SUPREME COURT OF NOVA SCOTIA

Citation: *Eco Awareness Society v. Antigonish (Municipality)*, 2010 NSSC 461

Date: 20101221
Docket: Hfx No. 336179
Registry: Halifax

Between:

Eco Awareness Society

Applicant

v.

Municipality of the County of Antigonish, Eastern District Planning Commission, Ms. Wanda Ryan, Development Officer and Shear Wind Inc.

Respondents

Judge:	The Honourable Justice M. Heather Robertson
Heard:	November 8, 2010, in Halifax, Nova Scotia
Written Decision:	December 21, 2010
Counsel:	Peter McInroy, for Eco Awareness Society Donald Macdonald, for the Municipality of the County of Antigonish, Eastern District Planning Commission, Ms. Wanda Ryan, Development Officer Peter M. Rogers, Q.C., for Shear Wind Inc.

Robertson, J.:

[1] This is a preliminary motion addressing "filing time lines" in the applicant's notice of judicial review of a decision taken by a development officer for the Municipality of the County of Antigonish, Eastern District Planning Commission, which decision was communicated to the applicant on June 30, 2010. The development permit allowed the installation of wind turbines for the Glen Dhu Power project.

[2] *Civil Procedure Rule* 7.05(1)(a) requires filing of a judicial review application challenging the development permits issued within twenty-five days of the decision to issue the permits being communicated to the applicant.

> 7.05 Judicial review application
>
> > (1) A person may seek judicial review of a decision by filing a notice for judicial review before the earlier of the following:
> >
> > (a) twenty-five days after the day the decision is communicated to the person;
> >
> > (b) six months after the day the decision is made.

[3] The twenty-five-day period from the June 30 communication of the decision expired on August 9, 2010.

[4] The applicant filed an application for judicial review on September 15, 2010, twenty-six business days after the appeal date expired.

[5] The applicant Eco Awareness Society, whose president and director is Kristen M. Overmyer, whose affidavit is before the Court. The affidavits of John Bain, the development officer and Bill Bartlett of Shear Wind are also in evidence. Cross-examination of these affidavits was conducted.

[6] The applicant asks that the court use its general discretionary power (Rule 2.03) to allow an extension to the time limit set out in Rule 7.05 for judicial review.

2.03 - General judicial discretions

(1) A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:

(a) give directions for the conduct of a proceeding before the trial or hearing;

(b) when sitting as the presiding judge, direct the conduct of the trial or hearing;

(c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

(2) A judge who exercises the general discretion to excuse compliance with a Rule must consider doing each of the following:

(a) order a new period in which a person must do something, if the person is excused from doing the thing within a period set by a Rule;

(b) require an excused person to do anything in substitution for compliance;

(c) order an excused person to indemnify another person for expenses that result from a failure to comply with a Rule.

(3) The general discretions do not override any of the following kinds of provisions in these Rules:

(a) a mandatory provision requiring a judge to do, or not do, something;

(b) a limitation in a permissive Rule that limits the circumstances in which a discretion may be exercised;

(c) a requirement in a Rule establishing a discretion that the judge exercising the discretion take into account stated considerations.

[7] The applicant also argued that the term communication of the decision should be interpreted in a far wider context to include giving the applicant the opportunity to review and consider more documentation, i.e. the review of a second wind study before deciding on further legal action. These studies had been reviewed by Mr. Bain the development officer in the course of making his decision.

[8] I note that the second wind study referred to by the applicant was in its hands on August 10, 2010, the date the applicant suggests the twenty-five-day limitation should then begin to run. The applicant's position is that the decision of the development officer was "not fully communicated" on June 30, 2010 and they should be accorded more time.

[9] The application for judicial review was filed September 15, 2010.

[10] The applicant recites a history and tradition of leniency in this court in extending time limitation.

[11] The applicant relies on *Wagner v. Carvery*, 2009 NSCA 102 and *Aurelius Capital Partners v. General Motors Corp.*, 2009 NSSC 100, a chambers decision, respecting extension of time. I did not find these cases to be particularly helpful, although it can be said that the court has the inherent and equitable jurisdiction to alter an abridge time limitations.

[12] The new rules of this Court were adopted after lengthy consultation with the bar.

[13] The new section 7.05(1)(a) has not to date been judicially considered by this Court.

[14] To receive guidance in this issue the respondents urge me to look at similar provisions in the *Federal Court Act*, governing judicial review. See *Fuchs v. Canada* [1997] F.C.J. No. 343.

[15] The provisions of our *Civil Procedure Rule* 7.05 and *Federal Court Rule* 18.1(1) and (2) are very similar. The application for review is required to be commenced within a fixed number of days from the communication of the decision – thirty days in the federal regime and twenty-five days in Nova Scotia. None of the other common law provinces have our Rule 7.05.

[16] In *Forster v. Canada (Attorney General)* 1999 CanLII 8762, (F.C.A.) the Federal Court of Appeal dismissed an inmate's late appeal arising from a discipline hearing, where the inmate claimed he had not received all of the tapes of evidence of the hearing at paras. 5 and 6:

> [5] In *Skycharter Ltd. v. Canada (Minister of Transport)* 1997 CanLII 4765 (F.C.), (1997), 125 F.T.R. 307, the Trial Division denied an applicant an extension of time when the applicant had not received a copy of a lease that they were challenging. The Court held that the applicants in that case had 30 days from the time that they heard about the decision to lease some land at Pearson International Airport, and that waiting for full particulars of a decision is not a good enough reason to grant an extension of the 30 day time limit.
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> [6] The Appellant had received the decision of the disciplinary hearing and most of the tapes of that hearing by November 17, 1997. Waiting for the full tape recorded transcript constituted waiting for full particulars in this case. The Motions Judge exercised his discretion properly when he found that waiting for the tapes did not constitute a sufficiently good reason for the delay in the case at bar.

[17] Similarly in *Goodwin v. Canada (Attorney General),* 2005 FC 1185 (CanLII) and *Peace Hills Trust Co. v. Saulteaux First Nation*, [2005] F.C.J. No. 1646, the court held that the communication of the decision of a statutory decision maker does not have to include anything other than the decision itself.

[18] In this case, the development officer's "decision was an action taken under legislation," the *Municipal Government Act*. Developmental officers in this province do not submit written reasons for their decisions, nor are they required to share background information that accompanies the application for a development permit other than with the developer/owner and their representatives, without the owner/developer's prior agreement. It is recognized that the disclosure of some of these materials would not be permitted pursuant to *FOIPOP* legislation for the protection of personal information or third parties.

[19] Development permits are issued as of right in Nova Scotia pursuant to the bylaws of the municipality, in the absence of a specified process of development agreement or zoning amendment. Indeed, I note, that in this case the Utility and Review Board heard a zoning appeal in this matter and found the applicant Eco Awareness Society to be without status as an interested party. That decision was not appealed. Thus, the development officer issued the permits. See also *Peterson v. Kentville (Town)* 2008 NSSC 254, para. 117.

> 117 In my opinion, the legitimate interests of abutters and other neighbours are engaged when a land use by-law, an amendment, or a minor variance is sought.

> Otherwise, the landowner must be permitted to do what the law allows even if the abutter does not like what the law allows. Thus, an abutter does not have a sufficient interest to be entitled to notice, or a hearing, or a challenge for bias when a neighbour applies for a development permit to which the neighbour is entitled as a matter of right.

[20] *Civil Procedure Rule* 7 specifically contemplates that the time begins running before an applicant has received a copy of a written decision, if there is one, or documents evidencing an action taken, such as background information the development officer may have relied on in making his decision.

[21] The Nova Scotia Court of Appeal has considered its own Rule 90 for time limits with respect to the filing of a notice of appeal. The criteria they set are also helpful when one considers on *Rule* 7.05. *Farrell v. Casavant,* 2010 NSCA 71, which sets forth a three-part test. The applicant must have had (a) a *bona fide* intention to appeal during the period the right existed (b) could present a reasonable excuse for not applying in time and (c) has a strong arguable case showing even that warrants intervention.

[22] Lastly, Beveridge, J.A. addressed in *Farrell* the essential question on such an application, that of whether "justice requires" that the application be granted.

> 17 Given the myriad of circumstances that can surround the failure by a prospective appellant to meet the prescribed time limits to perfect an appeal, it is appropriate that the so called three-part test has since clearly morphed into being more properly considered as guidelines or factors which a Chambers judge should consider in determining the ultimate question as to whether or not justice requires that an extension of time be granted. (See *Mitchell v. Massey Estate* (1997), 163 N.S.R. (2d) 278; *Robert Hatch Retail Inc. v. Canadian Auto Workers Union Local 4624*, 1999 NSCA 107.) From these, and other cases, common factors considered to be relevant are the length of delay, the reason for the delay, the presence or absence of prejudice, the apparent strength or merit in the proposed appeal and the good faith intention of the applicant to exercise his right of appeal within the prescribed time period. The relative weight to be given to these or other factors may vary. As Hallett J.A. stressed, the test is a flexible one, uninhibited by rigid guidelines.

Length of Delay

[23] Clearly the new Rule 7.05 intended that the length of delay be shortened from six months to twenty-five days, so that challenges to statutory decision makers would be expeditiously heard. Here a delay of fifty days, without any indication in writing that the applicant even intended to consider an appeal, is a very significance delay.

Reason for Delay

[24] In my view Ms. Overmyer's suggestion that her group was waiting for legal opinions, or had difficulty in assembling their group for a meeting during the summer are not sufficient reasons for delay. I note that the applicant never argued inadvertence or mistake or any occurrence that preventing filing an appeal on time. Indeed the applicant appears to have decided not to file the appeal within the requisite time – but chose to seek more information and more opinion notwithstanding this deadline. Simply put, there is no reasonable excuse.

[25] In *Council of Canadians v. Director of Investigation and Research*, 1996 Can LII 3949 (F.C.), a citizens group sought an extension for filing an application for judicial review, in similar circumstances to this case, the need to seek legal opinion and call board meetings of 15 members.

[26] The Federal Court refused to grant an extension, finding that the applicant had not provided justification for the delay:

> It is one thing to ask for an extension of time pursuant to the legislation, but it is entirely another to change the provision as to when that time starts to run – which is exactly what counsel for the applicants would have this Court do. Although the granting of a time extension is a discretionary decision, the provision is quite clear as to the time limits within which such a request can be made and communicated. The clock starts running when the decision to approve the transaction was made and communicated to the parties directly affected, and not from the time that the applicants received a legal opinion on the transaction. And even if the clock were to have started running when the legal opinion was given, the applicants would still have been out of time.

Presence of absence of prejudice

[27] Having reviewed the affidavit evidence before me, I am persuaded that the respondent will suffer the greater prejudice.

[28] They made financial commitments and proceeded with both phases of the project in both Pictou and Antigonish Counties on the strength that the decision was made and the appeal periods had run their course.

Strength of Merit of the Proposed Appeal

[29] The decision of a development officer to issue a permit is accorded a high degree of deference and the standard of review is one of reasonableness.

[30] There is no argument being made here that the development officer exceeded his authority or considered irrelevant matters in taking his decision. The evidence before me describes a development officer carrying out his usual duties, pursuant to his recognized expertise.

[31] The merits of a judicial review of the development officer's decision should be left for another day. Although counsel for the respondents recite cases *Weilgart v. Halifax (Regional Municipality),*2008 NSSC 130, *Grove v. Chester (Municipality),* 2003 NSCA 4, and *Oakland Indian Point Residents Association v. Seaview Properties Ltd.,* 2010 NSCA 66 with respect to the high degree of deference shown to the decisions of the development officers.

Intention to exercise right of appeal withing the prescribed period of time

[32] I see no evidence of Eco Awareness Society's intention to appeal within the twenty-five day limitation. Indeed, despite being represented by counsel, Eco Awareness Society seemed to take its time in consultation with its members and in seeking other legal opinions.

[33] This case is a good example where the statutory decision maker should have finality in the public decision making process. An "as of right decision" on a planning matter was made and a permit issued. The community, the government officials as well as the developers should be entitled to understand the finite time lines that apply, without fear of interference months after the decision, through a further judicial review.

[34] The new Rule 7.05 contemplates judicial review in a expeditious manner on a prescribed short time line that should not easily be ignored without very significant excuse or reason for the delay. None is present in this case.

[35] The respondents' (Municipality of the County of Antigonish and Shear Wind Inc.) motion for dismissal of the judicial review application of Eco Awareness Society is granted by reason of its failure of Eco Awareness Society to appeal within the requisite time frame.

[36] I will be happy to hear submissions in writing on the matter of costs, failing any agreement.

Justice M. Heather Robertson