SUPREME COURT OF NOVA SCOTIA

Citation: Rockwood Community Association v. Halifax (Regional Municipality) 2011 NSSC 91

Date: 20110304
Docket: Hfx. No. 337839
Registry: Halifax

Between:

Rockwood Community Association Limited, Helen Lynn Anderson, Gregory Edward Langthorne

Applicants

v.

Halifax Regional Municipality, Banc Properties Limited

Respondents

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	December 23, 2010, in Halifax, Nova Scotia
Oral Decision:	February 14, 2011
Written Decision:	March 4, 2011
Counsel:	Michael J. Wood, Q.C. and Jason Cooke, for the Applicants Randolphe Kinghorne and Stephen Jedynack, for Halifax Regional Municipality Christopher Robinson, Q.C. and Kevin Gibson, for Banc Properties

By the Court:

[1] The respondent, the Halifax Regional Municipality (HRM) has filed a motion seeking the dismissal of an application for judicial review by the applicants, the Rockwood Community Association Limited, Helen Lynn Anderson, and Gregory Edward Langthorne (the applicants) on the ground that the application was not filed within the time limit set out in *Civil Procedure Rule* 7.05. The respondent, Banc Properties Limited, joins in support of the motion.

[2] The central questions are (1) whether Rule 7.05 requires formal communication to an applicant for judicial review of the decision to issue a development permit, and (2) if the Court finds that there was communication, what is the basis for extending the filing time requirement beyond the time limit provided for in the Rules.

[3] HRM issued a development permit to the respondent on April 7, 2010 in respect of lands located at 1 Craigmore Drive in Halifax. On October 5, 2010, the applicants filed an application for judicial review in the nature of *certiorari* to challenge the issuance of the development permit.

[4] Rule 7.05(1) provides as follows:

> 7.05 (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.

[5] Rule 7.05 represents a change from Rule 56 of the *Civil Procedure Rules 1972*, which required the filing and service of an Originating Notice for Judicial Review within six months after the judgment, order, warrant or inquiry to which the application related. Rule 3.03 allowed the Court to extend the date for filing in certain circumstances, but did not extend that discretion to an originating notice seeking judicial review. Rule 56 provided that Rule 3.03 did not apply if the applicant had not complied with the filing and service requirements.

[6] The applicants maintain that Rule 7.05(1) creates two different time limits within which an application for judicial review can be filed, one of 25 days and one

of six months. Unlike the previous Rule 56, they say, the Court has jurisdiction to extend either time limit in appropriate circumstances.

[7] HRM argues that the applicants are subject to the 25-day time limit because they are the applicants and the decision of the Development Officer was communicated to them. HRM also argues that, although there was no formal communication of the decision to issue a development permit in the sense that the Development Officer personally served the applicants with a copy of the decision or provided them with notice by registered or certified mail, the applicants were aware of the decision made by the Development Officer.

[8] HRM states that when the development permit was issued on April 7, 2010, the Municipal Councillor representing the area where the land is situated made the applicants aware of the issuance of the permit. The respondent, Banc Properties, scheduled a public information meeting for May 10. Notification of the meeting was provided to area residents, including the applicants, by letter from Councillors Linda Mosher and Russell Walker on April 23. The record indicates that some of the applicants had notice of the fact that of the issuance of the development permit by at least April 26.

[9] Following the May 10, 2010, public meeting, the applicants made inquiries to HRM with reference to the development of the land, alleging that the development permit had been improperly issued. On June 17 the applicants attended at the offices of HRM to view the plan submitted for the renovation permit for 1 Craigmore (an existing building) and the development permit for a new residential tower behind the existing building. On June 23, Brian Adams, who was involved with the applicants, pointed out irregularities respecting the use of the land and stated that the applicants had found an additional violation of the *Land Use Bylaw*. Given the nature of the deficiencies pointed out by the applicants respecting the setback and angles, the respondent sought and obtained variances of these deficiencies. The applicants appealed these decisions, but the variances were confirmed.

[10] HRM points out that although there were various discussions between the applicants and HRM officials, as well as public meetings, the applicants did not indicate that they intended to seek judicial review until their legal counsel advised HRM of their intention to do so on September 10, 2010.

[11] HRM contends that there was communication of the decision to issue the development permit to the applicants. In support of this position, they rely on a somewhat analogous rule of the *Federal Courts Rules* that are applicable to applications for judicial review and for appeals under the *Income Tax Act* and *Employment Insurance Act*. HRM asserts that communicating a decision is a midpoint between personal service and no service at all. It argues that communication is akin to actual knowledge, or deemed knowledge, of the decision. In this case, it is submitted, the applicants had actual notice of the decision.

[12] As to the purpose and the means of service, HRM refers to *Hill v. Hill*, [1997] N.S.J. No. 465 (C.A.), at para. 6, where Bateman, J.A. said, "[t]he purpose of service is to ensure that a party is aware of a legal proceeding." In *Maritime Telegraph and Telephone Co. v. Chateau Lafleur Development Corp.*, [2001] N.S.J. 471 (C.A.), where Cromwell, J.A. (as he then was), quoting R.E. Megarry, H.W.R. Wade and Charles Harpum, *The Law of Real Property* (6th, 2000) at pp. 144 - 145, stated, at para. 62, that "[a] person is commonly said to have 'actual notice' of a fact where he subjectively knows of it, regardless of how that knowledge was acquired."

[13] HRM's position is that in instances where the parties are not directly affected by the application for, or the issuance of, a development permit, they are not served with a copy of either the approval or the refusal to grant the permit. Nonetheless, if they receive notice of the decision, the clock starts to run from that point. HRM relies on *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, where it was held that "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence..." (para. 77). HRM maintains that the material fact is the decision to issue the permit, and that the time limit in Rule 7.05 started to run as against the applicants from the date that they knew of the decision.

[14] HRM submits that, in addition to being made aware of the issuance of the development permit, the applicants had extensive involvement in the proposed development at 1 Craigmore, including correspondence and meetings with the development officer who issued the permit. HRM also says the Rule does not provide for formal communication as implied by the applicants. The real question, it submits, is whether the applicants were notified of the decision.

[15] HRM disputes the applicants' argument that a six-month limitation is intended to apply only to persons who were not parties directly involved in the application for the development permit. Rather, it submits, the Rule applies in its entirety to anyone seeking judicial review of the development decision. The Rule provides that "a person" may file an application for judicial review. Although the Rule does not define "person," HRM maintains that the rule does not contemplate two different types of person: one who was party to the process, and one who is not. HRM says the plain meaning of the Rule requires the "person" to file the application for judicial review at the earlier of the two limitations. Otherwise, persons directly involved in the application process, such as the developer, would be limited to 25 days from the date of communication, while interested parties, such as neighbours, would be allowed a period of six months. Consequently, a developer would need to suspend work for six months in order to be certain that the decision of the development officer was final. The respondents argue that the purpose of the changes in the Rule is to bring about finality in administrative decisions and to allow persons to make decisions with reasonable dispatch.

[16] The respondents submit that the "decision" in this proceeding is the issuance of the development permit itself and the time referred to in Rule 7.05 commences

from the date the permit is issued. They disagree with the applicants' argument that the ongoing discussions with HRM suspended the decision date. They suggest that the position now being taken by the applicants is inconsistent with a statement made by Ms. Anderson in her affidavit that she believed that "we could file an application for judicial review within six months of the development permit being issued in April 7, 2010." Such a statement, it is submitted, is inconsistent with the applicants' alleged belief that the decision date was to be extended pending the discussion between the applicants and HRM.

[17] The applicants say that after the issuance of the development permit on April 7, 2010, permitting the construction of the 16 storey, 77 unit residential "addition" to an existing commercial building, they had discussions and ongoing communications with HRM staff until mid-September 2010.

[18] The applicants argue that the interpretation advanced by HRM is inconsistent with the language of the Rule. The Rule provides that the time limit starts to run once there is communication of a decision, not from the time the applicant acquires knowledge of the decision to issue the development permit. On behalf of the applicants, Mr. Wood claims that the decision was not communicated

to them. He acknowledges that the applicants were informed of the decision by two municipal councillors.

[19] The applicants argue that simply being aware of a decision does not satisfy the requirement of communication. They rely on *Atlantic Coast Scallop Fisherman's Assn. v.Canada (Minister of Fisheries and Oceans)*, [1995] F.C.J. No. 1347, which involved a Federal Court rule providing a time limit of 30 days after a decision was "first communicated ... to the party directly affected." The dispute arose from an apparent decision of the Federal Government not to implement an agreement reached with scallop fishermen to cancel some licenses and to engage in certain consultations. It was common knowledge that there had been no formal communication of the decision to the fishermen, although they were aware that certain aspects of the agreement were not being followed. The Court relied on the dictionary definition of "communicate," requiring some positive action on the part of the decision-maker in order to communicate the decision to the parties directly affected. The Court decided that since the decision had never been communicated to the applicant, the limitation period did not operate against the fishermen.

[20] Secondly, the applicants take the position that since there are two different time limits set out in Rule 7.05, the six-month rule ought to apply against them. The basis of this position is that the decision-maker does not have to communicate with the applicants, but only with the respondent, Banc Properties. The applicants maintain that, although they had multiple contacts with the development officer dealing with the existing building, and attended an information session dealing with the proposed development, the development officer did not provide notification to them.

[21] The applicants contend, in the alternative, that if the 25-day time limit applies, there were several decisions made by the development officer after the initial decision to grant the development permit which effectively changed his decision. Therefore, the final decision is not the decision of April 7, 2010, but the final decision made after various changes and amendments were made. In support, the applicant refers to *Sharma v. University of Calgary* (1990), 71 D.L.R. (4th) 344, 1990 CarswellAlta 436 (Alta. Q.B.), where the Court found the effective date to be the last date on which changes were made to the decision as a result of additional information being provided to the decision-maker. The Court stated, at paras. 16 and 17:

> I am satisfied that in Sharma's case ... the Student Promotions Committee considered all of the additional material relating to Sharma's improved psychiatric condition and the explanations contained in his lawyer's twenty-six page letter as to why the rotational assessments were flawed.
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> The Student promotions Committee decision of October 24, 1989 which reaffirmed its earlier decision was in my view a "a decision" with the meaning of Rule 753.11(i) and accordingly review by *certiorari* is not barred by the operation of that limitation period.

[22] In *McPhee v. Pulpwood Marketing Board*, (1986), 72 N.S.R. (2d) 312, 1986 CarswellNS 183 (S.C.T.D.), where the applicant was seeking *certiorari*, Tidman, J. held that the six-month period ran from the date of a re-considered decision, rather than the initial decision. He stated, at para. 8:

> I cannot agree because what, in fact, this court is being asked to review is the board's second resolution of October 23, 1985. The board had agreed to reconsider its first decision of April 23, 1985, and therefore, a final decision was not made until it was made by the second resolution dated October 23, 1985. This application is an application to review the board's final decision of October 23, 1985, and therefore is well within the six month limitation period provided in Rule 56.06.

[23] The applicants point to their discussions with the development officer between April 26 and September 2010, during which period HRM reconsidered certain aspects of the decision to issue the development permit. On April 27, Helen Anderson, John Langley and Brian Adams met with Andrew Faulkner, the

development officer, and argued that the existing building did not meet setback requirements. HRM granted a variance to accommodate the setback deficiency, and Council affirmed the variance on appeal.

[24] Between June and August 2010, the applicants raised other issues with HRM, including the characterization of the development as one building, variance and angle controls, building setbacks and open space allotments. By e-mail of July 30, the development officer advised the applicants regarding the open space issue, indicating "the permit and your comments and concerns have undergone peer review." On August 31, Sharon Bond advised the applicants that "I am gathering information and should have a response by the end of the week." On September 10 Michael Wood, the applicants' counsel, sought a response to outstanding issues. On September 16 HRM's counsel acknowledged receipt of the correspondence.

[25] The applicants maintain that the exchange of information, expression of concerns, opposition to variances, appeals and changes by virtue of the approval of a variance should be viewed in their totality as extending the time limit until at least September 16, 2010. HRM granted a further variance on November 12, 2010, regarding 80 degree angle control, supporting the applicants' contention that the

letter of September 16, 2010, did not foreclose HRM from giving further consideration to their request.

[26] I conclude that there was communication to the applicants of the decision to grant a development permit to the respondent Banc Properties. They knew of the decision from at least April 26, 2010. I do not believe that the Rule stands for the proposition that there must be personal service or service by registered or certified mail to the applicants. Provided that they were informed of the development officer's decision, the applicants received communication of this decision.

[27] I cannot agree with the applicants that I should follow the result in *Atlantic Coast Scallop*. The Federal rule involved in that case required communication to the parties directly affected. The fishermen were directly affected because they were a party to the proceeding in question. Rule 7.05 does not specify how or from whom the communication must come. Therefore, reliable communication from any source of the development permit being issued would be sufficient to start the 25-day limit.

[28] I refer to *Skycharter Limited v. Canada (Minister of Transport)*, [1997] F.C.J. No. 128, where the minister sought to dismiss an application for judicial review brought by Skycharter and Millard Properties. The applicants had discussions with the Crown with respect to leasing certain Crown property. On June 7, 1996, the Minister advised the applicants that it had entered into a lease with another party. The applicants, who were third parties to the lease, sought particulars of that agreement, without success. They brought an application for judicial review on December 2, 1996. Weston, J. said, at para. 6:

> The applicants argue that they were not informed of the Minister's decision since the full particulars of the lease agreement were not made available to them. On June 7, 1996, and June 25, 1996, Transport Canada advised the applicants that they had agreed to enter into a lease with another party effective May 17, 1996. I cannot agree with the applicants that this did not constitute notification of the Minister's decision. At the very least, as of June 25, 1996, the parties were aware that the Minister had entered into a lease with a third party and that the lease was effective May 17, 1996. As such, the filing of the application for judicial review six months later was clearly well outside the limitation period.

[29] The reasoning from *Skycharter* was applied in *Forster v. Canada (Correctional Service)*, [1999] F.C.J. No. 1462 (Fed. C.A.), in dealing with an application for judicial review by an inmate on a decision in a disciplinary hearing, and in *Peace Hills Trust Co. v. Saulteaux First Nation*, [2005] F.C.J. No. 1646 (Fed. Ct.). In the latter case, the Court followed *Skycharter* and rejected the approach taken in *Atlantic Coast Scallop*, stating at paras. 42-44:

> The Applicant relies on the decision in *Atlantic Coast Scallop Fishermen's Assn. v. Canada (Minister of Fisheries and Oceans)* (1995), 189 N.R. 220 (F.C.A.) to argue that subsection 18.1(2) requires a tribunal itself, by some positive action, to communicate its decision to those directly affected by it. It argues that since it did not receive a copy of the impugned BCR, the thirty-day limitation period did not begin before the date on which the application for judicial review was filed.
>
> There is no doubt that the Applicant did not receive a copy of the impugned BCR until May 2004. This application was issued on September 8, 2003. There is evidence, however, that the Applicant was advised of the substance of the Band's position concerning non-payment of the outstanding loans as early as May 31, 2000; see the affidavit of Peter Chartrand. Equally, there is no doubt that as of November 1, 2001, the Applicant received written advice from INAC that the Saulteaux First Nation had executed a BCR which specifically directed that payments of loans to the Applicant would be withheld pending the outcome of litigation undertaken by the Saulteaux First Nations (TLE) Trust against the Applicant.
>
> In my opinion, this notification was sufficient to put the Applicant on notice that a decision had been made, affecting payment of the outstanding loans. The letter of November 1, 2001 originated from INAC, a clearly proximate if not ultimate source of funding for the Saulteaux First Nations.

[30] I find these cases to be persuasive authority for the proposition that, for the purpose of communication, all that is required is awareness of the decision. The applicants were aware that the development permit had been issued to the respondent not later than the end of April 2010.

[31] I am not persuaded by the applicants' argument that a reasonable interpretation of Rule 7.05 indicates that the 25-day period was intended only to apply to a person who was a party to the decision and would therefore be entitled

to direct communication of it, and that the six-month period was intended to apply to those persons who were not a part of the process. If I were to accept this interpretation, this would have the effect of giving persons in the position of the applicants much more time in which to decide to seek judicial review than would be available to a party in the position of the respondent Banc Properties.

[32] It is a primary rule of interpretation that an enactment, such as a rule of civil procedure, should be construed in a way that best furthers its objects. Moreover, an enactment must be construed so as to avoid absurdities.

[33] Rule 7.05 provides that a person may file for judicial review before the earlier of two deadlines, in paragraphs (a) and (b). The Rule does not differentiate between a person who was a party to the underlying proceeding or process and a person who is not a party. In my opinion, it would be unreasonable to hold that the drafters of the *Civil Procedure Rules* intended to restrict the 25-day period to persons directly involved, while reserving the longer period others. Such an interpretation would mean that a developer could not rely on a development permit until the six-month period was exhausted. During this time, strangers to the process could complain or threaten legal action, but not be required to commence

an application. In effect, they could remain on the sidelines, but could the prospect of judicial review at any time within the six months.

[34] I note several definitions of the term “communication” or “communicate”. *Black’s Law Dictionary* (9 ed.) defines “communication” as “the expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another’s perception” (p. 316). The *Collins Canadian Dictionary* (2010) defines “communicate” as “1 to exchange (thoughts) or to make known (information or feelings) by speech, writing or other means; 2 ... to transmit (to)...” (p. 188). In my view, the applicants received communication of the decision to issue a development permit to the respondent by April 26, 2010.

[35] I have reviewed the circumstances around the issuance of the development permit, including the various e-mails and letters from the municipal councillors and communications between the applicants and HRM regarding the proposed development. On June 22, 2010, Brian Adams wrote to Sharon Bond, Manager of Subdivision and Land Use, thanking her for the opportunity to view the plan respecting the development permit for the subject property.

[36] Although six months is the outside limit for a person to file an application for judicial review, the Rule also imposes an obligation to act promptly. HRM opposes the requested extension on the basis that the applicants have failed to establish a continuing intention to pursue the application, or that they have an arguable case, that there is no prejudice to the respondent and that there is a reasonable explanation for the delay.

[37] HRM cites *Farrell v. Casavant,* 2010 NSCA 71, where the Court considered an extension the time period for the filing of an appeal. Beveridge, J.A. said, at para. 13, that "[t]he power to grant an extension of time has been described as one that should only be exercised if 'exceptional' or 'special' circumstances have been shown...." HRM also refers to *Luke v. Luke*, 2009 NSCA 57, where Hamilton, J.A. quoted the three-part test set out in *Jollymore Estate v. Jollymore,* 2001 NSCA 116, 196 N.S.R. (2d) 177, where the Court set out a three-part test for extensions of time. The Court must be satisfied that "(1) the applicant had a *bona fide* intention to appeal when the right to appeal existed; (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is

a strong case for error at trial and real grounds justifying appellate interference" (*Luke* at para. 8). *Jollymore* warned against an excessively rigid approach, commenting that "[c]ases cannot be decided on a grid or chart. Ultimately the objective must be to do justice between the parties" (*Luke* at para. 8).

Continuing intention to seek review

[38] Apart from the statement in Ms. Anderson's affidavit, HRM contends that the only evidence of any continuing intention to pursue judicial review is Mr. Wood's letter on the applicants' behalf of September 10, 2010, indicating that his firm had been asked to consider the possibility of judicial review of the Development Permit and seeking an expedited response from HRM.

Arguable Case

[39] HRM asserts that the applicants do not have a right of appeal, and are unlikely to succeed. The respondents submit that the standard of review applicable to the decision to issue the development permit is reasonableness. According to HRM, the standard of correctness is not appropriate, but it appears that the

applicants are alleging that the development officer erred. The respondents say the development officer is afforded a high degree of deference, and consequently the chance of success is low.

[40] Banc Properties says the applicants are not owed a duty of fairness. The development permit was “issued as of right” because it was within the existing zoning, met all of the development norms and there were no requirements for the public or HRM Council to provide input. Ms. Anderson’s affidavit, it is submitted, fails to specify the basis on which the development officer's decision is allegedly unreasonable.

[41] The applicants maintain that there is merit to application. They assert that various elements of the development permit did not comply with the *Land Use Bylaw*, because the legitimacy of some of the concerns expressed by the applicants resulted in HRM issuing variances. Additionally, they say, a number of remaining complaints have yet to be resolved and will need to be considered in the context of the application for judicial review.

[42] The applicants suggest that the development exceeds maximum density limits and has insufficient open space and that the development officer erred in determining that the proposed development was an addition to an existing building and not an additional building. However, the affidavit evidence is primarily concerned with alleged setback requirements, angle control violations and open space necessities with respect to the existing building at the property in question. The applicants have adduced little evidence which would provide a basis for determining the Development Permit in question was improperly issued.

[43] I conclude that the development permit was issued "as of right". In *Eco Awareness Society v. Antigonish (Municipality)*, 2010 NSSC 461, 2010 CarswellNS 811, Robertson, J. said, "[t]he 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" (para. 29). She added, "[t]here 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" (para. 30). Similar comments are appropriate in this case.

Reason for Delay in filing

[44] HRM argues that because the applicants became aware of the issuance of the development permit shortly after it was issued, and because of their involvement with HRM, there are insufficient reasons to excuse the failure to file their application for judicial review within the time specified in the Rule: see *Zen v. Canada (Minister of National Revenue)*, 2008 FC 371; *Pomfret v. Canada (Attorney General)*, 2008 FC 1219; and *Didone v. Sakno*, 2003 FC 1530, affirmed at 2005 FCA 62. Various Federal Court decisions have decided that waiting for reasons for the decision was insufficient basis for a reasonable excuse: see *Westinghouse Canada Inc. v. Canada (Canadian International Trade Tribunal)*, [1989] F.C.J. No. 540 (Fed. C.A.).

[45] The respondents submit that it is not a failure to communicate the decision that caused the applicants' to delay filing their application for judicial review, but rather the fact that they were putting the application on hold until they had an opportunity to address their questions and to attempt to convince HRM to change its decision on the issuance of the development permit.

[46] The applicants point to the procedural context of the application, and argue that there are two limitation periods, one of which they complied with. They add that there is no Nova Scotia caselaw indicating which limitation period applies to them. Furthermore, the applicants say they wanted to have their queries to HRM addressed before initiating legal proceedings. Some of these queries were addressed while others are still outstanding.

[47] Various cases indicate that pursuing full particulars is not reason enough to grant an extension: see, for instance, *Skycharter*, *Goodwin v. Canada (Attorney General)*, 2005 FC 1185 (Fed. Ct.), and *Re Booth*, 2004 PESCAD 18. In *Goodwin*, the Court stated, at para. 33, that "[i]n any event, waiting for this information before filing an application for judicial review is analogous to waiting for the reasons supporting a decision. That in itself would not be sufficient reason to justify failing to file a timely application" (para. 33). In *Re Booth*, which involved an appeal of a decision to issue a building/development permit, Webber, J.A. said, "I am unable to accept that one doesn't know the true nature of a decision until one knows of a reason to challenge the validity of the decision..." (para. 12). The Court continued, at paras. 13-14:

> The Act allows for an appeal of "a decision" by someone dissatisfied with that decision. The decision in question was clearly the decision to issue a building

> permit. While the appellants argue that it was not "dissatisfied" with the decision when told that it was the right decision according to the bylaws, this is clearly not the case when one views the actions of the appellants subsequent to their finding out about the decision to issue the permit. They proceeded to seek out copies of the official plan, bylaws and zoning map. They sought legal advice. Clearly, they disagreed with the decision. They just did not realize that the decision may have been made in violation of the Community's bylaws.
>
> In essence the appellants argue that the appeal period only begins to run when someone can find a reason to challenge the validity of the decision. Public policy reasons would not support such an interpretation of the statute. If that interpretation were allowed, building permits issued years ago, and acted upon, could be challenged because someone just found an error — or thinks they have found an error — in connection with the issuance of the permit.

[48] The situation in *Re Booth* is not unlike this matter in the sense that the applicants seemed to be suggesting that they were waiting to gather more information - in the form of responses from HRM - before making a decision as to whether to proceed with judicial review. Similarly, in *Eco Awareness*, Robertson, J. held that waiting for a legal opinion or seeking more information is not sufficient reason for delay. In my view, the applicants have not provided a persuasive reason for their delay that is appropriate. The 25-day time limit should not easily be displaced without a significant excuse or reason for the delay.

Prejudice to other parties

[49] HRM argues that *certiorari* is an extraordinary remedy, and the Court should accordingly be reluctant to grant an extension of time. Decisions such as decisions of Municipal Councils and agencies need to have finality: see, for instance *Budisukma Puncak Sendirian Berhad v. Canada*, 2005 FCA 267, where the Court said, at para. 60:

> In my view, the most important reason why a shipowner who is aggrieved by the result of a ship safety inspection ought to exhaust the statutory remedies before asserting a tort claim is the public interest in the finality of inspection decisions. The importance of that public interest is reflected in the relatively short time limits for the commencement of challenges to administrative decisions - within 30 days from the date on which the decision is communicated, or such further time as the Court may allow on a motion for an extension of time. That time limit is not whimsical. It exists in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay and to provide security to those who comply with the decision or enforce compliance with it, often at considerable expense. In this case, the decision of the Chairman was not challenged until, a year and a half after it was made, the respondents filed their claim for damages.

[50] HRM also submits that permitting an extension would have the effect of providing the applicants with a broader right to challenge the development decision than the property owner who is a party to the decision. This, it is argued, would hinder construction and would unduly tie the hands of developers.

[51] The respondents claims that an extension of the time limitation would result in significant prejudice to the development. It is important for officials and

citizens to know when a decision can be challenged by judicial review. A development permit has a finite duration, the effect of an extension would be that there would be no certainty as to reliance on the deadline. Without this certainty, a developer would encounter real prejudice by undertaking significant financial risk without the ability to undertake work pursuant to a development permit.

[52] In my view, the effect of granting an extension would be to impose serious prejudice on the respondent developer and its project. This would tie the hands of the respondent for months into the future. It would be unable to work on the property until the time period has been exhausted.

[53] The application for judicial review was filed on October 5, 2010. The applicants became aware of the issuance of the development permit April 23, 2010 by virtue of a letter from two municipal councillors, notifying them of the public meeting to be held by the respondent, Banc Properties, on May 10, 2010. Some or all of the applicants attended the public meeting on May 10. Helen Anderson, Brian Adams and others had met with Andrew Faulkner and Paul Sampson of the HRM planning staff on April 27. Brian Adams was fully aware of the issuance of the development permit by virtue of an e-mail on April 26.

[54] Accordingly, the period from April 26, 2010, to the date of the filing of the application on October 5 covers about five months. I estimate approximately four months of delay in the filing of the application.

Was there a continuing interest in filing an application for judicial review?

[55] Helen Anderson states in her affidavit that there was always an interest in pursuing an application for judicial review if HRM did not agree with the applicants' position. She stated, at para. 22 that the "intention throughout was to proceed with judicial review unless HRM was able to sufficiently answer the questions we had regarding the proposed development at 1 Craigmore Drive. These questions related to the setback requirements for the existing building and that the existing building did not comply with the 80 degree angle required by the *Land Use Bylaw*."

[56] There is no indication that the applicants' intention to seek judicial review was communicated to HRM or Banc Properties prior to Mr. Woods's letter in September 2010. Up to that point, the group was seeking clarification on the basis

of the issuance of the development permit. They also pointed out issues with respect to the existing building which, in the end, required a number of variances in order to comply with the *Land Use Bylaw*.

[57] Ms. Anderson states in her affidavit that she understood that her group "could file an application for judicial review within six months of the development permit being issued on April 7, 2010" (para. 45). Although it may have been an honestly held belief that Rule 7.05(a) only applied to the respondent, it was an erroneous interpretation of the rule.

[58] HRM contends that since the applicants did not communicate their intention to file an application for judicial review until September 2010, the Court should not rely simply on the allegedly self-serving affidavit of Ms. Anderson. Banc Properties says the failure of the applicants to inform it of their continuing intention to apply for judicial review should be a consideration for the Court.

[59] I conclude that the process of information seeking and attending meetings does not substantiate the applicants' claim that they had a continuing intention to seek judicial review. Ms. Anderson's affidavit says that such an intention existed;

there is, however, no other evidence of such an intention prior to Mr. Wood's letter of September 10, 2010, when he indicated that he had been asked to look at the possibility of seeking judicial review of the Development Permit.

[60] I do not agree with the respondent's Banc's position that there was a need to communicate with them with reference seeking judicial review after the deadline and I would not impose that as a requirement.

Conclusion

[61] Consequently, I find that the 25-day limitation applies to this proceeding. The motion to dismiss the judicial review application is therefore granted by reason of the failure of the applicants to apply within the requisite time frame.

[62] If the parties are unable to agree on costs, I ask them to submit their positions in writing within the next three weeks.

J.