SUPREME COURT OF NOVA SCOTIA

Citation: *Donham v. Nova Scotia (Information and Privacy Commissioner)*, 2023 NSSC 87

Date: 20230310
Docket: Sydney, No. 518399
Registry: Halifax

Between:

Parker Donham

Applicant

v.

The Information and Privacy Commissioner for Nova Scotia, and the Attorney General for Nova Scotia

Respondents

DECISION

Judge:	The Honourable Justice Kevin Coady
Heard:	February 22, 2023, in Halifax, Nova Scotia
Decision:	March 10, 2023
Counsel:	Parker Donham, Self-Represented Applicant Jason Cooke, K.C. and Sarah MacLeod, Counsel for The Information and Privacy Commissioner for Nova Scotia Agnes E. MacNeil, K.C., Counsel for The Attorney General of Nova Scotia

By the Court:

Background

[1] Mr. Donham is a resident of the Community of Kempt Head which is located in the vicinity of the Seal Island Bridge in Cape Breton. He travels over this 60 plus year old bridge on a regular basis. The bridge is a critical piece of highway infrastructure. Over the past few years the community raised concerns about the integrity of the bridge. Throughout the summer of 2021 traffic on the bridge was reduced as provincially retained engineering consultants carried out a detailed inspection of the bridge.

[2] In July, 2022 Mr. Donham made an access request for studies of the bridge and plans for its reconstruction or replacement. He made the following request pursuant to s. 6(1) of the Freedom of Information and Protection of Privacy Act (FOIPOP):

> All final copies of reports, studies, plans produced over the last decade (from 20 July 2012 to 20 July 2022) as well as final copies of ministerial briefing notes (dated between 20 July 2020 to 20 July 2022) concerning the Seal Island Bridge (officially known as the Great Bras D'Or Crossing) on Rouge 105 in Victoria County.
>
> Specifically (but not to limit the generality of the foregoing), I seek the results of an inspection carried out last year, and any plans, contingencies, and timelines for reconstructing or replacing the bridge, or rerouting traffic along other routes.

[3] On July 20, 2022 Mr. Donham received the following response from an Information Access and Privacy Officer (IAP Officer):

> Pursuant to FOIPOP subsection 7(2), Public works has thirty days to respond to your application. You may expect a response by **August 17, 2022** unless we determine that an extension is required for consultation with third parties or other public bodies. We may also require an extension if we determine that there is a large number of records involved. If we require an extension, we will advise you.

[4] On August 17, 2022 the IAP Officer wrote to Mr. Donham once again extending the deadline pursuant to s. 9(1)(b) of the Act. She stated:

> I wish to advise you that Public Works has found it necessary to extend the 30-day decision-response time on your application for an additional 30 days to September 16, 2022.
>
> The reason for this extension is a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body. We are thus claiming an extension under Section 9(1)(b).
>
> If you are not in agreement with our decision to extend, you may contact the Information Access and Privacy Commissioner (formerly the Review Officer) directly in writing at PO Box 181, Halifax, NS B3J 2M4 or by telephone at (902) 424-4684 (within HRM) or toll-free at 1-866-243-1564.

[5] On that same date Mr. Donham wrote to the IAP Officer protesting this decision. He advised that "the main record I'm seeking is the report of a survey of the bridge that was carried out last summer". He requested that access be expedited. In response an investigator wrote "After reviewing this matter in detail, I am satisfied that the public body was authorized to take a time extension under s. 9(1)(b) of FOIPOP."

[6] On September 8, 2022 the IAP Officer wrote to the office of the Information and Privacy Commissioner requesting a further delay to November 7, 2022 pursuant to s. 9(1)(b) of the Act. In that request the IAP officer acknowledged that the requested documents had all been located but required some further redaction. The extension was granted and Mr. Donham was advised as follows:

> The reason for this extension a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body. Our extension has thus been approved under Section 9(1)(b).

Obviously Mr. Donham was not satisfied with the delay and on November 25, 2022 he filed this Notice for Judicial Review.

[7] This Judicial Review does not specifically challenge issues of access but rather interpretation of the word "or" in Section 9 of the FOIPOP Act. Mr. Donham's application challenges the extension granted. The following grounds were plead:

> 1. The plain English wording of s. 9 of the FOIPOP Act gives the government body a choice of two delays, not a sequence of delays. It can grant itself a 30-day

> extension of the deadline on its own authority, ***or***, with the permission of the OIPC commissioner, a longer delay.
>
> 2. The word "or" is disjunctive, meaning the government body's response to an access request may be subject to one delay or the other, but not both sequentially.
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> 3. For the clear, simple, ordinary meaning of "or", the Commissioner wishes to substitute a word salad that has no basis in the Act.
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> > *Reading s. 9 of FOIPOP in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature, the OIPC interprets the "or" in s. 9 of FOIPOP to be inclusive, which expresses the idea of "and or" with the alternatives being cumulative.*

Essentially this application is about statutory interpretation within a Judicial Review process.

[8] The Attorney General of Nova Scotia filed a Notice of Participation stating that the Court should not disturb any decision under review and that it is not the decision-making authority. The Information and Privacy Commissioner for Nova Scotia filed a Notice of Participation indicating it is the decision making authority and opposes disturbing the original decision.

Section 9 – FOIPOP

[9] Section 6 of the FOIPOP Act sets the procedure for seeking access to a public record. It requires a written request to the document holder, identification of the requested documents and payment of a fee. Section 7(2) requires the record holder to respond in 30 days. Further extensions are governed by Section 9:

> Extension of time for response
>
> 9 (1) The head of a public body may extend the time provided for in Sections 7 or 23 for responding to a request for up to thirty days OR, with the Review Officer's permission, for a longer period if
>
> > (a) the applicant does not give enough detail to enable the public body to identify a requested record;
> >
> > (b) a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body; or

> (c) more time is needed to consult with a third party or other public body before the head of the public body can decide whether or not to give the applicant access to a requested record.
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> (2) Where the time is extended pursuant to subsection (1), the head of the public body shall tell the applicant
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> (a) the reason;
>
> (b) when a response can be expected; and
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> (c) that the applicant may complain about the extension to the Review Officer.

The Decision

[10] Mr. Donham's request was for Judicial Review of a decision taken by Mary Kennedy, Intake Manager for the Office of the Information and Privacy Commissioner for Nova Scotia on September 23, 2022. The following is that decision:

> I write in response to your attached correspondence received at the Office of the Information and Privacy Commissioner ["OIPC"] on September 13, 2022 regarding the above-noted time extension under s. 9(1)(b) of the Freedom of Information and Protection of Privacy Act ["FOIPOP"].
>
> You filed an access request with the public body on July 18, 2022. A decision was originally due on August 17, 2022.
>
> The public body took a time extension on August 17, 2022 under s. 9(1)(b) of the FOIPOP extending the time to respond until September 16, 2022.
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> On August 17, 2022, you complained to the OIPC about the public body's August 17, 2022 time extension and on September 2, 2022, the OIPC concluded that the conditions for a time extension under s. 9(1)(b) were present and the public body was authorized under s. 9 of the FOIPOP to take its first time extension of its own accord.
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> Under s. 9 of FOIPOP the OIPC may grant further time extensions. An applicant's planned use of information obtained in response an access request is not a factor considered in granting time extensions under s. 9 of FOIPOP; only the public body's capacity to issue a decision within statutory timelines is considered.

The public body requested and was granted a subsequent time extension from the OIPC under s. 9(1)(b) of the FOIPOP; only the public body's capacity to issue a decision within statutory timelines is considered.

The public body requested and was granted a subsequent time extension from the OIPC under s. 9(1)(b) of FOIPOP until November 7, 2022.

On September 13, 2022, you complained about the OIPC granting an additional time extension. Your September 13, 2022 correspondence stated:

> ***9 (1) The head of a public body may extend the time provided for in Sections 7 or 23 for responding to a request for up to thirty days or, with the Review Officer's permission, for a longer period if***
>
> ***(…)***
>
> ***(b) a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body; or***

*It seems clear from this wording that Section 9 contemplates only one time extension. It may either be an extension of 30 days, "**or,** with the Review Officer's permission." [emphasis added] an extension for a longer period. It does not contemplate an initial extension of 30 days, and subsequently, with the Review Officer's permission, a second extension of a duration to be determined.*

Statutory Interpretation

Reading s. 9 of FOIPOP in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature, the OIPC interprets the "or" in s. 9 of FOIPOP to be inclusive, which expresses the idea of "and/or" with the alternatives being cumulative. FOIPOP permits a public body to take a time extension of its own accord for up to 30 days. FOIPOP also permits a public body to request a time extension for a longer period from the OIPC.

The OIPC's interpretation and practice of interpreting the legislation to permit a public body to take a 30 day time extension of its own accord and/or request a further time extension from the OIPC is in line with other Canadian jurisdictions operating with the same statutory language.

Subsection 9(2)(c) of FOIPOP contemplates that an applicant may complain to the OIPC a time extension. In this case, the office has already reviewed the initial time extension taken by the public body and found it to be authorized. Your correspondence of September 13, 2022 is a complaint about how the OIPC

> interprets the provisions in s. 9(1) of FOIPOP. I have explained to you here the basis for the interpretation. There is no mechanism under the Act for the OIPC to review a complaint about its interpretation of the statue. For this reason, this letter is the conclusion of your complaint in this office.
>
> Please don't hesitate to contact me if you have any further questions.

The sole issue before this Court is whether the Commissioner's interpretation of section 9 of FOIPOP was reasonable. The decision allowed a public body to take a time extension of it's own accord and to request a further time extension.

Standard of Review

[11] I am of the view that the applicable standard of review in this matter is reasonableness. The framework for determining the standard of review a Court should apply when the merits of an administrative decision are challenged is set out in Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 at paragraphs 16 and 17.

> 16 In the following sections, we set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged. **It starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions.**
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> 17 The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case of certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. As a result, it is no longer necessary for courts to engage in a "contextual inquiry" (CHRC, at paras. 45-47, see also Dunsmuir, at paras. 62-64; McLean, at para. 22) in order to identify the appropriate standard.

The two types of situations which may rebut the presumption of reasonableness are not present in this Judicial Review.

[12] Reasonableness is an approach meant to ensure that Courts intervene in administrative matters only where it is necessary to do so in order to safeguard the legality, rationality and fairness of this administrative process. Judicial restraint demonstrates a respect for the distinct role of administrative decision makers. In Vavilov the Court commented on this point at paragraph 93:

> 93 In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision.

The burden is on the party challenging the decision to show that it is unreasonable. If a reviewing court finds a decision to be justified, transparent and intelligible, it will be considered reasonable.

[13] This is a case that involves statutory interpretation of a word. Matters of statutory interpretation are not treated uniquely and are to be evaluated on a reasonableness standard. In such cases the reviewing court does not undertake a de novo analysis of the question or ask itself what the correct decision would have been. Vavilov provided the following direction at paraphs 117-118:

> 117 A court interpreting a statutory provision does so by applying the "modern principle" of a statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Rizzo & Rizzo Shoes Ltd., Re, [1998] 1 S.C.R. 27 (S.C.C.), at 21, and Bell ExpressVu Ltd. Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26, both quoting E. Driedger, Construction of Statues (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statues and regulations: see, e.g., Interpretation Act, R.S.C. 1985, c. 1-21.
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> 118 This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chose by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statues expect that questions about their meaning will be resolved by an analysis that has regard to the text,

> context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law – whether courts or administrative decision makers – will do so in a manner consistent with this principle of interpretation.

The modern principle requires that the words of a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the parliament.

[14] Mr. Donham takes the position that the standard of review should be correctness. He relies on the second rebuttal provision to displace the presumption of reasonableness, that this review involves "general questions of law of central importance to the legal system as a whole". With respect, I do not agree. While FOIPOP is an important piece of legislation, it does not amount to an Act of central importance to the legal system as a whole.

Law and Analysis

[15] The Commissioner is a creature of statute. FOIPOP has two principle purposes. The first is to make public bodies more open and accountable to the public by providing access to public records. The second is to protect the privacy of personal information and to prevent their improper disclosure. The issue at hand is whether the decision-makers interpretation of the word "or" in section 9(1) was a reasonable outcome.

[16] The legislation created the FOIPOP Act for the reasons cited above. Section 9 recognizes that there will be situations where the public body cannot meet proscribed deadlines and therefore a mechanism will be required to extend deadlines. The reasons for this mechanism are set out in section 9(1)(a), (b), and (c). Section 9(2) requires the record holder to advise the applicant when such extensions are granted pursuant to section 9(1).

[17] Mr. Donham argues that the word "or" must be interpreted disjunctively allowing the public body to either extend the time for responding to a request for up to 30 days of its own accord, or request permission from the Commissioner for a longer extension, as opposed to both types of extensions. The Respondents take the position that the word "or" allows for both extensions as was the case in this decision. The decision under review accepted the latter as a reasonable

interpretation when proper principles are applied. It concluded that the word "or" to be inclusive, which expresses the idea of and/or with the alternatives being cumulative. The decision indicates that the outcome under review is consistent with other Canadian jurisdictions operating with the same statutory language. The author concluded that this result was consistent with the legislative intent of allowing extensions in the proscribed circumstances.

[18] It is clear that the word "or" standing along is disjunctive. However, there are statutes wherein the object of the legislation dictates otherwise. In *Sullivan on the Construction of Statutes* the following appears at page 100:

> s. 4.96 "And"/"or", Courts often declare that "and" is conjunctive and "or" is disjunctive, but to avoid absurdity they must sometimes read "and" as if it said "or" or vice versa. In *International Woodworkers of America, Local 2-306 v. Miramichi Forest Products Ltd.* For example, the issue was whether the Labour Relations Board could both hold a hearing and take a vote under s. 10(2) of New Brunswick's *Labour Relations Act*. This section was drafted in the following terms:
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> > 10(2) The Board may make such inquiries as it deems necessary including the holding of such hearings *or* the taking of such votes as it deems expedient.
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> The union argued that since "or" is disjunctive the Board could hold a hearing or take a vote, but it could not do both. Hughes J. A. wrote:
>
> > While the natural meaning of "or" to mark an alternative or present a choice thereby implying an election is to be made to do one of two things, the word will not be construed where it would result in an absurdity or which the clear intent of the section in which it is found would be defeated.

In this case the clear intent is to provide a mechanism to address occasions where compliance is delayed for reasons set forth in section 9(1)(b).

[19] The modern approach to statutory interpretation emphasizes the importance of a purposive analysis. A purposive analysis of legislative texts is based on the following propositions:

1. All legislation is presumed to have a purpose it is possible for Courts to discover or adequately reconstruct this purpose through interpretation.

2. Legislative purpose must be take into account in every case and at every state of interpretation, including initial determination of a texts meaning.

3. In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided (Sullivan p. 273).

This approach to statutory interpretation does not necessarily make purpose the most important consideration in interpreting legislation. It ensures that the legislatures purposes – including both the purpose of the Act as a whole and consideration in interpreting legislation. It ensures that the legislatures purposes – including both the purpose of the Act as a whole and the purpose of a particular provision – are identified and taken into account in every case.

[20] The purposive approach was discussed in McBratney v. McBratney, (1919) 59 S.C.R. 550. Chief Justice Duff wrote at page 561:

> Of course where you have rival constructions of which the language of the statute is capable you must resort to the object or principle of the statute if the object or the principle of it can be collected from its language; and if one find there same governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevent against a construction which , though agreeing better with the literal effect of the words of the enactment runs counter to the principle and spirit of it.

In this passage the Supreme Court asserted two principles that govern judicial reliance on purpose in interpretation.

(1) If the ordinary meaning of legislation is ambiguous, the interpretation that best accords with the purpose of the legislation should be adopted.

(2) If the ordinary meaning is clear, but an alternative interpretation is plausible and more in keeping with the purpose, the interpretation that best accords with the purpose of the legislation should be adopted.

These principals suggest that an interpretation that would tend to frustrate or defeat the legislators purpose should be rejected if there is a plausible alternative.

[21] I find that the decision under review is justifiable, transparent and intelligible. Mr. Donham has not met his burden to demonstrate that the

Commissioner's interpretation of section 9 of FOIPOP was unreasonable. Consequently, this Judicial Review fails.

Coady, J.