SUPREME COURT OF NOVA SCOTIA

Citation: *Bancroft v. Nova Scotia (Lands and Forestry)*, 2020 NSSC 214

Date: 20200805
Docket: Hfx. No. 496023
Registry: Halifax

Between:

Robert Bancroft and Eastern Shore Forest Watch Association

Applicants

v.

Nova Scotia Minister of Lands and Forestry and
The Attorney General of Nova Scotia representing Her Majesty the Queen
In Right of the Province of Nova Scotia

Respondents

INTERLOCUTORY DECISION

Judge: The Honourable Justice Kevin Coady

Heard: June 29, 2020, in Halifax, Nova Scotia

Written Decision: August 5, 2020

Counsel: James Simpson, Counsel for the Applicants
Jack Townsend, Counsel for the Respondents

By the Court:

Background

[1] On January 31, 2020, the Applicants filed a Motion seeking an Order to "extend the six-month time limit per Civil Procedure Rule 7.05(1)". It was their intention to seek judicial review "of the decision by the Nova Scotia Minister of Lands and Forestry to delist Owl's Head Provincial Park Reserve from the Parks and Protected Areas Plan of 2013". (PAPA)

Civil Procedure Rule 7.05(1) states:

> 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.

Furthermore, Civil Procedure Rule 2.03 states:

> (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:
>
> ...
>
> (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.

The Applicants submit that the Provincial Government's decision was made without public awareness due to a secret process referred to as a "Letter of Offer". This process attracts cabinet confidentiality and, as such, does not appear in

conventional Provincial Government reports. It is accessible through FOIPOP legislation.

[2] PAPA legislation allows for the designation of areas as either Provincial Parks or Park Reserves. The latter designation creates a sort of holding pen for lands that, in the future, may become Provincial Parks. Owl's Head was a park reserve prior to delisting. It is now classified as general Crown land property.

[3] The evidence on this Motion clearly establishes that Owl's Head was portrayed to the public as a Provincial Park. Government documentation and maps, going back as far as 1978, refer to the area as "Owl's Head Provincial Park". Further, it was managed by Lands and Forestry to maintain its reserve status. The public had every reason to assume Owl's Head was a Provincial Park and, therefore, attracted protections not available on Crown lands.

[4] The delisting of the Owl's Head Provincial Park Reserve occurred on March 13, 2019, by way of a minute letter issued by the Provincial Treasury Board at the request of the Minister of Lands and Forestry. It is this decision that the Applicants wish to challenge by way of judicial review.

[5] In late 2019 CBC journalist, Michael Gorman, made a FOIPOP request for information related to the Province's plans for the development of the Owl's Head

property. He published the response, which included the minute letter, on December 18, 2019. Subsequently, on December 23, 2019, the same information was published on the Province's Freedom of Information portal. I accept the Applicants' position that this represents the earliest date that this information was available to the public. Mr. Bancroft filed his Notice on January 30, 2020. Eastern Shore Forest Watch Association joined the Application on January 31, 2020.

[6] There can be no question that the Applicants' Notice of Judicial Review was filed beyond the six-month limitation as stipulated in Civil Procedure Rule 7.05(1)(b). It was not filed in advance of September 13, 2019. However, the secrecy of the decision precluded any member of the public from legally responding within the six-month window. There is nothing in the evidence that suggests the Applicants were dragging their feet. They responded to Mr. Gorman's December 18, 2019 news report in a timely manner.

[7] It appears as if the Applicants' Notice of Judicial Review was filed outside the 25-day window stipulated in Civil Procedure Rule 7.05(1)(a). The calculation of time is governed by Civil Procedure Rule 94.02. If I accept December 18, 2019 as the "day the decision was communicated to the person", the Applicants' Notice would have to be filed by January 23, 2020.

[8] The Applicants are advocates for the environment and, prior to December 18, 2019, had some knowledge of discussions around development of the Owl's Head property. They may have felt unconcerned if they were under the impression the property was a fully protected Provincial Park. I consider December 18, 2019 as the earliest the Applicants could be aware of the Province's decision to delist the property. Consequently, they are outside the 25-day period.

[9] In ***Bridgewater (Town) v. South Shore Regional School Board***, 2017 NSSC 25, Justice Lynch commented as follows, at para. 8:

> The first question then was when does the period start to run for filing. So, when was the decision of the School Board communicated? The Town of Bridgewater argued that it was not until the whole Council knew, not just the Mayor, although it was clear that the mayor had commented on the decision on the day it happened, Wednesday, September 28, 2016. As I said, communication, based on that case law, is when Council knew of the decision, there is no special communication necessary. It is when they know. September 28th is also when the media reported on it and I can accept, as I indicated to counsel in argument, that not everyone would know that night. There could have been at least until October 3rd, but, as I indicated before, that is still out of time. It is clear days and so the Town was between one and four days out of time in filing.

Justice Lynch's comments support my decision to set December 18, 2019 as the date of communication to the public.

[10] The test for using my discretion under Civil Procedure Rule 2.03(1)(c) is set forth in ***Jollymore Estate v. Jollymore***, 2001 NSCA 116:

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.

Jollymore states there is a fourth part of the test:

4. Where justice requires that the Application be granted, the judge may allow an extension of time even if the three-part test is not strictly met.

The same Court indicated, in ***Farrell v. Casavant***, 2010 NSCA 71, that the relative weight to be given to these and other factors may vary, and the test should be flexible, uninhibited by rigid guidelines.

[11] In ***R. v. MacLean***, 2018 NSCA 1, Justice Derrick commented at para. 18 as follows:

> Pursuant to section 678(2) of the *Criminal Code* and *Civil Procedure Rule* 91.04, a judge of the Court of Appeal has the discretion to extend the time for filing a Notice of Appeal. The discretion must be exercised in accordance with the interests of justice and is structured by such factors as a genuine intention to appeal, a reasonable excuse for the delay, whether any prejudice will arise, and the merits of the proposed appeal. (*R. v. R.E.M., 2011 NSCA 8, para. 39)*

Civil Procedure Rules 91.04 and 2.03(2) are similar in their import.

[12] In ***Low v. Nova Scotia Police Complaints Commissioner***, 2020 NSSC 113, Justice Smith applied the principle of "discoverability" to a complaint wherein the limitation period was held to start only after the complainant received a Freedom of Information Report. She relied on ***Pioneer Corporation v. Godfrey***, 2019 SCC 42, and stated at para. 28:

> In *Pioneer*, the majority of the Court affirmed that limitation periods may be subject to a rule of discoverability, such that a cause of action will not accrue for the purpose of the running of a limitation period until the material facts on which the cause of action is based have been discovered, or ought to have been discovered by the exercise of reasonable diligence. The discoverability rule is a rule of construction to aid in the interpretation of statutory limitation periods.

In this case the Court applied the discoverability principle to extend the two-year limitation period in the *Competition Act*. The Court stated further at para. 36:

> In determining whether a limitation period runs from the accrual of action or knowledge of the injury, such that discoverability applies, substance, not form, is to prevail: even where the statute does not explicitly state that the limitation period runs from 'the accrual of the cause of action', discoverability will apply if it is evident that the operation of a limitation period is, in substance, conditioned upon accrual of a cause of action or knowledge of an injury. Indeed, clear statutory text is necessary to oust its application. In *Peixeiro*, for example, this Court applied its discoverability rule to s. 260(1) of the *Highway Traffic Act*,

> R.S.O. 1990 c. H.8, which stated that an action must be commenced within two years of the time when 'damages were sustained' (para.2). The use of the phrase 'damages were sustained' rather than 'when the cause of action arose' was a 'distinction without a difference', as it was unlikely that the legislature intended that the limitation period should run without the plaintiff's knowledge (para. 38).

It is my view that discoverability is recognized in the 25-day window in Civil Procedure Rule 7.05(1)(a). I conclude that discoverability applies in the case at Bar.

[13] In conclusion I find as follows in relation to the test:

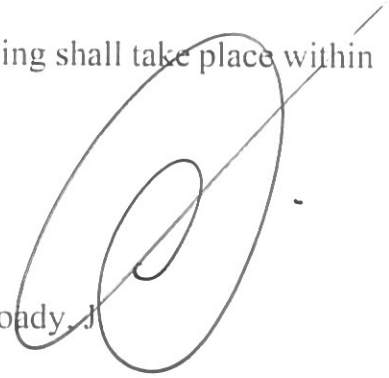
1. The Applicants had a *bona fide* intention to appeal;
2. Application of the discoverability principle indicates that the Applicants' delay amounts to a matter of days;
3. The Applicants have a reasonable excuse for the delay (i.e., secretive nature of the process);
4. The Applicants will suffer prejudice if the extension is not granted, whereas the Respondent will suffer little prejudice if the extension is granted; and
5. The Applicants have a well-reasoned Application for Judicial Review and it should be heard on the merits.

On point 5 above, I adopt Justice Lynch's comments in ***Bridgewater*** at para. 34:

> Having said that the matter can go forward I want everyone to understand that this is not a decision on the merits of the judicial review. Judicial reviews are difficult cases to win. It is always difficult when seeking a judicial review because it is a reasonable standard. The decision would have to be whether or not it is within range and I am not deciding that today. I am just deciding whether the motions are being granted or not and I dismissed the motions.

Conclusion

[14] In light of these conclusions, I grant the Applicants an extension to file their Notice of Judicial Review. I direct that filing shall take place within 14 days of the date of this decision.



Coady, J.