SUPREME COURT OF NOVA SCOTIA
Citation: ***Wells v. Amherst (Town)*, 2019 NSSC 251**

Date: 20190731
Docket: Amh. No. 485848
Registry: Amherst

Between:

Walter Wells

Applicant

v.

Municipality of the Town of Amherst

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Jeffrey R. Hunt
Heard:	June 14, 2019 in Amherst, Nova Scotia
Oral Decision:	July 31, 2019
Written Release:	August 8, 2019
Subject:	Municipal law – Judicial Review – Procedural Fairness
Summary:	The Applicant argued the Municipality failed to comply with the requirements of procedural fairness in declining to grant his request for a 60-day adjournment of an appeal hearing. His Counsel indicated this time was required to allow him to, hopefully, present a remediation plan for a structure with serious health and safety issues. The Respondent Municipality argued there was no infringement of procedural fairness.

Conclusion: After examining all the circumstances, the Court concluded the discretionary procedural decisions made by the Municipality were reasonable. Application for Judicial Review dismissed.

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DECISION

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Counsel:	Jim O'Neil, Solicitor for the Applicant Douglas B. Shatford, Q.C., Solicitor for the Respondent

By the Court:

Introduction

[1] Walter Wells seeks judicial review of a demolition order made against a property owned by him and situated at 196 East Victoria Street, Amherst, Cumberland County. The Order was made February 25, 2019 by the Municipality of the Town of Amherst under the authority of the ***Municipal Government Act***, SNS 1998, Chapter 18.

[2] No stay of the Order was sought by Mr. Wells, but the Municipality agreed not to press forward pending determination of this Application.

Position of the Applicant

[3] The Applicant in this matter is not seeking judicial review on the basis that the demolition decision is unreasonable or falls outside the jurisdiction of the decision maker. Rather the position of the Applicant is that the Municipality failed to comply with the requirements of procedural fairness by declining to grant his request for a 60-day adjournment of the appeal hearing. His counsel indicated this time was required to allow him to hopefully present a remediation plan.

Position of the Respondent

[4] The Municipality responds that it acted in compliance with the requirements of procedural fairness. They acknowledge the Municipality did decline to grant an adjournment of the February 25, 2019 hearing. However, they submit that when the totality of the circumstances are examined it is evident they acted reasonably, within the bounds of their discretion, and in compliance with their legal obligations.

[5] They argue that although the request of Mr. Wells was framed as an adjournment of the hearing it can more accurately be seen as a request that the demolition order be lifted, and he be given more time to consider advancing a remediation plan.

Issues

[6] The issues before the Court are:

1. How is the standard of review to be applied?
2. Has the Applicant carried his burden of demonstrating a breach of the Respondent's duty of procedural fairness?
3. If the answer to (2) is yes, what is the appropriate remedy?

Standard of Review

[7] The Nova Scotia Court of Appeal has provided recent direction on the issue of standard of review in the context of a judicial review of an adjournment decision by a municipal body.

[8] These cases include:

> ***Halifax (Regional Municipality) v. 3230813 Nova Scotia Ltd.,*** 2017 NSCA 72
>
> ***Halifax (Regional Municipality) v. Tarrant***, 2019 NSCA 27

[9] In both cases the municipal decision maker had not granted an adjournment. The Nova Scotia Supreme Court, at first instance, heard judicial review applications and overturned those decisions. On appeal the Court of Appeal reversed both those outcomes and concluded that insufficient deference had been paid to the relevant decision maker. Of course, every situation ultimately turns on its facts. We can, however, draw on these decisions for the applicable legal principles.

[10] In ***HRM v. 3230813 Nova Scotia Ltd.***, 2017 NSCA 72, the trial judge had overturned a decision of HRM Community Council refusing an adjournment request in a planning appeal. The hearing judge found that Council had breached their duty of procedural fairness. The Court of Appeal disagreed.

Their reasons set out in detail both the standard of review and how it ought to be employed in the context of reviewing discretionary procedural decisions. The following section from the decision is somewhat lengthy but serves to set out the applicable analysis:

> [11] Whether to grant an adjournment raises a question of procedural fairness. Where a question of procedural fairness is raised, the first step a court must undertake is an analysis of the content of that duty: **(*Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd.*,** 2016 NSCA 40 at ¶ 54).
>
> ….
>
> [13] As Justice Fichaud explained in ***CanMar,*** there is no standard of review for procedural fairness where no decision is involved:
>
> > [47] The reason there is no "standard of review" for a matter of procedural fairness is that no tribunal decision is under review. The court is examining how the tribunal acted, not the end product. If, on the other hand, the applicant asks the court to overturn a tribunal's decision – including one that discusses procedure – a standard of review analysis is needed. The reviewing court must decide whether to apply correctness or reasonableness to the tribunal's decision. (e.g. ***Coates***, *supra*, paras. 43-45) (emphasis in original)
>
> [14] Like ***CanMar,*** the Company's complaint of procedural unfairness here involved challenging a decision of Council on the very point raised: the request for the adjournment. So, two steps must be undertaken: first, a contextual analysis of the duty of fairness in the circumstances of this case; second, consideration of Council's decision in light of that analysis.
>
> [15] In ***Baker v. Canada (Minister of Citizenship and Immigration),*** [1999] 2 S.C.R. 817, the court set out the following non-exhaustive list of factors guiding definition of the content of the duty of fairness (¶ 23-28):

> 1. the nature of the decision being made, and the process followed in making it;
>
> 2. the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates";
>
> 3. the importance of the decision to the individual or individuals affected;
>
> 4. the legitimate expectations of the person challenging the decision;
>
> 5. the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

[16] The judge in this case conducted no analysis of the content of the duty of fairness. After commenting that procedural fairness should "lean toward correctness", she moved immediately to her analysis of whether there was a denial of procedural fairness. This is prohibited reasoning as Justice Cromwell cautioned in ***Burt v. Kelly***, 2006 NSCA 27 at ¶ 21:

> [21] The first step – determining the content of the tribunal's duty of fairness – must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step – assessing whether the Board lived up to its duty -- assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for this review.
>
> [Emphasis added]

[17] ***Kelly*** accords some latitude to the statutory decision-maker regarding both the content of the duty of fairness and the decision under review – at least where that decision involves some discretion. This looks a lot like a "reasonableness" standard. Apposite here are: ***Re: Sound v. Fitness***

Industry Council of Canada, 2014 FCA 48, and ***Maritime Broadcasting System Limited v. Canadian Media Guild***, 2014 FCA 59, ¶ 48 and following.

[18] These observations of Justice Evans in ***Re: Sound*** are telling:

> 34 The black-letter rule is that courts review allegations of procedural unfairness by administrative decision-makers on a standard of correctness: ***Canada (Citizenship and Immigration) v. Khosa***, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.
>
> 35 Courts give no deference to decision-makers when the issue is whether the duty of fairness applies in given administrative and legal contexts. This is evident from the discussion in ***Dunsmuir v. New Brunswick***, 2008 SCC 9; [2008] 1 S.C.R. 190 at paras. 77 et seq. (Dunsmuir) of whether David Dunsmuir was entitled to procedural fairness before his employment in the provincial public service was terminated.
>
> 36 However, the standard of review applicable to an allegation of procedural unfairness concerning the content of the duty in a particular context, and whether it has been breached, is more nuanced. The content of the duty of fairness is variable because it applies to a wide range of administrative action, actors, statutory regimes, and public programs, with differing impacts on individuals. Flexibility is necessary to ensure that individuals can participate in a meaningful way in the administrative process and that public bodies are not subject to procedural obligations that would prejudice the public interest in effective and efficient public decision-making.
>
> 37 In the absence of statutory provisions to the contrary, administrative decision-makers enjoy considerable discretion in determining their own procedure, including aspects that fall within the scope of procedural fairness: ***Prassad v. Canada (Minister of Employment and Immigration),*** [1989] 1 S.C.R. 560 at 568-569 (Prassad). These procedural aspects include: whether the "hearing" will be oral or in writing, a request for an adjournment is granted, or representation by a lawyer is permitted; and the extent to which cross-examination will be allowed or information in the possession of the decision-maker must be disclosed. Context and

> circumstances will dictate the breadth of the decision-maker's discretion on any of these procedural issues, and whether a breach of the duty of fairness occurred.
>
> 38 ***Dunsmuir*** **does not address the standard of review applicable to tribunals' procedural choices when they are challenged for breach of the duty of fairness. However, the Court held (at para. 53) that the exercise of administrative discretion is normally reviewable on a standard of reasonableness.** This proposition would seem applicable to procedural and remedial discretion, as well as to discretion of a more substantive nature. It is therefore not for a reviewing court to second-guess an administrative agency's every procedural choice, whether embodied in its general rules of procedure or in an individual determination.
>
> [emphasis added]

[11] These considerations will guide the Court's analysis of the arguments advanced by the Applicant and Respondent in this matter. As was the case in ***HRM v. 3230813***, this can most productively begin with a consideration of the context within which the challenged decision was made. This requires review of the factual background and process.

[12] The record in this matter is voluminous. It discloses a long history of public complaints about 196 East Victoria Street followed by efforts from municipal staff to seek voluntary remediation. When these failed, Orders were made. Beginning in 2015 and continuing thereafter the issues were nearly constant and the pace of engagement between building inspections officials and Mr. Wells

grew steadily. It is evident that municipal officials attempted to work with the property owner and for some time sought alternatives to a demolition order.

[13] Matters came to a head in 2018. Complaints had been received from the public and the concerns were moving from the realm of unsightly premises to the suggestion of a dangerous structure at risk of some critical failures. Children were said to be exploring the site and placing themselves in danger. Building inspectors feared the large columned front of the structure was in danger of collapse which they feared would involve risk to the occupants or members of the public. Parts of the building were open to the elements.

[14] In January 2018 the Municipality gave notice to Mr. Wells that its building inspection officials would be acting under the ***Municipal Act*** to enter and inspect the structure for structural integrity and fitness for human habitation. The subsequent report confirmed the serious risk to any occupant of the building. Issues of existing structural failure were highlighted. There was a serious rodent infestation problem. Significant safety dangers were identified including partial collapse which could endanger the safety of persons.

[15] On July 19, 2018 the Building Inspector made an Order directing Mr. Wells to obtain an engineer's assessment of the structure and to remediate the most

pressing safety concerns by September 3, 2018. This Order was neither appealed nor complied with. In the absence of compliance, municipal building inspection staff made a formal recommendation that the structure be demolished.

[16] Procedurally this staff recommendation had to be advanced to the Planning Advisory Committee of Council which would determine and make any formal order.

[17] On October 29, 2018 Mr. Wells was given notice of a meeting of the Planning Advisory Committee where the municipal staff recommendations would be considered. This meeting took place on November 5, 2018. Mr. Wells was in attendance and made representations. In essence, his request was for more time. The Committee deliberated and on November 13, 2019 acted under the ***Municipal Act*** and ordered demolition.

[18] Following the service of this Order Mr. Wells appealed to the full Municipal Council by Notice of Appeal dated November 23, 2018. Council agreed to consider the appeal at a meeting of February 20, 2019. At that time Mr. Wells did not appear personally but he was represented by legal counsel, Jim O'Neil. Mr. O'Neil indicated that he had instructions to seek a 60-day adjournment. He

noted Mr. Wells' absence and cited health reasons. Mr. Wells had been assaulted and had spent time in hospital since the Planning Advisory Meeting. He had been released at some point the month prior. No other details were supplied. Mr. O'Neil submitted the purpose of the 60-day adjournment was so that Mr. Wells could have additional time to hopefully advance a plan to address the concerns about the structure.

[19] Council declined to grant the adjournment and the process continued. There was further deliberation with the meeting of February 25 resulting in the Motion and Order found in the Record.

[20] This is the context within which the judicial review must be considered. As discussed in the appeal cases referenced above, we will consider the non-exclusive factors set out in the ***Baker*** decision.

Decision Being Made and Process

[21] The decision before Council was the procedural one of whether to adjourn the appeal hearing for 60 days. Council determined not to grant the adjournment and on February 25, 2019, by motion, voted to uphold the recommendation of the building inspector and Order respecting demolition.

[22] The full context of the decision is relevant. Council was aware of the purpose of the adjournment, which was to provide additional time for Mr. Wells to possibly bring forward a plan. It is relevant that Mr. Wells had made personal submissions to the Planning Advisory Committee some two to three months earlier and had been in on and off discussions with municipal officials for many months.

Statutory Scheme

[23] This process unfolded under the regime set out in the ***Municipal Act***. Parties are permitted the opportunity to appear in person or by agent and make representations. Timelines are set out and, in this case, there is no suggestion these were not adhered to. The Applicant received notice and instructed counsel to seek an additional 60 days, the stated purpose of which was to begin to generate a remediation plan.

Importance of Decision

[24] The substantive matter in issue was of importance to both parties. By extension, the adjournment decision was important as well as it impacted the timeline within the property owner was hoping to address the underlying

complaint. Of course, he previously had a substantial length of time in which to do so.

[25] The importance to the Municipality is underlined by the fact they had in their hands a report, ultimately available to the public, which stated there were significant safety risks including risk of partial structural collapse with attendant risk to persons. Conversely for Mr. Wells, he faced the risk of losing the building or incurring significant remediation cost. This was a risk that was not simply theoretical to Mr. Wells as he had in the past been the subject of other such orders on other properties which had advanced to the demolition and even judicial review stage (eg. ***Wells v. Amherst (Town),*** 2014 NSSC 378).

Legitimate Expectations

[26] A person in the position of the Appellant would have expected to be able to put to Council their request for more time. While he might have hoped to do so in person, in this case we know that legal counsel ultimately voiced the request for additional time in which he hoped to begin to formulate a plan to address the issues. Mr. Wells had appeared in person before the Planning Advisory Committee in November, 2018. His essential pitch at that time was for more time as well.

Procedural Choices

[27] As was said by the Court of Appeal in ***HRM v. 3230813 NS Ltd.***:

> 32 The choice of Council to refuse an adjournment was procedurally available to it as part of its control of its own process, and it was not inhibited by relevant legislation."

[28] They further went on to say:

> 36…Generally deference is owed to the administrative decision maker on procedural issues, as Justice Cromwell explained in ***Kelly:***
>
> > [28] The fifth contextual factor is the nature of the deference owed to the decision-maker. What the duty of fairness requires in a particular case "... should ... take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures ...*"*: ***Baker,*** *supra* at para. 27 per L'Heureux-Dubé, J.; ***Knight***, *supra* at p. 685 per L'Heureux-Dubé, J. Subject to the applicable statutes and regulations, an administrative body is the "... master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair." per L'Heureux-Dubé, J. in ***Knight*** at p. 685.

[29] As noted above, the Applicant in this matter has not sought review of the reasonableness of the decision to uphold the demolition order. Instead the issue has been framed as a procedural fairness argument based in Council's decision to refuse the 60-day adjournment request.

[30] This decision of Council must be assessed in the context of the duty owed by Council and within the framework of all the dealings between the parties.

[31] The history of the matter is relevant to the analysis. Whether the Council acted reasonably is informed by an understanding of the full context. Mr. Wells had on prior occasions either committed to advancing a remediation plan or had been ordered to do so. He failed to follow through.

[32] The particular context of this adjournment request is interesting. The request was not, for instance, for a few additional days to have Mr. Wells appear because he was ill. The request was for a two month pause for him to hopefully begin work on a remediation plan. Council received this request, considered and rejected it.

[33] This request came within the context of a multi-year dispute over this site. Arguably as time passed the property moved from being merely unsightly to actually dangerous. Prior gestures towards remediation by the property owner had not resolved the issues. The provision of extra time in the past had not resulted in action. It is evident based on the questions and comments of Council that these were the considerations before them.

[34] In ***HRM v. Tarrant***, *supra*, at paragraph 37 the Court of Appeal noted that municipal proceedings such as the one being considered here are informal and need not conform to our idea of a judicial proceeding as we might know it from court proceedings. So long as the Council is acting within jurisdiction, objectively in good faith, and without bias, then:

> …the management of the procedural aspects of the hearing is in the Council's discretion. That includes whether there should be an adjournment, either on request or on Council's own motion.

Judges in judicial review ought not substitute their own conception of a judicial procedure which does not properly mesh with the more informal procedure.

[35] Mr. Wells wanted more time. Council believed he had had more than ample time already. As was noted in paragraph 34 of ***HRM v. 3230813 NS Ltd.***

> …The party moving for an adjournment should show that the failure to grant the adjournment could reasonably be expected to have affected the result.

It is evident from the analysis of the Court of Appeal they felt such had not been demonstrated in that case. I conclude the same in our present circumstance.

[36] I cannot conclude that this Municipal Council failed to offer Mr. Wells due process. He was given multiple chances to remedy this situation. He was given multiple opportunities to even begin to do so, which I suspect would have been enough at one time. A review of this record does not reveal that the Municipal

Council was being cavalier in its approach. A review of the meetings of Council suggest they acted with a degree of regret but also with a recognition that genuine issues of safety had been raised. In all the circumstances, Council concluded it had a public duty to fulfill and acted accordingly.

[37] The decision not to further delay was a procedural determination that was open to the Council to make. They received and considered the request for additional time. They did not breach their duty of procedural fairness in opting to proceed as they did. It was reasonable in all the circumstances.

Conclusion

[38] The application for Judicial Review is dismissed. I ask that Counsel for the Respondent prepare the Order. In the event the parties are unable to resolve the issue of costs, written submissions ought to be directed to the Court within 30 days.

J.