SUPREME COURT OF NOVA SCOTIA

Citation: ***Parker Mountain Aggregates Ltd. v. Nova Scotia (Environment)*****, 2011 NSSC 134**

Date: 20110408
Docket: Hfx No. 324761
Registry: Halifax

Between:

Parker Mountain Aggregates Limited

Appellant

v.

Nova Scotia (Minister of Environment),
Angela Vroom, Kurt Daye, Rhonda Day and Mark Akin

Respondents

Judge:	The Honourable Justice M. Heather Robertson
Heard:	October 14 and November 16, 2010, in Halifax, Nova Scotia
Written Decision:	April 8, 2011
Revised Decision:	The text of the original decision has been corrected according to the erratum dated May 4, 2011. The text of the erratum is appended to this decision
Counsel:	John A. Keith and Ezra B. van Gelder, for the appellant, Parker Mountain Aggregates Limited Darlene Willcott, for the respondent, Nova Scotia (Minister of Environment) Jason T. Cooke and Tiffany Robertson, articled clerk, for the respondents, Angela Vroom, Kurt Daye, Rhonda Daye and Mark Akin

Robertson, J.:

[1] The applicant Parker Mountain Aggregates Limited ("PMAL") appeals under s. 138 of the *Environment Act* from the decision of the Honourable Sterling Belliveau, in his capacity as Minister of the Environment under the *Environment Act*, upholding Nova Scotia Environment's decision to:

1. Issue a renewal to PMAL in respect of an operating quarry for one month rather than ten years as required under the enabling legislation and governing regulations; and

2. Suspend the approval given to an operating quarry without authority or justification.

[2] On November 23, 2009, PMAL appealed the Nova Scotia Department of Environment's ("NSE") decision in which *inter alia*:

1. Failed or refused to issue an approval for a quarry for the prescribed ten-year period where that quarry already was operating under a valid approval; and

2. Improperly suspended the approval given to an operating quarry by a stop-work order dated October 30, 2009.

[3] The appeal was made to the Minister of Environment pursuant to the provisions of the *Environment Act*. On January 25, 2010, the Minister of Environment issued his decision, which is now the subject of this appeal.

[4] The grounds of appeal are as follows:

> 1. The Minister acted without authority or jurisdiction by failing to overturn the decisions and the actions of the Administrator under appeal and, further, by failing to issue an approval for ten years in accordance with section 56 of the *Environment Act* and sections 11(1) - (3) of the Approvals Procedure Regulations established under that statute.
>
> 2. The Minister failed to comply with the requirements of natural justice and procedural fairness when, prior to reaching a final determination, he:

(a) failed to give adequate notice of the issues and concerns being considered;

(b) failed to give adequate disclosure of the information considered and relied upon, including any information or recommendations arising from or related to an investigation conducted on the Minister's behalf; and

(c) failed to provide PMAL with an opportunity to respond to any issues and concerns being considered.

3. The Minister erred in fact and law by:

(a) concluding that PMAL was operating outside the approved active area by relying on supporting documentation previously considered insufficient by Nova Scotia Environment;

(b) failing to consider supporting documentation previously deemed necessary for identifying the approved active area pursuant to section 5(1)(e) of the Approvals Procedure Regulations;

(c) failing to consider the lack of any adverse effects related to the active area of PMAL's quarry operations, as approved by Nova Scotia Environment in Approval #2009-068511 issued on August 24, 2009 and extended on September 24 and October 23, 2009, when issuing a stop work order on October 30, 2009;

(d) suspending PMAL's quarry operations without any evidence or notice of adverse effects; and

(e) otherwise confirming an arbitrary and flawed exercise of discretion outside of the policy and objects of the *Environment Act* and its regulations.

[5] The appellant seeks the following order:

1. Renewing Quarry Approval #2009-068511-RO2 for a period of ten (10) years based on the legal surveys prepared by Everett Hall, N.S.L.S.;

2. Forthwith rescinding the suspension of Approval #2009-068511-RO2 imposed October 30, 2009;

3. Reimbursing PMAL for legal fees and other costs associated with initiating and prosecuting the within appeal; and

4. For such other and further relief as the circumstances of the appeal may warrant.

Background

[6] PMAL acquired lands known as the "Bloomington Lands" in Annapolis County, Nova Scotia, in 1997 for the purpose of operating a quarry and for the production of asphalt.

[7] PMAL filed its original application for quarry approval under the *Environmental Act*, S.N.S. 1994-95, C.1 (the "*Act*") on March 25, 1999. It can be found at Appeal Book, Volume II, Tab 1.

[8] The approval was granted August 24, 1999 but PMAL was required to provide NSE with "a legal property boundary survey outlining the area of the site . . . within two calendar months from the date of the issuance of the approval." See condition 2(j) of the 1999 approval (Appeal Book, Volume II, Tab 4).

[9] PMAL says that the 1999 approval neither specified any particular active area for the proposed quarry nor referenced any document designating a particular active area. They say that, after ten years of inactivity at the site, PMAL finalized the precise location of its proposed quarry and provided a survey defining the final location of that active area on August 4, 2009. (The Hall Survey, Appeal Book, Volume I, Tab B-3 dated July 30, 2009.) In its February 18, 2009 application for renewal of the approval the applicant advised that there had been no change in the site and no new acres had been opened up.

[10] However, it is the NSE's position that pursuant to the *Pit and Quarry Guidelines*, certain separation distances were in fact observed in 1999 before the approval was originally granted, based on information provided by PMAL to NSE, shown on plans dated July 6, 1999, Plan No. 99-100, Plan No. 99-002 and Plan No. 99-103, all on file with the NSE (Appeal Book, Volume II, Tab A).

[11] The *Guidelines* provided:

> No quarry excavation shall be closer than:
>
> In the case of a quarry, eight hundred (800) metres (0.5 mile) from any property in or restricted to residential use.
>
> * (or less with the written permission of adjacent land owners).

[12] Submitted with the original application were the consents of five property owners who resided within 800 metres.

[13] It is NSE's position that these plans formed the basis of the original representations for the approval granted in 1999.

[14] They say:

> Plan No. 99-100 depicted contour (elevation) information. Plan No. 99-002 showed the area where the quarry was to start as well as the stockpile and crushing site. Plan No. 99-103 showed the finished grade following reclamation of the quarry. *Appeal Book, Volume II, Tabs B, C, D*
>
> In an undated letter that was submitted in conjunction with the plans noted in paragraph 12, the Appellant wrote that the "active area" was approximately 43,500 square feet. The size of the active area is significant as quarries larger than four hectares are subject to registration under the Environmental Assessment Regulations. The Appellant indicated the overburden would be pushed from the "active area" as indicated on the site plan. He also pointed out the pit road would enter as shown on the drawing. The Appellant noted that all material crushed would be stockpiled as shown on the site plan. *Appeal Book, Volume II, Tab 2*
>
> Based on the above, Robert Rowe, an engineer with the Department of Environment on July 15, 1999 filed a report recommending approval of the Appellant's quarry, subject to terms and conditions. Attached to his report is a LRIS map showing the proposed area for the quarry. *Appeal Book, Volume II, Tab 3*
>
> On August 24, 1999 the Department issued Approval #99-IAW-106 for 10 years from the date of issuance. One of the conditions, namely Condition Section 2(j) of the Approval required the Appellant to submit a legal survey within two months of the approval. A legal survey containing the required information was never submitted. The condition to provide a legal survey plan within two months was never waived by the Department of Environment. *Appeal Book, Volume II, Tab 4*

[15] There is a certain logic to the respondent’s position, because had the separation distances not been determined why would local residents give consents in 1999 and then withdraw them in 2009. (Appeal Book, Volume II, Tab 8A)

Defining the Active Area in 2009

[16] Local residents, who are the respondents in this proceeding, observed activities at the quarry as PMAL commenced drilling a number of test holes and loading them with explosives. The respondents who had ten years earlier consented to the quarry operation alleged that the location of the quarry had now been changed by PMAL and was now much closer to their homes. The respondent Angela Vroom wrote to the Minister by letter dated July 24, 2009 and included in her correspondence what will be called the Vroom Plan (Volume II, Tab 3) dated July 6, 1999, showing the preliminary and proposed location of the quarry. This plan was already in the possession of the NSE, as were the other plans referred to herein.

[17] In receipt of the letter of complaint from the resident respondents, the NSE convened a meeting of the interested parties on August 4, 2009.

[18] At that meeting the NSE also had in its files a hand drawn sketch prepared ten years earlier showing the proposed site of the quarry (Appeal Book, Volume III, Tab 4). However, it was date stamped "August 4, 2009" as though received on that date, although it is clearly a ten-year old sketch dated July 6, 1999 with the title "Finished Quarry."

[19] It is the appellant's position that NSE approved the Hall Survey dated July 30, 2009, showing the 2009 location of the quarry closer to the front of the property. They say the approval was only subject to two conditions: the receipt of the water yield test and the pre-blast surveys. It is interesting to note that before this meeting on July 28, 2009, the NSE visited the quarry and told PMAL to cease all activities as they were not then in compliance with the license, with respect to the filing of the survey plan.

[20] On July 31, 2009, NSE acting district manager Jeff Garnhum wrote to PMAL:

31 July, 2009

Michael Lowe
Parker Mountain Aggregates Limited
P.O. Box 97
Annapolis Royal, Nova Scotia
B0S 1W0

Re: Industrial Approval 99-IAW-016, Parker Mountain Aggregates, August 24, 1999

I am writing to you regarding the terms and conditions of your Approval and as a follow-up to information requests made by our inspection staff.

During a site visit on July 28th you indicated that your contractor had drilled a number of boreholes and had loaded them with explosives, and that you were in a position to begin blasting operations in order to commence quarrying activities. You were directed to cease these operations since your company had not submitted a legal property boundary survey outlining the area of the site as required by section 2(j) of the Approval. The legal survey should have been submitted within the first two months after the Approval was issued in 1999.

The legal survey is needed by the Department to confirm the exact location and footprint of the quarry so as to ascertain its proximity to the adjoining properties that may be impacted by the quarry activities. A quarry may have to undergo an environmental assessment if the quarry and its subsequent activity exceeds 4 hectares and the legal survey would confirm the size of the operation. As outlined in the Approval conditions, the quarry application was recommended for approval subject to submitting the legal survey.

You were also requested to provide a copy of the pre-blast surveys of the homes within the 800 metre separation zone. These surveys are a requirement under the *Pit and Quarry guidelines* and adherence to the guidelines is also condition of the Approval under Section 8 (h). The pre-blast surveys identify pre-existing conditions of those homes or structures impacted by the blasting.

The borehole drilling and the loading explosives for the blasting operations should not have commenced until the legal survey was submitted and the pre-blast surveys were conducted. Until these documents have been received by the Department for review, you have not met the terms and conditions of the Approval.

We are in receipt of the letter from Mr. Jim LeBlanc, Director, Occupational Health and Safety Division, dated July 30th, in which he relates that your

explosive supplier indicates that you have until August 4th to initiate the blasting and that Mr. LeBlanc advised you that it would be prudent to prepare contingency plans for unloading the holes and for misfires. In the event that you cannot meet our document requests in a timely manner, and there is a safety risk to the site, we also request that you inform us of your plans and how you intend to proceed.

Please be aware as outlined in Section 2(d) of the Approval:

> *If the Minister determines that there has been non-compliance with any or all of the terms and conditions provided in this Approval issued pursuant to Section 56(1) of the Environment Act, the Minister may in accordance with Section 58(2)(b) cancel or suspend the approval until such time as the Minister is satisfied that all terms and conditions have been met.*

Failure to comply with all Terms and Conditions of the approval process may result in suspension or cancellation of Approval 99-IAW-016 and any subsequent application for renewal.

Should you have any questions pertaining to this matter, please contact the local District Office at (902) 679-6086.

Regards,

(signed)
Jeff Garnhum
Acting District Manager

[21] Following the meeting on August 4, 2009, the appellant wrote to NSE. PMAL say they stated what they understood to be the results of the August 4 meeting:

> The only outstanding issues with respect to the Bloomington Quarry are as follows:
>
> - Water yield test to be performed on all water wells within 800 metres where property owners agree to having the test done and will allow us to perform same.
>
> - Ensure that a pre-blast survey has been and will be completed and submitted to your Department for civic no. 1408 and also the old partially collapsed building to the south of civic no. 1233.

[22] The NSE does not agree with this interpretation.

[23] PMAL says that by August 20 they had provided everything required; the Hall Survey Plan, the pre-blast survey and the yield tests for surrounding wells. PMAL further says that a Ms. Skeine of the Department confirmed that the Hall Survey was acceptable.

[24] On August 24, 2009, NSE issued approval 2009-068511, for a one-month period.

[25] With respect to that approval and subsequent one month renewals, PMAL sets out at Volume I, Tab 3, paras. 18-33, the history of the quarry commencing operation on August 10, 2009 until it was shut down by NSE on October 30, 2009 and the subsequent offer by NSE to allow PMAL to redefine the quarry site - to the rear of the property to confirm with what NSE says was the identified location of the quarry in 1999.

[26] The affidavit of Michael Lowe, the President and a Director of PMAL also sets out in detail all of his communications with NSE.

[27] PMAL and NSE present slightly different versions of these events.

[28] NSE says that:

> On August 4, 2009 the Department of Environment met with the Appellant. At that meeting a site plan was submitted by the Appellant. The site plan showed a quarry area that was larger and one that overlapped a portion of the 1999 quarry location as identified in the site plans submitted in the 1999 application. It did not contain the quarry coordinates to confirm the location of the active area. *Appeal Book, Volume II, Tab 11 (As evidenced by the Joey Browne memo from NSE to Michael Lowe of PMAL.)*
>
> On August 24, 2009, the date of the original approval expired, a one-month approval was issued to the Appellant subject to terms and conditions. Condition 2(b) indicated the quarry must be operated as outlined in the application for industrial approval and supporting documentation dated the June 12, 2009. The one-month approval was issued to preserve the limitation period of the Appellant's original approval and to allow the Appellant opportunity to submit required documentation to the Department of Environment. *Appeal Book, Volume II, Tab 10*

In September 2009 the Department of Environment requested a legal survey plan from the Appellant. *Appeal Book, Volume II, Tab 12*

On September 24, 2009 the Department of Environment issued a one-month approval subject to terms and conditions. This one-month approval allowed the Appellant and opportunity to fulfil the condition of submitting a legal survey plan. *Appeal Book, Volume II, Tab 13*

On October 6, 2009 the Appellant delivered two plans to the Department of Environment, showing corner coordinates, one on scale l:1000 and the second on scale 1:2500. *Appeal Book, Volume II, Tab 14*

On October 23, 2009 a one-month approval was granted to the Appellant, subject to terms and conditions. Condition 2 states the quarry must be operated in accordance with the May 12, 2009 application. *Appeal Book, Volume II, Tab 16*

On October 30, 2009 the Appellant was advised by correspondence that the Department of Environment was suspending the October approval. A review of the file revealed that the current active area of the Appellant's quarry was different from the original proposed active area. The Appellant was advised that since the active area was outside the scope of the approval, an application for amendment, not renewal, would be required. *Appeal Book, Volume II, Tab 17*

On November 9, 2009, the Department of Environment wrote again to the Appellant giving it two options in relation to its quarry. The Appellant was advised that a longer term approval would be issued if the Appellant relocated the quarry to its original location. In the alternative, the Appellant could submit an application to amend the current approval with supporting documentation. *Appeal Book, Volume II, Tab 18*

In November 2009 a meeting took place with the Department of Environment and the Appellant to discuss the suspension of the approval. Following the meeting, the Department of Environment wrote to the Appellant confirming it would allow the Appellant to remove the stockpiles from the property, and it confirmed the suspension would be lifted if the quarry is relocated to its original location and a rehabilitation plan is submitted. *Appeal Book, Volume II, Tab 21*

On November 23, 2009 the Appellant appeals the decision to suspend its quarry operations pursuant to s. 137 of the *Environment Act*. The Appellant retains counsel who provides written submissions and documentation to the Minister in support of its appeal. *Appeal Book, Volume I*

> Administrator Glen Warner was asked to conduct a review of the matter, and on January 22, 2010 he wrote to a report to the Minister of Environment. *Appeal Book, Volume II*
>
> On January 25, 2010 the Minister of Environment notified the Appellant's counsel in writing that the appeal was denied.

[29] One of the complaints PMAL has in this process is that of the lack of continuity on NSE's department staff, whom they suggest accepted and approved that which PMAL filed between August and October 2009, then had a change of heart as the result of residents' complaints about a "changed location" of the quarry site.

[30] The appellant says they had settled all outstanding issues with Jeff Garnhum, District Manager of the Department of Environment and Joey Browne in August and September 2009, met the requirements of Adrian Fuller, District Manger of the Department of Environment in October 2009, whom they say approved the site plan subject to two conditions. PMAL was surprised by Adrian Fuller's suspension of October 30, 2009 on the basis that "the current active area was not the same as it was in 1999."

[31] PMAL says further that in the review conducted by Glen Warner of the PMAL appeal of November 23, 2009, Mr. Warner did not meet with PMAL although it is clear their legal counsel Kevin Latimer had been invited to make further representation to Mr. Warner and chose not to do so.

Legislative Overview

[32] This is a statutory appeal pursuant to s. 138 of the *Environment Act*, S.N.S., 1994-95, c. 1. ("the *Act*"). The applicable legislation is the *Act*, and the *Activities Designation Regulations, ("ADR").* Section 137 of the *Act*, addresses an appeal to the Minister as follows:

> Appeal to Minister
>
> 137 (1) A person who is aggrieved by a decision or order of an administrator or person delegated authority pursuant to Section 17 may, within thirty days of the

> decision or order, appeal by notice in writing, stating concisely the reasons for the appeal, to the Minister.
>
> (2) The notice of appeal may be in a form prescribed by the Minister.
>
> (3) The Minister shall notify the appellant, in writing, of the decision within sixty days of receipt of the notice of appeal.
>
> (4) The Minister may dismiss the appeal, allow the appeal or make any decision or order the administrator could have made.
>
> (5) The administrator and the appellant shall take such action as is necessary to implement the decision of the Minister disposing of the appeal. 1994-95, c. 1, s. 137; 2006, c. 30, s. 42.

[33] Section 138 of the *Act* addresses an appeal to the Supreme Court from a decision of the Minister as follows:

> Appeal to Supreme Court
>
> 138 (1) Subject to subsection (2), a person aggrieved by
>
> . . .
>
> may, within thirty days of the decision or order, appeal on a question of law or on a question of fact, or on a question of law and fact, to a judge of the Supreme Court, and the decision of that court is final and binding on the Minister and the appellant, and the Minister and the appellant shall take such action as may be necessary to implement the decision.

The judge may consider protection of the environment.

> (3) The judge on the hearing of an appeal may consider and hear evidence as to whether or not the matter that aggrieves the appellant is necessary to provide for the preservation and protection of the environment.
>
> ...

Decision of the court final.

> (6) The decision of the court under subsection (1) is final and there is no further appeal to the Nova Scotia Court of Appeal. 1994-95, c. 1, s. 138.

[34] Section 2 of the *Act* has as its purpose, "to promote the protection, enhancement and prudent use of the environment" while recognizing certain goals that are further outlined in the *Act*.

[35] Part V of the *Act* (ss. 50-66) deal with "Approvals and Certificates." Section 56 of the *Act* provides:

> Approval
>
> 56 (1) The Minister may issue or refuse to issue an approval.
>
> . . .
>
> (2) The Minister may issue an approval subject to any terms and conditions the Minister considers appropriate to prevent an adverse effect.

[36] Section 66 of the *Act* grants broad powers to make regulations which include, *inter alia*:

> 66 (1) The Governor in Council may make regulations
>
> (a) designating activities or any class of activities for which an approval or certificate of qualification is required, and specifying the kind of approval or certification of qualification required;
>
> (b) respecting procedures related to the issuance of an approval or a certificate of qualification, including prescribing the length of time for which approvals and certificates of qualification may be issued and permitting an approval or certificate of qualification to be issued for a shorter period of time than prescribed in the regulations;
>
> (c) governing and prohibiting any activity or the use of any thing for the purpose of the protection of the environment, including regulations governing the design, construction, maintenance or use of the activity or thing;
>
> . . .

> (f) generally, respecting any matter necessary or advisable to effectively carry out the intent and purpose of this Part.

[37] Section 3(1) of the *ADR* stipulates that "Any activity designated in these regulations requires an approval from the Minister or an Administer designated by the Minister."

[38] Division V of the *ADR* addresses quarry approvals. Section 13(f) of the *ADR* provides that the construction, operation or reclamation of a "quarry where the ground disturbance or excavation is made for the purpose of removing aggregate with the use of explosives" is a designated activity that requires an approval.

[39] The *Approval Procedure Regulations* ("*APR*") set out the procedures for the completion, review, and processing of applications for approvals. Section 11 states:

> (1) Unless provided otherwise in the Act or regulations and subject to subsection (2), where the Minister or an Administrator issues an approval, the Minister or the Administrator shall provide as a term and condition that the duration of the approval shall not exceed 10 years.
>
> (2) The applicant may request an approval for a shorter duration than the 10 years prescribed in subsection (1).
>
> (3) An approval may be renewed by the Minister or the Administrator with or without changes upon the payment of an administrative fee and a user fee which are approved by the Minister.

[40] In addition to the applicable legislation, there are the *Guidelines*. The *Guidelines* were developed by the Minister to provide guidance when considering an application to construct, operate or reclaim either a pit or quarry. Clause I (2)(c) certain separation distances from the quarry excavation as follows:

> No quarry excavation shall be closer than:
>
> In the case of a quarry operation, eight hundred (800) metres (0.5 mile) from any property in or restricted to residential use.*
>
> *(or less with the permission of adjacent land owners).

[41] On May 4, 1999, the *Guidelines* were revised to include a provision relating to separation distances for the operation of a quarry. Clause IV(2)(c) is as follows:

> 800 m of the foundation or base of a structure located off site. Structure includes but is not limited to a private home, a cottage, an apartment building, a school, a church, a commercial building, or a treatment facility associated with the treatment of municipal sewage, industrial or landfill effluent, an industrial building or structure, a hospital, nursing home, etc.*
>
> . . .
>
> *NOTE: The separation distance is measured from the working face and point of blast to the foundation or base of the structure. This distance can be reduced with written consent from all individuals owning structures within 800 m.

Standard of Review

[42] The first matter to be settled on appeal is the standard of review.

[43] *The New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC. 9, outlined a new approach to determining the appropriate standard of review, "the standard of review analysis." There are now only two standards of review: correctness and reasonableness. At para. 55 the Court stated:

> 55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> - The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

> 56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.
>
> 57 An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

[44] In *Elmsdale Landscaping Ltd. v. Nova Scotia (Minister of Environment)*, 2009 NSSC 358, the appellants appealed the decision of the Minister in upholding the decision of the administrator. Duncan J. at paras. 27-30:

> 27 The *Environment Act* does not contain a privative clause, however, this does not imply a high standard of scrutiny, where other factors be speak of a lower standard. It is but one of the four factors to consider. I note the broad powers of this court when sitting on appeal but that is not conclusive of the analysis.
>
> 28 The *Environment Act* is a public interest statute which contains a discrete administrative regime. The words of Justice Couglan (sic) in *Fairmount Developments Inc., v. Nova Scotia (Min of Environment)* 2004 NSSC 126, at para. 45 are, in my view, pertinent:
>
> > The purpose of the *Environment Act* is to support and promote the protection, enhancement and prudent use of the environment, while recognizing certain specific goals. It is a polycentric issue involving a balancing of various contingencies and factors to achieve its purpose. It is more political than legal in nature. Thus, the appropriateness of the court's supervision diminishes suggesting great deference.
>
> 29 The Minister, in the context of this application, is provided all necessary powers to review applications and can approve or refuse approval, or vary, or set terms and conditions for approval. In doing so, he is charged with balancing a number of interests identified in the purposes of the *Act*. There is a large measure of policy that must enter into the decision making process.

> 30 I conclude that the Minister's decision is afforded a high level of deference rather than exacting scrutiny.

[45] He concluded that reasonableness was the appropriate standard.

[46] In *Dunsmuir, supra,* at para. 47, the Court addressed how a reasonableness standard should be applied.

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[47] A further consideration of course is whether the issues as framed raise issues of law, fact, or mixed law and fact. In *Elmsdale, supra,* Duncan J. concluded at para. 41:

> 41 I conclude that neither of the issues raise pure questions of law for which correctness would be the appropriate standard of review. In my view, the questions posed by the appellants raise issues of fact, exercise of discretion and policy. As such the nature of the questions in this appeal attracts a standard of reasonableness. To the extent that the appellants allege a jurisdictional error by the Minister in Issue 1, it is, in the context of this case, no more than a question of mixed fact and law.

[48] Similarly I found that in this case the issues raised are those of mixed fact and law and in all the circumstances the reasonableness standard applies.

Issue One: Breach of Natural Justice

[49] The appellant says:

> The Minister's Decision consisted of what was essentially a two-stage process. At the first stage, Glen Warner was appointed to conduct a review of the file and provide his opinion to the Minister on the correctness of Mr. Fuller's decision to suspend the Third Renewal. The second stage involved the Minister reviewing the Warner Report and subsequently rendering his decision. PMAL submits that the Minister breached PMAL's right to procedural fairness at both stages of the appeal process.

[50] The appellant further says that administrative action which affects the rights, privileges or interests of an individual is sufficient to trigger the application of a duty of fairness. *Baker v. Canada (Minister of Citizenship & Immigration),* [1999] 2 S.C.R. 817 para. 20, citing *Cardinal v. Kent Institution,* [1985] 2 S.C.R. 643. The factors the Court will consider include:

> . . . (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. . . .

(Jones and DeVillars, *Principals of Administrative Law*, 5th ed. (Toronto: Thompson Reuters Canada Ltd., 2009) at pp. 256-257.)

[51] The appellant says as it is clear the Minister's decision merely echoes the Warner Report and even copies its language verbatim, in similar situation, the courts have found the affected individual is to be afforded at least some procedural rights even at the investigative stage. *British Columbia Assn. of Optometrists v. British Columbia (Minister of Health),* [1998] B.C.J. No. 186 and *Patrick's Beauty College Ltd. v. Nova Scotia (Superintendent of Private Trade Schools),* [1996] N.S.J. No. 562 and *Potter v. Nova Scotia (Security Commission),* 2006 NSCA 45 at para. 14.

[52] The appellant says it was entitled to respond to the Warner Report prior to the Minister making his decision but was entitled to speak to him directly to address the allegation and concerns in forming his report. PMAL also say they were not provided a copy of the Warner Report prior to the Minister issuing his own decision.

[53] The appellant has place significant emphasis on the Warner Report in this appeal.

[54] However, the decision the appellant is entitled to appeal is that the Minister under s. 137 through s. 138(1)(b) of the *Act*. Mr. Warner's role as an investigator was distinct from the role of the Minister as a decision-maker. Mr. Warner's investigation is not under review, distinguishing this situation from the *Potter* case.

[55] On my review of all of the volumes of material and Mr. Lowe's affidavit, I cannot say that I have a concern that PMAL was not afforded procedural fairness. In my view, NSE by letter dated October 30, 2009, was clear in stating their reason for suspension, (the active area differed from that in the 1999 approval) and the appellant was provided ample opportunity to present its position. In particular, Mr. Lowe's affidavit at para. 41 (c) and (d) leaves one with the indication that Mr. Latimer chose not to press the matter further.

[56] With respect to the *Baker* criteria, I find that:

(1) The nature of the decision was not judicial but administrative aimed at supporting and promoting the protection, enhancement and prudent use of the environment while balancing the rights of the parties involved, PMAL the quarry owner and those adjacent neighbours as well as exercising a general responsibility to all Nova Scotians.

(2) The statutory scheme, especially s. 137 did not obligate the Minister to solicit input from the appellant before making his decision although clearly I find the appellant had ample opportunity to do so, and did place a full volume of materials before the NSE.

(3) Although PMAL was affected by the decision and there were economic implications flowing from the Minister's decision NSE dealt more than reasonably with PMAL in particular in offering the opportunity to amend its application to apply for a new location or to return to the original location of 1999. I realize that there was a plethora of plans by Ron Christian, P.Eng. dated 1999 and these plans if made into transparencies and placed atop of one another, would show an overlap but be inexact in precisely defining the quarry site. However, they all located the quarry to the rear of the property and it would logically appear that Mr. Rowe, awaiting the legal boundary

survey defining the site issued the permit. It was accompanied by his sketch of the site, a circle on the LRIS drawing which is consistent with the Christian plans. Again, this shows the quarry at the rear of the property, the very reason why consents of neighbours were then obtained.

(4) PMAL could have no expectation that they would be further involved in the Warner review or the Minister's decision and no such promise was made or held out to the appellant. They were however invited by Warner to make further submissions if they wished.

(5) The legislation did not require the Minister to hold hearings and the procedures of s. 137 of the *Act* were followed. The Minister reviewed and then accepted his staff's advice and recommendations, pursuant to a well-established departmental practice.

[57] I find no breach of procedural fairness. The appellant was able to make ample written submission and knew well the case it had to meet. Arguably, the appellant chose not to press to make further submissions, but had been given the opportunity.

Issue two: Judicial error

[58] Rather than issuing an approval for ten years NSE issued the first renewal for a duration of one month and two subsequent one-month renewals before the suspension.

[59] PML argues that it had complied with all the conditions placed upon it by the expiry at the second renewal and, as such, was entitled to the approval renewal under s. 56 of the *Act* , s. 11 of the *APR* for the operation of the quarry for a duration of ten years as the default duration.

[60] This position ignores the live issue of the controversy over changed location of the quarry – an issue that remained unresolved during the three one-month renewal periods.

[61] The appellant was aware from the August 4th meeting that there was opposition to the location of the quarry as they defined it on the Hall Survey of 2009, and that NSE had received complaints from the residents, the respondents in

this proceeding, that the quarry site was now proposed to be much closer to the front of the PMAL property and closer to their homes.

[62] In my view, within the statutory language of s. 52 of the *Act*, the Minister has considerable discretion in deciding whether a particular activity will be granted approval. Under s. 52(1), the Minister has the power to refuse approval if the activity ". . . is not in the public interest with having regard to the purpose of this *Act* . . ."

[63] The Minister must consider any adverse effects in approving an activity, including the acceptability of the location of the activity.

[64] His express statutory duty is to take such action as he considers in order to manage, protect, or enhance the environment.

[65] The legislation provides the Minister with authority to issue temporary approvals. The Minister also determines the duration of such approvals. Section 11 of the *ARP* sets out the maximum duration of an approval only – 10 years. There are no statutory minimum approval periods. It is therefore reasonable to conclude that the Minister has the authority to issue approvals for temporary periods, until all conditions have been met, keeping in mind any adverse affect of the quarry activity.

[66] I do note that in Mr. Lowe's affidavit, the applicant acknowledges that renewals were usually for a 5-year period which is permitted by s. 11(2) of the *APR.*

[67] In my view, the Minister is unfettered in granting an approval for a duration of less than 10 years. This is in keeping with the broad discretionary power he is given under the *Act.*

[68] I find that the Minister's renewals were both reasonable and appropriate, and consistent with the legislative scheme. He had powers to review and refuse approvals, while balancing all of the interests identified in the purposes of the *Act*.

[69] The Minister's actions were reasonable and do not merit the intervention of the Court.

[70] As Justice Duncan noted in *Elmsdale Landscaping v. Nova Scotia (Minister of Environment), supra*:

> 28 The *Environment Act* is a public interest statute which contains a discrete administrative regime. The words of Justice Couglan (sic) in *Fairmount Developments Inc., v. Nova Scotia (Min of Environment*) 2004 NSSC 126, at para. 45 are, in my view, pertinent:
>
> > The purpose of the *Environment Act* is to support and promote the protection, enhancement and prudent use of the environment, while recognizing certain specific goals. It is a polycentric issue involving a balancing of various contingencies and factors to achieve its purpose. It is more political than legal in nature. Thus, the appropriateness of the court's supervision diminishes suggesting great deference.

Issue three: Did the Minister make errors of fact?

[71] I must consider first if the Minister considered all of the evidence before him in reviewing the decision to suspend the approval and second, to determine if the Minister's rejection of the appeal was reasonable based on the record before him.

[72] PMAL submits the Minister's decision rests on the conclusion that PMAL had moved from the 1999 active area, having failed to consider relevant evidence and ultimately relied on an erroneous and misconceived understanding of the historical events.

[73] With respect, I do not agree. After examining all of the evidence relating to the 1999 approval and the 2009 application for renewal, I can only conclude that PMAL were aware that they were relocating the quarry to a position much nearer the front of the property, close to the public road and to their neighbours. They did this just before the expiration of the ten-year approval. They are correct in asserting that the Warner report notes that Inspector Joey Browne of NSE filed a report with the Administrator recommending the renewal of the 1999 approval, as noted in paras. 18, 21 and 24 of the Warner Report. I believe he was unaware of the change in the active area. PMAL did not suggest that the Hall Plan, was anything other than a filing that would meet the original unfulfilled condition 2(j) of the 1999 approval. Initially, Mr. Browne did not focus on the requirement for a legal survey "to confirm the exact location and footprint of the quarry so as to ascertain its proximity to the adjoining properties that may be impacted by the

quarry activities" (the requirement set out in the Garnhum letter to PMAL on July 31, 2009 and a condition of the September 24, 2009 approval which set a deadline for receipt of the survey – October 14, 2009). The survey requirement was finally met by PMAL during the second renewal period.

[74] On October 30, 2009, Administrator Fuller corresponded with PMAL, suspended the approval and wrote:

> While conducting a review of your file and comparing the current active area to the proposed active area of the quarry when the first approval was issued, it has been determined that it is in fact a new active area. This is outside the original scope of the approval and would trigger an amendment (new review process) to your application and not a renewal.
>
> Section 3f(I) of your approval states that if the Minister or Administrator determines that there has been a non-compliance with any or all the Terms and Conditions contained in this Approval, the Minister or Administrator may cancel or suspend the Approval pursuant to Subsections 58(2A) and 58(4) of the Act, until such time as the Minister or Administrator is satisfied that all the Terms and Conditions have been met.
>
> **Therefore your Approval No. 2009-068511-R02 to construct and operate a quarry has been suspended until further notice pursuant to Section 58(A) of the Act. Reinstatement of the said approval may only be considered once the issues have been satisfactorily addressed. In the meantime, all quarry operations at the Bloomington Quarry must cease.** *Volume II Tab 17*

[75] On November 9, 2009, Administrator Fuller sent correspondence to PMAL further clarifying the suspension. The letter says in part:

> Nova Scotia Environment renewed your approval on the basis that your 2009 survey plan reflected the original active area for which the approval was issued in 1999. However, when the two were compared, it was determined that the active area has actually been moved. This results in a change in the scope of approval and would require an amendment and not a renewal.
>
> The options available to you are as follows
>
> 1. Establish the current active area back to the original area as approved in 1999. If this was completed a longer term renewal approval could be issued.

> 2. Apply for an amendment to your current approval to change the active area. This would require you to submit all the supporting documentation for the amendment. *Volume II, Tab 18*

[76] Although the department was slow in coming to the realization that the active area had changed even though it was in receipt of the complaint by the respondents and their withdrawal of consents to the quarry, it was not until October that the survey requirement was finally met and the review of the file concluded, by Administrator Fuller.

[77] I do not accept the appellant's position that the three renewals were issued in 2009 based on the Hall Survey and the two revisions thereof based on an active area where PMAL had been operating.

[78] The renewal process relates to the original 1999 approval and its conditions, which include the requirement to file the legal survey that conforms with the original approval. In my view, an approval was not granted in 1999 on the basis that no active area was agreed to. There is sufficient documentary evidence to show the planned active area at the rear north portion of the property as identified by Mr. Rowe's LRIS sketch.

[79] Without an active area in 1999 it would have been impossible to determine the 800 metre radius in which operation could occur without the consent of the neighbouring property owners. The consents were sought in 1999 and received.

[80] On my review of the evidence, I find that the Minister reasonably considered all of the evidence before him in reviewing the decision to suspend. By October 30, all of the information was then available to understand the history of the original application and its renewal.

[81] The Minister's rejection of the appeal was not unreasonable based on the record before him. He exercised a broad discretion in accordance with reasonable interpretation of the facts before him, in light of NSE policy and his mandate under the *Act*.

[82] Accordingly, the appellant's appeal is dismissed.

[83] I will be happy to hear submissions in writing on the matter of costs, failing any agreement.

Justice M. Heather Robertson

SUPREME COURT OF NOVA SCOTIA

Citation: ***Parker Mountain Aggregates Ltd. v. Nova Scotia (Environment)*****, 2011 NSSC 134**

Date: 20110408
Docket: Hfx No. 324761
Registry: Halifax

Between:

Parker Mountain Aggregates Limited

Appellant

v.

Nova Scotia (Minister of Environment),
Angela Vroom, Kurt Daye, Rhonda Day and Mark Akin

Respondents

Judge:	The Honourable Justice M. Heather Robertson
Heard:	October 14 and November 16, 2010, in Halifax, Nova Scotia
Written Decision:	April 8, 2011
Counsel:	John A. Keith and Ezra B. van Gelder, for the appellant, Parker Mountain Aggregates Limited Darlene Willcott, for the respondent, Nova Scotia (Minister of Environment) Jason T. Cooke and Tiffany Robertson, articled clerk, for the respondents, Angela Vroom, Kurt Daye, Rhonda Daye and Mark Akin
ERRATUM:	**Paragraph [60] This position ignores the line issue ..., should read: This position ignores the live issue ...**