SUPREME COURT OF NOVA SCOTIA

Citation: *Barney v. Halifax Regional Municipality*, 2021 NSSC 264

Date: 20210903
Docket: Hfx No. 479016
Registry: Halifax

Between:

Lance Barney, Wendy Brookhouse, Trevor Brumwell, Manuel Cierra, Glen Ginther, Sue Goyette, Scott Hodgson, Kelsey Macaulay, Gary MacLellan, Peter Munro, Nancy Murphy, Geraldine O'Shea, Kim Plaxton, Donna Rammo, Janet Stevenson, Jolyn Swain, Michael Teehan, Pat Thompson, Ross Thompson, and Kristin Tweel

Applicants

v.

Halifax Regional Municipality

Respondent

DECISION

Judges:	The Honourable Justice M. Heather Robertson, The Honourable Justice Christa M. Brothers
Heard:	December 15, 2020, in Halifax, Nova Scotia
Counsel:	Jason T. Cooke and Danielle Keating, for the Applicants Randolph Kinghorne, for the Respondent

By the Court:

Background

[1] A motion was heard by the late Honourable Justice M. Heather Robertson in relation to this Application in Chambers with oral submissions on December 15, 2020. Justice Robertson reserved her decision. Justice Robertson died on February 11, 2021.

[2] On February 23, 2021, Chief Justice Deborah K. Smith wrote to counsel indicating that a Judge of the Court could be designated to complete this matter or the matter could be re-heard by another judge. On March 1, 2021, the parties agreed to have a judge designated to complete the matter. Acting under *Civil Procedure Rule* 82.19(1), Chief Justice Smith requested that I complete Justice Robertson's work on the motion.

[3] By letter to counsel dated March 2, 2021, Chief Justice Smith advised counsel that:

> Pursuant to Civil Procedure Rule 82.19, I have designated Justice Christa M. Brothers to complete this matter. …

[4] On March 10, 2021, I advised that I had been appointed by the Chief Justice to review the evidence and submissions and prepare a decision.

[5] I have listened to the entire recording of the proceedings and made my own notes. I had access to Justice Robertson's notes but did not rely upon them. I read all of the affidavits filed. I reviewed and considered the legal briefs and authorities submitted by the parties. I asked counsel if they wished to provide me with additional written or oral submissions. They declined. I am satisfied that I can rely on the record to give a decision.

The Motion

[6] By Notice of Motion filed on July 2, 2020, HRM moved to convert this Application in Chambers to a Judicial Review. This is the sole issue before the Court. What follows is a review of the background to this Motion.

[7] On August 7, 2018, the applicants commenced an Application in Chambers pursuant to *Civil Procedure Rule* ("CPR") 5. The respondent has yet to file a Notice of Contest.

[8] On July 2, 2020, the respondent filed a Notice of Motion to convert the Application in Chambers to a Judicial Review. On March 20, 2020, a half-day hearing was scheduled for July 21, 2020, to hear this motion. The respondent filed an Amended Notice of Motion on September 21, 2020. The hearing was rescheduled and proceeded on December 15, 2020.

Background to the Conversion Motion

[9] On September 22, 2016, the Halifax Regional Council (the "Council") passed the Local Street Bikeway Implementation Administrative Order (the "Administrative Order") to allow the development of local street bikeways in the HRM.

[10] On May 8, 2018, the Council passed Resolution 14.4.1 titled "Implementation of Local Street Bikeways on Vernon-Seymour and Allan-Oak Corridors", for the purpose of establishing a bicycle route which included a portion of Allan Street, with a diagonal diverter of motor vehicle traffic at the intersection of Allan and Harvard Streets. The Resolution purports to implement a local street bikeway corridor on Allan and Oak Streets (the "Bikeway") and allows the construction of a permanent diagonal diverter for the purpose of blocking all through vehicular traffic along both Harvard Street and Allan Street at that intersection.

[11] The articulated reason for the proposed bike route is to promote commuting by bicycle, which is a component of the HRM's long term active transportation plan (HRM 2006 AT Plan). Appendix A to the HRM 2006 AT Plan sets out what are described as the numerous public benefits of converting motor vehicle traffic to bicycle traffic, including the public safety benefit of enhanced safety for existing bicycle commuters to have use of a dedicated bicycle lane.

[12] All of the applicants reside near the intersection of Harvard and Allan Streets (the "Project Area"), and maintain that they are directly affected by the Resolution. The applicants say they are not opposed to the Administrative Order, or to having a local street bikeway on Allan Street. They do, however, say they oppose the following:

- The flawed process by which the Resolution, as it relates to the Bikeway, was written, presented for Council's approval, and approved by Council at the May 8, 2018, meeting, without notice or discussion with the affected parties;

- The construction of a diagonal diverter at the intersection of Harvard and Allan Streets; and

- The imposed name change to the portion of Harvard Street affected by the diagonal diverter.

[13] The applicants allege that HRM's failure to follow the processes mandated by the Administrative Order for the implementation of the Resolution and Bikeway renders the Resolution illegal. They argue that in contravention of the Administrative Order, none of the applicants who are abutters and residents in the area were notified of the bikeway before Council approved it. The applicants seek relief as follows:

> Relief Sought
>
> 30. Neither Council nor HRM staff followed the mandated processes of the Administrative Order nor were the Applicants engaged and consulted with respect to the Bikeway as they reasonably expected.
>
> 31. Council, therefore, should not have passed the Resolution.
>
> 32. The Resolution is illegal and should be quashed under section 207 of the HRM Charter.

[14] This relief is being sought pursuant to s. 207(1) of the *Halifax Regional Municipality Charter*, SNS 2008, c 39.

[15] The applicants say they were neither properly consulted nor given an opportunity to be heard before the Resolution was passed. They argue that Council owed them a duty of procedural fairness which was not met. They say the failure to observe procedure resulted in illegality that can be remedied through the Court quashing the Resolution.

[16] The applicants act in their personal capacities as residents in proximity to the planned bicycle lane. The applicants filed their application pursuant to section 207 of the HRM Charter.

[17] The applicants say there are less intrusive street calming measures than a diagonal diverter that would serve the purpose of implementing the Bikeway without the alleged negative repercussions discussed herein.

[18] The applicants chose to proceed by Application in Chambers (*Civil Procedure Rule* 5), and not as a judicial review pursuant to Rule 7. Upon receipt of the application, HRM advised counsel for the applicants that the appropriate manner of proceeding was by way of judicial review. In an effort to secure time to attempt to resolve the residents' concerns, HRM committed to not proceed with the construction of the bicycle route in the subject area. By agreement of the parties, the Court adjourned the application without day. With the exception of this motion, there have been no further steps in the proceeding to date since HRM's receipt of the Notice of Application in Chambers.

[19] When deciding what process this matter should follow, the real impact will be in relation to what material will properly be before the Court. Judicial reviews restrict the scope of affidavit evidence, as well as imposing time limits.

Position of the Parties

[20] HRM maintains that the matter should proceed as a judicial review under Rule 7. HRM views the commencing of the application under Rule 5 as an irregularity which the Court can address pursuant to Rules 2(2)(b) and 2.03(1)(a). HRM is not seeking to have the applicants file a new proceeding or even to amend the application as filed, only for a direction from the Court that the matter proceed in accordance with Rule 7, on the basis of a filed record of the decision under review.

[21] It is the applicants' position that HRM's motion to convert the application in Chambers to a judicial review must be dismissed for the following reasons:

1. An Application is appropriate for quashing municipal resolutions being attacked for illegality;
2. The use of an Application to quash municipal resolutions being attacked for illegality is not irregular or exceptional;
3. An Application is appropriate here due to the extensive evidence advanced by the Applicants; and

4. An Application for a declaration is an appropriate response to illegal government action and a judge has the authority to grant such a declaration.

Issues

[22] The issue on the present motion is whether the court should grant the motion for this Application in Chambers to continue as a judicial review.

Law and Analysis

Enabling Legislation and Civil Procedure Rules

[23] The HRM is an incorporated municipality, whose operations are governed by the HRM Charter.

[24] The Council is empowered, through the HRM Charter, to act through three administrative actions: by-law, policy, and resolution. Section 58 of the HRM Charter sets forth the decision making authority as follows:

> 58 (1) The Council shall make decisions in the exercise of its powers and duties by resolution, by policy or by by-law.
>
> (2) The Council may exercise any of its powers and duties by resolution unless a policy or a by-law is required by an enactment.
>
> (3) The Council may exercise by by-law any of the duties and powers that it may exercise by resolution or policy.
>
> (4) The Council may exercise by policy any of the duties and powers that it may exercise by resolution.
>
> (5) The Council may make and carry out a contract, perform an act, do anything or provide a service for which the Municipality or the Council is authorized by an Act of the Legislature to spend or borrow money.

[25] The decision of Council challenged in this proceeding is a resolution to establish a bicycle route made further to its authority under the HRM Charter.

[26] The purpose of the HRM Charter is set out in s. 2 which states:

> 2 The purpose of this Act is to
>
> > (a) give broad authority to the Council, including broad authority to pass by-laws, and respect its right to govern the Municipality in whatever ways the Council considers appropriate within the jurisdiction given to it;

> (b) enhance the ability of the Council to respond to present and future issues in the Municipality; and
>
> (c) recognize the purposes of the Municipality set out in Section 7A. 2008, c. 39, s. 2; 2019, c. 19, s. 10.
>
> Purposes of Municipality
>
> 7A The purposes of the Municipality are to
>
> (a) provide good government;
>
> (b) provide services, facilities and other things that, in the opinion of the Council, are necessary or desirable for all or part of the Municipality; and
>
> (c) develop and maintain safe and viable communities. 2019, c. 19,
>
> s. 11.

[27] It is clear Council cannot exercise authority not granted by the HRM Charter.

[28] Section 207 of the HRM Charter sets out the procedure for quashing by-laws.

> Procedure for quashing by-law
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> 207 (1) A person may, by notice of motion that is served at least seven days before the day on which the motion is to be made, apply to a judge of the Supreme Court of Nova Scotia to quash a by-law, order, policy or resolution of the Council, in whole or in part, for illegality.
>
> (2) No by-law may be quashed for a matter of form only or for a procedural irregularity.
>
> (3) The judge may quash the by-law, order, policy or resolution, in whole or in part, and may, according to the result of the application, award costs for or against the Municipality and determine the scale of the costs.
>
> (4) An application pursuant to this Section to quash a by-law, order, policy or resolution, in whole or in part, must be made within three months of the publication of the by-law or the making of the order, policy or resolution, as the case may be.

[29] The applicants base their attack on the alleged illegality of the bylaw and the Resolution. The relief sought is for the Resolution to be quashed under s. 207 of the HRM Charter. In this way, they say the Rule 5 proceeding is absolutely appropriate.

[30] The applicants commenced this proceeding by a Notice of Application in Chambers. Rule 5.01 states:

> 5.01 Scope of Rule 5
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> …
>
> (3) The application in chambers is heard in a short time, and it is scheduled at a time when chambers is regularly held or at an appointed time.

[31] Rule 7 states as follows:

> 7.01 Interpretation in Rule 7
>
> In this Rule,
>
> "decision", includes all of the following:
>
> (i) an action taken, or purportedly taken, under legislation,
>
> (ii) an omission to take action required, or purportedly required, by legislation,
>
> (iii) a failure to make a decision;
>
> "decision-making authority" includes anyone who makes, neglects to make, takes, or neglects to take a decision.
>
> 7.02 Scope of Rule 7
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> (1) This Rule provides procedures for a judicial review by the court, or an appeal to the court.
>
> (2) This Rule applies to each of the following:
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> (a) judicial review of a decision within the supervisory jurisdiction of the court;
>
> (b) review of a decision under legislation authorizing review other than by appeal;
>
> (c) habeas corpus for civil detention, and an application for habeas corpus to which the Criminal Code applies is started under Rule 64 - Prerogative Writ;
>
> (d) an appeal to the court in accordance with legislation, except a summary conviction appeal is provided for in Rule 63 - Summary Conviction Appeal.

[32] Section 207 of the HRM Charter does not make mention of judicial review. The section refers to a "notice of motion". The Legislature does not specifically or impliedly reference Rule 7 or the term judicial review. The applicants brought the application to quash the resolution on August 7, 2018 within the three months referenced in s. 207(4).

[33] A decision was made concerning the proposed bike route pursuant to the HRM Charter. This is an authorizing legislation. The legislation also speaks of avenues to challenge acts by Council. What follows is a review of the different avenues depending on what remedy is sought.

Procedural Avenues

[34] What is a judicial review? This question was nicely answered by the Honourable Justice Denise M. Boudreau in *Sorflaten v. Nova Scotia (Environment)*, 2018 NSSC 7, as follows:

> 10. … A judicial review is, put simply, a review of a decision made by an administrative decision-maker. It is not a trial, nor is it a "re-trial" of the question before the administrative decision maker. In *Alberta Liquor Store Assn. v. Alberta (Gaming & Liquor Commission)*, 2006 ABQB 904 (Alta. Q.B.), the Court made the point that a judicial review is not a search for "universal truth":
>
> > 42. As a general rule, however, evidence that was not before the tribunal and that relates to the merits of the decision is not permitted on judicial review. … Attempting to introduce fresh evidence respecting the merits of the challenged decision on an application for judicial review misapprehends the nature of judicial review.
> >
> > 43. Whatever the standard of review, the review must be conducted on the record that the tribunal had... Whether there is a rational basis for the decision can only be determined by examining the evidence the tribunal had to work with: … Whether a decision is reasonable is not a search for some sort of universal truth: ... Any tribunal or court can only work with the evidence before it, and a decision may well prove to be reasonable, even though it can arguably be shown to be factually flawed. It follows that new evidence relating to the merits of the decision will seldom be admissible, as it is irrelevant to the issues before the Court on judicial review.

[35] A challenge to such administrative decisions have historically come in the form of a judicial review. In *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, the court commented about the use of judicial review with regards to a municipality action:

> [10] It is a fundamental principle of the rule of law that state power must be exercised in accordance with the law. The corollary of this constitutionally protected principle is that superior courts may be called upon to review whether particular exercises of state power fall outside the law. We call this function "judicial review".

> [11] Municipalities do not have direct powers under the Constitution. They possess only those powers that provincial legislatures delegate to them. This means that they must act within the legislative constraints the province has imposed on them. If they do not, their decisions or bylaws may be set aside on judicial review.

[36] In considering this matter, one must consider whether there is any possible avenue to pursue this challenge via Rule 5. Is this a viable and permitted alternative? This was discussed in *Geophysical Services Inc. v. Canada-Nova Scotia Offshore Petroleum Board*, 2013 NSSC 220, where the Court allowed a Rule 5 application challenging the validity of certain regulatory provisions that were allegedly *ultra vires* the enabling statutes which would have the effect of undermining the governmental action, but noting a direct challenge to the action could only be advanced pursuant to Rule 7:

> [38] While it is correct that the pleadings, filed by GSI, do seek certain relief relating to past directives of the Respondent Board, with respect to seismic data collection, retention and third party distribution, the fundamental preliminary question GSI poses, is whether the regulations are ultra vires the enabling statutes. The impugned provisions either stand or fall, based on a judicial interpretation of the enabling statutes. This is a proper question to be raised under Rule 5 application. This question is not anchored in a demand of decision of the Respondent Board, for which the process of judicial review is the only course, as the respondents suggest.

[37] In this statement, Justice Robertson seems to be accepting a dichotomy based on the distinction as being between a challenge of a void *ultra vires* action due to an underlying lack of statutory authority as opposed to the review of an *intra vires* decision voidable for deficiencies in the decision making process. Justice Robertson concluded the questions raised in the matter were properly dealt with under Rule 5.

[38] An earlier decision of this Court supports the argument that the Court has the discretion and inherent jurisdiction to permit a judicial review to proceed as a Rule 5 application in certain matters. The Honourable Justice James L. Chipman, in *Dawgfather PHD v. Halifax (Regional Municipality)*, 2016 NSSC 104, accepted that a Rule 5 application could be used as a vehicle to address an alleged illegal by-law or resolution as per section 207 of the HRM Charter. Justice Chipman stated:

> [11] Both parties submit that this application should be treated as an application for judicial review. They assert that all of the major requirements have been complied with and any deviations are minor and can be rectified. The

> parties have not provided any authorities indicating that in Nova Scotia judicial review and its consequent remedies are available outside of the context of an application for judicial review. I am not convinced this is the case. However, it is not necessary to decide this point. My analysis focuses on the other bases for taking jurisdiction.
>
> …
>
> [101] If I am wrong in my conclusion that a full judicial review analysis cannot be conducted outside of the context of an application for judicial review, for the reasons set out above I find that the Respondent has met its procedural obligations to the Applicant and the Intervenor.

[39] In *Dawgfather*, this issue of the application of Rule 5 or Rule 7 was raised by Justice Chipman while the parties were before the Court ready to commence argument after having completed disclosure and discovery. In proceeding under Rule 5, the Court was acting with the consent of both of the parties (one of whom was the HRM), who requested that the Court treat the application as being a Rule 7 judicial review. The parties urged the Court to accept that all the necessary information and argument to render such a decision was before the Court, and represented that all major requirements appropriate to a judicial review had been met. It appears upon a review of that decision and given the history of the matter and the time the litigants had spent on processes to that point that a failure to proceed in the manner agreed to by Justice Chipman would have wasted the judicial resources set aside for that day. Furthermore, directing the parties to amend the pleading and provide a record would likely have set the hearing of the matter back months. However, that is not the end of the analysis. Additional comment and analysis was undertaken by Justice Chipman which has application to this motion.

[40] In *Dawgfather*, the Court was asked to quash a resolution of council concerning a bike lane based on illegality and lack of participatory rights. Justice Chipman concluded he had the jurisdiction to hear the matter as an Application in Court based on s. 207 of the HRM Charter and Rules 38.01(1) and 38.07(5). Importantly, the Court stated that there were alternative processes to judicial review where by-laws and resolutions could be attacked for illegality where the remedy sought was for the by-law or resolution to be quashed. In particular, Justice Chipman stated:

> Application to Quash
>
> 12 Apart from an application for judicial review, the validity of municipal by-laws and resolutions can be attacked in most jurisdictions in Canada by way of a

special proceeding, usually called an application to quash. In *The Law of Canadian Municipal Corporations*, 2nd ed., looseleaf (Toronto: Thomson Reuters Canada Limited, 2009), Ian Rogers, Q.C. writes at §190.1:

> There are several ways in which the validity of municipal by-laws and resolutions can be brought into question. In most jurisdictions in Canada, there are special proceedings, usually by way of application to quash, for summarily testing the legality of the legislative acts of local authorities. Applications to quash are authorized by statute and have the advantage of being inexpensive and speedy.

13 And further, at §191.1:

Provision is made in some municipal statutes and charters for testing the validity of by-laws and resolutions by direct proceedings instituted for that purpose. ... The authority which the courts exercise to quash by-laws upon an application made by way of originating motion is entirely statutory in source and extent. Since this is a proceeding unknown at common law, it is not inherent in the jurisdiction of the court as is the power to declare a by-law invalid in an action. A provision in a city charter conferring upon electors the right to apply to quash a by-law for illegality was held to cover the bringing of an action for the same purpose. An application to quash is in the nature of an application for certiorari at least when a by-law is not illegal on its face and the court has a discretion whether to allow it. The statutory power to quash is said to be permissive in its terms so that a person is not obliged to bring a motion to quash in lieu of any other remedy.

14 Notwithstanding the ability to make an application for judicial review to have a by-law declared invalid, an application to quash can still be brought (see *Holmes v. Halton (Regional Municipality)* (1977), 2 M.P.L.R. 153, 16 O.R. (2d) 263 (Ont. H.C.)).

15 In Halifax, applications to quash by-laws and resolutions are available pursuant to s. 207 of the HRM Charter:…

16 Although s. 207(1) provides for a "notice of motion", Civil Procedure Rule 94.05 says this should be interpreted as providing for a notice of application in circumstances where there is no existing proceeding…

17 Because s. 207(3) says that a judge "may" quash the illegal by-law or resolution, the power to quash is a discretionary one (see Rogers at §191.2).

18 An application to quash under s. 207(1) may be brought only where the by-law or resolution is being attacked for "illegality". Section 207(2) specifically prohibits an application to quash where the by-law or resolution is being attacked "for a matter of form only or for a procedural irregularity."

[41] Here the Notice of Application in Chambers states as follows:

The Applicants request an order against you

> The Applicants are applying to a judge in chambers for an order to quash the Resolution made by Halifax Regional Council ("Council") on May 8, 2018, "14.4.1 Implementation of Local Street Bikeways on Vernon-Seymour and Allan-Oak Corridors" under section 207 of the *Halifax Regional Municipality Charter* ("HRM Charter")

[42] Consequently, while one avenue for the applicants would have been an application for judicial review, another appropriate avenue is through the statutory procedure to quash the Resolution.

[43] Here, while a Notice of Application in Court was not filed as was in *Dawgfather,* a Notice of Application in Chambers, a permitted procedure in the circumstances, was filed. Section 207(1) of the HRM Charter provides for a "notice of motion" to be filed to quash a by-law or resolution. Rule 94.05 indicates that a Notice of Application in Chambers is a permitted procedure.

> 94.05 Application referred to in legislation
>
> A person who is permitted or required by legislation to apply to the court or a judge may start the application by filing one of the following notices:
>
> > (a) an *ex parte* application, notice of application in chambers, notice of application in court, or notice for judicial review, if the permission or requirement is for an application that is not connected to an existing proceeding;
> >
> > (b) a notice of motion, if the permission or requirement is for an interlocutory step in a proceeding.

[44] The basis of the applicants' attack on the Resolution may constrict their arguments, as discussed in *Dawgfather*, where the distinction between illegality and procedural irregularity was discussed. However, this is not a question currently before the Court to be addressed. As Chipman, J stated:

> 74 The Applicant's attack on the legality of the resolution is confined to attacks on Council's failure to follow procedure and to afford sufficient participatory rights. Non-observance of obligatory, i.e. statutorily mandated, procedures can amount to illegality, but failure to observe internal procedure cannot: Rogers, supra at §193-194.1.

[45] In *Colchester Containers Limited v. Colchester County (Municipality)*, 2020 NSSC 203, reversed on other grounds, 2021 NSCA 53, the applicant brought an Application in Court to quash a by-law and policy, and also filed a judicial review challenging a decision made by the Municipality under the impugned by-law. This

is an example of the different processes depending on what relief is being sought. HRM says this case does not deal with the question of what process should have been used to advance the arguments. This is not accurate. In *Colchester Containers*, two proceedings were brought, with different relief sought and arguments advanced. The Court in fact did review the process being utilized, as follows:

> 23 Section 189 of the *Municipal Government Act* sets out the procedure for quashing a by-law or policy. A person may, by notice of motion, apply to a judge of the Supreme Court to quash a by-law, order, policy or resolution of council, in whole or in part, "for illegality". There is one ground set out and that is "illegality". The legislation does not provide further guidance or any definition of illegality. Illegality may involve bad faith, discrimination, failure to follow a statutory requirement, or the creation of a by-law that is beyond the jurisdiction of the municipality. *Dawgfather PHD v. Halifax (Regional Municipality*), 2016 NSSC 104 (N.S. S.C.). There is no onus on the party seeking to quash a by-law to prove bad faith on the part of the municipality. A municipality cannot expand the authority delegated to it by the *Municipal Government Act* by showing that it did so in the absence of bad faith.

[46] Furthermore, the Honourable Justice Jamie S. Campbell, in finding the by-law illegal noted that it followed that the decision made under the by-law must be set aside, although for this remedy alone a judicial review analysis and process would have to be followed:

> 44 The Disposal of Hazardous Substances By-law and the Disposal of Hazardous Substances Policy passed by the Municipality of the County of Colchester regulated land-use and were not passed using the process required to have been used by the *Municipal Government Act.* They were then "illegal" as that term is used in s. 189 of the Act. The by-law and policy are quashed, and the decision made under them is set aside.

[47] In *Jono Developments Ltd. v. North End Community Health Assn*., 2014 NSCA 92, leave to appeal denied, [2014] SCCA No 527, the property developer appealed the decision of Justice MacAdam (2012 NSSC 330) who had allowed the judicial review motion of the applicant community groups and quashed HRM's decision approving the sale of a surplus school property. The Court of Appeal reviewed ss 58 and 59 of the HRM Charter which state:

> Resolutions, policies, by-laws
>
> 58(1) The Council shall make decisions in the exercise of its powers and duties by resolution, by policy or by by-law.

> (2) The Council may exercise any of its powers and duties by resolution unless a policy or a by-law is required by an enactment.
>
> (3) The Council may exercise by by-law any of the duties and powers that it may exercise by resolution or policy.
>
> (4) The Council may exercise by policy any of the duties and powers that it may exercise by resolution.
>
> . . .
>
> 59 (1) Before a policy is passed, amended or repealed the Council shall give at least seven days' notice to all Council members.
>
> (2) The Council may adopt different policies for different areas of the Municipality.
>
> (3) In addition to matters specified in this Act or another Act of the Legislature, the Council may adopt policies on any matter that the Council considers conducive to the effective management of the Municipality.

[48] This is a similar case to *Jono Developments*, in that a decision was made pursuant to the HRM Charter and that decision was under attack. The proper procedure in *Jono Developments* was a judicial review. Furthermore, the Court dealt with issues of duty of fairness as raised in this case. However, there was no analysis of why this was the proper procedure or if there was another procedure which could have been followed. The case is silent on the relevance or applicability of Rule 5.

[49] Furthermore, the lower court in *North End Community Health Association v. Halifax (Regional Municipality)*, (reversed on other grounds, 2014 NSCA 92), reviewed the HRM Charter, in particular s. 207 and said:

> 64 The HRM Charter contains no privative clause respecting Council's decisions. Section 207 provides, under the heading "procedure for quashing by-law":
>
> > 207 (1) A person may, by notice of motion that is served at least seven days before the day on which the motion is to be made, apply to a judge of the Supreme Court of Nova Scotia to quash a by-law, order, policy or resolution of the Council, in whole or in part, for illegality.
> >
> > (2) No by-law may be quashed for a matter of form only or for a procedural irregularity.

> (3) The judge may quash the by-law, order, policy or resolution, in whole or in part, and may, according to the result of the application, award costs for or against the Municipality and determine the scale of the costs.
>
> (4) An application pursuant to this Section to quash a by-law, order, policy or resolution, in whole or in part, must be made within three months of the publication of the by-law or the making of the order, policy or resolution, as the case may be.
>
> 65 The applicants describe s. 207 as creating a statutory right of appeal. Clearly, however, the section actually contemplates judicial review. The introduction to the applicants' own brief indicates that this proceeding is a judicial review, and this is clear as well in the other parties' submissions.
>
> 66 This application is to quash Council's resolution for illegality. I note that ss. 207(2) provides that a by-law may not be quashed "for a matter of form only or for a procedural irregularity." The other subsections refer to by-laws, orders, policies and resolutions. This suggests that an order, policy or resolution may be quashed on grounds broader than those on which a by-law may be quashed, that is, on the grounds of form or procedural irregularity.

[50] The comments concerning judicial review were not disturbed on appeal. However, there was no discussion of the use of Rule 5 as a means of seeking to quash a by-law or resolution on the basis of illegality. There is no evidence that the courts at either level were asked to determine whether judicial review was the only relevant procedure and whether a Rule 5 application could be an alternative.

[51] The applicants argue that they lost an opportunity to provide information, concerns, and context in a participatory way when the resolution was being considered and passed. The applicants say it is settled law that an application to quash pursuant to s. 207 is a distinct mechanism from judicial review in Canada generally and Nova Scotia specifically.

[52] Here the Administrative Order is not being challenged, but the Resolution is, for illegality under s. 207 of the HRM Charter. Section 207, a long standing statutory provision, speaks to illegality. The wording is clear. The statutory provisions speak of a “notice of motion” within seven days, and provide that an “application to quash Council’s resolution for illegality” can be advanced within three months of the enactment. There is no use of the term “judicial review” or reference to the time frames for such proceedings. The legislature has said that you can bring an application to quash a by-law or resolution for illegality. The plain reading of the statute supports the applicants’ argument.

Impact on the Record and Evidence

[53] HRM argues that if the matter proceeds by way of Rule 5, additional affidavits and evidence would be admissible on the motion beyond that admissible on judicial review. The argument against a Rule 5 application suggests that a precedent would be raised which would allow more evidence before the Court.

[54] Historically judicial reviews in Nova Scotia (under the former prerogative writs) have been conducted on the basis of the "record" of the decision-maker. An early example of this can be found in *Dominion Cotton Mills Co. v. Trecothic Marsh Commissioners*, [1905] 37 SCR 79, which, as reflected in the headnote, was an appeal relating to a writ of certiorari reviewing the record of the proceeding of the Board of Commissioners for the Trecothic Marsh. Per Idington J., the subject matter of the appeal was described as "a writ of certiorari which he granted on the 11th November, 1904, to remove into said court a certain record made on the 21st, of March, 1904…".

[55] Under CPR 7, the practice is continued of judicial reviews being conducted on the basis of the record of the decision-maker whose decision is under review. CPR 7.09 requires that the decision-maker provide a record of the process, which may include reasons for the decision. Under CPR 7, the evidence on a judicial review is limited to the record, except for certain limited purposes. CPR 7.28 requires that a party who proposes to introduce evidence beyond the record must bring a motion for its admission. A grant of permission to include affidavit evidence to supplement the record is rare and its scope limited. Per the Court in *Canadian National Railway v. Teamsters Canada Rail*, 2017 NSSC 10:

> [14] It is well established that admitting evidence beyond the record in a judicial review proceeding will only be permitted in exceptional circumstances. The general rule is that affidavit evidence which was not before the decision-maker below should not be used to supplement the record on review. There are a few exceptions to that general rule. This Court in *Sipekne'katik v. Nova Scotia (Minister of Environment)*, 2016 NSSC 260 (Sipekne'katik) recently confirmed that these exceptions apply only in "exceptional circumstances."

[56] HRM further argues that Rule 2.02 supports the view that the commencing of the proceeding under Rule 5 is at worst "an irregularity", and that the Rule provides the Court wide discretion to rectify the situation.

[57] However, this argument fails to address the most recent Nova Scotia precedents which indicate that Rule 5 applications have been used on more than one occasion to advance motions to quash based on arguments of the illegality of by-laws and resolutions. There is precedent for this. Aside from arguing Justice

Chipman seemed uncertain in his decision in *Dawgfather, supra*, there was no argument advanced by the HRM to conclude that decision and the *Colchester* decision were wrong in law. Given this, and given the interpretation of s. 207 of the HRM Charter and the interpretation of the Rules, including Rule 38, the process advanced by the applicants is a suitable proceeding where the relief sought in the Notice of Application in Chambers is one contemplated by the HRM Charter and Rule 5.

Conclusion

[58] For the foregoing reasons, the motion to convert the application to a judicial review is dismissed. If the parties can not agree on costs, I will receive written submissions within 30 days.

Brothers, J.