

NOVA SCOTIA COURT OF APPEAL

Citation: *Porter v. Nova Scotia (Minister of Municipal Affairs and Housing)*,
2024 NSCA 43

Date: 20240409

Docket: CA 526655

Registry: Halifax

Between:

Darren Porter

Appellant

v.

Nova Scotia Minister of Municipal Affairs and Housing,
and the Attorney General of Nova Scotia
representing the King in Right of the Province of Nova Scotia

Respondents

Judge:

The Honourable Justice Joel Fichaud

Appeal Heard:

March 14, 2024, in Halifax, Nova Scotia

Subject:

Stay of proceedings – reasonableness review on “policy”
issues – standing

Summary:

On June 1, 2023, under ss. 12 and 14 of the *Emergency Management Act*, S.N.S. 1990, c. 8, the Minister of Municipal Affairs and Housing issued a Declaration of Emergency and a Direction that the gates at the Avon River causeway be operated to impound water in Pisiquid Lake. The measures were an effort to respond to the risk of wildfires. Mr. Porter, a commercial fisherman, alleged the measures were unnecessary in this area of the Province and prevented fish passage through the causeway’s gates, which would cause extinction of local fish populations.

Mr. Porter applied for judicial review of the Minister’s Declaration and Directive and moved in the Supreme Court of

Nova Scotia for a stay pending the hearing of the judicial review. The judge dismissed Mr. Porter's motion for a stay.

Mr. Porter applied for leave to appeal to the Court of Appeal.

Issues:

The Court of Appeal dealt with three issues:

- (1) Should leave to appeal be granted?
- (2) Did the judge correctly describe the scope of reasonableness review to "policy" issues?
- (3) Did the judge correctly characterize Mr. Porter's standing?

Result:

The Court of Appeal denied leave to appeal because Mr. Porter did not advance any argument on irreparable harm and balance of convenience, which are prerequisites for a stay.

The Court of Appeal disagreed with the judge's statement that issues of policy are not reviewable for reasonableness. The Minister's exercise of a statutory discretion is subject to reasonableness review.

The Court of Appeal disagreed with the judge's statements that a "commercial" interest does not support private interest standing and that Mr. Porter would lose standing because he had temporarily paused his fishing activity. The Court said the issues of standing and mootness should be left for the merits hearing.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 7 pages.

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Judges: Beaton, Fichaud and Scanlan JJ.A.

Appeal Heard: March 14, 2024 in Halifax, Nova Scotia

Held: Leave to appeal denied without costs per reasons for judgment
of Fichaud J.A., Beaton and Scanlan JJ.A. concurring

Counsel: Jamie Simpson and Richelle Martin for the Appellant
Jeremy Smith for the Respondents

Reasons for judgment:

[1] The Appellant Darren Porter has been a commercial fisher for over twenty years. He fishes for gaspereau and other species primarily in the estuary of the Avon River, down-stream from the Avon River causeway. The area is near Windsor in Hants County. He has worked with the Confederation of Mainland Mi'kmaq and Acadia University on a study to facilitate fish passage through the causeway's gates. He is the spokesperson for several local fisheries, representing 120 fishers.

[2] On June 1, 2023, wildfires were burning near Tantallon, Halifax Regional Municipality, and around Barrington Lake, Shelburne County. Water was needed for fire suppression. There was concern about the risk of wildfires generally across the Province. Meanwhile, a local fire chief reported that several fire hydrants in Windsor, Hants County, were not functioning because the water level in nearby Pisiquid Lake was too low.

[3] The *Emergency Management Act*, S.N.S. 1990, c. 8 says:

Interpretation

2 In this Act ...

(b) “emergency” means a present or imminent event in respect of which the Minister or a municipality, as the case may be, believes prompt co-ordination of action or regulation of persons or property must be undertaken to protect property or the health, safety or welfare of people in the Province;

...

(g) “Minister” means the Minister of Municipal Affairs;

...

State of emergency or state of local emergency

12 (1) The Minister, after consulting, if it is practical to do so, with a majority of the members of a committee established pursuant to Section 5 or a quorum of the Executive Council and, if the Minister is satisfied that an emergency exists or may exist, may declare a state of emergency in respect of all or any district, subdistrict or area of the Province.

...

14 Upon a state of emergency being declared in respect to the Province or an area thereof, or upon a state of local emergency being declared in respect to a municipality or an area thereof, the Minister may, during the state of

emergency, in respect of the Province or an area thereof, or the mayor or warden, as the case may be, may, during the state of local emergency, in respect of such municipality or an area thereof, as the case may be, do everything necessary for the protection of property and the health and safety of persons therein and, without restricting the generality of the foregoing, may ...

[4] On June 1, 2023, the Minister of Municipal Affairs and Housing declared a state of emergency under s. 12(1) for the area around Pisiquid Lake (“Declaration”) and a Direction under s. 14 relating to the Avon River causeway’s gates (“Direction”). The Direction said:

I direct that:

the owners and operators of the sleway connected to Pisiquid Lake, and any associated infrastructure, manipulate that sleway as directed by the Provincial Fire Marshal, in his role as the fire suppression and prevention co-ordinator, with the goal of maximizing the water supply resource available for the wildfire suppression efforts.

[5] Mr. Porter holds the view that the manipulation of the gates to impound water above the causeway prevents fish passage through the structure and leads to local extinction of fish populations. His evidence includes an affidavit of Dr. Michael Dadswell of Acadia University’s Department of Biology. Dr. Dadswell’s affidavit attaches a report of his opinion that would tend to support Mr. Porter’s view.

[6] On June 12, 2023, Mr. Porter filed a Notice for Judicial Review with the Supreme Court of Nova Scotia. He asserted standing as a private interest litigant. His Notice requested that the Minister’s Declaration and Direction be quashed as unreasonable, because:

5. The Minister’s decision to close the gates and impound water upriver of the causeway prevents gaspereau and other fish species from completing their lifecycles upstream of the causeway, and prevents the free passage of gaspereau and other species already upriver of the causeway in their migration back to the sea. The abrupt change from estuarine habitat to a freshwater system disrupts and degrades the function of the ecosystem and therefore the productivity of the fishery. The Minister’s decision thereby directly harms the fishery that Mr. Porter depends upon.

...

6. The Minister acted unreasonably by declaring a State of Emergency for the area around and including Pisiquid Lake, Windsor, Hants County, Nova Scotia.

...

8. Specifically, the Minister had no reasonable indication of a present or imminent event requiring the declaration in order to protect property or the health, safety or welfare of the citizens of Windsor. In other words, the Minister had no basis to conclude that an emergency exists or may exist in Windsor.

...

[7] Also on June 12, 2023, under *Civil Procedure Rule* 7.29, Mr. Porter filed a Notice of Motion in the Supreme Court for an interlocutory stay of the Minister’s Declaration and Direction.

[8] On July 18, 2023, Supreme Court Justice Scott Norton heard Mr. Porter’s motion for a stay.

[9] On August 24, 2023, Justice Norton dismissed the motion (2023 NSSC 261). The motions judge cited the three-part test from *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311: *i.e.* the applicant must show a serious question to be tried, irreparable harm and a favourable balance of convenience.

[10] The judge held there was no “serious issue to be tried”. His reasons on the point included:

[19] In this case, the Applicant does not allege in the Notice for Judicial Review that the Minister did not have the statutory authority to declare a state of emergency or issue a direction. The Application focuses exclusively on the reasonableness of doing so, which is not reviewable as a policy decision of the Minister. Nor does the Application allege bad faith by the Minister, or any violation of the Applicant’s procedural or constitutional rights.

...

[24] The Applicant’s stated interest in this matter is commercial, which is insufficient to ground a claim of standing to seek judicial review of a decision.

[25] Finally, Mr. Porter gave evidence that he is not currently fishing. Even if an indirect financial interest could ground private interest standing, the Applicant’s own evidence is that he is not affected by the issue he is alleging.

[underlining in Justice Norton’s Decision]

[11] Justice Norton also held (para 34) “...the Applicant has failed to establish that he will experience irreparable harm if the stay is not granted”. As the motion failed on the first and second tests from *RJR MacDonald*, the judge found it unnecessary to consider balance of convenience.

[12] On September 7, 2023, Mr. Porter filed a Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory) to the Court of Appeal.

Leave to Appeal

[13] Mr. Porter's submissions did not address whether there was irreparable harm or a favourable balance of convenience. The submissions were confined to the motions judge's comments on whether there was a "serious question to be tried". In this Court, Mr. Porter's counsel acknowledged a stay is off the table. Mr. Porter's concern is that the judge's comments on the "serious question" may create an issue estoppel on the merits hearing of the judicial review.

[14] This is an application for leave to appeal from a denial of a stay. Leave is granted only if the applicant has raised an arguable basis for overturning or varying the order under appeal. Arguable means a submission that, if accepted, could result in the appeal being allowed: *Magee v. Lauzon*, 2024 NSCA 23, paras. 22-24. Irreparable harm and a favourable balance of convenience are prerequisites to a stay. As those points have not been raised in this Court, there is no arguable basis to overturn the judge's denial of the stay.

[15] I would deny leave to appeal.

[16] However, as I will discuss, my ruling on leave should not be taken as endorsing paras. 19, 24 and 25 of the motions judge's decision.

Judicial Review of Policy Decisions

[17] The judge's para. 19 says a "policy" decision in the exercise of the Minister's statutory discretion is "not reviewable" for reasonableness. With respect, I disagree.

[18] This case does not involve second guessing the policy leading to the enactment of a statute. Subject to a constitutional assessment, that type of "policy" is outside the court's purview.

[19] Rather, this case involves the application of a statutory discretion accorded by ss. 12(1) and 14 of the *Emergency Management Act*. In the exercise of a statutory discretion, the Minister's determination must conform to the legislative intent. This is so, whether or not the Minister's criteria include matters of policy.

[20] At the hearing in this Court, counsel for the Minister cited *Nelson (City) v. Marchi*, 2021 SCC 41 for the proposition that a Minister’s “core” policy decision is exempt from reasonableness review. The suggested proposition misinterprets the Supreme Court of Canada’s reasons. In *City of Nelson*, Justices Karakatsanis and Martin for the Court held that a government’s “core” policy decisions are not subject to a private duty of care for the tort of negligence (paras. 2, 5 and 68). Justices Karakatsanis and Martin noted that, in this respect, private law liability was “[u]nlike public (administrative) law” (para. 47).

[21] The approach to public administrative law is prescribed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. While discussing the application of the reasonableness standard of review, the majority’s reasons said:

[108] ... Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply “with the rationale and purview of the statutory scheme under which it is adopted” [citations omitted]. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, “there is no such thing as absolute and untrammelled ‘discretion’”, and any exercise of discretion must accord with the purposes for which it was given: [citations omitted] ...

[109] As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. ...

[22] To the same effect: *Ecology Action Centre v. Nova Scotia (Environment and Climate Change)*, 2023 NSCA 12, para. 96.

[23] As noted in *Vavilov*, paras. 90, 108 and 110, the breadth of the discretion afforded by the statute affects whether the decision is reasonable. But on the threshold issue: a decision made further to a statutory discretion is reviewable under the reasonableness standard.

Standing

[24] The judge’s para. 24 says a commercial interest may not ground private interest standing to seek judicial review, a position endorsed by the Minister. I do not accept that sweeping statement.

[25] Standing depends on the circumstances of each case. There may well be circumstances when a threat to a source of livelihood will suffice for private interest standing.

[26] Then the motions judge's para. 25 says, as Mr. Porter is not currently fishing, he lacks standing.

[27] Mr. Porter's evidence was that, for over two decades, he has earned his livelihood from fishing in the Avon River estuary. However, according to his affidavit:

I have paused my typical commercial fishing activities to carry out the studies mentioned above as part of the development of and application process for a new gated structure design on the Avon River, and I intend to return to my regular commercial fishing activities upon completing this monitoring work.

[28] The purposive gatekeeping of standing is not commanded by fine distinctions. I do not accept that, if Mr. Porter otherwise had standing, he would lose it by pausing to help design a more effective gate structure at this causeway, before resuming fishing as his livelihood.

[29] The record for this appeal is limited to evidence from June and July, 2023. The wildfires of 2023 have passed. It is unknown whether in the future the measures in the Minister's Declaration and Direction of June 1, 2023 will have expired or will be continued, renewed or amended, and what effect any measures will have occasioned. The judge on the merits hearing likely will have more current evidence.

[30] This appeal from a stay motion is not the occasion for a definitive ruling on Mr. Porter's standing to seek judicial review. The issues of standing and mootness, if that point is raised at the time, are better left to the merits judge on the judicial review.

Conclusion

[31] I would deny leave to appeal. However, I disagree with aspects of the Minister's submissions. As success was divided, the parties should bear their own costs.

Fichaud J.A.

Concurred:

Scanlan J.A.

Beaton J.A.