Union of Nova Scotia Indians v. Canada (Attorney General), [1997] 1 FC 325

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T-1849-96

Union of Nova Scotia Indians, a body corporate, Chapel Island Indian Band, Eskasoni Indian Band, Membertou Indian Band, Wagmatcook Indian Band and **Whycocomagh Indian Band** (*Applicants*)

v.

Attorney General of Canada, representing the Minister of Fisheries and Oceans for Canada and the Minist of the Environment for Canada and **USG Canadian Mining Limited, a body corporate carrying on busines under the name of Little Narrows Gypsum Company** (*Respondents*)

T-2005-96

Union of Nova Scotia Indians, a body corporate, Chapel Island Indian Band, Eskasoni Indian Band, Membertou Indian Band, Wagmatcook Indian Band and **Whycocomagh Indian Band** (*Applicants*)

v.

Attorney General of Canada, representing the Minister of Fisheries and Oceans and **USG Canadian Mining Limited, a body corporate carrying on business under the name of Little Narrows Gypsum Company** (*Respondents*)

T-2006-96

Union of Nova Scotia Indians, a body corporate, Chapel Island Indian Band, Eskasoni Indian Band, Membertou Indian Band, Wagmatcook Indian Band and **Whycocomagh Indian Band** (*Applicants*)

v.

Attorney General of Canada, representing the Minister of the Environment, and **USG Canadian Mining Limited, a body corporate carrying on business under the name of Little Narrows Gypsum Company** (*Respondents*)

Indexed as: Union of Nova Scotia Indiansv. Canada (Attorney General) (T.D.)

Trial Division, MacKay J."Halifax, October 1 and 2; Ottawa, October 29, 1996.

Administrative law " Judicial review " Applicants questioning decisions on behalf of Ministers to approve screeni report denying impact upon environment of dredging sea bottom to deepen channel " Issues related to procedura fairness, assessment process under Canadian Environmental Assessment Act " Failure to consider fiduciary duty Indians lack of fairness " Doctrine of legitimate expectations not applicable " Impugned decisions administrative, not judicial " Not to be interfered with unless patently unreasonable " Conclusion project be approved subject to monitoring, mitigating measures not patently unreasonable.

Environment " Decisions on behalf of Ministers of Fisheries and Oceans, Environment to approve screening repo dredging project not likely to have significant impact upon environment " Whether assessment process met requirements, standard under Canadian Environmental Assessment Act " Responsible authorities taking into account general mitigation measures, conducting careful review " Failing, however, to consider fiduciary duty owed to native people.

Native peoples " Aboriginal right to fish for food " Applicants carrying on oyster, salmon aquaculture on reserve lands " Ministers' officers failing to assess potential adverse effects of dredging project upon use of fishery resources within Bras d'Or Lakes by native people for traditional purposes, food " Failure constituting unfairness in process, error in law.

These were applications for judicial review of decisions, made on behalf of the Minister of Fisheries and Oceans and Minister of the Environment, to accept as satisfactory, subject to mitigation measures, a screening report mad under the *Canadian Environmental Assessment Act*. The facts of the case are summarized in the Editor's Note. Tw issues were raised in relation to the impugned decisions: 1) procedural fairness and 2) whether the assessment process met the requirements and the standard applicable under the Act.

Held, the applications should be allowed.

1) The applicants submitted that it was unfair to change the arrangements and for the Departmental officials to sig off, or accept, the screening report before the meeting arranged for July 16, 1996 with science personnel of the Department of Fisheries and Oceans to discuss their concerns. There is no statutory requirement for consultation i regard to a screening review, except as the responsible authority in its discretion may determine. The consultation process was unsatisfactory for the applicants. Yet, unless there was more than a general sense of unfairness arisin from the timing, there was no basis for the Court to intervene to set the decision aside. The Aboriginal interests include, but are not limited to, the right of the Mi'kmaq people to fish for food in the waters of the Bras d'Or Lake and in the streams discharging into them. Despite brief reference in the screening report's table of potential advers effects, the actual use of fishery resources within the Bras d'Or Lakes by the Mi'kmaq people for traditional purposes was not addressed or carefully assessed by those acting for the Ministers. It is essential that the responsi authorities under CEAA address directly the matters included in "environmental effects" as defined in subsection (1) of the Act.

A further aspect of unfairness in relation to the applicants' special interests as Aboriginal people was said to arise reason of the fiduciary duty owed to them by the Crown. That duty, which would at least include the duty not to permit unjustified adverse effects upon continuing Aboriginal interests, including the interests in fishing within th Bras d'Or Lakes for food, continued throughout the assessment process and thereafter. There was no reference by the responsible authorities, acting on behalf of the Ministers of Fisheries and Oceans and of Environment, to the fiduciary duty owed by Her Majesty's government to the Mi'kmaq Aboriginal people. Failure to consider that duty and the responsibility it raises constituted a failure by those acting on behalf of the respondent Ministers to act wi fairness towards the applicants in the environmental assessment process. It was an error in law to fail to address th Aboriginal interest, and if it be affected, to assess whether that effect was warranted. By their failure to consider t fiduciary duty owed to the applicants, those acting on behalf of the Ministers did breach that duty. Finally, in rega to procedural fairness, the doctrine of legitimate expectations did not apply. There is no statutory or regulatory process or practice that provides for a meeting, either to explore scientific concerns with government scientists or with regional directors general. The decision in question was not typically judicial, rather it was an administrative decision to be made at the discretion of the Ministers concerned.

2) Paragraph 16(1)(*d*) of the CEAA provides that every screening study of a project shall include consideration of "measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects". Some mitigation measures were referred to, albeit briefly, in the screening report. The Ac does not require that all the detail of mitigating measures be resolved and considered before acceptance of the

screening report. When the screening report was accepted on July 15, 1996, the responsible authorities knew enough of the mitigating measures and did not fail to follow the procedures implied by the CEAA. They took into account, in approving the screening report, the general mitigation measures they perceived as necessary to deal w the adverse consequences foreseen, and they provided for approval of final detailed plans for mitigating measures before work on the project commenced. Those acting on behalf of the Ministers have conducted a careful review the project, except that they have not addressed the current use of Bras d'Or Lakes fisheries by the Mi'kmaq peopl thus failing to consider the fiduciary responsibility owed to that people. The Ministers' decision under the CEAA not a scientific decision; it is a decision made in the exercise of judgment that takes into account appropriate scientific, economic, political and social considerations. In judicial review proceedings, the Court must inevitably defer to the statutory decision maker, unless persuaded that the decision is patently unreasonable. So long as there information on which the decision could be rationally based, the Court will not intervene. Aside from considerations of procedural fairness, the final conclusion that the project be approved subject to monitoring and mitigating measures was not patently unreasonable. Applicants' critique of the scientific review of the LNG study was not persuasive that the ultimate conclusion on behalf of the Ministers should be set aside because the assessment of scientific information about the project was less than careful, as the CEAA requires of the assessme process. However, the decisions to approve the project should be set aside on the basis that the responsible authorities failed to meet requirements under the CEAA to assess potential adverse environmental effects upon th use of fishery resources of the Bras d'Or Lakes by the Mi'kmaq people for traditional purposes.

statutes and regulations judicially considered

Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 2(1) "environmental effect", "mitigation", 4(*a*), 5, 11, 16(1)(*a*),(*d*), 20(1)(*a*).

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44].

cases judicially considered

considered:

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170; (1990), 7 D.L.R. (4th) 385; [1991] 2 W.W.R. 145; 2 M.P.L.R. (2d) 217; 69 Man. R. (2d) 134; 46 Admin. L.R. 161; 116 N.R 46; *Alberta Wilderness Assn. v. Express Pipelines Ltd.*, [1996] F.C.J. No. 1016 (C.A.) (QL).

referred to:

R. v. Denny et al. 1990 CanLII 2412 (NS CA), (1990), 94 N.S.R. (2d) 253; 247 A.P.R. 253; [1990] 2 C.N.L.R. 11 (C.A.); *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075; (1990), 70 D.L.R. (4th) 385; [1990] 4 W.W.R. 410; 46 B.C.L.R. (2d) 1; 56 C.C.C. (3d) 263; [1990] 3 C.N.L.R. 160; 111 N.R. 241; *R. v. Adams*, 1996 CanLII 169 (SCC), [1996] 3 S.C.R. 101.

APPLICATIONS for judicial review of decisions, made on behalf of the Minister of Fisheries and Oceans and Minister of the Environment, to approve, subject to mitigation measures, of a screening report made under the *Canadian Environmental Assessment Act*. Applications allowed.

counsel:

Bruce H. Wildsmith for applicants.

John J. Ashley and *Colleen MacKey* for respondent Ministers.

Stephen T. McGrath and *Jennifer MacLellan* for respondent Little Narrows Gypsum Company.

solicitors:

Bruce H. Wildsmith, Barrs Corner, Nova Scotia, for applicants.

Deputy Attorney General of Canada for respondent Ministers.

Boyne Clarke, Dartmouth, Nova Scotia, for respondent Little Narrows Gypsum Company.

EDITOR'S NOTE

The Executive Editor has made a determination that, as provided for by Federal Court Act, subsection 58(2), thes 40 page reasons for order ought to be published in the abridged format. Omitted from the report are the facts of t case, including portions of the reasons under the headings "General Background" and "Events leading to Approv of the Screening Report and the Issuance of Permits and Commencement of Project". His Lordship's discussion o the legal issues is reported in full. The issue of greatest interest was that as to whether there had been a failure to fulfil fiduciary obligations as an aspect of unfairness in the environmental assessment process here followed so th Aboriginal interests (in particular, fishing for food in the Bras d'Or Lakes) had not been adequately addressed.

These were applications for judicial review of decisions, made on behalf of the Minister of Fisheries and Oceans and Minister of the Environment, to approve of a Canadian Environmental Assessment Act screening report that dredging of the navigational entrance to the Bras d'Or Lakes on Cape Breton Island, Nova Scotia was not likely t have a significant impact upon the environment so long as appropriate mitigation measures were undertaken. Litt Narrows Gypsum Company operates a mine on the shores of the Bras d'Or Lakes from which it ships its product i ocean-going vessels. Due to draft limitations at Middle Shoal, the company could load ships to not more than 80% capacity. The company has been losing market share and was concerned that, unless it could become more efficie by being able to fully load ships, it might have to shut down the mine, resulting in the loss of 100 jobs. That is why the dredging project was necessary.

The applicant Union represents Mi'kmaq Indians who have reserve lands on the shores of the Bras d'Or Lakes where they carry on oyster and salmon aquaculture. In addition, they exercise their Aboriginal right to fish for fo in the Lakes and in the streams which empty into them. That right had been confirmed by the Nova Scotia Suprem Court, Appeal Division in R. v. Denny et al. 1990 CanLII 2412 (NS CA), (1990), 94 N.S.R. (2d) 253; 247 A.P.R. 253. The mining company had retained consultants and a copy of their study was provided to the Indian Union bu its President wrote to the Ministers expressing the serious concerns on the part of the Mi'Kmaq communities as to the potential impact of the project upon their resources. The Union wanted an independent environmental and soc -economic impact study. DIAND gave the Union a grant to fund such a study. DIAND asked Fisheries and Ocean to consult directly with the First Nations whose concerns had to be addressed. It was understood that DFO would meet with the Union. While a meeting was held, it was made clear that a draft of the screening report had already been prepared by Government officials and the only question was how the Indians' concerns would be reflected through mitigation measures. The Union representatives walked out of the meeting but did put forward requests f further meetings and a response to their findings and recommendations. No undertaking was, however, given by t Departmental representatives. DFO did set up a meeting of its scientists with Union representatives for July 16, 1996 but on July 15 the principal Departmental officers signed off the screening report. The report acknowledged the Indians' studies and their concerns regarding siltation, changes to currents and the release of contaminants caused by dredging. The conclusion was, however, that all the potentially adverse impacts would be insignificant after mitigation. The mining company would have to prepare an environmental protection plan subject to Departmental approval and operations would be monitored by Government with the Union being invited to participate therein. The Indians were not advised until after the conclusion of their July 16 meeting with the Government scientists that the screening report had already been accepted. They were then informed that authorization for the project to proceed would be forthcoming upon publication of notice in the Canada Gazette.

The following are the reasons for order rendered in English by

MacKay J:

THE ISSUES

The applicants raise two basic issues in relation to the decisions here questioned. The first, in essence relates to procedural fairness, expressed by counsel in terms of denial of the level of respect to which the applicants were entitled in the assessment process, especially with respect to the decision made on July 15 to sign off, i.e. to accep subject to mitigation measures, the screening report when meetings were arranged for the following day to discuss matters with DFO [Department of Fisheries and Oceans] scientists. The issue of procedural fairness is said to hav special significance in this case because of the status of the Mi'kmaq, as represented by the applicants, as Aborigi people, and because of legitimate expectations they had as a result of the conduct of those acting on behalf of the

two Ministers principally concerned. The respondents deny any special procedural concern arises because of the status of the Mi'kmaq, but if there were any such concern about their Aboriginal interests, that was met in this cas and the respondents deny that the doctrine of legitimate expectations is applicable to the circumstances in this cas

The second basic issue raised is whether the assessment process here followed met the requirements and the standard applicable under the CEAA [*Canadian Environmental Assessment Act*, S.C. 1992, c. 37], which, it is urged, requires that mitigation measures be considered in the assessment process, and that the process involve a careful assessment of all relevant scientific evidence related to environmental concerns. The applicants contend those requirements were not met, a contention not accepted by the respondents.

The balance of these reasons deals with the two basic issues raised.

PROCEDURAL FAIRNESS

The applicants submit that they were not accorded procedural fairness in the process leading to the respondent Ministers' decisions, particularly the joint decision on July 15, 1996, to accept the screening report. The unfairnes alleged is said to arise in three respects, which I deal with in turn.

(a) Fairness and the Timing and Sequence of Decisions

In the first place, it is urged, in the circumstances here with encouraging responses of the Ministers concerned, wi a meeting arranged for July 16 with science personnel of DFO for the UNSI [Union of Nova Scotia Indians] to se an understanding of the scientists' concerns about the project and to seek scientific comment on some issues of concern to the applicants, that it was unfair to change arrangements and sign off, or accept, the screening report before those scheduled discussions were held. Daniel Christmas, for the applicants, avers by his affidavit of September 5, 1996, that:

At the July 16, 1996 meeting, we made specific inquiries about the migration of Atlantic salmon and gaspereau in and out of the Bras d'Or Lakes and the impact dredging in the Middle Shoal would have on them, particularly wit respect to the effects of the sedimentation plume on their olfactory cues and sense of smell. No one from DFO or EC had any knowledge or information about salmon and gaspereau and these matters, and an undertaking was ma by DFO personnel to provide that information. We have not yet received that information.

It seems clear that the UNSI representatives at the July 16 meeting were unsatisfied about science-related issues f which they had not received any information to resolve their concerns. To be informed only after that meeting tha the screening report had been signed off the previous day and that the authorizations required under the statutes were expected to be issued, must have come as a surprise. It is not surprising that the decision-making process is perceived as unfair by the applicants, for the UNSI had received funding from DIAND [Department of Indian Affairs and Northern Development] to undertake an independent review with the assistance of consultants, it had received encouraging responses from the Ministers of DFO and of EC [Environment Canada], and general assurances of the importance of UNSI involvement in the assessment process. Yet the decision was made before t meeting, arranged at the UNSI's request, with DFO scientists to discuss the applicants' concerns.

Affiants for the Ministers concerned aver that the consultant's report on fish and fish habitat provided by the applicants, and the latter's findings and recommendations, were considered in the assessment. The document identifying principal concerns, the findings and recommendations, of the UNSI was finally responded to in writin on Friday, July 12. The record reveals that the findings and recommendations were discussed by DFO with LNG [Little Narrows Gypsum Company] representatives in mid-June and towards the end of that month, within DFO, l science staff and officers concerned with preparation of the screening report. It seems odd that, if indeed the applicants' submissions were seriously considered, they were apparently not adequately dealt with, from the perspective of the UNSI representatives, in discussions on July 5, and only later when the UNSI requested written responses to its findings and recommendations, was an effort made to coordinate a reply to those.

At the same time, it is noted that there is no statutory requirement for consultation in regard to a screening review except as the responsible authority in its discretion may determine. Here, there was no express commitment to any particular, specified role or consultation program for UNSI. Moreover, here the record does show that written submissions were made by the applicants, i.e., the reports done for them on fish and fish habitat, on oceanographi concerns, and on the UNSI statement of findings and recommendations. There was some discussion of those with

LNG by officers responsible for the assessment process, further discussion with DFO, and reference is made to them in a summary way in the screening report itself. Yet, the consultation process was unsatisfactory for the applicants. Perhaps it is not surprising that counsel for the applicants suggests the process which was followed demonstrated a lack of respect. The timing was most unfortunate for those who ought to have concern for involvement of interested communities in the reso-lution of competing concerns.

Yet, unless there is some basis other than the general sense of unfairness arising from the timing, there is no basis for the Court to intervene to set the decision aside. The applicants urge there is another basis for a finding of unfairness in the process, that is, in light of the Aboriginal interests of the applicants, and the manner in which thc interests were here dealt with in the assessment.

(b) Fairness and Aboriginal Interests

These Aboriginal interests include, but are not limited to, the right of the Mi'kmaq people to fish for food in the waters of the Bras d'Or Lakes and in the streams discharging into the Lakes. As earlier noted, that right has been recognized by the Court of Appeal of Nova Scotia in *R. v. Denny et al.* [1990 CanLII 2412 (NS CA), (1990), 94 N.S.R. (2d) 253]. The exercise of that right in relation to some fish species relied upon apparently depends upon migration of fish, principally through the Great Bras d'Or, where the project [Middle Shoal Channel Improvement Project] has been underway, though for other species with no migratory life, any possible adverse effects of the project within the Lakes would be of importance.

It is urged that those acting for the Ministers failed to meet their responsibilities under the CEAA. That Act provides by paragraph 16(1)(*a*) that "[e]very screening . . . study of a project . . . shall include a consideration of t following factors: (*a*) the environmental effects of the project". Under subsection 2(1), the Act defines "environmental effect" as meaning "any change that the project may cause in the environment, including any effe of any such change . . . on the current use of lands and resources for traditional purposes by aboriginal persons". Reference to that important concept of "environmental effect" is included in the letter of June 21 to UNSI, receive on July 2, from the Minister of Environment.

The record reveals that the independent review of the project concerning fish and fish habitat (the Kenchington report) completed for UNSI does include reference to the current use of fishery resources in the Bras d'Or Lakes system by the Mi'kmaq people but it also notes that a full accounting of those fisheries was under preparation in another consultant's report for the UNSI. One of the reports completed for LNG is its review, *Middle Shoal Chan Improvement Program: Potential Impacts on Inlake Fish and Fisheries*, which does deal with fisheries in the Bra d'Or Lakes. It does make specific reference to the important historical and ongoing Mi'kmaq presence in those fisheries. Of course, it is upon that presence and their use of that fishery that their recognized Aboriginal interest i based. The LNG report reviews some of the major species of interest in the inlake fishery, and it refers to concern about deterrents from the project to migration of fish through the Great Bras d'Or Channel. That report concludes that the project is not expected to have significant impact on fish migration in or out of the lake, but that monitori programs should be established throughout the course of the project to ensure that such is the case.

Surprisingly, the screening report signed off by the Ministers' representatives, makes no specific reference to the u of the Bras d'Or Lakes fisheries by the Mi'kmaq, even in its brief reference to First Nations. It does include, in a "Table of Effects Related to Changes in the Environment", a reference to potential adverse effects on "Current Us of Lands and Resources for Traditional Purposes by Aboriginal Persons". The potential adverse effects are thus described: "changes to marine waters, fish habitat, and fish migration could adversely impact aboriginal use of marine resources". But the potential for that effect is classed as insignificant, with no cumulative effect. Moreove the report notes: "Implementation of above mitigation measures will ensure adverse environmental effects are avoided". While on its face, that entry would appear to address the use of resources for traditional purposes by Aboriginal persons, as the CEAA directs, in the context of the screening report, the use referred to is, in my opini the possible use of the fishery at the dredging site and the ocean dumping sites, neither of which are of direct concern to the applicants. The only concern with potential impact for fisheries within the Lakes that is dealt with i the screening report of the Ministers concerns migration of fish at the dredging site. For that migration of species the Great Bras d'Or, it is acknowledged there was little or no scientific information available before August 1996. While mitigation measures include provision for monitoring fish migration around the dredging site, the utility of the monitoring measures and the significance of any results appeared to be questionable, at least to some DFO fisheries scientists, since little or nothing was apparently known about fish migration in the area, or about the effectiveness of the procedures to be used for monitoring.

My conclusion is that despite brief reference in the screening report's table of potential adverse effects, the actual use of fishery resources within the Bras d'Or Lakes by the Mi'kmaq people for traditional purposes was not addressed or carefully assessed by those acting for the Ministers. I so find. Even if it was addressed by LNG, that use of resources is not specifically addressed in the screening report, or otherwise by DFO and EC assessors. In m view, it is essential that the responsible authorities under CEAA address directly the matters included in "environmental effects" as defined in subsection 2(1) of the Act. It may be that, if reviewed, the result would be a set out in the table of the report, that is, that the potential impact would be considered insignificant, but that canno be assumed now, without consideration of the matter, any more than it could have been assumed on July 15 when the screening report was accepted.

A further aspect of unfairness in relation to the applicants' special interests as Aboriginal people is said to arise by reason of the fiduciary duty owed to them by the Crown. The nature of that duty is not spelled out in argument, bu in this case, it would at least include the duty not to permit unjustified adverse effects upon continuing Aboriginal interests, here including the interests in fishing within the Bras d'Or Lakes for food.

I note that the applicants gave notice to the respondents in advance of hearing these applications and, consistent with that notice, they moved at the hearing to amend the grounds set out in all three applications as the bases of their requests for judicial review. They proposed to add a further ground, as follows:

12. The Applicants will submit that the Ministers erred in law and jurisdiction in respect of the fiduciary duty owe to the Applicants by Her Majesty the Queen in right of Canada by not providing the Applicants a fair opportunity be heard, and/or by not requiring that the Minister of Indian and Northern Affairs, the Applicants, or someone on his or their behalf, sign the CEAA environmental assessment screening document as a responsible authority, and/ otherwise ensuring that the environmental screening decision, the authorization, and the permit are consistent witl the fiduciary obligations of Her Majesty to the Applicants.

Counsel for the Attorney General, representing the Ministers, opposed the proposed amendment which, it was urged, adds a new ground at the last moment when, with an expedited schedule for the hearing, only the original grounds should be included, particularly since the Crown had no opportunity to canvas for possible evidence, perhaps in the records of DIAND, relating to any fiduciary duty here claimed.

I am not prepared to allow the amendment proposed, but in so concluding, I do not fully dispose of any claim here based upon fiduciary duty. I dismiss the amendment because it is unnecessary in order to raise the failure to fulfil fiduciary obligations as an aspect of unfairness in the process. That aspect is no surprise to the respondents, in my view, for it was referred to in argument when the application for a stay was heard on August 29, and breach of fiduciary duty was alleged in written argument filed on September 20 by the applicants in accord with the timetab for the hearing.

One of the principal purposes for the proposed amendment was said by counsel for the applicants to be to invite th Court to consider commenting upon or directing the manner in which the Crown's fiduciary duty ought to be discharged in light of the process set out in the CEAA, i.e. whether DIAND, or in lieu of DIAND, the applicants themselves, should be required to sign the environmental screening document. That suggestion apparently arises from uncertainty about responsibility for the Crown's fiduciary duty to the applicants in this case. Thus, for example, correspondence in the record from officers of DIAND includes recognition of the necessity of fulfilling that fiduciary duty, but it declined to be a party formally involved in the acceptance of, or consultations about, the screening assessment, and it affirmed that the applicants should be dealt with directly by DFO. By inference, DIAND's position is said to have been that the lead responsible authority under CEAA, here DFO, assumes responsibility for discharge of the Crown's fiduciary duty. Yet, there is no evidence that any of the DFO officers involved in the assessment recognized that responsibility. The applicants could not themselves assume that responsibility, in my view. Neither DIAND nor the applicants, nor anyone on their behalf, fall within the definitio of "responsible authority", to ensure that an environmental assessment is satisfactorily completed, within sections 11 and 5 of the CEAA, and neither had responsibility under the Act for approval of the screening report.

The Crown's fiduciary duty to the applicants as representing Aboriginal people continued throughout the assessm process and thereafter. It may be that within the public service, at least on this occasion, the perception was that th sole responsibility for discharge of that duty was that of DIAND. Only in so far as that duty is provided for within the terms of the CEAA, by reference to environmental effects as including the "current use of lands and resources for traditional purposes by aboriginal persons", was the duty here referred to implicitly. Thus, reference is found

only in the letter from the Minister of the Environment dated June 21, 1996, and in the table of environmental effects in the screening report. The latter, I have found, in reality does not reflect consideration by the screening authorities of the acknowledged Aboriginal interest of the Mi'kmaq to fish for food in the Bras d'Or Lakes. There simply was no reference by the responsible authorities here involved, acting on behalf of the Ministers of Fisherie and Oceans and of Environment, to the fiduciary duty owed by Her Majesty's government to the Mi'kmaq Aboriginal people. Failure to consider that duty and the responsibility it raises, where an Aboriginal interest has been earlier recognized and may be adversely affected by the project, in my view, constitutes a failure by those acting on behalf of the respondent Ministers to act with fairness towards the applicants in the environmental assessment process. Indeed, it is an error in law, in my view, to fail to address the Aboriginal interest, and if it be affected, to assess whether that effect is warranted, in accord with the approach set out by the Supreme Court of Canada in *R. v. Sparrow* ,

I am persuaded that by their failure to consider the fiduciary duty here owed to the applicants, when the decision was made on behalf of the Ministers, those acting on behalf of the Ministers did breach that duty. Addressing the duty, to avoid unjustified adverse consequences for the applicants' interests in the Bras d'Or Lakes fisheries, migh lead to the same conclusion as reached by the consultant retained by LNG, that is, that the interests in fisheries in the Lakes were not likely to be affected by the project. If so, the decision will be reached by those acting for the Crown who have the responsibility, on behalf of Her Majesty, to the Mi'kmaq people. It would not simply leave tl matter as determined by a private third party who has no authority or responsibility to act on behalf of Her Majest in considering the fiduciary duty here owed.

It was urged for the applicants that under the CEAA, they, as representatives of Aboriginal peoples, have a specia role in the environmental assessment process, as a result of the Act itself and the fiduciary duty owed to them. I a not persuaded of this. Nevertheless, it is clear that the CEAA requires assessment of any effect of environmental change on the current use of their interests in the fisheries in the Bras d'Or Lakes for traditional purposes. That assessment, in so far as change is assessed as affecting those interests, protected under subsection 35(1) of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]], requires the application of tests set out in *R. v. Sparrow*, *supra*. In some circumstances, the Act and any relevant regulations may well be subject to requirements outlined in the recent decision of the Supreme Court in *R. v. Adams*, 1996 CanLII 169 (SCC), [1996] 3 S.C.R. 101, but in this case, no issue is raised about the validity or the application of the CEAA.

(c) Fairness and Legitimate Expectations

Finally, in regard to procedural fairness, the applicants contend the doctrine of legitimate expectations is here applicable. That doctrine is described by Sopinka J. in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170, at page 1204 as:

. . . an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision o public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The Court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.

For the respondent Ministers, it is urged there was no express undertaking, and no regular practice in consideratio of screening reports, that a decision would not be made until after the meeting on July 16, when science-based concerns were to be discussed. The applicants urge that even without those factors, it was reasonable for them to have the expectation they did that no decision would be made before their concerns relating to scientific assessments were discussed. As already noted, those expectations arose, in part, from the grant of funding by DIAND for their independent studies, and from the assurances of Ministers of DFO and of Environment that their work would be important in the assessment, indeed, as indicated by the latter Minister in his letter of June 21, 199 that an ocean dumping permit would not issue before a report from the UNSI was considered. The meeting of July to address the applicants' concerns was unsatisfactory and three further steps were requested by the UNSI, two of which were met by the written responses to their findings and recommendations and by scheduling the meeting w DFO scientists. The third step, a further meeting with Regional Directors of DFO and EC, was not realized.

It is surprising, in light of the funding granted to the UNSI to undertake its independent review of the project, funding known to the Ministers concerned and to their involved officers, that no satisfactory comment on the UN study in relation to fish and fish habitat was provided, and the record shows no consideration of the other UNSI

studies undertaken and known to DFO and EC officers, before their decision to accept the screening report. Co-ordination of decisions within government, particularly when more than one agency is involved, is perhaps never easy, as this case exemplifies. In the field of environmental assessment, proper co-ordination is essential if the process is to generate any confidence among those who have interests affected by anticipated environmental change.

Nevertheless, in my opinion, the doctrine of legitimate expectations does not here apply. There is no statutory or regulatory process or practice that provides for a meeting, either to explore scientific concerns with government scientists or with Regional Directors General, and though both were requested by the applicants, neither was expressly held out as an undertaking by those acting for the Ministers. The Court has no basis for finding a legitimate expectation which would lead it to intervene to impose a procedural step to require a further opportunit for representations to be made, either to the DFO scientists or to the Regional Directors General. It is urged that th applicants were entitled to be informed of the "evidence" before those acting for the Ministers and to make representations in relation to scientific considerations included in that "evidence". The decision here in question is not typically judicial, rather it is an administrative decision to be made at the discretion of the Ministers concerne Even if the doctrine of legitimate expectations were here applicable, it would not support a finding that the applicants were entitled to more than an opportunity to make their own representations, to contribute to the materials before the Ministers. It would not be a basis to found a right to comment on all of the material or "evidence" provided for consideration of the Ministers.

REQUIREMENTS FOR ASSESSMENT UNDER THE CEAA

The applicants contend that in the decision to approve the screening report, the Ministers failed to comply with requirements under the CEAA to assess measures to be undertaken in mitigation of adverse effects as part of the screening process, and further, that they failed to conduct a careful and reasonable scientific assessment of the project, as the Act requires. In the latter regard, it is urged that the decision makers disregarded scientific advice before them and reached patently unreasonable findings. The respondents contest these arguments and urge that in light of the standard of review for the Court in these proceedings, it is not established that the findings and conclusions of the screening report were patently unreasonable.

In the first of these arguments, the applicants submit that at the time the screening report was accepted, not all mitigation measures had been determined or assessed. Rather, the report as accepted specifically provided that LN was to develop, for approval of DFO and EC prior to commencement of dredging, an environmental protection plan, a contingency plan and a dredged material disposal management plan. The implementation of operations wa to be monitored, and the implementation of the plans yet to be developed by LNG would ensure adverse effects were prevented and assessment predictions were evaluated.

The argument is based upon the Act, which provides that every screening study of a project shall include consideration of, *inter alia*, "measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects" (paragraph 16(1)(*d*), CEAA). Here the decision was made pursuant to paragraph 20(1)(*a*) of the Act, which provides that the responsible authority's decision is to be made "after taking into consideration the screening report", including "taking into account the implementation of any mitigation measures that the responsible authority considers appropriate".

Mitigation is defined in subsection 2(1) of the CEAA as meaning "in respect of a project, the elimination, reductio or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means".

Some mitigation measures were referred to, albeit briefly, in the screening report. For example, the creation of lobster habitat and compensation measures are foreseen as mitigating loss of lobster and invertebrate habitat at the dredging site, and the establishment of a monitoring program while work is in progress, to facilitate corrective action if significant schools of fish are perceived as delayed in migrating in the Great Bras d'Or Channel, is forese as mitigating noise and disturbance from dredging. The evidence also is, from affiants of EC and of LNG, that in the ongoing process of completing the screening study by LNG, there was considerable discussion of mitigating measures to deal with adverse consequences. Indeed, those were spoken of by government representatives at the July 5 meeting with the UNSI, perhaps with too much emphasis on mitigating measures, from the perspective of t UNSI representatives. It seems clear that possible mitigating measures were under consideration before the screening report was accepted on July 15.

Thus the applicants' argument, on the facts before me, would require that all the detail of mitigating measures be resolved and considered before acceptance of the screening report. I am not persuaded the CEAA requires that. Tl Act establishes a process for assessment of environmental effects. The process is ongoing and dynamic, with continuing dialogue between the proponent, the responsible authorities and often, as in this case, interested community groups. Dredging and ocean dumping of dredged material are well-known activities in Canadian wate even if they had not previously been undertaken at the site of the project in this case. Much was known of measur to mitigate adverse consequences of these activities generally, and the project was not approved by grant of the necessary permits until details of mitigation measures were worked out to the satisfaction of the responsible authorities.

My conclusion is that when the screening report was accepted on July 15, the responsible authorities knew enoug of the mitigating measures, even if final acceptable details had yet to be worked out by LNG, and it cannot be saic they failed to follow the procedures implied by the CEAA. The evidence is that they did take into account, in approving the screening report, the general mitigation measures they perceived as necessary to deal with the adve consequences foreseen, and they provided for approval of final detailed plans for mitigating measures before worl on the project commenced.

The applicants also urge that the Ministers were required to conduct a careful and reasonable assessment of the project in light of paragraph 4(*a*) of the CEAA which specifies, among other purposes of the Act, "to ensure that t environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them". I accept that standard as consistent with the purposes and the processes established by the Act.

Yet I am not persuaded that those acting on behalf of the Ministers failed to conduct a careful review, except for r addressing the current use of Bras d'Or Lakes fisheries by the Mi'kmaq people and thus failing to consider the fiduciary responsibility owed to that people. The applicants' claim that the statutory standard of care was not met i based on several factors. Thus, it is said there was no reasonable overall scientific review of the project, that certa critical information such as basic data concerning fish migration in the Great Bras d'Or Channel was not obtained, that certain advice from scientists was disregarded, including advice about fish habitat at one of the ocean dump sites, and advice about new lobster habitat was ignored. The written record, from DFO and EC files, includes E-mail messages recorded and filed, and it does reveal that some scientists consulted in the process were critical of aspects of the project and proposals made for monitoring and mitigating adverse consequences. The record reveal as well that key scientific officers, late in the day, appeared to recognize that their advice would have been clearer and more justifiable had they completed an overall scientific assessment, rather than simply arranging to provide comment as requested of individuals on particular aspects of the proposal.

There may well be lessons to be learned by scientists concerned about better arrangements for providing scientific advice in regard to environmental assessments of projects proposed in the future. If so, it would be unfortunate if differing views of scientists involved were masked in the process. It would be unusual if they did not have differi views, as the written record here reveals was the case.

Yet it must be remembered that the decision of the Ministers under the CEAA is not a scientific decision; it is a decision made in the exercise of judgment that takes into account appropriate scientific, economic, political and social considerations. In *Alberta Wilderness Assn. v. Express Pipelines Ltd.*, [1996] F.C.J. No. 1016 (C.A.) (QL), the Court of Appeal described the process under CEAA as follows [at paragraph 10]:

No information about the probable future effects of a project can ever be complete or exclude all possible future outcomes . . . . the principal criterion set by the statute is the "significance" of the environmental effects of the project: that is not a fixed or wholly objective standard and contains a large measure of opinion and judgment. Reasonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results without thereby raising questions of law.

The very nature of the decision means that in judicial review proceedings, the Court must inevita-bly defer to the statutory decision maker, unless persuaded that the decision is patently unreasonable, in the sense that it cannot rationally be justified in light of all the information available to the decision maker at the time of the decision. So long as there is information on which the decision could be rationally based, the Court will not intervene.

In this case, aside from considerations of procedural fairness, despite criticism of the role of scientists and the role of those who had responsibility to coordinate scientific advice and other information in the process of screening th project, including the very substantial study by LNG, I am not persuaded that the final conclusion here questioned that the project be approved subject to monitoring and mitigating measures, can be said to be patently unreasonab The applicants' critique of the scientific review of the LNG study, serious as it may be, is not persuasive that the ultimate conclusion on behalf of the Ministers should be set aside because the assessment of scientific information about the project was less than careful, as the CEAA requires of the assessment process.

CONCLUSION

As earlier stated, I find that those acting on behalf of the Ministers concerned failed to assess potential adverse effects of the project upon the use of fishery resources within the Bras d'Or Lakes by the Mi'kmaq people for traditional purposes, that is, for food. As earlier noted, that use has clearly been affirmed by the Nova Scotia Court of Appeal. It is an Aboriginal interest which those acting on behalf of Her Majesty have a fiduciary duty to protect from unwarranted adverse effects of the project, and I have found that those acting on behalf of the Ministers concerned failed to consider the fiduciary duty here owed. Those failures constituted unfairness in the process and errors in law.

For LNG it is urged that if the decisions approving the project are set aside, that would inevitably increase costs o the project, it would create liabilities for LNG without any benefit from the project, and it would create uncertainties that could jeopardize long-term prospects of the company and of its employees. Serious as those concerns are, in my view, they are not considerations which should lead this Court to decline to exercise discretio to set aside the decisions to approve the project, particularly where, as I have found, the responsible authorities failed to meet requirements under the CEAA to assess potential adverse environmental effects upon the use of fishery resources of the Bras d'Or Lakes for traditional purposes by the Mi'kmaq people.

Thus, an order issued in file T-1849-96, to set aside the primary decision of July 15, 1996, and to refer the matter for reconsideration, after further consultations with the applicants and the proponent LNG, and consideration of th potential adverse effects upon the current use of the fishery resources of the Lakes by the Mi'kmaq people represented by the applicants. In each of the other files, T-2005-96 and T-2006-96, orders were issued to set aside and suspend the decisions of July 22 and 29 respectively, pending review and reconsideration after reconsideratio of the primary decision to approve the environmental assessment screening report.

Reconsideration of the primary decision concerning the screening report should be undertaken in light of all information available at the time of reconsideration, not simply on the basis of information available on the record at July 15, 1996. If that review results again in approval of the screening report, which would then expressly inclu the assessment made concerning use of fisheries in the Bras d'Or Lakes by the Mi'kmaq people for traditional purposes, then subject to review of the terms on which the later approvals were granted so that any changes now indicated may be incorporated, then the suspended authorization issued by the Minister of Fisheries and Oceans may be reinstated by that Minister's approval, and the suspended permit issued by the Minister of the Environmen may be reinstated by that Minister's approval, in my view without the necessity of further advertising or other published formal notice.

The orders directed times for their becoming effective, unless counsel for the applicants, for the Ministers concerned, and for LNG agreed upon a different arrangement to serve the practicalities of ceasing dredging and ocean dumping operations.

The Minister of Fisheries and Oceans, as continuing lead responsible authority, is directed by the Orders, in consultation with the Minister of the Environment and LNG, to ensure continuing monitoring arrangements at the sites of drilling and ocean dumping, as may be determined by the Ministers to be appropriate, pending reconsideration of the environmental assessment screening report.

Finally, I direct that a copy of these reasons be filed in each of Court files T-1849-96, T-2005-96 and T-2006-96.