SUPREME COURT OF NOVA SCOTIA

Citation: IMP Group International Inc. v. Nova Scotia (Attorney General), 2013 NSSC 332

Date: 20131030
Docket: Hfx. No. 285603
Registry: Halifax

Between:

IMP Group International Incorporated,
a body corporate of Halifax, Halifax County, Nova Scotia

Appellant

- and -

The Attorney General of Nova Scotia,
representing Her Majesty for Queen in Right of the
Province of Nova Scotia

Respondent

Judge:	The Honourable Justice Margaret J. Stewart
Heard:	July 30, 2013 in Halifax, Nova Scotia
Counsel:	John P. Merrick, Q.C. and Kelly L. Buffet, counsel for the Appellant Peter McVey, counsel for the Respondent

Introduction

[1] This is a motion to order disclosure of documents (potentially followed by examination for discovery) in the context of an appeal of a Ministerial Order under the *Environment Act*. The Attorney General opposes the motion on the grounds that IMP has not made out an evidentiary basis for disclosure in the circumstances, and on the secondary ground of Crown immunity.

Summary

[2] In effect, IMP seeks to re-cast a statutory appeal of a Ministerial decision into the equivalent of a trial. In place of the Record that was before the Minister, IMP proposes a process of disclosure of documents in the Department's possession that would be relevant to the factors identified in section 129 of the *Environment Act*, as well as the potential for discovery examinations to follow. They present no evidence in support of the need for disclosure, other than alleging that the Record indicates that there are other materials in the Department's hands that are "relevant" to the proceeding. They do not seek to have the Record supplemented with particular materials, but ask the court to speculate that additional materials may exist and order an open-ended disclosure and discovery process, with the stated goal of conducting the appeal as a mini-trial, including the adducing of expert evidence.

[3] As a rule, evidence that was not before the decision-maker is not considered on judicial review (including statutory appeals). The typical exceptions arise where an appeal is based on bias or a denial of natural justice, in which case affidavit evidence is not only admissible, but generally required. In any event, IMP is not seeking to introduce new evidence, nor is it seeking to have the Record supplemented, or for the court to determine the content of the Record. This is purely a request for documentary disclosure, according to the Notice of Motion.

[4] Discovery and documentary disclosure as described in the *Civil Procedure Rules* are not absolutely precluded on judicial review or statutory appeal. However, it is clear that trial discovery procedures are available only in exceptional circumstances, for valid reasons supported by evidence. The Minister's Order is sheltered by a presumption of regularity; "valid reasons"

would be reasons that *prima facie* rebut that presumption. IMP would be required to show valid reasons for believing that the Minister's Order was outside the ambit of his power under the Act, and that the Record is insufficient to provide a basis for review. IMP does not point to any authority suggesting that all documents in the hands of the Department must be included in the Record. IMP does not explain why the usual evidentiary requirement – which normally requires the motion to be supported by affidavit evidence – should be set aside in this case. In short, it does not appear that IMP has provided a legal or factual basis for ordering disclosure in these circumstances.

Background

[5] The appellant, IMP Group International Incorporated (IMP) has appealed an order of the Minister under the *Environment Act*, SNS 1994-95, c 1, dated 16 August 2007 (the Order). The Order indicates that the Minister believes on reasonable and probable grounds that IMP has contravened the *Environment Act*; the order specifically references s 67(2), which prohibits any person from releasing or permitting the release "into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause an adverse effect, unless authorized by an approval or the regulations." The Order also cites s 71, which imposes a duty to take remedial measures. IMP is required to comply, at its own cost, "with the terms and conditions, including compliance times" set out in Schedule A to the Order, pursuant to s 125(1) of the *Environment Act*. Failing this, the Order permits the Minister to take "whatever action the Minister considers necessary to carry out the terms of the Order and … recover any reasonable costs, expenses and charges incurred by the Minister", pursuant to s 132 of the Act.

[6] The appeal is brought under s 138(1) of the *Environment Act*, which permits a "person aggrieved" by a Ministerial Order to appeal on a question of law, a question of fact, or a question of law and fact. IMP's position, as argued, is that the Minister failed to consider certain factors required by s 129(1) of the *Environment Act*. I note that the existence of a statutory right of appeal does not take the proceeding outside the bounds of the standard of review analysis that applies to judicial review: see, e.g., *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12.

[7] The grounds of appeal are eccentric. As noted above, an appeal is available on a question of law, a question of fact, or a question of law and fact. A decision is, of course, reviewable as well on grounds relating to jurisdiction and natural justice, such as denial of procedural fairness, bias, or acting in excess of jurisdiction. IMP frames its first ground of appeal as one of jurisdiction:

> 1. The Order is beyond the jurisdiction of the Minister, as the Minister did not have reasonable and probable grounds to believe that IMP had contravened the *Environment Act*, specifically:
>
> (a) pursuant to s. 67(2), the Minister had no reasonable or probable grounds to believe that IMP released or permitted the release into the environment a substance in an amount, concentration or level, or at a rate of release that causes of may cause an adverse affect [*sic*]; and
>
> (b) the Minister did not have reasonable and probable grounds to believe that IMP was responsible for the release of a substance or that IMP has not taken all reasonable measures to prevent, reduce and remedy the adverse affects [*sic*] of the substance and remove, or otherwise dispose of the substance in such a manner as to minimize adverse affects [*sic*]…

[8] The first ground is simply an expression of disagreement with the Minister's conclusion. There is no apparent basis to label this a matter of jurisdiction. The Minister may have erred in law, fact, or both, but this does not automatically lead to a loss of jurisdiction.

[9] In its second ground, IMP makes the factual assertion that a provincial Crown corporation, IEL, "owned, occupied, controlled and was responsible for the site" until 1977; that any release of a substance occurred while IEL held title; and therefore the Ministerial order "solely directing IMP to remediate is unlawfully discriminatory and an abuse of process given the responsibility of the Crown for any contamination." To the extent that any coherent meaning can be attached to this, it may be an assertion that the Minister declined to make an order against the Province due to bias. This flows into the third ground, which is no more than a statement that the Minister "failed to add" IEL (and its successors) and Digital Components Ltd. (and its successors), "being persons who the Minister believes on reasonable and probable grounds have contravened the *Act*…" (It should be noted that there is in fact no reference to IEL or Digital Components Ltd. in the Order.)

[10] The fourth ground alleges that the Minister's order "mandates compliance with terms and conditions which grossly exceed what is reasonable or required in the circumstances" and that insofar as it is "more onerous than what has been required by the Minister in equivalent situations, it is unlawfully discriminatory and an abuse of process." Once again, it is clear that IMP disagrees with the Order. This may amount to an assertion or error of fact or law; it may also be another implication of bias.

[11] While certain of the grounds of appeal seem to be more properly described as allegations of bias than of the rather esoteric terminology used by IMP. IMP's counsel indicated in the hearing that bias was not alleged.

[12] The true substance of the appeal may be at the fifth ground, where it is alleged that the Minister "failed to take reasonable and adequate consideration of the factors outlined in s. 129 of the *Environment Act*," resulting in "an Order which is beyond the jurisdiction of the Minister." A further jurisdictional allegation is found in the sixth ground, which alleges that the Order "mandates compliance with terms and conditions which are beyond the scope of the Act and, therefore, not within the jurisdiction of the Minister… [T]he terms and conditions prescribed by the Order are beyond the scope of the provisions contained in s. 125. Furthermore, the Order mandates compliance with terms and conditions which are impossible to fulfill … and as such the Order is beyond the jurisdiction of the Minister."

The Motion

[13] The substance of the present motion is IMP's request for document production for the purposes of the statutory appeal of the Minister's Order. The Attorney General has produced the Record, which includes, *inter alia*, the briefing material provided to the Minister. It does not include the entirety of the Department's file. According to representations of the Attorney General, the Record includes everything that was before the Minister when the decision was made. It is not disputed that there were other materials in the Department's hands, including documents provided by IMP.

[14] The Record as filed does not include certain documents IMP says it provided to the Department. The documents in question relate to the ownership and use of the property before IMP bought it. As such, IMP says there were additional documents that should have been included in the Attorney General's "disclosure." IMP has produced no specific evidence of additional documents provided to the Department.

[15] IMP thus brought a motion seeking "further production of documents; specifically, IMP seeks an order requiring the Attorney General to "produce all documents within the possession of the Province relevant to the factors mandated by s 129 of the *Environment Act* in relation to the Ministerial Order under appeal and setting a deadline for the production…" As a corollary, the order requested would require IMP itself to review the documents produced and determine if it possesses any additional relevant documents, and deliver a list of any such documents to the Attorney General.

[16] IMP submits that (1) *Civil Procedure Rule* 14 mandates full disclosure of relevant documents "in a proceeding": see Rules 14.08(1) and 14.12; (2) Rule 7.10 permits a court hearing a motion for directions in a judicial review proceeding to settle the contents of the record and require it to be prepared, filed, and delivered (Rules 7.10(a) and (b)) and to rule on the admissibility of evidence: see Rules 7.10(a) and (b), and Rules 7.10(g) and (h), respectively; (3) Rule 7.27 permits an appellant to seek admission of evidence beyond the record by filing "an affidavit describing the proposed evidence and providing the evidence in support of its introduction": Rule 7.27(1). In short, IMP submits that the court has broad discretion to order disclosure in all proceedings, including statutory appeals. IMP has also made reference to the recently-repealed s. 138(3) of the Environment Act, which contemplated the introduction of new evidence. However, the relief requested arises under the *Civil Procedure Rules*.

[17] The Attorney General submits that what IMP seeks, in substance, is "a three-day hearing, at the end of which the Court will determine as a factual finding, based upon evidence including expert opinion evidence, what the Minister should or should not have ordered to remedy the groundwater contamination." This, it is submitted, would be to apply a correctness standard in place of a reasonableness standard. The Attorney General submits that this proceeding is "a form of judicial review of administrative ministerial action, not an

appeal to decide on a correctness standard what should have been ordered by the Minister to protect the environment." Put more clearly, the Attorney General submits, this is a statutory appeal to which judicial review principles, including the analysis from *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, apply, not a trial de novo. The Attorney General's description seems to me to do justice to the substance of IMP's position, though IMP would certainly deny it.

[18] IMP's position is premised on the alleged "relevance" of all documents within the possession of the Province relevant to the Minister's consideration of the s. 129 factors. The Attorney General correctly points out that for the purposes of a statutory appeal, the "relevant" materials consist of those in the Record that was before the Minister, unless the court orders otherwise. It must be emphasized that the Notice of Motion seeks no remedy other than creation of an ad hoc document production process. IMP does not specifically ask the court to determine the content of the Record, as contemplated by Rule 7.10(a), nor does it request an order permitting the introduction of new evidence on the appeal, as contemplated by Rule 7.10(g) and (h). To be clear, the Notice of Motion cites Rule 7 generally, the only relief actually requested was an order for production of relevant documents. There was a good deal of discussion of "the Record" in the parties' submissions and at the hearing, but IMP's requested remedy is not one that goes directly to the proper content of the Record that was before the decision-maker.

[19] It is the position of the Attorney General that the Record that has been produced is the Record that was before the Minister. In order to justify disclosure and discovery, IMP is obliged to provide evidence establishing valid reasons – that is, reasons that prima facie rebut the presumption of regularity – to believe that the Order was outside the ambit of the relevant provisions of the *Environment Act*, and that the Record is insufficient to provide a basis for review.

The Record

[20] First, it may be worthwhile to review some basic principles respecting the record on judicial review and statutory appeal. As has been noted, the Notice of Motion does not seek a record-based remedy, but I believe it is essential to understand the nature of a "record" in order to comprehend the document disclosure remedy that has actually been sought.

[21] The *Civil Procedure Rules* do not define the "record," but the decision-making authority is required to produce it: Rule 7.09(1). A judge hearing a motion for directions may make certain determinations about the content of the record. This provides no guidance as to how such a determination should be made. According to Sara Blake, in *Administrative Law in Canada*, 5th edn. (LexisNexis, 2011), at 202-203:

> The record that was before the tribunal is the evidence on which a court bases its review of the tribunal's action or decision… The record must include the document that initiated the proceedings before the tribunal and the tribunal order or decision. If relevant to the issues raised in the application for judicial review, the record may include the tribunal's reasons …, interim rulings made by the tribunal, [and] the exhibits filed with the tribunal… The record does not include communications for the purpose of settlement nor documents protected by deliberative secrecy or privilege such as drafts of the tribunal decision… The tribunal is not obliged to create new documents as the record contains only existing documents in the possession of the tribunal that were used in making the decision. [Emphasis added.]

Blake goes on to say, at 204-206:

> Only material that was considered by the tribunal in coming to its decision is relevant on judicial review because it is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court. If the issue to be decided on the application involves a question of law, or concerns the tribunal's statutory authority, the court will refuse leave to file additional evidence. Evidence challenging the wisdom of the decision is not admissible… If the applicant alleges bias, use of statutory power for an improper purpose, fraud on the tribunal, absence of evidence to support a material finding of fact or failure to follow fair procedure, the court may grant leave to file evidence proving these allegations…
> …
> In exceptional circumstances, applicants may be permitted to obtain evidence by questioning the decision makers or tribunal registrar as to the process by which the tribunal made its decision, but no inquiries may be made into the deliberations of the decision makers, which are protected by deliberative secrecy...

[22] In an article on "The Record on Judicial Review," Freya Kristjanson writes that alleged failures of procedural fairness or natural justice, she notes, "may properly be the subject of affidavit evidence

where the failure is not visible on the face of the record", and evidence demonstrating such errors "will generally be permitted to form part of the record on judicial review. Key areas of concern are bias and use of statutory powers for an improper purpose." Freya Kristjanson, "The Record on Judicial Review," Adv Q 41:4 (September 2013) 387 at 397.

[23] In their text *Judicial Review of Administrative Action in Canada*, (Canvasback: looseleaf) at §6:5300, Brown and Evans comment that "affidavit evidence will only be permitted to supplement the administrative record in limited circumstances," adding that:

> where the basis for judicial review involves bias or fraud, it will almost always be necessary to have evidence which is not part of the administrative record… On the other hand, where the alleged error is not jurisdictional, nor one of adjudicative or procedural unfairness, the applicant will … usually be confined to the record of the tribunal's proceedings, without augmentation.

[24] As to the content and definition of the record, Brown and Evans write, at §6:5300, that, in the absence of statutory direction to the contrary,

> the content of the administrative record has, in the past, been limited to documents initiating the administrative proceedings, the pleadings, if any, the decision itself, and the reasons for the decision… More recently, however, some courts have recognized that because of the evolution of the scope of judicial review, namely its extension to include review for errors of fact and mixed fact and law, that the evidence before the statutory decision maker ought to be included as part of the record.

[25] These texts were not cited by the parties, but they are among the standard secondary authorities with which any discussion of the record on judicial review or statutory appeal should start.

[26] The caselaw will be discussed in more detail below; however, I emphasize that the general law respecting "the record" is of secondary importance here, where IMP seeks open-ended disclosure without adducing evidence (beyond speculation) to suggest that the Record is inadequate as a

basis for the appeal. Rather, the relevant law is found in the Court of Appeal's *Waverley* decision, which I will now consider.

Waverley v Nova Scotia

[27] There is no reason to question the continuing authority of *Waverley (Village) v Nova Scotia (Minister of Municipal Affairs)* (1994), 129 NSR (2d) 298, [1994] NSJ No 84. In that case, the Nova Scotia Court of Appeal held that "[c]ourts will consider the discovery of administrative decision makers only exceptionally and when there are valid reasons for doing so. Valid reasons must have an evidentiary foundation, which may be established by affidavit" (para.5). The Minister of Municipal Affairs had "prescribed that stone quarry operations in the Village of Waverley … be exempt from regional or municipal development permits if environmental permits had been previously issued; the intervenor Tidewater Construction Company Limited held such a permit and its stone quarry operation was exempted" (para. 1). The Minister was exercising statutory authority in granting the exemption. The appellants, who were Waverley village commissioners and local citizens, brought a *certiorari* application, seeking to quash the exemption. In the alternative, they sought a declaration that it was *ultra vires*, null and void and of no force and effect.

[28] The Court of Appeal decision preceded the hearing of the main application. The appellants sought the reversal of two chambers orders, "one made by Justice Davison striking out notices of examination for discovery for [the Minister] Mr. Kerr, and two provincial officials, Ronald Simpson and D.E. Hiltz; the other made by Chief Justice Glube settling the record, that is, determining the material to be included with a return made by the minister pursuant to Civil Procedure Rule 56.08" (para. 3).

[29] Justice Davison had stated that the respondents' aim was to examine the Minister by way of discovery in order to identify the "information and considerations" that he considered in exercising his discretion (*Waverley* (CA) at para 4, citing Davison J.). Justice Davison added that "it would be undesirable to see a practice develop whereby statutory decision makers are subject to examinations for discovery for the purpose of establishing grounds to overturn the decisions" (*Waverley* (CA) at para 4, citing Davison J.)

Freeman JA, for the court, held that these remarks reflected "prevailing judicial opinion in these matters" and that they were "supported by law and public policy. Courts will consider the discovery of administrative decision makers only exceptionally and when there are valid reasons for doing so. Valid reasons must have an evidentiary foundation, which may be established by affidavit" (*Waverley* (CA) at para 5). The general discovery rule – at that time Rule 18 of the *Civil Procedure Rules* 1972 – had general application in civil proceedings; however, Freeman JA was of the view (at para. 6) that it:

> does not necessarily impose discovery in the context of judicial review, although that is a civil proceeding, but does not preclude it where discovery is otherwise appropriate. It is apparent from the case law that discovery is not generally appropriate to judicial review by way of *certiorari*.

[30] Justice Freeman went on to cite a line of cases holding that trial discovery procedures were not appropriately applied to judicial review proceeding, with rare exceptions (paras. 7-16), and said, at para. 17:

> I would conclude … that a restricted right of discovery of administrative decision-makers or members of decision-making tribunals does exist, and that it is not necessarily limited to questions of procedure rather than the subjective decision-making process. A distinction exists between discovery, which is a somewhat unfocused fact gathering exercise, and the examination of witnesses in the course of a judicial review, when issues are more defined and questions must be relevant to them. In either case, discovery or testimony, a proper evidentiary foundation must be created, generally by affidavit evidence, to establish that valid reasons exist for concern that there has been a want of natural justice or procedural fairness, or that the discretionary authority has been otherwise exceeded. I am aware of no authority for the discovery examination of a discretionary decision-maker under a statute when the issue is whether his or her authority was properly exercised, although there is a clear analogy with the review of adjudicative decisions. A further difficulty arises when the decision-maker is a minister of the Crown; crown immunity was the basis for Justice Davison's decision and the focus of submissions of counsel. [Empahsis added.]

[31] Justice Freeman reviewed the authorities for the proposition that a discretion conferred by statute must be exercised within the ambit of the

discretionary authority intended by the legislature (paras. 18-24). He concluded, at para. 30, that discovery was available in aid of judicial review of the exercise of discretionary power:

> Despite the difficulties, judicial review is available when there are valid reasons to consider that a disputed decision is not within the ambit of the decision-maker's discretionary powers. Despite the absence of authority there is no basis for concluding that discovery may not be available in such circumstances. Indeed, given the sketchiness of the record inherent with such decisions, there may be circumstances when the discovery of the decision-maker is essential if justice is to be done. Discovery will not be granted lightly, however. Decisions by ministers and officials are protected by the presumption of regularity as well as the doctrine of deliberative secrecy referred to in [*Tremblay v. Quebec (C.A.S.)*, [1992] 1 S.C.R. 952]. Courts must be reluctant to intrude into the domain of government decision-making without valid reasons for considering that discretionary authority may have been unjustly exercised. Once again, an evidentiary foundation is essential. [Emphasis added.]

[32] As to the evidentiary foundation required to justify discovery in such circumstances, Justice Freeman said, at para. 31:

> Under Rule 18.01 the right to examine for discovery is available upon notice without order. If the person to be examined objects, he or she has the onus of supporting an application to strike the notice for examination. It is a clear inference from the authorities cited above that the onus is discharged when the person to be examined established that he or she is to be examined as a decision-maker in an application under Rule 56. The onus must then shift to the party seeking the discovery. In the words of Justice Gonthier in *Tremblay*, what must be shown are "valid reasons for believing that the process followed did not comply with the rules of natural justice." In the present case, by analogy, what must be shown are valid reasons for believing the prescription issued by Mr. Kerr was outside the ambit of the discretionary authority granted by s. 123(9) of the *Planning Act* and further, in my opinion, it must also be shown that the record is insufficient to provide a basis for review. Valid reasons, to my mind, would be reasons that *prima facie* rebut the presumption of regularity. Again by inference from the authorities cited above, the threshold is substantially higher for discovery than similar thresholds which must be crossed before evidence going beyond the record can be considered at the hearing of the merits of a Rule 56 application. [Emphasis added.]

[33] In short, presumptive discovery of an administrative decision-maker does not exist; a party seeking discovery must establish that there are valid reasons – that is, reasons that *prima facie* rebut the presumption of regularity – to believe that the action taken was outside the ambit of the relevant statutory authority, and that the record is insufficient to provide a basis for review. Those valid reasons must have an evidentiary basis, generally by affidavit. An attempt to inquire into the decision-making process by seeking discovery as to the advice the Minister was given "does not impugn the decision by showing, or pointing to the existence of, valid reasons for believing it was outside the ambit of the statutory authority." If it did, Freeman JA said, "any decision-maker could be examined on discovery by any person discontented with any decision and seeking grounds for judicial review. This would be incompatible with efficient government and the law does not permit it" (para. 36).

[34] Justice Freeman noted that evidence that the "exemption had been prescribed to settle a lawsuit might well attract the interest of a reviewing court, which would have to determine whether there had been a proper exercise of the discretion granted by the legislature" (para. 40). This was the allegation of the appellants, but there was no evidence properly before the court to support it. As a result, it was not necessary to consider the chambers judge's decision to strike notices for examination on the basis of the Crown's prerogative to refuse discovery (para. 42).

[35] Justice Freeman went on to consider the manner in which Glube CJSC (as she then was) had dealt with the record. He said, at paras. 51-53:

> Citing [Sir William Wade, *Administrative Law*, 6th edn, Clarendon Press, Oxford, 1988] at p. 312 that "the record extends to include any document referred to in the primary documents" Chief Justice Glube found that environmental permits referred to in the prescription and the Halifax-Dartmouth Regional Development Plan should be included in the record. Otherwise, she accepted the documents submitted with Mr. Kerr's certificate as the record. In doing so she found matters related to the oral briefings of the minister by officials, referred to in the narrative of his certificate, including documents referred to in the course of those briefings, not to be part of the record.
>
> She ordered:

> " The return filed pursuant to Rule 56 is to be amended by way of the filing of a copy of the Halifax-Dartmouth Metropolitan Regional Development Plan, including the map showing the development boundary, and copies of environmental permits issued prior to August 20, 1992, to other quarries in the Halifax-Dartmouth regional development planning area to which the ministerial prescription may apply; otherwise the Applicants' application is dismissed, without costs."
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> As counsel for the respondents and the intervenor pointed out, a court cannot create a record where none exists. A minister becomes informed of the affairs of his department from many sources, and where no formal procedure is prescribed, the sources of his information are not part of the record unless they are in the nature of reports implemented by the exercise of his statutory discretion. In my opinion Chief Justice Glube's order and her reasons for it disclose no error reversible on appeal. [Emphasis added.]

[36] In dismissing the appeal, Freeman JA wrote that no "injustice, injury or prejudice results from the striking of the discovery notices or the fixing of the record. The *certiorari* application remains to be heard, and there are other means of gathering information. Denial of discovery, particularly in circumstances where discovery is usually denied, and refusal of a further expansion of a record that appears complete, are at worst inconveniences, not injustices" (para. 54).

Other Caselaw

[37] In support of its position IMP cites *TG v Nova Scotia (Minister of Community Services)*, 2011 NSSC 356. This case supports the view that judicial review proceedings are not necessarily excluded from the coverage of general disclosure under the *Civil Procedure Rules*; it does not follow, in my view, that a party to a judicial review or statutory appeal has an entitlement to full disclosure of "relevant" documents mirroring that required in a conventional civil action.

[38] IMP also relies on *Hartwig v Saskatoon (City) Police Assn*, 2007 SKCA 74, application for leave to appeal dismissed, [2008] SCCA No 389. The applicants sought the quashing certain findings of fact made by a Commission of Inquiry into a death in police custody. The respondents sought to restrict the scope of the materials which the applicants could rely on in connection with their applications. In allowing the application in part, the Saskatchewan Court of

Appeal held that the traditional view – that evidence was only permissible on a *certiorari* application in respect of issues such as jurisdiction – was not consistent with the later evolution of the scope of judicial review. The court said, at para. 19:

> It is readily apparent therefore that the scope of judicial review has evolved significantly in the 55 years since the *Northumberland* case was decided. In contrast, the conception of what is properly before the court in a judicial review application has been largely static. As a result, we are currently at a point where, on one hand, the factual findings of administrative decision-makers made within jurisdiction can be reviewed from the perspective of reasonableness but, on the other hand, the evidence on which those findings are made cannot be put before the courts. This situation frequently creates serious injustices and precludes meaningful review. In my opinion, there is a pressing need to bring the law concerning the materials which can be placed before the courts in judicial review applications into line with the substance of contemporary administrative law doctrine.

[39] It was, the court held, "necessary to recognize and give effect to the reality that, in order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question" (para. 24).

[40] *Hartwig* may suggest a loosening of the traditional standards for admission of new evidence on judicial review. It has not been endorsed in Nova Scotia. Moreover, as the Attorney General notes, *Hartwig* involved evidence that was actually considered in the hearings that were the subject of the judicial review, not new evidence that had not been put before the relevant tribunal.

[41] The *Waverley* principle is reflected in the Court of Appeal's statement in *Canada Life Assurance Co. v. Nova Scotia (Minister of Municipal Affairs)*(1996), 150 N.S.R. (2d) 360, [1996] N.S.J. No. 194, at para. 64, that :

> if a party wishes to adduce additional evidence on the hearing of an application for judicial review, it must be by way of affidavit. Affidavit evidence is not only admissible but usually necessary when a court is reviewing a decision of an inferior tribunal where the grounds are lack of jurisdiction or bias or fraud. As a general rule, affidavit evidence is not admissible when the grounds for review are in error on the face of the record unless the affidavits show the record to be incomplete…

[42] The evidence at issue in *Canada Life Assurance* consisted of correspondence subsequent to the Minister's decision. *Canada Life Assurance* was cited, along with other authorities, by the Alberta Court of Queen's Bench in *White v. Alberta (Workers' Compensation Board, Appeals Commission)*, 2006 ABQB 359, where Slatter J said, at paras. 34-35:

> Since the issue on which the new evidence was tendered is not a question of law or jurisdiction, it was not the subject of the appeal, but rather was a portion of the application for judicial review. Judicial review is traditionally conducted "on the record", and fresh evidence on the merits that was not before the tribunal is generally not permitted: *Canada Life Assurance Co. v. Nova Scotia (Minister of Municipal Affairs)* (1995), 146 N.S.R. (2d) 32, 34 Admin. L.R. (2d) 180, affm'd (1996), 150 N.S.R. (2d) 360; *Ady v. Law Society of Alberta* (1994), 29 Admin. L.R. (2d) 56 (Alta. C.A.). Assuming that fresh evidence would occasionally be permitted on an application for judicial review, it would likely be subjected to the same tests as fresh evidence on appeal.
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> The use of affidavits on judicial review is exceptional. They can be introduced when they are needed to establish the grounds for the application, but not when they are intended to alter or supplement the factual record used by the tribunal to decide the issue on the merits... Affidavits are allowed on judicial review to show bias, or some defect in the way the hearing was conducted, or sometimes that the decision was patently unreasonable (where that is not apparent from the record), or to show other types of reviewable error. Affidavits are not generally permitted just to show that a different decision would have been better than the one made. In the circumstance, the Appellant was not permitted to rely on the new affidavit. Whether the decision that it is appropriate for the Appellant to relocate to find work is patently unreasonable must be decided on the evidence that was before the Appeals Commission… [Emphasis added.]

[43] *White* is not relied on by the parties here; they do, however, cite *Friends of Cypress Provincial Park Society v. British Columbia (Minister of Environment, Lands and Parks)*, 2000 BCSC 466, where the applicant on a judicial review of a ministerial order sought to introduce various information by way of attachment to an affidavit. This material was not before the Minister when the decision was made. The court said, at paras. 3-5:

> In general, the Minister's position is correct. That is, the court is to determine whether the Minister followed a lawful process in coming to her decision rather than

> determining if she would have come to the same conclusion on either the evidence before her or such further evidence as may have been put before the court.
>
> Typically, the only evidence I am allowed to consider is what can be described as the record of the proceedings before the Minister. There are exceptions. Extrinsic evidence may be admissible to demonstrate a lack of jurisdiction or a denial of natural justice. However, the extrinsic evidence must be relevant to such an allegation. For example, in this case, evidence relating to the allegation that the Minister lacked jurisdiction to issue an amendment to PUP 1506 would be admissible.
>
> Clearly, opinion evidence as to what the Minister ought or ought not to have done is not admissible, nor is evidence that seeks to show that the Minister did not have the facts before her when rendering her decision…

[44] In *Riley v Nova Scotia (Minister of Community Services)*, 2011 NSSC 387, the appellant had been denied funding for a "special need" under the *Employment Support and Income Assistance Act*, and claimed that there had been "further information before the Board, that was not considered properly" by the Assistance Appeal Board (para. 9). This material, he claimed, had been forwarded to the Department of Community Services, but did not appear in the record, and the Board decision indicated that no further information had been provided. Bourgeois J said, at para. 12:

> In the absence of compelling evidence to contradict the veracity of the certification provided by the Co-ordinator of Appeals, or the statement contained in the decision of Mr. Gallant, I must rely on the Record as provided as being accurate. <u>One would expect, where the completeness of the Record was being challenged, that a concerned party, be it applicant or respondent, would, at a minimum, file an affidavit outlining the specific documents alleging to be missing, and when, and in what context it was provided to the decision making authority</u>. This could be done in advance of the judicial review hearing itself, or perhaps preferably as part of the original or a subsequent motion for directions. [Emphasis added.]

[45] The Attorney General makes the obvious points that (1) Riley was concerned with material that was allegedly before the tribunal, and (2) the court should accept the record as being accurate in the absence of compelling evidence to the contrary.

[46] IMP submits that the court has the inherent jurisdiction to order discovery of documents in any proceeding. The authority offered for this proposition is *Brar v College of Veterinarians of British Columbia*, 2011 BCSC 215, where the British Columbia Supreme Court, citing its own previous decision in *Nechako Environmental Coalition v British Columbia (Minister of Environment, Lands and Parks)*, [1997] BCJ No 1790 (SC), held that where the rules of court did not provide for disclosure or discovery on judicial review, the court could nevertheless exercise its inherent jurisdiction to order disclosure on a narrow basis, adding that "[w]here the existence of relevant documents is known, the Court will not deprive itself of access thereto if there is no other bar to their production" (para. 25, citing *Nechako*). In addition to citing the Nova Scotia Court of Appeal decision in *Waverley* as to the exceptional nature of discovery of an administrative decision-maker, the court in *Brar* went on at para. 18 to cite *Kinexus Bioinformatics Corp v Asad*, 2010 BCSC 33, at para. 17, where it had taken the view that "[t]he court's power to admit evidence beyond the record of proceeding must be exercised sparingly, and only in an exceptional case. Such evidence may be admissible for the limited purpose of showing a lack of jurisdiction or a denial of natural justice." As the Attorney General points out, *Brar* involved an allegation of bias.

[47] IMP also cites *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2010 BCSC 243, where the court admitted transcripts of evidence presented to the British Columbia Human Rights Tribunal on a judicial review of the Tribunal's decision. While it was "not the court's role to re-evaluate or re-weigh the evidence and the court must maintain an attitude of deference to a tribunal's fact-finding role," the court was "mandated by s. 59 of the [British Columbia *Administrative Tribunals Act*] to scrutinize the evidence to determine whether there is evidence to support findings of fact and whether such findings are reasonable in light of all the evidence," and could not do so without the evidence being before it" (para. 77). As the Attorney General points out, this decision involved a transcript of the evidence that was actually before the tribunal.

[48] The Attorney General cites the recent decision of the Ontario Court of Appeal in *Kawartha Lakes (City) v Ontario (Director, Ministry of the Environment)*, 2013 ONCA 310, where spilled fuel oil had migrated onto the property of the appellant municipality after a spill on neighbouring private property. The Ministry of the Environment ordered the appellant to remediate the effects of the spill on its property. The appellant appealed the order. Unlike a

previous owner against the neighbouring owner, the order against the Municipality was not based on fault. The appellant initially appealed to the Environmental Review tribunal, where the procedure was hearing *de novo*. Nevertheless, the tribunal refused to allow the appellant to introduce evidence that the other involved parties were at fault for the spill; fault was "irrelevant to the Tribunal's task of determining whether the Act's objective of environmental protection meant that the Director's order should be upheld," although it was open to the appellant to argue (in the absence of new evidence) "that its status as an innocent owner together with the 'polluter pays' principle should relieve it of the Director's order" (para. 11). As it transpired, the tribunal "concluded that it was not enough for the appellant to rely on its status as an innocent victimized owner without addressing how the legislative objective of environmental protection would be met if the Director's order were revoked. Since the appellant presented no evidence of an environmentally responsible solution in the event of revocation of the Director's order, the Tribunal dismissed its appeal" (para. 12). This decision was affirmed by the Divisional Court. In further affirming, the Ontario Court of Appeal reviewed the grounds of appeal and said, *inter alia*, at paras. 17-20:

> The appellant … argued that the Tribunal's procedural order excluding evidence that others were at fault for the spill denied it natural justice and prevented it from fully making its case that it should be relieved of the Director's order because of the "polluter pays" principle.
>
> Framed either way, I would dismiss this argument. It turns entirely on whether the evidence sought to be tendered by the appellant was properly found irrelevant to the issue before the Tribunal. If the evidence is irrelevant, excluding it does not constitute a denial of natural justice to the appellant, nor does it improperly limit its ability to argue that the "polluter pays" principle requires that the Director's order be revoked.
>
> In this case, all agree that the appellant is innocent of any fault for the spill. I agree with the Tribunal and the Divisional Court that evidence that others were at fault for the spill is irrelevant to whether the order against the appellant should be revoked. That order is a no fault order. It is not premised on a finding of fault on the part of the appellant but on the need to serve the environmental protection objective of the legislation.
>
> The tribunal had to determine whether revoking the Director's order would serve that objective. Deciding whether others are at fault for the spill is of no assistance in answering that question. Evidence of the fault of others says nothing about how the environment would be protected and the legislative objective served if the Director's

> order were revoked. Indeed, by inviting the Tribunal into a fault finding exercise, permitting the evidence might even impede answering the question in the timely way required by that legislative objective.

[49] The Attorney General submits that the arguments advanced by the appellant municipality in *Kawartha* – that it was not at fault for the spill, and that it was unreasonable to require it to bear the cleanup cost in view of the "polluter pays" principle – are identical to those advanced by IMP. The Attorney General says the Ontario Court of Appeal's reasoning is equally applicable here.

[50] IMP argues that *Kawartha* is distinguishable. The main grounds of appeal, it submits, are different than "the determination of fault when the City was an undisputed innocent owner" in *Kawartha*. Specifically, IMP argues, those grounds are whether the Minister failed to consider the required factors in s. 129, and whether the content of the order is "beyond the requirements of the *Environment Act*." By comparison with *Kawartha*, IMP says, there is no evidence here that the Minister considered the former owners. This ignores the point of *Kawartha*, which was that fault was irrelevant. IMP also submits that the statutory regime in Kawartha was different, in that it "provided a summary remedy to a municipality to recover its costs, and a Compliance Policy, published by the Ontario [Ministry of the Environment], which addresses the apportionment of liability. Finally, the *Kawartha* case dealt with a recent spill, unlike the long-term contamination scenario that is the subject of the case at hand." Counsel does not attempt to explain why these differences have any significance for the claim that disclosure should be ordered. That being said, it does not seem to me that *Kawartha* adds anything of significance to the analysis of the present motion.

Conclusion

[51] For the reasons set out above – particularly the lack of an evidentiary basis to order disclosure or discovery, as set out by Freeman J.A. in *Waverley* – the motion is dismissed. The Attorney General has raised a secondary ground of Crown immunity, which I find it unnecessary to deal with in view of the resolution on the primary ground of a failure to establish grounds for disclosure; as Freeman J.A. held in *Waverley*, in this case, "the appellants did not cross the evidentiary threshold making Crown immunity the determinative issue" (para. 43).

[52] The parties may provide any further submissions as to costs by December 1.

Stewart, J.