SUPREME COURT OF NOVA SCOTIA
Citation: *Bancroft v. Nova Scotia (Minister of Lands and Forestry)*, 2020 NSSC 370

Date: 20201216
Docket: Hfx No. 496023
Registry: Halifax

Between:

Robert Bancroft and
Eastern Shore Forest Watch Association

Applicants

v.

Nova Scotia Minister of Lands and Forestry, and
The Attorney General of Nova Scotia Representing Her Majesty the Queen in Right of the Province of Nova Scotia

Respondents

v.

Lighthouse Links Development Company

Intervenor

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	December 10, 2020, in Halifax, Nova Scotia
Written Decision:	December 16, 2020
Counsel:	James I. Simpson, for the Applicants John K.C. Townsend, for the Respondents Richard W. Norman, for the Intervenor

By the Court:

MOTION BACKGROUND

[1] This is a motion brought by the Applicants to add documents beyond what has been produced in the Record on Judicial Review filed by the Respondents on October 30, 2020 (the "Record"). By way of background, the Applicants' Notice for Judicial review requests review of the decision by the Nova Scotia Minister of Lands and Forestry (the "Minister") to delist Owls Head Provincial Park Reserve from the Parks and Protected Areas Plan of 2013 ("PAPA"). The Respondents say that the application for judicial review should be dismissed. In their Notice of Participation, the Respondents clarify that the decision is in fact, two-fold. In this regard, the Respondents characterize the decisions as follows: "…the removal of a single parcel of Crown land (the "Property") from a 2013 parks and protected area policy document by the Treasury and Policy Board (the "T&PB") on March 13, 2019, and the signing of a Letter of Offer ("LOO")regarding a potential sale of the Property by the Minister on December 16, 2019". The judicial review is set for April 1, 2021.

[2] The Record contains the following 19 tabbed documents:

1. September 23, 2016 Email from Sean Glover, attaching Application for the Use of Crown Land and August 15, 2016 Correspondence
2. May 2, 2017 Branch Note
3. July 14, 2017 Information Note
4. Lighthouse Links PowerPoint Presentation
5. September 26, 2017 Correspondence from Margaret Miller, Minister of Natural Resources, to Beckwith Gilbert
6. October 23, 2017 Email from Leslie Hickman to Beckwith Gilbert
7. November 2017 Emails between Sean Glover, Leslie Hickman, and others
8. February 23, 2018 Emails between Leslie Hickman and Sean Fraser
9. July 22, 2018 Lighthouse Links Proposal
10. September 13, 2018 Email from Michel Samson, with August 2018 Appraisal
11. November 2018 Emails
12. November-December 2018 Emails

13. RJSC Profile for Lighthouse Links Development Company, printed December 5, 2018
14. Notes from December 5, 2018 Meeting
15. February 2019 Memorandum to Executive Council and Communications Plan
16. August 26, 2019 Emails attaching Terms of Engagement
17. August 26, 2019 Emails between Sean Glover and Cynthia Steele
18. Revised Valuation Report
19. Email from Sean Glover to Sean Rooney, attaching executed Letter of Offer.

[3] On this motion the Applicants ask that additional documents be included in the Record. They rely on Civil Procedure Rules 7.09(1), 7.10 and 7.28 which read:

> **Production of record by decision-making authority**
>
> 7.09 (1) The decision-making authority must file with the court, and deliver to the applicant, one of the following no more than five days after the day the decisionmaking authority is notified of the proceeding for judicial review:
>
> (a) a complete copy of the record, with copies of separate documents separated by pages with numbered or lettered tabs;
>
> (b) a statement indicating that the decision-making authority has made arrangements with the applicant to produce the record, providing details of those arrangements, and estimating when the record will be ready;
>
> (c) an undertaking that the decision-making authority will appear before the judge at the time of the motion for directions and seek directions concerning the record.
>
> (2) A decision-making authority who gives reasons orally without a record must include in the record a summary of the reasons and the decision-making authority's certificate that the summary is accurate.
>
> (3) A judge may grant an injunction against a decision-making authority who fails to comply with this Rule 7.09, and the judge may order the authority to indemnify each other party for expenses resulting from the failure, including expenses caused by an adjournment if that is a result.
>
> **Directions for judicial review**
>
> 7.10 A judge hearing a motion for directions may give any directions that are necessary to organize the judicial review, including a direction that does any of the following:

(a) settles what will make up the record and whether something is part of the record;

(b) assigns responsibility to prepare, file, and deliver the record;

(c) directs the format in which the record will be produced, and whether a party must receive a paper copy of a record that is in electronic format;

(d) provides for the protection of information claimed to be privileged or otherwise subject to a confidentiality protected by law, delivery of the information to the judge who determines the claim, and maintenance of a record for review by the Court of Appeal, under Rule 85 - Access to Court Records;

(e) allows an amendment to the notice for judicial review or a notice of participation;

(f) directs whether there are interested persons who are not parties and, if necessary, adjourns the motion until an interested person is made a party or joins an interested person as a respondent;

(g) rules on the admissibility of evidence sought to be introduced at the review hearing;

(h) provides for the introduction of admissible evidence by affidavit or otherwise, and provides for any reply affidavits, cross-examination at the hearing, or cross-examination outside court with a transcript;

(i) sets deadlines for filing the record, the applicant's brief, the respondent's brief, and any reply brief of the applicant;

(j) directs further appearances before a judge, if necessary, and directs whether those appearances will be before the same judge and whether they will be in chambers, in conference, or at appearance day;

(k) appoints the time, date, and place for the hearing of the judicial review.

…

Evidence on judicial review or appeal

7.28 (1) A party who proposes to introduce evidence beyond the record on a judicial review or appeal must file an affidavit describing the proposed evidence and providing the evidence in support of its introduction.

(2) An applicant for judicial review, or an appellant, must file the affidavit when the notice for judicial review or the notice of appeal is filed, and a respondent must file the affidavit no less than five days before the day the motion for directions is to be heard.

(3) A motion for permission to introduce new evidence must be made at the same time as the motion for directions, unless a judge orders otherwise.

[4] In their original motion filed September 18, 2020, the Applicants sought to add eight affidavits (and accompanying exhibits), an expert report, statement of qualifications as well as a partial transcript of the cross-examination of Leslie Hickman, one of the Respondents' affiants from when the matter was last in Court on June 29, 2020. In the lead-up to today's motion, the Applicants refined their request to add only the below materials, which they submit should be part of the Record:

1. Certain paras. and exhibits of Barbara Markovits' March 25, 2020 affidavit. Ms. Markovits is a director of the Applicant Eastern Shore Forest Watch Association (ESFW);
2. Certain pages from exhibit "A" of Ms. Markovits' May 15, 2020 supplemental affidavit;
3. The above-mentioned partial transcript of Ms. Hickman, the Executive Director of Lands Services with the Nova Scotia Department of Lands and Forestry attached as exhibit "A" to Ms. Markovits' October 27, 2020 affidavit; and
4. Exhibits "A", "B", "C" and "D" of Ms. Markovits' November 12, 2020 affidavit.

[5] In addition, the Applicants submit that the Record should be expanded as follows:

- Record, Tab 1: the Applicants request the Respondents to add to the Record and correspondence or emails from Minister Hines and Mr. Morris to Mr. Gilbert, as referred to by Mr. Gilbert (page 11).
- Record, Tab 2: the Applicants request the Respondents to add to the Record the policy referred to on page 1: "departmental policy has been for any crown land identified as a park reserve, to be managed under the parks program…".
- Record, Tab 2: the Applicants request the Respondents to add to the Record the unredacted Recommendation/Advice section of the May 2, 2017 Branch Note prepared by Matt Parker (bottom of page 1).
- Record, Tab 5: the Applicants request the Respondents to add to the Record the email correspondence of September 10, 2017 from Mr. Gilbert to Minister Miller, referred to at page 1.
- Record, Tab 5: the Applicants request the Respondents to add to the Record the "records research report", referred to at page 2.

- Record, Tab 7: the Applicants request the Respondents to add to the Record any and all notes of meetings between Leslie Hickman and Sean Glover, referred to at page 1.
- Record, Tab 8: the Applicants request the Respondents to add to the Record any and all notes of meetings between Leslie Hickman and Sean Fraser.
- Record, Tab 14: the Applicants seek confirmation of the author of the notes, as well as a typed version of the notes.
- Record, Tab 14: the Applicants request the Respondents to add the "Development Plan" to the Record, as referred to at page 2.
- Record, Tab 15: the Applicants request the Respondents to add to the Record the unredacted Memorandum to the Executive Council, prepared by Matt Parker and dated February 26, 2019, including the attached Communications Plan, dated February 15, 2019.

[6] In the main the Applicants argue that the Record is incomplete. They submit that it must be expanded to have all of the documents they say were before the Minister when he decided to request de-listing of Owls Head from PAPA and to enter into a LOO with the Intervenor, Lighthouse Links Development Company. At this juncture, I pause to again point out that the Applicants have characterized the decision as one of the Minister; however, based on the totality of the material before me, I have concluded differently. That is to say, I am of the firm view that the material establishes that there were two decisions; one made by the T&PB on March 13, 2019 and the other by the Minister on December 16, 2019. In any event, the Applicants submit as follows in their brief:

> As such, the Applicants submit that the Record as submitted by the Respondents is incomplete. There are a number of relevant documents referred to in the Record but which are not included in the Record. Furthermore, Freedom of Information reports reviewed by the Applicants include relevant documents that are not included in the Record. Finally, sections of the Record have been redacted without justification by way of solicitor-client privilege, deliberative secrecy, or as draft decisions.

[7] The Respondents argue that the Record is complete and that the motion must accordingly be dismissed. They submit that the application must be dismissed for a host of reasons, including:

> (a) The Applicants have not rebutted the presumption of regularity that attaches to the Record, nor have they established any exceptional circumstances warranting documentary disclosure beyond the Record.

(b) Much of the information tendered or requested by the Applicants is simply irrelevant and unnecessary, in that it does not truly relate to the Applicants' substantive grounds for review or the outstanding issues between the parties regarding procedural fairness.

(c) Other information is inadmissible because it does not properly form part of a Record (e.g. it consists of staff analysis, documents akin to draft decisions, material from an agency file that was not before the ultimate decision-maker, etc.), it is subject to a valid claim of public interest immunity, it does not fall within one of the recognized exceptions to the prohibition against affidavit evidence beyond the Record, and/or it consists of opinion or argument.

[8] The Intervenor supports the Respondents in resisting the motion and their arguments may be distilled from this passage from their brief:

> It is notable that the Applicants originally proposed to add to the record a vast amount of additional evidence, mostly in the form of various affidavits. Challenged on most of it, the Applicants have sought an inconvenient and questionable method of insisting on the admission of bits and pieces of a variety of affidavits. Lighthouse Links says that the Applicants' decision to withdraw from consideration large amounts of these affidavits (including affidavits from Dr. Bancroft and outside experts) is an admission that most of what they originally sought to admit was irrelevant or inaccurate. The remaining evidence is unnecessary and/or irrelevant for this application.

[9] In terms of evidence on this motion, the Court has before it on behalf of the Applicants, the March 25, May 15, October 27 and November 12, 2020 affidavits of Ms. Markovits. As for the Respondents, they filed a June 22, 2020 affidavit of Ms. Hickman and a November 27, 2020 affidavit of the Nova Scotia Department of Lands and Forestry's Director of Strategic Policy and Planning, Lesley O'Brien-Latham. None of the affiants were cross-examined.

APPLICATION FOR JUDICIAL REVIEW BACKGROUND

[10] As indicated at para. 4, this matter was last in Court on June 29, 2020. On August 5, 2020, Justice Coady released his decision (*Bancroft v. Nova Scotia (Minister of Lands and Forestry)*, 2020 NSSC 214) permitting the Applicants to proceed with judicial review. At paras. 1–5 he provided background which provides context to the within motion:

> 1 On January 31, 2020, the Applicants filed a Motion seeking an Order to "extend the six-month time limit per Civil Procedure Rule 7.05(1)". It was their intention to seek judicial review "of the decision by the Nova Scotia Minister of

> Lands and Forestry to delist Owl's Head Provincial Park Reserve from the Parks and Protected Areas Plan of 2013". (PAPA)
>
> …
>
> The Applicants submit that the Provincial Government's decision was made without public awareness due to a secret process referred to as a "Letter of Offer". This process attracts cabinet confidentiality and, as such, does not appear in conventional Provincial Government reports. It is accessible through FOIPOP legislation.
>
> 2 PAPA legislation allows for the designation of areas as either Provincial Parks or Park Reserves. The latter designation creates a sort of holding pen for lands that, in the future, may become Provincial Parks. Owl's Head was a park reserve prior to delisting. It is now classified as general Crown land property.
>
> 3 The evidence on this Motion clearly establishes that Owl's Head was portrayed to the public as a Provincial Park. Government documentation and maps, going back as far as 1978, refer to the area as "Owl's Head Provincial Park". Further, it was managed by Lands and Forestry to maintain its reserve status. The public had every reason to assume Owl's Head was a Provincial Park and. therefore, attracted protections not available on Crown lands.
>
> 4 The delisting of the Owl's Head Provincial Park Reserve occurred on March 13, 2019, by way of a minute letter issued by the Provincial Treasury Board at the request of the Minister of Lands and Forestry. It is this decision that the Applicants wish to challenge by way of judicial review.
>
> 5 In late 2019 CBC journalist, Michael Gorman, made a FOIPOP request for information related to the Province's plans for the development of the Owl's Head property. He published the response, which included the minute letter, on December 18, 2019. Subsequently, on December 23, 2019, the same information was published on the Province's Freedom of Information portal. I accept the Applicants' position that this represents the earliest date that this information was available to the public. Mr. Bancroft filed his Notice on January 30, 2020. Eastern Shore Forest Watch Association joined the Application on January 31, 2020.

WHAT CONSTITUTES THE RECORD ON JUDICIAL REVIEW

[11] Jones and de Villars refer to the following definition at pp. 485-486 of *Principles of Administrative Law*, 6th ed. (Carswell, 2014) as to what constitutes the record on a judicial review application:

> …Lord Denning said this in the *R. v. Northumberland Compensation Appeal Tribunal* case:
>
> > …I think the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them…

[12] Brown and Evans cite the above definition at §6:5420 of *Judicial Review of Administrative Action in Canada*. They go on to note (see §§6:5443, 6:5444 and 6:5447) that several types of items do not properly form part of the record, including the following:

(a) Tribunal files: "Provided that they were not otherwise a part of the proceedings, a tribunal's internal files do not form part of the record. For example, documents examined by a tribunal's investigator in the preparation of a report were held not to be part of the record, even though the report itself may be admissible. Furthermore, parts of a policy manual not before the tribunal have been held not to be part of its record".

(b) Confidential information: "Confidential information precluded from disclosure by statute or regulation does not constitute part of an agency's record".

(c) Drafts of decisions: "Drafts of decisions are not part of the administrative record, for the following reasons: …the effect upon this and other boards of the precedent that we were asked to establish would be incalculable. Who is to say how many drafts of any particular judgment or decision may have been prepared before the final document issues? If a full draft, why not brief memoranda prepared in contemplation of a draft? If such memoranda, why not notes taken by board members in the course of their hearing or their private or personal deliberations?"

[13] Sara Blake provides authority to a similar effect at pp. 202-203 of *Administrative Law in Canada*, 5th ed. (LexisNexis, 2011):

> 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 (including dissenting reasons) interim rulings made by the tribunal, the exhibits filed with the tribunal, and, if any oral hearing was held and transcribed, the transcript. 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, notes made by members of the tribunal (sic) legal opinions given to the tribunal by its counsel or other analyses done by tribunal staff to assist the tribunal in its deliberations. The record does not include briefs of authorities filed with the tribunal. 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.

[14] In *Kelly v. Nova Scotia Human Rights Commission*, 2018 NSSC 17, Justice Arnold quoted (para. 26) with approval Justice Stewart's overview of the meaning of the "record" under Rule 7:

> 26 In *IMP Group International Inc. v. Nova Scotia (Attorney General)*, (2013), 336 N.S.R. (2d) 188, 2013 NSSC 332, Stewart J. provides a comprehensive overview of the meaning of "record" under the Rules:
>
> > 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 ... [Emphasis added]

PUBLIC INTEREST IMMUNITY

[15] The scope of the record may also raise issues relating to public interest immunity. The Supreme Court of Canada recently discussed this doctrine at paras. 95-97 of *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 ("*BC Judges*"):

> 95 There is a strong public interest in maintaining the confidentiality of deliberations among ministers of the Crown: *Carey*, at pp. 647 and 656-59; *Babcock*, at paras. 18-19. As a matter of constitutional convention, Cabinet deliberations are confidential: N. d'Ombrain, "Cabinet secrecy" (2004), 47(3) *Canadian Public Administration* 332, at pp. 334-35. Federal ministers swear an oath as Privy Counsellors to "honestly and truly declare [their] mind and [their] opinion" and to "keep secret all matters ... secretly treated of" in Cabinet: see C. Forcese and A. Freeman, *The Laws of Government: The Legal Foundations of Canadian Democracy* (2nd ed. 2011), at p. 352. Provincial and territorial ministers swear a similar oath as executive counsellors.
>
> 96 Ministers enjoy freedom to express their views in Cabinet deliberations, but are expected to publicly defend Cabinet's decision, even where it differs from their views: see A. Heard, *Canadian Constitutional Conventions: The Marriage of Law & Politics* (2nded. 2014), at pp. 106-7; d'Ombrain, at p. 335. The confidentiality of Cabinet deliberations helps ensure that they are candid and frank and that what are often difficult decisions and hard-won compromises can be reached without undue external interference: see Forcese and Freeman, at p. 352; d'Ombrain, at p. 335. If Cabinet deliberations were made public, ministers could be criticized for publicly defending a policy inconsistent with their private views, which would risk distracting ministers and undermining public confidence in government.
>
> 97 Grounded in constitutional convention as much as in practical considerations, this confidentiality applies whether those deliberations take place in formal meetings of the Queen's Privy Council for Canada, or a province or territory's Executive Council, or in meetings of Cabinet or of committees composed of ministers, such as Treasury Board. The confidentiality extends not only to

> records of Cabinet deliberations, but also to documents that reflect on the content of those deliberations: Babcock, at para. 18.
>
> [my emphasis added]

[16] The Supreme Court of Canada went on to explain (see paras. 100-101) that the doctrine of public interest immunity requires a case-by-case balancing of the following factors to determine whether a specific document should be produced or withheld:

(a) The level of the decision-making process in question. As the Court explained at paras. 105-106, this factor often weighs in keeping the document in question confidential, given that Cabinet is the highest level of decision-making within the executive, aside from decisions made by the Queen or her representatives.

(b) The nature of the policy concerned. As the Court explained at paras. 105 and 107, this factor will also often weigh in favour of keeping the document in question confidential, particularly if the decision relates to an important or significant issue of public policy.

(c) The particular contents of the documents. As the Court explained at paras. 105 and 108, this factor also often weighs in favour of keeping the document in question confidential, particularly if the document will reveal considerations that were put before Cabinet.

(d) The timing of disclosure. As the Court explained at para. 109:

> 109 Depending on the contents of the document, the timing may also weigh in favour of keeping the document confidential. A document that simply reveals that Cabinet made a decision to reject a recommendation made by a judicial compensation commission will bear little confidentiality once that decision is publicly announced. By contrast, ministers can rightly expect that a document that weighs several different possible responses to the commission's recommendations and proposes a particular response will remain confidential for some prolonged time even after the decision is publicly announced.

(e) The importance of producing the documents in the interests of the administration of justice. As the Court explained at para. 113, this factor can encompass a broad set of considerations, including the need or desirability of producing the documents to ensure that the case can be adequately and fairly presented.

> (f) Whether the party seeking production has alleged unconscionable behaviour on the part of the government. As the Court explained at para. 119, the "conduct in question must be 'harsh' or 'improper'; though it need not be criminal, it must nevertheless be of a similar degree of seriousness".

[17] These considerations apply with equal force in Nova Scotia. The Supreme Court applied the above framework in a companion case to *BC Judges*, *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21 ("*NS Judges*"), and noted as follows at para. 61:

> Public interest immunity protects the confidentiality of Cabinet deliberations…The Nova Scotia legislature had not displaced the common law doctrine of public interest immunity and, indeed, in the context of proceedings against the Crown, has preserved it: *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360, s. 11.

[18] The importance of public interest immunity in Nova Scotia is also reflected in s. 13 of the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, which provides as follows:

> **Deliberations of Executive Council**
>
> 13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.
>
> (2) Subsection (1) does not apply to:
>
> (a) information in a record that has been in existence for ten or more years;
>
> (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal pursuant to an Act; or
>
> (c) background information in a record the purpose of which is to present explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
>
> (i) the decision has been made public,

> (ii) the decision has been implemented, or
>
> (iii) five or more years have passed since the decision was made or considered.

THE RECORD – LEGAL PRESUMPTION OF REGULARITY

[19] In their submissions the Respondents emphasize the principle of regularity drawing from *Lymburner v. Nova Scotia (Health and Wellness),* 2015 NSSC 113 and Justice McDougall's comments at para. 16:

> [16] Despite their different positions both counsel agree that the Record should consist of what was before the decision-maker at the time the decision was made. There are exceptions to this general rule but as pointed out by Respondents' counsel there is a legal presumption of regularity respecting the Record as produced by the administrative decision-maker. And, absent compelling evidence to rebut this presumption, the Court "must rely on the Record as provided as being accurate." [Reference *Riley v. Nova Scotia (Community Services),* 2011 NSSC 387, at para. 12 – a decision of the Honourable Justice Cindy A. Bourgeois when she was a member of this Court prior to her appointment to the Nova Scotia Court of Appeal]
>
> [my emphasis added]

[20] By way of response, the Applicants in their reply brief state that they are not contesting the accuracy of the Record; however, they are requesting that the Record be complete.

THE RECORD – EXTRINSIC EVIDENCE

[21] In *Sorflaten v. Nova Scotia (Environment),* 2018 NSSC 7, the Court emphasized that affidavit evidence beyond the record is generally not admissible on an application for judicial review. Justice Boudreau noted that judicial review is simply a review of a decision by an administrative decision-maker; it is not a re-trial of that decision, nor is it a search for a "universal truth" (see paras. 9-10).

[22] Justice Boudreau noted at para. 13 that the introduction of affidavit evidence beyond the record "is to be regarded as exceptional", and that there are certain categories of "exceptional" circumstances in which such evidence has been permitted. The Court continued (para. 15) to cite the following comments by the Federal Court of Appeal in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency,* 2012 FCA 22:

> 20 There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker … In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:
>
> > (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review… Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider...
> >
> > (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness… For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
> >
> > (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding…

[23] More recently in *Manitoba Metis Federation v. Brian Pallister et al*, 2019 MBQB, Chief Justice Joyal provided helpful direction as to the parameters of the record on a judicial review:

> 67 The "record" on a judicial review will generally not include documents that are protected by deliberative secrecy or privilege, notes made by tribunal or government members, legal opinions given to the tribunal by its counsel and other analyses done by tribunal or governmental staff to assist the tribunal in its deliberations. Nor does the record include documents filed in respect of matters other than the decision at issue in the judicial review. See Sara Blake, *Administrative Law In Canada*, 6th ed. (Toronto: LexisNexis Canada, 2017), pp. 219-20 (para. 7.87); *Fort McKay* at paras. 14-22; *Waverley (Village) et al. v. Nova Scotia (Minister of Municipal Affairs) et al.*, (1994) 126 N.S.R. (2d) 147 at paras. 20-24, affirmed *Village Commissioners of Waverley v. Nova Scotia (Minister of Municipal Affairs)*, 1994 CanLII 4136 (NS CA), leave to SCC refused.
>
> 68 The courts have recognized narrow, principled exceptions to the general inadmissibility of extrinsic evidence. Those exceptions include evidence to establish:

> i) that the record is incomplete or contains gaps;
>
> ii) procedural unfairness, jurisdictional error or bad faith; and
>
> iii) the existence, the scope and the content of the Crown's duty to consult.
>
> …
>
> 83 As earlier noted, the record on a judicial review will not generally include documents that are protected by deliberative secrecy and privilege, nor will it include notes made by tribunal or government members. Neither will the record include legal opinions, recommendations or other analyses given to the tribunal or governmental staff to assist the tribunal or government with its deliberations. On the issue of what has or has not been disclosed by Manitoba, absent a motion challenging Manitoba's position, this Court will proceed on the basis that the mere fact of an assertion of Cabinet confidence or privilege should not be seen to create an uncertainty that can be then reflexively used to justify the admission of otherwise inadmissible extrinsic evidence based on suggestions of incompleteness and based on speculation or conjecture concerning what the Cabinet confidence and/or privilege might be protecting.
>
> [my emphasis added]

ANALYSIS AND DISPOSITION

[24] It is with the above legal framework in mind that I consider the evidence and arguments on this motion. With respect to the former, the Court has before it the aforementioned four affidavits of Ms. Markovits and affidavits from Ms. Hickman and Ms. O'Brien-Latham. Having carefully considered these affidavits (inclusive of exhibits), the oral and written arguments as well as the authorities, I have determined that there is not compelling evidence to rebut the presumption of regularity. With respect to the Respondents' affidavits, we know from Ms. O'Brien-Latham's affidavit at para. 6 that:

> The only documents which the Department of Lands and Forestry submitted to the Treasury and Policy Board regarding the potential removal of Owls Head from PAPA were the Memorandum to Executive Council and Communications Plan referenced at Exhibit 2.

A copy (less redacted than what is attached to Ms. O'Brien-Latham's affidavit) of this Memorandum to Executive Council ("MEC") appears at tab 15 of the Record.

[25] In advance of the hearing, I requested and received a completely unredacted copy of the MEC. This was provided under seal by counsel for the Respondents "subject to claim of public interest immunity". Accordingly, I scrutinized this

document to ensure that the Respondents' stated rationale for keeping the redacted portions of the MEC from the Record were in keeping with the law and their claim for public interest immunity.

[26] The authorities confirm that the government (Respondents herein) has the burden to establish that a document (or portions of a document) should not be disclosed because of public interest immunity (see *Carey v. Ontario,* [1986] 2 S.C.R. 637 at pp. 653 and 678). Although the Respondents did not produce a detailed affidavit to support its claim for public interest immunity (this was recommended in *NS Judges*, at para. 63, albeit in the context of a *Bodner* review), I am satisfied that the Respondents' redactions to the MEC (and in the other parts of the Record) are sound and should stand. I come to this determination based on exhibit 1 of Mr. O'Brien-Latham's affidavit which provides confirmatory evidence that the T&PB is a Cabinet committee and should therefore be treated as attracting public interest immunity. Furthermore, having reviewed the entire MEC document and attached Communications Plan, I accept Mr. Townsend's arguments (on behalf of the Respondents) that what he redacted may fairly be regarded as attracting public interest immunity because revealing the passages would allow the reader a window into confidential cabinet deliberations.

[27] From Ms. Markovits' affidavits there are contained a number of paras. and exhibits the Applicants submit should be added to the Record. Having reviewed these passages and documents, I do not find that the requested additions address any issues of procedural fairness. Moreover, the asked for additions do not equate with the kind of exceptional circumstances required by the case authority. Furthermore, I specifically reject the inclusion of this material to the Record for the reasons outlined below.

Ms. Markovits' March 25, 2020 Affidavit, para. 10 and exhibit "M"

[28] This represents the opinion of a director of one of the Applicants. The information contained here is not a statement of fact and was not before the decision makers.

Ms. Markovits' March 25, 2020 Affidavits para. 11 and exhibit "N"

[29] This information does not pertain to Owls Head and was not before the decision makers.

Ms. Markovits' March 25, 2020 Affidavit, paras. 14, 15, (first sentence) and para. 18

[30] These paras. represent Ms. Markovits' reaction/opinion as well as her characterization of the reaction/opinion of all of ESFW (in the case of para. 14) with respect to the decision(s). These views are not relevant to what was before the decision makers.

Ms. Markovits' May 15, 2020 Affidavit, Exhibit "A" pp. 1-8 and 50-90

[31] The requested pages contain a host of emails which post-date the decision and are accordingly, irrelevant.

Ms. Markovits' October 27, 2020 affidavit, attaching the partial transcript of Ms. Hickman's cross-examination

[32] Ms. Hickman's evidence is not relevant to the judicial review of the decision. It is the after-the-fact view of a civil servant concerning issues which were raised at the last Court appearance.

Ms. Markovits' November 12, 2020 Affidavit, Exhibits "A", "B" and "C"

[33] Based on my review of the submissions I entirely accept the position of the Respondents on these exhibits as set forth in their brief at pp. 20-21:

> Exhibit "A" – Correspondence between staff at the Departments of Environment and Natural Resources/Lands and Forestry, which was not submitted to the T&PB when it decided to remove Owls Head from PAPA, is not relevant to the Applicants' substantive grounds of review. Further, this correspondence does not speak to any of the procedural fairness issues in dispute between the parties. Finally, it is unclear how such interdepartmental correspondence would have any relation to the signing of the LOO by the Minister of Lands and Forestry two years later. Again, to the extent the signing of the LOO by the Minister is a reviewable decision, the content of the LOO would speak for itself in terms of any issues regarding substantive review.
>
> Exhibit "B" – Correspondence and documents relating to a possible transfer of federally owned property are not relevant to the review of (a) a decision to removed provincially owned property from a specific policy document and (b) the signing of a LOO in respect of that provincially owned property.
>
> Staff correspondence relating to the MEC at tab 15 of the Record is not relevant to a review of the T&PB's decision. Rather, the relevant information for that review is in the MEC itself.

> Exhibit "C" – This policy does not speak to whether members of the public are owed any procedural entitlements in connection with the disposal of Crown lands. Nor does it speak to the substantive grounds raised in the Applicants' Notice for Judicial Review. Accordingly, it is not relevant to the matters in dispute between the parties.

[34] In advancing the position that the Record should contain more material, Applicants' counsel emphasized the "mechanics of the decision-making process". With respect, I do not believe that a fair reading of the authorities stands for such a proposition. Rather, I am of the view that what must be front and centre is a determination of what materials were before the decision-maker(s). When I scrutinize the affidavits and the Record it is clear to me that the latter contains all of what was before the T&PB and Minister on March 13, 2019 and December 16, 2019, respectively.

[35] It is clear from Ms. Markovits' affidavits that the Applicants have very thoroughly reviewed the Record. In this regard, their specific requests are aimed at securing a host of additional reports, policies, notes, correspondence and emails. Indeed, their approach may be likened to the scrutiny that typically occurs in a civil lawsuit, often leading to the production of supplemental affidavits disclosing documents and undertaking production. Importantly, however, the production of a Record in a judicial review is very distinct from the disclosure process in a civil lawsuit. The authorities and Rule 7 dictate an entirely different regime than what is contemplated under Rule 4 (action) or Rule 5 (application).

[36] Throughout Applicants' counsel's submissions runs the theme of public interest and consultation. Building on this, the Applicants submit that, "the nature of the process from a public interest point of view" requires further production "from a procedural fairness point of view." Having reviewed the evidence, I cannot accept this proposition. For example, Ms. Hickman's affidavit (paras. 23 – 27) makes it clear that although T&PB decided to remove Owls Head from PAPA, they did not approve any potential sale of Owls Head. The evidence further confirms that consultation will be required in the event of the sale of Owls Head. In this regard, the LOO (Record, tab 19) states as follows at clauses 17 and 18:

> 17. The sale of the Property is subject to the Province being satisfied that it has fulfilled its duty to consult with the Nova Scotia Mi'kmaq Chiefs under the August 31, 2010 Mi'kmaq-Nova Scotia-Canada Consultation Terms of Reference (TOR) regarding the proposed sale of Crown lands. Any costs for reports, studies, archaeological assessments or similar work associated with completing

> any necessary aboriginal consultation regarding the proposed sale are the responsibility of the Purchaser.
>
> 18. The sale of the Property is subject to public engagement being concluded to the satisfaction of the Department.

CONCLUSION:

[37] In addition to determining that the Applicants have failed to displace the presumption of regularity, I have determined that they have not established any exceptional circumstances giving entitlement to disclosure beyond the Record. Whereas the Applicants have pointed to a host of examples where they submit the Record should be expanded (see para. 5 *infra*), they have not demonstrated sufficient evidence to displace the presumption and prove entitlement to disclosure of these materials.

[38] In the result, I dismiss the motion brought by the Applicants in its entirety. I award costs to the successful parties, the Respondents ($750.00) and the Intervenors ($250.00) to offset the $1,000.00 awarded to the Applicants on the last motion.

Chipman, J.