or the making of the order, policy or resolution, as the case may be.

[25] The appellants advance the following in their written submissions:

> 58. Section 189 is meant to grant standing **to anyone** to attack the validity of a municipal resolution. The Appellants have standing based on s. 189 of the MGA to bring the conduct of the Municipal Council to a judicial review. (Emphasis added)

[26] In their oral submissions before this Court, the appellants submit that as they are residents and ratepayers of the Municipality, s. 189 must surely operate to give them standing to challenge municipal action. As such, they submit that the reviewing judge did not err in granting them standing on that basis.

[27] The same argument has, however, been rejected on a number of occasions where applicants without a direct interest, sought to challenge municipal action. A series of Nova Scotia Supreme Court decisions have rejected the proposition that s. 189 provides automatic standing to "any person"; rather, the test for standing arising at common law should be injected into the analysis.

[28] In *Solid Waste Association of Nova Scotia v. Halifax (Regional Municipality)*, 2005 NSSC 89, Hood, J. had the opportunity to consider s. 189 as it

relates to standing and rejected the approach now advanced by the appellants. She wrote:

> [8] SWANS says the plain meaning of Section 189 is that anyone, including SWANS, can bring an application to quash a by-law. Alternatively, it says it meets the test for being granted standing.
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> . . .
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> [11] Mr. Merrick says it would not make sense to interpret s. 189 as broadly as Bruce Outhouse, counsel for SWANS, suggests. He submits that, if there is to be a limit, the common law test is the means to determine the limit. He says that there must be clear wording to oust the court's discretion to determine what cases come before the courts. He submits that s. 189 does not have that clear wording.
>
> . . .
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> [13] In my view, if a way to limit those who can challenge municipal by-laws is to be found, it must be by using the common law test for determining standing.
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> [14] I conclude that s. 189 (1) is a procedural provision. Although headings are not determinative in interpreting legislation, I note that the heading to s. 189 is "Procedure for quashing by-law". Furthermore, s. 189 (1) does not say that "any person" may apply to quash a by-law but "a person" may apply to quash a by-law. Section 189 does not define who can apply but only how the application is made. In my view, it does not provide as of right standing to anyone seeking to challenge municipal by-laws.

[29] Justice Hood then proceeded to consider whether the test for public interest standing was met by the plaintiff, relying on a number of Supreme Court of Canada authorities, including *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236. The approach as articulated in *SWANS* has been subsequently followed in *Heritage Trust of Nova Scotia v. Halifax (Regional Municipality)*, 2007 NSSC 28 and *Jacques v. Annapolis Royal (Town)*, 2006 NSSC 264.

[30] In the matter before us, the reviewing judge's analysis stopped with his conclusion that s. 189 alone was sufficient to grant the appellants standing, even though he found they have no personal quarrel with the Municipality. He was provided with the cases noted above, but did not reference them, choosing instead to rely upon a decision of the Ontario Court of Appeal. With respect, the reasoning in *Galganov v. Russell (Township)*, 2012 ONCA 409, does not support the reviewing judge's interpretation of s. 189.

[31] In *Galganov*, two applicants challenged the legality of a municipal bylaw which required that all exterior commercial signs be displayed in both French and English. The applicant Brisson owned a business in the municipality and was directly impacted by the new language requirements. Both at the lower court and on appeal, there was no issue raised as to his standing. The other applicant, Galganov, did not own property, reside or operate a business in the municipality. The lower court denied him standing, a decision upheld on appeal.

[32] Brisson, a person with a private and direct interest, was permitted to challenge the bylaw. This is much different than the present instance where the appellants have not asserted a private interest. Rather, they say they are "a person" as contemplated in s. 189 of the *MGA*, and have standing as of right. The reviewing judge's reliance of the Ontario Court of Appeal's observation relating to Brisson's standing is misplaced. It fundamentally differs from the circumstances before us.

[33] I find the reasoning in *SWANS* to be applicable and persuasive. Clearly, the legislature could not have intended by the use of "a person" in s. 189(1), that an unlimited number of persons would have the ability to advance court challenges to municipal decisions. Something more is required. Where, as here, the challenging party does not argue a separate private right to bring action, the something more involves a consideration of the principles of public interest standing. In my view, the reviewing judge was incorrect in his interpretation of s. 189. That section does not give rise to standing as of right to "a person" or, as noted by the reviewing judge, "residents and ratepayers".

Should standing have been granted to the appellants on the basis of considerations other than those stated by the reviewing judge?

[34] The appellants assert that notwithstanding the reviewing judge's failure to consider their claim of public interest standing, they amply meet the requirements to advance their challenge on that basis. Glooscap disagrees.

[35] The parties are, however, in agreement that it is the party seeking standing who bears the burden of meeting the requisite test. The parties are also aligned with respect to the principles engaged in a claim of public interest standing, and the most recent authoritative statement thereof. In the opening paragraphs of *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence*

Society, 2012 SCC 45, (*Downtown Eastside*) Cromwell, J. provided a succinct preview:

> [1] This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.
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> [2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

[36] Relying on the test set out in earlier decisions of the Court, Cromwell, J. emphasized the inter-related nature of the factors to be assessed:

> [35] From the beginning of our modern public interest standing jurisprudence, the question of standing has been viewed as one to be resolved through the wise exercise of judicial discretion. As Laskin J. put it in *Thorson*, public interest standing "is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process" (p. 161); see also pp. 147 and 163; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, at pp. 269 and 271; *Borowski*, at p. 593; *Finlay*, at pp. 631-32 and 635. The decision to grant or refuse standing involves the careful exercise of judicial discretion through the weighing of the three factors (serious justiciable issue, the nature of the plaintiff's interest, and other reasonable and effective means). Cory J. emphasized this point in *Canadian Council of Churches* where he noted that the factors to be considered in exercising this discretion should not be treated as technical requirements and that the principles governing the exercise of this

> discretion should be interpreted in a liberal and generous manner (pp. 256 and 253).
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> [36] It follows from this that the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.

[37] The appellants and Glooscap both invite this Court to now consider the three factors and to determine whether public interest standing ought to have been granted. The first consideration is whether the appellants have raised, by virtue of their pleadings, a serious justiciable issue. This Court has recently considered that factor in *Canadian Elevator Industry Education Program v. Nova Scotia (Elevators and Lifts)*, 2016 NSCA 80 where Bryson, J.A. observed:

> [51] In *Downtown Eastside*, Justice Cromwell elaborated on "serious justiciable issue":
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> > [42] To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski*, at p. 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy* and *Zel's*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690).
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> [52] Justice Cromwell explained that "serious justiciable issue" addressed two related concerns: the appropriateness of judicial resolution of the matter (as opposed to legislative or executive action), and proper use of judicial resources (overburdening the courts with marginal or redundant suits) (¶¶ 39-41).
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> [53] The Supreme Court did not endorse assessment of the merits of the claim when deciding whether a serious justiciable issue was raised, (¶ 41). Nevertheless, it may be difficult in practice to ignore the merits altogether if maintaining the "rule of law" underwrites public interest standing, as *AXA* says and *Downtown Eastside* implies (¶ 31). Certainly, consideration of the merits is how the Ontario and Manitoba Courts of Appeal resolved this factor in *Corp. of the Canadian Civil Liberties Assn. v. Canada (Attorney General)* (1998), 40 O.R. (3d) 489, ¶ 87 and *Rowell v. Manitoba*, 2006 MBCA 14, ¶ 50, respectively.

[38] The appellants argue, and Glooscap concedes, that there is a serious justiciable issue to be resolved. They frame the issue as whether there is a serious issue as to the bylaw text amendment's legality. With respect, that framing over-generalizes the central issue raised by the appellants in their pleadings and in their submissions. The more appropriate statement of the central issue is whether the

landowners in Avonport were not given proper notice of the amendment, and accordingly, not afforded procedural fairness.

[39] Although I am prepared for present purposes to accept the appellants have raised a justiciable issue, its seriousness is questionable. Considerations of public interest standing have arisen most notably where constitutional issues are at play, or where there is a broad or significant impact to the challenged decision or action.

[40] In the present instance, the record before the Court is limited. We know that the challenged text amendment served to add additional uses to (C11) zones in the Municipality. We know that only two (C11) zones existed – that for which Glooscap had made the successful application for rezoning, and one in Avonport. We know that the appellants have raised procedural fairness concerns only as it relates to the zone in Avonport. It is unclear, however, how many landowners are impacted in Avonport. An assessment of the "seriousness" of a lack of procedural fairness would surely, in the circumstances of this matter, be informed by whether one landowner was purportedly ill-treated, or whether it was hundreds.

[41] "Seriousness" may also be informed by other factors such as the views of those landowners, whether they had actual notice of the proposed amendment, or whether the text amendment would result in alleged harm to them or their properties. An allegation that procedural fairness has not been afforded is, arguably, serious on its very face. But as *Baker v. Canada (Minister of Immigration)*, [1999] 2 S.C.R. 817 and the jurisprudence arising therefrom make clear, the importance of procedural fairness and the level to be afforded is contextually driven. Here, the Court has been provided with very little context to meaningfully assess the "seriousness" of the issue raised.

[42] I turn to the second factor. Do the appellants have a real stake or genuine interest in whether Avonport landowners were afforded procedural fairness? It is here where concerns regarding the use of scarce judicial resources and the need to screen out "the mere busybody" are engaged (*Downtown Eastside*, at para. 43). This factor also considers how the party seeking public interest standing has a concern which surpasses that of the general public (*Canadian Elevator*, at para. 63).

[43] Neither the record nor submissions give the Court any indication of why the appellants have an interest, beyond that of anyone else, in the treatment of Avonport landowners. Although the appellants most certainly have a general interest in the validity of the bylaw text amendment, the genuine interest must be in

the justiciable issue. What was pled as the issue for determination was whether Avonport landowners had been afforded procedural fairness.

[44] The third factor considers whether there are other means for the matter to be advanced. Cromwell, J. expands on this in *Downtown Eastside* as follows:

> [50] The Court's jurisprudence to date does not have much to say about how to assess whether a particular means of bringing a matter to court is "reasonable and effective". However, by taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

[45] Cromwell, J. gives a number of examples of matters which may be of use in assessing whether granting public interest standing is a "reasonable and effective" means of bringing a matter forward, including

- The plaintiff's capacity to bring forward a claim;
- Is the case of public interest which transcends the interests of those most directly affected?
- Are there realistic alternative means of bringing the issue forward for adjudication which would be a more effective use of judicial resources? This may include considering the existence of those who have a direct interest;
- Should those with a more direct interest refrain from bringing action, this may militate against granting standing.

[46] I am not satisfied the appellants' request for judicial review was a reasonable and effective means of addressing the justiciable issue as pled. Given the central issue was a purported lack of procedural fairness to landowners in Avonport, it begs the question as to why those persons could not more effectively and reasonably advance that cause. Clearly, they would have a direct interest in their own right to procedural fairness, and would be presumably better placed to

meaningfully advance how such a purported breach gave rise to harm. The appellants have provided nothing to establish that it is more reasonable or effective to permit them to challenge the Municipality's purported poor treatment of the Avonport landowners. Based on the record available, the appellants, in my respectful view are "mere busybodies" (*Downtown Eastside*, para.1), to whom standing ought not be granted.

[47] Considering the three factors outlined above, I am satisfied that the appellants were not entitled to public interest standing, either as a stand alone grant, or in conjunction with s. 189 of the *MGA*.

Conclusion

[48] Having concluded that the appellants were not entitled to standing, I would allow Glooscap's cross-appeal.

[49] In light of that conclusion, it is not necessary to consider the substantive issues raised by the appellant, the responses thereto, or the Notice of Contention. I would dismiss the appeal.

[50] On the appeal, each respondent shall be entitled to costs of $1,250.00, inclusive of disbursements. Having been successful on the cross-appeal, Glooscap is entitled to costs of $1,000.00, inclusive of disbursements, from the appellants.

Bourgeois, J.A.

Concurred in:

Saunders, J.A.

Van den Eynden, J.A.