SUPREME COURT OF NOVA SCOTIA

Citation: Specter v. Nova Scotia (Fisheries and Aquaculture), 2012 NSSC 40

Date: 20120130
Docket: Hfx No. 350371
Registry: Halifax

Between:

Marian and Herschel Specter

Appellants

v.

Minister of Fisheries and Aquaculture, and
Kelly Cove Salmon Ltd.

Respondents

LIBRARY HEADING

Judge:	The Honourable Justice Michael J. Wood
Heard:	December 15, 2011, in Halifax, Nova Scotia
Written Decision:	January 30, 2012
Subject:	Statutory Appeal, Standard of Review
Summary:	This was an appeal from a decision of the Minister of Fisheries and Aquaculture approving amendments to three licences/leases issued for aquaculture operations in Shelburne Harbour.

Issue: What was the proper standard of review to be applied?

Did the amendment applications have to be assessed as applications for new licences?

Was there sufficient evidence to support the Minister's decision to approve the amendments?

Result: The Minister's decision was to be reviewed on a standard of reasonableness even with respect to issues of statutory interpretation.

The procedure followed by the Minister closely tracked that applicable to new licence applications. The information gathered through the review process was extensive and included significant public comment. The procedure followed and the decision to approve the amendments were reasonable in the circumstances. The appeal was dismissed.

Citation: Specter v. Nova Scotia (Fisheries and Aquaculture), 2012 NSSC 40

Date: 20120130
Docket: Hfx No. 350371
Registry: Halifax

Between:

Marian and Herschel Specter

Appellants

v.

Minister of Fisheries and Aquaculture, and
Kelly Cove Salmon Ltd.

Respondents

Judge:	The Honourable Justice Michael J. Wood
Heard:	December 15, 2011, in Halifax, Nova Scotia
Written Decision:	January 30, 2012
Counsel:	Marc Dunning, for the Appellants Darlene Willcott, for the Respondent, Minister of Fisheries and Aquaculture William Moreira, Q.C. and Ian Breneman, for Kelly Cove Salmon Ltd.

By the Court:

Overview

[1] Shelburne Harbour has been the location of finfish aquaculture operations for many years. Such operations are regulated by the Province of Nova Scotia through the regime created by the *Fisheries and Coastal Resources Act*, S.N.S. 1996, c. 25 (the *"Act"*). The Minister responsible for the administration of the *Act* is the Minister of Fisheries and Aquaculture (the "Minister").

[2] In 2008, the respondent, Kelly Cove Salmon Ltd. ("Kelly Cove") held licences and leases issued pursuant to the *Act* for the operation of three sites in Shelburne Harbour. These are identified as site numbers 0602, 0983 and 1192. The operations consisted of floating cage systems containing salmon and rainbow trout, which were being raised for commercial production.

[3] In September, 2008, Kelly Cove applied to the Minister for an amendment of the licence/lease applicable to site 0602. The proposed amendment involved relocation of the site within Shelburne Harbour, as well as an increase in the size of the lease area. Applications for similar amendments were made by Kelly Cove in March, 2009 with respect to sites 0983 and 1192. In each case, the sites were to be relocated within Shelburne Harbour and the lease area increased.

[4] Between the spring of 2009 and the spring of 2011, the Minister undertook consultations and received materials with respect to the amendment applications. In February, 2011, the federal Minister of Transport, Infrastructure and Communities issued an approval under the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, for the installation of Kelly Cove's aquacultural equipment at the new locations.

[5] On March 9, 2011, the Minister issued the requested amendments to Kelly Cove authorizing the relocation of the three sites within Shelburne Harbour.

[6] On June 13, 2011, Marian and Herschel Specter commenced this appeal pursuant to s. 119 of the *Act* in relation to the Minister's decision to approve Kelly Cove's amendment applications.

[7] Kelly Cove was not initially named as a respondent to the appeal and they made a motion to this Court to be added as a party respondent. This was granted by decision of Rosinksi, J. (2011 NSSC 266).

[8] There were preliminary motions by the Minister and Kelly Cove to dismiss the appeal on the basis that it was filed out of time, and also that the appellants lacked the necessary standing. These motions were dismissed by decision of LeBlanc, J. (2011 NSSC 333).

[9] This decision deals with the merits of the Specters' appeal.

Legislative Framework

[10] In considering this appeal from the Minister's decision to grant the amendments, it is necessary to understand the legislative regime within which the decision was made.

[11] The purpose of the *Act* is set out in s. 2, which provides as follows:

> **Purpose of Act**
>
> 2 The purpose of this Act is to
>
> (a) consolidate and revise the law respecting the fishery;
>
> (b) encourage, promote and implement programs that will sustain and improve the fishery, including aquaculture;
>
> (c) service, develop and optimize the harvesting and processing segments of the fishing and aquaculture industries for the betterment of coastal communities and the Province as a whole;
>
> (d) assist the aquaculture industry to increase production;
>
> (e) expand recreational and sport-fishing opportunities and ecotourism;

(f) foster community involvement in the management of coastal resources;

(g) provide training to enhance the skills and knowledge of participants in the fishery, including aquaculture;

(h) increase the productivity and competitiveness of the processing sector by encouraging value-added processing and diversification.

[12] The powers of the Minister are found in s. 6, which provides:

Powers of Minister

6 The Minister, for the purpose of the administration and enforcement of this Act, may

(a) establish and administer policies, programs and guidelines pertaining to the administrative development and protection of the fishery and coastal zone aquatic resources;

(b) consult with and co-ordinate the work and efforts of other departments and agencies of the Province respecting any matter relating to the maintenance and development of fishery resources;

(c) enter into agreements with the Government of Canada or the government of any other province on matters relating to the management or development of fishery resources;

(d) develop scientific databases, especially with respect to determining the impact of various geartypes on the fisheries environment and engage in consultations with the Government of Canada to ensure equitable access to fishery resources;

(e) gather, compile, publish and disseminate information, including statistical data, relating to the maintenance and development of fishery resources;

(f) establish and assist demonstration programs that are consistent with the intent of this Act;

> (g) conduct economic analyses to determine the costs and benefits of proposed alterations to traditional harvesting and processing of fisheries resources and aquaculture;
>
> (h) convene conferences and conduct seminars and educational programs relating to the development, management and protection of fisheries resources;
>
> (i) give financial assistance to any person, group, society or association for purposes related to the promotion and enhancement of the fishery;
>
> (j) establish fees for the provision, registration or filing of any information, documents, returns and reports, any application for, processing and issuance of an approval, certificate, licence or lease, any inspection or investigation and any services or material provided in the course of the administration of this Act;
>
> (k) prescribe forms for the purpose of this Act.

[13] Part III of the *Act* is entitled, Training, Technology and Development, and sets out broad authority on the part of the Minister to undertake projects and establish programs for the development of fishery resources and the aquaculture industry.

[14] The procedure for the issuance of aquaculture licences and leases is set out in ss. 45 to 48 of the *Act*:

> **Application for licence**
>
> 45 (1) A person may apply to the Minister, in the manner prescribed by the Minister, for an aquaculture licence.
>
> (2) Where the site at which aquacultural activities are proposed to be carried on is on Crown land, the applicant shall, in addition to applying for a licence pursuant to subsection (1), apply to the Minister, in the manner prescribed by the Minister, for an aquaculture lease.
>
> (3) Where the site at which aquacultural activities are proposed to be carried on is on private land, the Minister shall only issue an aquaculture licence to the owner or lessee of that land.

Contents of application

46 (1) An application for an aquaculture licence or aquaculture lease shall be accompanied by the information stipulated by the Minister.

(2) The Minister may require an applicant for an aquaculture licence or aquaculture lease to submit any additional information the Minister considers necessary.

(3) Where the Minister considers an application to be incomplete, the application shall not be processed until the information required is submitted.

Prerequisites to making a decision

47 Before making a decision with respect to the application, the Minister

(a) shall consult with

(i) the Department of Agriculture and Marketing, the Department of the Environment, the Department of Housing and Municipal Affairs and the Department of Natural Resources, and

(ii) any boards, agencies and commissions as may be prescribed, and

(b) may refer the application to a private sector, regional aquaculture development advisory committee for comment and recommendation.

Issue of licences

48 After completing the consultation referred to in clause 47(a) and after receiving a recommendation, if any, from a regional aquaculture development advisory committee pursuant to clause 47(b), the Minister may

(a) issue the aquaculture licence or aquaculture lease;

(b) issue the aquaculture licence or aquaculture lease, subject to any conditions the Minister deems appropriate;

(c) refer the application to a public hearing; or

> (d) reject the application for the aquaculture licence or aquaculture lease.

[15] Sections 51 and 52 of the *Act* set out the requirements for aquaculture licences and leases. In both cases, they are granted for a specific geographic area and species. They are also to incorporate any necessary permit, approval, licence or permission which might be required under the laws of Nova Scotia or Canada.

[16] The amendment of licences and leases is referred to in the following provisions:

> 51 (2) An aquaculture licence may be varied or amended by the Minister at any time as may be reasonably necessary to carry out the purposes of this Part.
>
> . . . .
>
> **Amendment of licence or lease**
>
> 59 (1) An aquaculture licence or aquaculture lease may be amended by the Minister or upon the application of the holder in accordance with this Part, the regulations, the licence or the lease.
>
> (2) Where, in the opinion of the Minister, the proposed amendment is substantial and may have a detrimental impact on other uses of marine resources, the Minister shall follow the procedure set forth for a new licence application.

[17] The appeal provisions of the *Act* are found in ss. 119 and 120:

> **Appeal to Supreme Court**
>
> 119 (1) A person aggrieved by a decision of the Minister may, within thirty days of the decision, 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 of Nova Scotia 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.

> (2) The decision of the court pursuant to subsection (1) is final and there is no further appeal to the Nova Scotia Court of Appeal.
>
> **Duty to dismiss appeal**
>
> 120 An appeal in connection with any matter under this Act shall be dismissed by the Supreme Court of Nova Scotia if the sole ground for relief established on the appeal is a defect in form or a technical irregularity.

Facts

[18] The Record filed by the Minister is extensive, consisting of more than 2,000 pages of materials relating to these sites and the amendment application process. I will review and summarize the relevant facts which I have gleaned from those materials.

[19] The three sites in question have been operating as aquaculture facilities in Shelburne Harbour for many years - site 0602 since at least 1991, site 0983 since at least 1996 and site 1192 since at least 2006. Kelly Cove is the current operator and holds the licences and leases with respect to these locations.

[20] In 2008 and 2009, Kelly Cove applied to the Minister for an amendment of the existing licences and leases. The amendments consisted of relocation of the sites within Shelburne Harbour, as well as an increase in size of the leased/licenced areas. The purpose of the application was described in the Environmental Impact Assessment Report prepared on behalf of Kelly Cove by Sweeney International Management Corp. in March, 2009. That report states (at p. 842 of the Record) as follows:

> KCS proposes to relocate these existing sites in order to improve the environmental and economic sustainability of their production of Atlantic salmon (*Salmo salar*) in Shelburne Harbour, as well as to increase the overall production of their Nova Scotia operations. It is also the intention of KCS to increase production of their Nova Scotia operations. The two remaining sites in the area, Site #003 and Site #1193, located to the north of Boston Rock and Hartz Point, will have leases handed back over to the Nova Scotia government.

[21] As this passage indicates, Kelly Cove was surrendering two other site locations as part of the amendment process.

[22] The Minister had a number of reports that were prepared and submitted on behalf of Kelly Cove, including the following:

(i) Environmental Management Plan prepared by Sweeney International Management Corp. and dated February 20, 2008.

(ii) Environmental Impact Assessment prepared by Sweeney International Management Corp. and dated March, 2009.

(iii) Addendum to Environmental Impact Assessment prepared by Sweeney International Management Corp. and dated August 25, 2009.

(iv) 2009 Level II EMP Report and Mitigation Plan prepared by Sweeney International Management Corp. and dated September 30, 2009.

(v) Stocking Plan Justification submitted by Sweeney International Management Corp. and dated January 26, 2010.

(vi) 2010 EMP Report for Site 0602 prepared by Sweeney International Management Corp. and SIMCorp Marine Environmental Inc. and dated July 26, 2010.

(vii) 2010 EMP Report for Site 0983 prepared by Sweeney International Management Corp. and SIMCorp Marine Environmental Inc. and dated July 28, 2010.

(viii) External Audit for Site 0602 prepared by Sweeney International Management Corp. and SIMCorp Marine Environmental Inc. and dated December 29, 2010.

(ix) Addendum to Mitigation Plans for Sandy Point and Boston Rock (site 0602 and 0983) prepared by Sweeney International Management Corp. and SIMCorp Marine Environmental Inc. and dated January 26, 2011.

[23] The Environmental Monitoring Program (EMP) reports arise out of the Nova Scotia Aquaculture Environmental Monitoring Program established by the Province of Nova Scotia. The purpose of the Monitoring Program is to assess the interaction

between the aquaculture operation and the surrounding environment. There are three levels of potential monitoring which might be required. Level II Monitoring is described in the Environmental Monitoring Program Framework document (p. 1351 of the Record) as follows:

> **Level II** - For sites that are considered Hypoxic B or Anoxic, additional sampling is required to better delineate the affected area and more effectively defining the zone of influence.

[24] The 2010 EMP Report for the existing site 0983 concluded that some of the data fell within the Hypoxic B classification. The Environmental Monitoring Program Framework document describes Hypoxic B as follows (p. 1354 of the Record):

> **Hypoxic B**
>
> These sites are likely causing adverse environmental effects to the marine sediments under and adjacent to some cages. The site operator will conduct Level II monitoring and, in addition to following operational BMP's, the site operator will implement additional/enhanced BMP's. A mitigation plan must be submitted to NSDFA for approval and the site operator must provide a strong rationale for maintaining or increasing production levels.

[25] The 2010 EMP Report for the existing site 0602 stated that the data from the test results would cause the site to fall within the Hypoxic A classification. This is described in the Framework document (p. 1354 of the Record) as follows:

> **Hypoxic A**
>
> These sites are likely causing adverse environmental effects to the marine sediments under and adjacent to some cage structure. The site operator must adjust appropriate BMP's to improve environmental performance and follow Level I monitoring next sampling season.

[26] The External Audit for site 0602 indicates that it was prepared at the request of the Nova Scotia Department of Fisheries and Aquaculture as a result of the site being classified as Hypoxic A. The objectives of the audit were described as follows (p. 1279 of the Record):

1.1 Audit Objectives

The objective of this audit was to complete an external audit of the operation of Aquaculture site #0602 for conformity with the requirements of the NSDFA Environmental Monitoring Program and the Associated Best Management Practices contained within.

[27] The outcome of the audit was as follows (p. 1292 of the Record):

3.0 Audit Conclusions and Observations

The activities of KCS, with respect to their operation of site #0602 and their general operations, are compliant with the audit criteria. A site visit was conducted and confirmed the site's adherence to sound management practices and conformity with the audit criteria. The audit findings, limited to the noted opportunities for improvement, are based on interviews, the site visit and documentation review.

Within the scope of the criteria used for this external audit, evidence provided indicated that management practices are not likely the cause of the poor environmental rating. It is the auditors understanding the company has applied for a boundary amendment to aid in the mitigation of the environmental issue at this site.

[28] There was also an External Audit conducted for site 0983 in December of 2010. The conclusion of that audit (p. 1342 of the Record) was essentially identical to that for site 0602, including the reference to an application for a boundary amendment to aid in mitigation of environmental issues at the site.

[29] The Addendum to Mitigation Plans for sites 0602 and 0983 was prepared at the request of the Nova Scotia Department of Fisheries and Aquaculture. The addendum includes the following comments with respect to the potential impact of the proposed boundary amendment on the environmental issues at the two sites (pp. 1296 and 1300 of the Record):

2.1 Site Configuration [For Site 0602]

There are proposed changes to the site configuration of site #602. These changes are dependant on a boundary amendment, which is in the final stages of the federal review process. Assuming acceptance of the boundary amendment, the boundaries of #0602 will be shifted to the north. This will place the cages over an entirely

new section of seafloor and leave the currently occupied space fallow (Fig. 1). By leaving the previously occupied area fallow, it should be afforded an opportunity to recover from the impacts of previous years' farming activities. It is generally accepted that the major effects of aquaculture sites on benthic conditions are limited to within 25 - 50 m of the cage array. The nearest cages in the new cage configuration will be approximately 130 m away from the historically high sulphide areas that were noted during EMP surveys and thus should not have a great influence on the fallowed areas.

The new cages that will be installed at #0602 will be described by 3 sections of steel cages, each of a 2x4 arrangement. Each section of cages will be separated by approximately 155 m, effectively isolating each section from the others. Additionally, the groups of cages will be oriented with the longest sides of the cage arrays running perpendicular to the general flow of current (Fig. 1). This should help to spread the settling waste products from the farm over the widest area possible and minimize benthic impacts.

. . . .

3.1 Site Configuration [For Site 0983]

There are proposed changed (sic) to the site configuration of site #0983. These changes are dependent on a boundary amendment, which is in the final stages of the federal review process. Assuming acceptance of the boundary amendment, the boundaries of #0983 will be shifted to the east. This will place the cages over an entirely new section of seafloor and leave the currently occupied space fallow (Fig. 2). By leaving the previously occupied area fallow, it should be afforded an opportunity to recover from the impacts of previous years' farming activities. While the shift in position of the cage array will only place the new cages approximately 35 m away from the previously high sulphide locations, it should allow the impacted seafloor to lie fallow with little influence from the new cages since the major effects of aquaculture sites on benthic conditions are limited to within 25 - 50 m of the cage array (Mayor *et al.* 2010). The new cages that will be installed at #0983 will be described by 1 section of steel cages of a 2x8 arrangement. The stocking density and biomass for Boston Rock will be less than in previous production cycles. With a smaller biomass and a new location for the cages, KCS feels that the environmental conditions of the benthos will be better managed.

[30] The relocation of the sites within Shelburne Harbour required an approval under the *Navigable Waters Protection Act*. In February, 2011, the Minister of Transport, Infrastructure and Communities issued such an approval for each of

those sites, copies of which were forwarded to the Minister. Attached to each approval were specific details of the proposed relocation and particulars of the equipment to be installed. Also attached was an Environmental Assessment Screening Report prepared pursuant to the *Canadian Environmental Assessment Act* and dated December, 2010. The report identified a number of potential environmental effects and, where applicable, recommended mitigation measures. The report concluded as follows (p. 157 of the Record):

> After reviewing the input received from various sources, Transport Canada has concluded that all environmental concerns relevant to the scope of the project have been satisfactorily addressed in the EA.

[31] As part of its process, Transport Canada requested a further review of the application by Fisheries and Oceans Canada ("DFO") which resulted in a letter dated November 18, 2010 from DFO. DFO concluded that moving the sites, in conjunction with mitigation measures set out in the Kelly Cove plan, and additional mitigation measures identified by DFO, would be an improvement with respect to the environmental impact of the operations (p. 180 of the Record).

[32] The Minister sought input from a variety of sources with respect to the amendment applications. A number of memoranda were sent to the Aquaculture Review Network, although it is not completely clear who was included in that group. At the least, it appears to include various Federal and Provincial Government agencies. A number of such agencies responded with comments concerning the proposed amendments.

[33] The Record also includes comments and submissions from the public, some of which are in favour of the proposed amendments and some which are not. In some cases, there were extended communications between the public and staff of the Department of Fisheries and Aquaculture. Typically, this was in the form of e-mail exchanges. The appellants were particularly active in this process and the Record discloses that this included the following:

(i) On July 19, 2010, they made submissions to Transport Canada on behalf of the "Friends of Shelburne Harbour". (p. 1728 of the Record)

(ii) They prepared a series of letters on the topic of sustainable aquaculture in Shelburne Harbour, which were sent to the members of the Shelburne

community and posted on the website which they maintained for the Friends of Shelburne Harbour. Copies were also sent to Department staff and the Minister. (For example see p. 1831 of the Record)

(iii) They prepared and circulated various discussion papers on the monitoring of aquaculture sites in Nova Scotia and, in particular, Shelburne Harbour (pp. 1833 and 1851 of the Record).

(iv) In December, 2009, they provided a detailed document commenting on Kelly Cove's Environmental Impact Assessment for Shelburne Harbour and made recommendations for further amendments to that document (p. 1745 of the Record).

(v) In July, 2010, they sent a letter to members of the Shelburne community providing an analysis of the three proposed sites using a DFO site screening tool and concluded that approval could not be justified. They recommended that members of the public should make submissions directly to Transport Canada (p. 1716 of the Record).

[34] In February, 2011, the Ecology Action Centre in Halifax sent the Minister detailed comments concerning the November, 2010 DFO letter prepared as part of the federal environmental review process. The EAC letter came to the following conclusions with respect to the DFO advice (p. 1923 of the Record):

> **1.3 Conclusion: Reject DFO Advice**
>
> After a careful review, detailed in the following appendices, it was concluded that there are numerous and serious shortcomings in the DFO analyses of these three new proposed sites in the inner portion of Shelburne Harbour, Nova Scotia. The DFO advice defies common sense, is not supported by scientific analysis, and is inconsistent with DFO's own aquaculture siting guidance. If this DFO advice is accepted, the proponent would be rewarded by being given another opportunity to create three new and larger dead zones, one of which would be right in front of a residential area.

[35] After the initial submission of the applications, there were a number of changes to the boundary locations, some of which were made by Kelly Cove in response to concerns raised by shore front property owners (see pp. 672 and 682 of the Record).

[36] In March, 2011, on the recommendation of staff, the Minister approved the amendments to the size and boundaries of the three sites.

Issues

[37] The notice of appeal filed on June 13, 2011 alleged that the Minister's decision to grant the leases and licences was unreasonable for six reasons. At the conclusions of submissions, Mr. Dunning, on behalf of the appellants, indicated that only the following reasons were in issue:

> (a) The Minister erroneously treated the areas for the Licences and Leases in question as amendments to existing Licences and Leases rather than new Licences and Leases.
>
> (b) The Minister failed to follow the proper procedure for a new Licence and/or Lease pursuant to the *Fisheries and Coastal Resources Act*.
>
> (c) The Minister's decision violated section 3 of the *Aquaculture License and Lease Regulations* made pursuant to the *Fisheries and Coastal Resources Act*.
>
> . . . .
>
> (f) The Minister failed to engage in a sufficient public consultation process.

[38] In their submissions, the appellants addressed grounds of appeal (a) and (b) together as they are obviously inter-related. As a result, the issues on this appeal can be addressed under the following headings:

1. Did the Minister fail to follow the proper procedure in considering the Kelly Cove applications?

2. Did the Minister's decision violate s. 3 of the *Aquaculture Licence and Lease Regulations?*

3. Did the Minister fail to engage in a sufficient public consultation process?

In addition to these specific issues I will consider whether the Minister's decision was generally reasonable in all of the circumstances.

Analysis

Standard of Review

[39] The parties are in agreement that the Minister's decision to issue or amend licences and leases under the *Act* is reviewable based upon a standard of reasonableness. That was the conclusion of MacDonald, A.C.J. (as he then was) in *Brighton v. Nova Scotia (Minister of Agriculture and Fisheries),* 2002 NSSC 160, which involved an appeal pursuant to s. 119 of the *Act.*

[40] The appellant does argue that some aspects of the Minister's decision involve the interpretation of the *Act*, (such as whether it was necessary to follow the procedure for new licences and leases) and those aspects of the decision should be reviewed on a standard of correctness as they involve questions of law.

[41] 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*, 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).

[42] 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.

[43] In *Elmsdale Landscaping Ltd. v. Nova Scotia (Minister of Environment)*, 2009 NSSC 358, Duncan, J. applied a reasonableness standard of review to a statutory appeal of a Minister's decision to approve the construction and operation of a quarry, pursuant to the *Environment Act* and supporting regulations. The Court concluded that the Minister's decision involved questions of mixed fact and law, as well as the exercise of discretion and application of policy. I find this characterization applies equally to the Minister's decision which is under review in this proceeding.

[44] 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.

1. Did the Minister fail to follow the proper procedure in considering the Kelly Cove applications?

[45] The essential position of the appellants is that the applications by Kelly Cove ought to have been treated as new applications and not amendments, which would have triggered the provisions of ss. 47 and 48 of the *Act*. They make this submission on two alternative grounds. First, that there is no authority in the *Act* for Kelly Cove to apply for an amendment of the licences and leases. Alternatively, s. 59(2) requires the Minister to follow the procedure for a new licence application.

[46] The *Act* refers to amendments in several places. Section 51(2) states:

> 51 (2) An aquaculture licence may be varied or amended by the Minister at any time as may be reasonably necessary to carry out the purposes of this Part.

[47] In addition, s. 59(1) provides:

> **Amendment of licence or lease**
>
> 59 (1) An aquaculture licence or aquaculture lease may be amended by the Minister or upon the application of the holder in accordance with this Part, the regulations, the licence or the lease.

[48] The appellants argue that since there is no specific procedure for amendment set out in the *Act*, regulations or the specific licences and leases, then no such amendments can be permitted. Essentially, they say that s. 59(1) contemplates further legislative or regulatory enactments or the incorporation of amending authority in the licence and lease documents. In my view, that is not a proper interpretation of the *Act*. I do not believe that it is necessary that the amendment procedure be detailed in the legislation. Amendments can range from minor adjustments to substantial alterations, and the Minister should be given discretion to decide what procedure he needs to follow in order to carry out his statutory mandate.

[49] Section 59(2) requires the Minister to follow the new licence application process where he concludes that the amendment is "substantial and may have a detrimental impact on other uses of marine resources". This clearly contemplates that some amendments will go through the process for new applications and some will not. The appellants' argument is that all amendments must follow the new application process, which would suggest that s. 59(2) is meaningless. That cannot have been the intent of the legislature in drafting s. 59(1).

[50] The licence/lease documents themselves are structured as agreements between Her Majesty the Queen and Kelly Cove. They are described as "indentures" and contain recitals, as well as mutual promises. They are signed by the Minister on behalf of Her Majesty the Queen and the president of Kelly Cove. Agreements of this nature can always be amended with the mutual concurrence of both parties, whether or not a specific clause to that effect is included in the document. There is no reason why that principle should not apply to the agreements in this case unless there is a provision in the *Act* which would direct otherwise. As noted above, s. 59(2) provides some restrictions on the Minister's discretion to negotiate amendments, but only in the circumstances described in that subsection.

[51] The appellants also argue that the Kelly Cove applications fall within the scope of s. 59(2), and therefore ought to have been dealt with in accordance with the new application procedures set out in ss. 47 and 48. This is triggered where the Minister forms the opinion that the proposed amendment is both substantial and may have a detrimental impact on other uses of marine resources. With respect to the question as to whether the amendments are substantial, the appellants say that they involve moving the aquaculture facilities to brand new locations. The specific changes are set out in the various plans on file in the Record.

[52] It is obvious that the new locations are in relatively close proximity to the existing leases and licences. Counsel for the appellants, in argument, estimated that the boundaries between the new and old locations were generally less than a hundred metres apart at their closest points. The size of the area covered by the licences and leases also increased. With sites 0983 and 1192, the area was essentially doubled. For 0602, the new area was slightly more than three times the size of the existing site.

[53] With respect to the second requirement under s. 59(2), the appellants point out that the existing sites had significant environmental impacts as demonstrated by the results of the 2010 EMP's. In addition, they note that the Environmental Impact Assessment filed on behalf of Kelly Cove in support of the applications shows significant environmental impact from the operations if no mitigation measures are adopted. Similar conclusions were reached as part of the Transport Canada environmental review.

[54] In response, the Minister points out that s. 59(2) gives the Minister a very broad discretion by use of the phrase "in the opinion of". That, combined with the reasonableness standard of review, should give rise to a high degree of deference to any determination by the Minister that the new licence application procedures need not be followed.

[55] It is not completely clear from the Record what determination, if any, the Minister made under s. 59(2). It would appear that the Minister and his staff consulted relatively broadly with respect to the applications, which is the primary requirement under s. 47(a). The one exception appears to be the failure to consult with the Department of Housing and Municipal Affairs which no longer exists under that name. The appellants rely on correspondence from the Minister to a

member of the public dated March 14, 2011 (p. 2022 of the Record), the substance of which was as follows:

> Thank you for your correspondence of March 9th, 2011 regarding the amendments to finfish sites in Shelburne Harbour. I certainly do remember our talk about Sherm Embree and O Vacations which it is a nice play on words.
>
> Members of my department's Aquaculture Division have worked with the proponent, Fisheries and Oceans Canada, Transport Canada and several other agencies in the review of these files. The process to amend the lease Nos. 0602, 0983 and 1192 has now concluded and the amendments have been approved.
>
> Public engagement by our department was not deemed necessary as these were amendments to pre-existing aquaculture sites. However, I am confident that the extensive process followed has taken the necessary steps to reach a proper conclusion.

[56] The appellants submit that the last paragraph indicates that the Minister had determined that this was an amendment application which would exclude the new application procedures under ss. 47 and 48, including the option of a public hearing. While that is one possible interpretation of that correspondence, I would note that on March 25, 2009, the Manager of Aquaculture Policy and Licencing wrote to Kelly Cove advising them of the procedure to be followed with respect to their applications (p. 1617 of the Record). That correspondence indicated that among other things the following steps would take place:

- Complete an initial review and determine if the application should proceed.
- If proceeding, seek input from relevant network agencies, including other Provincial and Federal regulatory bodies.
- Determine whether there is to be public engagement, and if so, in what format.

[57] This letter outlines a procedure that very much tracks the new application process set out in ss. 47 and 48 of the *Act*.

[58] In addition, the Minister wrote to the appellants on January 19, 2011 (p. 1693 of the Record) as follows:

> Thank you for your recent e-mail concerning my response to Ms. Tudor.
>
> You are correct that the amendments to the inner Shelburne Harbour sites are in the latter stages of review by our department and by federal agencies.
>
> I understand the Canadian Environmental Assessment Act review has been completed for the inner Harbour amendments and that the Navigable Waters Protection Program of Transport Canada will soon make a decision regarding their authorization.
>
> Once all federal input has been received, I will consult with my staff to determine the appropriate next steps pertaining to these amendments. Public engagement may take place for site amendments but such decisions are made on a case by case basis.

[59] On February 1, 2011, the Minister again wrote to the appellants and stated the following (p. 1695 of the Record):

> Thank you for bringing your concerns over the Shelburne Harbour aquaculture sites to my attention. As you know, aquaculture site applications go through a network of agencies responsible for aquaculture development in marine waters. My department coordinates the information from the other government agencies and my office leases and licenses the aquaculture operations. I have not heard from all agencies, with their recommendations for the proposed site amendments. Therefore, I have not made a final decision on the aquaculture sites. All site approvals are posted on the department website, www.gov.ns.ca/fish/aquaculture for everyone to see. You are encouraged to check the website regularly to become informed of any decisions that may be of interest to you.
>
> At this time, no decision has been made with reference to a public hearing for the amendments.

[60] My interpretation of the documents is that the Minister was following a process which was very similar, if not identical, to that adopted for new applications. Section 48(c) of the *Act* makes a public hearing discretionary even for new applications.

[61] If the appellants are correct and the Minister was required to follow the new application procedures in ss. 47 and 48, the only deficiencies identified by the appellants are the failure to consult with the Department of Housing and Municipal Affairs and the failure to hold a public hearing. The latter issue will be discussed further when addressing the question of the sufficiency of the public consultation.

[62] When the Minister receives an application for an amendment of a licence or a lease, he must consider what information will be needed in order to assess the application. Part of that analysis will be to determine the nature and the extent of the consultation to be undertaken. The Minister should consider the questions raised by s. 59(2) and whether the nature of the application is such that the more fulsome procedures for new applications should be followed.

[63] In this case, we do not know the Minister's thought process as he did not give reasons for the procedure which he chose to follow, nor was he required to do so. As noted above, there are suggestions in the materials that he may have concluded that the application was not sufficiently substantial to merit the full ss. 48 and 47 review. On the other hand, there are comments in the documents which indicate that this review was, in fact, followed, except for the consultation with the Department of Housing and Municipal Affairs.

[64] If it was clear that the Minister had formed the opinion that the requested amendments were not substantial within the meaning of s. 59(2), I would defer to that decision on the basis that it fell within the reasonable range of options available in the circumstances. These amendments were to long standing leases and licences involving relocation to new sites in the immediate vicinity. Although there was an increase in area, whether this is significant would involve a consideration of the Shelburne Harbour area and any impacted uses, such as recreational, other fisheries and ecotourism. Those are matters clearly within the expertise of the Minister and his Department.

[65] In conclusion, if the appellants are correct and the Minister made a determination that he was not required to follow the new application procedures in light of s. 59(2), I am not prepared to conclude that such a decision was unreasonable in all of the circumstances.

1. Did the Minister's decision violate s. 3 of the Aquaculture Licence and Lease Regulations?

[66] This issue was addressed in the appellants' written submissions, but not expanded upon in oral argument. It relies on s. 3 of the *Aquaculture Licence and Lease Regulations* which provides:

> **Location and marking**
>
> **3 (1)** Marine aquaculture lease sites shall
>
> (a) be located 25 m from the mean low water level; and
>
> (b) have a water depth of 2 m on the shoreward boundary at low tide.
>
> **(2)** Despite subsection (1), the Minister may issue an aquaculture lease for a marine area up to the highwater mark if in the Minister's opinion the area is required for the aquaculture undertaking.
>
> **(3)** Despite subsection (1), the Minister may issue an aquaculture lease for the bottom culture of mollusks in respect of any area heretofore leased for such purpose by the Government of Canada according to the metes and bounds description used in the licence or lease issued by the Government of Canada.

[67] The appellants argue that the use of the word "shall" means that the lease must have a water depth of two metres on the shoreward side of the boundary at low tide, and that the site plans attached to the application documents indicate a minimum water depth of five metres at that point, and that this represents a violation of the Regulation.

[68] It is clear that the depth requirement in s. 3(1)(b) of the Regulations is intended to be a minimum depth and not the definition of a precise distance that must exist for every aquaculture lease site in the Province. I find no merit to this ground of appeal.

2. Did the Minister fail to engage in a sufficient public consultation process?

[69] Assuming that the process for new licence and lease applications is applicable, s. 48(c) of the *Act* gives the Minister discretion as to whether to refer the application to a public hearing. The appellants agree that such a decision is only reviewable if it is unreasonable in the circumstances.

[70] The Record indicates that the Minister, on the recommendation of staff, made the decision that a public hearing was not required. This determination was made some time after February 1, 2011, which was essentially at the end of the application review process. By the time the decision was made, the Minister had the benefit of the following:

- The results of the Aquaculture Network consultation.
- The results of the federal review under the *Navigable Waters Protection Act*, including copies of written submissions from the appellants and other members of the public.
- Significant correspondence and position papers from the appellants and other members of the public.
- The critique of the DFO opinion from the Ecology Action Centre.
- Correspondence from the Mayor of Shelburne in support of the amendment applications.
- The various technical reports and assessments filed on behalf of Kelly Cove.

[71] In his letter of March 14, 2011 (p. 2022 of the Record), which was written after the decision was made to grant the amendments, the Minister made the following comments:

> Public engagement by our department was not deemed necessary as these were amendments to pre-existing aquaculture sites. **However, I am confident that the extensive process followed has taken the necessary steps to reach a proper conclusion.** [Emphasis added]

[72] The highlighted sentence indicates that the Minister was satisfied that the nature and extent of the application review process, which covered a period of two years, was sufficient in order for him to make a decision. This is not a situation where a Minister made a decision in the absence of information and where a public hearing may have been essential. The Record discloses that the Minister obtained a significant amount of information, including submissions both pro and con from the public. In these circumstances, I cannot conclude that it was unreasonable for the Minister to forego a public hearing.

General Review of the Minister's Decision

[73] A decision such as that made by the Minister in this case has a number of components. There are questions of procedure, sufficiency of information, degree of consultation and, ultimately, whether to grant the application. In this case, the decision making process spanned a period of two years from the time of the initial applications. The appellants have invited the Court to review some specific complaints about the Minister's decision to grant the amendments, and these have been addressed above.

[74] The appellants also argue that the Minister's decision was unreasonable because he failed to consider relevant evidence and say that there was no evidentiary foundation which would allow the Minister to rely on the federal review process and the mitigation measures contained therein. Unlike the specific grounds of appeal already addressed, these arguments go to whether the Minister's overall decision was reasonable.

[75] The relevant evidence which the appellants say the Minister failed to consider is essentially the Ecology Action Centre letter of February 17, 2011 providing a critique of the DFO letter of November 18, 2010. There is nothing in the Record to say that the Minister did not review and consider the Ecology Action Centre letter. It was specifically sent to the Minister's attention by the Ecology Action Centre and it is a fair presumption that he reviewed and considered it. The argument of the appellants is that if he had considered this information, the Minister would have refused the amendment applications. I do not believe that that is necessarily a logical conclusion. It is equally probable that the Minister considered all of the other technical information before him and concluded that this material was sufficient to justify the granting of the applications.

[76] In matters such as this, it is not reasonable to expect that the Minister issue a written decision outlining what information he considered and why. The proper approach is summarized in the following passage from *Elmsdale Landscaping Limited, supra*:

> [56] It is not fatal to the decision that the Minister failed to specifically reference the additional information of amenities that was put before him. In my view, the question falls to a determination of whether, based on the information available to the Minister, his decision was reasonable.

[77] It is not the function of this Court, sitting in appeal of the Minister's decision, to review the scientific and technical evidence, and resolve any inconsistencies or ambiguities which might exist. To do so would turn this Court into an "academy of science" as that term has been used in other cases. Such an approach is inappropriate. It is the function of the Minister and his staff to review the scientific information and determine whether it supports the particular application. It is the role of this Court to assess that decision based on the standard of reasonableness and not to second guess the Minister's interpretation of the evidence.

[78] The appellants argue that there was no evidentiary foundation for the Minister's decision to rely on the materials generated by the federal review. They say that it was not reasonable for the Minister to rely on documents that were prepared for a different purpose, and that the Minister was obliged to carry out his own independent review of the information and did not do so. They also say that it was unreasonable for the Minister to rely on mitigation measures identified and imposed through the federal approval process.

[79] There is nothing inherently unreasonable about the Minister collecting information from a variety of sources, assessing it and making a decision. In fact, s. 47 of the *Act* contemplates consultation with various government departments, boards, agencies and commissions, as well as the private sector. Surely, it was contemplated by the Legislature that the Minister could accept and consider information obtained through this process without independent verification. In the present case, the fact that an environmental assessment was carried out as part of the *Navigable Waters Protection Act* approval does not make the information inherently unreliable. It cannot be said that it was unreasonable for the Minister to

obtain and review relevant information which was available concerning the new sites.

[80] The appellants claim that it was unreasonable for the Minister to rely on the mitigation measures set out in the federal environmental review and DFO's letter of November 18, 2010. In support of this, they cite the Federal Court decision in *Environmental Resources Centre v. Canada (Minister of Environment)*, 2001 FCT 1423. In that case, there was a statutory obligation under the *Canadian Environmental Assessment Act* to consider measures that would mitigate any significant adverse environmental effects of the project under consideration. The measures in question were found in a Regional Sustainable Development Strategy. The Court's comments relied upon by the appellants are found in paras. 154-156:

> [154] In my opinion, this opinion highlights the problem with reliance by the MOE upon RSDS, as a mitigation measure, when making her decision. She has no legislative control over that process in the event of its abandonment. In my view, reliance by the MOE upon provincial regulatory powers and initiatives, including the RSDS and industry based initiatives, including the CEEMI, which are beyond enforcement or control by the federal authorities, amounts to a misinterpretation of her duty to consider mitigation factors when she reviewed the CSR. She erred in her interpretation of the Act.
>
> [155] However, if I am in error in this conclusion, I will also consider her decision as an exercise of ministerial discretion. Viewed from that perspective, the question is whether the decision is reasonable.
>
> [156] I am not satisfied that reliance upon processes over which she has no control constitutes a reasonable exercise of authority or discretion.

[81] There are a number of distinguishing circumstances in the present case. First, the Minister had no statutory obligation to consider mitigation measures, and we do not know the extent to which the Minister, in fact, did so. The Record indicates that there were existing environmental concerns with the sites, and the purpose of the amendment was to mitigate those impacts. Whether this would be the result, is simply one of the factors that the Minister must weigh in considering the amendment applications.

[82] One of the concerns of the Court in *Environmental Resource Centre* was that the Minister had no control over the provincial requirements which were presented

as mitigation measures. In the present case, the licences between the Minister and Kelly Cove include the following provisions:

> 4. Any undertakings required by Schedule "B" to this licence, and any permits, protocols, approvals, licences or permissions which may be required under the laws of the Province or Canada form part of this Agreement, and the Licensee hereby agrees to comply with any conditions or limitations contained in these requirements unless compliance for licensing purposes is expressly waived by the Minister.
>
> . . . .
>
> 8. The Licensee agrees to comply with any environmental monitoring program determined by the Minister. This data shall be submitted to the Minister or his designate for purposes of site evaluation. Failure to comply will be grounds for immediate revocation of the licence.
>
> 9. The Licensee shall submit to the Minister, if requested, a report stating such information as the Minister requires concerning the Licensee's use and the productivity of the licence area.
>
> . . . .
>
> 17. If the Licensee is in breach of the terms of this licence and such breach is not corrected within the time period set out in the notice from the Minister, the Minister may cancel this licence without further notice or compensation.

[83] In addition, s. 51(3)(b) of the *Act* provides as follows:

> 51 (3) An aquaculture licence may be terminated by the Minister at any time if
>
> . . . .
>
> (b) the holder of the licence does not show due diligence in fulfilling the terms and conditions of the licence;

[84] Similarly, s. 58 of the *Act* states:

> 58 An aquaculture licence or aquaculture lease issued by the Minister pursuant to this Part may be terminated or revoked if the holder is in breach of this Part or the regulations or any term or condition set forth in the licence or lease.

[85] I am satisfied that the combined effect of the licence, conditions and statutory provisions is that the Minister has the ability to terminate any licence or lease for failure to comply with mitigation measures that might be imposed as part of an approval issued by Transport Canada pursuant to the *Navigable Waters Protection Act*.

[86] If the Minister determined that the mitigation measures identified in the federal review should be imposed on Kelly Cove at the amended site locations, I believe it was reasonable for him to conclude that he had the tools to monitor and enforce this through the provisions of the agreements and *Act* referred to above.

[87] When the Minister's approval decision is examined from a global perspective, it appears eminently reasonable. There were existing aquaculture sites which had operated in Shelburne Harbour for many years. Kelly Cove proposed to move these operations to adjacent sites within the Harbour in order to alleviate some environmental problems that had developed. There were to be some operational changes which would assist in minimizing any negative environmental impacts. These applications were subject to review by Transport Canada, including an environmental assessment, and received the necessary approval under the *Navigable Waters Protection Act*. Kelly Cove provided extensive technical reports to assist the Minister in assessing the applications. In some instances, the location of the sites was adjusted to respond to concerns of adjacent landowners.

[88] Members of the public were aware of the proposed amendments and made submissions to the Minister and the Department. Some were in favour of the relocation and some were not. The Minister consulted with a number of government departments and agencies, none of whom expressed any concerns with respect to the applications.

[89] When considering all of the circumstances, I am not satisfied that the appellants have met the burden of showing that the Minister's decision to approve the amendment applications was unreasonable. They are clearly unhappy with it, and perhaps feel that the Minister has not properly weighed the information which he had available to him. That does not mean that the decision is unreasonable.

Approval was certainly one of the options available to the Minister in light of the extensive information which he had.

Conclusion

[90] For the reasons outlined above, I have concluded that the appeal should be dismissed because I have found that the Minister's decision, including the particular components identified by the appellants, was reasonable in the circumstances.

[91] I want to make a further comment on one point raised by the appellants, and that was the failure to consult with the Department of Housing and Municipal Affairs. They argue that failure to do so is fatal to the Minister's decision if it is determined that the Minister was required to follow the procedures set out in s. 47(a).

[92] For the reasons set out above, I have concluded that the Minister was not required to follow those procedures; however, if I am wrong, then I believe this is a matter which would fall within the scope of s. 120 of the *Act*, which provides as follows:

> 120 An appeal in connection with any matter under this Act shall be dismissed by the Supreme Court of Nova Scotia if the sole ground for relief established on the appeal is a defect in form or a technical irregularity.

[93] In my opinion the failure to consult with the successor to the Department of Housing and Municipal Affairs is a technical irregularity, given the relatively extensive government consultation which did take place and the submissions received from the Town of Shelburne.

[94] If the parties are unable to reach an agreement on costs, I am prepared to receive written submissions by the end of February, 2012.

Wood, J.