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Riverlake Residents Association, Nova Scotia Municipal Board, 1985

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Administrative tribunals seem to go about their business in a manner which does not command much attention outside the coterie of specialists who work in the area. This seems a great pity, as the matters with which such forums deal are often of significance to the public at large. Occasionally a decision will command a broader audience and the public may then see the implications of what goes on behind doors which are only nominally open to all. *Riverlake Residents Association*¹ is one decision which has, in its short life, enjoyed intense public scrutiny.² The results of this attention are not yet manifest, but this commentator trusts that some of the less salutary aspects of the case will be authoritatively and promptly addressed by the courts, the Legislature or the Nova Scotia Municipal Board itself.

The modest factual setting of *Riverlake* was not such as to augur for the setting of a major precedent. It simply concerned an appeal by a well-established residents association (about 10 years old, with a formal constitution, incorporated under the Societies Act, with a record of interest in planning problems, and supported by an area rate on real property assessments) against the decision of Halifax County Council to permit rezoning of a property. The Respondent, PROCOR, had owned the land in question and carried on similar business activities

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1. The case is more formally styled *In the Matter Of: An Appeal by Riverlake Residents Association*. The decision, as yet unreported, was handed down on April 30, 1985, by Ms. Elizabeth Lawrence, Vice-Chair of the Nova Scotia Municipal Board, sitting as the sole Board member. As of the time of writing, early August 1985, it has not been the subject of judicial review, appeal or subsequent comment by the Board itself. Page numbers herein refer to the actual decision of the Board.

2. For example, the Community Planning Association of Canada, Nova Scotia Division, has established a working group dealing with the "aggrieved persons" formulation established in *Riverlake*. Further, the matter was raised in Oral

on its holdings for about 25 years. Its land had been previously unzoned and the Council decision altered its status to General Industrial (I-1), in effect making its use legal and conforming. However, prior to the Board considering the appeal on the merits, the Respondent raised an objection to the status of the Appellant, Riverlake Assistants Association, and hence to the jurisdiction of the Board to hear the appeal.

Since 63(1) of the Planning Act³ states:

The amendment, revision or refusal by a council to amend or revise the land-use by-law may be appealed by

- (a) *an aggrieved person*;
 - (b) the applicant;
 - (c) the Director;
 - (d) the council of an adjoining municipality.
- (Emphasis added)

Prior to June 1, 1983, the Planning Act, Ch. 16, R.S.N.S. 1969, as amended, had contained somewhat different wording on entitlement to appeal.

Section 38(4) had stated:

An interested person, the Director or the council of any other municipality may within thirty days of the publishing of the notice under sub-section (3) appeal to the Board. . . .
(Emphasis added)

The Board construed the change of criteria for an Appellant to express “. . . an intention to restrict to some degree those who have the right to appeal. . . .”⁴ The Board then formulated the issue: “. . . the degree to which the term ‘aggrieved person’ is more restrictive than the term ‘interested person’ and whether or not the Association meets this test.”

Questions Put by Members, in the May 15, 1985 sitting of the Nova Scotia House of Assembly (pp. 2260-61 of the Debates and Proceedings of the House, Edition 85-48). The Minister of Municipal Affairs, The Honourable Thomas McInnis replied, in part:

So, what we tried to do was to narrow it, and I recall the debate at length that took place in Law Amendments. At no time did we intend that the definition be so narrow as to exclude groups such as, for example, those vying to hold on to the Hart House or the Friends of the Public Gardens, for example. It was not the intention to exclude people like that. It was not the intention to exclude the group that obviously now have been excluded under this decision by the “Municipal Board”. (at p. 2260)

The Nova Scotia Municipal Board concluded that the new legislative language had to be interpreted to be far more confining than the predecessor section. It decided that Riverlake had not proven its standing as an aggrieved person and dismissed the appeal. It adopted a standard which is apparently an amalgam of what were in the Board's own words "the two most restrictive definitions of 'aggrieved person'"⁶

In the opinion of the Board, the Appellant does not have a legal grievance in this matter, it has not been denied some personal or property right or had imposed upon it a burden or obligation and therefore is not an 'aggrieved person' in the matter of this hearing.⁷

The Board would seem to have been accurate in its statement of the issue, but its reasoning and conclusion are somewhat doubtful. Interpretation of legislative intention, particularly without the aid of statutory definition as one sees here, is seldom an easy task. Nonetheless, this acknowledgement of the difficulty of the enterprise is not meant to excuse the employment of less reliable techniques of interpretation. In the common law, precedents are most deserving of respect in future curial considerations if they not only emerge from authoritative rungs in the judicial hierarchy but also bring the best methodology to bear to the process of arriving at a decision. *Riverlake*, by its choice and use of authority, emerges as a decision which is too formalistic and detached from its context.

Well, of course the obvious thing that could be done would be, the best solution of course would be an amendment to the Act. As I say, staff and the legal section of my department are reviewing the decision. . .

As I say, groups such as that of course would not in most instances have property and indeed, individuals in many instances are unable, if they are injuriously affected to proceed because of cost and so on. Therefore, they are always aided, in most instances at least, by a group or an association of some sort to help the body and to fight the cause.

It is unfortunate, but however that was the decision and perhaps it will be overturned in a higher court. (at 2261)

3. S.N.S., 1983, Chapter 9.

4. *Supra*, footnote 1, at 28.

5. *Id.*

6. *Id.*, p. 29.

7. *Id.*, p. 31.

The principal precedents relied upon by the Board are *Ex Parte Sidebotham*⁸ and *Halifax Atlantic Investments Ltd., et al v. Durham Leasehold Ltd.*⁹ In the author's view, neither are authorities which ought to have been determinative of the issues before the tribunal. In *Sidebotham*, the Court of Appeal was, in 1880, called upon to decide whether an undischarged bankrupt was a "person aggrieved" who could therefore appeal a refusal by a County Court judge to consider the bankrupt's application for review of a trustee's actions. The Comptroller in Bankruptcy alone was decided to be a "person aggrieved" within the legislation. It is submitted that this case should have been examined with greater skepticism by the Municipal Board to the extent that reliance should not have been placed upon it. First, it comes from an era of judicial antipathy to statute law. As Professor Frank Grad has observed, albeit mainly based on American observations:

. . . [J]udicial hostility to legislation around the end of the nineteenth century had reached outrageous proportions.¹⁰

Second, the case deals with a wholly different subject and statutory environment, where the Court may have had much better reasons for reducing the ambit of "aggrieved person".

Similarly, *Halifax Atlantic Investments* would be of dubious persuasive weight. It involved an attempt by members of the Halifax Hotel Association to oppose a lot consolidation by a would-be rival hotel owner. More than anything else, it was ". . . truly a contest based on potential competition,"¹¹ in the view of Coffin, J.A. The Riverlake Residents Association was, if anything, trying to protect what it deemed to be the interests of the community at large, not a narrow profit-oriented segment of society, as one sees in *Halifax Atlantic Investments*.

8. [1880] C.D. 459 (C.A.).

9. 28 N.S.R. (2d) 193 (1978, N.S.S.C., A.D.).

10. Frank P. Grad, *The Ascendancy of Legislation: Legal Problem-Solving in Our Time*, (1985), 9 Dalhousie Law Journal 228-260, at 229.

11. *Supra*, footnote 9, at p. 212.

Neither should the resort to *Black's Law Dictionary*¹² be applauded in the common law context in Canada. Not to put too fine a point on it, it is an American reference tool. Its definitions usually are derived from cases, as appears here for "aggrieved party" in the Revised Fourth Edition (1968). By the Fifth Edition (1979), the case references have been excised, although the definition is exactly the same. The cases themselves, the sources of Black's pronouncements, surely offer firmer guidance, if they survive the test of a close inspection. The author respectfully suggests that works such as *Black's* are most effectively and acceptably used to orient a legal researcher at the commencement of an exercise in interpretation, not to resolve difficult problems in the search for legislative meaning.

This reluctance in *Riverlake* to examine the context of the above decisions contrasts rather sharply with the Board's readiness to reject the cases cited by *Riverlake* in support of its contention that there has been a trend toward the liberalization of standing requirements. The Board refused to follow, for example, *Vladicka*,¹³ *Stein*,¹⁴ or *Brodie*,¹⁵ and other similar precedents because they ". . . are supportive only of the rights of Appellants to be considered 'aggrieved persons' where the issues are constitutional or where prerogative remedies are sought".¹⁶ Although the Board justified this position on the basis of its task in *Riverlake* being more limited, the Association having ". . . to establish its standing as an Appellant pursuant to the statutory right of appeal set out in the Planning Act",¹⁷ this chore of legislative interpretation would have been assisted by the consideration of such cases as the Appellants offered. To dismiss them as being irrelevant in any administrative law context would be extremely difficult to justify. In planning law, the choice to exclude such authorities seems even more unsuitable.

12. *Supra*, footnote 1, at p. 29. No reference to the edition used was made by the Board.

13. [1974] 4 W.W.R. 159 (Alta. S.C.).

14. (1974), 48 D.L.R. (3d) 223 (Man. C.A.).

15. (1975), 9 N.S.R. (2d) 380 (N.S.S.C., A.D.).

16. *Supra*, footnote 1, at p. 16.

17. *Id.*, at 18.

The purposes of the Planning Act are set forth in its Section 2, especially subsections (c) and (d):

(c) establish a consultative process which will ensure the right of the public to have access to information and participate in the formulation of policies, regulations, strategies and by-laws, including the right to be notified and heard before decisions are made under this act; and

(d) provide for the fair, reasonable and efficient administration of this Act, in order that sound development may be encouraged. 1983, c.9, s.2.

The Board concluded that sub-section (c) related “primarily to public participation in the preparation and approval of Municipal Planning Strategies and Land-Use By-Laws. . .”¹⁸ The “right to be notified and heard before decisions are made under this Act” was construed as referring to the “policy, regulation, strategy and by-law development and approval process only, or may by extension be intended to apply to other ‘decisions under this Act’, e.g. the approval or refusal by a Council to approve amendments to a Land-Use By-Law”.¹⁹ The Board concluded that:

“Public participation in all phases of the planning process”, (Counsel’s words) does not extend to an unrestricted right of appeal for each and every citizen, in either this Planning Act or its predecessor.²⁰

With respect, this is an extremely narrow reading of subsection (c). Even if it did not settle the meaning of “aggrieved person”, this subsection and the one following ought to have caused the Board to adopt a less closed interpretation. The Board’s outlook does not seem consonant with either the Planning Act or the spirit which should infuse an area of law where citizen participation is of such pivotal importance. Subsection (d) which should also colour one’s interpretation of section 63(1) was not mentioned at all. One can readily envisage “aggrieved person” being defined less restrictively while still preserving the elusive intention of the Legislature, a perspective which is supported

18. *Id.*, at 23.

19. *Id.*

20. *Id.*, at 24.

by the statements of purpose contained in these two subsections of the Act. This commentator argues that in this instance of there being two or more possible interpretations of the legislation, these portions of the Planning Act should cause the more liberal view to be adopted.

Planning law provides the framework wherein benefits are allocated among the various interests who compete for the financial and other non-quantifiable prizes inherent in land use.²¹ Section 63(5) (or Section 71(5)) of the Planning Act ensures that local governments will be accorded the primary responsibility for decision-making in planning matters and that the Board will not lightly substitute its judgment for one made by municipal political organs:

The Board shall not allow the Appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy.

There is, therefore, no real risk of the Municipal Board usurping the powers of civic governments. Merely adopting a less vigilant attitude at the portals of the Board would not change the very onerous burdens placed upon appellants. It is impossible to say with certainty what would have happened here had *Riverlake* been qualified as an Appellant. However, the Board having made some comments in the decision which could also be relevant to the merits, it is a fair prediction that *Riverlake* would have failed in its efforts to overturn the decision of Council with Section 63(5) in mind. This may have been quite appropriate, but at least *Riverlake* would have had the opportunity to present its full case.

Another result could have been produced by the use of less restrictive authorities than were finally relied upon in *Riverlake*. Alternatively, the tribunal may have chosen to invoke presumptions which may assist in determining the meaning of the legislature where there is doubt concerning a particular passage. Although presumptions ought not to be utilized where the effect would be to do violence to the clear words of the

21. Stanley M. Makuch, in his recent book *Canadian Municipal and Planning Law* (Toronto: Carswell, 1983), presents a coherent explanation of the various interests at stake in the overall planning process, notably in Chapter 5(2) The Nature of Planning, from which this observation is principally drawn.

legislature, this would not have been the result here. *Maxwell on the Interpretation of Statutes* suggests the direction that such presumptions would have yielded in *Riverlake*:

In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one.²²

Why was another arguable conception of the meaning of “aggrieved person” not selected in *Riverlake*? This is a challenging question, but one perhaps too speculative for this Comment. Eminently respectable common law authorities and techniques of reasoning were available to elucidate this troublesome phrase in a manner more favourable to *Riverlake* and other appellants. They just were not used. Of course, even the precise methodology and use of authorities as advocated herein would not have guaranteed a less restrictive outcome. Most decisions on similar cases are not ultimately based on precedent and reasoning, so much as on the complex of values held by the tribunal. It is this level of analysis which is beyond the scope of this note.

On the other hand, it is fair to observe that the interests of citizen’s groups like the *Riverlake Residents Association* are not advanced by this case. The implications of *Riverlake* are thereby more disturbing than one might first suspect. Citizens who individually or in association appeal planning decisions are not likely to embark upon such a course of action frivolously. It is suggested that, more often than not, they are people who have a sincere and thoughtful long-term outlook on the best interests of their community. The barriers erected by *Riverlake* will undoubtedly discourage many bona fides appellants, to the detriment of the broader society. Effectively, appellants are forced to overcome these looming standing obstacles before presenting the merits of their case. Lord Diplock, in a different context but with the same principle in mind as this commentator

22. P. St.J. Langan, *Maxwell on the Interpretation of Statutes*, (12th ed. London: Sweet and Maxwell, 1969) at 199.

wishes to convey, observed in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.*:

To revert to technical restrictions on locus stand to prevent this that were correct thirty years ago or more would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime.²³

There are many ways by which the more unfortunate aspects of *Riverlake* may be overcome. It may still be the subject of judicial review, as the time limit does not expire until about the end of October, 1985 (Civil Procedure Rule 56.06). In the alternative, a subsequent decision in the same genre may be appealed or the Municipal Board itself may decide, with due deference to *stare decisis*, to moderate the *Riverlake* notion of “aggrieved persons” in a future case. Finally, the legislature may fill in the lacunae in the 1983 amendment. At bottom, *Riverlake* deserves to be a short-lived precedent. Should it stand intact in the longer term, it ought to be subject to further and more intensive attention by academic and practising lawyers, the press and the general public. It is hoped that such scrutiny will at least mitigate its effects.

23. [1981] 2 All E.R. 93 (H.L.), at p. 104. The case concerned an application for judicial review of the Revenue decision to grant a form of amnesty to a group of Fleet Street casual employees who had not been paying tax.