CANTWELL et al. v. CANADA (MINISTER OF THE ENVIRONMENT) et al.

Indexed as: Cantwell v. Canada (Minister of the Environment)

Federal Court of Canada [Trial Division],
MacKay J.

Heard – December 12 and 13, 1990.
Judgment – January 18, 1991.

Environmental assessment – Conclusion of initial environmental evaluation that adverse effects insignificant or mitigable – Findings of environmental assessment not analogous to facts decided by labour arbitrators and reviewable by Court – Findings consistent with overall conclusion – Refusal to refer for public review – Discretion to be exercised in good faith – Decision not based entirely on irrelevant considerations – Certiorari denied – Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

The Nova Scotia Power Corporation proposed to build a 165-megawatt coal-fired generating station at Point Aconi in Cape Breton, using circulating fluidized bed combustion technology. This technology was expected to allow the use of high-sulphur coal, while reducing sulphur dioxide and nitrogen oxide emissions by 90 per cent and 75 per cent respectively. The corporation prepared and submitted an environmental assessment report to the Nova Scotia Department of the Environment. It was reviewed by a technical review committee and a public hearing was held in January 1990. In March 1990, the provincial Minister of the Environment approved the project with 53 conditions. Preliminary construction work began. Also in March 1990, the federal Department of Fisheries and Oceans determined the *Environmental Assessment and Review Process (EARP) Guidelines Order* applied to the project. The department completed its initial environmental evaluation in September, and the Minister announced that the requirements of the *Guidelines Order* had been met and no public review would be held. The Minister concluded that any adverse environmental impacts were either insignificant or could be mitigated with known technology. The corporation was authorized to proceed, conditional on implementation of the conditions related to protection of fish habitat.

The applicants brought an application for an order quashing the decision of the Minister to authorize the corporation to proceed with the project or, in the alternative, an order quashing the Minister's decision that the requirements of the *EARP Guidelines Order* had been complied with.

Held – The application was dismissed.

The first issue was whether the Minister had failed to comply with s. 12 of the *Guidelines Order* because some of the potential impacts were not, in fact, insignificant or mitigable with known technology or were unknown. The findings of the initial assessment were not "facts" as usually dealt with by courts or arbitrators. Rather, they were opinions about the future based on facts. A court could thus review those findings and grant certiorari even when they were not patently unreasonable.

Here, the general conclusions of the initial assessment were supported by the

specific provisions of the text. First, with respect to the need for further tests on groundwater, this was to be read in the context of the full text. The need for these tests could not be interpreted so as to draw a conclusion about the significance of potential impacts. The establishment of a compensation fund for damaged wells would not constitute mitigation with known technology, but the remedy for such damage, digging deeper wells, would. Second, with respect to certain stack gas emissions, the failure to conclude that the effects would be insignificant or mitigable was not inconsistent with the overall conclusion of the assessment. It would have been inappropriate for the Court to infer a particular conclusion about certain adverse effects because such facts were discussed in a manner different from the discussion of others. The assessment was drafted by technical and scientific staff whose knowledge and understanding of the facts on which their judgment was based must be relied upon. Concern about carbon dioxide emissions did not by itself determine that those emissions would have an adverse effect. The absence of evidence to that effect, and the fact that staff of Environment Canada, who have the responsibility to preserve and enhance air quality, concluded that the project's effects were mitigable with known technology, meant that there was no failure to assess the effects of carbon dioxide. Third, the conclusion of the assessment was final and not conditional.

The second issue was whether the Minister had failed to comply with s. 13 of the *Guidelines Order* to refer for public review if public concern made a review desirable. The discretion of the Minister in deciding whether to refer for public review under s. 13 was not absolute; it must be exercised reasonably and in good faith, taking into account relevant considerations, having regard for the purpose of the *Guidelines Order*.

Here, there was significant public concern about the project, but there were no reasons given by the Minister for not referring the project for public review. In the absence of reasons, the Court could only review the considerations in the record before the Minister at the time of his decision. While many of the factors apparently considered by the Minister were irrelevant, the decision was not based entirely on irrelevant factors.

Cases considered

Angus v. R., [1990] 3 F.C. 410, 5 C.E.L.R. (N.S.) 157, 72 D.L.R. (4th) 672, 111 N.R. 321 (C.A.) – referred to.

A.U.P.E. v. Alberta (Public Service Employees' Relations Board), [1982] 1 S.C.R. 923, 21 Alta. L.R. (2d) 104, (sub nom. *A.U.P.E. v. Olds College)* [1983] 1 W.W.R. 593, 82 C.L.L.C. 14,203, (sub nom. *Re A.U.P.E. and Olds College)* 136 D.L.R. (3d) 1, (sub nom. *A.U.P.E., Branch 63 v. Alberta (Public Service Employees' Relations Board)*) 42 N.R. 559, 37 A.R. 281 – referred to.

Blanchard v. Control Data Canada Ltée, [1984] 2 S.C.R. 476, 14 Admin. L.R. 133, 14 D.L.R. (4th) 289, 55 N.R. 194, 84 C.L.L.C. 14,070 – referred to.

Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment) (1989), 4 C.E.L.R. (N.S.) 1, [1990] 2 W.W.R. 69, 38 Admin. L.R. 138, 99 N.R. 72, 27 F.T.R. 159 (note) (C.A.), aff'g [1989] 3 F.C. 309, 3 C.E.L.R. (N.S.) 287, [1989] 4 W.W.R. 526, 37 Admin. L.R. 39, 26 F.T.R. 245 (T.D.) – applied.

Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment) (1989), 4 C.E.L.R. (N.S.) 201, 31 F.T.R. 1 (T.D.), aff'd [*Tetzlaff v. Canada (Minister of the Environment)*] (21 December 1990), Doc. A-48-90, Iacobucci C.J., Urie and Linden JJ.A. (Fed. C.A.) – referred to.

C.U.P.E., Local 963 v. N.B. Liquor Corp., [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417, 26 N.R. 341, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 79 C.L.L.C. 14,209, N.B.L.L.C. 24259 – referred to.

Doctors Hospital and Minister of Health, Re (1976), 12 O.R. (2d) 164, (sub nom. *Doctors Hospital v. Minister of Health*) 1 C.P.C. 232, (sub nom. *Re Doctors Hospital and Minister of Health*) 68 D.L.R. (3d) 220 (Div. Ct.) – referred to.

Friends of the Oldman River Society v. Canada (Minister of Transport), [1990] 2 F.C. 18, 5 C.E.L.R. (N.S.) 1, [1991] 1 W.W.R. 352, 76 Alta. L.R. (2d) 289, 68 D.L.R. (4th) 375, 108 N.R. 241, 33 F.T.R. 160 (note) – referred to.

Hyundai Motor Co. v. Canada (A.G.) (1987), [1988] 1 F.C. 333, 14 F.T.R. 316, 14 C.E.R. 248 (T.D.) – referred to.

Lifeforce Foundation v. R. (Minister of Oceans and Fisheries) (10 August 1990), Doc. T-2201-90, Collier J. (Fed. T.D.) – referred to.

Multi-Malls Inc. and Minister of Transportation and Communications, Re (1976), 14 O.R. (2d) 49, 73 D.L.R. (3d) 18 (C.A.) – referred to.

Padfield v. Minister of Agriculture, Fisheries & Food, [1968] A.C. 997 at 1016, [1968] 1 All E.R. 694 (H.L.) – referred to.

Secretary of State for Education & Science v. Tameside Metropolitan Borough Council, [1977] A.C. 1014 at 1036, [1976] 3 All E.R. 665 at 679 (H.L.) – referred to.

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, 26 C.C.E.L. 85, 59 D.L.R. (4th) 416, 93 N.R. 183, 89 C.L.L.C. 14,031, 40 C.R.R. 100 – referred to.

Trans Mountain Pipe Line Co. v. National Energy Board, [1989] 2 F.C. 118, 24 N.R. 44 (C.A.) – considered.

Statutes considered

Constitution Act, 1867 [formerly British North America Act, 1867] (U.K.), 30 & 31 Vict., c. 32.

Department of the Environment Act, R.S.C. 1985, c. E-10 –
s. 4(1)(a)

Environmental Assessment Act, R.S.N.S. 1989, c. 149.

Federal Court Act, R.S.C. 1985, c. F-7 –
s. 18

Fisheries Act, R.S.C. 1985, c. F-14 –
s. 35(1)
s. 35(2)

Regulations considered

Government Organization Act, 1979, S.C. 1978-79, c. 13 –
Environmental Assessment and Review Process Guidelines Order, SOR/84-467,
s. 3
s. 4
s. 6(b)
s. 12
s. 13
s. 14
s. 15
s. 18
s. 19
s. 20

s. 21
s. 22
s. 27
s. 31
s. 36

APPLICATION to quash decision authorizing respondent power corporation to proceed with power generating station.

Brian A. Crane and *Martin Mason*, for applicants.
Michael Donovan and *John J. Ashley*, for respondent Minister of the Environment.
Harvey Morrison, *Stuart McInnis* and *F.V.W. Penick*, for respondent Nova Scotia Power Corp.
No one appearing for respondent Minister of Fisheries and Oceans.

(Doc. T-2975-90)

1 January 18, 1991. MacKAY J.: – This is an application pursuant to s. 18 of the *Federal Court Act*, R.S.C. 1985, c. F-7, for an order in the nature of certiorari. The relief sought by motion is expressed as alternatives, for an order quashing and setting aside the decision by the respondent Minister of Fisheries and Oceans in September 1990 granting approval to the respondent Nova Scotia Power Corporation to carry out works and undertakings in connection with the Point Aconi project on Boularderie Island in Cape Breton, Nova Scotia, or an order quashing and setting aside the decision of the same Minister, made at the same time, pursuant to the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467, as corrected *Canada Gazette*, Part II, Vol. 118, No. 19, 9/19/84, p. 3804 (the "Guidelines Order"), that all the requirements of that order had been complied with in relation to the Point Aconi project.

2 At the hearing of this matter, counsel for the applicants clarified that the decisions of the Minister which are here contested, all made on September 18, 1990, include the decision to approve the initial environmental assessment conducted by his department, the decision not to refer the project for a public review of the matter, and implicitly the decision subsequently communicated to Nova Scotia Power authorizing it to proceed with the project. The project is a proposal to construct a 165-megawatt coal-fired generating station, utilizing a circulating fluidized bed combustion technology. It would be the first of three units that might ultimately be built at the site.

3 The applicants seeking relief include individuals who live on or

near Boularderie Island and who are concerned with the environmental and social effects of the proposed power generating station at Point Aconi. In addition, the applicants include Greenpeace Canada, a non-profit corporation devoted to the protection of the environment, and the Ecology Action Centre, a registered society in Nova Scotia devoted to the protection of the environment with a special concern for environmental issues affecting the province. The standing of any of the applicants as a party to these proceedings was not raised by the respondents, and it is unnecessary for purposes of these reasons to further outline the interests of the various applicants or their concerns about possible adverse effects upon their interests as a result of construction and operation of the proposed generating station.

4 Joined as respondents in these proceedings are the Minister of the Environment of Canada, in view of his overall responsibilites for co-ordination of federal concerns relating to the environment, the Minister of Fisheries and Oceans, whose department was the initiating department under the *Guidelines Order* for consideration of environmental issues arising from the proposed power plant at Point Aconi, and the Nova Scotia Power Corporation, a Crown corporation and an agent of Her Majesty the Queen in Right of the Province of Nova Scotia, to which approval was granted on behalf of the respondent Minister of Fisheries and Oceans to proceed with the project.

5 At the hearing, the respondent Ministers moved to strike portions of the affidavits filed by some individual applicants in part because the concerns expressed related to matters of speculation or opinion about future adverse effects of the plant and none of the individuals was an expert in the matters of concern to them. I declined to allow the motion, taking the concerns expressed as evidence of the serious interests of the individuals, supportive of their standing as applicants, but not accepting their concerns as factual assessments of how future events may unfold.

6 It was submitted on behalf of the respondent Nova Scotia Power that some of the concerns raised in the applicants' affidavits and dealt with in the initial environmental assessment that is a key element in these proceedings, for example in relation to possible adverse effects upon groundwater and wells in the area, were matters beyond the scope of application of the *Guidelines Order*, and were irrelevant for the decisions of the Minister, since they were outside federal legislative competence. Counsel for the applicants argued that since the Order does not do more than set out a process for an enquiry which in itself involves no legislative action, any limitation that may be implicit from the distribution of legislative powers between federal and provincial legislatures ought not to restrict the range of environmental effects subject to review within the plain meaning of the *Guidelines*

Order. In my view, this application can be dealt with on other grounds, and it is unnecessary to determine whether the scope of the *Guidelines Order* is limited in light of the division of legislative powers under the *Constitution Act, 1867* [formerly *British North America Act, 1867*] (U.K.), 30 & 31 Vict., c. 32, as amended.

The Project, its Planning and Approval

7 While this application concerns the decisions made by the respondent Minister of Fisheries and Oceans, it is essential, in my view, to see those decisions against the background of the process of planning and approvals for the project.

8 In 1987 Nova Scotia Power concluded that new generating capacity would be needed to meet anticipated demand for electricity for consumption in the province. In that same year it was assigned a target, by the provincial government, for limited sulphur dioxide emissions by 1994, consistent with federal-provincial arrangements, that led the company to adopt a 20-year plan which is expected to result in reducing sulphur dioxide emissions by 50 per cent and nitrogen oxide emissions by 15 per cent despite an anticipated doubling of demand from customers. The Point Aconi generating station is a major element in the Corporation's plan to meet its sulphur emissions objective. Much of the coal available to Nova Scotia Power for generating purposes is relatively high-sulphur coal, now mixed with lower sulphur coal and burned in conventional generating stations. The technology to be used in the proposed plant at Point Aconi is expected to permit burning of the high-sulphur coals while reducing sulphur dioxide emissions by 90 per cent and nitrogen oxide emissions by up to 75 per cent at that plant. Nova Scotia Power's conventional generating stations will then burn coal with lower sulphur content, emitting reduced levels of sulphur dioxide. After careful consideration, Point Aconi was determined by the Power Corporation to be the optimum location for the plant, which will burn coal mainly to be produced at mines in Cape Breton, particularly the nearby Prince Mine. Preliminary site construction commenced in March of 1990 with anticipated completion of the plant in May of 1993.

9 Substantial environmental studies were carried out by Nova Scotia Power commencing in September of 1988, and a Point Aconi environmental assessment report, by the Corporation, was concluded late in 1989 including studies relating to fuel/sorbent management, liquid waste management, solid waste management, fresh water supply, circulating water system, air quality, general construction practices, and community issues.

10 The proposal to build the generating station was first registered

with the Nova Scotia Department of Environment on December 2, 1988. A new provincial *Environmental Assessment Act*, R.S.N.S 1989, c. 149, subsequently came into force and the Power Corporation voluntarily re-registered the project on July 28, 1989, and newspaper notices informing the public about the project were published in August. The terms of reference for the Corporation's environmental studies, begun in September 1988, were submitted in August 1989 for approval by the provincial government and after review, comment and revision, were approved by the Minister of the Environment in November of 1989. Thereafter, on December 1, the Power Corporation submitted its environmental assessment report, taking into account revised terms of reference, to the provincial Department of the Environment. The report was then reviewed by a technical review committee, including representatives from Environment Canada and the Department of Fisheries and Oceans Canada, and a public hearing was held by the provincial environmental control council on January 17, 1990, at the Point Aconi Community Hall. In March 1990 approval of the project was granted by the provincial Minister of the Environment with 53 conditions. Those conditions were developed in the course of the provincial review process to which representatives of the two federal departments contributed, and the conditions included the establishment of a community liaison committee with representation from the local area.

11 Since that approval the liaison committee has met a dozen times, and it is perceived by the Power Corporation as having a continuing role in the evolution of final plans for the project. During the preparation of its own environmental assessment report, Nova Scotia Power had several meetings in the local area, commencing in November 1988, with municipal representatives, with members of the public and a series of meetings with fishermen, or their representatives, from the area.

12 Also in March 1990, the federal government determined that the federal *Guidelines Order* applied to the Point Aconi project, and that the Canada Department of Fisheries and Oceans would be the initiating department for the purposes of that Order. On May 12 a meeting held by the Bras d'Or North Community Development Association was addressed by the regional director for the Department of Fisheries and Oceans, and those residents then present requested that the project be referred for a full panel review by the Federal Environmental Assessment Review Office (FEARO). By affidavit, one member of the Cape Breton Coalition for Environmental Protection affirms that following a meeting which she attended on May 28 in Halifax, the federal Minister of the Environment discussed the Point Aconi project with a number of individuals and was heard to say that there would be

a full environmental review of the project, that he understood the Minister of Fisheries and Oceans would be requesting a review by the Federal Assessment and Review Agency, and that such a request was supported by the Minister of the Environment. It appears the Minister subsequently explained his comments to mean that the process by the initiating department was nearing completion, and not that the project would necessarily be submitted for a full public panel review by FEARO.[1] The Department of Fisheries and Oceans organized a public meeting in the area on August 3, a meeting with fishermen from the area on August 16 and on August 23, 1990, a meeting for invited fishermen and concerned environmentalists. It is said by one of the applicants that on those occasions members of the Cape Breton Coalition for Environmental Protection, fishermen and environmentalists, respectively, urged a full panel review of the project by FEARO.

13 Subsequently, by covering memorandum dated September 6, the regional director general, Scotia-Fundy region, submitted to his superiors in the Department of Fisheries and Oceans the initial environmental assessment on the Point Aconi power generating station which had been completed in the department. In addition to the covering memorandum, the initial environmental assessment itself consists of 9 pages, with three attachments, (1) ecological field observations at Round Pond and Long Pond, Point Aconi, Boularderie Island, Cape Breton Island, August 9-10, 1990, by Hargrave and Harding (9 pages); (2) assessment by Environment Canada (a 2-page letter from J. E. Vollmershausen, regional director general, Environment Canada); and (3) public concern analysis (an 8-page assessment of meetings with the public, an analysis of ministerial correspondence, a reference to a petition to federal ministers, and a summary of media coverage).

14 That package of documents, together with others, was submitted to the Minister of Fisheries and Oceans under a covering memorandum from the deputy minister of the department dated September 17.

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[1]The respondent Ministers moved to strike portions of the affidavit affirming the hearing of the statements of the Minister of the Environment, on grounds of relevance and, in part, hearsay. Comments of the Minister about his understanding of the position of his colleague the Minister of Fisheries and Oceans may well be hearsay, but nothing turns on this statement. There is, however, reference to the statement of the Minister of the Environment in the initial environmental assessment completed by the Department of Fisheries and Oceans, and while it cannot be evidence of any decision made at that time, it is relevant in considering the background of expectations held by interested members of the public about a public review process.

Thus, the "record" before the Minister at the time of his decisions was constituted by the following documents:

> The deputy minister's memorandum of September 17 (3 pages), attaching
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> • Attachment I – public panel review considerations (2 pages);
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> • a memorandum of the deputy minister dated July 12, 1990 (3 pages) concerning Point Aconi thermal generating plant, Nova Scotia – environmental assessment, with attached
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> • Annex I – Point Aconi generating plant – public opinion synopsis (3 pages – summarizing correspondence to the Ministers of Fisheries and Oceans and of the Environment, a petition from 287 people to the Ministers, and media coverage);
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> • the documents described in the preceding paragraph of these reasons, i.e., the memorandum from the regional director general of the Scotia-Fundy Region and the initial environmental assessment dated September 6, with attachments;
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> • a communications plan for Point Aconi announcement;
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> • a draft letter to the president, Nova Scotia Power Corporation;
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> • draft letters to the Minister of Mines and Energy and the Minister of the Environment of Nova Scotia;
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> • a draft press release; and
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> • a summary of measures taken to address public concerns (2 pages).

15 At a meeting on September 18, the Minister of Fisheries and Oceans approved the recommendations of his deputy and so signified by concurring signature. The recommendations acknowledged the results of the initial assessment by the department, that is, that with additional conditions, environmental effects from the project are expected to be insignificant or mitigable with known technology, and that the project would not be referred to the Minister of the Environment for review by a public panel. The proposed communications plan was also approved, including a press release to announce the result of the initial environmental assessment and the Minister's decisions. Letters to the two Nova Scotia Ministers were signed and

approval given to the draft letter to Nova Scotia Power authorizing the project, with conditions, pursuant to the *Fisheries Act*, R.S.C. 1985, c. F-14.

16 On September 20 the Minister's decisions were announced by press release in the following terms:

> "POINT ACONI PLANT PASSES ENVIRONMENTAL ASSESSMENT
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> OTTAWA . . . Following an indepth review by federal scientists, Fisheries and Oceans Minister Bernard Valcourt today announced the results of the environmental assessment of the Point Aconi Thermal Generating Plant in Nova Scotia.
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> 'After all the issues, including those concerns raised by the public, were carefully examined by scientists, it was found that the environmental effects can be mitigated with known technology,' said Mr. Valcourt. 'I am satisfied that all the requirements of the Environmental Review Process have been met and I will not be requesting a Public Review Panel.'
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> Authorization under the *Fisheries Act*, incorporating strict conditions, will be issued in the near future. These conditions include measures to control sediment in run-off, fish entrainment and potential effects from chlorination. 'I fully intend to ensure that there will be careful planning and stringent monitoring throughout the construction and operating life of the plant,' said Mr. Valcourt."

17 With that release, copies of the initial environment assessment and its attached documents were made available, together with fact sheets concerning fishery and fish habitat concerns raised by Point Aconi, groundwater issues raised by the construction of the Point Aconi plant, and air emission concerns raised by the Point Aconi power plant. The letters to the Nova Scotia Ministers were dated September 20. The final step, the letter to Nova Scotia Power authorizing the project subject to conditions, was not sent until a month later, dated October 23, and sent on behalf of the Minister by the then acting director general of the Scotia-Fundy region. Delay in sending the letter following the Minister's decisions is said to have been intended to comply with s. 15 of the *Guidelines Order*, that is, to provide opportunity for the public to have access to the information and the opportunity to respond before conveying formal authority to proceed. In that interval, six letters were received by the Minister of Fisheries and Oceans, a response deemed "minimal" within the

department. No record or analysis of media coverage following the decision in September was apparently maintained in the department, and there was no record of receipt there of a second petition with some 250 signatures supporting a public review of the project which one of the applicants avers by affidavit was collected, apparently late in August or early September, to be sent to the two federal Ministers who are here respondents. Another affidavit of an applicant affirms a public meeting in mid-October when again there was urged that a public review by a panel be conducted, but there is no evidence before the Court that information about this meeting reached the Minister.

18 The letter to Nova Scotia Power authorizes it to proceed with the project pursuant to subs. 35(2) of the *Fisheries Act*,[2] and that authorization is expressly made conditional upon the implementation of a number of specified measures relating to site drainage, entrainment of fish, the chlorination system, coastal zone impacts, organic/inorganic compounds formation and release, blasting (under water), and thermal plume. That letter includes the statement:

> "The environmental impacts of the proposed work have been reviewed in accordance with the *Environmental Assessment and Review Process Guidelines Order* (1984). It has been concluded that any adverse environmental impacts arising from the proposed undertaking are either insignificant or can be mitigated."

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[2] *Fisheries Act*, R.S.C. 1985, c. F-14, s. 35 provides:

> "35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
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> (2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act."

The Guidelines Order and the Issues

19 The *Guidelines Order* provides a mandatory process[3] for environmental assessment applicable to any proposal to be undertaken by any federal department or agency, that may have an environmental effect on an area of federal responsibility, for which the Government of Canada makes a financial commitment, or that is located on lands, including the offshore, that are administered by the Government of Canada.[4] A process is established for determining "the initiating department" and for it to assume the lead in co-ordination of the assessment of potential environmental effects on all areas of federal responsibility.[5] That department is the decision-making authority in relation to the assessment process, and each proposal for which it is the decision-making authority is to be subject to an environmental screening or initial assessment to determine whether, and the extent to which, there may be any potentially adverse environmental effects.[6]

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[3]The *Guidelines Order* is mandatory, binding upon all those to whom it is addressed:

> *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1989), 4 C.E.L.R. (N.S.) 1, [1990] 2 W.W.R. 69, 38 Admin. L.R. 138, 99 N.R. 72, 27 F.T.R. 159 (note) (C.A.), aff'g [1989] 3 F.C. 309, 3 C.E.L.R. (N.S.) 287, [1989] 4 W.W.R. 526, 37 Admin. L.R. 39, 26 F.T.R. 245 (T.D., per Cullen J.).

The Order does not require compliance by the Governor in Council:

> *Angus v. Canada (Minister of Transport)* (1990), unreported, Court File A-21-90 [since reported as *Angus v. R.*, [1990] 3 F.C. 410, 5 C.E.L.R. (N.S.) 157, 72 D.L.R. (4th) 672, 111 N.R. 321 (C.A.)].

[4]The *Guidelines Order*, s. 6.

[5]All of the potential environmental effects, where a proposal may have an effect on areas of federal responsibility, are to be considered in the environmental review process undertaken by the initiating department, not merely those that otherwise fall within that department's responsibilities, and the *Guidelines Order* requires participation of every department in charge of an area of federal responsibility that may be environmentally affected by a proposal. See: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1990] 2 F.C. 18, 5 C.E.L.R. (N.S.) 1, [1991] 1 W.W.R. 352, 76 Alta. L.R. (2d) 289, 68 D.L.R. (4th) 375, 108 N.R. 241, 33 F.T.R. 160 (note). See also the *Guidelines Order*, ss. 3, 4, 6(b), 19, 36.

[6]The *Guidelines Order*, s. 10.

The process is to be a self-assessment, undertaken as early in the planning process as possible and before irrevocable decisions are taken, which shall ensure that the environmental implications of the proposal are fully considered, and where the implications, i.e., the potentially adverse environmental effects, are significant the proposal shall be referred to the Minister of the Environment for public review by a panel.[7]

20 Those sections of the *Guidelines Order* of particular interest in this case include the following:

> "3. The Process shall be a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.
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> 4.(1) An initiating department shall include in its consideration of a proposal pursuant to section 3
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> (a) the potential environmental effects of the proposal and the social effects directly related to those environmental effects, including any effects that are external to Canadian territory; and
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> (b) the concerns of the public regarding the proposal and its potential environmental effects.
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> . . .
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> 12. Every initiating department shall screen or assess each proposal for which it is the decision making authority to determine if
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> . . .
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> (c) the potentially adverse environmental effects that may be caused by the proposal are insignificant or mitigable with known technology, in which case the proposal may proceed or proceed with the mitigation, as the case may be;
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> (d) the potentially adverse environmental effects that may be

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[7]Ibid., s. 3; see also s. 12(e).

caused by the proposal are unknown, in which case the proposal shall either require further study and subsequent rescreening or reassessment or be referred to the Minister for public review by a Panel;

(e) the potentially adverse environmental effects that may be caused by the proposal are significant, as determined in accordance with criteria developed by the Office in cooperation with the initiating department, in which case the proposal shall be referred to the Minister for public review by a Panel. . . .

13. Notwithstanding the determination concerning a proposal made pursuant to section 12, if public concern about the proposal is such that a public review is desirable, the initiating department shall refer the proposal to the Minister for public review by a Panel.

14. Where, in any case, the initiating department determines that mitigation or compensation measures could prevent any of the potentially adverse environmental effects of a proposal from becoming significant, the initiating department shall ensure that such measures are implemented.

15. The initiating department shall ensure

(a) after a determination concerning a proposal has been made pursuant to section 12 or a referral concerning the proposal has been made pursuant to section 13, and

(b) before any mitigation or compensation measures are implemented pursuant to section 13,

that the public have access to the information on and the opportunity to respond to the proposal in accordance with the spirit and principles of the *Access to Information Act.*

. . .

20. Where a determination concerning a proposal is made pursuant to paragraph 12(b), (d) or (e) or section 13, the initiating department shall refer the proposal to the Minister for public review."

Other provisions of the *Guidelines Order* constitute the Federal Environmental Assessment Review Office (FEARO) and outline its

responsibilities to assist initiating departments[8] and provide for involvement of other than the initiating department.[9] The public review process is to be undertaken by an environmental assessment panel which is constituted by the Minister of the Environment of members who are unbiased, free from any conflict of interest relative to the proposal under review and of any political influence, and who have special knowledge and experience relevant to the anticipated technical, environmental and social effects of the proposal.[10] All hearings of the panel are to be public, witnesses may be questioned but not sworn or subpoenaed,[11] and at the end of its review the panel shall submit a report with its conclusions and recommendations for decisions to the Minister of the Environment and the Minister of the initiating department.[12] Together, the Ministers are required to make the report available to the public.[13] There is no requirement for the Ministers to approve or adopt the recommendations of the panel.

21 The public review process has been described by my colleague Muldoon J. in the following terms:

> "At the end of its work, the Environmental Assessment Panel must prepare a report containing its conclusions and recommendations – formulated through and after an utterly public and mandatorily fair process – for decisions by the appropriate Ministers, and transmit that report to the Minister who, in this instance, is also the Minister responsible for the 'initiating department'. Guideline 32 continues and ends with the command to the Minister to make the Panel's report available to the public. This is the great strength of this legislative scheme. It balances the information, knowledge and ultimately the opinion of the public, against the authority of the Minister and the government of the day who may, for what they believe to be high purposes of State, quite ignore the Panel's recommendations. They may, equally of course, adopt or adapt the

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[8]Ibid., s. 18.

[9]Ibid., ss. 19, 36.

[10]Ibid., ss. 21, 22.

[11]Ibid., ss. 27(1) and 27(3).

[12]Ibid., s. 31(1).

[13]Ibid., s. 31(2).

Panel's recommendations in order to save both the environment and the project, as they see fit and feasible."[14]

22 The submissions on behalf of the applicants raise the following issues:

1. whether the Minister of Fisheries and Oceans erred in law, failing to comply with s. 12 of the *Guidelines Order*, by deciding not to refer to the Point Aconi project to the Minister of the Environment for public review by a panel since, it is submitted, certain potential adverse environmental effects were not insignificant or mitigable with known technology, or alternatively were unknown; and

2. whether the Minister of Fisheries and Oceans erred in law, failing to comply with s. 13 of the *Guidelines Order*, by deciding not to refer the project to the Minister of the Environment for public review by a panel since, it is submitted, public concern was such that a public review was desirable and it is said that the Minister's decision to the contrary was made in light of considerations which were irrelevant.

The Role of the Court

In judicial review of administrative action, as here through an application for certiorari, the role of the Court is not that of an appellant body reviewing the merits of the administrator's decision. It is not the Court's function to determine whether the decision in question is right or wrong; rather, the Court is concerned only with the question whether the administrator has acted in accord with the law. Counsel referred to a number of authorities referring to the Court's role. One that concerns the exercise of discretion under authority with broadly described legislated standards is *Trans Mountain Pipe Line Co. v. National Energy Board*, [1979] 2 F.C. 118, 24 N.R. 44 (C.A.), at p. 121 [of F.C.], where the Court dealt with an appeal from an order of

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[14] *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1989), 4 C.E.L.R. (N.S.) 201, 31 F.T.R. 1 (T.D.), at p. 213 of C.E.L.R., p. 8 of F.T.R., quoted by Stone J.A. in *Friends of the Oldman River Society*, supra, note 5 at p. 50 [of F.C., p. 34 of C.E.L.R.]. Muldoon J. at trial was upheld by the Court of Appeal: *Tetzlaff v. Canada (Minister of the Environment)* (21 December 1990), Doc. A-48-90, Iacobucci C.J., Urie and Linden JJ.A.

the Board which by statute had authority to order tolls that were just and reasonable. For the Court of Appeal, Pratte J. stated:

> "Whether or not tolls are just and reasonable is clearly a question of opinion which, under the Act, must be answered by the Board and not by the Court. The meaning of the words 'just and reasonable' in section 52 is obviously a question of law, but that question is very easily resolved since those words are not used in any special technical sense and cannot be said to be obscure and need interpretation. What makes difficulty is the method to be used by the Board and the factors to be considered by it in assessing the justness and reasonableness of tolls. The statute is silent on these questions. In my view, they must be left to the discretion of the Board which possesses in that field an expertise that judges do not normally have. If, as it has clearly done in this case, the Board addresses its mind to the right question, namely, the justness and reasonableness of the tolls, and does not base its decision on clearly irrelevant considerations, it does not commit an error of law merely because it assesses the justness and reasonableness of the tolls in a manner different from that which the Court would have adopted."

23 The role of the Court is well understood by counsel. It is here referred to as background for consideration of the applicant's submissions. That consideration entails examination of matters in the record before the Minister at the time of his decisions, not to review the merits of those decisions but rather to review whether in making those decisions the Minister addressed the issues required by law and did not base his decisions on clearly irrelevant considerations.

Section 12 of the Guidelines Order

On behalf of the applicants, counsel submits that there was error in law in the conclusion of the initial environmental assessment within the department, or in the Minister's approval of it, as meeting the requirements of subs. 12(c) of the *Guidelines Order*, that is, that potentially adverse environmental effects of the project are insignificant or mitigable with known technology. It is urged that some potentially adverse effects, of significance, are not assessed as insignificant and others are unknown, and in either case a reference to the Minister of the Environment for a public review by a panel, or further reassessment of unknown effects, is required under subs. 12(d) or 12(e).

24 For the respondent Ministers, it is submitted that the findings of

the assessment are issues of fact, and that authorities[15] relating to the recognized scope of arbitrators in labour relations are applicable by analogy so that, unless the findings be patently unreasonable, certiorari should not be granted. In my view, those authorities, dealing with judicial review of arbitrators' decisions, are not applicable here. The process of an environmental assessment under the *Guidelines Order* is not analogous to arbitration between two parties in labour relations. The findings of the assessors, relating to potential environmental effects, are not facts in the usual sense that courts and arbitrators deal with facts. Rather, the conclusions drawn, though based in part on facts, are informed judgments or opinions about the future.

25 The applicants urge that in three respects the assessment itself does not support its general conclusion about potentially adverse environmental effects. Counsel for the applicants points in particular to the treatment of groundwater and stack emission concerns in the text of the assessment, both of which concerns are evidently of significance to some of the applicants, to the public generally and to others, including Nova Scotia Power. The third respect raised by the applicants relates to conditions that are integral to the approval granted, which it is said render the assessment conditional, not final.

26 About groundwater, the initial assessment has this to say:[16]

> "Point Aconi is located on Boularderie Island, Cape Breton, Nova Scotia. Domestic water is obtained from dug wells and from wells drilled into the Upper and Lower Morien aquifers. There has been a history of well problems in the area. Residents have alleged that there has been a decrease in water quantity and quality since test drilling and site development began. They are extremely concerned that when water is withdrawn from the aquifer by the plant, their wells will no longer be useable because of water depletion or because of saltwater intrusion. Hydrologists from EC [Environment

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[15]The cases suggested included *C.U.P.E., Local 963 v. N.B. Liquor Corp.*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417; 26 N.R. 341, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 79 C.L.L.C. 14,209, N.B.L.L.C. 24259; *Blanchard v. Control Data Canada Ltée*, [1984] 2 S.C.R. 476, 14 Admin. L.R. 133, 14 D.L.R. (4th) 289, 55 N.R. 194, 84 C.L.L.C. 14,070; *A.U.P.E. v. Alberta (Public Service Employees' Relations Board)*, [1982] 1 S.C.R. 923, 21 Alta. L.R. (2d) 104, (sub nom. *A.U.P.E. v. Olds College)* [1983] 1 W.W.R. 593, 82 C.L.L.C. 14,203, (sub nom. *Re A.U.P.E. and Olds College)* 136 D.L.R. (3d) 1, (sub nom. *A.U.P.E., Branch 63 v. Alberta (Public Service Employees' Relations Board)* 42 N.R. 559, 37 A.R. 281.

[16]I.E.A., pp. 2-3 (respondent Ministers' record, pp. 33-34).

> Canada] have reviewed the consultants' work and have concluded that the aquifer has sufficient capacity for the Island residents as well as the three plants proposed. Complaints were received from ten residences located in the general area of the project. Well inspections and well records indicated that the problems encountered were not related to work or pump tests carried out by the Power Corporation. There are many possible causes for well failure or poor performance in this area, including high iron and manganese mineralization, which plugs off fissures and pores in the well bore, inadequate or improperly installed pumps, and seismic activity due to the use of explosives at nearby strip mines.
>
> The Nova Scotia Power Corporation has completed a 72 hour pump test on the aquifer. A 60 day pump test has also been scheduled for later this year. This will help to better delineate the area which will be affected by the drawdown and will also assist in determining the impact of the plant over its 30 year life.
>
> The Nova Scotia Power Corporation has proposed a contingency plan to deal with deterioration of wells which might possibly result from their activities. This plan has been reviewed by both EC and DFO [Department of Fisheries and Oceans]. The plan includes the establishment of an arbitration board consisting of a member of the community, a representative of the Power Corporation and an unbiased third party (possibly a retired judge). This group would administer a $150,000+ trust fund for the contingency plan. In light of the corporation's intention to implement a contingency plan if necessary, any potential impacts on ground water supply are considered to be insignificant or mitigable with known technology. Provided that the plan is adhered to, there should be no hardships imposed on area residents."

27 Counsel contends that the conclusion stated in the final paragraph is not supported by the preceding comments. In particular, the reference to further testing in the second paragraph indicates that the effects are unknown until that is completed. Reference is also made to the letter from Environment Canada, appended to the assessment,[17] which states, in part, "Ongoing and planned studies, prior to operation, will increase the accuracy of existing predictions,

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[17]I.E.A., Attachment 2, para. 2 (respondent Ministers' record, p. 51, para. 2).

i.e., groundwater." Further, it is urged that the reference to Nova Scotia Power's contingency plan for an arbitration board and a trust fund to deal with deterioration of wells resulting from the project cannot be considered as mitigation "with known technology", as the guidelines require. Compensation, in the sense of the provision of money for damaged wells, cannot be mitigation as intended by the guidelines, just as subsequent monitoring programs were not acceptable as mitigation with known technology by Muldoon J. in *Canadian Wildlife Federation*, supra, note 14, at p. 220 of C.E.L.R., p. 12 of F.T.R.

28 I am not persuaded that the references to further testing should be interpreted as meaning the assessment is not completed to a stage where a conclusion can be drawn about the significance of potential adverse effects. The references to further tests must here be read in the full context of the passage concerning groundwater, including the statement in the middle of the first paragraph:[18]

> "Hydrologists from EC [Environment Canada] have reviewed the consultants' work and have concluded that the aquifer has sufficient capacity for the Island residents as well as the three plants proposed."

Further on in the assessment, in relation to agricultural impacts, this same conclusion is essentially repeated:[19]

> "As indicated above, the Lower Morien aquifer has sufficient capacity to meet the requirements of the power plant as well as the needs of residents and farmers."

I note also that in the assessment, under the heading "Public Concern," this statement is made:[20]

> "Among other things, there is fear that it will interfere with groundwater and dry up wells (according to Habitat personnel there is indeed some possibility of a few wells nearest the site drying up, although drilling deeper would restore water)."

29 Counsel for the respondent Ministers and Nova Scotia Power both point to the remedy foreseen, drilling deeper, for wells that are

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[18]Supra, note 16.

[19]I.E.A., p. 6 (respondent Ministers' record, p. 37).

[20]I.E.A., p. 7 (respondent Ministers' record, p. 38) para. 2.

adversely affected in supply of water, and to the assessment of hydrologists as to the adequacy of groundwater supply. It is urged that the further testing referred to is intended merely to clarify the extent and the area to which the power plant's requirements for fresh water may be anticipated to affect groundwater supply.

30 Counsel for Nova Scotia Power also refers to the affidavit filed, with consent, at the hearing from an officer of the Corporation with information on the trust fund established to meet expenses incurred by residents with domestic wells that are adversely affected within an area defined in the declaration of trust. It is submitted that the fund established is not simply to provide monetary compensation but to ensure that domestic wells continue to provide supply for residents.

31 I agree with counsel for the applicants that provision for monetary compensation, if that is all that was envisaged from operation of the trust established, would not constitute mitigation with known technology as I would interpret those words in subs. 12(c) of the *Guidelines Order*.[21] However, in view of the anticipated remedy for domestic wells adversely affected, that is by drilling deeper, costs of which are expected to be met from the trust established, it cannot be said that there was no reasonable basis for the conclusion of the assessment in relation to groundwater supply, particularly in light of the conclusions by hydrologists, referred to in the assessment, concerning the adequacy of supply.

32 While it is not necessary to discuss further the relationship of mitigation and compensation measures, I note as a matter of interest that s. 14 of the *Guidelines Order* would appear to countenance an assessment by an initiating department, as an alternative to mitigation measures, that "compensation measures could prevent any of the potentially adverse environmental effects of a proposal from becoming significant."

33 The second aspect of the initial environmental assessment that the applicants claim does not justify its overall conclusion is the treatment in the assessment of stack emissions. Concern about this is discussed in the assessment as follows:[22]

> Concern has been expressed locally about the release of SO_2, NOx, methylmercury, CO_2, and polycyclic aromatic hydrocarbons (PAH). The plant at Point Aconi will use Circulating

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[21]On the interpretation of subs. 12(c), see also *Tetzlaff v. Canada (Minister of the Environment)*, supra, note 14, per Iacobucci C.J., pp. 17-18.

[22]I.E.A., pp. 4-5 (respondent Ministers' record, pp. 35-36).

> Fluidized Bed technology which is capable of reducing sulphur emissions by 90%. This technology is also a low emitter of NOx. The potential for methyl mercury release is considered to be an insignificant problem for the combustor because the coal to be used in the combustor has a minimal mercury content. With regard to CO_2, there are presently no federal regulations or international agreements governing its production. The existing levels of polycyclical aromatic hydrocarbons are somewhat elevated in the Point Aconi area due to the other industrial activities. With proper combustion, the PAH production at Point Aconi will be insignificant. However, as a precautionary measure, it is recommended that a sampling and monitoring program be established immediately to determine background levels in lobster and shellfish prior to the plant going into operation. The Nova Scotia Power Corporation has agreed to carry out this program."

Counsel for the applicants contends that this portion of the assessment is essentially incomplete. While the combustion technology may significantly reduce sulphur dioxide (SO_2) and nitrogen oxide (NOx) emissions, there is no reference to what the actual emissions, and effects of emissions, of these will be, and the only reference to carbon dioxide (CO_2) emissions is that "there are presently no federal regulations or international agreements governing its production." Unlike the other gaseous elements referred to as concerns, i.e., methylmercury and polycyclical aromatic hydrocarbons, anticipated emission of which in each case is referred to as insignificant, no such assessment is specifically stated for each of SO_2, NOx and CO_2 emissions. Counsel notes that throughout the review of controversial issues within the assessment, virtually all others are specifically stated to be insignificant or mitigable with known technology. With no such conclusion stated for emission of these gases, or for the passage on stack emissions as a whole, it is urged that the assessment is incomplete, and by implication these emissions and their effects are unknown.

34 The *Guidelines Order* does not specify any particular form for an assessment. It would be inappropriate for the Court to insist on a particular form, or to infer a particular conclusion about potentially adverse effects that are discussed in a different manner from the discussion of others. The assessment is not drafted by lawyers but by technical, scientific and managerial staff whose technical and scientific judgment is required. Unless there is some clear reason to question their qualifications and methodology, and these are not in issue here, their knowledge and understanding of the facts upon which their judgment is based must be relied upon. Thus, in my view, it must be assumed those involved here were aware of or could calculate the an-

ticipated stack emissions of SO_2, NOx and CO_2, even though these are not here stated. In the same way, it must be assumed they were aware of anticipated freshwater requirements of the plant, and of potential outflow temperatures and residual chlorine in the circulating water system, though these are not stated in the assessment. That knowledge and the assessors' understanding of general technical and scientific information and processes must be assumed as part of the background against which their general conclusion for the report as a whole is stated.

35 In the case of SO_2 and NOx in the record before the Court, reference is made to the existence of international agreements limiting their emission, to a federal-provincial agreement concerning the former and discussions about the latter. I am prepared to assume that the comments of the assessors in relation to these two gases are made with the knowledge of existing international and federal-provincial agreements and discussions on goals and standards, and that the general conclusion to the assessment is applicable to the effects of emission of these products. In my view, the following other passages in the assessment support that assumption and the general conclusion.

> (1) In relation to wildlife – Bird Islands[23] (located approximately 7 km northwest of the site):
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> "Because of the Fluidized bed technology to be used, the Islands will be unaffected by stack emissions."
>
> (2) In relation to agriculture impacts[24] :
>
> "The SO_2 emissions from the plant will be low due to the Circulating Fluidized Bed technology and the impacts on agricultural activities are expected to be insignificant."
>
> (3) In the letter from Environment Canada (appended to the assessment)[25] :
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> "Based on our review Environment Canada is of the opinion *that for environmental issues related to Environment Canada's*

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[23]I.E.A., p. 6 (respondent Ministers' record, p. 37).

[24]Ibid.

[25]I.E.A. Attachment 2), respondent Ministers' record, p. 51, para. 2.

mandate or within our areas of expertise, potentially adverse impacts for development of the 165 MW unit are mitigable with known technology. . . . In certain cases such as NOx control potential may exist for even lower levels of emission or impact than originally predicted."

(4) In the public concern analysis (appended to the assessment)[26] :

"Several persons claimed that the wind data used in the assessment was inaccurate because there is a strong microclimate in the Point Aconi area. According to EC if this were true, the conclusions drawn from the investigations would still not change because of the low levels of emissions produced by the circulating fluidized bed combustor.

. . .

Some fishermen were worried that fly ash, SO_2 emissions . . . would have significant impacts on floating lobster larvae. One individual complained of being subjected to noxious fumes while fishing during certain atmospheric conditions. These fumes originated from the nearby Lingan plant which uses a conventional combustor. The Point Aconi plant will have a capability of removing 90% of the sulphur from emissions. The fishermen confirmed comments made by the SBIS and others regarding predominant wind directions. However for the reasons stated earlier, this does not effect (sic) EC's conclusions about the project."

36 The discussion concerning CO_2 emission is somewhat different. In addition to the reference in the passage on stack emissions quoted above, the only other references to CO_2 in the record before the Minister are the following:

(1) In relation to public concern[27] :

"The Power Corporation has done little to explain the environ-

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[26]I.E.A. Attachment 3), respondent Ministers' record, p. 55, 1st full para. and p. 56, para. 3.

[27]Ibid., p. 7 (respondent Ministers' record, p. 38), para. 5.

mental aspects of the project. In fact, problems are relatively minor. Federal scientists have questions and quibbles about most parts of the project, but none of them has raised a concern that cannot be mitigated. Putting aside CO_2, on which there are no clear guidelines, the project can be made to fit all the rules. . . . In general, all impacts should be insignificant or mitigable. Point Aconi is in some respects a model."

(2) In Attachment I to the deputy minister's memorandum of September 17, about public panel review considerations[28] :

"It is doubtful that a public panel review would result in real changes to the project to address the public concerns. For example, concerns have been expressed over atmospheric emissions. The Point Aconi plant can be considered a model project in this regard since it is capable of reducing acid causing sulphur emissions by 90%. With respect to carbon dioxide emissions and global warming, Canada does not yet have the legislation to require that specific levels be met. The EARP panel can recommend measures but certain measures may not be implementable if federal control legislation does not exist."

37 There can be little doubt that emission of CO_2 is a concern of importance. The record before the Court includes correspondence filed with the affadavit of the vice-president, planning and environment, of Nova Scotia Power, including letters by the chairman of the House of Commons standing committee on the environment and by the chairman of Nova Scotia Power, underlining that concern. General concern is also reflected by reference to it as such in the assessment itself, as we have seen. Does that concern warrant the conclusion that anticipated CO_2 emission from the plant at Point Aconi will have an adverse environmental effect?

38 The applicants submit that the assessment is incomplete because it does not include any assessment at all of the effects of CO_2 emissions, rather, it merely refers to the lack of any standards or guidelines that would provide a basis for assessment. It is urged by the respondents that there is no evidence in the record before the Court that CO_2 emission from the plant at Point Aconi is likely to have a potentially adverse environmental effect. While concern about this aspect may be relevant to consideration of a possible public review under s. 13 of the *Guidelines Order*, that concern in itself does not establish for purposes

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[28]Respondent Ministers' record, p. 22, para. 4.

of s. 12 that anticipated emission of CO_2 from this plant has a potentially adverse environmental effect. In the absence of standards or guidelines, it is urged the Court cannot assume a potentially adverse effect from CO_2 emissions any more than it could assume such an effect from breathing by humans or animals, or burning fuel at any other site, all of which activities produce CO_2.

39 I am persuaded that concern about CO_2 emission from this plant does not in itself constitute that emission as a potentially adverse effect. Under the *Department of the Environment Act*, R.S.C. 1985, C. E-10, s. 41(1)(a), the powers, duties and functions of the Minister of the Environment include matters over which Parliament has jurisdiction, among others in relation to the preservation and enhancement of the quality of the natural environment, including water, air and soil quality. Staff of the Minister of Environment Canada were involved and advised those responsible for the assessment here. This advice, provided only in summary form in attachment 2) to the assessment, includes the following:[29]

> "Based on our review Environment Canada is of the opinion that for environmental issues related to Environment Canada's mandate or within our areas of expertise, potentially adverse impacts for development of the 165 MW unit are mitigable with known technology. Ongoing and planned studies prior to operation will increase the accuracy of existing predictions (i.e. groundwater) and required or planned discussions with several technical experts (i.e. AES) will assist in finalizing project designs, and effects monitoring programs. In certain cases such as NOx control potential may exist for even lower levels of emission or impact than originally predicted." [Underlining appears in copy filed in record.]

That assessment is obviously relied upon and is reflected in the general conclusion to the assessment that, provided proper steps are followed, "the overall impacts of the project are considered to be insignificant or mitigable with known technology."

40 In my view, the absence of evidence that CO_2 emission from the Point Aconi plant constitutes a potentially adverse environmental effect, and the assessment by Environment Canada, within its responsibilities for preservation and enhancement of air quality, that potentially adverse impacts are mitigable with known technology, both support the reading of the general conclusion of the assessment with ref-

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[29] I.E.A., Attachment 2, para. 2.

erence to stack emissions, including SO_2, NOx and CO_2. Thus, I am not persuaded that the assessment in relation to stack emissions demonstrates a failure to complete the assessment required for determination within s. 12 of the *Guidelines Order*, or that the general conclusion of the assessment is not supported in its application to the matter of stack emissions.

41 The third aspect from which the applicants contest the validity of the assessment's conclusion is that it is said that conclusion itself, supported by other references in the record before the Minister, makes clear that the conclusion that effects are insignificant or mitigable with known technology is not final but conditional. That submission is based on references: to the necessity of following sound design construction and management practices and the requirements of regulatory agencies; to that in the covering memorandum to the Minister of September 17, stating that several outstanding issues were identified by federal scientists which required resolution before the conclusion is reached that the project's impacts would be mitigable with known technology; and to the inclusion of conditions stipulated in the draft letter to the president of Nova Scotia Power approved by the Minister on September 18 and confirmed in the letter ultimately sent on October 23.

42 I am not persuaded that the conditions referred to lead to the conclusion that the assessment itself was conditional. The *Guidelines Order* in s. 14 provides that the initiating department shall ensure that mitigation or compensation measures, which can prevent any of the potentially adverse environmental effects from becoming significant, are implemented. The conditions to which applicants' counsel points are, in my view, no more than mitigation measures, identified as necessary in the process of the assessment, which the department sets out as requirements to be met, in addition to any others required by provincial or local authorities, by Nova Scotia Power.

43 I conclude discussion of submissions related to s. 12 of the *Guidelines Order*. I am not persuaded that the text of the initial environmental assessment demonstrates that its general conclusions are unwarranted. Those are stated as follows:[30]

> "CONCLUSIONS
>
> Provided that environmentally sound design, construction and management practices are used and the requirements of the regulatory agencies are followed, the overall impacts of the

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[30]I.E.A., p. 9 (respondent Ministers' record, p. 40).

> project are considered to be insignificant or mitigable with known technology. There is however an element of public concern which should be addressed under Section 13 of the Guidelines Order (refer to appended public concerns analysis). Additional advice from EC is contained in the attached letter Vollmershausen – MacPhee 29/08/90."

I understand the words "the overall impacts of the project" to mean the potentially adverse environmental effects, which is what the initial environmental assessment is concerned with under the *Guidelines Order*.

44 In my view there is no basis to conclude that the Minister of Fisheries and Oceans erred in law when he decided to accept the initial assessment completed by his department as meeting the requirements of subs. 12(c) of the *Guidelines Order*, and thus accepting that the potentially adverse environmental effects of the project at Point Aconi are insignificant or mitigable with known technology.

Section 13 of the Guidelines Order

Whatever the outcome of the Initial Assessment under s. 12 of the *Guidelines Order*, s. 13 provides that:

> "if public concern about the proposal is such that a public review is desirable, the initiating department shall refer the proposal to the Minister for public review by a Panel."

There can be no doubt of widespread public concern about this project and interest in a public review by a panel under the aegis of the Minister of the Environment. The assessment itself refers to this, particularly in its discussion of public concerns and in its attachment 3) dealing with these at greater length. That concern and interest is evident from the affidavits of some of the applicants. Clearly a key issue before the Minister of Fisheries and Oceans at the meeting on September 18 was whether the matter should be referred for a public review by a panel; that issue is highlighted in the covering memorandum from the Deputy Minister, and the Minister's decision not to refer the matter for a public review is included in the press announcement released on September 20.

45 I agree with counsel for the applicants that the discretion vested

in the Minister by s. 13 is not absolute,[31] that it must be exercised reasonably and in good faith taking into account relevant considerations, having regard to the purposes of the *Guidelines Order*. The concerns of the public regarding a proposal and its potential adverse environmental effects are important matters to be considered in assessing the proposal. Where the potentially adverse environmental effects of a proposal are significant, then the proposal is to be referred to the Minister of the Environment for a public review by a panel.[32] The involvement of the public at various stages in the process is an integral part of the full consideration of potentially adverse environmental effects which the Guidelines call for, even at the stage of the initial assessment.

46 On behalf of the applicants it is submitted that, in light of the purposes of the *Guidelines Order*, if there is sufficient public concern about a project a public review should be held. That is not what the Order, in s. 13, says. I do agree that the level and extent of public concern ought to be an important factor considered by the Minister in his deliberations under s. 13 to determine whether a public review by a panel "is desirable". From the record it seems clear that this was an identified consideration, both in the assessment itself and in the covering memorandum and other documents before the Minister at the meeting on September 18.

47 The main argument of the applicants in relation to s. 13 is that the Minister, in making his decision, appears to have taken into account considerations which are irrelevant to the purposes of the *Guidelines Order*, and thus irrelevant for his decision. If those were the only considerations before the Minister at the time of his decision, or if he clearly relied on irrelevant considerations, then the applicants are entitled to certiorari.[33]

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[31]See, e.g., Lamer J. (as he then was) in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 26 C.C.E.L. 85, 59 D.L.R. (4th) 416, 93 N.R. 183, 89 C.L.L.C. 14,031, 40 C.R.R. 100, at p. 1038 of S.C.R.; see, also cases cited, note 33, infra.

[32]The *Guidelines Order*. ss. 3, 4 and 12(e).

[33]*Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997 at 1016, [1968] 1 All E.R. 694 (H.L.); *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164, (sub nom. *Doctors Hospital v. Minister of Health*) 1 C.P.C. 232, (sub nom. *Re Doctors Hospital and Minister of Health*) 68 D.L.R. (3d) 220 (Div. Ct.); *Secretary of State for Education & Science v. Tameside Metropolitan Borough Council*, [1977] A.C. 1014 at 1036, [1976] 3 All E.R. 665 at 679 (H.L.); *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1976), 14 O.R. (2d) 49, 73 D.L.R. (3d) 18 (C.A.).

48 In particular, counsel urges that a list of factors against referring the project for a public review by a panel, contained in the Deputy Minister's memorandum of July 12, and others appended to the Deputy's memorandum of September 17 (both in the record before the Minister when he made his decisions), are considerations of expediency or practicality or political factors which are irrelevant to a decision whether "public concern about the proposal is such that a public review is desirable." Thus, it is urged that considerations such as the following are irrelevant: that construction has begun; that a panel could not be precluded from examining the entire project as if construction had not begun and the public review would generate pressure to halt the project until the review is completed; that there appeared to be no federal legislative authority to halt the project, and if efforts were made to do so the federal government would be open to action in damages for any delay in construction; that the provincial government, having concluded its own assessment, would be unlikely to agree to participate in a public review; that a panel might recommend no meaningful change which would cause frustration to some, and to others exasperation at expenditure of taxpayers' money; that the panel might recommend measures that lie beyond federal legislative competence; that not having a public review would be seen as collaboration with the province whose process for public involvement was criticized by many.

49 Counsel for Nova Scotia Power conceded these factors were irrelevant, a position not shared by counsel for the respondent Ministers, but both pointed to another factor as relevant, that is, the advice to the Minister that it was concluded that impacts over which members of the public have expressed concern are considered to be insignificant or mitigable with known technology. This advice was contained in the covering memorandum to the initial assessment from the regional director general, in the memorandum of September 17 from the Deputy Minister, and it underlies the final document in the record before the Minister, the summary of measures taken to address public concerns. It was also urged that the lack of likely effectiveness of a panel in recommending changes in the project that would address concerns expressed by the public was a relevant consideration.

50 I would agree with counsel for the applicants that many of the factors suggested for consideration by the Minister were irrelevant to the issue to be decided. On the other hand, the following considerations were obviously before the Minister, and in my view these are relevant factors: the general conclusion of the assessment which expressly referred to public concern and the necessity for a decision under s. 13; the widespread public concern about the project and the evident interest of many in a public review, evident from the assessment

and other documents, including the memorandum from the Deputy Minister recommending that the assessment's conclusion be accepted and that the matter not be referred for a public review by a panel. Some other factors listed in the memoranda to the Minister might also be accepted as relevant: that referral to a public review would be seen by many in the public as a positive response to public concern; that a public review would at least provide opportunity for people to gain a better understanding of anticipated environmental effects and to alleviate suspicion of government.

51 As is often the case, there are no reasons given for the decision not to refer the project for public review by a panel. In the absence of reasons, the Court can only review considerations in the record before the Minister at the time of his decisions. In this case, that review leads me to the conclusion that his decision, to not refer the project for public review by a panel, cannot be said to be based entirely on irrelevant factors. Nor can it be said that he clearly relied on irrelevant factors. Whether his decision was wise or unwise, whether in the long run it generates support or opposition, it is not a decision which this Court can question by an order of certiorari.[34]

Conclusion

52 As I have indicated, it is my view that the Minister of Fisheries and Oceans did not err in law in accepting the conclusion of the initial environmental assessment, completed within his department, that the potentially adverse environmental effects of the 165 MW Point Aconi power generating station are insignificant or mitigable with known technology and that the project might proceed with mitigation conditions pursuant to subs. 12(c) of the *Guidelines Order*.

53 Further, it is my view that the record reveals that the Minister considered whether the project should be referred to the Minister of the Environment for a public review by a panel pursuant to s. 13 of the *Guidelines Order*, and in deciding not to refer the matter he acted within his discretion in light of various considerations, some of which were relevant to the issue, whether "public concern about the proposal is such that a public review is desirable."

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[34]See: *Hyundai Motor Co. v. Canada (A.G.)* (1987), [1988] 1 F.C. 333, 14 F.T.R. 316, 14 C.E.R. 248 (T.D.), per Strayer J. at p. 321 [of F.T.R., pp. 342-343 of F.C.]; *Lifeforce Foundation v. R. (Minister of Oceans and Fisheries)* (10 August 1990), Doc. T-2201-90, per Collier J. (Fed. T.D.).

54 The application for certiorari is dismissed. Costs were requested by the respondent Ministers, but the respondent Nova Scotia Power expressly does not seek its costs in view of "the importance of the matters raised in the application, the unsettled state of the law and the genuine intent of the applicants." The order in this matter goes directing costs as requested by the respondent parties.

Application dismissed.