Union of Nova Scotia Indians v. Canada (Attorney General), 1996 CanLII 11847 (FC)

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Federal Court Reports
Union of Nova Scotia Indians v. Canada (Attorney General) (T.D.) 1996 CanLII 3847 (FC), [1997] 1 F.C. 325

T-1849-96

BETWEEN:

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

AND:

ATTORNEY GENERAL OF CANADA, representing the Minister of

Fisheries and Oceans for Canada and the Minister of the Environment for Canada

and **USG CANADIAN MINING LIMITED**, a body corporate carrying

on business under the name of **LITTLE NARROWS GYPSUM COMPANY**,

Respondents.

T-2005-96

BETWEEN:

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

AND:

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

BETWEEN:

UNION OF NOVA SCOTIA INDIANS, a body corporate,

CHAPEL ISLAND INDIAN BAND, ESKASONI INDIAN BAND,

MEMBERTOU INDIAN BAND, WAGMATCOOK INDIAN BAND, and

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Applicants

AND:

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.

REASONS FOR ORDER

MACKAY, J.:

These are three applications for judicial review, heard together on an expedited schedule, concerning decisions reached in regard to approvals on behalf of the Minister of Fisheries and Oceans and of the Minister of the Environment to accept as satisfactory, though subject to mitigation measures, an environmental screening report made under the *Canadian Environmental Assessment Act*, R.S.C. 1985, c. C-15.2 (enacted S.C. 1992, c.37) (the "*CEAA*" or the "Act") and decisions made in consequence of that acceptance by each of the Ministers.

After hearing counsel for the parties on October 1 and 2, decision was reserved to permit consideration of submissions then made in relation to the extensive record filed. On October 23, Orders issued to set aside the primary decision made on behalf of the Ministers concerned, and setting aside and suspending their respective decisions to approve permissions required by statute for the project to proceed, pending reconsideration after review of their primary decision to approve an environmental assessment screening report. These are Reasons for those Orders.

The decisions in issue, all interrelated, constituted the necessary environmental approvals for the respondent USG Canadian Mining Limited, a company carrying on business in Nova Scotia under the name Little Narrows Gypsum Company ("LNG) to proceed with a project known as the Middle Shoal Channel Improvement Project (the "project"). That undertaking, in the waters of the Great Bras d'Or, the northern approach and the largest navigational entrance to the Bras d'Or Lakes, seaward, off the northern shore of Cape Breton Island, involves dredging of the sea bottom to provide for a deepened channel over the Middle Shoal, and for disposal, at approved ocean dumping sites, of the material recovered by dredging.

LNG operates a gypsum mine at Little Narrows on the shores of the Bras d'Or Lakes and from there it ships raw gypsum and rock product to its markets, mainly by ocean-going vessels via the Lakes and into the Atlantic Ocean. The project at Middle Shoal, some 60 km from Little Narrows, is designed to permit LNG to load its charter cargo vessels above the 75% to 80% of capacity that natural draft limitations at the Middle Shoal have dictated in recent years.

The applicant Union of Nova Scotia Indians (the "UNSI" or the "Union") is a body corporate, constituted under the *Societies Act* of Nova Scotia. Its members are all the Mi'kmaq persons in Nova Scotia who are registered Indians and whose names are on Band lists. The others applicants are the five Bands of Mi'kmaq people resident in Cape Breton. All, except the Membertou Band with its reserve lands in Sydney, have reserve lands and their principal communities bordering on the shores of the Bras d'Or Lakes in Cape Breton. Those reserves are not in the immediate vicinity of the dredging or ocean dumping sites; they are located from 40 to 75 km from the dredging site as the crow flies.

The Mi'kmaq operate aquaculture facilities in the Bras d'Or Lakes, raising oysters and salmon, and the closest of those facilities to the dredging site is at Seal Island, about 10 km from the project. Mi'kmaq in Cape Breton have an aboriginal right to fish for food in the waters of the Bras d'Or Lakes and in the streams that empty into the lakes, a right recognized as existing, and not extinguished or surrendered, by Chief Justice Clarke, speaking for the Nova Scotia Supreme Court, Appeal Division, in *R. v. Denny et al*, (1990) 1990 CanLII 2412 (NS CA), 94 N.S.R. (2d) 253; 247 A.P.R. 253 (C.A.), following *R. v. Isaac*, (1975) 13 N.S.R. (2d) 460; 9 A.P.R. 460 (C.A.).

The applicants question three decisions: the decision to accept the environmental screening report approving the project, subject to monitoring its effects and mitigating foreseen adverse effects, and two subsequent decisions, on behalf of the Minister of Fisheries and Oceans to authorize works affecting fish habitat, and on behalf of the Minister of the Environment to permit dumping of dredged materials at sea. All decisions were made in July 1996.

The original application for judicial review, in file T-1849-96, filed August 12, 1996, sought orders to quash all three decisions and it also sought an interim stay of implementation of the decisions pending hearing and determination of the application. Work on the project commenced on August 20, 1996. The application for a stay was heard on August 29, 1996, when this Court dismissed that application on the ground that evidence then before the Court did not establish the likelihood of irreparable harm to the applicants if the stay were not granted, but they were subsequently to succeed in obtaining relief to set aside or quash the decisions. The Court did

establish an expedited timetable for the matter to be heard on its merits. Counsel were directed to consult on the question of the appropriate number of applications, in view of the *Federal Court Rule* 1602 (4) which provides for judicial review to commence by an originating motion "in respect of a single decision, order or other matter only ...". Subsequently, on September 9, 1996, the applicants filed applications in files T-2005-96 and T-2006-96, deemed to have been filed August 12, 1996, in accord with directions of the Court, and the three applications, concerning inter-related decisions, were heard together on the basis of a single record filed to support the three applications. I note that on the basis of evidence of LNG's Project Manager, dredging at the site was expected to be about 75% completed when these applications were heard at the beginning of October 1996, but it was still unfinished.

Specifically, these applications concern the following.

(i) In file T-1849-96, the decision in issue was jointly made on July 15, 1996, on behalf of the Minister of Fisheries and Oceans and the Minister of the Environment, under para. 20(1)(a) of the *CEAA*, which provides, with s-s. 20(2):

> **20.** *(1)* The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):
>
> (*a*) subject to subparagraph *(c)(iii)*, where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out and shall ensure that any mitigation measure that the responsible authority considers appropriate is implemented.
>
> [...]
>
> *(2)* Where a responsible authority takes a course of action referred to in paragraph *(1)(a)*, it shall, notwithstanding any other Act of Parliament, in the exercise of its powers or the performance of its duties or functions under that other Act or any regulation made thereunder or in any other manner that the responsible authority considers necessary, ensure that any mitigation measures referred to in that paragraph in respect of the project are implemented.

The impugned decision accepted the screening report, completed in relation to the project, as indicating that the project, taking into account mitigation measures considered to be appropriate, is not likely to cause significant environmental effects. While in its terms, the application originally filed also referred to the two other decisions in question, since those were each the subject of applications filed subsequently, the Court considers the application in T-1849-96 to be now limited to the decision made on July 15, 1996, on behalf of both Ministers.

(ii) In file T-2005-96, the decision in issue is that made on behalf of the Minister of Fisheries and Oceans on July 22, 1996, in consequence of the earlier decision on July 15, 1996, to allow LNG to proceed under an *Authorization for Works and Undertakings Affecting Fish Habitat*, issued pursuant to s. 35(2) of the *Fisheries Act*, R.S.C. 1985, c. F-14. S. 35 provides as follows:

> **35.** *(1)* No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
>
> *(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.

(iii) In file T-2006-96, the decision in question is that made on behalf of the Minister of the Environment on July 29, 1996, by issuing to LNG an *Ocean Dumping Permit*, pursuant to Part VI

of the *Canadian Environmental Protection Act*, R.S.C. 1985, c. C-15-3 (enacted S.C. 1988, C. 22), s. 71 of which reads, in part:

> **71.** *(1)* Subject to subsections *(2)* and *(3)*, the Minister may grant any permit required by this Part on receipt of an application
>
> *(a)* in the prescribed form;
>
> *(b)* containing such information as may be prescribed or required by the Minister for the purpose of taking into account any factor referred to in subsection 72(1);
>
> *(c)* accompanied by the prescribed fee; and
>
> *(d)* containing proof that notice of the application was published in a newspaper of general circulation in the vicinity of the loading, dumping or disposal described in the application.
>
> [...]
>
> *(3)* No permit may be granted in respect of any substance unless, in the opinion of the Minister,
>
> *(a)* the substance is rapidly rendered harmless by physical, chemical or biological process of the sea and does not render normally edible marine organisms inedible or unpalatable or endanger human health or the health of animals;
>
> [...]

I note that the *CEAA, Law List Regulations*, SOR/94-636, prescribe certain statutory provisions, including s-s. 35(2) of the *Fisheries Act* and s-s. 71(1) of the *Canadian Environmental Protection Act*, as conferring powers, duties or functions the exercise of which requires an environmental assessment. In this case, there is no dispute that the LNG project required an authorization from the Minister of Fisheries and Oceans under s. 35(2) of the *Fisheries Act* and an ocean dumping permit under s-s. 71(1) of the *Canadian Environmental Assessment Act*, and further that both the authorization and the permit were dependent upon a satisfactory environmental assessment. I note also that in addition to those two Ministers primarily concerned, the Atlantic Canada Opportunities Agency ("ACOA") was also a party to, and signed as accepting, the environmental screening report. That agency was involved in financial assistance or guarantee in relation to the project, and pursuant to s. 5 of the *CEAA*, it was obliged to approve the environmental screening report.

In this case, with three federal offices or agencies involved, the Department of Fisheries and Oceans ("DFO") undertook the role of lead responsible authority under the *CEAA*, assuming responsibility for establishing requirements for the environmental screening assessment and report, and for coordinating the assessment process. In that process, DFO and Environment Canada ("EC"), acting on behalf of their respective Ministers, were the principal responsible authorities and as noted, DFO took the lead responsibility, acting under the Habitat Management Division of its Science Branch.

GENERAL BACKGROUND

LNG has operated for more than 40 years at Little Narrows, providing stable employment for more than 100 person years annually. In recent years, however, its market share, particularly in its principal markets in the United States, is said to have been reducing. It's concern is that unless it can ship its product more efficiently and economically, by fully loaded ocean-going carriers, it will be forced to close its operations at Little Narrows in a few years. Its interest in the Middle Shoal Project was settled in early 1995 when it developed a business plan that established, in its view, the significance of the project for its future. Preliminary discussions were held with representatives of

local groups as early as the spring of 1995, and discussions with governments in the course of that year apparently led to commitment of financial support for the project by the federal and, perhaps, the provincial governments.

In August 1995, LNG representatives had their first discussions with representatives of the federal agencies concerned. It was determined that the environmental assessment required under the *CEAA* would be met by a screening based on assessment of the environmental effects to be undertaken by LNG and submitted to DFO, the lead responsible authority, which would then provide a screening report. LNG retained independent consultants to undertake the studies necessary for its assessment. In September 1995, some of the consultants representing LNG initiated their first direct discussions with representatives of the applicant Union and thereafter, in December of 1995 as well as February, April and July of 1996, representatives of the Union and of LNG met on at least seven occasions, in addition to exchanges of correspondence and telephone conversations.

On December 22, 1995, LNG completed and submitted to DFO its study "Environmental Review and Approval Submission for ... Middle Shoal Channel Improvement Program (Screening Study)". Thereafter, further reports were submitted and modifications were made to the project proposal in the course of regular discussions with DFO and with others, including fishers who fish in the vicinity of the dredging and dumping operations. Indeed, with the fisher group, LNG arranged for compensation and for use of the services, in the course of the project, of those fishers whose abilities to fish were considered to be limited by the dredging and dumping activities.

A copy of the LNG study was provided to the applicant Union. On February 19, 1996, the President of the Union wrote jointly to the Ministers of Fisheries and Oceans and of the Environment, communicating to them that "Mi'kmaq communities that live along the Bras d'Or Lakes have serious concerns about the potential impact of [the] project upon their resources". The UNSI requested that an independent environmental and socio-economic impact study be completed to assess the project's impact upon First Nations, and they also requested that the Ministers' departments delay any approvals until the Union had a full and fair opportunity to determine the potential impact on First Nations communities. Enclosed with that letter to the Ministers was a resolution of February 1, 1996, by the UNSI, expressing *inter alia* the Union's opposition to the dredging of the Middle Shoal Channel "until a full environmental and social/economic impact study is completed by an independent consulting firm acceptable to the union...".

The Union applied for and received, early in March 1996, from the Department of Indian Affairs and Northern Development ("DIAND"), the sum of $15,000 to undertake a study of the potential impact of the project on Mi'kmaq interests in the Bras d'Or Lakes area. When it wrote to advise the Union of funding for its study, DIAND also wrote to Mr. R.K. Sweeney, the responsible officer in DFO's Habitat Management Division, to outline DIAND's position concerning the project, confirming its funding of the Union's study and reiterating the latter's concerns. DIAND's mandate was said to be to ensure protection of reserve lands and interests by working in partnership with First Nations so that all potential environmental impacts on reserve lands are addressed.

The Union commissioned three studies. The first of those to be completed, in April 1996, was a report to the Union by independent consultants, entitled "Independent Examination of the Environmental Review of the Middle Shoal Channel Improvement Program: Fish and Fish Habitat Component". That was provided to DFO in May and was forwarded to both Ministers principally concerned, by letter dated June 5, 1996. With that letter, the Union included a summary of some 20 Findings and Recommendations concerning the project, and stated it would welcome an opportunity to discuss those findings and recommendations with the Ministers' officials at their earliest convenience.

The letter of February 19 to the two Ministers, referred to earlier, was replied to by the Minister of Fisheries and Oceans on March 22, 1996. The Minister referred to concerns of his department that the risk of impact on fish and fish habitat of the Bras d'Or Lakes and the aquaculture industry be addressed in the environmental review process underway in accord with *CEAA*, and that "under CEAA, an environmental review must be completed before irrevocable decisions are made, and your independent study will form part of that review". The Minister of the Environment replied to the letter of February 19, by letter dated June 21, which was received by the Union on July 2, 1996. In that letter, the Minister said:

> The Mi'kmaq have a long history of utilizing the lands and waters of the Bras d'Or Lakes and continue to rely on its resources today. Understanding your concerns, therefore, is fundamental to our review of this proposed project.
>
> [...]
>
> [...] Under the Act [i.e. the *CEAA*], a review of potential environmental effects includes related effects on the current use of lands and resources for traditional purposes by First Nations peoples, as well as features of historical and archeological significance.
>
> [...]
>
> [...] the understanding was that the Union of Nova Scotia Indians would be receiving funds from the Department of Indian and Northern Affairs to further develop its position on the project, and that my department would not issue the Ocean Dumping Permit before considering their report. For its part, the Union of Nova Scotia Indians agreed that its work would be carried out in a reasonable time period and that its specific comments on the proponent's Environmental Review will be provided to the relevant government departments for consideration as soon as possible.
>
> I fully support the approach worked out between Mr. Christmas and Mr. Bangay to incorporate the concerns of the Mi'kmaq First Nation in the environmental assessment of the proposed dredging project. [...]

EVENTS LEADING TO APPROVAL OF THE SCREENING REPORT AND THE ISSUANCE OF PERMITS AND COMMENCEMENT OF PROJECT

On July 3, 1996, the Regional Manager, Environmental Projection, DIAND, wrote to DFO, commenting upon a draft of a screening report, to ensure that there was no reference to DIAND being part of the consultation and approval process for the screening report on the project. The letter notes that DIAND requested DFO to consult directly with the First Nations having interests in the Bras d'Or Lakes and DIAND's position was that "First Nations stakeholder concerns must be addressed" and that it was understood DFO intended to meet with the Union to discuss their recommendations and findings.

There was a meeting on July 5, of officers concerned and the Regional Directors General of DFO and Environment Canada with Union representatives and their consultants who had completed the fish and fish habitat study and an oceanographic study. The UNSI group arrived, expecting that their independent report and their 20 findings and recommendations would be discussed, and their concerns addressed. That anticipation was not realized to their expectations. It was clear that a draft of a screening report had already been prepared by government officials and that the government representatives were prepared to discuss the Union's concerns, insofar as they were perceived to be related to the project, only in terms of how they could be addressed through mitigation measures. After a morning of discussions that appear to have been unsatisfactory for all parties, the Union representatives did not return in the afternoon following lunch. Instead, one of their representatives returned and on their behalf, requested three things: that DFO and Environment respond to the

Union's findings and recommendations in writing, that a meeting be arranged for them with DFO scientists to discuss the scientists' assessments of the project and of the UNSI recommendations, and that thereafter, they have a further opportunity to meet with DFO and EC Regional Directors General. The Union representative is said to have understood that DFO and EC agreed to meet those requests, but it seems clear that there was not then or later an express undertaking to do so.

On July 10, the President of the Union received an undated letter from the Minister of Fisheries and Oceans, acknowledging receipt of the June 5, 1996, correspondence. He noted that officials from DFO had met with LNG and discussed the 20 issues raised by the Union. Those issues concerning oceanographic, fisheries and fish habitat matters were under examination by DFO, while those concerning community consultation and socio-economic aspects would be left for LNG and the UNSI representatives to discuss in continuing direct consultations, an approach supported by DFO which encouraged LNG to accommodate Union concerns. In thanking the UNSI for its contribution, the Minister wrote: "Your professional approach and timely input will help to ensure all potential impacts are examined".

Also on July 10, there was a meeting between UNSI and LNG representatives, to discuss matters of concern to the Union. A representative of each of DFO and EC were in attendance. The meeting apparently went reasonably well, but no definite results from the meeting appear in the record before the Court.

On July 12, three events occurred. In the morning, DFO confirmed arrangements for the requested meeting of DFO scientists with Union representatives, then scheduled it for the afternoon of Tuesday, July 16. Also in the afternoon of July 12, the officers concerned with the environmental assessment completed their drafting of responses to the 20 findings and recommendations of the UNSI and those responses were sent by fax to the Union, by 4:00 or 4:30 p.m. They were sent under cover of a letter from the Regional Director DFO,said to be on his own behalf and for his counterpart at EC, which letter noted "We will be pleased to discuss these matters further during your meeting with our scientists ... early next week". Thereafter, before the afternoon ended, officers of both departments agreed that they had completed the draft screening report and would send it by fax for consideration, and possibly for signature by the ACOA representative on the following Monday, July 15.

At some time between July 12 and 14, the Union forwarded to DFO a copy of a study of the socio-economic impact of the project upon interests of the Mi'kmaq Bands, but this does not appear to have been the subject of discussion within government circles as the UNSI report concerning fish and fish habitat was, albeit without response, in the case of the latter document, until the letter of July 12 dealing with the UNSI concerns.

On July 15, in turn, ACOA, Environment Canada and DFO representatives, including for the latter two the principal officers responsible for the screening study and the Director General of each, signed the screening study. The principal decision of the study, certified by the signatories as a summary of the results of an environmental assessment of the project "performed and completed by the Responsible Authorities in accordance with the *Canadian Environmental Assessment Act*" is that "the project [taking into account appropriate mitigation measures] is not likely to cause significant adverse environmental effects " project can be supported. Section 20.1(a)".

The report makes reference to public consultations with the community, commercial fishermen, public interest groups and with reference to the First Nations, the report states:

> Discussions between the proponent and First Nation interests began in the fall of 1995 and are continuing. In terms of the project under review, First Nations have concerns with siltation,

changes to currents in the area of the project, and release of contaminants all attributable to dredging and ocean disposal activities. Resulting potential impacts identified relate to fish, fish habitat, fish migration, changes to oceanographic conditions and socio-economic effects. The Union of Nova Scotia Indians commissioned three independent studies of the project. the Fish and Fish Habitat study and the Union's findings and recommendations were submitted to Department of Fisheries and Oceans and Environment Canada and have been considered in the assessment of the project. Representatives from both departments met with the Union on July 5, 1996 to discuss the project. On July 12, 1996 the Union was provided with a written response to its findings and recommendations.

The Union of Nova Scotia Indians also identified a number of concerns related to ballast water exchange; current and proposed activities at Little Narrows Gypsum Company's mine site and shipping terminal; and the need for dredging the shipping channel within the Bras d'Or Lakes. These activities fall outside the scope of this assessment but were addressed in the July 12, 1996 Environment Canada/Department of Fisheries and Oceans response to the Union.

The screening report summarises potential changes in the environment caused by the project and summarizes mitigation measures which the report indicates will successfully address those changes and any significant adverse effects. Included in the summary of the screening report are the following entries, here tabulated differently than in the report, of certain valued ecosystem components expected to be affected by the project.

Component	**Potential adverse effect - *Significance***
marine waters:	siltation of water column and seabed - *significant*
fish and fish habitat:	direct loss of lobster and other invertebrate habitat within t he section of the ocean bottom to be dredged - *significant*
fish migration:	noise and disturbances resulting from dredging will interfe re with the migration of fish - *significant*
current use of lands and resources f or traditional purposes by aborigina l persons:	changes to marine waters, fish habitat, and fish migration could adversely impact aboriginal use of marine resources - *insignificant*

For all of these components, the effects are classified as insignificant after mitigation.

The report also notes that generally described mitigation measures will be implemented as conditions of the authorization for works affecting fish and of the permit for ocean dumping. Included among those measures were requirements for LNG to prepare an environmental protection plan, a contingency plan and a dredged material disposal plan, all subject to approval by DFO and EC prior to commencement of dredging. Commercial fisherman, it is said, will assist in the development and implementation of the plans and the UNSI will be invited to participate. The operations, when underway, were to be monitored by DFO, EC and commercial fishermen, and the UNSI was to be invited to participate in monitoring activities. The screening report had appended to

it drafts of the Authorization for Works or Undertakings Affecting Fish Habitat, to be issued by DFO, and of the Ocean Dumping Permit, to be issued by EC.

LNG was informed of the approval of the screening report on July 15. The UNSI was not then informed. On July 16, representatives of the applicants, along with their consultants, met with scientists and others from DFO and EC. Before UNSI representatives arrived for the meeting, all government representatives in attendance were informed that the screening report had been approved the previous day. The representatives of the Union and other applicants were not informed before or during the meeting. In the course of the meeting, among other matters, representatives of the applicants are said, by affidavit of Daniel Christmas, to have made specific inquiries about migration of certain fish species and the impact of dredging at Middle Shoal, which led to undertakings by DFO to provide information, but those undertakings were not fulfilled.

Only after the conclusion of the meeting on July 16 were the representatives of the UNSI informed that the screening report had been approved the previous day. Two of the applicants' representatives were provided, after the meeting, with a copy of the screening report signed on July 15, and they were informed (presumably, if the conditions of further satisfactory reports were subsequently met), that the authorization and permit for the project to proceed would be granted after notice of the latter permit was published in the Canada Gazette on July 20. That was a surprise to the applicants' representatives, who had believed that the meeting on July 16 was to consider fisheries and environmental concerns and that the merits of granting the authorization and the permit required were still under consideration. In fact, the final decision had been made on July 15, and thereafter, there was no opportunity to be heard on the merits of the project. Approval of the authorization and the permit was dependent only upon satisfactory plans for mitigating against anticipated adverse environmental effects of the project.

After the meeting on July 16, one of the fisheries scientists in the Science Branch of DFO informed those responsible in his own department for the screening report that one of the proposed disposal sites, Site A (revised), was located in an area that his earlier studies indicated was a juvenile cod nursery area and a lobster migration route. That information led to modification of the draft Authorization for Works and Undertakings Affecting Fish Habitat to include a brief stipulation referring to the identification of fish rearing and migration in the area and that restrictions on the use of Site A (revised) might be imposed, dependent on the results of pre-dumping biological surveys designed to detect the presence of the species found earlier in the region. In addition, dumping at Site A (revised) was restricted by terms of the dredged material disposal plan, which was approved before the Ocean Dumping Permit later issued. That same information subsequently came to the attention of the UNSI and the applicants point to its earlier oversight by DFO as indicative of failure to consider all the evidence available before approval of the screening report. Interestingly, one of the consultants for LNG was aware of the earlier studies which he discounted in his report to LNG for various reasons, though he is not a fisheries science specialist.

The following is a brief chronology of other events, after July 16.

" On July 22, 1996, the UNSI received a letter from the Minister of the Environment, dated July 15, 1996, acknowledging the letter of June 5, 1996, and assuring that the Union's findings and recommendations, as well as its independent evaluation of the environmental review of the project "will be included in Environment Canada's study of the proposed project". The letter, drafted for the Minister before the end of June, included reference to his understanding that DFO and Environment Canada would be meeting with Union representatives to discuss their concerns, an understanding, said to be related, when the letter was drafted, to the meeting of July 5.

" On July 22, 1996, the Regional Director General, DFO, signed the Authorization for Works or

Undertakings Affecting Fish Habitat in relation to the project, pursuant to s-s. 32(2) of the *Fisheries Act* ; the authorization as signed included the modification noted above about site A (revised) for disposal of dredged material.

" On July 29, 1996, after notice of intent to grant an Ocean Dumping Permit for the project was published in the Canada Gazette on July 20, the permit for this project was signed by the Regional Director General of Environment Canada, pursuant to the *Canadian Environmental Protection Act* . The permit is the same as the draft earlier appended to the approved environmental screening report. It required submission to Environment Canada of the mitigation plans identified as required in the screening report, i.e. an environmental protection plan, a contingency plan, and a dredged material disposal plan, all to be submitted and adjudged satisfactory by Environment Canada before dredging began. Development of those plans was undertaken by LNG with ongoing consultations with DFO and Environment Canada, and with commercial fishermen. The UNSI declined to participate in that process. Discussions continued between LNG and departmental officers, and the required reports were submitted to the satisfaction of EC.

" On August 12, 1996, the applicants filed their original application for judicial review and their request for an order staying implementation of the decisions made,pending the hearing of the application for review.

" On August 14, 1996, LNG concluded its contract arrangements for dredging and for ocean dumping.

" On August 20, 1996, LNG completed its submissions of required mitigation plans and that evening, it commenced dredging operations subject to a variety of arrangements for monitoring the dredging and dumping process as work proceeds.

" On August 29, 1996, as earlier noted, the application of the UNSI and the five Bands for a stay was heard and it was dismissed, but an expedited schedule for an early hearing was directed.

Both at the earlier hearing on the application for a stay and when this matter was heard, the applicants objected to affidavit evidence of the respondents' officers and consultants insofar as that evidence concerns events after approval of the screening report and the granting of the authorization and permit. That evidence concerned observations of LNG's consultants and some officials of the departments principally involved, relating to observations made in the course of ongoing operations and monitoring. Those observations were said to be supportive of the mitigation measures adopted, and of the decisions made. I agree with the applicants that evidence of events after the decisions were made is of no direct significance for the issues here raised.

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 accept, subject to mitigation measures, the screening report when meetings were arranged for the following day to discuss matters with DFO scientists. The issue of procedural fairness is said to have special significance in this case because of the status of the Mi'kmaq, as represented by the applicants, as aboriginal 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 case, and the respondents deny that the doctrine of legitimate expectations is applicable to the circumstances in this case.

The second basic issue raised is whether the assessment process here followed met the requirements and the standard applicable under the *CEAA*, 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 unfairness 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, with a meeting arranged for July 16 with science personnel of DFO for the UNSI to seek 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 with 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 made 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 for which they had not received any information to resolve their concerns. To be informed only after that meeting that 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 to undertake an independent review with the assistance of consultants, it had received encouraging responses from the Ministers of DFO and of EC, and general assurances of the importance of UNSI involvement in the assessment process. Yet the decision was made before the 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 writing on Friday, July 12. The record reveals that the findings and recommendations were discussed by DFO with LNG representatives in mid-June and towards the end of that month, within DFO, by 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 oceanographic 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 resolution 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 those 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*, supra. 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 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 para. 16(1)(a) that "every screening ... study of a project ... shall include a consideration of the following factors: (a) the environmental effects of the project ..." Under s-s. 2(1), the Act defines "environmental effect" as meaning "any change that the project may cause in the environment, including any effect 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, received 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 Channel Improvement Program: Potential Impacts on Inlake Fish and Fisheries*, which does deal with fisheries in the Bras 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 is based. The LNG report reviews some of the major species of interest in the inlake fishery, and it refers to concerns 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 monitoring 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 use 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 Use 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. Moreover, 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 opinion, 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 in the screening report of the Ministers concerns migration of fish at the dredging site. For that migration of species in 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 it if was addressed by LNG, that use of resources is not specifically addressed in the screening report, or otherwise by DFO and EC assessors. In my view, it is essential that the responsible authorities under *CEAA* address directly the matters included in "environmental effects" as defined in s-s. 2(1) of the Act. It may be that, if reviewed, the result would be as set out in the table of the report, that is, that the potential impact would be considered insignificant, but that cannot 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, but 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 owed to the Applicants by Her Majesty the Queen in right of Canada by not providing the Applicants a fair opportunity to 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/or otherwise ensuring that the environmental screening decision, the authorization, and the permit are consistent with 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 timetable for the hearing.

One of the principal purposes for the proposed amendment was said by counsel for the applicants to be to invite the 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 definition of "responsible authority", to ensure that an environmental assessment is satisfactorily completed, within ss. 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 assessment process and thereafter. It may be that within the public service, at least on this occasion, the perception was that the sole responsibility for discharge of that duty was that of DIAND. Only insofar 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 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, 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*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075 at 1111-1119; 70 D.L.R. (4th) 385 at 411-417.

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, might 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 the matter as determined by a private third party who has no authority or responsibility to act on behalf of Her Majesty in considering the fiduciary duty here owed.

It was urged for the applicants that under *CEAA*, they, as representatives of aboriginal peoples, have a special role in the environmental assessment process, as a result of the Act itself and the fiduciary duty owed to them. I am 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, insofar as change is assessed as affecting those interests, protected under s-s. 35(1) of the *Constitution Act, 1982*, 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 *Adams v. Her Majesty the Queen et al*, unreported, Supreme Court file 23615, dated October 3, 1996, 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 Residence Assn. Inc. v. City of Winnipeg*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170 at 1204, as

> ... an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a 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 consideration 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, 1996, that an ocean dumping permit would not issue before a report from the UNSI was considered. The meeting of July 5 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 with 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 UNSI 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 opportunity for representations to be made, either to the DFO scientists or to the Regional Directors General. It is urged that the 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 concerned. 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 LNG 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 was 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 environmental effects" [para. 16(1)(d), *CEAA*]. Here the decision was made pursuant to para. 20(1)(a) of the Act, which provides that the responsible authority's decision is to be made "after taking into account the screening report", including "taking into account the implementation of any mitigation measures that the responsible authority considers appropriate".

Mitigation is defined in s-s. 2(1) of the *CEAA* as meaning "in respect of a project, the elimination, reduction 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 foreseen 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 the UNSI representatives. It seems clear that possible mitigating measures were under consideration before the screening report was accepted on July 15.

Thus the applicant's 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. The 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 waters, even if they had not previously been undertaken at the site of the project in this case. Much was known of measures 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 enough of the mitigating measures, even if final acceptable details had yet to be worked out by LNG, and it cannot be said 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 adverse consequences foreseen, and they provided for approval of final detailed plans for mitigating measures before work 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 para. 4(a) of the *CEAA* which specifies, among other purposes of the Act, "to ensure that the 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 not 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 is based on several factors. Thus, it is said there was no reasonable overall scientific review of the project, that certain 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 reveals 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 differing 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.*, unreported, Court files A-494-96 *et al*, July 24, 1996; (1996) 1996 CanLII 12470 (FCA), F.C.J. No. 1016 (F.C.A.), the Court of Appeal described the process under *CEAA* as follows:

> 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 inevitably 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 the 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 unreasonable. 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 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 of 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 discretion 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 the 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 reconsideration 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 include 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 Environment 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.

W. Andrew MacKay

J U D G E

O T T A W A, Ontario

October 29, 1996.