SUPREME COURT OF NOVA SCOTIA

Citation: Margaree Environmental Association v. Nova Scotia (Environment), 2012 NSSC 296

Date: 20120803
Docket: Hfx. No. 371459
Registry: Halifax

Between:

Margaree Environmental Association

Plaintiff

v.

Nova Scotia (Minister of Environment)

Defendant

LIBRARY HEADING

Judge: The Honourable Justice A. David MacAdam

Heard: June 27 and July 17, 2012, in Halifax, Nova Scotia

Final Written Submissions: June 22, 2012

Subject: Appeal; judicial review; environmental law; ministerial appeals

Summary: An official approved a permit for oil exploration. The appellant, a group made up of local residents, appealed to the Minister under s. 137 of the *Nova Scotia Environment Act*. The Minister dismissed the appeal and reaffirmed the permit. The appellant brought a further appeal of the Minister's decision to the court under s. 138 of the Act. The appellant alleged, inter alia, a denial of procedural fairness in the conduct of the appeal, that the Minister had misinterpreted the definition of "watercourse" under the Act in finding that a "brook" also described as a "drainage conveyance" was not a watercourse, and that the Minister had failed to consider or adequately address certain concerns raised by the appellant.

Issue: (1) Was there a denial of procedural fairness? (2) What was the standard of review applicable to the Minister's decision? (3) Did the Minister err in finding that the "brook" was not a watercourse? (4) Did the Minister fail to consider or adequately address concerns raised by the appellant?

Result: (1) There were no mandated procedures for the ministerial appeal. To the extent there was a duty of procedural fairness, it was met by the manner in which the Minister conducted the appeal. (2) The parties agreed that the standard of review of the Minister's decision was reasonableness, with the exception of the interpretation of the definition of "watercourse" in the Environment Act. The court held that reasonableness was the proper standard on that issue as well. (3) The Minister's interpretation of the definition of "watercourse" would survive on a standard of reasonableness or a standard of correctness. (4) There was no basis to conclude that the Minister ignored or failed to adequately consider issues that were before him.

The Minister's decision was upheld on the basis of review on a standard of reasonableness.

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Counsel: Derek Simon, for the plaintiff

Aleta Cromwell, for the defendant

By the Court:

[1] The appellant, the Margaree Environmental Association, appeals a decision of the Minister of the Environment (hereafter the "Minister") to dismiss its ministerial appeal of a departmental decision to allow PetroWorth Resources Inc. (hereafter "PetroWorth") to operate an oil well on a property on West Lake Ainslie Road (the "MacDonald property"). PetroWorth received an exploration agreement permitting it to explore and develop oil and gas on 383,000 acres in southern Inverness County, including the area around Lake Ainslie, the largest freshwater lake in Nova Scotia. It is the headwaters of the Southwest Margaree River, and part of the Margaree-Lake Ainslie River System, which has been designated a Canadian Heritage River. PetroWorth also entered into a surface lease for the MacDonald property, where it intended to drill a test well.

[2] The operation and reclamation of a conventional petroleum exploration well is a designated activity under the *Activities Designation Regulations*, N.S. Reg. 47/95, thus requiring approval under Part V of the *Environment Act*, S.N.S. 1994-95, c. 1, and the *Approvals Procedure Regulations*, N.S. Reg. 48/95. Accordingly, after PetroWorth applied for an approval, two officials, David Fougere and Lorne J. MacNeil, were assigned to review the application.

[3] On learning about the PetroWorth exploration agreement, lease and proposed well, the appellant's members, including Robert Parkins, an adjacent resident and president of the Lake Ainslie Development Association, began

publicizing their concerns about oil and gas exploration in the watershed in the media, and communicating with government officials about the issue. In October 2010 and February 2011, PetroWorth held public meetings to discuss the proposed exploration and drilling. Government officials attended at least one of these meetings.

[4] The meeting of February 10, 2011, was conducted at the Wycobah First Nation. The Kwilmu'kw Maw-klusuaqn Negotiation Office, on behalf of the Assembly of Nova Scotia Mi'kmaq Chiefs (KMK) retained exp Services Inc. to carry out an independent hydrogeological, hydrological, and biological analysis of the proposed project. The resulting report was submitted to the Department for consideration. The exp report concluded that the terms and conditions in the draft permit indicated "a sound appreciation by the regulators for the technology, operations and risks involved with the drilling the exploration hole" (*sic.*).

[5] In carrying out their review on behalf of the Minister, Mr. Fougere and Mr. MacNeil consulted with several other individuals, including Ian M. Campbell, Regional Hydrogeologist; David C. Williams, Regional Protected Areas Coordinator; and Kathleen Johnson, Regional Engineer. All three took the view that the proposal could safely proceed on appropriate terms and conditions. The approval – Approval No. 2010-074696 – was granted on July 29, 2011, by Janet MacKinnon, District Manager.

[6] The appellant learned of the approval, and obtained a copy, through the media in September 2011. The appellant is a non-profit society whose purposes include "promoting the interests of all people and owners of real property in the

preservation of the natural environment and their landholdings." Most of the appellant's members live in the Lake Ainslie-Margaree watershed, and some are landowners adjacent to the MacDonald property.

[7] The appellant filed an appeal under s. 137 of the *Environment Act* on October 11, 2001. Section 137 provides:

> 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.

[8] The appeal to the Minister raised several substantive grounds, including alleged factual errors by the District Manager and failure to consider adverse effects. The factual errors essentially relate to the suggestion that there was a watercourse approximately 50 feet from the well of one of the adjoining landowners, whereas condition 4(e) of the approval provided that no portion of the drill pad or facility was to be located less than 100 metres from a surface watercourse. It was also alleged that the District Manager failed to consider the

residential nature of the area and the large number of residences in close proximity to the proposed well site. In respect to adverse effects, the appellant alleged that the District Manager failed to take into account the likelihood of unacceptable adverse effects, as required by s. 52(2) of the Act, and, in particular the likelihood of adverse human and environmental effects arising from locating an oil well in a residential area, close to water courses, residences, and a "sensitive watershed ecosystem." As to errors in the approval letter, the appellant alleged "a general failure on part of the District Manager to turn her mind to the possible adverse effects from the proposed activity, and to impose appropriate conditions to safeguard against damage to the environment or to human health."

[9] After the filing of the ministerial appeal and an accompanying letter (hereafter the "appeal letter") to the Minister, the Minister assigned Johnny MacPherson, the Acting Manager for Solid Waste Resources, to conduct a review of the appeal. Mr. MacPherson provided a memorandum to the Minister, dated December 12, 2011 (the review memo), in which he recommended dismissal of the appeal. This memo was followed by a briefing note dated December 14, 2012. The Minister informed the appellant that the appeal was denied. The appellant subsequently appealed the Minister's decision to this court under s. 138 of the *Environment Act*, which provides, in part:

> Appeal to Supreme Court
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> 138 (1) Subject to subsection (2), a person aggrieved by
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> ...
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> (b) a decision of the Minister pursuant to Section 137;

(c) a decision of the Minister respecting the granting or refusal of a certificate or an approval;

....

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.

....

(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.

(4) An appeal pursuant to this Part shall be commenced within thirty days of the date of the decision or the date of the order referred to in subsection (1).

....

(6) The decision of the court under subsection (1) is final and there is no further appeal to the Nova Scotia Court of Appeal.

Issues

[10] The issues in this proceeding are the following:

1. Whether, and if so, at what level procedural fairness was owed to the appellant?

2. The appropriate standard of review.

> 3. Whether the Minister erred in deciding that "Parkins Brook" also known as "a Drainage conveyance" was not a watercourse?
>
> 4. Whether the Minister erred in failing to consider or adequately address concerns raised by the appellant?
>
> 5. If the appellant is successful, the appropriate remedy.

Argument

1. Whether, and if so, at what level procedural fairness was owed to the appellant?

[11] The parties agree that the issue of procedural fairness is not subject to a standard of review analysis. As the Nova Scotia Court of Appeal said in *Communications, Energy and Paperworkers Union of Canada Local 141 v. Bowater Mersey Paper Co. Ltd.*, 2010 NSCA 19, at para. 30:

> The judge gave no deference to the arbitrator in the judge's assessment of procedural fairness. With that, I agree. I note parenthetically that deference is not withheld because of any standard of review analysis. The judge is not reviewing the tribunal's ultimate decision, to which a "standard of review" is accorded. Rather, the judge assesses the tribunal's process, a topic outside the typical standard of review analysis. In *Nova Scotia (Provincial Dental Board) v. Creager*, 2005 NSCA 9, this court said:
>
> > [24] Issues of procedural fairness do not involve any deferential standard of review: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74 per Arbour, J.; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paras. 100-103 per Binnie, J. for the majority and at para. 5, per Bastarache, J. dissenting. As stated by Justice Binnie in *C.U.P.E*, at para. 102:

> The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.

> This point is also clear from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Justice L'Heureux-Dubé (paras. 55-62) considered "substantive" aspects of the tribunal's decision based on the standard of review determined from the functional and practical approach but (para. 43) considered procedural fairness without analyzing the standard of review.

> [25] Procedural fairness analysis may involve a review of the statutory intent and the tribunal's functions assigned by that statute: eg. *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at paras. 21-31; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624 at paras. 31-32. But, once the court has determined that a requirement of procedural fairness applies, the court decides whether there was a violation without deference.

[12] The appellant submits that procedural fairness was owed both during the period that PetroWorth's application for approval of a permit was being considered by the Minister's delegate, Ms. MacKinnon, as well as during the period of the appeal under s. 137. In oral submissions, counsel for the Minister submitted that at the initial stage, procedural fairness was only owed to PetroWorth, not to the appellant. In respect to the s. 137 appeal, it is agreed that procedural fairness was owed to the appellant. However, the parties disagree as to the nature and extent of the duty. The appellant suggests a much higher level of procedural fairness than the respondent is willing to concede.

[13] The parties also agree that in determining the appropriate level of procedural fairness, recourse should be had to the analysis suggested by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and*

Immigration), [1999] 2 S.C.R. 817. The five non-exhaustive factors listed by the court include:

> a. The nature of the decision and the nature of the decision-maker;
>
> b. The nature of the statutory scheme;
>
> c. The importance of the decision to affected individuals;
>
> d. The legitimate expectations, if any, of the person challenging the decision; and
>
> e. The process chosen by the decision-maker.

[14] In the present circumstances there were two decisions made. The nature of each decision must be considered in assessing whether procedural fairness was owed to anyone, and in particular, to the appellant, and in determining the nature and extent of any such duty.

[15] In the first instance, Ms. MacKinnon was delegated by the Minister to determine whether PetroWorth should receive approval to drill and operate the oil well. In the second instance, the approval having been granted, the appellant appealed to the Minister pursuant to s. 137 of the Act. As noted above, the Minister submits that the first decision only triggered a duty of procedural fairness in favour of PetroWorth, but agrees that the subsequent ministerial appeal also required that the appellant be provided with procedural fairness.

[16] A review of the factors outlined in *Baker, supra.,* suggests that there was a duty of procedural fairness owed at the first stage. Although the issuance of the approval by Ms. MacKinnon was more in the nature of an administrative act than a

judicial or adjudicative decision, and was subject to a right of appeal for anyone aggrieved by the decision, it is clear that the decision was important to those persons living in close proximity to the proposed oil well. There was no suggestion that either the Minister or any official had represented to the appellant, or anyone, any particular form of hearing or right to intervene in the application for the permit. Therefore the factor of legitimate expectations is not present.

[17] On the evidence it appears that the appellant's first participation in the proceeding was by filing a notice of appeal, followed by a written submission in support. However, officers and directors of the appellant were in communication with officials of the Department of Environment, even before the permit was approved by Ms. MacKinnon. The issuance of the permit being essentially an administrative act, any duty of procedural fairness would be at what would be described as a "low level". The Act does not mandate any form of notice by the Department. However, as noted, there were two public meetings organized by PetroWorth at which the proposed drilling was discussed. The record also shows correspondence and telephone calls by officials of the Department with interested citizens, including many who are officers and directors of the appellant. There is nothing in the record to suggest the appellant was denied the opportunity to voice its concerns about the proposed well drilling and the potential risks to local residents as well as to the public at large.

[18] In the absence of any specific mandated form of procedural fairness, I am satisfied that the duty of procedural fairness that arose at the approval stage was met by the dialogue between the Department and those persons who expressed concerns about the risks associated with granting the approval for the well drilling, including individuals who were officers, directors and/or members of the

appellant. As the appellant itself had, at that time, not shown an interest in the matter, there was no duty of fairness owed to it. Any duty of fairness owed to individuals, including officers and directors of the appellant, as well as other local residents, who had shown such an interest, was met by the Department receiving and responding to their concerns. In the absence of mandatory procedures for involvement of third parties, which did not exist, the Minister, and his delegate, met their obligation of procedural fairness.

[19] In respect to the appeal pursuant to s. 137 of the Act, it likewise does not mandate any specific form of hearing or other attributes of procedural fairness. Having filed a notice of appeal, the appellant was entitled to make representations, and did so. The six-page letter by its counsel was the only written document filed by the appellant in support of its appeal. In the letter, counsel submitted that the approval should be quashed based on a lack of procedural fairness. Counsel argued that "given its demonstrated interest in the issue, and the significant effect on its members interests," the appellant and its members "were entitled to, at a minimum, notice of the Approval application, an opportunity to make submissions to and be heard by the decision-maker, notice of and reasons for the decision, as well as notice of any amendments to the Approval."

[20] The letter goes on to state that the appellant and its members had "consistently demonstrated an interest in this issue and a concern with oil and gas development in the Lake Ainslie watershed in general, and at this site in particular." Counsel acknowledged that prior to the filing of the appeal, there had been no communication with the Department by the appellant. Rather, as already noted, there were communications by individuals, some of whom were directors

and officers of the appellant. However their correspondence had not indicated any association with the appellant.

[21] The appellant cites no authority that would require, at the permit issuing stage, an entitlement to notice of the permit application, an opportunity to make submissions to the decision-maker, notice of and reasons for the decision, and notice of any amendments to the approval.

[22] In respect to the appeal under s. 137, while there are no mandated procedures, the Minister is required to ensure that any interested person, whether the interest arises by virtue of being a resident in the area or otherwise being affected by the project, would have an opportunity to make submissions. This opportunity was afforded to the appellant who, as already noted, filed both a notice of appeal and a written submission of counsel.

[23] The appellant did not file evidence in support of the various allegations of deficiencies and errors in the granting of the permit, and the Minister is not obliged to advise a party to an appeal as to what evidence they should provide in support of their position. In the letter of October 18, 2011, counsel argued that various conditions contained in the approval had not been responded to, or were erroneous or deficient. Counsel's review concluded with the notation that additional evidence in support of the application could be provided to the Minister upon request. No such evidence was requested by the Minister, and no further submissions were made by the appellant. The submission went on to deal with procedural fairness and the substantive grounds of the appeal.

[24] After receiving the notice of appeal, the Minister directed Johnny McPherson, Manager, Solid Waste Resources, to review it and the submission by counsel in support thereof.

[25] As to the argument that the approval should be quashed because of a denial of procedural fairness to the appellant, Mr. McPherson responded that a search of the Department's file did not reveal "any correspondence, media report(s), or other direct evidence to support the appellant's claim of 'demonstrated interest in this issue'." He also observed that in their correspondence, the individuals concerned did not identify themselves as members of the appellant. He stated that the file indicated that the Department responded to inquiries in a timely manner. He concluded that the Administrator and departmental staff dealt fairly with inquiries from the public and in administering the *Approvals Procedure Regulations* (APR).

[26] There is nothing in the record to suggest that the appellant sought to provide further representations or evidence in support of its submission on the ministerial appeal, but was refused. There is no obligation for the Minister to conduct a formal hearing analogous to a trial. Absent mandated procedures, I am satisfied that the appellant received procedural fairness in the conduct of the s. 137 appeal.

2. Standard of Review

[27] The parties agree generally that the standard of review of the Minister's decision is reasonableness, with the exception of the interpretation of the

definition of "watercourse" in s. 3(be) of the *Environment Act*. On that specific point, the appellant says that the standard of review is correctness, while the respondent maintains that it should also be reviewed on a standard of reasonableness.

[28] The leading case on standard of review is *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9. The majority concluded that there are now two standards: reasonableness and correctness. At paras. 62 and 64 the court outlined the process for determining the applicable standard:

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.
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> ...
>
> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[29] The majority explained the content of the reasonableness and correctness standards at paras. 47 and 50:

> 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.
>
> ...
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> As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[30] The first step is to determine whether there is jurisprudence that has already decided the appropriate standard of review for the particular question. The appellant says there is a long line of cases that have determined that statutory interpretation under the *Environment Act* is reviewed on a correctness standard. For instance, in *Truro Sanitation Ltd. v. Nova Scotia (Minister of Environment and Labor)*, 2004 NSSC 146, Scanlan J. said, at para. 6:

> ...As noted the Court is being asked to resolve a question of law related to the meaning of the statutory term "construction and demolition debris". While the Minister may have a degree of expertise beyond that of the Court as regards environmental issues there is nothing to convince me that the Minister has any expertise beyond the Court in terms of statutory interpretation. On the issue of statutory interpretation and the meaning of the term "construction and demolition debris", I am satisfied the appropriate standard of review is that of correctness....

[31] Scanlan J. cited *Fairmount Developments Inc. et al. v. Nova Scotia (Minister of Environment and Labour)*, 2004 NSSC 126, where Coughlan J. held, at paras. 17-24, that the interpretation of the phrase "person who is aggrieved" in s. 137 was reviewable on a standard of correctness. Similarly, in *Acheson & DeWolfe v. Minister of Environment*, 2006 NSSC 211, an appeal under s. 137 respecting the Minister's decision as to whether a body of water was a "watercourse" within the meaning of the Act, Stewart J. said, at para. 21:

> The Respondent does not dispute the appellants position that interpretation of legislation such as the Act and [*Activities Designation Regulations*] is a pure legal function, requiring the court to apply a standard of "correctness" on determining whether the Minister in exercising his discretion, incorrectly interpreted the language of ss.3(1), (bc) and (be) of the Act, so as not to require his approval. Had the parties not agreed, I would still select correctness as the standard of review...The nature of the problem before the Minister is one of statutory interpretation. The interpretation of these terms is a question of law and the appropriate standard of review is one of correctness...

[32] These decisions preceded *Dunsmuir, supra.,* although the appellant submits there is nothing in that decision suggesting that it alters the previous jurisprudence as to when the standard of correctness is appropriate.

[33] The Minister says the applicable standard of review of the decision under s. 137 is reasonableness. In *Elmsdale Landscaping Ltd. v. Nova Scotia (Minister of Environment)*, 2009 NSSC 358, Duncan J. commented on the level of deference to be afforded the Minister on a s. 138(1)(b) appeal, at paras. 28-30:

> The *Environment Act* is a public interest statute which contains a discrete administrative regime. The words of Justice Couglan 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.

> 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.

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

[34] The Minister submits that Duncan J. held that the Minister was owed a high level of deference, rather than exacting scrutiny, upon applying the *Dunsmuir, supra.,* factors. Duncan J. was reviewing the Minister's dismissal of an appeal against a quarry approval. One of the issues was whether the Minister properly interpreted the term "structure" in the *Pit and Quarry Guidelines*. Counsel states that Duncan, J. held that *Acheson, supra.*, had not satisfactorily determined the issue. The submission on behalf of the Minister continues:

> ...Rather, he considered each of the *Dunsmuir* factors, and in light of the polycentric balancing contemplated in the purpose of the *Act*, the substantial discretion and expertise of the Minister and his delegates, and in light of the mixed law-and-fact questions before the Minister, a high degree of deference was owed.

[35] The appellant suggests a similar distinction in *Parker Mountain Aggregates Ltd. v. Nova Scotia (Minister of Environment)*, 2011 NSSC 134, where Robertson J. applied a reasonableness standard on an appeal under s. 137. She referenced *Elmsdale Landscaping*, *supra.*, and the factors set out in *Dunsmuir, supra*. In

reply, it is argued that *Elmsdale Landscaping* did not deal with statutory interpretation, but only with interpretation of guidelines developed by the Minister.

Presence or absence of a privative clause

[36] The *Environment Act* contains no privative clause, although it does contemplate an appeal to this court under section 138. In *Acheson, supra.*, Stewart J. noted that "the absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a lower standard," and added that the statutory right of appeal indicated less deference (para. 43).

Purpose of the tribunal as determined by interpretation of enabling legislation

[37] The purpose of the *Environment Act* is described in s. 2, which provides, in part:

> 2. The purpose of this Act is to support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals:
>
> (a) maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society;
>
> (b) maintaining the principles of sustainable development, including
>
> ...
>
> (vi) the linkage between economic and environmental issues, recognizing that long-term economic prosperity depends upon sound environmental

> management and that effective environmental protection depends on a strong economy....

[38] The Minister submits that the purpose of the Act is to "protect, enhance, and promote the prudent use of the environment, according to goals listed under the Act." Counsel's submission continues:

> These goals require the Minister to engage in a balancing of interests. They do not prohibit economic development, but rather recognize that the stewardship of the environment is inextricably linked to the prudent economic use of the environment. Many interests arise and must be balanced in the context of each decision of the Minister or his delegate. This requires that a large measure of policy enter into the Minister's decision making process.

[39] The Minister notes the observation by Duncan J., in *Elmsdale Landscaping, supra*., that the Act "is a public interest statute which contains a discrete administrative regime" (para. 28), as well as Coughlan J.'s remarks in *Fairmount Developments, supra.,* to the effect that the appeal raises a "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" (para. 28). Accordingly, the Minister says the requirement to balance various interests, according to the purpose of the Act, while being guided by policy, suggests the Minister's decision is owed "a high degree of deference rather than exacting scrutiny."

The nature of the question at issue

[40] The interpretation of “watercourse” as defined in s. 3(be) of the *Environment Act* is a question of statutory interpretation, and consequently a legal determination. However, this does not necessarily determine that a standard of correctness applies. In *Specter v. Nova Scotia (Minister of Fisheries and Aquaculture)*, 2012 NSSC 40, Wood J. said at paras. 40-42 and 44:

> Questions of statutory interpretation do not automatically attract a standard of correctness. It is important to consider the nature of the legislation and the extent to which the decision involves both factual and policy determinations. A useful overview of the categorization of issues and the related standard of review is found in the following passage from *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7:
>
> > [26] Under *Dunsmuir*, [2008] 1 S.C.R. 190, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (*Dunsmuir*, at para. 60 citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or vires" (paras. 58-61). On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).
>
> A review of the *Act* indicates that the Minister has broad powers to promote and regulate the aquaculture industry. The purposes of the *Act* are set out in s. 2, which demonstrates the legislative intent to have the Minister promote the aquaculture industry, while at the same time balancing other interests, such as the expansion of recreational, sport fishing and ecotourism opportunities.
>
> ....
>
> I am satisfied that the entirety of the Minister's decision-making process is subject to review based upon a reasonableness standard. Although the Minister was required to interpret and apply statutory provisions, that process involved factual

> determinations as well as legislative analysis. In addition, the *Act* is integral to the Minister's role of regulating and promoting aquaculture and fisheries. These are areas in which the Minister has particular familiarity and expertise, and so his interpretation of that legislation ought to be given deference.

[41] Wood J. also cited *Elmsdale Landscaping*, *supra.*, where "the Minister's decision involved questions of mixed fact and law, as well as the exercise of discretion and application of policy," and found that "this characterization applies equally to the Minister's decision which is under review in this proceeding" (para. 43).

[42] The respondent submits that the question at issue in this appeal is also a matter within the relative expertise of the Minister and not a question of central importance to the legal system. It is submitted that "[a]dministration of the Act and, in particular, the procedural choices made in considering a proponent's Application for Approval under Part V, is within the special policy expertise of the Minister, as stated by this Court in *Acheson* and *Elmsdale*...."

The expertise of the tribunal

[43] As to the Minister's expertise, Stewart J. said, in *Acheson, supra*, at paras 46 and 49:

> As did Justice Haliburton in *DRL Environmental Services, Demolition Resources Ltd. v. Nova Scotia, supra* para. 27, I also accept, as a general rule, the proposition also advanced here on behalf of the Minister that ministerial decisions, "are based on a public mandate relating to the administration of their department to determine matters of public interest and to balance competing public rights. By virtue of their status they are, in effect, experts in public policy. A Minister also has the benefit of specialist advice from within his or her department." As a matter of policy, the expertise of the Federal Department of Fisheries and Oceans is also

> sought out by this Minister when approvals are applied for relating to the Minister's management and supervision of water resources under Part X.
>
> On issues of environmental education, environmental emergencies, environmental research, government policies, standards, objectives, guidelines and other means to protect the environment, the Minister possesses greater expertise than does the court. The department, has the staff with the scientific and technical knowledge to oversee and regulate the environment. This expertise supports a high level of deference to the Minister's decision.

[44] To similar effect, Duncan J. said, in *Elmsdale Landscaping, supra.*, that the Act "provides a substantial degree of discretion to the Minister. To assist him he has the benefit of departmental expertise" (para. 32). He went on, at paras. 36-37:

> It is not only these individual topics that require expertise to assess. The Department staff must also have the capability of understanding and assessing the cumulative result of the information tendered in relation to each of these headings in determining how, if at all, the application meets the purposes of the Act and how it should be disposed of. Put another way, the determination of whether a building is a structure within the meaning of the guidelines is not done in isolation or to the exclusion of all relevant information.
>
> This is an expertise that is greater than that of a court. Such expertise favors a greater degree of deference to the Minister' decision making.

[45] The Minister argues that the decision is an "exercise of discretionary authority in promoting the protection, enhancement, and prudent use of the environment, taking into consideration technical information, and involves a large measure of policy regarding environmental regulation." Further, it is argued, the Minister has greater expertise than the court "in making determinations on the administration of the Act....".

[46] In determining whether the jurisprudence has determined, in a satisfactory manner, the degree of deference to be accorded with regard to the question, it is

clear that the caselaw does not provide a satisfactorily consistent answer as to whether the standard of correctness applies to the Minister's interpretation of the meaning of "watercourse" in the *Environment Act*.

[47] In *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40, Mainville J.A., for the court, considered the standard of review owed to the Minister of Fisheries and Oceans in interpreting a provision of the *Species at Risk Act*, S.C. 2002, c. 29 (SARA) and the *Fisheries Act*, R.S.C. 1985, c. F-14. The SARA provided that the Minister must make an order under ss. 58(1) and (4) protecting the critical habitat of listed endangered or threatened aquatic species if such critical habitat "is not legally protected by provisions in, or measures under, this or any other Act of Parliament". The Minister had determined that the *Fisheries Act* be used as a substitute to a protection order under the SARA in certain conditions. This decision was quashed by the Federal Court (Trial Division)(paras. 2-3). On appeal, Mainville J.A. summarized, at paras. 5-6:

> The first ground of appeal concerns the standard of review. The Minister submits that Parliament made him responsible for the administration of the regulatory schemes of the SARA and of the *Fisheries Act*; hence, his interpretation of their provisions is entitled to deference. The Minister bases that submission on a judgment rendered fairly recently by the Supreme Court of Canada: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*"). That judgment emphasized the deference owed to an administrative tribunal when it interprets a provision of its enabling (or "home") statute or statutes closely related to its functions.
>
> In my view, no deference is owed to the Minister as to the interpretation of the relevant provisions of the SARA or of the *Fisheries Act*. The Minister's interpretation of the Supreme Court's most recent pronouncements is erroneous as it fails to consider the context in which they were developed and the reasons which may warrant deference to an administrative tribunal when it interprets its enabling statute. The reasonableness standard of review does not apply to the interpretation of a statute by a minister responsible for its implementation unless

> Parliament has provided otherwise. I thus conclude - as did the Federal Court judge in this case - that where an application for judicial review of a decision as to the implementation of the SARA is based on an allegation that the Minister has misinterpreted a provision of the SARA - or of the *Fisheries Act* as it relates to the SARA - the Minister's interpretation must be reviewed on a standard of correctness. The courts owe no deference to the Minister in that respect.

[48] In *David Suzuki Foundation*,*supra.*, Mainville J.A. reviewed the historical and constitutional foundations of judicial review, the modern Canadian approach to judicial review of questions of law, the decision in *Dunsmuir, supra.,* and the subsequent caselaw. He stated, on the strength of *Dunsmiur*, *supra.*, that in "the case of an administrative tribunal exercising adjudicative functions in the context of an adversarial process, and explicitly or implicitly empowered by its enabling statute to decide questions of law, judicial deference will normally extend to its interpretation of its enabling statute or of a statute closely connected to its functions" (para. 87). He added; however, that "deference on a question of law will not always apply, notably where the administrative body whose decision or action is subject to review is not acting as an adjudicative tribunal, is not protected by a privative clause, and is not empowered by its enabling legislation to authoritatively decide questions of law" (para. 88). He continued, at paras. 89-90:

> What *Dunsmuir* has made clear is that "[a]n exhaustive review is not required in every case to determine the proper standard of review": *Dunsmuir* at para. 57. Further, *Dunsmuir* has also made clear that "at an institutional level, adjudicators ... can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions": *Dunsmuir* at para. 68 (emphasis added); *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para. 53.

> Consequently, since *Dunsmuir*, unless the situation is exceptional, the interpretation by an adjudicative tribunal of its enabling statute or of statutes closely related to its functions should be presumed to be a question of statutory interpretation subject to deference on judicial review: *Alberta (Information and*

> *Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 34 and 41, per Justice Rothstein ("Alberta Teachers' Association").

[49] Mainville J.A. elaborated on the issues on the appeal at. paras. 99 – 100:

> The issues in this appeal concern the interpretation of a statute by a minister who is not acting as an adjudicator and who thus has no implicit power to decide questions of law. Of course, the Minister must take a view on what the statute means in order to act. But this is not the same as having a power delegated by Parliament to decide questions of law. The presumption of deference resulting from *Dunsmuir*, which was reiterated in *Alberta Teachers' Association* at paras. 34 and 41, does not extend to these circumstances. The standard of review analysis set out at paragraphs 63 and 64 of *Dunsmuir* must thus be carried out in the circumstances of this case in order to ascertain Parliament's intent.
>
> In other words, does Parliament intend to shield the Minister's interpretation of the pertinent provisions of the SARA and of the *Fisheries Act* from judicial review on a standard of correctness? On the basis of the standard of review analysis further set out below, I answer in the negative.

[50] The statutes at issue in *David Suzuki Foundation*, *supra.*, did not contain a privative clause. Mainville J.A. found this to be a strong indication of Parliament's intent not to shield the Minister's legal interpretation from judicial review. The statutes also contained provisions that restricted the Minister's discretion, so that it would be strange if the Minister's interpretation of the restrictive legislative language could somehow prevail in order to curtail Parliament's intent. Mainville J.A. then noted that the Minister was acting in an administrative capacity and not as an adjudicator. Finally, although officials in the Department could claim expertise managing fisheries and fish habitat, this did not confer on the Minister expertise in the interpretation of statutes. As such, the issues of statutory interpretation raised by the appeal would be reviewed on a standard of correctness.

[51] It appears that the nature of the body making the interpretation is a significant consideration in deciding the standard of review on a question of statutory interpretation; more specifically, is the decision-maker acting in an administrative or in a judicial capacity. In *David Suzuki Foundation, supra.*, the Minister was acting as an administrative tribunal in interpreting SARA and the *Fisheries Act*. In this case, the administrative decision relates to the decision of the Minister's delegate in granting the permit. The statutory appeal pursuant to s. 137, like the appeal to this court pursuant to s. 138, involved adjudicative or judicial functions. In each instance the appeal is to a single adjudicator. Although the nature and extent of procedural fairness owed to the parties will vary, in each instance the tribunal is exercising judicial or judicial like functions.

[52] The review of the factors in *Dunsmuir, supra.,* therefore suggests that the standard of review is reasonableness, particularly having regard to the adjudicative role of the Minister in deciding the appeal under s. 137. The question is not a constitutional one, nor is it a question of general law that is both of central importance to the legal system as a whole and outside the Minister's specialized area of expertise. Nor does it involve jurisdictional lines between competing specialized tribunals, or a "true question of jurisdiction or vires." Rather it relates to the interpretation of a provision in the Minister's enabling, or home, statute. It raises issues of fact, discretion and policy, and involves intertwined legal and factual issues. For these reasons I conclude that the appropriate standard of review under s. 138 of the Minister's decision under s. 137 is reasonableness.

3. Whether the Minister erred in deciding that "Parkins Brook" also known as "a Drainage conveyance" was not a watercourse?

[53] The Minister decided that the so-called “Parkins Brook” or “drainage conveyance” was not a “watercourse” under s. 3(be) of the *Environment Act*. Counsel confirm that there are only three references to site visits by members of the Department in the Record, two being site visits reported by Mr. Fougere and one by Mr. McPherson.

[54] The initial inspection report by Mr. Fougere is dated October 29, 2010. It includes this notation: “[t]ook note of a drainage conveyance which runs down the property line to a watercourse which empties into a wetland and then into the Lake. Gps [sic] coordinates taken at the staked area where the proposed well is to be located. Also determined distance between proposed drill site and the watercourse using handheld gps [sic] - 180 meters and from the drill site to the adjacent drainage conveyance - approximately 41 meters.” In a second inspection report, dated July 19, 2011, Mr. Fougere stated that Janet MacKinnon and a student, Kevin Turner, were present during the site visit. The second inspection report does not appear to contain a reference to the “Parkins Brook” or the “drainage conveyance” that Mr. Fougere noted on his first site visit.

[55] Initially, both counsel interpreted a reference in the report prepared by exp on behalf of the Kwilmu'kw Maw-klusuaqn Negotiation Office as identifying “Parkins Brook” or the “drainage conveyance.” This report notes that a field trip was arranged by Scott Weldon of the Department of Energy, who attended on-site with Fred Baechler and Dr. James Foulds of exp on June 17, 2011. The report identifies an unnamed stream, which is labelled as a “Receptor Stream”. The report then continues:

> Based upon the site visit, the Receptor Stream is located approximately 100 metres from the proposed drill pad. Within the open field it consists of an apparent man-made drainage ditch, which drains to the northwest. It comprises a narrow, defined channel heavily infilled with vegetation....

[56] On further reflection counsel agreed that the "apparent man-made drainage ditch" is, in fact, not "Parkins Brook," nor is it the "drainage conveyance" noted by Mr. Fougere on his 2010 site visit.

[57] This apparently is the entirety of the documentary evidence about this brook or drainage conveyance. The only reference in the Record to "Parkins Brook" or the "drainage conveyance" is in the inspection report of Mr. Fougere following his first site visit. It is not referenced in the documentation respecting other site visits, nor in the exp report. Clearly this brook or conveyance was either not significant enough to be noted in the later reports, or the authors of these reports did not view it as a potential watercourse in proximity to the proposed drilling site.

[58] In his memorandum to the Minister respecting the s. 137 appeal, Mr. McPherson stated:

> The department does recognize that determining what is a surface watercourse may, at times, be challenging and has developed a Divisional Operating Procedure to assist inspectors in making that determination. The Watercourse Procedure requires that if a channel meets two or more characteristics, as described in the Watercourse Procedure, then it shall be deemed a watercourse.
>
> The "unnamed watercourse" referenced in the Approval does meet two characteristics: it does appear on the National Topographic Series of maps...; and there is visible evidence of water flowing in the channel.
>
> As the "drainage conveyance" does not meet two or more characteristics described in the Watercourse Procedure and, as further clarified in the Watercourse Procedure, "(a) ditch for a highway, forestry road and agricultural drainage ditch

> or a pond created by humans are not watercourses", the drainage conveyance is(sic) not considered to be a watercourse.
>
> The file shows that the proposed location of the Facility will not be within one-hundred (100) metres of a watercourse.

[59] Regardless of whether the standard of review is "correctness " or "reasonableness", I am satisfied there was no evidence on which either Ms. McKinnon, who approved the application, or the Minister in conducting the appeal under s. 137, could decide that "Parkins Brook" or the "drainage conveyance" was a "watercourse" as defined in s. 3(be) of the Act.

4. Whether the Minister erred in failing to consider or adequately address concerns raised by the appellant?

[60] The appellant submits that the Minister made errors in considering the issues it raised. The appellant says the failure to consider relevant factors can result in loss of jurisdiction. In *S.E.I.U. Local 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, Dickson J. (as he then was) said, at para. 5:

> A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

[61] The appellant cites Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action*, looseleaf (Toronto: Canvasback Publishing, 2008), vol. 3 at §15:2300 and §15:2321:

> Conceptually, acting on the basis of an irrelevant consideration or failing to take a relevant consideration into account in exercising discretion is an error in the process of decision-making. However, the exercise if a statutory power has also been referred to as *ultra vires* if based on irrelevant factors or considerations, in that it is closely related to the requirement that powers be exercised only for their intended purposes. Indeed, determining whether a particular consideration is relevant to the exercise of a given power requires interpretation of the enabling legislation, and possibly reference to the intent and purpose of the enabling statute. Of course, to attract intervention, the error must be material, and in substantive terms, it must have rendered the decision or action unreasonable. Indeed, some courts directly assess these decisions for reasonableness.
>
> ....
>
> Failure to take a relevant consideration into account is as erroneous as the improper consideration of an irrelevant one. However, and while the matter has not been decisively settled in Canada, it would seem that in order to succeed on this ground, an applicant must establish that the factor not considered by the agency was one that the legislation expressly or by necessary implication obliged it to take into account, because of its importance to the attainment of the legislative purposes underlying the statutory scheme, as indicated, for example, by its inclusion in policy guidelines.

[62] Edwards J. commented on the effect of a failure to deal with relevant considerations in *Pinsonnault-Flinn v. Nova Scotia (Minister of Environment and Labour)*, 2004 NSSC 206, at para 76:

> The failure to take account of relevant considerations has been found to constitute grounds for review of a decision: For example, in *Danson v. Alberta (Labour Relations Board)*, [1983] A.J. No. 782 (Alta. Q.B.), notwithstanding the "patent unreasonableness" standard of review, the Court quashed a decision of the Alberta Labour Relations Board where it failed to take into account relevant factors when it dismissed the complaint of an applicant without considering evidence advanced by the applicant. There, Wachowich J. stated at para. 14 ff.:
>
> > The argument is that the Board failed to take this extremely relevant evidence into consideration. The applicant is not arguing that given this evidence the Board's decision cannot be supported for that would clearly

> be asking this court to re-try the complaint on the merits. The argument is that the error complained of, if established, is a jurisdictional defect. That is, the Board empanelled to hear this complaint failed to exercise their jurisdiction by not hearing relevant matters.
>
> If the record supports this ground of attack, there is no doubt that this court would be authorized to set aside the Board's decision. Authority for the proposition is in the House of Lords' decision in *Anisminic v. Foreign Compensation Commission*, [1969] 1 All E.R. 208....

[63] After reviewing the purposes of the Act as set out in s. 2 of the *Environment Act*, and the duty on the Minister as outlined in s. 52, Robertson J. made the following remarks in *Parker Mountain Aggregates v. Nova Scotia (Environment)*, *supra*, at paras. 62-64:

> 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* ..."
>
> The Minister must consider any adverse effects in approving an activity, including the acceptability of the location of the activity.
>
> His express statutory duty is to take such action as he considers in order to manage, protect, or enhance the environment.

[64] The appellant offers, as an instance of a matter not adequately dealt with, the location of the proposed well and its proximity to “Parkins Brook” and to a number of residences. As already noted, the evidence in the Record does not support the appellant’s submission that “Parkins Brook” is a watercourse as defined in the Act. In respect to the proximity of residences, Mr. McPherson made the following comments in his memorandum to the Minister:

> ..., it is the Appellant's opinion that "the District Manager appears to have failed to consider the residential nature of the area, and the large number of residences in relatively close proximity to the proposed well site." The evidence in the complete file indicates that the proposed Facility will be located on a hay field, and that there will be five (5) residences within a one-thousand (1,000) metre radius of the proposed drill site. As noted by the Administrator, "NS Environment does not have standards or regulations relating to separation distances from drill sites to private homes." However, the Approval does have terms and conditions for noise, air quality, water quality, and erosion control to ensure environmental conditions are maintained within safe limits for human health.

[65] The appellant also references concerns raised in the exp report. However, in the executive summary, the authors state:

> The primary provincial regulators who are responsible for permitting the proposed operation to ensure no adverse environmental impacts occur are the Nova Scotia Department of Energy and Nova Scotia Environment. Review of the terms and conditions associated with the draft permit indicates a sound appreciation by the regulators for the technology, operations and risks involved with the drilling the exploration hole [*sic*].

[66] In response to the allegation that there was a failure to consider "the likelihood of adverse effects on the environment and human health from locating an oil well in a residential area in close proximity to watercourses, human habitations, and a sensitive watershed ecosystem", Mr. McPherson wrote:

> The area for this project has been closely studied, the technology for exploratory drilling is mature and historical drilling in this area has not been shown to have caused detrimental impact, and the department requires the Approval Holder to implement and follow several measures to prevent environmental degradation.

[67] He also wrote that the approval conditions and terms required adherence "to safeguards and monitoring during the construction, operation and reclamation of the conventional petroleum exploration well to ensure environmental conditions

(such as noise, water, air, sedimentation) are not adversely impacted or experience contamination at levels that would impact human health."

[68] In responding to the claim that the Minister and his delegates failed to "utilize the precautionary principle to guide decision-making as required by s. 2(b)(ii) of the Act", Mr. McPherson responded:

> A second claim made by the Appellant on this ground is that the Minister and his delegates failed to "utilize the precautionary principle to guide decision-making as required by s. 2(b)(ii) of the *Act*." The *Act's* description of the precautionary principle requires the existence of both a threat of serious or irreversible damage, and a lack of full scientific certainty. And, where these do exist, they shall not be used as a reason for postponing measures to prevent environmental degradation.
>
> According to the Approval Holder, "about seven or eight wells have been drilled to date in the area near MacIsaac Point...[and] there are no reports of any of these wells causing damage to the environment or public health." And, more generally, "there have been literally hundreds of thousands of these types of wells drilled throughout the world without any detrimental impact on the environment or public health." And, modern equipment is "much more sophisticated and protective of the environment [than the equipment that was used in this particular area in the past]."

[69] In respect to the alleged "errors in the approval", Mr. McPherson noted one typographical error in the reference to "on mole percent" rather than "one mole percent." I agree with Mr. McPherson that this typographical error is not a basis for quashing an otherwise supportable decision by the Minister.

[70] In reference to another alleged factual error in the Approval, relating to the appellant's statement that the "unnamed watercourse" runs into Lake Ainslie, draining the wetland, Mr. McPherson says the Approval was correct and the "unnamed watercourse" feeds the wetland found on the property.

[71] Mr. McPherson further responded to a suggested omission in respect of condition 13(g) of the Approval. Mr. McPherson's report states:

> iv) With respect to Condition 13(g), which requires that the "Approval Holder shall immediately report any losses greater than 20% of the parameters outlined in 13(e) (sic)", the Appellant claims that "[t]here are no parameters outlined in 13(e), leading one to conclude that there is effectively no requirement for Petrowroth to report any losses". This is the Appellant's "conclusion;" however it is understood by NSE and PRI that the "parameters" referred to are "oil, gas, water in drilling, producing or processing operations" and that nay losses greater than 20% of the original volume of these are to be immediately reported to the Port Hawkesbury District Office.

[72] The appellant's submission details a wide variety of concerns, some taken from the exp report, some obviously originating with adjoining residents and some from reports generated by the Approval Holder. In respect to those that are not specifically responded to, the approach of the Department appears to be to establish monitoring, together with reporting by the Approval Holder and presumably by the residents. It appears, as noted, for instance, in the exp report, that the Department has considered the technology, operations and risks involved. Counsel for the Minister submits:

> The Record demonstrated that concerns of proximity to residential homes and the location of various water sources were considered in the Minister's review of the decision to issue the Approval.
>
> The proponent's application contains their Technical Report, Emergency Response Plan, and Environmental Management Plan. The Technical Report states it will be guided by the special terms and conditions established by Nova Scotia Environment and the Department of Energy. The Emergency response Plan sets out the proposed measures of the proponent for mitigating any harm because of an emergency. The Management Plan sets out how the proponent has assessed surrounding water sources, and the steps proposed to mitigate any risks, both regarding water sources and noise and air pollution.

[73] Counsel also observes that three experts were consulted, one of whom, Kathleen Johnson, concluded:

> The mitigative and precautionary measures should be sufficient to protect the environment and human health. Should drilling activity be found to be creating an adverse effect, the Approval should be suspended until such time as the adverse effect is stopped and the potential for re-occurrence eliminated.

[74] Another of the suggested experts, Mr. Campbell, concluded, after reviewing the technical plan and domestic wells in the area, that:

> ...the proposed activity with the noted safeguards - 240 m of surface casing, constructed drill pad and berm, blowout preventer, environmental management plan - should have negligible effect on the surface water and groundwater environments.

[75] The Minister refers to three layers of environmental protection being built into the conditions of Approval with respect to the protection of groundwater and surface water resources. The first relates to site development itself, the second to a control plan in respect to erosion and sedimentation control, and the third is the maintenance of minimum separation distances from watercourses and surface water supplies and testing of those supplies.

[76] In respect to monitoring, the Minister acknowledges that the Department does not prescribe how to conduct monitoring under the Approval. However, the Department stipulates that the monitoring must be conducted in accordance with accepted monitoring guidelines. Also, in respect to noise monitoring, the Minister submits that additional noise monitoring "would be required based on complaints received or based on the discretion of the inspector when conducting site

inspections (i.e. consistent with a plan under clause 3(p)). If the facility were to be in non-compliance with noise levels, Nova Scotia Environment would require the company to correct the situation."

[77] The Minister acknowledges that there are no regulations or statutory requirements relating to separation distances between homes and proposed drill sites. However, clauses 6 and 7 of the Approval set conditions on sound levels and air emissions, imposing specified sound levels and permitting the Department to request monitoring and construction of monitoring stations by the Approval Holder.

[78] Counsel for the Minister notes that the terms and conditions of the permit include measures designed to protect human health and the environment. The appellant did not identify any concerns about human health or the environment that were not addressed, either by the terms and conditions in the permit or in the documentation contained in the Record.

[79] Another question, of course, is the adequacy of the Minister's response to the various concerns. There was no evidence on this point to supplement the submissions of counsel. Absent evidence to the contrary, there is no basis for the court to question the adequacy of the Department's response. The Minister says the dismissal of the s. 137 appeal was reasonable, arguing that the terms and conditions of the Approval "reasonably address and respond to concerns about human health and environment, and the possibility of adverse effects, based on the record." The Minister's submission continues:

> The position of the Appellant effectively ignores the obligation of the Minister under the *Act*, in favour of an absolute prohibition against any activity that could pose a risk to the environment. The Minister, as outlined above, is obliged to take many factors into consideration, balancing the interests of human health against the environment, and socio-economic development of the province to provide for both. When the Minister's decision is considered under the purpose of the *Act*, the decision was reasonable, transparent, and intelligible, supported by facts that warrant his conclusion that the terms and conditions of the Approval reasonably provide for the integrity of ecosystems, human health, and the socio-economic well-being of society.

[80] The *Environment Act* directs the Minister, not the court, to determine whether, and under what terms and conditions, approval for oil well drilling will be given to an applicant. In determining whether to grant approval, the Minister is required by s. 52 to consider "such matters as whether the proposed activity contravenes a policy of the Government or the Department, whether the location of the proposed activity is unacceptable or whether adverse effects from the proposed activity are unacceptable." The Minister has a discretion to prevent the proposed activity from preceding when he determines it is not in the public interest having regard to the purpose of the Act.

[81] The Act does not preclude granting oil well drilling approvals. Rather, it requires the Minister to take into account concerns about the environment and human health, and to determine whether, in the public interest, having regard to these concerns, an application should be approved. It is not a pure legal determination, but involves matters of public policy as well. The purpose of the Act is primarily one of balancing interests, "of protecting the environment by balancing ecosystem integrity, human health and socio-economic well-being." Section 52 , however, permits the Minister to decide, in the final analysis, whether the granting of approval is in the public interest. The Minister is entitled to

deference in determining whether, having regard to the purpose of the Act, it is in the public interest to approve an oil well drilling permit.

[82] The surrounding residents have legitimate concerns and are entitled to ask questions about the effects on them and their environment of the proposed well drilling activity. The Legislature has directed the Minister assess the risks and benefits and determine whether approval is in the public interest. The present appeal requires the court to determine whether the Minister had reasonable grounds to decide as he has. There is nothing in the Record to show that he failed in this regard. It is not sufficient to show that the appellant has concerns. It is necessary to show that the Minister has not acted reasonably based on the information before him. Apart from making a number of assertions, the appellant has not shown on the Record where the decision of the Minister was not reasonable in the circumstances.

[83] Appeal dismissed.

MacAdam, J.