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NSARB 2023-001

NOVA SCOTIA AQUACULTURE REVIEW BOARD

IN THE MATTER OF: *Fisheries and Coastal Resources Act*, SNS 1996, c 25

– and –

IN THE MATTER OF: An application by KELLY COVE SALMON LTD. for a boundary amendment for the cultivation of Atlantic salmon (*Salmo salar*) - AQ#1205x in Liverpool Bay, Queens County

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BOOK OF AUTHORITIES
PROTECT LIVERPOOL BAY ASSOCIATION
November 28, 2025

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This consolidation is unofficial and is for reference only. For the official version of the regulations, consult the original documents on file with the Office of the Registrar of Regulations, or refer to the Royal Gazette Part II.

Regulations are amended frequently. Please check the list of Regulations by Act to see if there are any recent amendments to these regulations filed with our office that are not yet included in this consolidation.

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Aquaculture Licence and Lease Regulations
made under Section 64 of the
Fisheries and Coastal Resources Act
S.N.S. 1996, c. 25
O.I.C. 2015-338 (October 26, 2015), N.S. Reg. 347/2015
amended to O.I.C. 2019-322 (effective November 12, 2019), N.S. Reg. 186/2019

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Citation

1 These regulations may be cited as the *Aquaculture Licence and Lease Regulations*.

Definitions

2 In these regulations,

"Act" means the *Fisheries and Coastal Resources Act*;

"adjudicative amendment" means an amendment to an aquaculture licence or aquaculture lease that the Review Board is required by clause 49(b) or (c) of the Act to decide on;

"adjudicative hearing" means a public hearing held by the Review Board as required by Section 51 of the Act in accordance with the process set out in Sections 17 to 36;

"aquaculture development area" means an aquaculture development area designated by the Minister under clause 56(1)(a) of the Act;

"bottom shellfish with gear method" means a method of shellfish aquaculture using gear placed on the solum;

"bottom shellfish without gear method" means a method of shellfish aquaculture practised without using gear placed on the solum;

"development plan" means a document that specifies the technical aspects and feasibility of an aquacultural operation at a particular site;

"Farm Management Plan" means a farm management plan as required by the *Aquaculture Management Regulations* made under the Act;

"institutional lease" means an institutional lease granted by the Administrator under Section 55A of the Act;

"institutional licence" means an institutional licence granted by the Administrator under Section 55A of the Act;

"intervenor" means a person who is granted leave to intervene in an adjudicative hearing before the Review Board under Section 23;

"option to lease" means an option issued by the Minister under subsection 44A(4) of the Act to lease a tract of Crown land that is not designated as an aquaculture development area;

"prescribed fee" means a fee prescribed in Sections 76 to 78;

"reallocation", in relation to an aquaculture site, means the issuance of an aquaculture licence or aquaculture lease for the aquaculture site after the revocation of its previous aquaculture licence or aquaculture lease, as referred to in clauses 54A(1)(f) and 58(1)(e) of the Act and subsection 59(2) of the Act;

"special experimental lease" means a special experimental lease granted by the Administrator under Section 55 of the Act;

"security bond" means a surety bond or any other form of financial security acceptable to the Administrator;

"special experimental licence" means a special experimental licence granted by the Administrator under Section 55 of the Act;

"suspended shellfish method" means a method of shellfish aquaculture using gear placed in the water column;

"u-fish pond" means a pond stocked with fish that meets all of the following criteria:

(i) it is located on private property,

(ii) in the opinion of the Administrator, it is used primarily for the purpose of allowing persons to fish in the pond with rod and line for a fee.

Factors to be considered in decisions related to marine aquaculture sites

3 In making decisions related to marine aquaculture sites, the Review Board or Administrator must take all of the following factors into consideration:

(a) the optimum use of marine resources;

(b) the contribution of the proposed operation to community and Provincial economic development;

(c) fishery activities in the public waters surrounding the proposed aquacultural operation;

(d) the oceanographic and biophysical characteristics of the public waters surrounding the proposed aquacultural operation;

(e) the other users of the public waters surrounding the proposed aquacultural operation;

(f) the public right of navigation;

(g) the sustainability of wild salmon;

(h) the number and productivity of other aquaculture sites in the public waters surrounding the proposed aquacultural operation;

Options to Lease

Details in call for proposals

4 A call for proposals for options to lease issued by the Minister must include any details the Minister considers necessary, including all of the following:

(a) a description of the geographic area under consideration;

(b) the types of species to be cultivated;

(c) the method of cultivation to be used;

(d) the deadline for submitting a proposal;

(e) the number of options to be issued.

Unsolicited proposal for option to lease

5 The Minister may entertain an unsolicited proposal for an option to lease in a manner determined by the Minister.

Issuing options to lease

6 **(1)** The Minister may establish procedures for evaluating proposals for and issuing options to lease.

(2) The Minister has sole discretion in deciding whether to issue an option to lease and, if issued, whether to issue it

(a) as set out in the proposal for the option; or

(b) with variations from the proposal for the option.

(3) In deciding on a proposal for an option to lease, the Minister may take any of the following into consideration:

(a) the potential benefits to the community and Province;

(b) any previous record of the proponent related to aquacultural operations;

(c) the ability of the proponent to carry out the proposal;

(d) the concentration of current and proposed aquacultural operations, in order to ensure orderly development of the industry;

(e) the suitability of the proposal, determined in accordance with any policies established by the Minister.

(4) Before issuing an option to lease, the Minister must notify the proponent that their proposal has been approved and that a fee to secure the option must be paid as required by Section 7 before the option to lease will be issued.

Fee required to secure option to lease

7 **(1)** To secure an option to lease, a proponent must pay the prescribed fee no later than 15 days after the date the Minister notifies the proponent under subsection 6~~(5)~~[(4)] of their successful proposal for the option to lease.

(2) The Minister must not issue an option to lease to a proponent who does not pay the prescribed fee as required by subsection (1).

Duration of option to lease

8 **(1)** Unless it is renewed under subsection (2), an option to lease expires on the date determined by the Minister, which must be no later than 6 months from the date the option is issued.

(2) At the written request of the holder, the Minister may grant an extension of up to 6 months to the duration of an option to lease.

Public notice of issued option to lease

9 **(1)** The Minister must publish notice of an issued option to lease on the Department's website and in the *Royal Gazette* Part I no later than the following dates:

(a) 30 days after the option has been issued; or

(b) 60 days after the option has been issued, if requested by the proponent and approved by the Minister.

(2) Notice of an issued option to lease must include any information determined by the Minister.

(3) In addition to publishing notice of an issued option to lease as required by subsection (1), the Minister may do any of the following:

(a) notify any person, group of persons or organization, as determined by the Minister, of the issued option to lease;

(b) publish notice of the issued option to lease by any means determined by the Minister.

Scoping process for option to lease holder for marine aquaculture site

10 **(1)** Before submitting an application for an aquaculture licence or aquaculture lease for a marine aquaculture site in the area for which their option to lease was issued, an option to lease holder must complete a scoping process.

(2) The scoping process required by subsection (1) must be carried out as determined by the Minister and must include at least 1 public information meeting that is

(a) organized by the option to lease holder; and

(b) held in the community that the Minister determines is the most appropriate community closest to the location of the aquaculture site that is the subject of the option to lease.

(3) An option to lease holder must publish notice of the public information meeting required by subsection (2) in a manner determined by the Minister.

New application for a marine site in a non-designated area

11 **(1)** An option to lease holder who wishes to apply for an aquaculture licence or aquaculture lease must submit their application

(a) after completing the scoping process required by Section 10; and

(b) before their option to lease expires.

(2) In addition to any information required by the Minister under Section 46 of the Act, an option to lease holder must include all of the following with their application for an aquaculture licence or aquaculture lease:

(a) a report on the scoping process carried out under Section 10, including any details required by the Minister;

(b) a development plan that meets the criteria established by the Minister for the type of aquacultural operation to be carried out under the licence or lease.

Incomplete application

11A (1) If the Minister considers an application for an aquaculture licence and aquaculture lease to be incomplete, the Minister must notify the applicant in writing of all of the following:

(a) that the application is incomplete;

(b) that, for the application to be processed, the applicant must provide the additional required information no later than 90 days after the date of the Minister's notice.

(2) If an applicant does not submit the required additional information in compliance with the deadline in clause (1)(b), the Minister must notify the applicant in writing that the application is deemed to be withdrawn.

Adjudicative Amendments

Approval to advance application for adjudicative amendment

11B (1) In this Section,

"approval" means an approval issued by the Minister under subsection 47A(4) of the Act to advance an application for an adjudicative amendment before the Review Board; and

"proposal" means a proposal to the Minister under subsection 47A(1) of the Act to advance an application for an adjudicative amendment before the Review Board.

(2) The Minister may establish procedures for evaluating proposals and issuing approvals.

(3) Subject to any extension granted under subsection (4), the prescribed duration of approvals for the purpose of clause 47A(5)(b) of the Act is 6 months.

(4) At the written request of the holder of an approval, the Minister may extend the approval's duration for up to 6 months.

Scoping process for applicant for adjudicative amendment

12 (1) Before applying for an adjudicative amendment, the holder of the aquaculture licence or aquaculture lease must complete a scoping process.

(2) The scoping process required by subsection (1) must be carried out as determined by the Minister and must include at least 1 public information meeting that is

(a) organized by the holder of the aquaculture licence or aquaculture lease; and

(b) held in the community that the Minister determines is the most appropriate community closest to the location of the site that is the subject of the aquaculture licence or aquaculture lease.

(3) A prospective applicant for an adjudicative amendment must publish notice of the public information meeting required by subsection (2) in a manner determined by the Minister.

Applying for adjudicative amendment

13 An application for an adjudicative amendment must include any information or documentation that the Minister considers necessary to assess the application, including all of the following:

(a) a report on the scoping process carried out under Section 12, including any details required by the Minister;

(b) an updated development plan that meets the criteria established by the Minister for the type of aquacultural operation to be carried out under the amended aquaculture licence or lease.

Consultations on adjudicative amendment application

14 (1) On receipt of a completed application for an adjudicative amendment, the Minister must appoint an employee of the Department to undertake consultations with any of the following as required under the laws of the Province or of Canada with respect to the application:

(a) a department or agency of the Government of Nova Scotia;

(b) a department or agency of the Government of Canada.

(2) In addition to any required consultation referred to in subsection (1), the Minister may appoint an employee of the Department to undertake consultations with any person, group of persons or organization that the Minister considers necessary in the circumstances.

Performance review on application for adjudicative amendment

15 (1) On receipt of a completed application for an adjudicative amendment, the Minister must appoint an employee of the Department to conduct a performance review of the aquacultural operation that is the subject of the amendment.

(2) The Minister must determine the criteria for and scope of a performance review under this Section.

Minister must refer application to Review Board

16 The Minister must refer a completed application for an adjudicative amendment to the Review Board, along with all of the following:

(a) a report on the outcomes of any consultations undertaken under Section 14;

(b) a report on any outcomes of the performance review conducted under Section 15.

Adjudicative Hearings

Adjudicative hearing process

17 The Review Board must follow the adjudicative hearing process with respect to any of the following applications:

(a) an aquaculture licence or aquaculture lease application with respect to a marine site in an area not designated as an aquaculture development area, as referred to in clause 49(a) of the Act;

(b) an application for an adjudicative amendment.

Date of adjudicative hearing

18 (1) No later than 15 days after receiving an application referred by the Minister, the Review Board must set a date for an adjudicative hearing.

(2) The date of an adjudicative hearing must be at least 60 days but no later than 90 days after the date on which the Review Board sets the adjudicative hearing date under subsection (1).

(3) The Review Board must give the parties to an adjudicative hearing at least 60 days' written notice of the hearing date.

Public notice of adjudicative hearing

19 **(1)** At least 60 days before the date set for an adjudicative hearing, the clerk of the Review Board must publish notice of the adjudicative hearing on the Department's website and in the Royal Gazette Part I.

(2) Public notice of an adjudicative hearing must include all of the following information:

(a) the nature of the hearing;

(b) the time and place of the hearing;

(c) the location of the aquaculture site that is the subject of the adjudicative hearing;

(d) the species and method of cultivation proposed;

(e) the applicant's name;

(f) any information about the hearing that the Review Board determines should be made public.

(3) In addition to publishing notice of an adjudicative hearing as required by subsection (1), the clerk of the Review Board may publish the notice by any means determined by the Review Board.

Pre-hearing submissions for adjudicative hearing

20 Members of the public may submit written comments to the Review Board during the notice period provided for an adjudicative hearing and in the manner determined by the Review Board.

Location of adjudicative hearing

21 An adjudicative hearing must be held in the community that the Review Board determines is the most appropriate community closest to the aquaculture site that is the subject of the hearing.

Parties to adjudicative hearing

22 All of the following are parties to an adjudicative hearing:

(a) the applicant;

(b) any intervenor;

(c) the Minister or the Minister's designate.

Request for intervenor status

23 **(1)** A person may request intervenor status from the Review Board.

(2) A request under subsection (1) must be in writing in a form determined by the Review Board and must be submitted to the Review Board no later than 10 days after the date that notice of the adjudicative hearing is published under Section 19.

(3) No later than 10 days after the date it receives a request for intervenor status, the Review Board must decide whether to grant or refuse the request.

(4) The Review Board must grant intervenor status to any person requesting it who, in the opinion of the Review Board, is substantially and directly affected by the hearing.

(5) A decision made by the Review Board with respect to intervenor status is final.

(6) No later than 5 days after deciding on a request for intervenor status, the Review Board must provide notice of its decision to the person requesting intervenor status and, if the request is granted, to each of the parties to the proceeding.

Copies of documents to intervenor

24 (1) Subject to any order under subsection (2) respecting confidentiality, promptly after receiving ~~of~~ any of the following documents referred by the Minister for an adjudicative hearing, the Review Board must provide copies of the documents to an intervenor in the hearing:

(a) for an application for a new aquaculture licence or aquaculture lease for a marine site in a non-designated area, the documents referred to in subsection 11(2);

(b) for an application for an adjudicative amendment, the documents referred to in Section 13.

(2) If an applicant requests, consistent with the Review Board's procedures, that the Review Board hold a document in confidence, the requirement to provide copies in subsection (1) does not apply until the Review Board makes an order respecting the confidentiality of the document, and the requirement must then be applied only in a manner consistent with the Review Board's order.

Intervenors' evidence may be consolidated

25 The Review Board may require all or part of 2 or more intervenors' evidence to be consolidated if the Review Board determines that consolidation is necessary to avoid repetitive or cumulative evidence.

Copies of documents and correspondence to parties

26 (1) Subject to any order under subsection (1A) respecting confidentiality, a party to an adjudicative hearing who files any correspondence or document with the Review Board, other than a document referred to in Section 24, must at the same time deliver a copy of the document or correspondence to each of the other parties to the adjudicative hearing.

(1A) If a party to an adjudicative hearing requests, consistent with the Review Board's procedures, that the Review Board hold a document in confidence, the requirement to deliver copies in subsection (1) does not apply until the Review Board makes an order respecting the confidentiality of the document, and the requirement must then be applied only in a manner consistent with the Review Board's order.

(2) At the same time it delivers any correspondence to a party to an adjudicative hearing, the Review Board must deliver a copy of the correspondence to each of the other parties.

Review Board authority

27 (1) If procedures are not provided for in these regulations or in the Act, the Review Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

(2) The Review Board may dispense with, amend, vary or supplement all or part of the procedures for adjudicative hearings set out in these regulations if it is satisfied that the special circumstances of the application before it so require or it is in the public interest to do so.

Opening adjudicative hearing

28 The Review Board must open an adjudicative hearing by describing in general terms the purpose of the adjudicative hearing and the general procedure governing its conduct.

Adjourning and reconvening adjudicative hearing

29 **(1)** The Review Board may adjourn an adjudicative hearing and reconvene the adjudicative hearing at any time and at any place the Review Board considers appropriate.

(2) The Review Board must provide reasonable notice of the time and place of a reconvened hearing to the parties to the hearing and to the public.

Evidence at adjudicative hearing

30 **(1)** Evidence presented at an adjudicative hearing must be relevant to all of the following:

(a) the proposed aquacultural operation, including its geographic location;

(b) the factors to be considered by the Review Board as required by Section 3.

(2) The Review Board may exclude anything it considers to be hearsay, irrelevant, immaterial or unduly repetitious from the evidence presented at an adjudicative hearing.

(3) A party is not entitled to present the evidence of an expert witness at an adjudicative hearing unless

(a) the evidence is in the form of a report that includes the expert's name, address and qualifications, along with a statement of the substance of the expert's proposed evidence; and

(b) the party has provided the evidence to the Review Board and each of the other parties as required by subsection (5).

(4) A party to an adjudicative hearing may submit written evidence or present oral testimony to explain their position.

(5) At least 15 days before the date of an adjudicative hearing, a party who intends to present written or visual evidence at the adjudicative hearing must provide that evidence to the Review Board through an affidavit, with a copy to each of the other parties.

(6) The Review Board may take notice of any facts of which judicial notice could be taken.

Documentary and real evidence at adjudicative hearing

31 **(1)** The clerk of the Review Board must number or otherwise identify each document, material item and object offered and accepted as evidence in an adjudicative hearing.

(2) The Review Board may accept evidence submitted in the form of a copy or excerpt if the original is not readily available.

(3) The Review Board may require any person presenting a document or photograph as an exhibit to submit a specified number of copies, unless the document or photograph is determined to be unsuitable for reproduction.

Public participation in adjudicative hearing

32 **(1)** Any member of the public may participate in an adjudicative hearing by making a sworn oral statement or an affirmation providing the Review Board with all of the following information:

(a) their name;

(b) their place of residence;

(c) their position on the issues, subject to any limits, terms and conditions determined by the Review Board.

(2) The Review Board must limit the duration of oral testimony given by a member of the public to 6 minutes per person.

(3) To be considered by the Review Board, a sworn oral statement or an affirmation provided by any member of the public must be in relation to 1 or more of the factors set out in Section 3.

Questions at adjudicative hearing

33 (1) The Chair of the Review Board may determine the order of questioning at an adjudicative hearing.

(2) The Chair may exclude any question that, in the opinion of the Chair, is outside of the terms of reference of the Review Board or is needlessly repetitive in nature.

(3) The Chair may limit the number of questions that may be asked at an adjudicative hearing.

(4) A question addressed to a group of persons representing a party may be directed to a specific member of the group or all members present in person.

(5) If a question is directed to a specific member of a group representing a party and that person is unable to answer because of a lack of knowledge or qualification, the Chair may permit another member of the group to provide an answer.

(6) If a party is unable to answer a question without further consultation or research, the party must undertake to provide an answer on or before the close of the hearing or, if that is not possible, no later than 7 days after the close of the adjudicative hearing, and the clerk must provide the response to the person who asked the question and to any other person on request.

Conclusion of adjudicative hearing

34 (1) At the conclusion of an adjudicative hearing, the record of the hearing must be closed and, except by agreement of all parties or as specified by the Review Board in accordance with subsection (2), no other evidence may be entered into the record.

(2) The Review Board may re-open the record of an adjudicative hearing after it has been closed to take additional evidence on specific issues if the Review Board is not satisfied that all necessary information to make a decision has been presented.

Record of adjudicative hearing

35 (1) The clerk of the Review Board must keep a full and complete record for each adjudicative hearing.

(2) A record of an adjudicative hearing must include all of the following:

(a) the application;

(b) supporting documents;

(c) all exhibits.

Decision on application for adjudicative hearing

36 **(1)** No later than 30 days after the date that an adjudicative hearing concludes, the Review Board must decide on the application and issue a written decision that includes the reasons for the decision.

(2) In setting out reasons in a written decision, the Review Board must include all of the following:

(a) the findings of fact on the evidence related to the factors set out in Section 3;

(b) the conclusions of law based on the findings of fact;

(c) particulars of any deviations by the Review Board from the procedures for adjudicative hearings set out in these regulations, as allowed under subsection ~~24~~[27](2).

(3) Once a written decision on an application is issued by the Review Board, the clerk of the Review Board must

(a) send a certified copy of the decision to each party to the adjudicative hearing on the application; and

(b) publish a certified copy of the decision on the Department's website.

Deadline for implementing Review Board decision

37 An action of the Minister to implement a decision of the Review Board must be taken no later than 15 days after the closing date of the appeal period set out in Section 50 of the Act.

Administrative Decisions

Prescribed process for administrative decisions

38 **(1)** Except as provided in subsection (2), the process set out in Sections 39 to 42 is prescribed as the process to be followed by the Administrator in making a decision with respect to an application for any of the following:

(a) an aquaculture licence or aquaculture lease in a designated aquaculture development area;

(b) an aquaculture licence for a land-based aquaculture site;

(c) an amendment of an aquaculture licence or aquaculture lease;

(d) a renewal of an aquaculture licence or aquaculture lease;

(e) an assignment of an aquaculture licence or aquaculture lease;

(f) a special experimental licence or special experimental lease;

(g) a reallocation of an aquaculture site;

(h) an institutional licence or institutional lease in a designated aquaculture development area.

(2) The administrative decision process prescribed by subsection (1) is not required for any of the following:

(a) a routine amendment to an aquaculture licence or aquaculture lease that is required to correct an error or to address a revised policy or a regulatory change of the Government of Nova Scotia or of the Government of Canada;

(b) a request for corresponding expiry dates under subsection 52(5);

(c) a renewal of a special experimental licence or special experimental lease;

(d) an amalgamation of aquaculture licences or aquaculture leases and their associated aquaculture sites.

Manner of applying to Administrator

39 Any application referred to in clauses 38(1)(c) to (f) must be made in a manner determined by the Administrator.

Consultations on application to Administrator

40 **(1)** On receipt of a completed application that is within the jurisdiction of the Administrator, the Administrator must undertake consultations with any of the following as required under the laws of the Province or of Canada with respect to the application:

(a) a department or agency of the Government of Nova Scotia;

(b) a department or agency of the Government of Canada.

(2) In addition to any required consultation referred to in subsection (1), the Administrator may undertake consultations with any person, group of persons or organization that the Administrator considers necessary in the circumstances.

Public submissions on application to Administrator

41 **(1)** On completion of any consultations conducted under Section 40 with respect to an application, the Administrator must publish a notice on the Department's website and in the Royal Gazette Part I inviting the public to submit written comments on the application to the Administrator within the 30 days following the date the notice is published.

(2) A public notice under subsection (1) must specify the period during which written comments may be submitted together with any additional information that the Administrator determines to be necessary.

(3) In addition to the means of publishing required by subsection (1), the Administrator may publish a notice inviting written comments on an application by any other means determined by the Administrator.

(4) A member of the public may submit written comments about an application to the Administrator by mail, fax or e-mail.

(5) To be considered by the Administrator, a written submission from a member of the public must meet all of the following requirements:

(a) it must identify the person making the comments and include contact information;

(b) it must describe how the person making the comment is connected with the matter to be determined;

(c) it must be submitted within the 30-day period specified in the notice published under subsection (1);

(d) if it concerns a marine aquaculture site, it must be in relation to 1 or more of the factors set out in Section 3;

(e) if it concerns a land-based aquaculture site, it must be in relation to 1 or more of the factors set out in Section 43.

Administrator's decision

42 **(1)** After the close of submissions under Section 41, the Administrator must decide on the application and issue a written decision that includes the reasons for the decision.

(2) On issuing a written decision, the Administrator must

(a) send a copy of the written decision issued to the applicant; and

(b) publish a copy of the decision on the Department's website.

Land-based Aquaculture

Factors to be considered in application for land-based aquaculture licence

43 In deciding on an application for a land-based aquaculture licence, the Administrator may take the following factors into consideration:

(a) the financial viability of the proponent and the proposed operation;

(b) the extent to which the proposal is in accordance with the Act, the relevant regulations made under the Act and any guidelines or policies established by the Minister;

(c) the technical viability of the proposed operation;

(d) any factors that the Administrator considers relevant to the application.

Applications for land-based aquaculture

44 In addition to any information required by the Minister under Section 46 of the Act, an application for a land-based aquaculture licence must include a development plan together with any information or documentation that the Administrator considers necessary to assess the application.

U-fish operations

45 **(1)** Sections 43 and 44 apply to an application for an aquaculture licence for a u-fish pond.

(2) The holder of an aquaculture licence for a u-fish pond must not process and sell the aquacultural produce from their u-fish pond.

Special Experimental Leases and Licences

Applying for special experimental licence

46 A person who wishes to conduct aquaculture to do any of the following may apply for a special experimental licence:

(a) test or develop new technology or methods;

(b) carry out basic research;

(c) test the technical feasibility of a aquaculture site.

Applying for special experimental lease

47 An applicant for a special experimental licence must also apply for a special experimental lease if the proposed aquaculture site is on Crown land.

Research purposes

48 Aquaculture conducted under a special experimental licence must be in support of research and must not be on a scale that exceeds the research purposes for which the special experimental licence or special experimental lease was granted.

Research results

49 (1) A holder of a special experimental licence must make a summary of the research results from the aquaculture conducted under the experimental licence available to the Minister.

(2) The Minister, in the Minister's sole discretion, may release the summary submitted under subsection (1) to the public in full or in part.

No assigning special experimental licence or lease

50 (1) A holder of a special experimental licence or special experimental lease must not assign the special experimental licence or special experimental lease.

(2) An assignment contrary to subsection (1) is void.

Conversion to commercial purpose

51 A holder of a special experimental licence or special experimental lease applying for a commercial aquaculture licence or aquaculture lease must apply to the Minister in accordance with Section 45 of the Act and these regulations, including any requirement to submit a proposal for an option to lease, if the application is for either of the following:

(a) the same site;

(b) an area that includes all or part of the same site.

Institutional Licences and Leases

Applying for institutional licence

51A An applicant for an institutional licence must apply in a manner determined by the Administrator.

Applying for institutional lease

51B If the proposed aquaculture site is on Crown land, an applicant for an institutional licence must also apply for an institutional lease.

Terms and Conditions of Aquaculture Licences and Aquaculture Leases

Term and renewal of aquaculture licence or aquaculture lease

52 (1) Except as provided in subsection (3), the term of an aquaculture licence must not exceed 10 years, and an aquaculture licence may be renewed for further terms of no longer than 10 years each.

(2) Except as provided in subsection (3), the term of an aquaculture lease must not exceed 20 years, and an aquaculture lease may be renewed for further terms of no longer than 20 years each.

(3) A special experimental licence or a special experimental lease is valid for a term of 1 year and may be renewed annually for up to 5 years.

(4) On application by the holder of an aquaculture licence or aquaculture lease at least 6 months before its term expires, the Administrator may renew the licence or lease.

(5) On request by the holder of an aquaculture licence or aquaculture lease, the Administrator may amend the expiry date of the licence or lease so that it corresponds with the expiry date of another aquaculture licence or aquaculture lease granted to the same holder, but only if this does not result in the granting or renewal of a term longer than that permitted under subsection (1) or (2).

Application of Sections 54 to 58

53 Sections 54 to 58 apply to all aquaculture licences and aquaculture leases, including, unless otherwise specified, special experimental licences and special experimental leases.

Information included on licence or lease

54 (1) An aquaculture licence or aquaculture lease must indicate all of the following information:

(a) the species that may be cultivated under the licence or lease;

(b) the methods of cultivation authorized under the licence or lease;

(c) the geographic coordinates of the boundaries of the site under the licence or lease.

(2) In addition to the requirements of subsection (1), an aquaculture licence or aquaculture lease may specify the maximum amount of aquacultural produce allowed on the site.

Location and marking

55 (1) An aquaculture licence holder must mark each of their sites in a manner determined by the Minister and keep each site marked during the term of their licence.

(2) An aquaculture licence holder must ensure all of the following:

(a) that each of their sites is marked as required under subsection (1) before any development takes place at the site;

(b) that equipment and aquacultural produce related to any of their sites remain within the geographic boundaries of that site.

Security bond

56 (1) An aquaculture licence holder must ensure that a security bond is in place for the aquaculture site under the licence until a certificate of discharge has been issued by the Administrator.

(2) The holder of a new aquaculture licence must not begin their aquacultural operation until any applicable security bond has been approved by the Administrator.

(3) A person carrying out an aquacultural operation under an existing aquaculture licence on the date these regulations come into force must, no later than 18 months after that date, provide the Administrator with proof that any security bond required by this Section is in place and meets the requirements of this Section.

(4) A security bond must be in a form satisfactory to the Administrator.

(5) Except as provided in subsection (6), and subject to subsection (7) and (8), a security bond must be in an amount equal to the amount set out in the following table for the type of aquacultural operation carried out by the licensee:

Type of Aquacultural Operation	**Security Bond Amount**
Land-based operation	none
Operation using only bottom shellfish without gear method	none
Operation using bottom shellfish with gear method, site size 10 ha or smaller	$500.00
Operation using bottom shellfish with gear method, site size larger than 10 ha and smaller than or equal to 50 ha	$1000.00
Operation using bottom shellfish with gear method, site size larger than 50 ha	$1500.00
Operation using suspended method for shellfish, marine plant or other species, site size 10 ha or smaller	$5000.00
Operation using suspended method for shellfish, marine plant or other species, site size larger than 10 ha and smaller than or equal to 50 ha	$10 000.00
Operation using suspended method for shellfish, marine plant or other species, site size larger than 50 ha	$15 000.00
Marine finfish operation	$1.50 per 100 kg licensed

(6) For a holder of a special experimental licence, the amount required for a security bond is 50% of the applicable amount specified in subsection (5).

(6A) For a holder of an institutional licence, the amount required for a security bond is 50% of the applicable amount specified in subsection (5).

(7) The security bond amount required for an aquaculture licence holder who is licensed for more than 1 species class on a site is the highest amount listed in subsection (5) that is applicable to that licensee.

(8) The Minister may approve collective security arrangements for a group of aquaculture licence holders if the Minister is satisfied that those arrangements will effectively meet the requirements of this Section.

Access for riparian land owner

57 An aquaculture licence holder must conduct their aquacultural operation so as not to deprive any riparian land owner of reasonable access to and from the water adjacent to the land of the riparian land owner.

Recording and reporting requirements

58 **(1)** An aquaculture licence holder must maintain current and accurate records of all of the following with respect to their aquacultural operation:

(a) all aquacultural produce sales, including the date, number or weight and destination of each sale;

(b) all losses of aquacultural produce by any means, including predation and weather;

(c) all on-site inventory;

(d) any information that the Minister requires to be recorded.

(2) An aquaculture licence holder must retain each record maintained under subsection (1) at their normal place of business for at least 7 years from the date of the last entry in the record.

(3) On request, an aquaculture licence holder must provide the Minister or the Minister's designate with any information from their records that is specified in the request in the manner and within the time period specified in the request.

(4) An aquaculture licence holder must submit an annual report to the Minister at a time determined by the Minister that sets out any information required by the Minister concerning the aquaculture licence holder's use of the aquaculture site under the licence and the productivity of the site.

No sublicensing or subletting

59 **(1)** A holder of an aquaculture licence must not sublicense their interest in an aquaculture site.

(2) A holder of an aquaculture lease must not sublet their interest in an aquaculture site.

(3) A sublicence or sublease contrary to this Section is void.

Use of aquaculture site

59A An aquaculture licence holder must use all of the aquaculture site for aquaculture purposes, to the degree and in the manner determined by the Administrator.

Discontinuance of Aquacultural Operation at Marine Site

Request for certificate of discharge

60 **(1)** On revocation of an aquaculture licence or aquaculture lease by the Administrator under Section 59A of the Act, or on the decision of an aquaculture licence holder to discontinue their marine aquacultural operation, the former aquaculture licence holder or aquaculture licence holder must obtain a certificate of discharge from the Administrator.

(2) A request to the Administrator for a certificate of discharge must include all of the following:

(a) a remediation plan;

(b) an anticipated date of completion of the remediation plan;

(c) payment of any outstanding fees that are owed for the aquaculture licence or aquaculture lease.

(3) On receipt of a request for a certificate of discharge, the Administrator must do 1 of the following with respect to the remediation plan submitted with the request:

(a) accept the remediation plan as submitted; or

(b) establish an amended remediation plan with or without adjusting the anticipated date of completion of the remediation plan.

When Minister may remediate aquaculture site

61 **(1)** The Minister may remediate an aquaculture site at the risk and expense of a former aquaculture licence holder or aquaculture licence holder in either of the following circumstances:

(a) the site is not remediated in accordance with the remediation plan by the anticipated date of completion provided in a request for a certificate of discharge under Section 60;

(b) the site is abandoned without the former aquaculture licence holder or aquaculture licence holder first requesting a certificate of discharge from the Administrator.

(2) The Minister may draw on the security bond of the former aquaculture licence holder or aquaculture licence holder to remediate an aquaculture site.

Certificate of discharge

62 On completion of a remediation plan established under Section 60 or a remediation carried out by the Minister under Section 61, the Administrator must issue a certificate of discharge to the former aquaculture licence holder or aquaculture licence holder and release any outstanding portion of their security bond.

Reallocated Marine Aquaculture Sites

Definition for Sections 64 to 67

63 In Sections 64 to 67, “proposal” means a proposal for the exclusive right to apply for reallocation of a marine aquaculture site.

Call for proposals

64 **(1)** The Administrator may issue a call for proposals.

(2) A call for proposals must include any details the Administrator considers necessary, including all of the following:

(a) a description of the location and size of the aquaculture site;

(b) the types of species to be cultivated;

(c) the method of cultivation to be used;

(d) the deadline for submitting a proposal.

Evaluating proposals

65 **(1)** The Administrator may establish the criteria for selecting a proposal and may, in the Administrator's sole discretion, do any of the following:

(a) select a proposal as submitted;

(b) select a proposal but require variations to the proposal;

(c) not select any proposals.

(2) On selecting a proposal, the Administrator must notify the successful proponent of the selection and of any variations to the proposal required by the Administrator under clause (1)(b).

Application requirements for reallocation of marine aquaculture site

66 **(1)** A proponent whose proposal is selected by the Administrator and who wishes to apply for an aquaculture licence and aquaculture lease for the aquaculture site being reallocated must submit their application no later than 90 days after the date of the Administrator's notice under subsection 65(2).

(2) In addition to any information required by the Minister under Section 46 of the Act, an application referred to in subsection (1) must be accompanied by a development plan together with any information or documentation that the Administrator considers necessary to assess the application.

Aquaculture Development Areas

Definition for Sections 68 to 70

67 In Sections 68 to 70, "proposal" means a proposal for the exclusive right to apply for an aquaculture licence and aquaculture lease for a site in an aquaculture development area.

Call for proposals

68 **(1)** The Minister may issue a call for proposals.

(2) A call for proposals must include any details the Minister considers necessary, including all of the following:

(a) a description of the location of the aquaculture development area;

(b) the types of species to be cultivated;

(c) the method of cultivation to be used;

(d) the size of the sites within the aquaculture development area;

(e) the deadline for submitting a proposal.

Evaluating proposals

69 **(1)** The Administrator may establish the criteria for selecting a proposal and may, in the Administrator's sole discretion, do any of the following:

(a) select 1 or more proposals as submitted;

(b) select 1 or more proposals but require variations to the proposal or proposals;

(c) not select any proposals.

(2) On selecting a proposal, the Administrator must notify the successful proponent of the selection and of any variations to the proposal required by the Administrator under clause (1)(b).

Application requirements for licence and lease in aquaculture development area

70 (1) A proponent whose proposal is selected by the Administrator and who wishes to apply for an aquaculture licence and aquaculture lease for a site within the aquaculture development area must submit their application no later than 90 days after the date of the Administrator's notice.

(2) In addition to any information required by the Minister under Section 46 of the Act, an application referred to in subsection (1) must be accompanied by a development plan together with any information or documentation that the Administrator considers necessary to assess the application.

Performance Reviews Conducted by Administrator

Definition for Sections 72 and 73

71 (1) In Sections 72 and 73, "performance review" means a performance review of an aquacultural operation required by this Section.

(2) The Administrator or a person designated by the Administrator must conduct performance reviews of aquacultural operations at the times specified in Section 72.

(3) The Minister must determine the criteria for and scope of a performance review.

Timing of performance reviews

72 The times specified for performance reviews are as follows:

(a) for a new aquaculture licence, following the first production cycle, as determined on initial issuance of the licence;

(b) on receiving an application to assign the aquaculture licence or aquaculture lease for the operation;

(c) on receiving an application to renew the aquaculture licence or aquaculture lease for the operation;

(d) on receiving an application for an amendment to the aquaculture licence or aquaculture lease for the operation that is under the jurisdiction of the Administrator;

(e) before entering the information related to that site into the aquaculture registry;

(f) at any time the Minister considers a performance review to be necessary.

Outcomes of performance review

73 (1) On completion of a performance review, the Administrator must notify the aquaculture licence holder of the outcome of the review.

(2) In a notice under subsection (1), the Adminstrator may address concerns raised in the review by either

(a) varying the terms and conditions of the aquaculture licence or aquaculture lease; or

(b) revoking the aquaculture licence or aquaculture lease in accordance with Section 59A of the Act.

Fee Payments and Fee Waivers

Fees required

74 **(1)** A fee must be paid for each application, renewal, assignment and amendment of an aquaculture licence or aquaculture lease under the Act or these regulations.

(2) All fees are payable to the Minister of Finance and Treasury Board.

(3) All fees are non-refundable.

Application fee payable on date application submitted

75 An application under these regulations is not considered complete and ready for processing until the application fee is paid.

Prescribed Fees

Fee to secure option to lease

76 The fee to secure an option to lease is $500.00.

Fees for aquaculture licence and aquaculture lease applications

77 **(1)** For an aquacultural operation at a marine aquaculture site that is in an area not designated as an aquaculture development area, or at a reallocated site, the application fee is as set out in the following table:

Application Type	Application Fee	
	Licence	Lease
New licence or lease for finfish operation	$1000.00	$1000.00
New licence or lease for operation using only bottom shellfish without gear operation	$250.00	$250.00
New licence for operation using bottom shellfish with gear method	$375.00	$375.00
New licence or lease for suspended shellfish operation	$500.00	$500.00
New licence or lease for operation using suspended method for marine	$250.00	$250.00

plants or other species		
Amendment to add finfish to a non-finfish operation	$1000.00	$1000.00
Amendment to add or change species, other than to add finfish to a non-finfish operation	$250.00 per species	$250.00 per species
Amendment to change culture method to include suspended shellfish	$375.00	$375.00
Amendment to change culture method to include bottom shellfish with gear	$250.00	$250.00
Amendment to change culture method to include bottom shellfish without gear	$125.00	$125.00
Amendment to change site boundaries	$500.00	$500.00
Assignment	$250.00	$250.00
Renewal, other than renewal of special experimental licence or lease	$500.00	$1000.00
New special experimental licence or lease	$250.00	$250.00
Renewal of special experimental licence or lease	$50.00	$50.00
Amendment to site configuration without adding gear	$125.00	$125.00
Amalgamation of aquaculture licences or aquaculture leases and their associated aquaculture sites	$500.00	$500.00
New institutional licence or institutional lease	$250.00	$250.00
Renewal of institutional licence or institutional lease	$125.00	$125.00

(2) For an aquaculture site that is in an aquaculture development area, the application fee is as set out in the following table:

	Application Fee	
Application type	**Licence**	**Lease**

New licence or lease for finfish operation	$2000.00	$2000.00
New licence or lease for operation using only bottom shellfish without gear operation	$500.00	$500.00
New licence for operation using bottom shellfish with gear method	$750.00	$750.00
New licence or lease for suspended shellfish operation	$1000.00	$1000.00
New licence or lease for operation using suspended method for marine plants or other species	$500.00	$500.00
Amendment to add finfish to a non-finfish operation	$2000.00	$2000.00
Amendment to add or change species, other than to add finfish to a non-finfish operation	$500.00 per species	$500.00 per species
Amendment to change culture method to include suspended shellfish	$750.00	$750.00
Amendment to change culture method to include bottom shellfish with gear	$500.00	$500.00
Amendment to change culture method to include bottom shellfish without gear	$250.00	$250.00
Amendment to change site boundaries	$1000.00	$1000.00
Assignment	$250.00	$250.00
Renewal, other than renewal of special experimental licence or lease	$500.00	$1000.00
New special experimental licence or lease	$250.00	$250.00
Renewal of special experimental licence or lease	$50.00	$50.00
Amendment to site configuration without adding gear	$125.00	$125.00

Amalgamation of aquaculture licences or aquaculture leases and their associated aquaculture sites	$500.00	$500.00
New institutional licence or institutional lease	$250.00	$250.00
Renewal of institutional licence or institutional lease	$125.00	$125.00

(3) For a land-based aquaculture site, the application fee is as set out in the following table:

Application Type	**Application Fee**
Licence for new commercial operation	$500.00
Amendment to licence to add or change species	$250.00 per species
Commercial licence renewal	$500.00
Licence assignment	$250.00
New institutional licence	$250.00
Renewal of institutional licence	$250.00
New special experimental licence	$250.00
Renewal of special experimental licence	$50.00

Annual fees

78 **(1)** Except as provided in subsection (1A) for an institutional lease or institutional licence, an aquaculture licence or aquaculture lease holder must pay an annual fee on each anniversary date of the issuance of the licence or lease.

(1A) There is no annual fee for an institutional lease or an institutional licence.

(2) An annual fee that is not paid on the anniversary date of the issuance of the aquaculture licence or aquaculture lease is subject to a late fee.

(3) For any type of aquacultural operation other than one conducted under an institutional lease or institutional licence, the following annual fees apply:

Item	**Annual Fee**
Aquaculture licence	$398.10
Aquaculture lease	$13.30/ha
Late fee	10% of annual fee amount or $100, whichever is more

(4) If an amendment to an aquaculture lease results in a change to the annual fee, the annual fee payable for the year of the amendment is adjusted on a pro rata basis from the date of the amendment.

(5) The holder of an aquaculture licence to operate a u-fish pond is eligible for a rebate of $124.60 on their annual fees.

Minister may waive annual fee

79 **(1)** The Minister may waive annual fees payable by a person in connection with an aquaculture licence or aquaculture lease if all of the following conditions are met:

(a) existing environmental, food safety, market or fish health conditions have resulted in a loss to the person;

(b) the loss referred to in clause (a) cannot, in the opinion of the Minister, be mitigated;

(c) significant hardship is demonstrated by the person.

(2) An annual fee waiver granted under subsection (1) may apply to any of the following:

(a) 1 or more classes of aquacultural operations;

(b) 1 or more species of aquacultural produce;

(c) 1 or more geographic areas.

(3) A request to have an annual fee waived must be accompanied by any supporting information required by the Minister.

(4) Once a year, the Minister must review the records of fees waived during the preceding year.

Legislative History
Reference Tables

Aquaculture Licence and Lease Regulations
Fisheries and Coastal Resources Act

N.S. Reg. 347/2015

Note: The information in these tables does not form part of the regulations and is compiled by the Office of the Registrar of Regulations for reference only.

Source Law

The current consolidation of the *Aquaculture Licence and Lease Regulations* made under the *Fisheries and Coastal Resources Act* includes all of the following regulations:

N.S. Regulation	In force date*	How in force	Royal Gazette Part II Issue
347/2015	Oct 26, 2015	date specified	Nov 13, 2015
186/2019	Nov 12, 2019	date specified	Dec 6, 2019

The following regulations are not yet in force and are not included in the current consolidation:

N.S. Regulation	In force date*	How in force	Royal Gazette Part II Issue

*See subsection 3(6) of the *Regulations Act* for rules about in force dates of regulations.

Amendments by Provision

ad. = added
am. = amended
fc. = fee change
ra. = reassigned
rep. = repealed
rs. = repealed and substituted

Provision affected	How affected
2, defn. of "institutional lease".....	ad. 186/2019
2, defn. of "institutional licence".....	ad. 186/2019
2, defn. of "security bond".....	ad. 186/2019
9(1).....	rs. 186/2019
11A.....	ad. 186/2019
11B.....	ad. 186/2019
16.....	am. 186/2019

Provision affected	How affected
24	ra. as 24(1), 186/2019
24(1)	ra. from 24, 186/2019; am. 186/2019
24(2)	ad. 186/2019
26(1)	am. 186/2019
26(1A)	ad. 186/2019
33(1)	rs. 186/2019
38(1)(a)	am. 186/2019
38(1)(h)	ad. 186/2019
38(2)	am. 186/2019
38(2)(b)	am. 186/2019
38(2)(c)-(d)	ad. 186/2019
41(4)	ra. from 41(5), 186/2019
41(5)	ra. as 41(4), 186/2019
41(5)	ra. from 41(6), 186/2019
41(5)(d)	am. 186/2019
41(5)(e)	ad. 186/2019
41(6)	ra. as 41(5), 186/2019
51	rs. 186/2019
51A	ad. 186/2019
51B	ad. 186/2019
53	am. 186/2019
56(6A)	ad. 186/2019
59A	ad. 186/2019
62	am. 186/2019
77(1)-(3)	am. 186/2019
78(1)	am. 186/2019
78(1A)	ad. 186/2019
78(3)	am. 186/2019
79	am. 186/2019

Note that changes to headings are not included in the above table.

Editorial Notes and Corrections

	Note	Effective date
1	Original text does not include subsection 41(4). **(corrected by N.S. Reg 186/2019)**	

Note	Effective date

Repealed and Superseded

N.S. Regulation	Title	In force date	Repealed date
15/2000	Aquaculture Licence and Lease Regulations	Feb 2, 2000	Oct 26, 2015

Note: Only regulations that are specifically repealed and replaced appear in this table. It may not reflect the entire history of regulations on this subject matter.

Tab 2

This consolidation is unofficial and is for reference only. For the official version of the regulations, consult the original documents on file with the Office of the Registrar of Regulations, or refer to the Royal Gazette Part II.

Regulations are amended frequently. Please check the list of Regulations by Act to see if there are any recent amendments to these regulations filed with our office that are not yet included in this consolidation.

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Aquaculture Management Regulations
made under Section 64 of the
Fisheries and Coastal Resources Act
S.N.S. 1996, c. 25
O.I.C. 2015-339 (effective October 26, 2015), N.S. Reg. 348/2015
amended to O.I.C. 2019-218 (effective August 13, 2019), N.S. Reg. 118/2019

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Citation

1 These regulations may be cited as the *Aquaculture Management Regulations*.

Definitions

2 In these regulations,

"biosecurity measures", in relation to an aquaculture site, means the measures taken to prevent the entry or escape of disease causing agents;

"breach" means any escaping of fish from an aquaculture site;

"Chief Aquatic Animal Health Veterinarian" means the veterinarian appointed by the Minister under Section 3;

"containment management" means the structures in place, and practices carried out, to contain the fish at an aquaculture site;

"critical control limit" means the level or range of a value measured at a critical control point at which no remedial action is required;

"critical control point" means a stage in a procedure at which an action could be taken, if necessary, to prevent, eliminate or reduce a risk;

"disease" means any condition that adversely affects the health of fish;

"fallow period" means a period of time during which aquacultural produce must not be present and aquaculture must not be carried out at an aquaculture site;

"Farm Management Plan" means the document required by Section 5 that sets out how the aquaculture licence holder must address issues such as fish health management, environmental monitoring, farm operations and containment management at their aquacultural operation;

"fish" means any finfish or shellfish;

"holding unit" means a cage, tank, pond or other device used to contain, hold or demarcate groups of fish;

"laboratory" means any of the following:

(i) a laboratory operated or managed by an aquaculture licence holder,

(ii) a veterinary diagnostic or research laboratory,

(iii) a medical or clinical diagnostic laboratory,

(iv) a medical research laboratory;

"mitigation plan" means a mitigation plan to address poor environmental performance determined through monitoring, as required by clause 10(1)(e) or 11(1)(e) for a marine aquaculture site or by subsection 12(1) for a land-based aquaculture site;

"oxic conditions", in relation to sub-aquatic lands, means oxygen availability indicated directly or indirectly by a verifiable and quantifiable measure;

"quarantine" means the isolation of an aquaculture site and the control or prohibition of the movement of fish, fish products, food, equipment or any other thing to or from the site;

"quarantine order" means an order for a quarantine issued by the Minister under Section 24;

"test", in relation to an aquatic animal, includes the collection of body tissue or fluid from the aquatic animal for the purpose of determining whether the animal is infected with a disease causing agent;

"veterinarian" means a person who is permitted to practise veterinary medicine in the Province under the *Veterinary Medical Act*;

"veterinary administrator" means a veterinarian employed by the Department to assist in administering these regulations.

Administration

Chief Aquatic Animal Health Veterinarian

3 **(1)** The Minister must appoint a person as the chief aquatic animal health veterinarian to administer parts of these regulations.

(2) In the absence of the Chief Aquatic Animal Health Veterinarian, the Minister may temporarily delegate the powers and duties of the Chief Aquatic Animal Health Veterinarian to a veterinary administrator.

(3) The Chief Aquatic Animal Health Veterinarian or a veterinary administrator, in exercising powers under these regulations, may be accompanied by any person they consider necessary to enable them to exercise those powers.

Release of information to the public

4 The Minister may establish policies for the routine release to the public of aquaculture related information held by the Department, including policies for any of the following:

(a) the type of information to be released;

(b) the manner in which information is released;

(c) the timing of the release of information.

Farm Management Plans

Farm Management Plan and record of amendments

5 **(1)** An aquaculture licence holder must prepare a Farm Management Plan in accordance with these regulations.

(1A) Before the initial stocking of their aquaculture site, an aquaculture licence holder must notify the Minister that they have prepared their Farm Management Plan, and make it available for review and approval by the Minister.

(2) An aquaculture licence holder must keep a record of any amendments to their Farm Management Plan, to be provided as required as part of an audit under Section 38.

Required content for Farm Management Plan

6 **(1)** A Farm Management Plan must include any information required by the Minister, including sections for all of the following:

(a) fish health management, in accordance with Section 9;

(b) environmental monitoring, in accordance with Sections 10 to 13;

(c) farm operations, in accordance with Section 14;

(d) containment management, in accordance with Section 15, for holders of aquaculture licences for finfish in marine aquaculture sites.

(2) Each procedure contained in a Farm Management Plan must include any of the following that apply with respect to that procedure:

(a) critical control points;

(b) critical control limits;

(c) details about how the procedure is to be monitored;

(d) details about corrective actions to be taken.

(3) The Minister may establish minimum requirements for the procedures referred to in subsection (2).

(4) The Minister must publish any minimum requirements established under subsection (3) on the Department's website.

Minister may require amendments to Farm Management Plan

7 On reviewing a Farm Management Plan, the Minister may require the Plan to be amended.

Adherence to Farm Management Plan

8 An aquaculture licence holder must adhere to the procedures contained in their Farm Management Plan and must keep records that

(a) verify adherence to the procedures; and

(b) demonstrate that effective action was taken at critical control points.

Fish health content

9 **(1)** The fish health section of a Farm Management Plan must include any information and procedures the Minister requires to ensure the effective management of fish health at an aquacultural operation, including all of the following:

(a) for a holder of an aquaculture licence for shellfish, shellfish husbandry;

(b) for a holder of an aquaculture licence for finfish, all of the following:

(i) finfish husbandry and welfare,

(ii) veterinary care and disease surveillance practices,

(iii) culling and mass stock depopulation practices;

(c) biosecurity measures;

(d) general emergency measures, other than culling or mass stock depopulation practices.

(2) In addition to the procedures required by subsection (1), the fish health section of a Farm Management Plan for an aquacultural operation in which trout or salmon is farmed at a marine aquaculture site must include procedures for managing sea lice.

(3) The holder of an aquaculture licence for finfish in a marine aquaculture site must prepare an updated fish health section of their Farm Management Plan for approval for each production cycle, at a time determined by the Minister.

Environmental monitoring content for finfish in marine aquaculture site

10 **(1)** For a holder of an aquaculture licence for finfish in a marine aquaculture site, the environmental monitoring section of a Farm Management Plan must include any information and procedures the Minister requires to ensure the effective environmental monitoring of the site, including all of the following:

(a) processes for measuring oxic conditions within the boundaries of the site and at any other locations determined by the Minister;

(b) the monitoring schedule and associated process for reporting results;

(c) sampling locations for each monitoring event;

(d) processes for assessing and reporting on the stocking levels associated with monitoring events;

(e) a mitigation plan.

(2) Any information resulting from the environmental monitoring procedures required by subsection (1) must be submitted by the aquaculture licence holder to the Minister on annual basis, at a time determined by the Minister.

Environmental monitoring content for shellfish and plants in marine aquaculture site

11 **(1)** For the holder of an aquaculture licence for shellfish or plants in a marine aquaculture site, the environmental monitoring section of a Farm Management Plan must include any information and procedures the Minister requires to ensure the effective environmental monitoring of the site, including a mitigation plan.

(2) Any information resulting from the environmental monitoring procedures required by subsection (1) must be submitted by the aquaculture licence holder to the Minister, at a time determined by the Minister.

Environmental monitoring content for land-based aquaculture site

12 **(1)** The environmental monitoring section of a Farm Management Plan for a holder of an aquaculture licence for a land-based aquaculture site must include any information and procedures the Minister

requires to ensure the effective environmental monitoring of that type of aquacultural operation, including a mitigation plan.

(2) Any information resulting from the environmental monitoring procedures required by subsection (1) must be submitted by the aquaculture licence holder to the Minister periodically, at a time determined by the Minister.

Alternative procedures to achieve effective environmental monitoring

13 If an aquaculture licence holder establishes to the Minister's satisfaction that not all of the requirements in these regulations are relevant to their aquacultural operation, or that different requirements would be more appropriate to achieve effective environmental monitoring of their aquacultural operation, the Minister may do any of the following:

(a) waive the requirement for the aquaculture licence holder to provide all of the information and procedures required by these regulations;

(b) accept alternative information and procedures proposed by the aquaculture licence holder.

Farm operations content

14 The farm operation section of a Farm Management Plan must include any information the Minister requires to ensure the responsible operation of an aquacultural operation, including information and procedures that are consistent with industry best practices relating to all of the following:

(a) storing and disposing of feed, fuel, lubricants and chemicals;

(b) removing and disposing of accumulated refuse and decommissioned farm supplies and equipment;

(c) retrieving any gear or debris from the aquacultural operation that has broken loose;

(d) interactions with wildlife;

(e) maintaining the site in good order;

(f) noise.

Containment management content

15 The containment management section of a Farm Management Plan for a holder of an aquaculture licence for finfish in a marine aquaculture site must include information and procedures related to all of the following:

(a) operating procedures that limit the risk of a breach;

(b) processes for installing and maintaining infrastructure in place to limit the risk of a breach;

(c) responses to breaches;

(d) areas of potential impact if a breach occurs;

(e) management of the site if unusual events or severe weather occurs;

(f) schedules for reporting all of the following:

(i) initial farm stocking,

(ii) inventory levels during production,

(iii) audits of the containment management system;

(g) proof of a professional engineer's approval of the design of the structures in place for containment management;

(h) a finfish marking plan.

Aquaculture Management Areas

Minister may define aquaculture management area

16 The Minister may establish an area with multiple aquaculture sites as an aquaculture management area for the purpose of managing the health of aquatic animals in the area.

Agreement among multiple licensees in aquaculture management area

17 **(1)** If the aquaculture sites within an aquaculture management area established under Section 16 are operated by 2 or more aquaculture licence holders, all the aquaculture licence holders within the aquaculture management area must agree among themselves, in writing, to do all of the following:

(a) share procedures that are required to be carried out under their Fish Health Management Plans;

(b) coordinate treatments where applicable;

(c) coordinate fallow periods;

(d) create communication protocols concerning all fish health issues of common concern.

(2) A copy of an agreement required by subsection (1) must be submitted to the Minister annually at a time determined by the Minister.

(3) If the Minister considers it necessary to better prevent and manage disease, the Minister may require an amendment to any agreement submitted under subsection (2).

(4) If the aquaculture licence holders within an aquaculture management area fail to agree on any of the requirements in subsection (1), the Minister must determine the requirements and notify the licence holders that they must comply with the Minister's direction.

Disease Surveillance and Reporting

Health records for aquaculture sites

18 **(1)** An aquaculture licence holder must keep health records for the current stock in each of the licence holder's aquaculture sites and must submit the records to the Minister at the Minister's request.

(2) The Minister may determine the information that an aquaculture licence holder must include in the health records required by subsection (1).

Diagnostic testing by approved laboratory

19 **(1)** In this Section, "approved laboratory" means a laboratory approved by the Minister to conduct diagnostic testing on fish for the purpose of disease surveillance.

(2) The Chief Aquatic Animal Health Veterinarian may require an aquaculture licence holder to collect and submit samples to an approved laboratory for diagnostic testing.

Mandatory reporting of products used for treatments

20 An aquaculture licence holder must report any use of any of the following at their aquacultural operation to the Minister in the manner and at the times determined by the Minister:

(a) antibiotics;

(b) products to treat sea lice.

Mandatory reporting of disease or mortality

21 **(1)** In this Section,

"mortality event", in relation to fish in an aquaculture site, means the death of a number of fish

(i) within a 24-hour period, equivalent to at least 2% of the current aquaculture site inventory, or

(ii) within a 5-day period, equivalent to at least 5% of the current aquaculture site inventory;

"reportable disease" means a disease that the Minister determines must be reported to the Chief Aquatic Animal Health Veterinarian in accordance with subsection (4).

(2) The Minister must post a list of all reportable diseases on the Department's website.

(3) The reporting requirements in this Section apply to all of the following persons:

(a) an aquaculture licence holder;

(b) a member of the personnel of an aquacultural operation;

(c) a veterinarian;

(d) a member of the personnel of a laboratory.

(4) A person listed in subsection (3) must immediately report any of the following to the Chief Aquatic Animal Health Veterinarian by telephone, followed by a written report no later than 24 hours after the telephone report:

(a) knowledge or suspicion that a fish may have a reportable disease;

(b) a mortality event.

(5) A report under this Section must include the name and contact information of the person who is making the report together with all of the following information, if available, about the aquaculture site and fish that are the subject of the report:

(a) all of the following information about the aquacultural operation:

(i) name of the aquaculture licence holder,

(ii) license or lease number,

(iii) location of the site, including the address,

(iv) holding unit number infected or suspected to be infected;

(b) the species, age and number of fish in the holding unit;

(c) the presumptive diagnosis;

(d) clinical signs of disease in the affected fish;

(e) the mortality rate.

Managing Outbreaks of Disease

Outbreak of disease

22 For the purposes of Sections 23 and 24, an outbreak of disease is the presence of disease that, in the opinion of the Chief Aquatic Animal Health Veterinarian, requires extraordinary means for control.

Authority during outbreak

23 If the Chief Aquatic Animal Health Veterinarian suspects or considers a situation to be an outbreak of disease, the Chief Aquatic Animal Health Veterinarian or veterinary administrator may

(a) with respect to each aquaculture site where the disease was reported, do any of the following:

(i) take samples of the fish, other organisms or water,

(ii) undertake an epidemiological investigation,

(iii) order the treatment of a group of fish,

(iv) order the vaccination of a group of fish,

(v) order that no fish be moved to or from the site,

(vi) require the aquaculture licence holder to take enhanced biosecurity measures;

(b) for the purpose of inspecting or examining fish to determine whether the fish are infected with a disease, do any of the following:

(i) stop and inspect any vehicle, including the vehicle's load, in which the Chief Aquatic Animal Health Veterinarian or veterinary administrator believes fish are being or have been transported,

(ii) inspect each aquaculture site where the fish originated or to which a disease causing agent may have spread.

Minister may make quarantine order

24 **(1)** The Minister may make an order designating any aquaculture site or any other area where an outbreak of disease is known or suspected as a quarantine area.

(2) A quarantine order may include any conditions or restrictions with respect to the quarantine area that the Minister considers necessary or advisable in the circumstances, including biosecurity measures.

Serving quarantine order

25 A quarantine area order must be served on each holder of an aquaculture licence for an aquaculture site within the quarantine area.

Minister may order slaughter, destruction or disposal

26 **(1)** The Minister may order the slaughter, destruction or disposal of any fish in a quarantine area.

(2) Nothing in these regulations imposes an obligation on the Minister to pay compensation for any fish slaughtered, destroyed or disposed of under an order under subsection (1).

Disease management measures for quarantine area

27 **(1)** The Chief Aquatic Animal Health Veterinarian may specify disease management measures required for complying with a quarantine order, including any of the following:

(a) controlling the movement of any fish or thing into or out of the quarantine area;

(b) slaughtering, destroying or disposing of any fish in the quarantine area, as ordered under Section 26;

(c) operating a disinfection station at the entrance to and exit from any aquaculture site in the quarantine area;

(d) disinfecting any thing in the quarantine area;

(e) eradicating the disease or disease causing agents in the quarantine area;

(f) establishing a fallow period for the quarantine area;

(g) preventing the spread of the disease or disease-causing agents out of or into the quarantine area.

(2) An aquaculture licence holder whose aquaculture site is the subject of a quarantine order must provide to the Chief Aquatic Animal Health Veterinarian, for approval, written incident-specific information indicating how they will take any disease management measures specified under subsection (1).

Testing and sampling restocked fish in quarantine area

28 **(1)** The Chief Aquatic Animal Health Veterinarian may require an aquaculture licence holder whose aquaculture site is subject to a quarantine order to complete specified testing of newly stocked fish within a specified period of time after the date the site is restocked.

(2) The Chief Aquatic Animal Health Veterinarian or veterinary administrator may collect samples of newly stocked fish for testing.

Consequences of non-compliance

29 **(1)** If the Minister believes, on reasonable grounds, that a quarantine order, a disease management requirement under Section 27 or a requirement for testing under Section 28 has not been complied with, the Chief Aquatic Animal Health Veterinarian or veterinary administrator may enter any place in the quarantine area and take or cause to be taken any steps they consider necessary to accomplish the following:

(a) ensure compliance with the order or requirement;

(b) remedy the consequences of the failure to carry out the order or requirement.

(2) The Minister may recover any expenses reasonably incurred in taking steps under subsection (1) from the person who failed to comply with the quarantine order or the requirement.

Environmental Monitoring Management

Requirements for stocking

30 **(1)** In this Section, "baseline assessment" means environmental monitoring procedures carried out at an aquaculture site to record, for the purpose of future comparison, the state of environmental conditions that prevail without aquacultural produce at the site.

(2) Before the initial stocking or restocking of a marine finfish aquaculture site, an aquaculture licence holder must obtain the Minister's approval for the proposed stocking level as being supported by either the baseline assessment of the site or by environmental monitoring results.

Updating mitigation plan

31 **(1)** If poor environmental performance is determined through monitoring, an aquaculture licence holder must update their mitigation plan to address the poor environmental performance and submit the updated plan for the Minister's approval.

(2) An aquaculture licence holder must implement an updated mitigation plan approved under subsection (1) within the timeframe determined by the Minister.

Oxic conditions remediation requirements

32 **(1)** A holder of an aquaculture licence for finfish in a marine aquaculture site must conduct their aquacultural operation in a manner that maintains oxic conditions that indicate that sufficient oxygen is present within the boundaries of their site.

(2) If monitoring results indicate that the oxic conditions referred to in subsection (1) are not maintained, an aquaculture licence holder must do all of the following:

(a) conduct follow up (level II) monitoring no later than 35 days after initial (level I) monitoring;

(b) submit the results of the follow up (level II) monitoring conducted under clause (a), along with an updated mitigation plan, no later than 14 days after conducting the monitoring, for the Minister's approval.

(3) In addition to the requirements in subsection (2), the aquaculture licence holder must take any action at the aquaculture site required by the Minister to reduce environmental impact, including any of the following:

(a) expediting the harvest program;

(b) extending a fallow period;

(c) limiting approved stocking levels;

(d) adjusting the site layout.

Containment Management Monitoring

Mandatory notification to Department of breach

33 **(1)** A holder of an aquaculture licence for finfish in a marine aquaculture site must conduct their aquacultural operation in a manner that is designed to prevent breaches.

(2) A holder of an aquaculture licence for finfish in a marine aquaculture site or any personnel of their aquacultural operation who know or suspect a breach must immediately notify the Department in the manner determined by the Minister and in accordance with subsection (3).

(3) A notice required by subsection (2) must include any information the Minister requires to ensure that the suspected or confirmed breach is remedied, including all of the following information:

(a) name and contact information of the individual who is making the report;

(b) suspected date of the breach;

(c) all of the following information about the aquacultural operation:

(i) name of the aquaculture licence holder,

(ii) licence or lease number,

(iii) address of the site,

(iv) holding unit number where the suspected or confirmed breach occurred;

(d) species and approximate age, size, and weight of the fish that escaped;

(e) approximate number of fish in the holding unit where the suspected or confirmed breach occurred;

(f) freshwater place of origin of the fish that escaped;

(g) level of the suspected or confirmed breach;

(h) suspected or confirmed cause of the breach;

(i) any mitigation efforts that have been undertaken, are in progress or are proposed.

Third-party audit of containment management section required

34 The containment management section of a Farm Management Plan must be audited at all of the following times by a third party approved by the Minister:

(a) before the initial stocking of an aquaculture site;

(b) **[repealed]**

(c) no later than 30 days after the date that a breach of more than 50 fish is reported;

(d) when 1 or more cultured salmonids are identified in a water body, for all aquaculture licence holders who have identified the water body in their containment management section as being potentially affected by a breach other than aquaculture licence holders who have an approved marking plan that verifies the fish are not part of their operation;

(e) other times, as required by the Minister.

Report to Minister on third-party audit of containment management section

35 (1) A report on the results of a third-party audit of the containment management section of a Farm Management Plan must be submitted to the Minister no later than the following dates:

(a) for an audit required by clause 34(a), (b) or (e), 30 days after the date the audit is completed;

(b) for an audit required by clause 34(c) or (d), 15 days after the date that the audit is completed.

(2) A report required by subsection (1) must include any corrective actions taken in response to the results of the audit.

Adopted federal containment management procedures

36 (1) If requirements that are more stringent than the requirements for containment management in these regulations are established under the laws of Canada, the Minister may adopt and impose those requirements on aquaculture licence holders.

(2) The Minister must notify all affected aquaculture licence holders before imposing any requirements under subsection (1).

Audits of Farm Management Plans

Appointment of aquaculture management specialist

37 The Minister may appoint a person as an aquaculture management specialist to audit the implementation of a Farm Management Plan at an aquacultural operation.

When audit may be conducted

38 An aquaculture management specialist, the Chief Aquatic Animal Health Veterinarian, or a veterinary administrator may audit an aquacultural operation's Farm Management Plan at any time.

Powers of auditor

39 As part of an audit under Section 38, an auditor may do any of the following:

(a) enter and inspect any aquaculture site or any other facility or location that the Farm Management Plan applies to;

(b) accompany individuals who are collecting or analyzing samples;

(c) accompany individuals who are inspecting equipment or gear;

(d) observe and document the procedures used in collecting or analyzing samples;

(e) collect samples of any substance for examination and analyses;

(f) examine or test equipment and materials;

(g) require production of written and electronic copies of procedures, records or documents that they believe contain information related to the Farm Management Plan, and examine and make copies of them.

Records, Reports and Release of Information

Records to be kept by aquaculture licence holder

40 (1) An aquaculture licence holder must keep all records relating to their Farm Management Plan at their place of business in the Province, and make them available, in whole or in part, to the Minister on request.

(2) A record referred to in subsection (1) must be kept for at least 7 years from the date the record is created or updated.

Reports on records

41 An aquaculture licence holder must submit reports relating to the records required by these regulations at times determined by the Minister, or on the request of the Minister or the Minister's designate.

Documents requested by auditor

41A An aquaculture licence holder must submit any documents related to an audit under these regulations that are requested by an auditor to the auditor no later than 72 hours after the auditor's request.

Aquatic Animal Health Transfer Permit

Obtaining permit

42 (1) In this Section and in Sections 43 and 44, "aquatic animal health transfer permit" means a certificate issued by the Minister that authorizes an aquaculture licence holder to move fish to an aquaculture site.

(2) An aquaculture licence holder must comply with any conditions set by the Minister for issuing an aquatic animal health transfer permit.

(3) An aquatic animal health transfer permit must be in the form approved by the Minister.

Permit required for transfer

43 An aquaculture licence holder must ensure that an aquatic animal health transfer permit accompanies each group of live fish that is being moved to their aquaculture site.

Permit kept and produced on request

44 (1) An aquaculture licence holder must keep a copy at their aquacultural operation of each aquatic animal health transfer permit for fish that have been moved to their aquaculture site.

(2) An aquaculture licence holder must produce a copy of any aquatic animal health transfer permit for any specified group of fish in the time and manner specified in a request by the Chief Aquatic Animal Health Veterinarian or a person designated by the Minister.

Legislative History
Reference Tables

Aquaculture Management Regulations
Fisheries and Coastal Resources Act

N.S. Reg. 348/2015

Note: The information in these tables does not form part of the regulations and is compiled by the Office of the Registrar of Regulations for reference only.

Source Law

The current consolidation of the *Aquaculture Management Regulations* made under the *Fisheries and Coastal Resources Act* includes all of the following regulations:

N.S. Regulation	In force date*	How in force	Royal Gazette Part II Issue
348/2015	Oct 26, 2015	date specified	Nov 13, 2015
118/2019	Aug 13, 2019	date specified	Aug 30, 2019

The following regulations are not yet in force and are not included in the current consolidation:

N.S. Regulation	In force date*	How in force	Royal Gazette Part II Issue

*See subsection 3(6) of the *Regulations Act* for rules about in force dates of regulations.

Amendments by Provision

ad. = added
am. = amended
fc. = fee change
ra. = reassigned
rep. = repealed
rs. = repealed and substituted

Provision affected	How affected
5(1).....	rs. 118/2019
5(1A).....	ad. 118/2019
9(1)(b).....	rs. 118/2019
9(1)(d).....	am. 118/2019
9(3).....	am. 118/2019
11(1).....	rs. 118/2019
11(2).....	am. 118/2019

ad. = added
am. = amended
fc. = fee change
ra. = reassigned
rep. = repealed
rs. = repealed and substituted

Provision affected	How affected
15(f).....	am. 118/2019
15(f)(i).....	am. 118/2019
15(f)(ii).....	am. 118/2019
15(f)(iii).....	ad. 118/2019
15(g).....	am. 118/2019
15(h).....	ad. 118/2019
21(1) defn. of “mass mortality”.....	rep. 118/2019
21(1) defn. of “mortality event”.....	ad. 118/2019
21(1) defn. of “reportable disease”..	am. 118/2019
21(1) defn. of “significant mortality event”.....	rep. 118/2019
21(4)(b).....	am. 118/2019
21(4)(c).....	rep. 118/2019
30(2).....	am. 118/2019
32(2)(a).....	am. 118/2019
34(b).....	rep. 118/2019
34(d).....	am. 118/2019
34(e).....	rs. 118/2019
40(1).....	am. 118/2019
41A.....	ad. 118/2019
42(1).....	am. 118/2019
42(2).....	am. 118/2019
42(3).....	am. 118/2019
43.....	rs. 118/2019
44(1).....	am. 118/2019
44(2).....	am. 118/2019

Note that changes to headings are not included in the above table.

Editorial Notes and Corrections

Note	Effective date

Repealed and Superseded

N.S. Regulation	Title	In force date	Repealed date

Note: Only regulations that are specifically repealed and replaced appear in this table. It may not reflect the entire history of regulations on this subject matter.

Webpage last updated: 21-05-2020

Tab 3

Fisheries and Coastal Resources Act

CHAPTER 25 OF THE ACTS OF 1996

as amended by

1999, c. 2; 2001, c. 6, s. 108; 2005, c. 19; 2005, c. 50, s. 1; 2010, c. 51;
2012, c. 22; 2015, cc. 18, 19; 2015, c. 32, s. 73; 2018, c. 8; 2019, c. 31, ss. 1-3;
2021, c. 31; 2024, c. 3, s. 10; 2024, c. 5, ss. 110-117, 124, 125, 129, 130

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CHAPTER 25 OF THE ACTS OF 1996

amended 1999, c. 2; 2001, c. 6, s. 108; 2005, c. 19; 2005, c. 50, s. 1; 2010, c. 51; 2012, c. 22; 2015, cc. 18, 19; 2015, c. 32, s. 73; 2018, c. 8; 2019, c. 31, ss. 1-3; 2021, c. 31; 2024, c. 3, s. 10; 2024, c. 5, ss. 110-117, 124, 125, 129, 130

An Act to Revise and Consolidate the Laws of the Province Respecting the Fishery and to Encourage and Promote Programs to Sustain and Improve the Fishery

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Short title

1 This Act may be cited as the *Fisheries and Coastal Resources Act*. 1996, c. 25, s. 1.

PART I

INTRODUCTION

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;

(ca) recognize that the fish harvesting, fish processing and aquaculture industries are integral to the food system;

(d) support the sustainable growth of the aquaculture industry;

(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. 1996, c. 25, s. 2; 2015, c. 19, s. 1; 2024, c. 5, s. 110.

Interpretation

3 **(1)** In this Act,

(a) "aquaculture" means the farming for commercial purposes of aquatic plants and animals over which the Minister exercises control but does not include raising or breeding in tanks, nets, pens or cages of aquatic plants and animals either as aquarium species, in laboratory experiments or by individuals on their own property as food for their own use;

(b) "aquaculturist" means a person who practises aquaculture;

(c) "Department" means the Department of Fisheries and Aquaculture;

(d) *repealed 1999, c. 2, s. 1.*

(da) "fish products" includes fishery resources and any parts, products or by-products derived from fishery resources, including, for greater certainty, processed fish;

(e) "fishery resources" includes all vertebrate and invertebrate animals and all plants which spend all or part of their life in the aquatic and marine environment;

(f) "Government" means His Majesty in right of the Province;

(g) "inspector" means an inspector appointed pursuant to this Act;

(h) "marketing" means offering or advertising for sale;

(i) "Minister" means the Minister of Fisheries and Aquaculture;

(j) *repealed 2019, c. 31, s. 1.*

(k) "solum" means the soil or land lying under the tidal water and extending seaward from mean high water mark and includes the foreshore;

(l) "veterinary medical record" means

(i) a record of medical services, including examination, diagnosis, care or treatment, or

(ii) any information pertaining to medical history,

provided by or to a professional veterinarian in relation to the health of an aquatic animal, and may include documents, data or images produced by any means.

(2) For the purpose of this Act,

(a) a person is in possession of a thing when it is in that person's personal possession or when that person knowingly

(i) has it in the actual possession or custody of another person, or

(ii) has it in any place, whether or not that place belongs to or is occupied by that person, for the use or benefit of that person or of another person; and

(b) when one of two or more persons, with the knowledge and consent of the rest has anything in that person's custody or possession, it is in the possession of each of them. 1996, c. 25, s. 3; 1999, c. 2, s. 1; 2010, c. 51, s. 1; 2012, c. 22, s. 1; 2015, c. 19, s. 2; 2019, c. 31, s. 1.

PART II

ADMINISTRATION

Personnel

4 Such officers and employees as are necessary for the administration of this Act shall be appointed in accordance with the *Civil Service Act*. 1996, c. 25, s. 4.

Supervision and management of Act

5 The Minister is responsible for the general supervision and management of this Act. 1996, c. 25, s. 5.

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. 1996, c. 25, s. 6.

Committees

7 The Minister may

(a) establish advisory and *ad hoc* committees and retain experts to report to the Minister with respect to

(i) the content and administration of this Act, and

(ii) any policies, programs, standards, guidelines or other matters under the administration of the Minister;

(b) specify the functions that the committees and experts are to perform, including the seeking of input from the public, and the manner and time period in which those functions are to be performed;

(c) provide for the remuneration of and payment of expenses to experts, witnesses and members of advisory committees;

(d) provide for the issue of summonses requiring the attendance of witnesses, the production of documents and things and the payments of fees to witnesses. 1996, c. 25, s. 7.

Public registry

8 (1) The Minister may establish a public registry containing

(a) procedures, standards, codes of practice or guidelines established pursuant to this Act;

(aa) all trust agreements entered into between fishermen and corporations;

(b) information or documents required by regulation to be included in the registry;

(c) any other information or document considered appropriate by the Minister.

(2) The Minister shall ensure public access to the information and documents contained in the public registry during business hours of the Department.

(3) Subject to subsection (4) and subject to the *Freedom of Information and Protection of Privacy Act*,

(a) all information under the control of the Department is accessible to the public; and

(b) the Minister shall ensure that information under the control of the Department is shared with other government departments and agencies.

(4) A veterinary medical record under the control of the Department is to be kept in confidence and may only be disclosed in accordance with subsection (5).

(5) A veterinary medical record may only be disclosed

(a) for the protection of human health;

(b) if so required by the laws of the Parliament or Government of Canada;

(c) to enable the enforcement of this Act or the regulations;

(d) in the form of summary health data that reveals no identifiable personal information; or

(e) if the owner of the animal that is the subject of the record has consented. 1996, c. 25, s. 8; 2005, c. 19, s. 1; 2015, c. 19, s. 3.

Alternate dispute resolution

9 **(1)** For the purpose of resolving a dispute, the Minister may refer a matter to a form of alternate dispute resolution, including but not limited to, conciliation, negotiation, mediation or arbitration.

(2) Where the Minister decides to use a form of alternate dispute resolution to resolve a dispute, the Minister, in consultation with the affected parties and using criteria prescribed or adopted by the Department, shall determine which form of dispute resolution is most appropriate to use to resolve the dispute.

(3) Any form of alternate dispute resolution used shall strive to achieve consensus to resolve procedural and substantive issues throughout the process.

(4) Where a form of alternate dispute resolution is being used to resolve a dispute, and where an independent party or neutral third party has been chosen to facilitate, mediate or arbitrate, at the conclusion of the process that person shall file a report with the Minister and with the parties whether or not the dispute was resolved.

(5) Without limiting the generality of subsections (1) to (4), a form of alternate dispute resolution may be used

(a) in case of a dispute over the issuance, cancellation or suspension of a licence or lease;

(b) in case of a dispute over an approval;

(c) as a substitute for a hearing; or

(d) generally, for conflict resolution. 1996, c. 25, s. 9.

Development of objectives and standards

10 (1) In order to further the protection and wise use of fishery and coastal zone aquatic resources the Minister may develop and adopt quality objectives in qualitative or quantitative terms for all or part of the Province.

(2) The Minister may develop other policies, standards, guidelines and objectives to meet goals and purposes towards which fishery and coastal zone aquatic resource development and protection efforts of the Government are directed, including procedures, practices and methods for monitoring and analysis. 1996, c. 25, s. 10.

Delegation by Minister

11 (1) The Minister may, in writing, delegate to

(a) an employee of the Department;

(b) any employee of the Government or a Government agency;

(c) any employee of the Government of Canada or an agency of that government; or

(d) any person,

who has the qualifications and experience, any power or duty conferred or imposed on the Minister pursuant to this Act.

(2) Before making a delegation to a person pursuant to clause (1)(b), (c) or (d), the Minister shall consult with and obtain the consent of the person or, where applicable, the employer of the person.

(3) The Minister may revoke a delegation made pursuant to this Section.

(4) The Minister, with the approval of the Governor in Council, may utilize the facilities and personnel of other Government agencies or departments in furtherance of the objectives of this Act. 1996, c. 25, s. 11.

Transfer of administration and control

12 **(1)** The Minister may, with the approval of the Governor in Council, transfer the administration and control of a provision of this Act, after appropriate consultation, to

(a) another minister of the Government or a Government agency; or

(b) any other person,

and may specify the terms and conditions under which and subject to which the transfer is made.

(2) The Minister may, with the approval of the Governor in Council, revoke a transfer of administration and control made pursuant to this Section. 1996, c. 25, s. 12.

Agreements

13 The Minister may enter into agreements with

(a) any person relating to any matter pertaining to the fishery and coastal zone aquatic resources; or

(b) the Government of Canada with respect to the administration of this Act, the *Fisheries Act* (Canada) or any other federal enactment for the purpose of protection of the fishery and coastal zone aquatic resources. 1996, c. 25, s. 13.

Purchase and disposal of real property

14 The Minister may, with the approval of the Governor in Council, purchase and dispose of any estate or interest in real property for the purpose of this Act. 1996, c. 25, s. 14.

Inspectors

15 **(1)** The Minister may appoint as an inspector a person who has the qualifications and experience to be an inspector for the purpose of all or part of this Act.

(2) Where a person appointed pursuant to subsection (1) is not an employee of the Department, the Minister, before making the appointment, shall consult with and obtain the consent of the person or, where applicable, the employer of the person.

(3) An appointment under subsection (1) may direct that the authority of the inspector be exercised subject to any terms and conditions that the Minister prescribes in the appointment, including limitations on the scope of the appointment. 1996, c. 25, s. 15.

Identification of inspectors

16 On entering any place, an inspector shall, on request, produce an identification card provided by the Department and provide reasons for the entry. 1996, c. 25, s. 16.

Laboratory analyses

17 (1) Before accepting results from any laboratory, the Minister may require proof of acceptable certification of the laboratory.

(2) The Minister may prescribe standards and procedures for any sampling or analysis that is required pursuant to this Act or the regulations. 1996, c. 25, s. 17.

Mode of serving documents

18 (1) Where any notice, request, order, direction or other document is required to be given in writing or served pursuant to this Act, it is deemed to be sufficiently given or served

(a) upon a copy being personally given to or served on the person to whom it is directed;

(b) upon a copy being sent by facsimile or by other electronic means to the person to whom it is directed and an acknowledgement of receipt being received;

(c) five days after a copy is sent by mail addressed to the person to whom it is directed at the last known address for that person; or

(d) in the case of a registered owner of real property, five days after a copy is sent by mail to the address for the registered owner shown on the last revised assessment roll.

(2) Where the person to be served is a corporation, service on a director, officer or recognized agent of the corporation in accordance with subsection (1), or service in accordance with the *Corporations Registration Act*, is deemed to be service on the corporation for the purpose of this Act.

(3) Where it is impractical for any reason to serve a document in the manner prescribed in subsection (1), an *ex parte* application may be made to a judge of the Supreme Court of Nova Scotia who may make an order for substituted service providing for such steps to be taken to bring the matter to the attention of the person to be served. 1996, c. 25, s. 18.

Regulations

19 **(1)** The Governor in Council may make regulations

(a) respecting information or documentation to be filed in the public registry established pursuant to this Part;

(b) respecting the manner in which reports of advisory or *ad hoc* committees are made public;

(c) respecting alternate dispute-resolution mechanisms;

(d) defining any word or expression used but not defined in this Act;

(e) for the effective administration of this Act, and, without restricting the generality of the foregoing, exempting a person or a class of persons, activities, matters or things from this Act;

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

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the *Regulations Act*. 1996, c. 25, s. 19.

PART III

TRAINING, TECHNOLOGY AND DEVELOPMENT

Fisheries training

20 **(1)** The Minister is responsible for fisheries training in the Province and for the operation of any fisheries training school or facility operated by the Province and may, in the Minister's discretion, make provision for the standards and mode of admission, course of study, curriculum and apprenticeship in each branch in which instruction is given, and may authorize diplomas, certificates of proficiency, scholarships or other awards to be given after evaluation in any such subjects.

(2) For greater certainty, nothing in subsection (1) affects a fisheries training program offered by the private sector. 1996, c. 25, s. 20.

Undertaking of projects by Minister

21 **(1)** The Minister may undertake projects

(a) for the exploration, development and enhancement of fisheries resources;

(b) for the more efficient harvesting and utilization of fishery resources;

(c) for the introduction and demonstration to fishers and aquaculturists and others of new types of fishing and aquaculture vessels, gear, equipment, methods, techniques and operations;

(d) respecting the encouragement of the aquaculture industry, including the provision of financial or technical assistance, or a combination thereof, to persons engaged in aquaculture or in the applied research and development or applied technology related to aquaculture;

(e) for the introduction of more efficient methods in landing, handling, transporting, processing and storing fish;

(f) for the training, education and career planning of fishers and processing plant workers;

(g) for the promotion and marketing of fishery products;

(h) for the more efficient processing of fishery products;

(i) for the improvement of the quality of fish products and for the encouragement of value-added processing;

(j) for the improvement of fishing ports and aquaculture landing sites under Provincial jurisdiction, and their facilities and services;

(k) for the development of aquaculture;

(l) for the enhancement of fishing communities;

(m) to collect and disseminate statistics related to the fishery, including aquaculture.

(2) Without restricting the generality of subsection (1), the Minister may undertake economic studies to assist in the effective formulation of policies relating to the fishery and coastal zone aquatic resources. 1996, c. 25, s. 21.

Establishment of programs by Minister

22 The Minister may, in accordance with the regulations, establish programs for the research, development and use of economic instruments and market-based approaches for the management of the fishery and coastal zone aquatic resources and for the purpose of achieving quality objectives in a cost-effective manner, including, without limiting the generality of the foregoing,

(a) user charges;

(b) resource pricing and physical resource accounts;

(c) deposit refund systems;

(d) product charges;

(e) charges on inputs or materials;

(f) tax incentives and tax differentiation;

(g) subsidies, loans and grants. 1996, c. 25, s. 22.

Regulations

23 **(1)** The Governor in Council may make regulations respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Part.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the *Regulations Act*. 1996, c. 25, s. 23.

PART IV

LENDING FOR FISHERIES AND AQUACULTURE DEVELOPMENT

Interpretation of Part

24 In this Part,

(a) "Board" means the Nova Scotia Fisheries and Aquaculture Loan Board;

(b) "fishing industry" includes the catching, harvesting, raising, handling, processing, marketing and distributing of fisheries resources and products and includes aquaculture;

(c) "Fund" means the Fisheries and Aquaculture Development Fund. 1996, c. 25, s. 24.

Board continued

25 **(1)** The body corporate known as the Nova Scotia Fisheries Loan Board is hereby continued under the name Nova Scotia Fisheries and Aquaculture Loan Board and is responsible for the administration of this Part.

(2) The Board consists of such directors as are appointed to it by the Governor in Council.

(3) The Governor in Council may designate one director of the Board to be Chair and one director to be Vice-chair.

(4) A reference in any Act of the Legislature or in any rule, order, regulation, by-law, ordinance or proceeding or in any document whatsoever to a member of the Board shall be held and construed to be a reference to a director of the Board. 1996, c. 25, s. 25; 2024, c. 5, s. 111.

Remuneration and reimbursement of members

26 **(1)** The directors of the Board shall receive such remuneration and allowances as may be determined by the Governor in Council.

(2) The directors of the Board shall be paid such reasonable expenses incurred by them in the performance of their duties as are determined by the Governor in Council. 1996, c. 25, s. 26; 2024, c. 5, s. 112.

Quorum and term of office

27 **(1)** A majority of directors constitutes a quorum of the Board.

(2) A vacancy on the Board does not impair the right of the remaining directors to act.

(3) Each director of the Board holds office for a term, not exceeding five years, prescribed in the director's appointment, unless the director's appointment is sooner revoked by the Governor in Council, and is eligible for re-appointment to the Board.

(3A) No person is eligible to serve as a director of the Board for more than two consecutive terms.

(4) The Governor in Council may appoint persons to fill vacancies occurring from time to time on the Board. 1996, c. 25, s. 27; 2024, c. 5, s. 113.

Object of Board

28 The object and purpose of the Board is to make loans and guarantees of loans to fishers, aquaculturists, companies, co-operatives, associations or other persons in order to encourage, sustain, improve and develop the fishing industry in the Province. 1996, c. 25, s. 28.

Use of Fund

29 Subject to the regulations, the Board may, out of the Fund or other money under its control, make loans and guarantees of loans to or on behalf of fishers, aquaculturists, companies, co-operatives, associations or other persons engaged directly in the fishing industry or to or on behalf of any person for any purpose which, in the opinion of the Governor in Council, will encourage, sustain, improve or develop the fishing industry in the Province. 1996, c. 25, s. 29.

Powers and duties of Board

30 The Board

(a) shall administer, in accordance with the regulations, the Fund and any other fund or money as shall from time to time come under the control of the Board;

(b) with the approval of the Governor in Council, may enter into agreements with the Government of Canada or another province, or with any person or any organization, whether public or private, or any combination of them, for the better carrying out of this Part on such terms and conditions as may be approved by the Governor in Council notwithstanding the provisions of this Part;

(c) subject to the regulations, may receive, take, hold, mortgage, sell, convey or otherwise dispose of real or personal property;

(d) shall perform such duties and exercise powers as may from time to time be approved or determined by the Governor in Council;

(e) has power to do all such matters and things as may be necessary for or incidental to the attainment of its objects and purposes and the exercise of its powers. 1996, c. 25, s. 30.

Board subject to Ministerial directions

31 In the exercise and performance of its functions, powers and duties under this or any other enactment the Board shall act in accordance with any general directions of the Minister. 1996, c. 25, s. 31.

Personnel

32 The Minister may, in accordance with the *Civil Service Act*, appoint from the staff of the Department such officers, assistants, supervisors, clerks and other staff and employees as may be necessary to carry on the work of the Board or to carry out the provisions of this Part. 1996, c. 25, s. 32.

Administration expenses

33 The administration expenses of the Minister and the Board pursuant to this Part are administration expenses of the Department and shall not be a charge upon the Fund. 1996, c. 25, s. 33.

Fisheries and Aquaculture Development Fund

34 For the purpose of this Part, there is established in the office of the Minister of Finance and Treasury Board a special account to be known as the Fisheries and Aquaculture Development Fund. 1996, c. 25, s. 34; O.I.C. 2013-348.

Transfers to Fund

35 The Governor in Council, upon the recommendation of the Minister, may from time to time transfer to the Fund such amounts as are considered necessary for the purpose of this Part and may charge the same to Capital Account, Special Reserve Account or Revenue of the Province for any year or years. 1996, c. 25, s. 35.

Guarantees as charges

36 All guarantees of loans made pursuant to this Part or pursuant to any other Act are a charge upon the Fund to the amount of the guarantees from time to time outstanding. 1996, c. 25, s. 36.

Treatment of repayments and recoveries

37 All repayments and all recoveries made in respect of any transaction out of the Fund shall be credited to the Fund. 1996, c. 25, s. 37.

Approval for certain guarantees

38 The Board shall not make a loan or guarantee of loan in excess of the amount prescribed by regulation without the approval, as applicable and prescribed by regulation, of the Minister or of the Governor in Council. 1996, c. 25, s. 38; 2005, c. 50, s. 1; 2024, c. 5, s. 114.

Priority of claim

38A (1) Notwithstanding any law, statutory or otherwise, in force in the Province, no person may, except with the consent in writing of the Board, acquire any estate, right, title, interest, lien, charge, claim or demand whatsoever in, on, to or against any property of a borrower in priority to or to the prejudice of any claim of the Board, so long as any part of the sale price or the amount of any advance made by the Board with respect to such property or any interest thereon remains unpaid to the Board.

(2) Notwithstanding subsection (1), that subsection does not apply with respect to property if an interest in that property may be perfected or registered pursuant to the *Personal Property Security Act*. 2024, c. 5, s. 115.

Execution of documents

39 All deeds, mortgages, transfers, assignments, discharges, releases, agreements, securities or other documents of whatsoever nature or kind must be executed by officers of the Board as designated by the directors of the Board and approved by the Deputy Minister of the Department. 2019, c. 31, s. 2; 2024, c. 5, s. 116.

Finances and fiscal year

40 (1) The system of accounting and the books and records of the Board shall be subject to the approval and supervision of the Minister of Finance and Treasury Board and subject to audit by the Auditor General or any person designated by the Auditor General.

(2) The fiscal year of the Board shall be the same as the fiscal year of the Province. 1996, c. 25, s. 40; O.I.C. 2013-348.

Annual statements

41 The Board shall, not later than June 30 in each year, prepare and submit to the Minister a financial statement setting forth the assets and liabilities of the Board, the receipts and expenditures of the Board for the previous year, together with a report concerning the work of the Board during the previous year, and the report shall be tabled by the Minister at the next ensuing session of the Legislature. 1996, c. 25, s. 41; 2024, c. 5, s. 117.

Regulations

42 (1) The Governor in Council, on the recommendation of the Minister, may make such regulations as the Governor in Council deems necessary or advisable for the more effective carrying out of the provisions of this Part and for

dealing with matters for which no express provision has been made and, without restricting the generality of the foregoing, may make regulations

(a) prescribing the manner in which applications for loans or guarantees of loans may be made;

(b) prescribing the terms and conditions on which loans or guarantees of loans may be made;

(c) prescribing the manner and conditions on which fishers, aquaculturists, companies, co-operatives, associations or other persons may sell or transfer any asset, boat, equipment or product in respect of which a loan has not been fully repaid;

(d) prescribing or limiting the size or type of assets, boats, equipment or products for or in respect of which loans or guarantees of loans may be made;

(e) limiting the amount of any loan or guarantee of loan;

(ea) prescribing the fees and expenses payable with respect to loans or guarantees of loans;

(f) prescribing the terms, conditions or circumstances under which the Board, in its discretion, may extend, defer, adjust or compromise

(i) the repayment of a loan, or

(ii) the terms and conditions of any loan or guarantee of loan;

(g) fixing rates of interest on loans;

(h) providing for the commuting of any payment due to the Board;

(i) prescribing the amount and nature of the security to be required before a loan or guarantee of loan is made;

(j) prescribing the form of any mortgage and the manner of its execution;

(k) prescribing or regulating the form and contents of any agreement between a fisher, aquaculturist, company, co-operative, association or other person and a boat builder for the construction of a boat;

(l) respecting the design, plans and specifications for fishing boats;

(m) prescribing the purposes for which loans or guarantees of loans may be made;

(n) prescribing the manner in which meetings of the Board shall be called, the time and place of such meetings and the manner in which business shall be conducted at the meetings;

(o) respecting records to be kept by fishers, aquaculturists, companies, co-operatives, associations or other person to or for whom any loan or guarantee of loan has been made;

(p) for the examination and audit of records and accounts and for the inspection of any premises, plant, boat, assets, products or equipment in respect of which a loan or guarantee of loan has been made;

(q) notwithstanding the definition of "fishing industry", prescribing commercial, business or other activities that are deemed to be included in the definition of "fishing industry" for the purpose of this Part and the regulations;

(r) defining any word or expression used but not defined in this Part;

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

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the *Regulations Act*. 1996, c. 25, s. 42; 2019, c. 31, s. 3.

PART V

AQUACULTURE

Interpretation of Part

43 In this Part,

(a) "adjudicative amendment" means an amendment to an aquaculture licence or to an aquaculture lease approved by the Review Board on the hearing of an application to amend pursuant to clause 49(b) or (c); ~~and~~

(aa) "aquacultural operation" means the practice of aquaculture at a site;

(ab) "aquacultural produce" means aquatic plants and animals farmed or being farmed as part of an aquacultural operation;

(b) "aquaculture lease" means an aquaculture lease issued pursuant to this Part;

(c) "aquaculture licence" means an aquaculture licence issued pursuant to this Part;

(ca) "aquaculture registry" means a public registry of Provincial aquaculture licences and leases and information related to sites available for reallocation in the Province;

(d) "aquatic" refers to fresh, brackish or marine water;

(e) "aquatic plants and animals" means plants and animals that during all stages of their development or life cycles have water as their natural habitat;

(f) "brackish water" means water situated in tidal areas where fresh water mixes with marine water;

(g) "experimental licence" means an experimental licence issued pursuant to this Part;

(h) "farming" means the culture, husbandry, production, development or improvement of aquatic plants and animals;

(i) "feed stock" includes any form of flora or fauna given or intended to be given as food to aquacultural produce;

(ia) "finfish" means any cultured cold-blooded aquatic vertebrate possessing fins and gills;

(j) "prescribed" means prescribed by the regulations;

(ja) "Review Board" means the Nova Scotia Aquaculture Review Board established pursuant to this Act;

(k) "seed stock" includes eggs, alevins, parr, smolt, juvenile and adult fish, crustaceans and shellfish, seeds, spat, seedlings and other forms of aquatic plants and animals used or intended to be used as the primary source of the aquacultural produce;

(ka) "shellfish" means any cultured mollusc or crustacean, at any stage of its life cycle;

(l) "sub-aquatic land" means the bed of a natural body of water including the solum of the sea;

(m) "water column" means the aqueous medium superjacent to a defined area of sub-aquatic land. 1996, c. 25, s. 43; 2015, c. 19, s. 4; 2018, c. 8, s. 1.

Purpose of Part

43A The purpose of this Part is to

(a) recognize that aquaculture is a legitimate and valuable use of the Province's coastal resources;

(b) ensure aquaculture is conducted under conditions and in accordance with controls that protect the environment;

(c) provide a predictable and efficient regulatory environment for business and public confidence;

(d) ensure equity, fairness and compatibility in access to, and utilization of, public water resources for aquaculture;

(e) ensure that members of the public have access to information with respect to the regulatory process and an opportunity to participate in the process;

(f) ensure that regulations governing aquaculture are achievable, contain incentives for compliance and are enforceable;

(g) ensure that coastal communities derive positive social and economic benefits from aquaculture;

(h) ensure that aquaculture is conducted with due regard to the health, well-being and recovery of species at risk; and

(i) ensure that the regulation of aquaculture contributes to the productive development of the Province's coastal resources. 2015, c. 19, s. 5.

Licences

44 (1) No person shall carry on aquaculture without an aquaculture licence.

(2) No person shall carry on aquaculture on Crown land without an aquaculture licence and an aquaculture lease.

(3) Unless otherwise restricted by this Part or the terms of the lease, the granting of an aquaculture lease carries with it the exclusive right, for aquacultural purposes, to possession of the water column and sub-aquatic land described in the lease. 1996, c. 25, s. 44; 2015, c. 19, s. 6.

Proposals for options to lease undesignated Crown land

44A (1) From time to time, the Minister may issue a call for proposals for options to lease a tract of Crown land chosen by the Minister that is not designated as an aquaculture development area.

(2) A person may submit a proposal within such time and in such manner as the Minister determines.

(3) A proposal shall include such information as the Minister determines.

(4) Upon review of a proposal, the Minister may issue an option to lease for an area within the tract.

(5) An option to lease shall

(a) convey the exclusive right, for the duration of the option, to apply for an aquaculture lease for a site within the area;

(b) be for a prescribed duration; and

(c) be subject to a prescribed fee.

(6) Where there are competing proposals of equivalent and acceptable stature, the Minister shall issue an option to lease to the proponent who, in the opinion of the Minister, is the best overall proponent based on the information available to the Minister under this Section. 2015, c. 19, s. 7; 2018, c. 8, s. 2.

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, an aquaculture licence may only be issued to the owner or lessee of the land. 1996, c. 25, s. 45; 2015, c. 19, s. 8.

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. 1996, c. 25, s. 46.

Procedure upon receipt of application

47 (1) Upon receipt of an application referred to in subsection 54A(1) for an aquaculture licence or aquaculture lease, the Minister shall refer the application to the Administrator.

(2) Upon the receipt of an application for an aquaculture licence or aquaculture lease for an area not designated as an aquaculture development area, the Minister shall appoint an employee of the Department to consult with

(a) other departments or agencies of the Government or the Government of Canada, as may be required under the laws of the Province or of Canada; and

(b) any person, group of persons or organization that the Minister considers necessary or advisable in the circumstances,

and shall refer the application, along with a report on the outcome of the consultation described in clauses (a) and (b), to the Review Board for decision. 2015, c. 19, s. 9.

Proposal to advance application

47A (1) The holder of an aquaculture licence or an aquaculture lease may submit a proposal to the Minister to advance an application before the Review Board for an adjudicative amendment to the licence or lease.

(2) The proposal must be submitted within such time and in such manner as the Minister determines.

(3) The proposal must include such information as the Minister determines.

(4) Upon review of the proposal, the Minister may issue an approval to advance the application for an adjudicative amendment before the Review Board.

(5) The approval to advance the application

(a) must convey the exclusive right, for the duration of the approval, to apply for the adjudicative amendment to the Review Board;

(b) must be for a prescribed duration; and

(c) is subject to a prescribed fee.

(6) Where the Minister grants an approval pursuant to subsection (4) and the Review Board could approve an increase of the area of an existing aquaculture site under that application, the Minister shall not, pending the Review Board's determination, grant an option to lease or approve another proposal to advance an application relating to the area that may be added to the existing aquaculture site.

(7) Where there are competing proposals of equivalent and acceptable stature, the Minister shall issue an approval to advance an application for an adjudicative amendment to the proponent who, in the opinion of the Minister, is the best overall proponent based on the information available to the Minister under this Section. 2018, c. 8, s. 3

Review Board

48 (1) There is hereby established a board to be known as the Nova Scotia Aquaculture Review Board consisting of not more than ten members appointed by the Minister for such terms as the Minister may determine.

(2) The Minister shall appoint one member of the Review Board to be its Chair and another member to be its Vice-chair.

(3) The Minister shall appoint an employee of the Department to act as the clerk of the Review Board.

(4) The Chair of the Review Board shall assign three or more of its members to constitute a panel to hear an application before the Review Board.

(4A) The Chair of the Review Board shall determine a quorum of the Review Board or of a hearing panel.

(5) Members of the Review Board shall be paid such remuneration as the Minister determines.

(6) Members of the Review Board shall be reimbursed as the Minister determines for reasonable travelling and other expenses incurred by them in accordance with the work of the Review Board.

(7) A vacancy on the Board does not impair the ability of the Review Board to act.

(8) The Review Board may make rules of procedure for the conduct and management of its affairs.

(9) The Review Board and each member of the Review Board has all the powers, privileges and immunities of a commissioner appointed pursuant to the *Public Inquiries Act*, with the exception of the powers of contempt, arrest and imprisonment. 2015, c. 19, s. 9; 2021, c. 31, s. 1.

Review Board's duties with respect to undesignated marine areas

49 The Review Board shall, with respect to marine areas not designated as aquaculture development areas, make decisions with respect to

(a) an application for an aquaculture licence or aquaculture lease;

(b) where an existing aquaculture licence or aquaculture lease authorizes the production of shellfish or aquatic plants but not finfish species, an application to amend the aquaculture licence or aquaculture lease to authorize the production of a finfish species; and

(c) an application to amend an aquaculture licence or aquaculture lease to change the boundaries of an existing aquaculture site if the change results in an increase in the area of the aquaculture site. 2015, c. 19, s. 9.

Review Board decision

49A Where a panel is constituted to hear an application before the Review Board, a decision of a majority of the panel is the decision of the Review Board but, where there is no majority, a decision of the chair of the panel is the decision of the Review Board. 2021, c. 31, s. 2.

Appeal

50 (1) A party to an application may appeal a Review Board decision to the Supreme Court of Nova Scotia, upon any question as to the jurisdiction of the Review Board or upon any question of law, upon filing with the Court a notice of appeal within thirty days after the decision is issued.

(2) An appeal made pursuant to subsection (1) does not operate as a stay of the Review Board decision pending the outcome of the appeal. 2015, c. 19, s. 9; 2018, c. 8, s. 4.

Public hearing

51 Where the Minister refers an application to the Review Board, the Review Board shall hold a public hearing as prescribed. 2015, c. 19, s. 9.

Review Board decision

52 (1) Upon receiving a decision of the Review Board made pursuant to Section 49, the Minister shall, in accordance with the decision,

(a) issue the aquaculture licence or aquaculture lease;

(b) issue the aquaculture licence or aquaculture lease, subject to any conditions the Review Board considered appropriate;

(c) reject the application for the aquaculture licence or aquaculture lease; or

(d) amend the aquaculture licence or aquaculture lease.

(2) The Minister shall make publicly available a decision of the Review Board upon implementation pursuant to subsection (1). 2015, c. 19, s. 9.

53 *repealed 2015, c. 19, s. 9*.

Prohibition

54 (1) No person shall introduce a species of aquatic plants or animals foreign to the area where it is intended to introduce them without having first obtained an aquaculture licence authorizing such introduction.

(2) and **(3)** *repealed 2015, c. 19, s. 10*.

1996, c. 25, s. 54; 2015, c. 19, s. 10.

Administrator

54A (1) The Minister shall appoint an employee of the Department to act as Administrator and make decisions with respect to

(a) applications for aquaculture licences or aquaculture leases in designated aquaculture development areas only;

(b) applications for aquaculture licences for land-based aquaculture sites;

(c) applications to amend aquaculture licences or aquaculture leases except those applications referred to in clauses 49(b) and (c);

(d) applications to renew aquaculture licences or aquaculture leases;

(e) applications to assign aquaculture licences or aquaculture leases;

(f) applications with respect to an aquaculture site for which the licence or lease has been revoked; and

(g) applications to amalgamate two or more aquaculture licences or aquaculture leases and their associated aquaculture sites.

(2) In making a decision under subsection (1), the Administrator shall follow the prescribed process. 2015, c. 19, s. 11; 2018, c. 8, s. 5.

Special experimental licence or lease

55 Notwithstanding anything contained in this Part, the Administrator may grant a special experimental licence or special experimental lease upon such terms and conditions as the Administrator considers necessary or advisable. 2015, c. 19, s. 12.

Institutional licence or lease

55A Notwithstanding anything contained in this Part, the Administrator may grant an institutional licence or institutional lease, upon such terms and conditions as the Administrator considers necessary or advisable, to a person who is carrying out public fishery enhancement and research activities. 2018, c. 8, s. 6; 2024, c. 5, s. 124.

Powers of Minister respecting aquaculture

56 (1) The Minister may, with the approval of the Governor in Council,

(a) designate as an aquaculture development area sub-aquatic lands under marine or brackish waters and their water columns;

(b) impose conditions and restrictions on the conduct of aquaculture and other activities in an aquaculture development area;

(c) change any designation, condition, restriction or determination pursuant to clause (a) or (b);

(d) designate as a provisional aquaculture development area sub-aquatic lands under marine or brackish waters and their water columns not otherwise designated as an aquaculture development area or a closed area;

(e) designate as a closed area sub-aquatic lands under marine or brackish waters and their water columns which, in the opinion of the Minister, are not suitable for aquaculture development;

(f) determine when aquaculture development areas may be designated.

(1A) A designation made pursuant to subsection (1) must contain a description of the sub-aquatic lands comprising the aquaculture development area sufficient to identify their boundaries.

(2) Before designating an aquaculture development area or imposing conditions or restrictions to be applicable thereto, the Minister shall consult with

(a) other departments or agencies of the Government or the Government of Canada, as may be required by the laws of the Province or of Canada; and

(b) any person, group of persons or organization that the Minister considers necessary or advisable in the circumstances.

(3) and **(4)** *repealed 2015, c. 19, s. 13.*

(5) When

(a) an aquaculture development area has been designated;

(b) conditions and restrictions are imposed on the conduct of aquaculture or of other activities in an aquaculture development area; or

(c) there have been changes in those matters outlined in clauses (a) or (b),

the Minister shall cause a copy of the designation and the conditions or restrictions to be published on the Department's website and in the Royal Gazette.

(6) Property is deemed not to be injuriously affected by reason of the exercise, pursuant to subsection (1), by the Minister of the authority conferred upon the Minister by that subsection. 1996, c. 25, s. 56; 2015, c. 19, s. 13; 2024, c. 5, s. 125.

Consequences of designation

57 **(1)** Where the Minister has designated an area as an aquaculture development area, a person may apply to the Administrator for an aquaculture licence or an aquaculture lease and the Administrator may issue an aquaculture licence or aquaculture lease in the aquaculture development area on such terms and conditions as the Administrator considers necessary or advisable.

(1A) The Minister may determine when applications in aquaculture development areas may be submitted.

(2) For greater certainty, Sections 51 and 52 do not apply to an aquaculture licence or aquaculture lease issued by the Administrator pursuant to subsection (1). 1996, c. 25, s. 57; 2015, c. 19, s. 14.

Powers of Administrator

58 **(1)** The Administrator may

(a) issue aquaculture licences for land-based aquaculture sites;

(b) amend aquaculture licences and aquaculture leases except those applications referred to in clauses 49(b) and (c);

(c) renew aquaculture licences and aquaculture leases;

(d) approve applications to assign aquaculture licences and aquaculture leases; ~~and~~

(e) issue in accordance with the regulations aquaculture licences and aquaculture leases with respect to aquaculture sites for which the licence or lease has been revoked; and

(f) amalgamate aquaculture licences and aquaculture leases and their associated aquaculture sites.

(2) The Administrator may assign any conditions that the Administrator considers necessary or advisable to an aquaculture licence or aquaculture lease referred to in subsection (1). 2015, c. 19, s. 15; 2018, c. 8, s. 7.

Powers where licence or lease revoked

59 (1) Where an aquaculture licence or aquaculture lease has been revoked, the Administrator may

(a) maintain use and activity information related to the aquaculture site on the aquaculture registry for a prescribed period; or

(b) remove use and activity information related to the aquaculture site from the aquaculture registry.

(2) A person may apply to the Administrator in the prescribed manner for an aquaculture licence or aquaculture lease to a site for which the licence or lease has been revoked. 2015, c. 19, s. 15.

Power to revoke licence or lease

59A An aquaculture licence or aquaculture lease issued pursuant to this Part may be revoked by the Administrator if

(a) the holder is in breach of this Part, the regulations or any term or condition of the licence or lease;

(b) in the opinion of the Administrator, the aquaculture activities authorized by the licence or lease are detrimental to or interfere with previously licensed or leased aquaculture sites;

(c) the holder is found by a court of competent jurisdiction to be in violation of any law of the Province or of the Parliament or Government of Canada relating to fishery activities; or

(d) the holder requests revocation of the licence or lease. 2015, c. 19, s. 15.

Title to plants and animals

60 All aquatic plants and animals of the species specified in an aquaculture licence or aquaculture lease in or on the licensed or leased area, except free-swimming or drifting flora or fauna not enclosed by a net, pen, cage or enclosure, are the exclusive property of the holder of the licence or lease. 1996, c. 25, s. 60.

Exclusive property of holder

61 (1) All aquatic animals owned by the holder of an aquaculture licence or aquaculture lease remain the exclusive property of the licence or lease holder while within the licensed or leased area boundaries.

(2) Notwithstanding subsection (1), if the aquatic animals owned by the holder of an aquaculture licence or aquaculture lease escape from the licensed or leased area, the holder of the licence or lease retains the exclusive property right to those aquatic animals while within one hundred metres of the boundaries of the licensed or leased area. 1996, c. 25, s. 61.

62 *repealed 2015, c. 19, s. 16.*

Certain provisions prevail

63 Where there is a conflict between Sections 44, 50 or 57 of this Part and any other enactment, those Sections prevail. 1996, c. 25, s. 63; 2015, c. 19, s. 17.

Regulations

64 (1) The Governor in Council may make regulations

(a) for the proper development, management and control of aquaculture;

(b) respecting the forms and information required upon an application;

(ba) respecting the application process for the reallocation of an aquaculture site;

(bb) respecting options to lease including, without limiting the generality of the foregoing, their duration and the payment of fees required for their issuance;

(c) respecting the term and conditions under which an aquaculture lease or aquaculture licence may be issued;

(ca) respecting the issuance of an aquaculture licence or aquaculture lease for an aquaculture site that is being reallocated pursuant to clause 58(1)(e);

(d) respecting fees for aquaculture licences and aquaculture leases;

(e) respecting the environmental monitoring, conservation and protection of licensed or leased areas;

(f) respecting the introduction of new species or strains of aquatic plants and animals;

(g) respecting the health of aquacultural produce including, without limiting the generality of the foregoing,

(i) the isolation, quarantining, gathering, disposal and destruction of aquacultural produce, seedstock and feedstock,

(ii) payments to the Minister for costs incurred, and

(iii) the payment of compensation;

(h) respecting methods of handling, marketing and maintaining the quality of aquacultural produce;

(i) providing for the use, control or prohibition of feedstock and seedstock;

(j) providing for inspection of feedstock and seedstock;

(k) respecting the manner and methods of marking the boundaries of licensed areas, leased areas or aquaculture development areas;

(l) respecting the marking of aquacultural operations so as to provide notice to mariners;

(m) respecting information to be submitted to the Minister by the holder of a lease or licence concerning the productivity and obligations in respect of the area leased or licensed;

(n) respecting the exemption of persons or classes of persons or activities from all or part of this Part;

(o) determining whether or not compensation for anything done pursuant to this Part is payable and, if payable, the circumstances in which, the extent to which, by whom and to whom such compensation is payable and the manner in which and the person by whom the amount of such compensation is to be determined;

(oa) respecting the requirement for security bonds in connection with issuance of licences or leases;

(ob) prescribing the powers and duties of the Review Board;

(oc) prescribing the procedures of the Review Board for conducting hearings, public consultations, investigations and issuing decisions;

(od) prescribing procedures and fees payable for making an application to the Administrator;

(oe) respecting applications to the Administrator for the granting, renewing, amending, assigning or revoking of aquaculture licences and aquaculture leases;

(p) defining any word or expression used but not defined in this Part;

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

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the *Regulations Act*. 1996, c. 25, s. 64; 2015, c. 19, s. 18.

PART VI

SEA PLANTS HARVESTING

Interpretation of Part

65 In this Part,

(a) "lease" means a lease issued pursuant to this Part;

(b) "sea plant" means all fucoids (commonly known as rock weeds) and laminarians (commonly known as kelp) but does not include chondrus crispus (commonly known as Irish moss), dulse or eel grass. 1996, c. 25, s. 65.

Leases

66 (1) The Minister may issue a lease to an individual, corporation or other entity to harvest sea plants from an area or areas of the solum, based on commercialization of harvest.

(2) No lease shall be issued in respect of an area for which a lease is in force.

(3) No lease shall be issued for a period, or combined extension of periods, in excess of fifteen years. 1996, c. 25, s. 66.

Exclusion from lease

67 No lease shall include any part of the solum which has been granted or leased under the *Beaches and Foreshores Act*. 1996, c. 25, s. 67.

Application for lease

68 (1) Application for a lease shall be made to the Minister on the form or forms provided by the Minister and shall contain the information required by the Minister or by the regulations.

(2) The Minister, if the Minister is satisfied that it is in the best interests of the Province, may adjourn, reject or allow the application for a lease.

(3) A lease is subject to the regulations and other relevant enactments.

(4) The Minister may from time to time extend the term of a lease for periods not to exceed fifteen years.

(5) The Minister may terminate a lease at any time if the lessee breaches any of the terms or conditions of the lease. 1996, c. 25, s. 68.

Notice of application and objection

69 (1) Notice of an application for a lease shall be served on the Minister not less than twenty days before the application is made.

(2) The notice referred to in subsection (1) shall contain

(a) the name and residence of the applicant;

(b) a description of the area in respect of which the application is made;

(c) the date of the application; and

(d) a detailed management and commercialization plan.

(3) The notice shall be published in a newspaper having a general circulation in the county or counties to which the area is contiguous and in the Royal Gazette not less than ten days before the date of the application.

(4) Any person who objects to the issuance of a lease in respect of the area referred to in the notice shall notify the Minister, in written form, not more than seven days after the date of publication of the later of the two notices required by subsection (3).

(5) Upon receipt of a notice of objection to the issuance of a lease, the Minister may hold a public hearing at a time and place determined by the Minister and shall notify the applicant and the person or persons who have given notice pursuant to subsection (4) of the time and place of the hearing. 1996, c. 25, s. 69.

Permit for harvesting

70 (1) No person shall harvest sea plants in an area for which a lease is in force unless that person has applied to the Minister for a permit and been granted a permit by the Minister to harvest in the leased area.

(2) The Minister shall issue an identification card to each person granted a permit pursuant to subsection (1) and that identification card shall be in the possession of that person at all times while harvesting sea plants in a leased area.

(3) A person who harvests sea plants in a leased area without a permit issued pursuant to subsection (1) is guilty of an offence. 1996, c. 25, s. 70.

Regulations

71 **(1)** The Governor in Council may make regulations

(a) exempting from the application of this Part certain classes of persons who harvest sea plants for agricultural or scientific purposes and not for processing or sale;

(b) providing for the method by which sea plants shall be harvested;

(c) providing for conservation of sea plants;

(d) prescribing the form of notice, application and lease and providing for hearings and notice of and the procedure at hearings;

(e) respecting the duration of leases and permits;

(f) prescribing the terms and conditions of leases and permits;

(g) providing for the payment of fees by lessees and persons applying for a permit and fixing the amount and rate of those fees;

(h) providing for the revocation of leases and permits;

(i) designating an area as a closed or open area;

(j) defining any word or expression used but not defined in this Part;

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

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the *Regulations Act*. 1996, c. 25, s. 71.

PART VII

LICENSING AND INSPECTING OF FISH PRODUCTS

General supervision and control

72 The Minister has the general supervision and control of processing, buying, selling, possession and marketing of fish products within the Province for the purpose of maintaining product quality, protecting the health and safety of seafood consumers and assisting in the orderly development of the fisheries industry. 1996, c. 25, s. 72; 1999, c. 2, s. 2; 2010, c. 51, s. 2; 2012, c. 22, s. 3.

Prohibition

73 No person shall process, buy, sell, be in possession of or market, within the Province, fish products except in accordance with the terms of a licence from the Minister unless the person is exempt pursuant to the regulations. 1996, c. 25, s. 73; 1999, c. 2, s. 3; 2010, c. 51, s. 3; 2012, c. 22, s. 4.

Licences

74 **(1)** A person may apply to the Minister, in the manner required by the Minister, for a licence to

(a) process fish products; or

(b) buy fish products.

(2) An application for a licence shall be accompanied by the information stipulated by the Minister.

(3) The Minister may require an applicant for a licence to submit any additional information the Minister considers necessary.

(4) Where the Minister considers an application to be incomplete, the application shall not be processed until the information required is submitted. 1996, c. 25, s. 74; 1999, c. 2, s. 4; 2010, c. 51, s. 4; 2012, c. 22, s. 5.

Grounds for refusing licence

75 The Minister may refuse to issue a licence to process or buy fish products if the Minister is not satisfied that it is in the public interest to issue the licence having regard to the supply of fisheries resources available, the presence of existing under-utilized processing capacity or any other factor that, in the opinion of the Minister, is relevant to determining the public interest. 1996, c. 25, s. 75; 1999, c. 2, s. 5; 2010, c. 51, s. 5; 2012, c. 22, s. 6.

Particulars respecting licence

76 **(1)** A licence issued pursuant to this Part

(a) shall be granted for a period prescribed by the regulations, with a right of renewal by the licensee at the Minister's option;

(b) may specify what fees are payable; and

(c) is subject to any terms and conditions prescribed by the Minister.

(2) A licence may be varied or amended by the Minister at any time as may be reasonably necessary to carry out the purpose of this Part.

(3) A licence may be terminated by the Minister at any time if

(a) the application for a licence is false in any material particular;

(b) the holder of the licence fails to pay, within thirty days, any fee or charges pursuant to this Part;

(ba) the holder of the licence fails to meet any requirement placed on the licence holder by the regulations;

(c) the holder of the licence fails to comply with this Part.

(4) The holder of a licence shall submit to the Minister such information as is prescribed by the regulations. 1996, c. 25, s. 76; 1999, c. 2, s. 6; 2010, c. 51, s. 6.

Certain powers of Governor in Council and Minister

77 **(1)** Notwithstanding anything contained in this Act or any other enactment, the Minister may, with the approval of the Governor in Council,

(a) authorize any action or invoke any measure to encourage the development and protection of fishery resources in the Province;

(b) authorize any action or invoke any measure relating to fish products deemed necessary by the Minister to effect the purposes of this Act.

(2) Notwithstanding anything contained in this Part, the Governor in Council may make regulations on any matter relating to fishing, the fishing industry, fishery resources and fish products, and so as not to limit the generality of the foregoing, may make regulations

(a) exempting a person or class of persons from this Part;

(b) prescribing fees for the purpose of this Part;

(c) prescribing information to be submitted to the Minister by the holder of a licence issued pursuant to this Part;

(ca) prescribing information to be submitted to the Minister by a person processing, buying, selling, in possession of or marketing fishery products who is exempt pursuant to the regulations;

(d) governing the licensing of intra-provincial trade in fish products;

(e) respecting the licensing of persons involved in the processing or buying of fish products;

(ea) providing for financial contributions by the lobster industry for use in the promotion and development of that industry, including the designation of those members of that industry required to make the contributions, the determination of the amount of the contributions, the designation of an organization to receive and disburse the contributions and the enforcement of the payment of the contributions;

(f) respecting the inspection of premises or facilities used in the processing, buying, selling, possession or marketing of fish products and vehicles used for the transportation of fish products;

(g) limiting the number and the kind or type of licences issued pursuant to this Part;

(h) defining any word or expression used but not defined in this Part;

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

(2A) A regulation made pursuant to subsection (2) may be of general application or may apply to such classes of persons, matters or things as the Governor in Council determines and there may be different regulations with respect to different classes of persons, matters or things.

(3) The exercise by the Governor in Council of the authority contained in this Section is regulations within the meaning of the *Regulations Act*. 1996, c. 25, s. 77; 1999, c. 2, s. 7; 2010, c. 51, s. 7; 2012, c. 22, s. 7; 2015, c. 18, s. 1.

Existing regulations

78 For greater certainty, regulations made prior to the coming into force of this Part respecting those matters referred to in clauses 77(2)(e), (f) and (g) are hereby ratified and confirmed and have the force of law on, from and after the day those regulations were made until varied in accordance with this Part. 1996, c. 25, s. 78.

PART VIII

RECREATIONAL FISHING

Requirement for licence

79 **(1)** In this Part, "Provincial waters" means such of the waters upon any shore or land, or on or in any lake, river, stream or watercourse, wholly or partially within the Province, over or in respect of which the Province has authority to legislate with respect to fishing.

(2) No person shall angle or fish in Provincial waters without a valid licence issued pursuant to the *Wildlife Act* or the regulations made pursuant to that Act.

(3) Every person is guilty of an offence who is found in possession of a fish which is not tagged in the manner prescribed by the regulations made pursuant to the ~~*Wilidlife*~~ *[Wildlife] Act*. 1996, c. 25, s. 79.

Permit for fishing event

80 **(1)** The Minister may establish a competitive fishing policy respecting fishing derbies, tournaments, competitive fishing events and fund raising events involving fishing.

(2) An individual, person, group or organization that intends to conduct an event covered by the competitive fishing policy shall apply to the Minister, at the time and in the manner prescribed by the Minister, for a permit to conduct the event.

(3) The Minister may grant the permit if

(a) the requirements of the competitive fishing policy have been complied with; and

(b) the event is consistent with the goals of the Department with respect to the management of the fishery resource.

(4) The Minister may attach terms and conditions to a permit issued pursuant to this Section.

(5) If an individual, person, group or organization to whom a permit is issued fails to comply with the permit, the permit is revoked.

(6) No individual, person, group or organization shall conduct a fishing derby, tournament, competitive fishing event or fund raising event involving fishing unless the individual, person, group or organization has been issued a permit pursuant to this Section. 1996, c. 25, s. 80.

Regulations

81 **(1)** The Governor in Council may make regulations

(a) exempting persons or classes of persons from this Part or the regulations;

(b) respecting the angling of fish in the Province;

(c) respecting a competitive fishing policy;

(d) fixing fees for a permit and prescribing the manner of their collection and persons entitled to collect them;

(e) respecting permits for competitive fishing events;

(f) respecting the non-authorized introduction of fish into Provincial waters;

(fa) respecting the possession and transport of live fish;

(g) defining any word or expression used but not defined in this Part;

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

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the *Regulations Act*. 1996, c. 25, s. 81; 2010, c. 51, s. 8.

PART IX

ENFORCEMENT, INVESTIGATIONS AND PENALTIES

Powers of inspector

82 An inspector, in carrying out duties pursuant to this Act or the regulations, has and may exercise in any part of the Province all the powers, authorities and immunities of a peace officer as defined in the *Criminal Code* (Canada). 1996, c. 25, s. 82.

Seizure

83 Where an inspector believes on reasonable grounds that an offence against this Act or the regulations has been committed, the inspector may seize any fish or other thing by means of or in relation to which the inspector reasonably believes the offence was committed. 1996, c. 25, s. 83.

Further powers of inspector

84 (1) In the course of exercising powers pursuant to this Act or the regulations, an inspector may do any or all of the following:

(a) enter any place for the purpose of carrying out an inspection pursuant to this Act or the regulations;

(b) require that any thing be operated, used or set in motion under conditions specified by the inspector;

(c) use any machine, structure, material or equipment in the place the inspector is inspecting in order to carry out the inspection;

(d) take samples of any substance;

(e) conduct tests or take measurements;

(f) use any computer system at any place to examine any data contained in or available to the computer system;

(g) record or copy any information by any method;

(h) reproduce any record from data in the form of a printout or other intelligible output;

(i) take a printout or other output for examination or copying;

(j) use any copying equipment to make copies;

(k) take any photographs or audio-video records;

(l) make reasonable inquiries of any person, orally or in writing.

(2) An inspector may remove documents that the inspector is entitled to examine or copy or otherwise reproduce but shall give a receipt to the person from whom they were taken and shall promptly return them on completion of the examination or reproduction.

(3) An inspector who exercises the power set out in clause (1)(l) may exclude from the questioning any person, except counsel for the person being questioned.

(4) Upon request, an inspector who exercises a power set out in subsection (1) shall produce an identification card and explain the purpose of the inspection. 1996, c. 25, s. 84.

Requirement to stop vehicle or vessel

85 The operator of a vehicle or vessel shall stop the vehicle or vessel when required to do so by an inspector who is readily identifiable as such, or who has identified himself or herself as an inspector. 1996, c. 25, s. 85.

Seizure

86 (1) An inspector may, without a court order or a search warrant, seize any thing that is produced to the inspector, or that is in plain view during an inspection pursuant to Section 84 if the inspector has reasonable grounds to believe that there has been an offence committed under this Act or the regulations and that the thing will afford evidence as to the commission of the offence.

(2) The inspector may remove the thing seized or may detain it in the place where it is seized.

(3) The inspector shall inform the person from whom the thing was seized of the reason for the seizure and shall give the person a receipt for it. 1996, c. 25, s. 86.

Persons accompanying inspector

87 An inspector, in carrying out duties or exercising powers pursuant to this Act or the regulations, may be accompanied by any person considered by the inspector to be necessary to enable the inspector to carry out those duties and exercise those powers. 1996, c. 25, s. 87.

Requirement to assist inspector

88 The owner of and every person found in any place in respect of which an inspector is exercising powers or carrying out duties pursuant to this Part shall

(a) give the inspector all reasonable assistance to enable the inspector to exercise those powers and carry out those duties; and

(b) furnish all information relative to the exercising of those powers and the carrying out of those duties that the inspector may reasonably require. 1996, c. 25, s. 88.

Custody of fish seized

89 (1) An inspector who seizes any fish or other thing pursuant to this Act may retain custody of it or deliver it into the custody of any person the inspector considers appropriate.

(2) A person who is given custody of any fish or other thing pursuant to subsection (1) shall, on the request of an inspector at any reasonable time, make the fish or thing available for inspection by or deliver it into the custody of the inspector.

(3) An inspector who has custody of any fish or other perishable thing seized pursuant to this Act may dispose of it in any manner the inspector considers appropriate and any proceeds realized from its disposition shall be paid to His Majesty in right of the Province. 1996, c. 25, s. 89.

Treatment of seized fish

90 (1) Subject to this Section, any fish or other thing seized pursuant to this Act, or any proceeds from its disposition, may be detained until the fish or thing or proceeds are forfeited or proceedings relating to the fish or thing are finally concluded.

(2) Subject to subsection 92(4), a court may order any fish or other thing seized pursuant to this Act to be returned to the person from whom it was seized if security is given to His Majesty in right of the Province in a form and amount that is satisfactory to the Minister.

(3) Subject to subsection 92(4), where proceedings are not instituted in relation to any fish or other thing seized pursuant to this Act, the fish or thing or any proceeds realized from its disposition shall be returned to the person from whom it was seized

(a) on the Minister's decision not to institute proceedings; or

(b) on the expiration of ninety days after the day of the seizure or any further period that may be specified in an order made pursuant to subsection (4).

(4) Where a court is satisfied, on the application of the Minister within ninety days after the day on which any fish or other thing is seized, that detention of the fish or thing for a period greater than ninety days is justified in the circumstances, the court may, by order, permit the fish or thing to be detained for any further period that may be specified in the order. 1996, c. 25, s. 90.

Order to pay compensation

91 (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order the person to pay the Minister an amount of money for compensation for any costs incurred in the seizure, storage or disposition of any fish or other thing seized pursuant to this Act by means of or in relation to which the offence was committed.

(2) Where a court orders a person to pay an amount of money as compensation pursuant to subsection (1), the amount and any interest payable on that amount constitute a debt due to His Majesty in right of the Province and may be recovered as such in any court of competent jurisdiction. 1996, c. 25, s. 91.

Power of court

92 (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized pursuant to this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to His Majesty in right of the Province.

(2) Where a person is convicted of an offence under this Act that relates to fish seized, the court shall, in addition to any punishment imposed, order that the fish, or any proceeds realized from its disposition, be forfeited to His Majesty in right of the Province.

(3) Where a person is charged with an offence under this Act that relates to fish seized and the person is acquitted but it is proved that the fish was caught in contravention of this Act or the regulations, the court may order that the fish, or any proceeds realized from its disposition, be forfeited to His Majesty in right of the Province.

(4) Where the ownership of any fish or other thing seized pursuant to this Act cannot be ascertained at the time of the seizure, the fish or thing is thereupon forfeited to His Majesty in right of the Province. 1996, c. 25, s. 92.

Disposal of seized fish and property

93 (1) Subject to Sections 96 to 98, any fish or other thing forfeited to His Majesty in right of the Province pursuant to subsection 92(1), (2) or (3) shall be disposed of after the final conclusion of the proceedings relating to the fish or thing, as the Minister directs.

(2) Subject to Sections 96 to 98, any fish or other thing forfeited to His Majesty in right of the Province pursuant to subsection 92(4) shall be disposed of after the expiration of thirty days from the day of forfeiture, as the Minister directs.

(3) Notwithstanding subsection (2), where any fishing gear or equipment is forfeited pursuant to subsection 92(4) it may be disposed of immediately on its forfeiture, as the Minister directs. 1996, c. 25, s. 93.

Treatment of unforfeited property

94 **(1)** Subject to subsection (2), any fish or other thing seized pursuant to this Act, or any proceeds realized from its disposition, that are not forfeited to His Majesty in right of the Province pursuant to Section 92 shall, on the final conclusion of the proceedings relating to the fish or thing, be delivered to the person from whom the fish or thing was seized.

(2) Subject to subsection 92(4), where a person is convicted of an offence relating to any fish or other thing seized pursuant to this Act and the court imposes a fine but does not order forfeiture,

(a) the fish or thing may be detained until the fine is paid;

(b) it may be sold under execution in satisfaction of the fine; or

(c) any proceeds realized from its disposition may be applied in payment of the fine. 1996, c. 25, s. 94.

Return of fish to water

95 Notwithstanding anything contained in Sections 89 to 94, an inspector who seizes any fish pursuant to this Act may, at the time of the seizure, return to the water any fish that the inspector believes to be alive. 1996, c. 25, s. 95.

Holders of interests in forfeited property

96 **(1)** Where any thing other than fish is forfeited to His Majesty in right of the Province pursuant to subsection 92(1) or (4), any person who claims an interest in the thing as owner, mortgagee, lienholder or holder of any like interest, other than a person convicted of the offence that resulted in the forfeiture or a person from whom the thing was seized may, within thirty days after the forfeiture, apply in writing to a judge of the Supreme Court of Nova Scotia for an order pursuant to subsection (4).

(2) The judge to whom an application is made pursuant to subsection (1) shall fix a day not less than thirty days after the date of filing of the application for the hearing thereof.

(3) The applicant shall serve a notice of the application and of the hearing on the Minister at least fifteen days before the day fixed for the hearing.

(4) Where, on the hearing of an application made pursuant to subsection (1), it is made to appear to the satisfaction of the judge

(a) that the applicant is innocent of any complicity in the offence or alleged offence that resulted in the forfeiture and of any collusion in relation to that offence with the person who was convicted of, or who may have committed the offence; and

(b) that the applicant exercised all reasonable care in respect of the person permitted to obtain the possession of the thing

in respect of which the application is made to satisfy the applicant that the thing was not likely to be used contrary to this Act or the regulations, or, in the case of a mortgagee or lienholder, that the mortgagee or lienholder exercised such care with respect to the mortgagor or the liengiver,

the applicant is entitled to an order declaring that the applicant's interest is not affected by the forfeiture and declaring the nature and extent of the applicant's interest. 1996, c. 25, s. 96.

Appeal

97 **(1)** The applicant or the Minister may appeal to the Nova Scotia Court of Appeal from an order made pursuant to subsection 96(4) and the appeal shall be asserted, heard and decided according to the ordinary procedure governing appeals to the Court of Appeal from orders or judgments of a judge.

(2) The Minister shall, on application made to the Minister by any person who has obtained a final order pursuant to this Section or Section 96,

(a) except in the case of any thing disposed of pursuant to subsection 89(3), direct that the thing to which the interest of the applicant relates be returned to the applicant; or

(b) direct that an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant. 1996, c. 25, s. 97.

Exception from application of Sections 96 and 97

98 Sections 96 and 97 do not apply to

(a) any fishing gear or equipment that has been disposed of pursuant to subsection 93(3); or

(b) any fish that have been returned to the water pursuant to Section 95. 1996, c. 25, s. 98.

Prohibition of retaliation

99 **(1)** No employer shall

(a) dismiss or threaten to dismiss an employee;

(b) discipline or suspend an employee;

(c) impose a penalty on an employee; or

(d) intimidate or coerce an employee,

because the employee has reported or proposes to report to any person an act or omission that contravenes, or that the employee has reasonable grounds to believe may contravene, this Act or the regulations.

(2) Any person who wilfully or intentionally provides false or misleading information pursuant to subsection (1) is guilty of an offence. 1996, c. 25, s. 99.

Ministerial order

100 Where the Minister believes on reasonable and probable grounds that a person has contravened or will contravene this Act or the regulations, the Minister may, whether or not the person has been charged or convicted in respect of the contravention, issue an order requiring a person, at that person's own expense, to

(a) cease the specified activity;

(b) undertake remedial action to control, reduce, eliminate or mitigate an adverse affect;

(c) carry out clean-up, site rehabilitation or management, site security and protection or other remedial actions in accordance with directions set out in the order;

(d) provide security in an amount and form specified by the Department during a clean-up and afterwards for monitoring or other purposes;

(e) do all things and take all steps necessary to comply with this Act, to repair any injury or damage or to control, eliminate or manage an adverse effect. 1996, c. 25, s. 100.

Permitted contents of order

101 In addition to any other requirements that may be included in an order issued pursuant to this Part, the order may contain provisions

(a) requiring a person, at that person's own expense, to

(i) maintain records on any relevant matter, and report periodically to the Minister or person appointed by the Minister,

(ii) hire an expert to prepare a report for submission to the Minister or person appointed by the Minister,

(iii) submit to the Minister or person appointed by the Minister any information, proposal or plan specified by the Minister setting out any action to be taken by the person with respect to the subject-matter of the order,

(iv) prepare and submit a contingency plan,

(v) undertake tests, investigations, surveys and other action and report results to the Minister,

(vi) take any other measure that the Minister considers necessary to facilitate compliance with the order or to protect or restore the fishery;

(b) fixing the manner or method of, or the procedures to be used in, carrying out the measures required by the order;

(c) fixing the time within which any measure required by the order is to be commenced and the time in which the order or any portion of the order is to be complied with. 1996, c. 25, s. 101.

Persons bound by order

102 An order issued pursuant to this Part is binding on the heirs, successors, executors, administrators, trustees, receiver, receiver manager and assigns of the person to whom it is directed. 1996, c. 25, s. 102.

Enforcement of order

103 **(1)** When an order is served on a person to whom it is directed, that person shall comply with the order forthwith or, where a period for compliance is specified in the order, within the time period specified.

(2) Where the person to whom an order is directed does not comply with the order or part thereof, the Minister may take whatever action the Minister considers necessary to carry out the terms of the order.

(3) Reasonable costs, expenses or charges incurred by the Minister pursuant to this Part are recoverable by order of the Minister

(a) against the person to whom the order was directed; or

(b) directing any person who has purchased real property from the person to whom the order was directed to pay to the Minister from any money which is still owed to the vendor, a sum not to exceed the amount owing in respect of the costs, expenses or charges.

(4) A purchaser who pays an amount to the Minister pursuant to clause (3)(b) is discharged from any obligation to pay that amount to the vendor.

(5) For the purpose of this Section, the costs referred to in subsection (3) include any costs incurred in investigating and responding to

(a) any matter to which an order relates; or

(b) the failure to comply with an order.

(6) In any claim or action under this Section, a certificate purporting to be signed by the Minister setting out the amount of costs, expense or charge is admissible in evidence and is, in the absence of evidence to the contrary, proof of the amount of the cost, expense or charge set out in the certificate.

(7) Where an order to pay is issued by the Minister pursuant to subsection (3), the order may be filed with the prothonotary of the Supreme Court of Nova Scotia and, when so filed,

(a) the order is of the same force and effect as if it were a judgment against real property that the person named in the order may now or hereafter own;

(b) a lien is established on the property referred to in clause (a) for the amount stated and it is deemed to be taxes in respect of the real property and may be collected in the same way and in the same priority as taxes under the *Assessment Act*; and

(c) the order may be enforced as if it were a judgment of the Supreme Court of Nova Scotia in civil proceedings.

(8) The lien referred to in subsection (7) is not a charge against a parcel registered pursuant to the *Land Registration Act* until a certificate evidencing the lien has been recorded in the register of the parcel. 1996, c. 25, s. 103; 2001, c. 6, s. 108.

Additional penalty

104 Where a person is guilty of an offence under subsection 103(1), a court may, in addition to any other penalty it may impose, order the person to comply with subsection 103(1), the violation for which that person has been convicted. 1996, c. 25, s. 104.

Persons liable under order

105 (1) Where an order pursuant to this Part is directed to more than one person, all persons named in the order are jointly responsible for carrying out the terms of the order and are jointly and severally liable for payment of the costs of doing so, including any costs incurred by the Minister pursuant to this Part.

(2) Subsection (1) does not apply to an order where the Minister and the persons responsible have agreed to an apportionment of costs. 1996, c. 25, s. 105.

Duty of insurer

106 Where a person to whom an order issued pursuant to this Part is insured under an insurance policy that provides for coverage for any cost, expense, loss, damage or charge, the insurer shall, subject to the terms of the relevant policy, pay to the Minister on demand in writing any cost, expense, loss, damage or charge incurred by the Minister while acting pursuant to this Part. 1996, c. 25, s. 106.

Conviction as evidence of negligence

107 Where a person is convicted of an offence under this Act, the conviction is *prima facie* evidence of negligence and any person who suffers loss or damage as a result of the conduct that constituted the offence may, in a court of competent jurisdiction, sue for an amount equal to the reasonably foreseeable loss or damage proved to have been suffered as a result of the conduct that constituted the offence. 1996, c. 25, s. 107.

Immunity from liability

108 Notwithstanding anything contained in this Act, no action for damages may be commenced or maintained and no cause of action lies against

(a) an employee, as defined in the *Civil Service Act*, who is

(i) under the direction of the Minister,

(ii) acting under the direction of an employee referred to in subclause (i), or

(iii) acting pursuant to a delegation pursuant to Part II;

(b) an agent of the Government;

(c) an employee or agent of a Government agency, a municipality or the Government of Canada, any department or agency of that Government, or any person if there has been a delegation pursuant to Part II;

(d) an employee or agent of a Government agency or a municipality, or any person if there has been a transfer of administration pursuant to Part II;

(e) a person who has been retained or employed to serve on any board, or committee;

(f) a person referred to in Section 87,

if the action arises out of any act or omission of that person that occurs while that person is carrying out duties or exercising powers pursuant to this Act or the regulations in good faith and, without restricting the generality of the foregoing, no person referred to in this Section is liable for damage caused by a system of inspection or the manner in which inspections are to be performed or the frequency, infrequency or absence of inspections. 1996, c. 25, s. 108.

Recovery of costs and expenses

109 The Government may recover in debt either in an action or as prescribed in this Act or the regulations against any person who is convicted of an offence under this Act the costs and expenses incurred by the Government

(a) in responding to any matter related to the offence; and

(b) in carrying out or causing to be carried out any preventive or remedial action made necessary by the act or omission that constituted the offence. 1996, c. 25, s. 109.

Limitation period

109A A prosecution for an offence under this Act may not be commenced more than two years after

(a) the date on which the offence was committed; or

(b) the date on which evidence of the offence first came to the attention of an inspector,

whichever is later. 1999, c. 2, s. 8.

Offence

110 A person who

(a) knowingly provides false or misleading information pursuant to a requirement under this Act or the regulations to provide information;

(b) provides false or misleading information pursuant to a requirement under this Act or the regulations to provide information;

(c) does not provide information as required pursuant to this Act or the regulations;

(d) hinders or obstructs an inspector who is exercising powers or carrying out duties, or attempting to do so, pursuant to this Act or the regulations;

(e) knowingly contravenes an order; or

(f) otherwise contravenes this Act or the regulations,

is guilty of an offence. 1996, c. 25, s. 110.

Defences

111 Unless otherwise provided in this Act, no person shall be convicted of an offence under this Act if the person establishes that the person

(a) exercised all due diligence to prevent the commission of the offence; or

(b) reasonably and honestly believed in the existence of facts that, if true, would render the conduct of that person innocent. 1996, c. 25, s. 111.

Additional fine

112 Where a person is convicted of an offence under this Act and the court is satisfied that, as a result of the commission of the offence, monetary benefits accrued to the offender, the court may order the offender to pay, in addition to a fine pursuant to this Act, a fine in an amount equal to the estimation of the court of the amount of those monetary benefits. 1996, c. 25, s. 112.

Proof of offence

113 In any prosecution for an offence under this Act, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without the knowledge or consent of the accused. 1996, c. 25, s. 113.

Effect of corporate offence on certain persons

114 Where a corporation commits an offence under this Act or the regulations, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the violation of this Act or the regula-

tions is guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted. 1996, c. 25, s. 114.

Powers of court on conviction

115 (1) Where a person is convicted of an offence under this Act, in addition to any other penalty that may be imposed pursuant to this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order

(a) prohibiting the offender from doing anything that may result in the continuation or repetition of the offence;

(b) directing the offender to take any action the court considers appropriate to remedy or prevent any adverse effect that results or may result from the act or omission that constituted the offence;

(c) directing the offender to post a bond or pay money into court in an amount that will ensure compliance with any order made pursuant to this Section;

(d) directing the offender to compensate the Minister, in whole or in part, for the cost of any remedial or preventive action that was carried out or caused to be carried out by the Government and was made necessary by the act or omission that constituted the offence;

(e) directing the offender to perform community services;

(f) requiring the offender to comply with any other conditions the court considers appropriate in the circumstances for securing the good conduct of the offender and for preventing the offender from repeating the offence or committing other offences.

(2) An order made pursuant to subsection (1) comes into force on the day on which it is made or on any other day specified in the order and continues in force for the period specified in the order. 1996, c. 25, s. 115.

Penalties

116 (1) A person who contravenes any provision of this Act or the regulations or fails to comply with a term or condition of any licence or lease issued pursuant to this Act is guilty of an offence and liable to a fine not exceeding one million dollars or to imprisonment for a period of not more than ninety days, or to both a fine and imprisonment.

(2) Where an offence under subsection (1) is committed on more than one day or continues for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.

(3) Notwithstanding subsection (1), a person who is guilty of a second or subsequent offence, other than by virtue of subsection (2), is liable to a fine not exceeding two million dollars or to imprisonment for a period of not more

than six months, or to both a fine and imprisonment. 1996, c. 25, s. 116; 1999, c. 2, s. 9; 2024, c. 3, s. 10.

Regulations

117 **(1)** The Governor in Council may make regulations

(a) prescribing penalties in respect of offences created pursuant to this Act;

(aa) respecting any matter necessary or advisable for the administration of a system of administrative penalties;

(ab) defining any word or expression used but not defined in this Part;

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

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the *Regulations Act*. 1996, c. 25, s. 117; 1999, c. 2, s. 10.

PART X

APPEALS

Appeal to Minister

118 **(1)** A person who is aggrieved by a decision or order of an employee of the Department may, within thirty days of the date of the decision or order, appeal to the Minister by notice in writing, stating concisely the reasons for the appeal.

(2) A notice of appeal may be in a form prescribed by the Minister and shall be accompanied by the fee, if any, prescribed by the Minister.

(2A) Where more than one appeal of a decision or order is made pursuant to subsection (1), the Minister may, in the Minister's discretion, consolidate some or all of the appeals and render a single decision with respect to the consolidated appeals.

(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 employee could have made.

(5) The employee and the appellant shall take such action as is necessary to implement the decision of the Minister disposing of the appeal.

(6) The initiation of an appeal made pursuant to this Section does not suspend the operation of any decision or order appealed from pending the disposition of the appeal. 1996, c. 25, s. 118; 2024, c. 5, s. 129.

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.

(1A) The initiation of an appeal made pursuant to this Section does not suspend the operation of any decision or order appealed from pending the disposition of the appeal.

(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. 1996, c. 25, s. 119; 2024, c. 5, s. 130.

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. 1996, c. 25, s. 120.

Regulations

121 (1) The Governor in Council may make regulations respecting any matter necessary or advisable to effectively carry out the intent and purpose of this Part.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the *Regulations Act*. 1996, c. 25, s. 121.

PART XI

MISCELLANEOUS

Valid provisions severable

122 If a provision of this Act is for any reason held to be beyond the legislative authority of the Province, all the remaining provisions of this Act shall stand and be valid and operative and shall have the same effect as if they had been originally enacted as an enactment separate and independent of the provisions held to be beyond the legislative authority of the Province. 1996, c. 25, s. 122.

Prohibitions re marine renewable-electricity areas

122A (1) Notwithstanding anything in this Act, no lease may be entered into and no licence, permit or other authorization may be issued under this Act in respect of any part of a marine renewable-electricity area as defined by the *Marine Renewable-energy Act*.

(2) Notwithstanding subsection 56(1), the Minister may not designate as an aquaculture development area any sub-aquatic lands situated within a marine renewable-electricity area as defined by the *Marine Renewable-energy Act*. 2015, c. 32, s. 73.

Comprehensive review of Act

123 The Minister shall appoint an advisory committee to initiate a comprehensive review of this Act and the regulations within five years of its coming into force and the committee shall submit to the Minister, within six months of initiating the review, a report that includes amendments, if any, recommended by the committee. 1996, c. 25, s. 123.

Transitional provisions

124 (1) Every permit, requirement, licence, lease, approval, order, designation or certificate given, made or issued pursuant to one or more of the Acts listed in Section 125 that is subsisting and in force on the coming into force of this Act, is deemed to have been given, made or issued pursuant to this Act and continues in force until varied, cancelled, suspended or appealed in accordance with this Act.

(2) Where a right of appeal existed in one or more of the Acts listed in Section 125 and an appeal arises after the coming into force of this Act, the appeal provisions in this Act apply. 1996, c. 25, s. 124.

Repeal

125 (1) Chapter 18 of the Revised Statutes, 1989, the *Aquaculture Act*, is repealed.

(2) Chapter 173 of the Revised Statutes, 1989, the *Fisheries Act*, is repealed.

(3) Chapter 174 of the Revised Statutes, 1989, the *Fisheries Development Act*, is repealed.

(4) Chapter 175 of the Revised Statutes, 1989, the *Fishermen's Associations Act*, is repealed.

(5) Chapter 237 of the Revised Statutes, 1989, the *Irish Moss Act*, is repealed.

(6) Chapter 209 of the Revised Statutes, 1967, the *Nova Scotia Fish Inspection Act*, is repealed.

(7) Chapter 330 of the Revised Statutes, 1989, the *Oyster Fisheries Act*, is repealed.

(8) Chapter 14 of the Acts of 1970, the *Salt Fish Marketing Act*, is repealed.

(9) Chapter 416 of the Revised Statutes, 1989, the *Sea Plants Harvesting Act*, is repealed. 1996, c. 25, s. 125.

Executive Council Act amended

126 *amendment*

Public Service Act amended

127 *amendment*

Substituted reference

128 A reference in any Act of the Legislature or in any rule, order, regulation, by-law, ordinance or proceeding or in any document whatsoever to the Department of Fisheries or the Minister or Deputy Minister of that Department, whether the reference is by official name or otherwise, shall as regards any subsequent transaction, matter or thing be held and construed to be a reference to the Department of Fisheries and Aquaculture or to the Minister or Deputy Minister of that Department, where the reference relates to an affair, matter or function that, by or pursuant to the *Public Service Act* or this Act, is assigned to the Department of Fisheries and Aquaculture or to the Minister or Deputy Minister of that Department. 1996, c. 25, s. 128.

Proclamation

129 This Act comes into force on such day as the Governor in Council orders and declares by proclamation. 1996, c. 25, s. 129.

Proclaimed - February 18, 1997
In force - February 28, 1997

Tab 4

114957 Canada Ltée (Spraytech, Société d'arrosage) and Services des espaces verts Ltée/Chemlawn *Appellants*

v.

Town of Hudson *Respondent*

and

Federation of Canadian Municipalities, Nature-Action Québec Inc. and World Wildlife Fund Canada, Toronto Environmental Alliance, Sierra Club of Canada, Canadian Environmental Law Association, Parents' Environmental Network, Healthy Lawns – Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee and Dr. Merryl Hammond, and Fédération interdisciplinaire de l'horticulture ornementale du Québec *Interveners*

INDEXED AS: 114957 CANADA LTÉE (SPRAYTECH, SOCIÉTÉ D'ARROSAGE) *v.* HUDSON (TOWN)

Neutral citation: 2001 SCC 40.

File No.: 26937.

2000: December 7; 2001: June 28.

Present: L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Municipal law — By-laws — Regulation and restriction of pesticide use — Town adopting by-law restricting use of pesticides within its perimeter to specified locations and enumerated activities — Whether Town had statutory authority to enact by-law — Whether by-law rendered inoperative because of conflict with federal or

114957 Canada Ltée (Spraytech, Société d'arrosage) et Services des espaces verts Ltée/Chemlawn *Appelantes*

c.

Ville de Hudson *Intimée*

et

Fédération canadienne des municipalités, Nature-Action Québec Inc. et Fonds mondial pour la nature (Canada), Toronto Environmental Alliance, Sierra Club du Canada, Association canadienne du droit de l'environnement, Parents' Environmental Network, Healthy Lawns – Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee et Dr Merryl Hammond et la Fédération interdisciplinaire de l'horticulture ornementale du Québec *Intervenants*

RÉPERTORIÉ : 114957 CANADA LTÉE (SPRAYTECH, SOCIÉTÉ D'ARROSAGE) *c.* HUDSON (VILLE)

Référence neutre : 2001 CSC 40.

Nº du greffe : 26937.

2000 : 7 décembre; 2001 : 28 juin.

Présents : Les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit municipal — Règlements — Réglementation et restriction de l'utilisation des pesticides — Adoption par la Ville d'un règlement limitant l'utilisation des pesticides sur son territoire à des endroits précis et à des activités énumérées — La Ville avait-elle le pouvoir légal d'adopter le règlement? — Le règlement a-t-il été rendu inopérant du fait de son incompatibilité avec la législation fédérale ou provinciale? — Règlement 270

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provincial legislation — Town of Hudson By-law 270 — Cities and Towns Act, R.S.Q., c. C-19, s. 410(1).

The appellants are landscaping and lawn care companies operating mostly in the greater Montreal area, with both commercial and residential clients. They make regular use of pesticides approved by the federal *Pest Control Products Act* in the course of their business activities and hold the requisite licences under Quebec's *Pesticides Act*. In 1991 the respondent Town, located west of Montreal, adopted By-law 270, which restricted the use of pesticides within its perimeter to specified locations and for enumerated activities. The definition of pesticides in By-law 270 replicates that in the *Pesticides Act*. Under s. 410(1) of the Quebec *Cities and Towns Act* ("*C.T.A.*"), the council may make by-laws to "secure peace, order, good government, health and general welfare in the territory of the municipality", while under s. 412(32) *C.T.A.* it may make by-laws to "regulate or prohibit the . . . use of . . . combustible, explosive, corrosive, toxic, radioactive or other materials that are harmful to public health or safety, in the territory of the municipality or within l km therefrom". In 1992 the appellants were charged with having used pesticides in violation of By-law 270. They brought a motion for declaratory judgment asking the Superior Court to declare By-law 270 to be inoperative and *ultra vires* the Town's authority. The Superior Court denied the motion, and the Court of Appeal affirmed that decision.

Held: The appeal should be dismissed.

Per L'Heureux-Dubé, Gonthier, Bastarache and Arbour JJ.: As statutory bodies, municipalities may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation. Included in this authority are "general welfare" powers, conferred by provisions in provincial enabling legislation, on which municipalities can draw. Section 410 *C.T.A.* is an example of such a general welfare provision and supplements the specific grants of power in s. 412. While enabling provisions that allow municipalities to regulate for the "general welfare" within their territory authorize the enactment of by-laws genuinely aimed at furthering goals such as public health and safety, courts faced with

de la ville de Hudson — Loi sur les cités et villes, L.R.Q., ch. C-19, art. 410(1).

Les appelantes sont des entreprises d'aménagement paysager et d'entretien des pelouses qui exercent leurs activités surtout dans la région métropolitaine de Montréal et qui ont aussi bien des clients commerciaux que des clients résidentiels. Elles utilisent régulièrement, dans le cadre de leurs activités commerciales, des pesticides conformes à la *Loi sur les produits antiparasitaires* du gouvernement fédéral et détiennent les permis requis par la *Loi sur les pesticides* du Québec. En 1991, la Ville intimée, située à l'ouest de Montréal, a adopté le règlement 270, qui limite l'utilisation des pesticides sur son territoire à des endroits précis et aux activités énumérées. La définition de pesticides contenue dans le règlement 270 est la réplique exacte de celle adoptée dans la *Loi sur les pesticides*. En vertu du par. 410(1) de la *Loi sur les cités et villes* du Québec (« *L.C.V.* »), le conseil peut faire des règlements « [p]our assurer la paix, l'ordre, le bon gouvernement, la salubrité et le bien-être général sur le territoire de la municipalité », tandis qu'en vertu du par. 412(32) *L.C.V.*, il peut faire des règlements « [p]our réglementer ou défendre [. . .] l'usage de [. . .] matières combustibles, explosives, corrosives, toxiques, radioactives ou autrement dangereuses pour la santé ou la sécurité publiques, sur le territoire de la municipalité ou dans un rayon de 1 km à l'extérieur de ce territoire ». En 1992, les appelantes ont été accusées d'avoir utilisé des pesticides contrairement au règlement 270. Elles ont introduit une requête en jugement déclaratoire demandant à la Cour supérieure de déclarer inopérant le règlement 270 et *ultra vires* le pouvoir de la Ville. La Cour supérieure a rejeté la requête, et la Cour d'appel a confirmé cette décision.

Arrêt : Le pourvoi est rejeté.

Les juges L'Heureux-Dubé, Gonthier, Bastarache et Arbour : En tant qu'organismes créés par la loi, les municipalités peuvent exercer seulement les pouvoirs qui leur sont conférés expressément par la loi, les pouvoirs qui découlent nécessairement ou vraiment du pouvoir explicite conféré dans la loi, et les pouvoirs indispensables qui sont essentiels et non pas seulement commodes pour réaliser les fins de l'organisme. Y sont inclus les pouvoirs en matière de « bien-être général » conférés par la loi provinciale habilitante, sur laquelle les municipalités peuvent se fonder. L'article 410 *L.C.V.* constitue un exemple d'une telle disposition générale de bien-être et il ajoute aux pouvoirs spécifiques conférés par l'art. 412. Bien que les dispositions habilitantes permettant aux municipalités de réglementer pour le « bien-être général » sur leur territoire autorisent l'adoption de

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an impugned by-law enacted under an "omnibus" provision such as s. 410 *C.T.A.* must be vigilant in scrutinizing the true purpose of the by-law.

By-law 270 does not fall within the ambit of s. 412(32) *C.T.A.* There is no equation of pesticides and "toxic . . . materials" either in the terms of the by-law or in any evidence presented during this litigation. Since there is no specific provision in the provincial enabling legislation referring to pesticides, the by-law must fall within the purview of s. 410(1) *C.T.A.* By-law 270 read as a whole does not impose a total prohibition, but rather permits the use of pesticides in certain situations where that use is not purely an aesthetic pursuit. Based on the distinction between essential and non-essential uses of pesticides, it is reasonable to conclude that the Town by-law's purpose is to minimize the use of allegedly harmful pesticides in order to promote the health of its inhabitants. This purpose falls squarely within the "health" component of s. 410(1) *C.T.A.* The distinctions impugned by the appellants as restricting their businesses are necessary incidents to the power delegated by the province under s. 410(1) *C.T.A.* Moreover, reading s. 410(1) to permit the Town to regulate pesticide use is consistent with principles of international law and policy. The interpretation of By-law 270 set out here respects international law's "precautionary principle". In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action.

By-law 270 was not rendered inoperative because of a conflict with federal or provincial legislation. As a product of provincial enabling legislation, By-law 270 is subject to the "impossibility of dual compliance" test for conflict between federal and provincial legislation set out in *Multiple Access*. The federal *Pest Control Products Act* regulates which pesticides can be registered for manufacture and/or use in Canada. This legislation is permissive, rather than exhaustive, and there is no operational conflict with By-law 270. The *Multiple Access* test also applies to the inquiry into whether there is a conflict between the by-law and provincial legislation. In this case, there is no barrier to dual compliance with By-law 270 and the Quebec *Pesticides Act*, nor any plausible evidence that the legislature intended to preclude municipal regulation of pesticide use. The *Pesticides Act* establishes a permit and licensing system for

règlements visant véritablement à faciliter la réalisation d'objectifs telles la santé et la sécurité publiques, les tribunaux saisis d'un règlement contesté adopté en vertu d'une disposition « omnibus » comme l'art. 410 *L.C.V.* doivent être vigilants lorsqu'ils cherchent à déterminer le but véritable du règlement.

Le règlement 270 ne tombe pas sous l'égide du par. 412(32) *L.C.V.* Le texte du règlement et la preuve présentée au cours du présent litige n'assimilent pas les pesticides aux « matières [. . .] toxiques ». Étant donné qu'aucune disposition particulière de la loi provinciale habilitante ne mentionne les pesticides, le règlement doit tomber dans le champ d'application du par. 410(1) *L.C.V.* Interprété dans son ensemble, le règlement 270 n'impose pas une interdiction totale, mais permet plutôt l'usage de pesticides dans certains cas où cet usage n'a pas un but purement esthétique. Selon la distinction entre l'usage essentiel et l'usage non essentiel des pesticides, il est raisonnable de conclure que le règlement de la Ville a pour objet de minimiser l'utilisation de pesticides qui seraient nocifs afin de protéger la santé de ses habitants. Cet objet relève directement de l'aspect « santé » du par. 410(1) *L.C.V.* Les distinctions contestées par les appelantes au motif qu'elles restreignent leurs activités commerciales sont des conséquences nécessaires à l'application du pouvoir délégué par la province en vertu du par. 410(1) *L.C.V.* De plus, interpréter le par. 410(1) comme permettant à la Ville de réglementer l'utilisation des pesticides correspond aux principes de droit et de politique internationaux. L'interprétation du règlement 270 exposée ici respecte le « principe de précaution » du droit international. Dans le contexte des postulats du principe de précaution, les craintes de la Ville au sujet des pesticides s'inscrivent confortablement sous la rubrique de l'action préventive.

Le règlement 270 n'a pas été rendu inopérant du fait de son incompatibilité avec la législation fédérale ou provinciale. Découlant d'une loi provinciale habilitante, le règlement 270 est sujet au critère de « l'impossibilité de se conformer aux deux textes » en cas de conflit entre la législation fédérale et la législation provinciale, critère qui a été énoncé dans l'arrêt *Multiple Access*. La *Loi sur les produits antiparasitaires* du gouvernement fédéral dicte quels pesticides peuvent être agréés à des fins de fabrication et/ou d'utilisation au Canada. Cette loi est permissive, et non pas exhaustive, de sorte qu'il n'y a aucun conflit d'application avec le règlement 270. Le critère de l'arrêt *Multiple Access* s'applique également à l'examen de la question de savoir s'il y a conflit entre le règlement municipal et la législation provinciale. Dans la présente affaire, rien n'empêche que l'on se conforme à la fois au règlement 270 et à la *Loi sur les*

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vendors and commercial applicators of pesticides and thus complements the federal legislation's focus on the products themselves. Along with By-law 270, these laws establish a tri-level regulatory regime.

Per Iacobucci, Major and LeBel JJ.: The basic test to determine whether there is an operational conflict remains the impossibility of dual compliance. From this perspective, the alleged conflict with federal legislation simply does not exist. Nor does a conflict exist with the Quebec *Pesticides Act*, for the reasons given by the majority.

The issues in this case remain strictly first whether the *C.T.A.* authorizes municipalities to regulate the use of pesticides within their territorial limits, and second whether the particular regulation conforms with the general principles applicable to delegated legislation. The Town concedes that the only provision under which its by-law can be upheld is the general clause of s. 410(1) *C.T.A.* While it appears to be sound legislative and administrative policy, under general welfare provisions, to grant local governments a residual authority to address emerging or changing issues concerning the welfare of the local community living within their territory, it is not enough that a particular issue has become a pressing concern in the opinion of a local community. This concern must be closely related to the immediate interests of the community within the territorial limits defined by the legislature in a matter where local governments may usefully intervene. In this case, the by-law targets problems of use of land and property, and addresses neighborhood concerns that have always been within the realm of local government activity. The by-law was thus properly authorized by s. 410(1).

Two basic and longstanding principles of delegated legislation state that a by-law may not be prohibitory and may not discriminate unless the enabling legislation so authorizes. While on its face, By-law 270 involves a general prohibition and then authorizes some specific uses, when it is read as a whole its overall effect is to prohibit purely aesthetic use of pesticides while allowing other uses, mainly for business or agricultural

pesticides du Québec, et il n'y a aucun élément de preuve plausible indiquant que la législature avait l'intention d'empêcher la réglementation par les municipalités de l'utilisation des pesticides. La *Loi sur les pesticides* établit un régime de permis pour les vendeurs et les applicateurs commerciaux de pesticides et elle est donc complémentaire à la législation fédérale, qui porte sur les produits eux-mêmes. Conjointement avec le règlement 270, ces lois établissent un régime de réglementation à trois niveaux.

Les juges Iacobucci, Major et LeBel : Le critère fondamental permettant de déterminer s'il existe conflit d'application demeure l'impossibilité de se conformer aux deux textes. Dans cette optique, le présumé conflit avec la législation fédérale n'existe tout simplement pas. Il n'y a pas non plus conflit avec la *Loi sur les pesticides* du Québec pour les raisons données par la majorité.

En l'espèce, les questions se résument à savoir si, premièrement, la *L.C.V.* autorise les municipalités à réglementer l'utilisation des pesticides sur leur territoire et, deuxièmement, si le règlement en cause respecte les principes généraux applicables à la législation déléguée. La Ville admet que la seule disposition qui permette de confirmer la légalité de son règlement est la clause générale du par. 410(1) *L.C.V.* Bien qu'il paraisse logique, sur les plans législatif et administratif, de recourir à des dispositions générales de bien-être pour conférer aux administrations publiques locales le pouvoir résiduaire de traiter des questions nouvelles ou évolutives relativement au bien-être de la collectivité locale vivant sur leur territoire, il ne suffit pas qu'une question particulière soit devenue une préoccupation urgente selon la collectivité locale. Cette préoccupation doit être étroitement liée aux intérêts immédiats de la collectivité se trouvant dans les limites territoriales définies par la législature pour ce qui concerne toute question pour laquelle l'intervention des administrations publiques locales peut se révéler utile. En l'espèce, le règlement vise les problèmes liés à l'utilisation des terres et des biens et il porte sur des préoccupations de quartier qui ont toujours relevé du domaine d'activité des administrations publiques locales. Le règlement était donc autorisé en bonne et due forme par le par. 410(1).

Selon deux principes fondamentaux établis depuis longtemps en matière de législation déléguée, un règlement ne peut pas être prohibitif et discriminatoire à moins que la loi habilitante ne l'autorise. Bien que le règlement 270 établisse de prime abord une prohibition générale pour ensuite permettre certaines utilisations particulières, lu dans son ensemble, il a comme effet d'interdire l'utilisation des pesticides pour des raisons

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purposes. Moreover, although the by-law discriminates, there can be no regulation on such a topic without some form of discrimination in the sense that the by-law must determine where, when and how a particular product may be used. An implied authority to discriminate was thus unavoidably part of the delegated regulatory power.

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By L'Heureux-Dubé J.

Distinguished: *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; **applied:** *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; **referred to:** *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *R. v. Sharma*, [1993] 1 S.C.R. 650; *Re Weir and The Queen* (1979), 26 O.R. (2d) 326; *Kuchma v. Rural Municipality of Tache*, [1945] S.C.R. 234; *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13; *Scarborough v. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255; *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *A.P. Pollution Control Board v. Nayudu*, 1999 S.O.L. Case No. 53; *Vellore Citizens Welfare Forum v. Union of India*, [1996] Supp. 5 S.C.R. 241; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Attorney General for Ontario v. City of Mississauga* (1981), 15 M.P.L.R. 212; *Township of Uxbridge v. Timber Bros. Sand & Gravel Ltd.* (1975), 7 O.R. (2d) 484; *British Columbia Lottery Corp. v. Vancouver (City)* (1999), 169 D.L.R. (4th) 141; *Law Society of Upper Canada v. Barrie (City)* (2000), 46 O.R. (3d) 620; *Huot v. St-Jérôme (Ville de)*, J.E. 93-1052; *St-Michel-Archange (Municipalité de) v. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875.

By LeBel J.

Applied: *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; **referred to:** *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 2 S.C.R. 409, 2000 SCC 45;

purement esthétiques tout en permettant d'autres utilisations, surtout pour des activités commerciales et agricoles. De plus, bien que le règlement soit discriminatoire, il ne peut y avoir aucune réglementation sur un tel sujet sans une certaine forme de discrimination, en ce sens que le règlement doit établir où, quand et comment un produit particulier peut être utilisé. Le pouvoir de réglementation délégué comportait donc inévitablement le pouvoir implicite de faire de la discrimination.

Jurisprudence

Citée par le juge L'Heureux-Dubé

Distinction d'avec les arrêts : *R. c. Greenbaum*, [1993] 1 R.C.S. 674; *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231; **arrêt appliqué :** *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; **arrêts mentionnés :** *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3; *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213; *R. c. Sharma*, [1993] 1 R.C.S. 650; *Re Weir and The Queen* (1979), 26 O.R. (2d) 326; *Kuchma c. Rural Municipality of Tache*, [1945] R.C.S. 234; *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368; *Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13; *Scarborough c. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255; *Allard Contractors Ltd. c. Coquitlam (District)*, [1993] 4 R.C.S. 371; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *A.P. Pollution Control Board c. Nayudu*, 1999 S.O.L. Case No. 53; *Vellore Citizens Welfare Forum c. Union of India*, [1996] Supp. 5 S.C.R. 241; *M & D Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961; *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121; *Attorney General for Ontario c. City of Mississauga* (1981), 15 M.P.L.R. 212; *Township of Uxbridge c. Timber Bros. Sand & Gravel Ltd.* (1975), 7 O.R. (2d) 484; *British Columbia Lottery Corp. c. Vancouver (City)* (1999), 169 D.L.R. (4th) 141; *Law Society of Upper Canada c. Barrie (City)* (2000), 46 O.R. (3d) 620; *Huot c. St-Jérôme (Ville de)*, J.E. 93-1052; *St-Michel-Archange (Municipalité de) c. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875.

Citée par le juge LeBel

Arrêt appliqué : *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; **arrêts mentionnés :** *M & D Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961; *Public School Boards' Assn. of Alberta c. Alberta (Procureur général)*, [2000]

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Town of Hudson By-law 270 [am. 1995, by-law 327; am. 1996, by-law 341], arts. 1, 2, 3, 4, 5, 6, 10.

2 R.C.S. 409, 2000 CSC 45; *Ontario English Catholic Teachers' Assn. c. Ontario (Procureur général)*, [2001] 1 R.C.S. 470, 2001 CSC 15; *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368; *R. c. Sharma*, [1993] 1 R.C.S. 650; *Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13; *R. c. Greenbaum*, [1993] 1 R.C.S. 674; *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231.

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Loi sur les cités et villes, L.R.Q., ch. C-19, art. 410 [mod. 1982, ch. 64, art. 5; mod. 1996, ch. 2, art. 150], 412(32) [mod. 1984, ch. 47, art. 213; mod. 1986, c. 31, art. 5; mod. 1996, c. 2, art. 151], 463.1 [aj. 1998, ch. 31, art. 15].

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Swaigen, John. « The *Hudson* Case: Municipal Powers to Regulate Pesticides Confirmed by Quebec Courts » (2000), 34 C.E.L.R. (N.S.) 162.

APPEAL from a judgment of the Quebec Court of Appeal, [1998] Q.J. No. 2546 (QL), J.E. 98-1855, affirming a decision of the Superior Court (1993), 19 M.P.L.R. (2d) 224, dismissing the appellants' motion for declaratory judgment. Appeal dismissed.

Gérard Dugré and *Denis Manzo*, for the appellants.

Stéphane Brière and *Pierre Lepage*, for the respondent.

Stewart A. G. Elgie and *Jerry V. DeMarco*, for the interveners Federation of Canadian Municipalities, Nature-Action Québec Inc. and World Wildlife Fund Canada.

Written submissions only by *Theresa A. McClenaghan* and *Paul Muldoon*, for the interveners Toronto Environmental Alliance, Sierra Club of Canada, Canadian Environmental Law Association, Parents' Environmental Network, Healthy Lawns – Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee and Dr. Merryl Hammond.

Jean Piette, for the intervener Fédération interdisciplinaire de l'horticulture ornementale du Québec.

The judgment of L'Heureux-Dubé, Gonthier, Bastarache and Arbour JJ. was delivered by

1 L'HEUREUX-DUBÉ J. — The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment. In the words of the Superior Court judge: "Twenty years ago, there was very little concern over the effect of chemicals such as pesticides on the population. Today, we are more conscious of what type of an environment we wish to live in, and what quality of life we wish to expose our children [to]" ((1993), 19 M.P.L.R. (2d) 224, at p. 230). This Court has recognized that

POURVOI contre un arrêt de la Cour d'appel du Québec, [1998] A.Q. nº 2546 (QL), J.E. 98-1855, qui a confirmé un jugement de la Cour supérieure (1993), 19 M.P.L.R. (2d) 224, qui avait rejeté la requête en jugement déclaratoire des appelantes. Pourvoi rejeté.

Gérard Dugré et *Denis Manzo*, pour les appelantes.

Stéphane Brière et *Pierre Lepage*, pour l'intimée.

Stewart A. G. Elgie et *Jerry V. DeMarco*, pour les intervenants la Fédération canadienne des municipalités, Nature-Action Québec Inc. et le Fonds mondial pour la nature (Canada).

Argumentation écrite seulement par *Theresa A. McClenaghan* et *Paul Muldoon*, pour les intervenants Toronto Environmental Alliance, Sierra Club du Canada, l'Association canadienne du droit de l'environnement, Parents' Environmental Network, Healthy Lawns — Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee et Dr Merryl Hammond.

Jean Piette, pour l'intervenante la Fédération interdisciplinaire de l'horticulture ornementale du Québec.

Version française du jugement des juges L'Heureux-Dubé, Gonthier, Bastarache et Arbour rendu par

LE JUGE L'HEUREUX-DUBÉ — Le contexte de ce pourvoi nous invite à constater que notre avenir à tous, celui de chaque collectivité canadienne, dépend d'un environnement sain. Comme l'a affirmé le juge de la Cour supérieure : [TRADUCTION] « Il y a vingt ans, on se préoccupait peu de l'effet des produits chimiques, tels les pesticides, sur la population. Aujourd'hui, nous sommes plus sensibles au genre d'environnement dans lequel nous désirons vivre et à la qualité de vie que nous voulons procurer à nos enfants » ((1993), 19

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"[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment . . . environmental protection [has] emerged as a fundamental value in Canadian society": *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 55. See also *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 16-17.

« [n]ous savons tous que, individuellement et collectivement, nous sommes responsables de la préservation de l'environnement naturel [. . .] la protection de l'environnement est [. . .] devenue une valeur fondamentale au sein de la société canadienne » : *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031, par. 55. Voir également *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, p. 16-17.

Regardless of whether pesticides are in fact an environmental threat, the Court is asked to decide the legal question of whether the Town of Hudson, Quebec, acted within its authority in enacting a by-law regulating and restricting pesticide use.

2 Peu importe que les pesticides constituent ou non en fait une menace pour l'environnement, la Cour est appelée à trancher la question de droit consistant à savoir si la ville de Hudson (Québec) a agi dans le cadre de ses pouvoirs en adoptant un règlement régissant et restreignant l'utilisation de pesticides.

The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity. La Forest J. wrote for the majority in *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 127, that "the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels" (emphasis added). His reasons in that case also quoted with approval a passage from *Our Common Future*, the report produced in 1987 by the United Nations' World Commission on the Environment and Development. The so-called "Brundtland Commission" recommended that "local governments [should be] empowered to exceed, but not to lower, national norms" (p. 220).

3 Cette instance surgit à une époque où les questions de gestion des affaires publiques sont souvent examinées selon le principe de la subsidiarité. Ce principe veut que le niveau de gouvernement le mieux placé pour adopter et mettre en œuvre des législations soit celui qui est le plus apte à le faire, non seulement sur le plan de l'efficacité mais également parce qu'il est le plus proche des citoyens touchés et, par conséquent, le plus sensible à leurs besoins, aux particularités locales et à la diversité de la population. S'exprimant au nom de la majorité dans *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213, par. 127, le juge La Forest écrit que « la protection de l'environnement est un défi majeur de notre époque. C'est un problème international qui exige une action des gouvernements de tous les niveaux » (je souligne). Dans ses motifs, il cite avec approbation un extrait de *Notre avenir à tous*, rapport publié en 1988 par la Commission mondiale sur l'environnement et le développement (« Commission Brundtland »), créée par les Nations Unies. Cette commission a recommandé que « les autorités locales [soient] habilitées à renforcer, mais non pas à libéraliser, les normes nationales » (p. 262).

There are now at least 37 Quebec municipalities with by-laws restricting pesticides: J. Swaigen, "The *Hudson* Case: Municipal Powers to Regulate

4 Il existe aujourd'hui au Québec au moins 37 municipalités où l'utilisation des pesticides est restreinte par règlement : J. Swaigen, « The *Hudson*

Pesticides Confirmed by Quebec Courts" (2000), 34 C.E.L.R. (N.S.) 162, at p. 174. Nevertheless, each level of government must be respectful of the division of powers that is the hallmark of our federal system; there is a fine line between laws that legitimately complement each other and those that invade another government's protected legislative sphere. Ours is a legal inquiry informed by the environmental policy context, not the reverse.

Case: Municipal Powers to Regulate Pesticides Confirmed by Quebec Courts » (2000), 34 C.E.L.R. (N.S.) 162, p. 174. Chaque niveau de gouvernement doit, toutefois, respecter le partage des compétences, qui est la caractéristique de notre système fédéral; il existe une distinction subtile entre les lois qui se complètent légitimement les unes les autres et celles qui empiètent sur le domaine de compétence législative protégé de l'autre ordre de gouvernement. Notre examen en est donc un d'ordre juridique dans le contexte des politiques environnementales et non l'inverse.

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I. Facts

I. Les faits

5 The appellants are landscaping and lawn care companies operating mostly in the region of greater Montreal, with both commercial and residential clients. They make regular use of pesticides approved by the federal *Pest Control Products Act*, R.S.C. 1985, c. P-9, in the course of their business activities and hold the requisite licences under Quebec's *Pesticides Act*, R.S.Q., c. P-9.3.

Les appelantes sont des entreprises d'aménagement paysager et d'entretien des pelouses qui exercent leurs activités surtout dans la région métropolitaine de Montréal et qui ont aussi bien des clients commerciaux que des clients résidentiels. Elles utilisent régulièrement, dans le cadre de leurs activités commerciales, des pesticides conformes à la *Loi sur les produits antiparasitaires* du gouvernement fédéral, L.R.C. 1985, ch. P-9, et détiennent les permis requis par la *Loi sur les pesticides* du Québec, L.R.Q., ch. P-9.3.

6 The respondent, the Town of Hudson ("the Town"), is a municipal corporation governed by the *Cities and Towns Act*, R.S.Q., c. C-19 ("*C.T.A.*"). It is located about 40 kilometres west of Montreal and has a population of approximately 5,400 people, some of whom are clients of the appellants. In 1991, the Town adopted By-law 270, restricting the use of pesticides within its perimeter to specified locations and for enumerated activities. The by-law responded to residents' concerns, repeatedly expressed since 1985. The residents submitted numerous letters and comments to the Town's Council. The definition of pesticides in By-law 270 replicates that of the *Pesticides Act*.

L'intimée, la ville de Hudson (la « Ville »), est une municipalité régie par la *Loi sur les cités et villes*, L.R.Q., ch. C-19 (« *L.C.V.* »). Elle est située à environ 40 kilomètres à l'ouest de Montréal et compte approximativement 5 400 habitants, dont certains sont des clients des appelantes. En 1991, la Ville adopte le règlement 270, qui limite l'utilisation des pesticides sur son territoire à des endroits précis et aux activités énumérées. Ce règlement fait suite aux craintes exprimées à maintes reprises depuis 1985 par les résidants, qui ont présenté de nombreuses lettres et observations au conseil municipal. La définition de pesticides contenue dans le règlement 270 est la réplique exacte de celle adoptée dans la *Loi sur les pesticides*.

7 In November 1992, the appellants were served with a summons by the Town to appear before the Municipal Court and respond to charges of having used pesticides in violation of By-law 270. The appellants pled not guilty and obtained a suspen-

En novembre 1992, les appelantes ont reçu signification, de la part de la Ville, de sommations leur enjoignant de comparaître devant la Cour municipale pour répondre à des accusations d'avoir utilisé des pesticides contrairement au

sion of proceedings in order to bring a motion for declaratory judgment before the Superior Court (under art. 453 of Quebec's *Code of Civil Procedure*, R.S.Q., c. C-25). They asked that the court declare By-law 270 (as well as By-law 248, which is not part of this appeal) to be inoperative and *ultra vires* the Town's authority.

The Superior Court denied the motion for declaratory judgment, finding that the by-laws fell within the scope of the Town's powers under the *C.T.A.* This ruling was affirmed by a unanimous Quebec Court of Appeal.

II. Relevant Statutory Provisions

Town of Hudson By-law 270

1. The following words and expressions, whenever the same occur in this By-Law, shall have the following meaning:

   a) "PESTICIDES": means any substance, matter or micro-organism intended to control, destroy, reduce, attract or repel, directly or indirectly, an organism which is noxious, harmful or annoying for a human being, fauna, vegetation, crops or other goods or intended to regulate the growth of vegetation, excluding medicine or vaccine;

   b) "FARMER": means a farm producer within the meaning of the Farm Producers Act (R.S.Q., chap., P-28);

. . .

2. The spreading and use of a pesticide is prohibited throughout the territory of the Town.

3. Notwithstanding article 2, it is permitted to use a pesticide in the following cases:

   a) in a public or private swimming-pool;

   b) to purify water intended for the use of human beings or animals;

   c) inside of a building;

   d) to control or destroy animals which constitute a danger for human beings;

   e) to control or destroy plants which constitute a danger for human beings who are allergic thereto.

règlement 270. Les appelantes ont plaidé non coupable et ont obtenu la suspension des procédures afin d'introduire une requête en jugement déclaratoire devant la Cour supérieure (en vertu de l'art. 453 du *Code de procédure civile* du Québec, L.R.Q., ch. C-25). Elles ont demandé à la cour de déclarer inopérant le règlement 270 (et le règlement 248, qui ne fait pas l'objet du pourvoi) et *ultra vires* le pouvoir de la Ville.

8 La Cour supérieure a rejeté la requête en jugement déclaratoire, concluant que les règlements relevaient des pouvoirs conférés à la Ville par la *L.C.V.* Cette décision a été confirmée à l'unanimité par la Cour d'appel du Québec.

II. Les dispositions législatives pertinentes

Règlement 270 de la ville de Hudson

9

1. Dans ce règlement, les mots et expressions suivants ont le sens et l'application que leur attribue le présent article :

   a) « PESTICIDE » : toute substance, matière ou micro-organisme destiné à contrôler, détruire, amoindrir, attirer ou repousser, directement ou indirectement, un organisme nuisible, nocif ou gênant pour l'être humain, la faune, la végétation, les récoltes ou les autres biens, ou destiné à servir de régulateur de croissance de la végétation, à l'exclusion d'un médicament ou d'un vaccin.

   b) « FERMIER » : un producteur agricole au sens de la Loi sur les producteurs agricoles (L.R.Q., chap. P-28);

. . .

2. L'épandage et l'utilisation de tout pesticide est interdit partout sur le territoire de la Ville.

3. Nonobstant l'article 2, l'utilisation d'un pesticide est permis dans les cas suivants :

   a) dans une piscine publique ou privée;

   b) pour purifier l'eau destinée à la consommation des humains ou des animaux;

   c) à l'intérieur d'un bâtiment;

   d) pour contrôler ou enrayer la présence d'animaux qui constituent un danger pour les humains;

   e) pour contrôler ou enrayer les plantes qui constituent un danger pour les humains qui y sont allergiques.

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4. Notwithstanding article 2, a farmer using a pesticide on an immoveable which is exploited for purposes of agriculture or horticulture, in a hot house or in the open, is requested to

   a) register, by written declaration, with the Town, in the month of march of each year, the products which he stores and which he will be using during that year.

   b) also provide, in the written declaration at article 4 a), the schedule of application of said products and the area(s) of his property where the products will be applied.

5. Notwithstanding article 2, it is permitted to use a pesticide on a golf course, for a period not exceeding five (5) years from the date this by-law comes into force:

. . .

6. Notwithstanding article 2, it is permitted to use a biological pesticide to control or destroy insects which constitute a danger or an inconvenience for human beings.

. . .

10. For the purpose of article 8 of the Agricultural Abuses Act (R.S.Q. chap. A-2) an inspector designated by the Town may use a pesticide, notwithstanding article 2 of the By-Law, if there is no other efficient way of destroying noxious plants determined as such by the Provincial Government and the presence of which is harmful to a real and continuous agricultural exploitation.

Cities and Towns Act, R.S.Q., c. C-19

410. The council may make by-laws:

(1) To secure peace, order, good government, health and general welfare in the territory of the municipality, provided such by-laws are not contrary to the laws of Canada, or of Québec, nor inconsistent with any special provision of this Act or of the charter;

. . .

In no case may the council make by-laws on the matters contemplated in the Agricultural Products, Marine Products and Food Act (chapter P-29) or in the Dairy Products and Dairy Products Substitutes Act (chapter P-30). This paragraph applies notwithstanding any provision of a special Act granting powers on those matters

4. Nonobstant l'article 2, un fermier utilisant un pesticide sur une propriété qui est exploitée à des fins agricoles ou horticoles, dans une serre ou à l'extérieur, doit :

   a) enregistrer, par déclaration écrite à la Ville, au cours du mois de mars de chaque année, les produits qu'il entrepose et dont il entrevoit faire usage durant l'année;

   b) de plus fournir, dans la déclaration écrite à l'article 4a), la cédule d'épandage desdits produits et les secteurs de sa propriété où les produits seront appliqués.

5. Nonobstant l'article 2, il est permis d'utiliser un pesticide sur un terrain de golf, pour une période n'excédant pas cinq (5) ans, à partir de la date d'entrée en vigueur de ce règlement :

. . .

6. Nonobstant l'article 2, il est permis d'utiliser un pesticide biologique pour contrôler ou enrayer les insectes qui constituent un danger ou qui incommodent les humains;

. . .

10. Selon l'article 8 [de] la Loi sur les abus agricoles (L.R.Q. chap. A-2), un inspecteur désigné par la Ville peut utiliser un pesticide en dépit de l'article 2 du règlement, s'il n'existe aucune autre façon efficace d'enrayer les plantes nocives déterminées comme telles par le gouvernement provincial et la présence desquelles est nuisible à une exploitation agricole véritable et continue.

Loi sur les cités et villes, L.R.Q., ch. C-19

410. Le conseil peut faire des règlements :

1º Pour assurer la paix, l'ordre, le bon gouvernement, la salubrité et le bien-être général sur le territoire de la municipalité, pourvu que ces règlements ne soient pas contraires aux lois du Canada ou du Québec, ni incompatibles avec quelque disposition spéciale de la présente loi ou de la charte;

. . .

Le conseil ne peut faire des règlements sur des matières visées par la Loi sur les produits agricoles, les produits marins et les aliments (chapitre P-29) et par la Loi sur les produits laitiers et leurs succédanés (chapitre P-30). Le présent alinéa s'applique malgré une disposition d'une loi spéciale accordant des pouvoirs sur ces

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to any municipality other than Ville de Trois-Rivières and Ville de Sherbrooke.

. . .

412. The council may make by-laws:

. . .

(32) To regulate or prohibit the storage and use of gun-powder, dry pitch, resin, coal oil, benzine, naphtha, gasoline, turpentine, gun-cotton, nitro-glycerine, and other combustible, explosive, corrosive, toxic or radioactive or other materials that are harmful to public health or safety, in the territory of the municipality or within 1 km therefrom;

By-laws passed under the first paragraph in respect of corrosive, toxic or radioactive materials require the approval of the Minister of the Environment;

. . .

463.1 Subject to the Pesticides Act (chapter P-9.3) and the Environment Quality Act (chapter Q-2), the municipality may, with the consent of the owner of an immovable, carry out pesticide application works on the immovable.

Pesticides Act, R.S.Q., c. P-9.3

102. The provisions of the Pesticide Management Code and of the other regulations of this Act prevail over any inconsistent provision of any by-law passed by a municipality or an urban community.

102. [As revised in 1993; not yet in force] The Pesticide Management Code and any other regulation enacted pursuant to this Act shall render inoperative any regulatory provision concerning the same matter enacted by a municipality or an urban community, except where the provision

– concerns landscaping or extermination activities, such as fumigation, as defined by government regulation, and

– prevents or further mitigates harmful effects on the health of humans or of other living species or damage to the environment or to property.

. . .

matières à une municipalité autre que la Ville de Trois-Rivières et la Ville de Sherbrooke.

. . .

412. Le conseil peut faire des règlements :

. . .

32º Pour réglementer ou défendre l'emmagasinage et l'usage de poudre, poix sèche, résine, pétrole, benzine, naphte, gazoline, térébenthine, fulmicoton, nitroglycérine, ainsi que d'autres matières combustibles, explosives, corrosives, toxiques, radioactives ou autrement dangereuses pour la santé ou la sécurité publiques, sur le territoire de la municipalité ou dans un rayon de 1 km à l'extérieur de ce territoire;

Un règlement adopté en vertu du premier alinéa à l'égard de matières corrosives, toxiques ou radioactives requiert l'approbation du ministre de l'Environnement;

. . .

463.1 Sous réserve de la Loi sur les pesticides (chapitre P-9.3) et de la Loi sur la qualité de l'environnement (chapitre Q-2), la municipalité peut, avec le consentement du propriétaire d'un immeuble, procéder à des travaux d'épandage de pesticides sur l'immeuble.

Loi sur les pesticides, L.R.Q., ch. P-9.3

102. Toute disposition du Code de gestion des pesticides et des autres règlements édictés en vertu de la présente loi prévaut sur toute disposition inconciliable d'un règlement édicté par une municipalité ou une communauté urbaine.

102. [Selon la modification de 1993; non en vigueur] Le Code de gestion des pesticides et tout autre règlement édictés en application de la présente loi rendent inopérante toute disposition réglementaire portant sur une même matière qui est édictée par une municipalité ou une communauté urbaine, sauf dans le cas où cette disposition réglementaire satisfait aux conditions suivantes :

– elle porte sur les activités d'entretien paysager ou d'extermination, notamment la fumigation, déterminées par règlement du gouvernement;

– elle prévient ou atténue davantage les atteintes à la santé des êtres humains ou des autres espèces vivantes, ainsi que les dommages à l'environnement ou aux biens.

. . .

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105. [Not yet in force] The Government shall enact by regulation a Pesticide Management Code which may prescribe rules, restrictions or prohibitions respecting activities related to the distribution, storage, transportation, sale or use of any pesticide, pesticide container or any equipment used for any of those activities.

105. [Non en vigueur] Le gouvernement édicte, par règlement, un Code de gestion des pesticides. Ce code peut édicter des règles, restrictions ou prohibitions portant sur les activités relatives à la distribution, à la vente, à l'entreposage, au transport ou à l'utilisation de tout pesticide, de tout contenant d'un pesticide ou de tout équipement servant à l'une de ces activités.

105.1. [Not yet in force] The Pesticide Management Code may require a person who stores pesticides of a determined category or in a determined quantity to subscribe civil liability insurance, the kind, extent, duration, amount and other applicable conditions of which are determined in the said Code, and to furnish proof thereof to the Minister.

105.1. [Non en vigueur] Le Code de gestion des pesticides peut exiger d'une personne qui entrepose des pesticides d'une catégorie ou en quantité déterminée qu'elle contracte une assurance de responsabilité civile, dont il détermine la nature, l'étendue, la durée, le montant ainsi que les autres conditions applicables, et en fournisse l'attestation au ministre.

106. [Not yet in force] The Pesticide Management Code may cause any rule elaborated by another government or by a body to be mandatory.

In addition, the code may cause any instructions of the manufacturer of a pesticide or of equipment used for any activity referred to in the code to be mandatory.

106. [Non en vigueur] Le Code de gestion des pesticides peut rendre obligatoire une règle élaborée par un autre gouvernement ou par un organisme.

Il peut, en outre, rendre obligatoires les instructions du fabricant d'un pesticide ou d'un équipement servant à l'une des activités visées par le code.

107. [Not yet in force] The Government may prescribe that the contravention of the provisions of this code which it determines constitutes an offence.

107. [Non en vigueur] Le gouvernement peut, dans ce code, déterminer les dispositions dont la contravention constitue une infraction.

Pest Control Products Act, R.S.C. 1985, c. P-9

Loi sur les produits antiparasitaires, L.R.C. 1985, ch. P-9

4. (1) No person shall manufacture, store, display, distribute or use any control product under unsafe conditions.

4. (1) Il est interdit de fabriquer, stocker, présenter, distribuer ou utiliser un produit antiparasitaire dans des conditions dangereuses.

. . .

. . .

(3) A control product that is not manufactured, stored, displayed, distributed or used as prescribed or that is manufactured, stored, displayed, distributed or used contrary to the regulations shall be deemed to be manufactured, stored, displayed, distributed or used contrary to subsection (1).

(3) La fabrication, le stockage, la présentation, la distribution ou l'utilisation d'un produit antiparasitaire, réalisés de façon contraire ou non conforme aux règlements, sont réputés contrevenir au paragraphe (1).

. . .

. . .

6. (1) The Governor in Council may make regulations

6. (1) Le gouverneur en conseil peut, par règlement :

. . .

. . .

(*j*) respecting the manufacture, storage, distribution, display and use of any control product;

j) régir la fabrication, le stockage, la présentation, la distribution et l'utilisation de produits antiparasitaires;

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Pest Control Products Regulations, C.R.C. 1978, c. 1253

45. (1) No person shall use a control product in a manner that is inconsistent with the directions or limitations respecting its use shown on the label.

(2) No person shall use a control product imported for the importer's own use in a manner that is inconsistent with the conditions set forth on the importer's declaration respecting the control product.

(3) No person shall use a control product that is exempt from registration under paragraph 5(*a*) for any purpose other than the manufacture of a registered control product.

III. Judgments

A. *Superior Court* (1993), 19 M.P.L.R. (2d) 224

Kennedy J. held that by-laws are presumed valid and legal. He found that By-laws 248 and 270 were adopted under s. 410 *C.T.A.* and, thus, did not require ministerial approval to enter into effect. Both by-laws deal with pesticides and not toxic substances and since "pesticides" are not included in s. 412(32), ministerial approval is not required. According to Kennedy J., the Town, faced with a situation involving health and the environment, acted in the public interest by enacting the by-laws in question. Consequently, the Town could rely on s. 410(1) *C.T.A.* as the legislative provision that enabled it to adopt these by-laws.

Kennedy J. then considered the provisions of the *Pesticides Act* to determine whether the by-laws conflicted with provincial legislation. He found it clear that the *Pesticides Act* was enacted with the intention to allow municipalities to adopt by-laws of this nature. In this regard, Kennedy J. cited ss. 102 and 105 to 107 of the *Pesticides Act*, which envision the creation of a Pesticide Management Code allowing the provincial government to restrict or prohibit pesticides. Section 102 of that Act states that the provisions of the Code are to take precedence over inconsistent by-laws. Yet, given that the Code had yet to come into force, nothing prohibited municipalities from regulating

Règlement sur les produits antiparasitaires, C.R.C. 1978, ch. 1253

45. (1) Il est interdit d'utiliser un produit antiparasitaire d'une manière qui ne correspond pas au mode d'emploi, ni aux limitations figurant sur le label.

(2) Il est interdit d'utiliser un produit antiparasitaire importé par un utilisateur pour son propre usage d'une manière qui ne correspond pas aux conditions énoncées sur la déclaration de l'importateur visant ledit produit.

(3) Il est interdit d'utiliser un produit antiparasitaire exempté de l'enregistrement en vertu de l'alinéa 5*a*) pour une autre fin que la fabrication d'un produit antiparasitaire enregistré.

III. Les jugements

A. *Cour supérieure* (1993), 19 M.P.L.R. (2d) 224

10 Le juge Kennedy conclut que les règlements sont présumés valides et légaux. À son avis, les règlements 248 et 270 ont été adoptés en vertu de l'art. 410 *L.C.V.*, de sorte que leur entrée en vigueur ne nécessite pas l'approbation du ministre. Ils portent tous deux sur les pesticides et non pas sur les substances toxiques; vu que les « pesticides » ne sont pas visés par le par. 412(32), l'approbation du ministre n'est pas requise. Selon le juge Kennedy, la Ville, face à une situation où la santé et l'environnement sont en jeu, a agi dans l'intérêt public en adoptant les règlements en question. Elle pouvait donc se fonder sur le par. 410(1) *L.C.V.* en tant que disposition législative l'habilitant à adopter ces règlements.

11 Le juge Kennedy examine ensuite les dispositions de la *Loi sur les pesticides* pour déterminer si les règlements vont à l'encontre de cette loi provinciale. À son avis, l'adoption de la *Loi sur les pesticides* vise clairement à permettre aux municipalités d'adopter des règlements de cette nature. À cet égard, le juge Kennedy cite les art. 102 et 105 à 107 de la *Loi sur les pesticides*, qui prévoient la création d'un Code de gestion des pesticides permettant au gouvernement provincial de restreindre ou d'interdire l'utilisation des pesticides. Selon l'article 102 de cette loi, les dispositions du Code prévalent sur tout règlement inconciliable. Toutefois, étant donné que le Code n'était pas encore en

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pesticide use in the interim. Kennedy J. thus concluded that there was no conflict between the by-laws and provincial or federal legislation.

B. *Court of Appeal*, [1998] Q.J. No. 2546 (QL)

12 Before the Court of Appeal, the Town conceded that By-law 248 was inoperative. Thus, only By-law 270 was at issue. The appellants challenged Kennedy J.'s ruling on two grounds. First, they argued that By-law 270 was inoperative given that it was incompatible with the *Pesticides Act*. Second, the appellants contended that since the regulation of toxic substances was covered by s. 412(32) *C.T.A.*, Kennedy J. erred in finding that the by-law was enacted under s. 410(1) *C.T.A.* While the latter provision allows a municipality to enact by-laws considered necessary for public health and welfare, s. 412(32) *C.T.A.* is concerned with "toxic" materials, and states that by-laws addressing this subject matter require approval from the Minister of the Environment. Given that the Town did not obtain such approval when it enacted By-law 270, the appellants argued that the by-law was invalid.

13 The Court of Appeal, *per* Delisle J.A., accepted the Town's position that By-law 270 was enacted under s. 410(1) *C.T.A.* In reaching this conclusion, the court noted that By-law 270 repeated the definition of "pesticide" that is found in the *Pesticides Act*. This definition makes no reference to terms used in s. 412(32) or to toxicity. Moreover, the *C.T.A.* itself does not discuss whether pesticides are "toxic . . . materials", nor does it require ministerial approval for regulations relating to pesticides. No evidence was submitted concerning the toxic character of pesticides. The Court of Appeal also held that By-law 270 furthered the objectives set out in s. 410(1) *C.T.A.* It reiterated the statements of Kennedy J. that by-laws are presumed to be valid and legal and that there is a presumption that legislators act in good faith and in the public interest. It found that s. 410(1) is a very general

vigueur, rien n'empêchait les municipalités de réglementer entre-temps l'utilisation des pesticides. Le juge Kennedy conclut donc qu'il n'y a aucun conflit entre les règlements et la législation provinciale ou fédérale.

B. *Cour d'appel*, [1998] A.Q. nº 2546 (QL)

Devant la Cour d'appel, la Ville admet que le règlement 248 est inopérant. En conséquence, seul le règlement 270 est ici en cause. Les appelantes contestent la décision du juge Kennedy pour deux motifs. Premièrement, elles font valoir que le règlement 270 est inopérant du fait de son incompatibilité avec la *Loi sur les pesticides*. Deuxièmement, elles soutiennent que, la réglementation des substances toxiques étant visée par le par. 412(32) *L.C.V.*, le juge Kennedy a commis une erreur en concluant que le règlement avait été adopté en vertu du par. 410(1) *L.C.V.* Même si cette dernière disposition autorise une municipalité à adopter les règlements jugés nécessaires pour la santé et le bien-être publics, le par. 412(32) *L.C.V.*, qui porte sur les matières « toxiques », prévoit que les règlements en cette matière doivent être approuvés par le ministre de l'Environnement. Les appelantes soutiennent que, la Ville n'ayant pas obtenu l'approbation requise lorsque le règlement 270 fut adopté, celui-ci est en conséquence invalide.

Le juge Delisle, au nom de la Cour d'appel, accepte la position de la Ville selon laquelle le règlement 270 a été adopté en vertu du par. 410(1) *L.C.V.* En tirant cette conclusion, la cour souligne que le règlement 270 reprend la définition de « pesticide » dans la *Loi sur les pesticides*. Cette définition ne réfère aucunement aux termes utilisés au par. 412(32) ni à la toxicité. De plus, la *L.C.V.* elle-même ne précise pas si les pesticides sont des « matières [. . .] toxiques » et elle n'exige pas non plus l'approbation du ministre pour les règlements visant les pesticides. Aucun élément de preuve n'a été présenté au sujet de la toxicité des pesticides. La Cour d'appel conclut aussi que le règlement 270 facilite la réalisation des objectifs énoncés au par. 410(1) *L.C.V.* La cour réitère les déclarations du juge Kennedy voulant que les règlements sont présumés valides et légaux et qu'il existe une pré-

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enabling clause and must receive a liberal interpretation.

The court agreed with Kennedy J.'s finding that the by-law was enacted by the Town in the public interest and in response to health concerns expressed by residents. The court noted that these concerns were recorded in the Town Council's meeting minutes and manifested themselves in letters to Council, as well as a petition with more than 300 signatures. Moreover, the Court of Appeal recognized that s. 410 *C.T.A.* describes when a municipality may not act under its general governance powers. By-laws on subjects contemplated in the *Pesticides Act* were not included in this list of unauthorized areas of regulation. The appellants argued that s. 410(1) does not permit the Town to ban pesticides. The Court of Appeal held that an absolute ban would be forbidden, but that the by-law does not impose an absolute ban.

The Court of Appeal then examined whether By-law 270 was in conflict with the *Pesticides Act* and thus inoperative. It found that s. 102 of the *Pesticides Act* — which states that the Pesticide Management Code and all regulations of the *Pesticides Act* take precedence over any incompatible municipal by-law — contemplated municipal regulation of pesticide use. The court also commented that the revised version of s. 102, as well as ss. 105 to 107 regarding the Pesticide Management Code, had yet to be enacted. As a result, it held that, as opposed to a real conflict, a potential future incompatibility between the by-law and the Code did not suffice to render the by-law inoperative.

Finally, the Court of Appeal noted that, although not yet in force, the revised version of s. 102 of the *Pesticides Act* allows municipalities to adopt by-laws concerning pesticides, so long as these are not incompatible with the Pesticide Management Code. At the same time, even if such incompatibil-

somption que le législateur agit de bonne foi et dans l'intérêt public. Elle juge que le par. 410(1) est une clause habilitante très générale qui doit recevoir une interprétation libérale.

14 La Cour d'appel partage l'avis du juge Kennedy, selon lequel la Ville a adopté le règlement dans l'intérêt public en réponse aux craintes liées à la santé exprimées par les résidants. Elle souligne que ces craintes ont été consignées dans les procès-verbaux du conseil municipal et qu'elles se sont manifestées par des lettres au conseil de même que par une pétition portant plus de 300 signatures. De plus, la cour reconnaît que l'art. 410 *L.C.V.* précise les cas où une municipalité ne peut pas agir en vertu de son pouvoir général de gestion des affaires publiques. Les règlements portant sur des matières visées par la *Loi sur les pesticides* ne figurent pas parmi les domaines de réglementation interdits. Les appelantes soutiennent que le par. 410(1) n'autorise pas la Ville à interdire les pesticides. La Cour d'appel conclut qu'une interdiction absolue serait interdite, mais que le règlement en question n'impose pas une telle interdiction.

15 La Cour d'appel examine ensuite la question de savoir si le règlement 270 entre en conflit avec la *Loi sur les pesticides* et s'il est en conséquence inopérant. Selon la cour, l'art. 102 de la *Loi sur les pesticides* — qui prévoit que le Code de gestion des pesticides et les règlements d'application de la *Loi sur les pesticides* prévalent sur tout règlement municipal incompatible — vise la réglementation par les municipalités de l'utilisation des pesticides. La cour fait aussi remarquer que la version modifiée de l'art. 102, de même que les art. 105 à 107 relatifs au Code de gestion des pesticides, n'étaient pas encore en vigueur. Elle conclut donc que, contrairement à un conflit réel, une éventuelle incompatibilité entre le règlement et le Code ne suffit pas pour rendre le règlement inopérant.

16 Enfin, la Cour d'appel souligne que, même si la nouvelle version de l'art. 102 de la *Loi sur les pesticides* n'était pas encore en vigueur, elle permettait aux municipalités d'adopter des règlements sur les pesticides dans la mesure où ils ne sont pas incompatibles avec le Code de gestion des pesti-

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ity arises, the by-laws can continue to be operative if they relate to landscaping activities, or if they aim to prevent or reduce injury or damage to people, animals, the environment or property. As such, this new regime would enable municipalities to enact by-laws that are more restrictive than the provisions set out in the provincial Pesticide Management Code. Based on these reasons, the Court of Appeal dismissed the appeal, holding that By-law 270 was validly enacted and operative.

cides. Par ailleurs, même en cas d'incompatibilité, les règlements continuent de s'appliquer s'ils ont trait à l'aménagement paysager ou s'ils visent à prévenir ou à réduire les blessures causées aux personnes ou aux animaux ou les dommages causés à l'environnement ou à la propriété. Ainsi, ce nouveau régime permettrait aux municipalités d'adopter des règlements plus restrictifs que le Code de gestion des pesticides de la province. Pour ces motifs, la Cour d'appel rejette le pourvoi, concluant que le règlement 270 a été valablement adopté et qu'il s'applique.

IV. Issues

17 There are two issues raised by this appeal:

(1) Did the Town have the statutory authority to enact By-law 270?

(2) Even if the Town had authority to enact it, was By-law 270 rendered inoperative because of a conflict with federal or provincial legislation?

IV. Les questions en litige

Le pourvoi soulève deux questions :

1) La Ville avait-elle le pouvoir légal d'adopter le règlement 270?

2) Dans l'hypothèse où la Ville avait le pouvoir de l'adopter, le règlement 270 a-t-il été rendu inopérant du fait de son incompatibilité avec la législation fédérale ou provinciale?

V. Analysis

A. *Did the Town Have the Statutory Authority to Enact By-law 270?*

18 In *R. v. Sharma*, [1993] 1 S.C.R. 650, at p. 668, this Court recognized "the principle that, as statutory bodies, municipalities 'may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation' (Makuch, *Canadian Municipal and Planning Law* (1983), at p. 115)". Included in this authority are "general welfare" powers, conferred by provisions in provincial enabling legislation, on which municipalities can draw. As I. M. Rogers points out, "the legislature cannot possibly foresee all the powers that are necessary to the statutory equipment of its creatures. . . . Undoubtedly the inclusion of 'general welfare' provisions was intended to circumvent, to some extent, the effect of the doctrine of *ultra vires* which puts the municipalities in the position of having to point to an express

V. Analyse

A. *La Ville avait-elle le pouvoir légal d'adopter le règlement 270?*

Dans l'arrêt *R. c. Sharma*, [1993] 1 R.C.S. 650, p. 668, notre Cour reconnaît que le « principe selon lequel, en tant qu'organismes créés par la loi, les municipalités [TRADUCTION] "peuvent exercer seulement les pouvoirs qui leur sont conférés expressément par la loi, les pouvoirs qui découlent nécessairement ou vraiment du pouvoir explicite conféré dans la loi, et les pouvoirs indispensables qui sont essentiels et non pas seulement commodes pour réaliser les fins de l'organisme" (Makuch, *Canadian Municipal and Planning Law* (1983), à la p. 115) ». Y sont inclus les pouvoirs en matière de « bien-être général » conférés par la loi provinciale habilitante, sur laquelle les municipalités peuvent se fonder. Comme le souligne I. M. Rogers, [TRADUCTION] « la législature ne peut pas prévoir tous les pouvoirs de réglementation nécessaires à ses créatures [. . .] Sans doute, l'inclusion de dispositions en matière de "bien-être général" visait à contourner dans une certaine mesure l'effet de la

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grant of authority to justify each corporate act" (*The Law of Canadian Municipal Corporations* (2nd ed. (loose-leaf)), Cum. Supp. to vol. 1, at p. 367).

Section 410 *C.T.A.* is an example of such a general welfare provision and supplements the specific grants of power in s. 412. More open-ended or "omnibus" provisions such as s. 410 allow municipalities to respond expeditiously to new challenges facing local communities, without requiring amendment of the provincial enabling legislation. There are analogous provisions in other provinces' and territories' municipal enabling legislation: see *Municipal Government Act*, S.A. 1994, c. M-26.1, ss. 3(*c*) and 7; *Local Government Act*, R.S.B.C. 1996, c. 323, s. 249; *Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M225, ss. 232 and 233; *Municipalities Act*, R.S.N.B. 1973, c. M-22, s. 190(2), First Schedule; *Municipal Government* Act, S.N.S. 1998, c. 18, s. 172; *Cities, Towns and Villages Act*, R.S.N.W.T. 1988, c. C-8, ss. 54 and 102; *Municipal Act*, R.S.O. 1990, c. M.45, s. 102; *Municipal Act*, R.S.Y. 1986, c. 119, s. 271.

While enabling provisions that allow municipalities to regulate for the "general welfare" within their territory authorize the enactment of by-laws genuinely aimed at furthering goals such as public health and safety, it is important to keep in mind that such open-ended provisions do not confer an unlimited power. Rather, courts faced with an impugned by-law enacted under an "omnibus" provision such as s. 410 *C.T.A.* must be vigilant in scrutinizing the true purpose of the by-law. In this way, a municipality will not be permitted to invoke the implicit power granted under a "general welfare" provision as a basis for enacting by-laws that are in fact related to ulterior objectives, whether mischievous or not. As a Justice of the Ontario Divisional Court, Cory J. commented instructively on this subject in *Re Weir and The*

théorie de l'excès de pouvoir qui oblige les municipalités à invoquer une attribution expresse de pouvoir pour justifier chaque acte qu'elles accomplissent » (*The Law of Canadian Municipal Corporations* (2e éd. (feuilles mobiles)), suppl. cum. du vol. 1, p. 367).

19 L'article 410 *L.C.V.* constitue un exemple d'une telle disposition générale de bien-être et il ajoute aux pouvoirs spécifiques conférés par l'art. 412. Les dispositions moins limitatives ou « omnibus », tel l'art. 410, permettent aux municipalités de relever rapidement les nouveaux défis auxquels font face les collectivités locales sans qu'il soit nécessaire de modifier la loi provinciale habilitante. Les lois habilitantes des autres provinces et des territoires qui autorisent l'adoption de règlements municipaux contiennent des dispositions analogues: voir *Municipal Government Act*, S.A. 1994, ch. M-26.1, al. 3*c*) et art. 7; *Local Government Act*, R.S.B.C. 1996, ch. 323, art. 249; *Loi sur les municipalités*, L.M. 1996, ch. 58, C.P.L.M., ch. M225, art. 232-233; *Loi sur les municipalités*, L.R.N.-B. 1973, ch. M-22, par. 190(2), annexe I; *Municipal Government Act*, S.N.S. 1998, ch. 18, art. 172; *Loi sur les cités, villes et villages*, L.R.T.N.-O. 1988, ch. C-8, art. 54 et 102; *Loi sur les municipalités*, L.R.O. 1990, ch. M.45, art. 102; *Loi municipale*, L.R.Y. 1986, ch. 119, art. 271.

20 Bien que les dispositions habilitantes permettant aux municipalités de réglementer pour le « bien-être général » sur leur territoire autorisent l'adoption de règlements visant véritablement à faciliter la réalisation d'objectifs telles la santé et la sécurité publiques, il importe de garder à l'esprit le fait que ces dispositions non limitatives ne confèrent pas un pouvoir illimité. Les tribunaux saisis d'un règlement contesté adopté en vertu d'une disposition « omnibus » comme l'art. 410 *L.C.V.* doivent plutôt être vigilants lorsqu'ils cherchent à déterminer le but véritable du règlement. Ainsi, une municipalité ne pourra pas invoquer le pouvoir implicite conféré par une disposition de « bien-être général » pour adopter des règlements qui sont en fait liés à des objectifs inavoués, que ceux-ci soient ou non malicieux. Lorsqu'il était juge à la Cour division-

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Queen (1979), 26 O.R. (2d) 326 (Div. Ct.), at p. 334. Although he found that the City of Toronto's power to regulate matters pertaining to health, safety and general welfare (conferred by the *Municipal Act*, R.S.O. 1970, c. 284, s. 242) empowered it to pass a by-law regulating smoking in public retail shops, Cory J. also made the following remark about the enabling provision: "There is no doubt that a by-law passed pursuant to the provisions of s. 242 must be approached with caution. If such were not the case, the municipality could be deemed to be empowered to legislate in a most sweeping manner."

naire de l'Ontario, le juge Cory a fait des commentaires instructifs sur ce sujet dans l'affaire *Re Weir and The Queen* (1979), 26 O.R. (2d) 326 (C. div.), p. 334. Même s'il a conclu que le pouvoir de réglementation de la ville de Toronto en matière de santé, de sécurité et de bien-être général (conféré par la *Municipal Act*, R.S.O. 1970, ch. 284, art. 242) lui permettait d'adopter un règlement sur l'usage du tabac dans les commerces de détail, le juge Cory a aussi fait la remarque suivante au sujet de la disposition habilitante : [TRADUCTION] « Il ne fait aucun doute qu'un règlement adopté en vertu de l'art. 242 doit être examiné avec prudence. Sinon, la municipalité pourrait être réputée avoir un pouvoir de réglementation extrêmement étendu. »

21 Within this framework, I turn now to the specifics of the appeal. As a preliminary matter, I agree with the courts below that By-law 270 was not enacted under s. 412(32) *C.T.A.* This provision authorizes councils to "make by-laws: To regulate or prohibit the storage and use of gun-powder, dry pitch, resin, coal oil, benzine, naphtha, gasoline, turpentine, gun-cotton, nitro-glycerine, and other combustible, explosive, corrosive, toxic or radioactive or other materials that are harmful to public health or safety, in the territory of the municipality or within 1 km therefrom" (emphasis added). In replicating the definition of "pesticides" found in the provincial *Pesticides Act*, By-law 270 avoids falling under the ambit of s. 412(32). There is no equation of pesticides and "toxic . . . materials" either in the terms of the by-law or in any evidence presented during this litigation. The provincial government did not consider By-law 270 to fall under s. 412(32): see letter of July 5, 1991 from the Deputy Minister of the Environment. As Y. Duplessis and J. Hétu state in *Les pouvoirs des municipalités en matière de protection de l'environnement* (2nd ed. 1994), at p. 110,

C'est sur cette toile de fond que j'aborde maintenant les questions spécifiques soulevées par ce pourvoi. Tout d'abord, je suis d'accord avec les cours d'instance inférieure que le règlement 270 n'a pas été adopté en vertu du par. 412(32) *L.C.V.* Cette disposition autorise les conseils à « faire des règlements: Pour réglementer ou défendre l'emmagasinage et l'usage de poudre, poix sèche, résine, pétrole, benzine, naphte, gazoline, térébenthine, fulmicoton, nitroglycérine, ainsi que d'autres matières combustibles, explosives, corrosives, toxiques, radioactives ou autrement dangereuses pour la santé ou la sécurité publiques, sur le territoire de la municipalité ou dans un rayon de 1 km à l'extérieur de ce territoire » (je souligne). Reprenant la définition de « pesticide » dans la *Loi sur les pesticides* de la province, le règlement 270 évite de tomber sous l'égide du par. 412(32). Le texte du règlement et la preuve présentée au cours du présent litige n'assimilent pas les pesticides aux « matières [. . .] toxiques ». Selon le gouvernement provincial, le règlement 270 ne relève pas du par. 412(32) : voir la lettre du 5 juillet 1991 du sous-ministre de l'Environnement. Comme le disent Y. Duplessis et J. Hétu dans *Les pouvoirs des municipalités en matière de protection de l'environnement* (2e éd. 1994), p. 110 :

[TRANSLATION] . . . these subsections concerning "corrosive, toxic or radioactive materials" in no way limit the other more general powers granted to municipalities that

. . . ces paragraphes relatifs aux « matières corrosives, toxiques, radioactives » ne viennent aucunement limiter les autres pouvoirs plus généraux confiés aux munici-

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could justify municipal intervention in relation to pesticides.

As a result, since there is no specific provision in the provincial enabling legislation referring to pesticides, the by-law must fall within the purview of s. 410(1) *C.T.A.* The party challenging a by-law's validity bears the burden of proving that it is *ultra vires*: see *Kuchma v. Rural Municipality of Tache*, [1945] S.C.R. 234, at p. 239, and *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368, at p. 395.

The conclusion that By-law 270 does not fall within the purview of s. 412(32) *C.T.A.* distinguishes this appeal from *R. v. Greenbaum*, [1993] 1 S.C.R. 674. In that case, various express provisions of the provincial enabling legislation at issue covered the regulation of Toronto sidewalks. The appellant was therefore trying to expand the ambit of these specific authorizations by recourse to the "omnibus" provision in Ontario's *Municipal Act*. Moreover, that provision, s. 102, stated that "[e]very council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act as may be deemed expedient and are not contrary to law . . . ." (emphasis added). The Court thus held in *Greenbaum*, at p. 693, that "[t]hese express powers are . . . taken out of any power included in the general grant of power". Since the *C.T.A.* contains no such specific provisions concerning pesticides (nor a clause limiting its purview to matters not specifically provided for in the Act) the "general welfare" provision of the *C.T.A.*, s. 410(1), is not limited in this fashion.

Section 410(1) *C.T.A.* provides that councils may make by-laws:

(1) To secure peace, order, good government, health and general welfare in the territory of the municipality, provided such by-laws are not contrary to the laws of

paux [*sic*] et pouvant justifier une intervention municipale dans le domaine des pesticides.

Par conséquent, étant donné qu'aucune disposition particulière de la loi provinciale habilitante ne mentionne les pesticides, le règlement doit tomber dans le champ d'application du par. 410(1) *L.C.V.* Il incombe à la partie qui conteste la validité d'un règlement de prouver qu'il est *ultra vires* : voir *Kuchma c. Rural Municipality of Tache*, [1945] R.C.S. 234, p. 239, et *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368, p. 395.

22 La conclusion selon laquelle le règlement 270 n'est pas visé par le par. 412(32) *L.C.V.* établit une distinction entre le présent pourvoi et l'affaire *R. c. Greenbaum*, [1993] 1 R.C.S. 674. Dans cette affaire, différentes dispositions expresses de la loi provinciale habilitante en cause portaient sur la réglementation des trottoirs de Toronto. L'appelante tentait donc d'élargir la portée de ces autorisations spécifiques au moyen de la disposition « omnibus » de la *Loi sur les municipalités* de l'Ontario. De plus, cette disposition, soit l'art. 102, prévoit que « [l]e conseil peut adopter les règlements municipaux, ainsi que les règlements qui ne sont pas contraires à la loi, qui sont réputés pertinents, et qui portent sur la santé, la sécurité, la moralité et le bien-être des habitants de la municipalité, au sujet de questions qui ne sont pas expressément prévues par la présente loi . . . » (je souligne). Notre Cour a en conséquence conclu dans *Greenbaum*, p. 693, que [TRADUCTION] « [c]es pouvoirs explicites sont [. . .] soustraits de ceux qui sont compris dans le pouvoir général ». Étant donné que la *L.C.V.* ne contient aucune disposition particulière de ce genre au sujet des pesticides (et aucune disposition qui en limite la portée aux matières non expressément prévues par la loi), la disposition en matière de « bien-être général » de la *L.C.V.*, soit le par. 410(1), n'est pas ainsi limitée.

23 Le paragraphe 410(1) *L.C.V.* prévoit que les conseils peuvent faire des règlements :

1º Pour assurer la paix, l'ordre, le bon gouvernement, la salubrité et le bien-être général sur le territoire de la municipalité, pourvu que ces règlements ne soient pas

Canada, or of Québec, nor inconsistent with any special provision of this Act or of the charter.

In *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 36, this Court quoted with approval the following statement by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 244:

> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives. [Emphasis added.]

24 The appellants argue that By-law 270 imposes an impermissible absolute ban on pesticide use. They focus on s. 2 of the by-law, which states that: "The spreading and use of a pesticide is prohibited throughout the territory of the Town." In my view, the by-law read as a whole does not impose such a prohibition. By-law 270's ss. 3 to 6 state locations and situations for pesticide use. As one commentary notes, "by-laws like Hudson's typically target non-essential uses of pesticides. That is, it is not a total prohibition, but rather permits the use of pesticides in certain situations where the use of pesticides is not purely an aesthetic pursuit (e.g. for the production of crops)": Swaigen, *supra*, at p. 178.

contraires aux lois du Canada ou du Québec, ni incompatibles avec quelque disposition spéciale de la présente loi ou de la charte.

Dans *Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13, par. 36, notre Cour cite avec approbation l'énoncé suivant du juge McLachlin (maintenant Juge en chef) dans *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231, p. 244 :

> Il ressort d'un commentaire récent que l'on commence à s'accorder pour dire que les tribunaux doivent respecter la responsabilité qu'ont les conseils municipaux élus de servir leurs électeurs et de prendre garde de substituer à l'opinion de ces conseils leur propre avis quant à ce qui est dans le meilleur intérêt des citoyens. À moins qu'il ne soit clairement démontré qu'une municipalité a excédé ses pouvoirs en prenant une décision donnée, les tribunaux ne devraient pas conclure qu'il en est ainsi. Dans les cas où il n'y a pas d'attribution expresse de pouvoirs, mais où ceux-ci peuvent être implicites, les tribunaux doivent se montrer prêts à adopter l'interprétation «bienveillante» évoquée par notre Cour dans l'arrêt *Greenbaum* et à conférer les pouvoirs par déduction raisonnable. Quelles que soient les règles d'interprétation appliquées, elles ne doivent pas servir à usurper le rôle légitime de représentants de la collectivité que jouent les conseils municipaux. [Je souligne.]

Les appelantes prétendent que le règlement 270 impose une interdiction absolue non permise relativement à l'utilisation de pesticides. Elles mettent l'accent sur l'art. 2 du règlement : « L'épandage et l'utilisation de tout pesticide est interdit partout sur le territoire de la Ville. » Selon moi, le règlement, interprété dans son ensemble, n'impose pas une telle interdiction. Les articles 3 à 6 du règlement 270 indiquent les lieux et les cas où l'utilisation de pesticides est permise. Comme le souligne Swaigen, *loc. cit.*, p. 178 : [TRADUCTION] « les règlements comme celui de Hudson visent généralement les usages non essentiels de pesticides. C'est-à-dire qu'ils ne prévoient pas une interdiction totale, mais permettent plutôt l'usage de pesticides dans certains cas où cet usage n'a pas un but purement esthétique (p. ex. pour la production de récoltes) ».

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The appellants further submit that the province's adoption in 1997 of s. 463.1 *C.T.A.*, which states that a municipality may get permission to introduce pesticides onto private property, indicates, by virtue of the principle of *expressio unius est exclusio alterius* (express mention of one is the exclusion of the other), that the province did not intend to allow municipal regulation of pesticides. I find this argument to be without merit, since, even if this subsequent enactment were considered to instantiate prior legislative intent, there is absolutely no implication in s. 463.1 *C.T.A.*, a permissive provision, that it is meant to exhaust municipalities' freedom of action concerning pesticides.

Les appelantes soutiennent, en outre, que l'adoption par la province en 1997 de l'art. 463.1 *L.C.V.*, selon lequel une municipalité peut obtenir la permission d'épandre des pesticides sur une propriété privée, indique, d'après le principe *expressio unius est exclusio alterius* (la mention explicite de l'un signifie l'exclusion de l'autre), que la province n'avait pas l'intention de permettre la réglementation des pesticides par les municipalités. J'estime cet argument mal fondé, car, même si l'on considère que l'adoption ultérieure de cette disposition confirme l'intention antérieure du législateur, absolument rien dans l'art. 463.1 *L.C.V.*, une disposition permissive, ne vise à retirer aux municipalités leur liberté d'action en ce qui a trait aux pesticides. 25

In *Shell*, *supra*, at pp. 276-77, Sopinka J. for the majority quoted the following with approval from Rogers, *supra*, § 64.1:

> In approaching a problem of construing a municipal enactment a court should endeavour firstly to interpret it so that the powers sought to be exercised are in consonance with the purposes of the corporation. The provision at hand should be construed with reference to the object of the municipality: to render services to a group of persons in a locality with a view to advancing their health, welfare, safety and good government.

Dans l'arrêt *Shell*, précité, p. 276-277, le juge Sopinka, au nom de la majorité, cite avec approbation l'extrait suivant tiré de l'ouvrage de Rogers, *op. cit.*, § 64.1 : 26

> [TRADUCTION] Devant un problème d'interprétation d'une résolution ou d'un règlement adopté par une municipalité, les tribunaux doivent s'efforcer en premier lieu de donner une interprétation qui harmonise les pouvoirs que l'on cherche à exercer avec les objectifs de la municipalité. La disposition en cause devrait s'interpréter en fonction de l'objectif de la municipalité : fournir des services à un groupe de personnes, dans une localité, en vue d'en améliorer la santé, le bien-être, la sécurité et le bon gouvernement;

In that case, Sopinka J. enunciated the test of whether the municipal enactment was "passed for a municipal purpose". Provisions such as s. 410(1) *C.T.A.*, while benefiting from the generosity of interpretation discussed in *Nanaimo*, *supra*, must have a reasonable connection to the municipality's permissible objectives. As stated in *Greenbaum*, *supra*, at p. 689: "municipal by-laws are to be read to fit within the parameters of the empowering provincial statute where the by-laws are susceptible to more than one interpretation. However, courts must be vigilant in ensuring that municipalities do not impinge upon the civil or common law rights of citizens in passing *ultra vires* by-laws".

Dans cet arrêt, le juge Sopinka énonce le critère applicable afin de déterminer si le règlement municipal a été « adopt[é] à des fins municipales ». Même si elles bénéficient de l'interprétation large mentionnée dans *Nanaimo*, précité, les dispositions tel le par. 410(1) *L.C.V.* doivent être raisonnablement liées aux objectifs municipaux permis. Comme le mentionne l'arrêt *Greenbaum*, précité, p. 689 : « lorsqu'ils sont susceptibles de recevoir plus d'une interprétation, les règlements municipaux doivent être interprétés de manière à respecter les paramètres de la loi provinciale habilitante. Toutefois, les tribunaux doivent veiller à ce que les municipalités n'empiètent pas sur les droits civils ou de common law des citoyens en adoptant des règlements *ultra vires* ».

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27 Whereas in *Shell*, the enactments' purpose was found to be "to affect matters beyond the boundaries of the City without any identifiable benefit to its inhabitants" (p. 280), that is not the case here. The Town's By-law 270 responded to concerns of its residents about alleged health risks caused by non-essential uses of pesticides within Town limits. Unlike *Shell*, in which the Court felt bound by the municipal enactments' "detailed recital of . . . purposes" (p. 277), the by-law at issue requires what Sopinka J. called the reading in of an implicit purpose. Based on the distinction between essential and non-essential uses of pesticides, it is reasonable to conclude that the Town by-law's purpose is to minimize the use of allegedly harmful pesticides in order to promote the health of its inhabitants. This purpose falls squarely within the "health" component of s. 410(1). As R. Sullivan appositely explains in a hypothetical example illustrating the purposive approach to statutory interpretation:

Alors que, dans l'arrêt *Shell*, les règlements adoptés ont été jugés avoir « pour objet d'exercer une influence à l'extérieur des limites de la ville et ne comport[a]nt aucun bénéfice précis pour ses citoyens » (p. 280), tel n'est pas le cas ici. Le règlement 270 de la Ville répondait aux craintes de ses résidants au sujet des risques que pourrait présenter pour la santé l'usage non essentiel de pesticides dans les limites de la Ville. Contrairement à la situation dans *Shell*, où notre Cour s'est sentie liée par « l'énumération détaillée des objets » (p. 277) des règlements municipaux, le règlement en cause exige ce que le juge Sopinka a recommandé de faire, soit de lui prêter un objectif implicite. Selon la distinction entre l'usage essentiel et l'usage non essentiel des pesticides, il est raisonnable de conclure que le règlement de la Ville a pour objet de minimiser l'utilisation de pesticides qui seraient nocifs afin de protéger la santé de ses habitants. Cet objet relève directement de l'aspect « santé » du par. 410(1). Comme R. Sullivan l'explique pertinemment dans un exemple hypothétique illustrant l'interprétation téléologique des lois :

> Suppose, for example, that a municipality passed a by-law prohibiting the use of chemical pesticides on residential lawns. With no additional information, one might well conclude that the purpose of this by-law was to protect persons from health hazards contained in the chemical spray. This inference would be based on empirical beliefs about the harms chemical pesticides can cause and the risks of exposure created by their use on residential lawns. It would also be based on assumptions about the relative value of grass, insects and persons in society and the desirability of possible consequences of the by-law, such as putting people out of work, restricting the free use of property, interfering with the conduct of businesses and the like. These assumptions make it implausible to suppose that the municipal council was trying to promote the spread of plant-destroying insects or to put chemical workers out of work, but plausible to suppose that it was trying to suppress a health hazard.

> [TRADUCTION] Supposons, par exemple, qu'une municipalité adopte un règlement interdisant l'utilisation de pesticides chimiques sur les pelouses résidentielles. Sans autre renseignement, on pourrait bien conclure que le règlement avait pour objet la protection contre les risques pour la santé que présente la vaporisation de produits chimiques. Cette conclusion serait fondée sur des croyances empiriques au sujet des problèmes que les pesticides chimiques peuvent causer et des risques d'exposition créés par leur utilisation sur des pelouses résidentielles. Elle serait également fondée sur des présomptions au sujet de la valeur relative de l'herbe, des insectes et des personnes dans la société ainsi qu'au sujet du caractère souhaitable des conséquences possibles du règlement, comme le fait de causer des pertes d'emploi, de restreindre la liberté d'utilisation de la propriété, de s'ingérer dans l'exploitation des entreprises et les autres conséquences semblables. Ces présomptions font en sorte qu'il n'est pas plausible de supposer que le conseil municipal tentait de favoriser la propagation des insectes qui détruisent les plantes ou de causer la mise à pied de travailleurs du domaine des produits chimiques, mais qu'il est plausible de supposer qu'il tentait d'éliminer un risque pour la santé.

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(*Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 53)

Kennedy J. correctly found (at pp. 230-31) that the Town Council, "faced with a situation involving health and the environment", "was addressing a need of their community." In this manner, the municipality is attempting to fulfill its role as what the Ontario Court of Appeal has called a "trustee of the environment" (*Scarborough v. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255, at p. 257).

The appellants claim that By-law 270 is discriminatory and therefore *ultra vires* because of what they identify as impermissible distinctions that affect their commercial activities. There is no specific authority in the *C.T.A.* for these distinctions. Writing for the Court in *Sharma*, *supra*, at p. 668, Iacobucci J. stated the principle that:

> . . . in *Montréal (City of) v. Arcade Amusements Inc.*, *supra*, this Court recognized that discrimination in the municipal law sense was no more permissible between than within classes (at pp. 405-6). Further, the general reasonableness or rationality of the distinction is not at issue: discrimination can only occur where the enabling legislation specifically so provides or where the discrimination is a necessary incident to exercising the power delegated by the province (*Montréal (City of) v. Arcade Amusements Inc.*, *supra*, at pp. 404-6). [Emphasis added.]

See also *Shell*, *supra*, at p. 282; *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, at p. 413.

Without drawing distinctions, By-law 270 could not achieve its permissible goal of aiming to improve the health of the Town's inhabitants by banning non-essential pesticide use. If all pesticide uses and users were treated alike, the protection of health and welfare would be sub-optimal. For example, withdrawing the special status given to farmers under the by-law's s. 4 would work at cross-purposes with its salubrious intent. Section 4 thus justifiably furthers the objective of By-law 270. Having held that the Town can regulate the use of pesticides, I conclude that the distinctions

(*Driedger on the Construction of Statutes* (3e éd. 1994), p. 53)

Le juge Kennedy a conclu à bon droit (aux p. 230-231) que, [TRADUCTION] « devant une situation où la santé et l'environnement sont en jeu », le conseil municipal « voyait à un besoin de sa collectivité ». Ainsi, la municipalité tente d'exercer son rôle, qualifié par la Cour d'appel de l'Ontario de [TRADUCTION] « fiduciaire de l'environnement » (*Scarborough c. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255, p. 257).

28 Les appelantes font valoir que le règlement 270 est discriminatoire et en conséquence est *ultra vires* en raison de ce qu'elles identifient comme des distinctions non permises affectant leurs activités commerciales. La *L.C.V.* n'autorise pas explicitement de telles distinctions. S'exprimant au nom de la Cour dans *Sharma*, précité, p. 668, le juge Iacobucci énonce le principe suivant :

> . . . dans l'arrêt *Montréal (Ville de) c. Arcade Amusements Inc.*, précité, notre Cour a reconnu que la discrimination au sens du droit municipal n'était pas plus permise entre des catégories qu'au sein de catégories (aux pp. 405 et 406). En outre, le caractère raisonnable ou rationnel général de la distinction n'est pas en cause: il ne saurait y avoir de discrimination que si la loi habilitante le prévoit précisément ou si la discrimination est nécessairement accessoire à l'exercice du pouvoir délégué par la province (*Montréal (Ville de) c. Arcade Amusements Inc.*, précité, aux pp. 404 à 406). [Je souligne.]

Voir également *Shell*, précité, p. 282; *Allard Contractors Ltd. c. Coquitlam (District)*, [1993] 4 R.C.S. 371, p. 413.

29 Sans faire ces distinctions, le règlement 270 ne pourrait pas atteindre l'objectif y autorisé, soit d'améliorer la santé des habitants de la Ville en interdisant l'usage non essentiel de pesticides. Si l'on traitait de façon similaire tous les usages et utilisateurs de pesticides, la protection de la santé et du bien-être ne serait pas optimale. Par exemple, le retrait du statut spécial que l'art. 4 du règlement confère aux fermiers irait à l'encontre de l'objectif de salubrité de ce règlement. L'article 4 facilite ainsi, et il est justifié de le faire, la réalisation de l'objectif visé par le règlement 270. Ayant conclu

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impugned by the appellants for restricting their businesses are necessary incidents to the power delegated by the province under s. 410(1) *C.T.A.* They are "so absolutely necessary to the exercise of those powers that [authorization has] to be found in the enabling provisions, by necessary inference or implicit delegation"; *Arcade Amusements*, *supra*, at p. 414, quoted in *Greenbaum*, *supra*, at p. 695.

30 To conclude this section on statutory authority, I note that reading s. 410(1) to permit the Town to regulate pesticide use is consistent with principles of international law and policy. My reasons for the Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 70, observed that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review". As stated in *Driedger on the Construction of Statutes*, *supra*, at p. 330:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

31 The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle", which is defined as follows at para. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990):

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for

que la Ville peut réglementer l'utilisation des pesticides, je juge que les distinctions contestées par les appelantes au motif qu'elles restreignent leurs activités commerciales sont des conséquences nécessaires à l'application du pouvoir délégué par la province en vertu du par. 410(1) *L.C.V.* Elles sont « indispensable[s] à l'exercice de ces pouvoirs de telle sorte que [l'autorisation] doive [être] trouv[ée] dans ces dispositions habilitantes, par inférence nécessaire ou délégation implicite »; *Arcade Amusements*, précité, p. 414, cité dans *Greenbaum*, précité, p. 695.

En conclusion quant à cette partie relative au pouvoir conféré par la loi, je souligne qu'interpréter le par. 410(1) comme permettant à la Ville de réglementer l'utilisation des pesticides correspond aux principes de droit et de politique internationaux. Au nom de la Cour dans *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 70, je note dans mon opinion que « [l]es valeurs exprimées dans le droit international des droits de la personne peuvent [. . .] être prises en compte dans l'approche contextuelle de l'interprétation des lois et en matière de contrôle judiciaire ». Comme il est mentionné dans *Driedger on the Construction of Statutes*, *op. cit.*, p. 330 :

> [TRADUCTION] [L]a législature est présumée respecter les valeurs et les principes contenus dans le droit international, coutumier et conventionnel. Ces principes font partie du cadre juridique au sein duquel une loi est adoptée et interprétée. Par conséquent, dans la mesure du possible, il est préférable d'adopter des interprétations qui correspondent à ces valeurs et à ces principes. [Je souligne.]

L'interprétation que je fais ici du règlement 270 respecte le « principe de précaution » du droit international, qui est défini ainsi au par. 7 de la *Déclaration ministérielle de Bergen sur le développement durable* (1990) :

> Un développement durable implique des politiques fondées sur le principe de précaution. Les mesures adoptées doivent anticiper, prévenir et combattre les causes de la détérioration de l'environnement. Lorsque des dommages graves ou irréversibles risquent d'être infligés, l'absence d'une totale certitude scientifique ne

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postponing measures to prevent environmental degradation.

devrait pas servir de prétexte pour ajourner l'adoption de mesures destinées à prévenir la détérioration de l'environnement.

Canada "advocated inclusion of the precautionary principle" during the Bergen Conference negotiations (D. VanderZwaag, CEPA Issue Elaboration Paper No. 18, *CEPA and the Precautionary Principle/Approach* (1995), at p. 8). The principle is codified in several items of domestic legislation: see for example the *Oceans Act*, S.C. 1996, c. 31, Preamble (para. 6); *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 2(1)(*a*); *Endangered Species Act*, S.N.S. 1998, c. 11, ss. 2(1)(*h*) and 11(1).

Le Canada « a préconisé l'inclusion du principe de précaution » au cours des négociations de la Conférence de Bergen (D. VanderZwaag, Examen de la LCPE : Document d'élaboration des enjeux 18, *La LCPE et le principe ou l'approche précaution* (1995), p. 11). Ce principe est intégré dans plusieurs dispositions de législation interne : voir par exemple la *Loi sur les océans*, L.C. 1996, ch. 31, Préambule (par. 6); la *Loi canadienne sur la protection de l'environnement (1999)*, L.C. 1999, ch. 33, al. 2(1)*a*); la *Endangered Species Act*, S.N.S. 1998, ch. 11, al. 2(1)(*h*) et par. 11(1).

Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment" (D. Freestone and E. Hey, "Origins and Development of the Precautionary Principle", in D. Freestone and E. Hey, eds., *The Precautionary Principle and International Law* (1996), at p. 41. As a result, there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law" (J. Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in *ibid.*, at p. 52). See also O. McIntyre and T. Mosedale, "The Precautionary Principle as a Norm of Customary International Law" (1997), 9 *J. Env. L.* 221, at p. 241 ("the precautionary principle has indeed crystallised into a norm of customary international law"). The Supreme Court of India considers the precautionary principle to be "part of the Customary International Law" (*A.P. Pollution Control Board v. Nayudu*, 1999 S.O.L. Case No. 53, at para. 27). See also *Vellore Citizens Welfare Forum v. Union of India*, [1996] Supp. 5 S.C.R. 241. In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action.

32 Des auteurs ont démontré que le principe de précaution est repris [TRADUCTION] « dans pratiquement tous les traités et documents de politique récents en matière de protection et de préservation de l'environnement » (D. Freestone et E. Hey, « Origins and Development of the Precautionary Principle », dans D. Freestone et E. Hey, dir., *The Precautionary Principle and International Law* (1996), p. 41. Par conséquent, il y a peut-être [TRADUCTION] « actuellement suffisamment de pratiques de la part des États pour qu'il soit permis de prétendre de façon convaincante que le principe de précaution est un principe de droit international coutumier » (J. Cameron et J. Abouchar, « The Status of the Precautionary Principle in International Law », *ibid.*, p. 52). Voir également O. McIntyre et T. Mosedale, « The Precautionary Principle as a Norm of Customary International Law » (1997), 9 *J. Env. L.* 221, p. 241 [TRADUCTION] (« le principe de précaution s'est vraiment cristallisé en une norme de droit international coutumier »). La Cour suprême de l'Inde considère le principe de précaution comme faisant [TRADUCTION] « partie du droit international coutumier » (*A.P. Pollution Control Board c. Nayudu*, 1999 S.O.L. Case No. 53, par. 27). Voir également *Vellore Citizens Welfare Forum c. Union of India*, [1996] Suppl. 5 S.C.R. 241. Dans le contexte des postulats du principe de précaution, les craintes de la Ville au sujet des pesticides s'inscrivent confortablement sous la rubrique de l'action préventive.

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B. *Even if the Town Had Authority to Enact it, Was By-law 270 Rendered Inoperative Because of a Conflict with Federal or Provincial Legislation?*

33 This Court stated in *Hydro-Québec*, *supra*, at para. 112, that *Oldman River*, *supra*, "made it clear that the environment is not, as such, a subject matter of legislation under the *Constitution Act, 1867*. As it was put there, 'the *Constitution Act, 1867* has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament' (p. 63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64)." As there is bijurisdictional responsibility for pesticide regulation, the appellants allege conflicts between By-law 270 and both federal and provincial legislation. These contentions will be examined in turn.

1. Federal Legislation

34 The appellants argue that ss. 4(1), 4(3) and 6(1)(*j*) of the *Pest Control Products Act* ("*PCPA*"), and s. 45 of the *Pest Control Products Regulations* allowed them to make use of the particular pesticide products they employed in their business practices. They allege a conflict between these legislative provisions and By-law 270. In *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 187, Dickson J. (as he then was) for the majority of the Court reviewed the "express contradiction test" of conflict between federal and provincial legislation. At p. 191, he explained that "there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other". See also *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, at paras. 17 and 40; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121,

B. *Dans l'hypothèse où la Ville avait le pouvoir de l'adopter, le règlement 270 a-t-il été rendu inopérant du fait de son incompatibilité avec la législation fédérale ou provinciale?*

Notre Cour a dit dans *Hydro-Québec*, précité, par. 112, que l'arrêt *Oldman River*, précité, « a précisé [. . .] que l'environnement n'est pas, comme tel, un domaine de compétence législative en vertu de la *Loi constitutionnelle de 1867*. Comme il y est affirmé, "la *Loi constitutionnelle de 1867* n'a pas conféré le domaine de 'l'environnement' comme tel aux provinces ou au Parlement" (p. 63). Il s'agit plutôt d'un sujet diffus qui touche plusieurs domaines différents de responsabilité constitutionnelle, dont certains sont fédéraux et d'autres provinciaux (pp. 63 et 64). » Étant donné qu'il existe une responsabilité bijuridictionnelle en matière de réglementation de pesticides, les appelantes allèguent que le règlement 270 entre en conflit tant avec la législation fédérale qu'avec la législation provinciale. Je discuterai de ces prétentions à tour de rôle.

1. La législation fédérale

Les appelantes prétendent que les par. 4(1) et 4(3) ainsi que l'al. 6(1)*j*) de la *Loi sur les produits antiparasitaires* (la « *LPAP* ») et l'art. 45 du *Règlement sur les produits antiparasitaires* leur permettaient d'utiliser les pesticides particuliers qu'elles employaient dans le cadre de leurs activités commerciales. Elles allèguent qu'il existe un conflit entre ces dispositions et le règlement 270. Dans *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 187, le juge Dickson (plus tard Juge en chef), au nom de la majorité de la Cour, examine le « critère du conflit explicite » entre la législation fédérale et la législation provinciale. À la page 191, il explique qu'« il ne semble y avoir aucune raison valable de parler de prépondérance et d'exclusion sauf lorsqu'il y a un conflit véritable, comme lorsqu'une loi dit "oui" et que l'autre dit "non"; "on demande aux mêmes citoyens d'accomplir des actes incompatibles"; l'observance de l'une entraîne l'inobservance de l'autre ». Voir également *M & D Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961, par. 17 et 40; *Banque de Montréal c. Hall*, [1990] 1 R.C.S.

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at p. 151. By-law 270, as a product of provincial enabling legislation, is subject to this test.

Federal legislation relating to pesticides extends to the regulation and authorization of their import, export, sale, manufacture, registration, packaging and labelling. The *PCPA* regulates which pesticides can be registered for manufacture and/or use in Canada. This legislation is permissive, rather than exhaustive, and there is no operational conflict with By-law 270. No one is placed in an impossible situation by the legal imperative of complying with both regulatory regimes. Analogies to motor vehicles or cigarettes that have been approved federally, but the use of which can nevertheless be restricted municipally, well illustrate this conclusion. There is, moreover, no concern in this case that application of By-law 270 displaces or frustrates "the legislative purpose of Parliament". See *Multiple Access*, *supra*, at p. 190; *Bank of Montreal*, *supra*, at pp. 151 and 154.

2. Provincial Legislation

Multiple Access also applies to the inquiry into whether there is a conflict between the by-law and provincial legislation, except for cases (unlike this one) in which the relevant provincial legislation specifies a different test. The *Multiple Access* test, namely "impossibility of dual compliance", see P. W. Hogg, *Constitutional Law of Canada* (looseleaf ed.), vol. 1, at p. 16-13, was foreshadowed for provincial-municipal conflicts in *dicta* contained in this Court's decision in *Arcade Amusements*, *supra*, at p. 404. There, Beetz J. wrote that "otherwise valid provincial statutes which are directly contrary to federal statutes are rendered inoperative by that conflict. Only the same type of conflict with provincial statutes can make by-laws inoperative: I. M. Rogers, *The Law of Canadian Municipal Corporations*, vol. 1, 2nd ed., 1971, No. 63.16" (emphasis added).

121, p. 151. Découlant d'une loi provinciale habilitante, le règlement 270 est sujet à ce critère.

35 La législation fédérale relative aux pesticides s'étend à la réglementation et à l'autorisation de leur importation, de leur exportation, de leur vente, de leur fabrication, de leur agrément, de leur emballage et de leur étiquetage. La *LPAP* dicte quels pesticides peuvent être agréés à des fins de fabrication et/ou d'utilisation au Canada. Cette loi est permissive, et non pas exhaustive, de sorte qu'il n'y a aucun conflit opérationnel avec le règlement 270. Nul n'est placé dans la situation impossible d'avoir l'obligation légale de se conformer aux deux régimes de réglementation. L'analogie avec les véhicules automobiles et les cigarettes qui ont été approuvés au niveau fédéral mais dont l'usage peut toutefois être restreint au niveau municipal illustre bien cette conclusion. Il n'y a, en outre, aucune crainte en l'espèce que l'application du règlement 270 écarte ou déjoue « l'intention du Parlement ». Voir *Multiple Access*, précité, p. 190; *Banque de Montréal*, précité, p. 151 et 154.

2. La législation provinciale

36 L'arrêt *Multiple Access* s'applique également à l'examen de la question de savoir s'il y a conflit entre le règlement municipal et la législation provinciale, sauf dans les cas (différents de la présente affaire) où la loi provinciale pertinente spécifie un critère autre. La remarque incidente faite dans la décision rendue par notre Cour dans *Arcade Amusements*, précité, p. 404, présageait le critère de l'arrêt *Multiple Access*, à savoir [TRADUCTION] « l'impossibilité de se conformer aux deux textes », voir P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 1, p. 16-13. Dans cette décision, le juge Beetz écrit que « des lois provinciales, valides par ailleurs, mais qui se heurtent directement à des lois fédérales, sont rendues inopérantes par suite de ce conflit. Seule la même sorte de conflit avec des lois provinciales peut rendre des règlements inopérants: I. M. Rogers, *The Law of Canadian Municipal Corporations*, vol. 1, 2e éd., 1971, no 63.16 » (je souligne).

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37 One of the competing tests to *Multiple Access* suggested in this litigation is based on *Attorney General for Ontario v. City of Mississauga* (1981), 15 M.P.L.R. 212 (Ont. C.A.). In that case, decided before *Multiple Access*, Morden J.A. saw "no objection to borrowing, in this field, relevant principles of accommodation which have been developed in cases involving alleged federal-provincial areas of conflict. In both fields great care is, and should be, taken before it is held that an otherwise properly enacted law is inoperative" (p. 232). He added, at p. 233, the important point that "a by-law is not void or ineffective merely because it 'enhances' the statutory scheme of regulation by imposing higher standards of control than those in the related statute. This is not conflict or incompatibility per se" (quoting *Township of Uxbridge v. Timber Bros. Sand & Gravel Ltd.* (1975), 7 O.R. (2d) 484 (C.A.)). See also P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 353 ("In some cases, the courts have held that the provincial statute does not imply full repeal of the municipal power. The municipality retains its authority as long as there is no conflict with provincial legislation. It may be more demanding than the province, but not less so").

L'un des critères opposés à celui de l'arrêt *Multiple Acesss* qui ont été proposés dans le présent litige est fondé sur l'arrêt *Attorney General for Ontario c. City of Mississauga* (1981), 15 M.P.L.R. 212 (C.A. Ont.). Dans cette décision rendue avant l'arrêt *Multiple Access*, le juge Morden de la Cour d'appel de l'Ontario ne voit [TRADUCTION] « aucun problème à introduire dans ce domaine les principes d'accommodement pertinents qui ont été élaborés dans les affaires portant sur des présumés domaines de conflit entre les textes fédéraux et les textes provinciaux. Dans les deux domaines, on fait, et il faut faire, bien attention avant de déclarer inopérante une disposition qui a été autrement valablement adoptée » (p. 232). Il ajoute, à la p. 233, un point important, qui est qu' [TRADUCTION] « un règlement n'est pas nul ou sans effet simplement parce qu'il "rehausse" le régime législatif de réglementation en imposant des normes de contrôle plus sévères que celles prévues dans la loi connexe. Cela n'est pas un conflit ou une incompatibilité en soi » (citation de *Township of Uxbridge c. Timber Bros. Sand & Gravel Ltd.* (1975), 7 O.R. (2d) 484 (C.A.)). Voir également P.-A. Côté, *Interprétation des lois* (3e éd. 1999), p. 446-447 (« Dans certaines affaires, on a jugé que l'adoption de la loi provinciale ne devait pas s'interpréter comme une abrogation complète du pouvoir municipal : celui-ci pouvait continuer à s'exercer à la condition toutefois de ne pas contredire la réglementation provinciale, c'est-à-dire que la municipalité pouvait être plus exigeante, mais non moins exigeante que la province »).

38 Some courts have already made use of the *Multiple Access* test to examine alleged provincial-municipal conflicts. For example, in *British Columbia Lottery Corp. v. Vancouver (City)* (1999), 169 D.L.R. (4th) 141, at pp. 147-48, the British Columbia Court of Appeal stated that cases pre-dating *Multiple Access*, including the Ontario Court of Appeal decision in *Mississauga*, *supra*, "must be read in the light of [that] decision".

Certains tribunaux ont déjà recouru au critère de l'arrêt *Multiple Access* pour examiner les présumés conflits entre des textes provinciaux et des textes municipaux. Par exemple, dans *British Columbia Lottery Corp. c. Vancouver (City)* (1999), 169 D.L.R. (4th) 141, p. 147-148, la Cour d'appel de la Colombie-Britannique déclare que les décisions rendues avant l'arrêt *Multiple Access*, notamment la décision de la Cour d'appel de l'Ontario dans *Mississauga*, précité, [TRADUCTION] « doivent être interprétées selon [cette] décision ».

It is no longer the key to this kind of problem to look at one comprehensive scheme, and then to look at the other comprehensive scheme, and to decide which

[TRADUCTION] On ne résout plus ce genre de problème en examinant un régime complet, en examinant l'autre régime complet et en décidant quel régime

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scheme entirely occupies the field to the exclusion of the other. Instead, the correct course is to look at the precise provisions and the way they operate in the precise case, and ask: Can they coexist in this particular case in their operation? If so, they should be allowed to co-exist, and each should do its own parallel regulation of one aspect of the same activity, or two different aspects of the same activity. [Emphasis added.]

occupe tout le domaine à l'exclusion de l'autre. Il faut plutôt examiner les dispositions précises et la manière dont elles s'appliquent dans le cas particulier et se demander si elles peuvent s'appliquer de façon harmonieuse dans ce cas précis? Dans l'affirmative, il faut permettre leur coexistence et elles doivent chacune réglementer en parallèle une facette, ou deux facettes différentes, de la même activité. [Je souligne.]

The court summarized the applicable standard as follows: "A true and outright conflict can only be said to arise when one enactment compels what the other forbids." See also *Law Society of Upper Canada v. Barrie (City)* (2000), 46 O.R. (3d) 620 (S.C.J.), at pp. 629-30: "Compliance with the provincial Act does not necessitate defiance of the municipal By-law; dual compliance is certainly possible"; *Huot v. St-Jérôme (Ville de)*, J.E. 93-1052 (Sup. Ct.), at p. 19: [TRANSLATION] "A finding that a municipal by-law is inconsistent with a provincial statute (or a provincial statute with a federal statute) requires, first, that they both deal with similar subject matters and, second, that obeying one necessarily means disobeying the other."

La cour a résumé ainsi la norme applicable : [TRADUCTION] « On peut dire qu'il y a un conflit réel et direct seulement lorsqu'un texte impose ce que l'autre interdit. » Voir également *Law Society of Upper Canada c. Barrie (City)* (2000), 46 O.R. (3d) 620 (C.S.J.), p. 629-630 : [TRADUCTION] « La conformité à la loi provinciale ne requiert pas l'inobservation du règlement municipal; il est certainement possible de se conformer aux deux textes); *Huot c. St-Jérôme (Ville de)*, J.E. 93-1052 (C.S.), p. 19 : « En effet, pour qu'un règlement municipal soit incompatible avec une loi provinciale (ou une loi provinciale avec une loi fédérale), il faut d'abord que les deux touchent des sujets similaires et, ensuite, qu'un citoyen, pour obéir à l'une doive enfreindre l'autre. »

39 As a general principle, the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter. As stated by the Quebec Court of Appeal in an informative environmental decision, *St-Michel-Archange (Municipalité de) v. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875 (C.A.), at pp. 888-91:

39 De façon générale, la simple existence d'une loi provinciale (ou fédérale) dans un domaine donné n'écarte pas le pouvoir des municipalités de réglementer cette matière. Comme le dit la Cour d'appel du Québec dans un arrêt instructif en matière d'environnement, *St-Michel-Archange (Municipalité de) c. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875 (C.A.), p. 888-891 :

[TRANSLATION] According to proponents of the unitary theory, although the provincial legislature has not said so clearly, it has nonetheless established a provincial scheme for managing waste disposal sites. It has therefore reserved exclusive jurisdiction in this matter for itself, and taken the right to pass by-laws concerning local waste management away from municipalities. The *Environment Quality Act* therefore operated to remove those powers from municipal authorities.

Pour les tenants de la thèse unitaire, le législateur provincial, sans le dire d'une façon claire, a néanmoins instauré un système provincial de gestion des sites de réception des déchets. Il s'est donc réservé l'exclusivité des compétences en la matière et a enlevé aux municipalités le droit de faire des règlements sur la gestion locale des déchets. La *Loi sur la qualité de l'environnement* aurait donc eu pour effet de retirer ces pouvoirs aux autorités municipales.

According to proponents of the pluralist theory, the provincial legislature very definitely did not intend to abolish the municipality's power to regulate; rather, it

Pour les tenants de la thèse pluraliste, le législateur provincial n'a pas, bien au contraire, entendu abolir le pouvoir municipal de réglementation, mais simplement

intended merely to better circumscribe that power, to ensure complementarity with the municipal management scheme. . . .

. . .

The pluralist theory accordingly concedes that the intention is to give priority to provincial statutory and regulatory provisions. However, it does not believe that it can be deduced from this that any complementary municipal provision in relation to planning and development that affects the quality of the environment is automatically invalid.

. . .

A thorough analysis of the provisions cited *supra* and a review of the environmental policy as a whole as it was apparently intended by the legislature leads to the conclusion that it is indeed the pluralist theory, or at least a pluralist theory, that the legislature seems to have taken as the basis for the statutory scheme.

In this case, there is no barrier to dual compliance with By-law 270 and the *Pesticides Act*, nor any plausible evidence that the legislature intended to preclude municipal regulation of pesticide use. The *Pesticides Act* establishes a permit and licensing system for vendors and commercial applicators of pesticides and thus complements the federal legislation's focus on the products themselves. Along with By-law 270, these laws establish a tri-level regulatory regime.

40 According to s. 102 of the *Pesticides Act*, as it was at the time By-law 270 was passed: "The provisions of the Pesticide Management Code and of the other regulations of this Act prevail over any inconsistent provision of any by-law passed by a municipality or an urban community." Evidently, the *Pesticides Act* envisions the existence of complementary municipal by-laws. As Duplessis and Hétu, *supra*, at p. 109, put it, [TRANSLATION] "the Quebec legislature gave the municipalities the right to regulate pesticides, provided that the by-law was not incompatible with the regulations and the Management Code enacted under the *Pesticides Act*". Since no Pesticide Management Code has been enacted by the province under s. 105, the

l'encadrer davantage dans une perspective de complémentarité de gestion avec les autorités municipales. . .

. . .

La thèse pluraliste admet donc qu'il y a intention de donner priorité aux dispositions législatives et réglementaires provinciales. Elle ne croit cependant pas que l'on puisse en déduire qu'automatiquement toute disposition municipale complémentaire en matière d'urbanisme et d'aménagement et qui touche la qualité de l'environnement soit nulle.

. . .

Une analyse approfondie des textes précités et l'examen de l'ensemble de la politique environnementale que semble avoir voulue le législateur mènent à la conclusion que c'est bien la thèse pluraliste, ou du moins une certaine thèse pluraliste, que celui-ci semble avoir pris comme base de l'ensemble législatif.

Dans la présente affaire, rien n'empêche que l'on se conforme à la fois au règlement 270 et à la *Loi sur les pesticides*, et il n'y a aucun élément de preuve plausible indiquant que la législature avait l'intention d'empêcher la réglementation par les municipalités de l'utilisation des pesticides. La *Loi sur les pesticides* établit un régime de permis pour les vendeurs et les applicateurs commerciaux de pesticides et elle est donc complémentaire à la législation fédérale, qui porte sur les produits eux-mêmes. Conjointement avec le règlement 270, ces lois établissent un régime de réglementation à trois niveaux.

En vertu de l'art. 102 de la *Loi sur les pesticides*, tel qu'il existait au moment de l'adoption du règlement 270 : « Toute disposition du Code de gestion des pesticides et des autres règlements édictés en vertu de la présente loi prévaut sur toute disposition inconciliable d'un règlement édicté par une municipalité ou une communauté urbaine. » Il est clair que la *Loi sur les pesticides* envisage l'existence de règlements municipaux complémentaires. Comme le disent Duplessis et Hétu, *op. cit.*, p. 109, « le législateur provincial reconnaissait aux municipalités le droit de réglementer les pesticides en autant que cette réglementation n'était pas inconciliable avec les règlements et le Code de gestion adoptés en vertu de la *Loi sur les pesti-*

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lower courts in this case correctly found that the by-law and the *Pesticides Act* could co-exist. In the words of the Court of Appeal, at p. 16: [TRANSLATION] "The *Pesticides Act* thus itself contemplated the existence of municipal regulation of pesticides, since it took the trouble to impose restrictions."

cides ». Étant donné qu'aucun Code de gestion des pesticides n'a été adopté par la province aux termes de l'art. 105, les tribunaux antérieurs en l'espèce ont eu raison de conclure que le règlement et la *Loi sur les pesticides* pouvaient coexister. Pour reprendre les termes de la Cour d'appel, à la p. 16 : « La *Loi sur les pesticides* envisageait donc elle-même l'existence d'une réglementation municipale sur les pesticides, puisqu'elle prenait la peine d'imposer des contraintes. »

I also agree with the Court of Appeal at p. 16, that: [TRANSLATION] "A potential inconsistency is not sufficient to invalidate a by-law; there must be a real conflict". In this regard, the Court of Appeal quoted, at p. 17, *St-Michel-Archange*, *supra*, at p. 891, to the effect that: [TRANSLATION] "However, to the extent that and for as long as the provincial regulation is not in force, the municipal by-law continues to regulate the activity, provided, of course, that it complies with all the rules established by the law and the courts concerning its validity."

41 Je suis également d'accord avec la Cour d'appel à la p. 16 pour dire qu'« [u]ne éventuelle incompatibilité ne suffit pas pour invalider un règlement; il faut une réelle opposition ». À cet égard, la Cour d'appel a cité, à la p. 17, l'arrêt *St-Michel-Archange*, précité, p. 891, selon lequel « [t]ant et aussi longtemps toutefois que le règlement provincial n'est pas en vigueur, le règlement municipal continue à régir l'activité à condition, naturellement, qu'il respecte toutes les normes fixées par la loi et par la jurisprudence relativement à sa validité ».

I note in conclusion that the 1993 revision to the *Pesticide Act* added a new s. 102 stating:

42 Je souligne, en terminant, que la version modifiée de 1993 de la *Loi sur les pesticides* comporte un nouvel art. 102, ainsi libellé :

The Pesticide Management Code and any other regulation enacted pursuant to this Act shall render inoperative any regulatory provision concerning the same matter enacted by a municipality or an urban community, except where the provision

Le Code de gestion des pesticides et tout autre règlement édictés en application de la présente loi rendent inopérante toute disposition réglementaire portant sur une même matière qui est édictée par une municipalité ou une communauté urbaine, sauf dans le cas où cette disposition réglementaire satisfait aux conditions suivantes :

– concerns landscaping or extermination activities, such as fumigation, as defined by government regulation, and

– elle porte sur les activités d'entretien paysager ou d'extermination, notamment la fumigation, déterminées par règlement du gouvernement;

– prevents or further mitigates harmful effects on the health of humans or of other living species or damage to the environment or to property.

– elle prévient ou atténue davantage les atteintes à la santé des êtres humains ou des autres espèces vivantes, ainsi que les dommages à l'environnement ou aux biens.

This revised language indicates more explicitly that the *Pesticides Act* is meant to co-exist with stricter municipal by-laws of the type at issue in this case. Indeed, the new s. 102, by including the word "health", echoes the enabling legislation that underpins By-law-270, namely s. 410(1) *C.T.A.* Once a Pesticide Management Code is enacted,

Ce nouveau libellé indique de façon encore plus explicite que la *Loi sur les pesticides* vise à coexister avec des règlements municipaux plus sévères du genre de celui qui est en cause en l'espèce. En fait, l'inclusion du mot « santé » dans le nouvel art. 102 reflète la disposition habilitant le règlement 270, soit le par. 410(1) *L.C.V.* Dès l'adoption

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municipalities will be able to draw on s. 102 in order to continue their independent regulation of pesticides. As Duplessis and Hétu, *supra*, explain at p. 111: [TRANSLATION] "the Quebec legislature has again recognized that municipalities have a role to play in pesticide control while at the same time indicating that it intends to make the municipal power subordinate to its own regulatory activity".

VI. Disposition

43 I have found that By-law 270 was validly enacted under s. 410(1) *C.T.A.* Moreover, the by-law does not render dual compliance with its dictates and either federal or provincial legislation impossible. For these reasons, I would dismiss the appeal with costs.

The reasons of Iacobucci, Major and LeBel JJ. were delivered by

LEBEL J. —

Introduction

44 I agree with Justice L'Heureux-Dubé that the impugned by-law on pesticide use adopted by the respondent, the Town of Hudson, is valid. It does not conflict with relevant federal and provincial legislation on the use and control of pesticides and is a valid exercise of municipal regulatory power under s. 410(1) of the *Cities and Towns Act*, R.S.Q., c. C-19 ("*C.T.A.*").

45 I view this case as an administrative and local government law issue. Although I agree with L'Heureux-Dubé J. on the disposition of the appeal, I wish to add some comments on some of the problems raised by the appellants. First, I will discuss the alleged operational conflict with the regulatory and legislative systems put in place by other levels of government. I will then turn to the difficulties created by the use of broad provisions like s. 410 and the application of the general prin-

du Code de gestion des pesticides, les municipalités pourront se fonder sur l'art. 102 pour continuer de réglementer les pesticides de façon indépendante. Comme Duplessis et Hétu, *op. cit.*, l'expliquent à la p. 111 : « le législateur québécois reconnaît une fois de plus que les municipalités ont un rôle à jouer en matière de contrôle des pesticides tout en voulant subordonner le pouvoir municipal à son activité réglementaire ».

VI. Dispositif

J'ai conclu que le règlement 270 a été valablement adopté en vertu du par. 410(1) *L.C.V.* De plus, le règlement ne rend pas impossible la conformité à ses prescriptions ainsi qu'à la législation fédérale et à la législation provinciale. Pour ces motifs, je rejetterais le pourvoi avec dépens.

Version française des motifs des juges Iacobucci, Major et LeBel rendus par

LE JUGE LEBEL —

Introduction

Je conviens avec le juge L'Heureux-Dubé que le règlement sur l'utilisation des pesticides contesté qui a été adopté par l'intimée la ville de Hudson est valide. Il n'entre pas en conflit avec la législation fédérale et la législation provinciale pertinentes sur l'utilisation et le contrôle des pesticides, et il constitue un exercice valide du pouvoir de réglementation que confère aux municipalités le par. 410(1) de la *Loi sur les cités et villes*, L.R.Q., ch. C-19 (« *L.C.V.* »).

Je considère la présente affaire comme une question de droit administratif et de droit municipal. Je suis d'accord avec le juge L'Heureux-Dubé quant à l'issue du pourvoi, mais je désire ajouter quelques observations au sujet de certains problèmes soulevés par les appelantes. J'aborde en premier lieu le présumé conflit d'application avec les régimes réglementaire et législatif mis en place par les autres ordres de gouvernement. Je traite ensuite des difficultés que créent l'application de

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ciples of administrative law governing delegated legislation.

The Operational Conflict

As its first line of attack against By-law 270 of the Town of Hudson, the appellants raise the issue of an operational conflict with the federal *Pest Control Products Act*, R.S.C. 1985, c. P-9, and the *Pest Control Products Regulations*, C.R.C. 1978, c. 1253. The appellants also assert that the by-law conflicts with the Quebec *Pesticides Act*, R.S.Q., c. P-9.3. As L'Heureux-Dubé J. points out, the applicable test to determine whether an operational conflict arises is set out in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at pp. 187 and 189. There must be an actual conflict, in the sense that compliance with one set of rules would require a breach of the other. This principle was recently reexamined and restated by Binnie J. in *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, at paras. 39-42. The basic test remains the impossibility of dual compliance. From this perspective, the alleged conflict with federal legislation simply does not exist. The federal Act and its regulations merely authorize the importation, manufacturing, sale and distribution of the products in Canada. They do not purport to state where, when and how pesticides could or should be used. They do not grant a blanket authority to pesticides' manufacturers or distributors to spread them on every spot of greenery within Canada. This matter is left to other legislative and regulatory schemes. Nor does a conflict exist with the provincial *Pesticides Act*, and I agree with L'Heureux-Dubé J.'s analysis on this particular point. The operational conflict argument thus fails.

The Administrative Law Issues

The most serious problems raised by the appeal involve pure administrative law issues. The appellants' arguments raise some basic issues of admin-

dispositions larges comme l'art. 410 et celle des principes généraux de droit administratif régissant la législation déléguée.

Le conflit d'application

46 Comme premier moyen de contestation du règlement 270 de la ville de Hudson, les appelantes soulèvent la question du conflit d'application avec la *Loi sur les produits antiparasitaires*, L.R.C. 1985, ch. P-9, et le *Règlement sur les produits antiparasitaires*, C.R.C. 1978, ch. 1253, adoptés au niveau fédéral. Les appelantes affirment également que le règlement va à l'encontre de la *Loi sur les pesticides* du Québec, L.R.Q., ch. P-9.3. Comme le souligne le juge L'Heureux-Dubé, le critère servant à déterminer s'il existe un conflit d'application est établi dans *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 187 et 189. Il faut qu'il y ait un conflit véritable, en ce sens que l'observation d'un ensemble de règles entraîne l'inobservation de l'autre. Le juge Binnie a récemment réexaminé et réaffirmé ce principe dans *M. & D. Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961, par. 39-42. Le critère fondamental demeure l'impossibilité de se conformer aux deux textes. Dans cette optique, le présumé conflit avec la législation fédérale n'existe tout simplement pas. La loi fédérale et son règlement d'application ne font qu'autoriser l'importation, la fabrication, la vente et la distribution des produits au Canada. Ils ne visent pas à prescrire où, quand et comment les pesticides peuvent ou doivent être utilisés. Ils ne confèrent pas aux fabricants et aux distributeurs de pesticides l'autorisation générale de les appliquer partout où il y a un bout de verdure au Canada. Cette question relève d'autres régimes législatifs et réglementaires. Il n'y a pas non plus conflit avec la *Loi sur les pesticides* de la province, et je souscris à l'analyse du juge L'Heureux-Dubé sur ce point particulier. L'argument reposant sur le conflit d'application n'est donc pas fondé.

Les questions de droit administratif

47 Les problèmes les plus graves mentionnés dans le pourvoi portent sur des questions de droit administratif pur. Dans leurs arguments, les appelantes

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istrative law as applied in the field of municipal governance.

48 The appellants assert that no provision of the *C.T.A.* authorizes By-law 270. If such legislative authority exists, the by-law is nevertheless void because of its discriminatory and prohibitory nature. A solution is to be found in the principles governing the interpretation and application of the laws governing cities and towns like the respondent in the Province of Quebec. Interesting as they may be, references to international sources have little relevance. They confirm the general importance placed in modern society and shared by most citizens of this country on the environment and the need to protect it. Nevertheless, no matter how laudable the purpose of the by-law may be, and although it may express the will of the members of the community to protect their local environment, the means to do it must be found somewhere in the law. The issues in this case remain strictly, first, whether the *C.T.A.* authorizes municipalities to regulate the use of pesticides within their territorial limits and, second, whether the particular regulation conforms with the general principles applicable to delegated legislation.

49 A tradition of strong local government has become an important part of the Canadian democratic experience. This level of government usually appears more attuned to the immediate needs and concerns of the citizens. Nevertheless, in the Canadian legal order, as stated on a number of occasions, municipalities remain creatures of provincial legislatures (see *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 2 S.C.R. 409, 2000 SCC 45, at paras. 33-34; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 470, 2001 SCC 15, at paras. 29 and 58-59). Municipalities exercise such powers as are granted to them by legislatures. This principle is illustrated by numerous decisions of our Court (see, for example, *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368; *R. v. Sharma*, [1993] 1 S.C.R. 650). They are not endowed with residuary general powers, which would allow them to exercise dor-

soulèvent des questions de droit administratif fondamentales appliquées au domaine de la gestion des affaires municipales.

Les appelantes affirment qu'aucune disposition de la *L.C.V.* n'autorise le règlement 270. Même si une telle autorisation législative existe, le règlement est nul en raison de son caractère discriminatoire et prohibitif. Une solution se trouve dans les principes régissant l'interprétation et l'application des lois visant les cités et les villes comme l'intimée au Québec. Si intéressants soient-ils, les renvois aux sources internationales ne sont guère pertinents. Ils confirment l'importance que la société moderne accorde généralement à l'environnement et à la nécessité de le protéger, position que partagent la plupart des citoyens de ce pays. Cependant, aussi louable que soit l'objet du règlement et même si celui-ci exprime la volonté des membres de la collectivité de protéger son environnement local, les moyens pour ce faire doivent être tirés de la loi. En l'espèce, les questions se résument à savoir, premièrement, si la *L.C.V.* autorise les municipalités à réglementer l'utilisation des pesticides sur leur territoire et, deuxièmement, si le règlement en cause respecte les principes généraux applicables à la législation déléguée.

La tradition d'établir des administrations publiques locales fortes est devenue une partie importante de l'expérience démocratique canadienne. Cet ordre d'administration publique paraît généralement mieux adapté aux besoins et préoccupations immédiats des citoyens. Toutefois, dans l'ordre juridique canadien, comme on l'a dit à plusieurs reprises, les municipalités demeurent des créatures du législateur provincial (voir *Public School Boards' Assn. of Alberta c. Alberta (Procureur général)*, [2000] 2 R.C.S. 409, 2000 CSC 45, par. 33-34; *Ontario English Catholic Teachers' Assn. c. Ontario (Procureur général)*, [2001] 1 R.C.S. 470, 2001 CSC 15, par. 29 et 58-59). Les municipalités exercent les pouvoirs que leur confèrent les législatures. Nombre de décisions de notre Cour illustrent ce principe (voir, par exemple, *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368; *R. c. Sharma*, [1993] 1 R.C.S. 650). Elles ne possèdent aucun pouvoir résiduaire

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mant provincial powers (see I. M. Rogers, *The Law of Canadian Municipal Corporations* (2nd ed. (loose-leaf)), Cum. Supp. to vol. 1, at pp. 358 and 364; J. Hétu, Y. Duplessis and D. Pakenham, *Droit Municipal: Principes généraux et contentieux* (1998), at p. 651). If a local government body exercises a power, a grant of authority must be found somewhere in the provincial laws. Although such a grant of power must be construed reasonably and generously (*Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13), it cannot receive such an interpretation unless it already exists. Interpretation may not supplement the absence of power.

général qui leur permettrait d'exercer des pouvoirs provinciaux non attribués (voir I. M. Rogers, *The Law of Canadian Municipal Corporations* (2e éd. (feuilles mobiles)), suppl. cum. du vol. 1, p. 358 et 364; J. Hétu, Y. Duplessis et D. Pakenham, *Droit Municipal: Principes généraux et contentieux* (1998), p. 651). Une administration publique locale ne peut exercer un pouvoir que s'il est conféré par une loi provinciale. Certes, ce pouvoir doit être interprété de façon raisonnable et libérale (*Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13), mais il ne peut recevoir cette interprétation que s'il existe. L'interprétation ne peut pas suppléer à l'absence de pouvoir.

The appellants argue that no power to regulate the use of pesticides was delegated to municipalities in Quebec, either under a specific grant of power or under the more general provisions of s. 410(1) *C.T.A.* The respondent concedes that the only provision under which its by-law can be upheld is the general clause of s. 410(1). It no longer asserts that it could be supported under s. 412(32) concerning toxic materials.

50 Les appelantes prétendent qu'aucun pouvoir de réglementation de l'utilisation des pesticides n'a été délégué aux municipalités du Québec, que ce soit par un pouvoir particulier ou en vertu des dispositions plus générales du par. 410(1) *L.C.V.* L'intimée admet que la seule disposition qui permette de confirmer la légalité de son règlement est la clause générale du par. 410(1). Elle n'affirme plus que son règlement pourrait s'appuyer sur le par. 412(32), qui porte sur les matières toxiques.

As the appellants interpret a general clause like s. 410 *C.T.A.*, it would amount to an empty shell. Any exercise of municipal regulatory authority would require a specific and express grant of power. The history of the *C.T.A.* confirms that the Quebec legislature has generally favoured a drafting technique of delegating regulatory or administrative powers to municipalities through a myriad of specific provisions, which are amended frequently. The reader is then faced with layers of complex and sometimes inconsistent legislation.

51 Si l'on acceptait l'interprétation par les appelantes d'une clause générale comme l'art. 410 *L.C.V.*, cette disposition équivaudrait à une coquille vide. L'exercice de tout pouvoir de réglementation municipal nécessiterait un pouvoir particulier et explicite. L'historique de la *L.C.V.* confirme que la législature du Québec privilégie généralement la technique de rédaction consistant à déléguer des pouvoirs de réglementation ou administratifs aux municipalités par d'innombrables dispositions particulières qui sont modifiées fréquemment. Le lecteur se retrouve donc avec une série de dispositions législatives complexes et parfois incohérentes.

In the case of a specific grant of power, its limits must be found in the provision itself. Non-included powers may not be supplemented through the use of the general residuary clauses often found in municipal laws (*R. v. Greenbaum*, [1993] 1 S.C.R. 674).

52 Dans le cas d'un pouvoir particulier, la disposition elle-même doit en préciser les limites. L'application des clauses générales relatives aux pouvoirs non attribués que comportent souvent les lois municipales ne peut pas suppléer aux pouvoirs non visés (*R. c. Greenbaum*, [1993] 1 R.C.S. 674).

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53 The case at bar raises a different issue: absent a specific grant of power, does a general welfare provision like s. 410(1) authorize By-law 270? A provision like s. 410(1) must be given some meaning. It reflects the reality that the legislature and its drafters cannot foresee every particular situation. It appears to be sound legislative and administrative policy, under such provisions, to grant local governments a residual authority to deal with the unforeseen or changing circumstances, and to address emerging or changing issues concerning the welfare of the local community living within their territory. Nevertheless, such a provision cannot be construed as an open and unlimited grant of provincial powers. It is not enough that a particular issue has become a pressing concern in the opinion of a local community. This concern must relate to problems that engage the community as a local entity, not a member of the broader polity. It must be closely related to the immediate interests of the community within the territorial limits defined by the legislature in a matter where local governments may usefully intervene. In *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, the Court emphasized the local ambit of such power. It does not allow local governments and communities to exercise powers in questions that lie outside the traditional area of municipal interests, even if municipal powers should be interpreted broadly and generously (see F. Hoehn, *Municipalities and Canadian Law: Defining the Authority of Local Governments* (1996), at pp. 17-24).

La question qui se pose en l'espèce est différente : en l'absence d'un pouvoir particulier, une disposition de bien-être général comme le par. 410(1) autorise-t-elle le règlement 270? Il faut donner un sens à une disposition comme le par. 410(1). Celui-ci correspond à la réalité que la législature et ses rédacteurs ne peuvent pas prévoir tous les cas particuliers. Il paraît donc logique, sur les plans législatif et administratif, de recourir à de telles dispositions pour conférer aux administrations publiques locales le pouvoir résiduaire d'intervenir en cas d'imprévu et de changements ainsi que de traiter des questions nouvelles ou évolutives relativement au bien-être de la collectivité locale vivant sur leur territoire. On ne peut toutefois pas interpréter une telle disposition comme conférant de façon absolue des pouvoirs provinciaux. Il ne suffit pas qu'une question particulière soit devenue une préoccupation urgente selon la collectivité locale. Cette préoccupation doit avoir trait à des problèmes touchant la collectivité comme entité locale et non pas comme membre de la société au sens large. Elle doit être étroitement liée aux intérêts immédiats de la collectivité se trouvant dans les limites territoriales définies par la législature pour ce qui concerne toute question pour laquelle l'intervention des administrations publiques locales peut se révéler utile. Dans *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231, notre Cour a souligné la portée locale d'un tel pouvoir. Elle ne permet pas aux administrations publiques locales et aux collectivités locales d'exercer des pouvoirs pour des questions ne relevant pas du domaine traditionnel des intérêts municipaux, même si les pouvoirs municipaux doivent être interprétés de façon large et libérale (voir F. Hoehn, *Municipalities and Canadian Law: Defining the Authority of Local Governments* (1996), p. 17-24).

54 In the present case, the subject matter of the by-law lies within the ambit of normal local government activities. It concerns the use and protection of the local environment within the community. The regulation targets problems of use of land and property, and addresses neighbourhood concerns that have always been within the realm of local government activity. Thus, the by-law was prop-

En l'espèce, l'objet du règlement relève des activités normales des administrations publiques locales. Il s'agit de l'utilisation et de la protection de l'environnement local de la collectivité. La réglementation vise les problèmes liés à l'utilisation des terres et des biens, et elle porte sur des préoccupations de quartier qui ont toujours relevé du domaine d'activité des administrations

erly authorized by s. 410(1). I must then turn briefly to the second part of the administrative law argument raised by the appellants, that the particular exercise of the existing municipal power breached principles of delegated legislation against prohibitory and discriminatory regulations.

publiques locales. Par conséquent, le règlement était autorisé en bonne et due forme par le par. 410(1). Je dois donc aborder brièvement la deuxième partie de l'argument de droit administratif soulevé par les appelantes, selon lequel l'exercice particulier du pouvoir municipal existant a contrevenu aux principes de législation déléguée interdisant la prise de règlements prohibitifs et discriminatoires.

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55 Two basic and longstanding principles of delegated legislation state that a by-law may not be prohibitory and may not discriminate unless the enabling legislation so authorizes. (See P. Garant, *Droit administratif* (4th ed. 1996), vol. 1, at pp. 407 *et seq.*; R. Dussault and L. Borgeat, *Administrative Law: A Treatise* (2nd ed. 1985), vol. 1, at pp. 435 *et seq.*; Hétu, Duplessis and Pakenham, *supra*, at pp. 677-82 and 691-96.) The drafting technique used in the present case creates an apparent problem. On its face, the by-law involves a general prohibition and then authorizes some specific uses. This obstacle may be overcome through global interpretation of the by-law. When it is read as a whole, its overall effect is to prohibit purely aesthetic use of pesticides while allowing other uses, mainly for business or agricultural purposes. It does not appear as a purely prohibitory legal instrument. As such, it conforms with this first basic principle of municipal law. There remains the problem of the discriminatory aspect of the by-law. Although the by-law discriminates, I agree with L'Heureux-Dubé J. that this kind of regulation implies a necessary component of discrimination. There can be no regulation on such a topic without some form of discrimination in the sense that the by-law must determine where, when and how a particular product may be used. The regulation needed to identify the various distinctions between different situations. Otherwise, no regulation would have been possible. An implied authority to discriminate was then unavoidably part of the delegated regulatory power.

Selon deux principes fondamentaux établis depuis longtemps en matière de législation déléguée, un règlement ne peut pas être prohibitif et discriminatoire à moins que la loi habilitante ne l'autorise. (Voir P. Garant, *Droit administratif* (4e éd. 1996), vol. 1, p. 407 et suiv.; R. Dussault et L. Borgeat, *Traité de droit administratif* (2e éd. 1984), t. I, p. 557 et suiv.; Hétu, Duplessis et Pakenham, *op. cit.*, p. 677-682 et 691-696.) La technique de rédaction employée en l'espèce crée un problème apparent. Le règlement établit de prime abord une prohibition générale pour ensuite permettre certaines utilisations particulières. L'interprétation globale du règlement permet de contourner cet obstacle. Lu dans son ensemble, le règlement a comme effet d'interdire l'utilisation des pesticides pour des raisons purement esthétiques tout en permettant d'autres utilisations, surtout pour des activités commerciales et agricoles. Il ne paraît pas constituer un texte juridique purement prohibitif. À ce titre, il respecte ce premier principe fondamental du droit municipal. Il reste le problème de l'aspect discriminatoire du règlement. Bien que le règlement soit discriminatoire, je conviens avec le juge L'Heureux-Dubé que ce genre de réglementation comporte nécessairement une composante de discrimination. Il ne peut y avoir aucune réglementation sur un tel sujet sans une certaine forme de discrimination, en ce sens que le règlement doit établir où, quand et comment un produit particulier peut être utilisé. La réglementation devait établir les diverses distinctions entre les différentes situations. Autrement, aucune réglementation n'aurait été possible. Le pouvoir de réglementation délégué comportait donc inévitablement le pouvoir implicite de faire de la discrimination.

56 For these reasons, the appeal is dismissed, with costs to the respondent the Town of Hudson.

Appeal dismissed with costs.

Solicitors for the appellants: Fraser Milner Casgrain, Montréal.

Solicitors for the respondent: Bélanger Sauvé, Montréal.

Solicitors for the interveners Federation of Canadian Municipalities, Nature-Action Québec Inc. and World Wildlife Fund Canada: Sierra Legal Defence Fund, Toronto.

Solicitors for the interveners Toronto Environmental Alliance, Sierra Club of Canada, Canadian Environmental Law Association, Parents' Environmental Network, Healthy Lawns — Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee and Dr. Merryl Hammond: Canadian Environmental Law Association, Toronto.

Solicitors for the intervener Fédération interdisciplinaire de l'horticulture ornementale du Québec: Ogilvy Renault, Québec.

Pour ces motifs, le pourvoi est rejeté avec dépens en faveur de l'intimée la ville de Hudson.

Pourvoi rejeté avec dépens.

Procureurs des appelantes : Fraser Milner Casgrain, Montréal.

Procureurs de l'intimée : Bélanger Sauvé, Montréal.

Procureurs des intervenants la Fédération canadienne des municipalités, Nature-Action Québec Inc. et le Fonds mondial pour la nature (Canada) : Sierra Legal Defence Fund, Toronto.

Procureurs des intervenants Toronto Environmental Alliance, Sierra Club du Canada, l'Association canadienne du droit de l'environnement, Parents' Environmental Network, Healthy Lawns — Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee et Dr Merryl Hammond : Association canadienne du droit de l'environnement, Toronto.

Procureurs de l'intervenante la Fédération interdisciplinaire de l'horticulture ornementale du Québec : Ogilvy Renault, Québec.

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SUPREME COURT OF NOVA SCOTIA

Citation: *Bancroft v. Nova Scotia (Lands and Forests)*, 2020 NSSC 175

Date: 20200529
Docket: HFX 484556
Registry: Halifax

2020 NSSC 175 (CanLII)

Between:

Robert Bancroft, Federation of Nova Scotia Naturalists, Blomidon Naturalists Society and The Halifax Field Naturalists

Applicants

v.

Nova Scotia Minister of Lands and Forestry and The Attorney General of Nova Scotia Representing Her Majesty the Queen in Right of the Province of Nova Scotia

Respondents

v.

East Coast Environmental Law Association (2007)

Intervenor

Judge:	The Honourable Justice Christa M. Brothers
Heard:	September 23 and October 1, 2019, in Halifax, Nova Scotia
Additional Submissions:	February 14, 2020
Final Decision:	May 29, 2020
Counsel:	Jamie Simpson, for the Applicants Jeremy Smith, for the Defendants James Gunvaldsen Klaassen and Sarah McDonald, for the Intervenor

> UNLESS someone like you cares a whole awful lot, nothing is going to get better. It's not.
>
> [Dr. Seuss – The Lorax, 1971]

2020 NSSC 175 (CanLII)

Introduction

[1] When government is entrusted, through legislation, with duties and responsibilities, but fails to discharge them, there must be recourse. This is such a case. The Notice of Judicial Review alleges a suite of failures by government, specifically, long-term, systemic failures to fulfill legal obligations under the *Endangered Species Act*, SNS 1998, c 11 (the *ESA*). Then, after this Judicial Review was commenced, the government undertook a flurry of activity in an inadequate and transparent attempt to correct its failures *ex post facto*. While the court cannot interfere if government conduct is reasonable, if it is not, this court must and will require government to fulfill its legislative duties.

Background

[2] This is an application for judicial review of Ministerial decisions under the *ESA*. The Applicants are Robert Bancroft, a wildlife biologist; the Federation of Nova Scotia Naturalists; the Blomidon Naturalists Society; and the Halifax Field Naturalists. The Intervenor, the East Coast Environmental Law Association (2007), is a registered charity concerned with the development and implementation of environmental laws in Atlantic Canada.

[3] The Minister of Lands and Forestry (the Minister) is responsible for implementing the *ESA*. The Applicants say the Minister has failed to implement the *ESA* as it pertains to six representative species: Mainland Moose, Ram's-head Lady Slipper, Canada Warbler, Black Ash, Wood Turtle, and Eastern Wood Pewee. Each of these species is native to Nova Scotia and is listed as endangered, threatened, or vulnerable under the *ESA*. The Applicants seek a declaration that the Minister's failure to implement the *ESA*, specifically section 15, is unlawful and unreasonable; an order of *mandamus*; and a supervisory order by which the court would retain jurisdiction and require the Minister to produce status reports on the implementation of section 15.

[4] As I will explain in these reasons, I have concluded that the Minister has failed to meet certain statutory duties under the ESA, and that remedies are required to correct this situation.

The Nova Scotia *Endangered Species Act*

[5] The *ESA* codifies aspects of the *National Accord for the Protection of Species at Risk*, which Nova Scotia endorsed in 1996. Under the Accord, the provincial and federal governments agreed to share responsibility for the protection of wildlife in Canada, particularly species at risk of extinction or extirpation. The purpose of the *ESA* is set forth at section 2:

> 2 (1) The purpose of this Act is to provide for the protection, designation, recovery and other relevant aspects of conservation of species at risk in the Province, including habitat protection, while recognizing the following:
>
> (a) the goal of preventing any species in the Province from becoming extirpated or extinct as a consequence of human activities;
>
> (b) the conservation of species at risk is a key component of a broader strategy to maintain biodiversity and to use biological resources in a sustainable manner;
>
> (c) the commitment of Government to a national co-operative approach for the conservation of species at risk, as agreed to in the National Accord for the Protection of Species at Risk;
>
> (d) all Nova Scotians share responsibility for the conservation of species at risk and governments have a leadership role to play in this regard;
>
> (e) Nova Scotians be provided with the opportunity for meaningful participation in relation to conservation of species at risk;
>
> (f) the aboriginal peoples of the Province have an important role in conserving species at risk;
>
> (g) the importance of promoting the purposes of this Act primarily through non-regulatory means such as co-operation, stewardship, education and partnerships instead of punitive measures, including such preventative actions as education, incentives, sustainable management practices and integrated resource management; and
>
> (h) the precautionary principle that a lack of full scientific certainty must not be used as a reason for postponing measures to avoid or minimize the threat of a species at risk in the Province.

[6] Section 3 of the *ESA* defines three categories of species listing under the *ESA* relevant to this application: endangered, threatened, and vulnerable species:

> (d) "endangered species" means a species that faces imminent extinction or extirpation and is listed as an endangered species pursuant to Section 12;
>
> ...

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> (r) "threatened species" means a species that is likely to become endangered if the factors affecting its vulnerability are not reversed and is listed as a threatened species pursuant to Section 12;
>
> (s) "vulnerable species" means a species of special concern due to characteristics that make it particularly sensitive to human activities or natural events and that is listed as a vulnerable species pursuant to Section 12.

[7] The *ESA* creates a Species-at-risk Working Group of six "recognized scientific experts in the status and population biology of plants, animals, other organisms and their habitats or in the conservation biology, ecology and geography of plants, animals and other organisms", appointed by the Minister (s. 9(4)). The Working Group advises the Minister on Species at Risk, as described at s. 10:

> Functions of Group
>
> 10 (1) The Group shall
>
> (a) provide the Minister with a categorized list of the species at risk in the Province, which list shall include those species native to the Province that are listed nationally as species at risk;
>
> (b) advise the Minister annually of any addition or deletion of a species to or from the list referred to in clause (a) or of any changes in the status of a listed species;
>
> (c) provide the Minister with a written summary of the rationale for listing, adding, deleting or changing the status of a species;
>
> (d) make recommendations to the Minister regarding the content and implementation of recovery plans; and
>
> (e) provide advice respecting the conservation and management of species at risk, and their habitats, in the Province.
>
> (2) The Group shall base its decisions to list species pursuant to clause (1)(a) and to add or delete species or to change the status of a listed species pursuant to clause (1)(b) upon scientific information and traditional knowledge as documented in peer reviewed status reports.

[8] The Minister has the power to list an "endangered or threatened species where, in the opinion of the Minister, there is threat to the survival of the species" (s. 11(1)), notwithstanding s. 10. In either case, the species listed are deemed to be at risk, pursuant to s. 12(1):

> 12 (1) Where the Group provides the Minister with a categorized list of species at risk in the Province, with any additions to or deletions from the list or with any changes in the status of a listed species or where the Minister lists endangered or

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> threatened species pursuant to Section 11, the species listed from time to time are deemed to be the listed species at risk for the purpose of this Act.

[9] When this Judicial Review was commenced, more than 60 species were listed as endangered, threatened, or vulnerable. Of the species with which this application is specifically concerned, the Canada Warbler, Mainland Moose, and Ram's-head Lady Slipper are listed as endangered; the Black Ash and Wood Turtle as threatened; and the Eastern Wood Pewee as vulnerable.

[10] Where a species is listed as endangered or threatened, the Minister is required, pursuant to s. 15 of the *ESA*, to appoint a recovery team and prepare a recovery plan. Section 15 addresses the Minister's duties where a species has been listed as endangered or threatened under section 12:

> 15 (1) The Minister shall
>
> (a) within one year of the listing of an endangered species; and
>
> (b) within two years of the listing of a threatened species,
>
> appoint a recovery team and prepare a recovery plan for the species.
>
> (2) The Minister may appoint to a recovery team any person whom the Minister considers to be interested in the recovery of the particular species for which the recovery team is appointed and the team shall include an appropriate diversity of expertise.
>
> (3) The recovery team shall assist the Minister in developing and implementing the recovery plan.

[11] A recovery plan is "a statement of needs and actions to be undertaken for the recovery of an endangered or threatened species" (s. 3(n)). The content and objectives of a recovery plan – and the Minister's duties in that respect – are set out at ss. 15(4)-(9):

> 15 ... (4) A recovery plan prepared pursuant to subsection (1) shall
>
> (a) identify the needs of and threats to an endangered or threatened species;
>
> (b) identify the viable status needed for recovery;
>
> (c) identify options for the recovery of the endangered or threatened species;

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> (d) identify the costs and benefits of the options referred to in clause (c);
>
> (e) recommend a course of action or a combination of actions for the recovery of an endangered or threatened species;
>
> (f) recommend a schedule for implementation of the recovery plan including a prioritized listing of recommended actions;
>
> (g) identify habitat of the endangered or threatened species; and
>
> (h) identify areas to be considered for designation as core habitat.
>
> (5) A recovery plan may include provisions respecting one or more endangered or threatened species and may, where the Minister considers it appropriate, include ecosystem management in the recovery plan.
>
> (6) The Minister may determine the feasibility of implementing any recovery plan or any portion of a recovery plan.
>
> (7) With the advice of the Group, the Minister may, in determining the feasibility of implementing a recovery plan or any portion of a recovery plan, take the following factors into consideration:
>
> (a) whether scientific evidence indicates that the species referred to in the recovery plan is naturally becoming extinct;
>
> (b) biological, technical and economic factors affecting the recovery of the species; and
>
> (c) the status of the species elsewhere.
>
> (8) The Minister may, to the extent possible, prepare a recovery plan in co-operation with other jurisdictions where the endangered or threatened species is also found.
>
> (9) Where a recovery plan is in existence before the coming into force of this Act or where a recovery plan has been prepared in another jurisdiction for the endangered or threatened species, the Minister may adopt that recovery plan in lieu of the requirements of subsection (1).

[12] In summary, the Minister is required to appoint a recovery team for a species listed as endangered (within one year) or threatened (within two years). Within the applicable timeframe, the Minister and the recovery team shall also prepare a recovery plan. Where another jurisdiction has prepared a recovery plan, the Minister may decide to adopt it. No consequences are specified for failing to

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appoint a recovery team or produce a recovery plan within the specified timeframes.

[13] Certain provisions of the *ESA* give the Minister discretion, notably s. 15(6), which provides that the Minister "may determine the feasibility of implementing any recovery plan or any portion of a recovery plan." Specific factors that the Minister must consider when determining feasibility include scientific evidence, technical or economic factors, and the status of the species elsewhere (s. 15(7)). The Minister is not obliged to implement a plan that, in his or her opinion, is not feasible.

[14] Section 15 also contemplates the preparation of a management plan for a vulnerable species, defined at s. 3(j) as "a statement of needs and actions to be undertaken to keep a vulnerable species from becoming at increased risk..." Subsection 15(10) states that the Minister "may appoint a management team and shall, within three years of the listing of a vulnerable species, prepare a management plan for the species."

[15] Pursuant to s. 15(10), then, the Minister may appoint a management team for a vulnerable species, and shall, within three years of the listing, prepare a management plan. By contrast, for endangered and threatened species, the Minister shall appoint a recovery team within the relevant timeframe (s. 15(1)).

[16] Finally, ss. 15(11) and (12) address the ongoing review of recovery plans and management plans, and the scope of the Minister's implementation duties:

> (11) Recovery plans and management plans shall be reviewed every five years to determine the progress of the recovery of the species and whether any changes or modifications are required.
>
> (12) The Minister shall ensure the implementation of the portions of the recovery or management plan which are provincial responsibilities and which, in the Minister's discretion, are considered feasible.

Issues

[17] The Applicants raise several issues, summarized as follows:

> (1) Whether the Minister's failure to appoint a recovery team for Canada Warbler, or to appoint a recovery team and prepare a recovery plan within the required timeframe for the Ram's-head Lady Slipper, was reasonable (s. 15(1));

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(2) Whether the Minister's interpretation of "core habitat" in the recovery plans for Black Ash and Mainland Moose was reasonable (s. 15(4)(h));

(3) Whether the Mainland Moose "review" published by the Minister was a reasonable under s. 15(11); and

(4) Whether the Minister's "adoption" of federal recovery plans for the Eastern Wood Pewee and the Wood Turtle was reasonable under s. 15(9).

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Standard of review

[18] Before embarking on the substantive issues, I must determine the applicable standard (or standards) of review. The parties did not agree on the standard of review, and were given the opportunity to provide post-hearing submissions in view of the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, which they did.

[19] I conclude that the applicable standard of review for the Ministerial decisions in this case is reasonableness. The majority in *Vavilov* held that there is "a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions" (para. 16). The presumption may be rebutted in two circumstances: first, where the legislature indicates that "a different standard or set of standards to apply" or where a statutory appeal is provided, and second, where "the rule of law requires that the standard of correctness be applied." This will be the case for "constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies" (para. 17).

[20] The Applicants argue that the interpretation of *ESA* terms such as "shall" and "adopt" as applied to ministerial duties is a question of central importance to the legal system, so that the standard is correctness. This mischaracterizes the reach of this proceeding. Nothing before the court suggests that the outcome as it relates to these two terms in the context of the *ESA* will have implications for constitutional or general law beyond the relevant legislation.

[21] The Applicants have not rebutted the presumption of reasonableness. Therefore, the standard of review is reasonableness for all issues.

[22] The majority in *Vavilov* stated that review for reasonableness "aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that

exercises of state power are subject to the rule of law" (para. 82). The majority continued:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem... Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[23] That is not to say administrative decision makers are immune from review. The court must determine whether the decision is internally coherent and has a rational chain of analysis that is justified in relation to the facts and law:

> [86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process... In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes"... Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"... In short, it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
>
> ....
>
> [102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error"... However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived"... Reasons that "simply repeat statutory

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> language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment... [Emphasis in original; some citations omitted.]

[24] The majority in *Vavilov* noted that not only must the decision display logical reasoning, but it "must be justified in relation to the constellation of law and facts that are relevant to the decision" (para 105). Adhering to the relevant factual and legal constraints is a hallmark of a reasonable decision. Such constraints include

> the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached. [para. 106]

[25] Given that decision makers' powers derive from statute, "the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision" (para 108). When a decision maker interprets their own statute, they must remain within the scope authorized by the act:

> [110] Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

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[26] The majority in *Vavilov* commented on the complications of applying a reasonableness standard to statutory interpretation. Courts are accustomed to dealing with statutory interpretation "at first instance or on appeal ... where they are expected to perform their own independent analysis and come to their own conclusions" (para. 114). Judicial review for reasonableness is different:

> [116] ... Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been"... Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.
>
> [117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament":... Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations...
>
> [118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context... Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.
>
> ....
>
> [120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise... Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

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> [121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome. [Emphasis added. Citations omitted.]

[27] Though *Vavilov* provides some clarity for cases where the decision maker has interpreted a statutory provision, this is a balancing act. The reviewing court must avoid conducting a *de novo* statutory interpretation analysis and holding the decision maker to that standard. On the other hand, the court must be wary of a reverse-engineered analysis in favour of a desired outcome. The majority acknowledged that in some cases there will only be one reasonable construction:

> [124] Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52., in which Laskin J.A., after analyzing the reasoning of the administrative decision maker..., held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision... As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker. [Emphasis added.]

[28] In most cases, the starting position for a reasonableness review is the decision-maker's reasons, although reasons are not always required, depending on the level of procedural fairness owed (*Vavilov* at para. 77). In this case, reasons were not provided, but the Applicants do not allege a lack of procedural fairness. The majority in *Vavilov* noted the difficulty arising from absence of reasons:

> [137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote... However, even in such circumstances, the reasoning process

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> that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision... For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw"... In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan... Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.
>
> [138] There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape. [Emphasis added]

[29] Therefore, even where there are no reasons, the decision must display a coherent basis that considers the relevant factual and legal constraints. Instead of reasons, the reviewing court will focus on the record and the outcome. A lack of reasons does not enable the reviewing court to speculate and invent reasons that cannot be supported. With all of this in mind, I will review the Minister's acts and omissions on the basis of the standard of reasonableness.

(1) Whether the Minister's failure to appoint a recovery team for Canada Warbler, or to appoint a recovery team and prepare a recovery plan within the required timeframe for the Ram's-head Lady Slipper, was reasonable (s. 15(1)).

[30] Section 15 of the *ESA* sets out the duties of the Minister when a species is listed as endangered or threatened. The Minister shall "appoint a recovery team and prepare a recovery plan" for an endangered species within one year (s. 15(1)(a)) and for a threatened species within two years (s. 15(1)(b)). A recovery plan states the "needs and actions to be undertaken for the recovery of an endangered or threatened species" (s. 3(n)), and its required contents are set out at s. 15(4). Section 15 also sets forth the Minister's powers and duties in determining the feasibility of implementing a recovery plan or a part thereof, and indicates implementation to the extent that they are feasible (ss. 15(6)-(7), (12)). The Minister is authorized to prepare a recovery plan in co-operation with another

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jurisdiction “to the extent possible” (s. 15(8), and to adopt an existing plan from another jurisdiction (s. 15(9)). There are Ministerial duties for ongoing review of recovery plans and management plans (ss. 15(11)). Certain provisions of the *ESA* give the Minister discretion, such as s. 15(6), providing that the Minister “may determine the feasibility of implementing any recovery plan or any portion of a recovery plan”. For endangered and threatened species, however, the Minister shall appoint a recovery team and prepare a recovery plan, within the required timelines.

[31] The Respondents say the federal *Species At Risk Act,* SC 2002, c. 29 (the *SARA*) affects *ESA* duties, since the *ESA* contemplates work in conjunction with other jurisdictions, creating efficiencies and assisting with interjurisdictional approaches to species at risk, as suggested by s. 2(c). This inter-governmental approach was discussed in *Centre québécois du droit de l'environnement c. Canada (Ministre de l'Environnement)*, 2015 FC 773:

> 10 Parliament and the provincial or territorial legislatures are gambling that the governments and people concerned will step up before the decline of a species in Canada becomes irreversible, which is why it is important that the departments and ministries concerned adopt recovery strategies and action plans as soon as possible. … [Emphasis added]

[32] The purpose of the co-operative approach is to ensure the speedy recovery of Canadian species, which do not respect borders. The habitats that the species rely on also do not respect borders.

[33] Not all equivalent legislation contains the firm timelines found in the *ESA*. Some statutes have no timeline provisions, or use more permissive language (i.e. “may”). The Newfoundland and Labrador *Endangered Species Act*, S.N. 2001, c E-10.1 is similar to the *ESA*, in that it says the Minister “shall” release a recovery plan within two years of a species being designated as threatened or endangered (s. 14(2)). Unlike the *ESA*, however, it qualifies the Minister’s duty to ensure that a plan is published within the timeline:

> 14(3) If the minister cannot release the recovery plan within the time specified in subsection (2), he or she may delay the release of the recovery plan for up to 6 months in the case of an endangered species and one year in the case of a threatened species and shall notify the public of the reason for the delay.

[34] There is no such exception in the *ESA*. Notably, the Newfoundland exception only grants the Minister six months for endangered species, not an indefinite period. The Ontario *Endangered Species Act, 2007*, S.O. 2007, c 6, allows the Minister to delay publishing a strategy indefinitely, but the Minister

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must, within the time limit, publish an estimate of when the strategy will be prepared, along with the reasons for the delay (s. 11(5)). The Nova Scotia *ESA* contains no equivalent provision.

[35] The issue is whether the Minister's failure to appoint a recovery team within the required timeframe for Canada Warbler, or to appoint a recovery team and prepare a recovery plan within the required timeframe for the Ram's-head Lady Slipper, was reasonable under s. 15(1)(a) of the *ESA*.

[36] The Canada Warbler, a bird, was listed as endangered in 2013. The Minister had one year to appoint a recovery team pursuant to section 15(1)(a). No recovery team was appointed until March 2019, shortly after the Applicants filed this judicial review in January 2019. This appointment was some five years after the timeframe contemplated by the *ESA*. The Respondents say the Minister adopted a federal Recovery Action Plan for the Canada Warbler in 2016.

[37] The Ram's-head Lady Slipper, a flower, was listed as endangered in 2007. As with the Canada Warbler, the Minister had one year to appoint a recovery team and publish a recovery plan. The Minister neither appointed a recovery team nor prepared a plan in 2008. According to the Record, a draft recovery plan was created in 2009. There is nothing in either the Record or submissions to explain why this plan was never finalized.

[38] The Minister appointed a "Plants Recovery Team" in May 2019, whose mandate includes several species of flora, including the Lady Slipper. This appointment is more than 11 years outside the *ESA* timelines. Still, no recovery plan has been prepared for the Ram's-head Lady Slipper. The Respondents say a recovery plan is pending from the recovery team. What of the 11 years that elapsed between the designation of the species and the appointment of the team?

[39] The legislature used the word "shall" in s. 15(1) of the *ESA* to impose the relevant timelines on the Minister. Subsection 9(3) of the *Interpretation Act*, R.S.N.S. 1989, c 235, states that, "[i]n an enactment, "shall" is imperative and "may" is permissive." It is clear that s. 15(1) does not grant discretion to the Minister as to whether or not to comply with his or her obligations. The Federal Court said in *David Suzuki Foundation v. Canada (Fisheries and Oceans)*, 2010 FC 1233, varied on other grounds, 2012 FCA 40, referring to the federal SARA, that "critical habitat protection under SARA must be mandatory and not discretionary. Parliament did not intend to allow ministers to "choose" whether to

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protect critical habitat" (para. 299). The same can be said about the Legislature's intentions in the *ESA*.

[40] The Respondents argue, however, that "shall" can be either "mandatory" or "directory". If the provision was mandatory, the Minister would lose jurisdiction upon failure to comply. The Minister's apparent interpretation is that "imperative" in the *Interpretation Act* may also be mandatory or directory. *British Columbia (Attorney General) v Canada (Attorney General)*, [1994] 2 S.C.R. 41, sheds some light on this distinction. In that case, Iacobucci J., for the majority, cited (at 122-124) *Reference re Manitoba Language Rights,* [1985] 1 S.C.R. 721, where the court stated that the "doctrinal basis of the mandatory/directory distinction is difficult to ascertain" but appeared to lie in "serious general inconvenience or injustice", as described in *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.). Justice Iacobucci concluded:

> In other words, courts tend to ask, simply: would it be seriously inconvenient to regard the performance of some statutory direction as an imperative?
>
> There can be no doubt about the character of the present inquiry. The "mandatory" and "directory" labels themselves offer no magical assistance as one defines the nature of a statutory direction. Rather, the inquiry itself is blatantly result-oriented..
>
> Thus, the manipulation of mandate and direction is, for the most part, the manipulation of an end and not a means. In this sense, to quote again from *Reference re Manitoba Language Rights*, *supra*, the principle is "vague and expedient" (p. 742). This means that the court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is informed by the usual process of statutory interpretation. But the process perhaps evokes a special concern for "inconvenient" effects, both public and private, which will emanate from the interpretive result. [Emphasis added]

[41] In *Waterman v. Waterman*, 2014 NSCA 110, the majority of the Nova Scotia Court of Appeal considered the mandatory/directory distinction, emphasizing the importance of a contextual view as required by the modern principle of statutory interpretation (paras. 28-34). Speaking for the majority, Beveridge J.A. quoted the Supreme Court of Canada decision in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, where the majority confirmed that "the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory" (para. 42, cited in *Waterman* at para. 34).

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[42] The distinction between "mandatory" and "directory" has the following implication in this context: if, for example, including "core habitat" in a recovery plan is mandatory, and the Minister publishes a recovery plan that does not set out any core habitat, then arguably the rest of the recovery plan for that species is *ultra vires* and therefore invalid. If the provision is directory, the Minister does not lose jurisdiction and the rest of the plan may stand. The analysis is outcome-oriented because the main distinction between mandatory and directory is whether the result is "inconvenient." I infer that the Minister, through assessment of the statutory framework and relevant case law, concluded that adhering to the *ESA* timelines was directory, not mandatory. The parties agree that the Minister does not lose jurisdiction. But this does not end the analysis on this issue.

[43] In *Western Canada Wilderness Committee v Minister of Fisheries and Oceans and Minister of the Environment*, 2014 FC 148, it was unnecessary to decide whether "shall" was directory or mandatory, as the parties agreed that the ministers did not lose jurisdiction with expiry of the *SARA* time periods, and could continue developing recovery strategies after their expiry. The court held that neither outcome rendered the timelines optional:

> 100 Given the parties' agreement on this point, I do not need to decide whether the timelines contained in sections 42 and 132 of *SARA* are mandatory or directory. However, the fact that the timelines may be directory rather than "mandatory" (in the legal sense) does not mean that they are optional, or that the responsible Ministers do not have to comply with them. Indeed, counsel for the Ministers acknowledged that the Ministers are indeed required to comply with the statute in this regard.
>
> 101 To state the obvious, the *Species at Risk Act* was enacted because some wildlife species in Canada *are at risk*. As the applicants note, many are in a race against the clock as increased pressure is put on their critical habitat, and their ultimate survival may be at stake.
>
> 102 The timelines contained in the Act reflect the clearly articulated will of Parliament that recovery strategies be developed for species at risk in a timely fashion, recognizing that there is indeed urgency in these matters. Compliance with the statutory timelines is critical to the proper implementation of the Parliamentary scheme for the protection of species at risk. [underlining added; italics in original]

[44] While not necessary to decide given the parties' acknowledgement, I conclude that "shall" in the *ESA* is directory. This does not mean the Minister has discretion not to comply. The Respondents concede that the legislature's use of

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"shall" leaves no such discretion. Counsel agreed that it was imperative for the Minister to meet the deadlines, that the Minister failed to meet them, that this failure was unlawful, and that if it was found to be unreasonable, a declaration should result. The parties agree, and I conclude, that the Minister does not lose jurisdiction over the protection of species by failing to comply with this imperative obligation. It was clearly not the legislature's intention (as manifested, for instance, in the purpose provisions of the *ESA* as considered through the modern principle of statutory interpretation) that the Minister would lose jurisdiction under the *ESA* by failing to meet timelines. I note here as well that the above interpretation of "shall" will apply throughout the discussion of the ESA in this decision.

[45] The Minister's interpretation of "shall" as directory is reasonable. However, it does not follow that the failure to meet directory timelines without explanation – such as lack of resources – is reasonable. Counsel for the Respondents cited several somewhat vague suggestions of limited departmental resources in the Record as justification for the delay. Counsel was unable to point to anything in the Record that could specifically relate the failure to comply with the timelines in respect of any of the named species to resource issues. Unlike in *Western Canada Wilderness Committee*, the Minister did not provide affidavits from departmental staff offering evidence of limited resources. Furthermore, this submission is contrary to the agreed facts. The Ram's-head Lady Slipper waited 11 years for a recovery team until resources were suddenly made available shortly after this judicial review was filed.

[46] The Minister and the Department must uphold the law, all the more so when their duties are as plain as they are in this case. If they conduct themselves unlawfully without good reason, the court must hold them to account. As the Supreme Court of Canada said in *Inuit Tapirisat of Canada v Canada (Attorney General)*, [1980] 2 SCR 735, at 752:

> … in my view the essence of the principle of law here operating is simply that in the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the superior court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorized by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respond to a duty assigned to it by statute.

[47] There is nothing in either the Record or submissions to explain the failure to meet the Minister's statutory duty on this issue. Without an explanation, the court

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is left with nothing. I cannot speculate and consequently, I conclude that this failure to take action under the statute was unreasonable.

(2) Whether the Minister's interpretation of "core habitat" in the recovery plans for Black Ash and Mainland Moose was reasonable (s. 15(4)(h)).

[48] Section 15(4)(h) of the *ESA* states that a recovery plan pursuant to s. 15(1) shall "identify areas to be considered for designation as core habitat". The term "core habitat" is defined at s. 3(b) to mean "specific areas of habitat essential for the long-term survival and recovery of endangered or threatened species and that are designated as core habitat pursuant to Section 16 or identified in an order made pursuant to Section 18".

[49] From a plain reading of the above sections, it is apparent that the Minister must ensure that recovery plans identify areas that may later be considered for designation as core habitat. The core habitat for a species is the specific area essential for its survival that has been designated under the *ESA*. Subsection 16(2) allows the Minister to designate "specific physical areas or landforms of the Province as core habitat" and to enter into agreements with landowners over these areas. Subsection 16(3) adds that core habitat "shall not include the entire geographical range that can be occupied by the threatened or endangered species unless inclusion is considered essential for the survival of the species." Section 18 allows the Minister to designate core habitat where the species is only provisionally listed as endangered or threatened. Sections 16 and 18 are discretionary. According to the Applicants' oral submissions, no land, public or private, has ever been designated as "core habitat" for any species in Nova Scotia.

[50] Due to the cooperative nature of the national statutory regime for endangered species, cases interpreting the federal *SARA* will be of guidance in reviewing the Minister's decision. The *SARA* defines "critical habitat" as "the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species" (s. 2(1)). Both statutes require the minister to ensure that core or critical habitat is identified in recovery plans or strategies. The *SARA* goes further in addressing how critical habitat is identified:

> 41 (1) If the competent minister determines that the recovery of the listed wildlife species is feasible, the recovery strategy must address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and must include

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…

> (c) an identification of the species' critical habitat, to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction;
>
> (c.1) a schedule of studies to identify critical habitat, where available information is inadequate...

[51] The federal Minister has no discretion not to include critical habitat despite a lack of adequate information. "Critical habitat" was discussed in *Centre québécois du droit de l'environnement*, *supra*:

> [10] Parliament and the provincial or territorial legislatures are gambling that the governments and people concerned will step up before the decline of a species in Canada becomes irreversible, which is why it is important that the departments and ministries concerned adopt recovery strategies and action plans as soon as possible. That being said, before going any further, it is important not to confuse the residence of an individual with the critical habitat of a species. Under the federal Act, the concept of "residence" refers to "a dwelling‑place, such as a den, nest or other similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of their life cycles, including breeding, rearing, staging, wintering, feeding or hibernating"... By contrast, the concept of "critical habitat" is much broader: it refers to "the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan"... [Emphasis in original.]

[52] While the federal Act is relevant to our analysis, the two regimes have substantive differences. Under *SARA*, the federal minister has several positive duties once a recovery strategy or action plan that identifies critical habitat is published. The minister has 180 days to ensure that critical habitat areas on Crown lands receive federal protection (s. 58(5)). If any portion of the critical habitat remains unprotected after 180 days, the minister must publish a report every 180 days on the steps taken to protect the species (s. 63). The purpose of this is to ensure all critical habitat is protected in some way (s. 57).

[53] Unlike the *SARA*, there are no direct consequences to identifying some areas of core habitat in a recovery plan under the *ESA*. Doing so does not further compel the Minister to act in any way. The Minister retains discretion to designate specific physical areas as core habitat in s. 16. In Nova Scotia, the areas to be identified in a recovery plan are not yet designated as core habitat.

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[54] The purpose section of the *ESA* recognizes “the precautionary principle that a lack of full scientific certainty must not be used as a reason for postponing measures to avoid or minimize the threat of a species at risk in the Province” (s. 2(h)). The Intervenors submit that the “precautionary principle” is a “fundamental and widely recognized principle of Canadian environmental law.” They cite *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, where L’Heureux-Dubé J. said, for the majority (citations omitted):

> 32 Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment"... As a result, there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law"...

[55] In *Wilderness Committee, supra*, the court held that waiting for consensus among stakeholders and improved scientific data is not an excuse to avoid provisions of the *SARA*:

> 71 Insofar as the scientific basis for the proposed recovery strategies is concerned, I agree with the applicants that "the perfect should not become the enemy of the good" in these cases. Section 38 of *SARA* (which incorporates the "precautionary principle" into the Act) is very clear: the preparation of a recovery strategy for a species at risk "should not be postponed for a lack of full scientific certainty".
>
> 72 The precautionary principle was discussed by the Supreme Court of Canada in *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)*, 2001 SCC 40, [2001] 2 S.C.R. 241 (S.C.C.). Citing the Bergen Ministerial Declaration on Sustainable Development (1990), the Court noted that "[e]nvironmental measures must anticipate, prevent and attack the causes of environmental degradation". As a result, "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation": at para. 31
>
> 73 Indeed, as Justice Russell observed in his decision in the *Orca* case, "[e]ndangered species do not have time to wait for [the competent minister] to 'get it right'": at para. 66. [Emphasis added]

[56] The precautionary principle is a legislative tool that prevents governments from pointing to imperfect data as an excuse for failing to implement a statutory duty. Protecting habitat is a key component of the legislation, which has as its aim the protection and management of vulnerable species in Nova Scotia. The Minister

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must ensure that recovery plans identify areas that may later be designated as core habitat. A lack of full scientific certainty may not be used as an excuse for failing to meet the *ESA*'s purposes.

[57] The Applicants say the Minister breached the statute by failing to ensure that "core habitat" is clearly delineated in the recovery plans for Black Ash and Mainland Moose. While the recovery plan for Black Ash "provides a partial definition" of core habitat, they say, it "does not identify areas to be considered for designation as core habitat for the species." As for the Mainland Moose, the recovery plans do not set out any core habitat, which the Minister concedes. The Applicants argue that because section 15 uses the word "shall", the inclusion of core habitat in a recovery plan is imperative, and the Minister had no discretion to omit core habitat from the recovery plans. They rely on the precautionary principle for the proposition that a lack of scientific certainty may not be used to avoid the duty of including core habitat in a recovery plan.

Black Ash

[58] In 2013, the Black Ash tree was designated as threatened under the *ESA*. In 2015, the Minister published a recovery plan and action plan for Black Ash. In its discussion of core habitat, the plan does not refer to any specific area, location, or landform, but explains over several paragraphs why identifying specific areas of core habitat is not feasible. The main issue raised is a lack of data. The report states that "[t]hese factors, plus a lack of clear understanding as to what is necessary to recover the species suggest that there is currently insufficient information to provide a complete definition of core habitat, although a more complete definition may be possible in the future."

[59] The Respondents say the 2015 recovery plan for Black Ash satisfies the requirements of the *ESA*, but say that identifying specific areas in Nova Scotia as core habitat for the Black Ash is not feasible. They concede that "shall" is imperative and not discretionary. However, they argue that the Applicants' interpretation of the Minister's duty under these provisions would "mandate action where there is no scientific basis for the action."

[60] The Respondents say a lack of full scientific certainty "does not encapsulate situations in which there is a complete lack of scientific support for something." Other sections of the *ESA*, specifically sections 11 and 18, could allow a zealous Minister to take steps to protect a species with no scientific basis to do so, but these sections have safeguards – for example, if the Minister lists a species as

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endangered without scientific evidence, that listing expires in one year. There are no such safeguards in section 15.

[61] Finally, the Respondents say that when a species is at risk, its habitat is already protected by section 13, which prohibits harming endangered and threatened species and their dwelling places. The Respondents say the decision not to identify specific "core habitat" is reasonable in light of the Record.

[62] As discussed above, the meaning of "shall" is imperative. The Minister has no discretion to avoid this duty. Therefore, the Minister must ensure that published recovery plans identify areas which the Minister may later consider for designation as core habitat. To do otherwise is not a reasonable interpretation of the Minister's statutory duty. The areas identified must be specific enough to put the Minister in a position to designate core habitat. Therefore, to comply with s. 15(4)(h), recovery plans must identify "specific physical areas and landforms" consistent with s. 16.

[63] The Respondents point to the interim recommendations in the recovery plan as satisfying s. 15(4)(h), specifically the following:

> On an interim basis, the definition of core habitat needs to balance the immediate need for Emerald ash borer management and the long-term need for core habitat to support species recovery. To this end, it is recommended that individual seed-bearing trees be protected with a 150m buffer from forest harvest and industrial activity that may harm the tree or its surrounding habitat. Long distance dispersal distances for ashes is up to 150 m in the direction of the prevailing winds (e.g., Schmiedel et al. 2013), so the buffered area should support recruitment if it occurs and maintain localized habitat conditions. Given the proximity of some of these trees to streams and wetlands, some consideration should be also given to the maintenance of watercourses near seed trees.
>
> To prevent net loss of individual Black ash trees (non-seed-bearing trees), activities that may result in mortality (e.g. forestry, road construction, infilling of swamps) should plant replacement trees in suitable relatively undisturbed habitat. Replacement rates should be related to seedling survival (e.g. transplant 5 seedlings to 1 lost tree). Benedict (2003) suggests that the desired plant density at emergence in 30 to 45 plants/m^2 or 10 to 15 seedlings/ft^2. Seedlings should be planted 3 to 4.5 m (10 to 15 ft) apart for reforestation and basket materials projects. [Emphasis added.]

[64] This, the Respondents say, shows that the recovery team was working to compile essential information, even though "it was not possible to provide a final definition of core habitat."

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[65] Under s. 15(4)(h), a recovery plan must "identify areas to be considered for designation as core habitat." Pursuant to s. 16(2), "where the Minister considers it necessary for the purpose of implementing a recovery plan, the Minister may designate specific physical areas or landforms of the Province as core habitat." When ss. 15(4)(h) and 16(2) are read together with the definition of "core habitat" at s. 3(b) ("specific areas of habitat..."), it is clear that the recovery plan must identify specific physical areas or landforms. Without that information, the Minister is not in a position to determine whether to exercise his or her discretion under s. 16(2) to designate a land area as core habitat for the purpose of implementing the recovery plan.

[66] Nothing else in the Black Ash recovery plan sets out specific areas or landforms that could be used for designation. In the recovery plan, under the status column for "Identify native seed-bearing Black ash and maintain them through stewardship programs", it says, "Not yet underway". The recovery plan notes that "Black ash habitat has not been described in a Nova Scotia context and the preferred habitat is unclear". It outlines the various threats to the species' survival, including habitat loss, forestry, climate change, and invasive beetles.

[67] One of the four key conditions for recovery of the species is ensuring the viability of seed-bearing trees. Therefore, protecting these seed-bearing trees is essential. The plan notes (p. 5) that although "Black ash is known from 35-40 sites in 11 counties of Nova Scotia[,] mature individuals are rare and only 12 are known to occur. Total number of known trees in Nova Scotia is approximately 1000". Those twelve trees are the only seed-bearing trees verified in the province (p. 6). At page 7, there is a map of Nova Scotia with dots that show the known distribution of Black Ash according to the records for which coordinates were available, but it does not provide the locations of known seed-bearing trees.

[68] The recovery plan's authors suggest that prospective Wildlife Habitat and Watercourse Regulations "may provide some protection to trees found within 20m of streams greater than 50 cm in width" but would not protect "trees along smaller streams or shrug swamps" (pp. 10-11). The plan appears to contemplate that some areas where trees are known to occur will be protected by future regulations. Five years later, however, those regulations do not exist.

[69] Counsel for the Respondents was asked where the Court could find the Minister's justification for this decision. Counsel pointed to the Record. The information contained therein will weigh heavily in this Court's analysis.

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[70] The lack of available information is reflected throughout the recovery plan. There are, however, a passages that could contradict the conclusion that it is impossible to identify any areas to be considered for core habitat. At page 6, the plan indicates, "only 12 seed-bearing trees are known to occur (i.e., verified)". At page 23, it states, "Locations and ownership of properties with seed-bearing trees are mostly known". Given the "interim recommendation" that seed-bearing trees receive a 150m buffer of protection, this suggests that it would be possible to identify the locations of some of these trees, but those locations are not identified in this plan. Consequently, the Minister could not use the information provided to later designate any areas as core habitat. There is nothing in the Record to explain why these specific areas were not identified in the recovery plan.

[71] There is no apparent support in the Record for the claim that institutional restraints, such as lack of resources, are at fault for this failure to observe statutory requirements. No affidavits were provided by the Respondents to support the assertion that resources are scant, unlike in *Western Canada Wilderness Committee*. In view of this lack of explanation, I cannot conclude that the Minister's failure to include areas to be considered for core habitat designation in the recovery plans for Black Ash was reasonable.

[72] Although the Respondents say the *ESA*'s definition of "core habitat" necessarily means that it must also be designated as such (unlike the *SARA* definition of "critical habitat"), that does not mean that s. 15(4)(h) is rendered meaningless. The issue is not whether specific areas have been designated, but whether specific areas have been *identified*. Having reviewed other sections in the *ESA* dealing with core habitat, it is clear that the information in the recovery plan must be sufficient to allow the Minister to designate specific physical areas or landforms in the province. That is not possible if no specific areas have been identified. Given the above discussion regarding ensuring government actors comply with the rule of law, and the precautionary principle, it cannot be said that the Minister's actions here were a reasonable interpretation of the statutory duties, particularly where the recovery plan itself suggests that more specific information is available.

Mainland Moose

[73] The Mainland Moose was listed as endangered in 2003. A recovery team was appointed in 2004 and a recovery plan was prepared in 2007, but not approved until 2012. While this population once thrived in the province, it "has experienced significant and continuous decline over the past thirty years". As of 2003, the

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population was around 1,000-1,200, and that number has not been revised. According to the 2003 data, Moose distribution has remained largely the same since aerial surveys were taken in the 1960s. Localized groups occupy "the northern Cobequid Hills and Pictou-Antigonish Highlands, the southwestern interior in and around the Tobeatic Wildlife Management Area, and scattered pockets along the eastern shores of Guysborough, Halifax, Shelburne, Queens and Yarmouth counties". A map sets out population estimates by area. Threats are complex and poorly understood, but appear to include disease, parasites, poaching, road access to moose habitat, development, forest practices, and climate change. Throughout the plan, lack of data is cited frequently (see, e.g., pp. 219-220).

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[74] The Nova Scotia government made efforts to help the struggling Moose population for several decades, with few positive results. Moose hunting was closed in 1937 in recognition of the decline in population. Efforts to monitor and protect the population are cited from the 1960s and 1970s. Key information regarding habitat is still lacking, however, and no core habitat has been identified. Under the heading for "core habitat", the recovery plan refers to the *ESA* definition, and says:

> ... Under the NSESA, the province of Nova Scotia may identify "core habitat" for provincially endangered species.
>
> Insufficient qualitative, quantitative, spatial and temporal information exists at this time necessary to identify core habitat for mainland moose. Moose use a broad array of habitat types that are variable in space and time. Significant information gaps surrounding the life history, landscape ecology and biology of mainland moose will need to be addressed before core habitat can be defined.

[75] The wording of the plan (i.e. using "may" when the *ESA* says "shall") indicates a non-imperative interpretation by the drafters of the report regarding setting out core habitat for the Mainland Moose.

[76] The recovery plan states that a portion of the land used by Mainland Moose is protected by other legislation, including the *Wildlife Act*, R.S.N.S. 1989, c 504, the *Forests Act*, R.S.N.S 1989, c. 179 (or the *Forest Enhancement Act*, R.S.N.S. 1989, c. 178), the *Off-highway Vehicles Act*, R.S.N.S. 1989, c. 323, and the *Wilderness Areas Protection Act*, S.N.S 1998, c. 27. Neither the plan nor counsel's submissions explain how these statutes specifically help Moose or their habitat.

[77] Outside of this report, other instances of studying Moose include a two-page 2012 document entitled "Endangered Mainland Moose Special Management Practices", showing a map of Nova Scotia with large coloured patches to mark

"Significant Mainland Moose Concentration Areas". There is a short comment above the map, stating, in part:

> Moose population concentration areas were identified using a scientifically-based geographic model, expert review, and the best available data. The model included an estimate of total occupied range, relative population density, and significant population concentration areas. It was developed using 3272 moose observational records compiled between 1999 and 2011.

[78] The document includes several preservation recommendations, such as ensuring a 250m buffer of trees at the edge of any forest harvest for Moose habitat.

[79] There is also an "Action Plan" for the Moose, dated for 2014-2018. According to the Respondent, this document reviews the 2007 plan for species recovery. The plan indicates that progress was made on understanding the distribution, but getting reliable data on the Moose population remains a top priority. Field surveys were ongoing. There was otherwise no further update on "core habitat" in the 2014-2018 plan.

[80] Counsel for the Respondents concedes that it was not possible to identify specific core habitat for Mainland Moose "due to the ecology of the species." The Respondents say it is not proper for the court to question the expertise of the scientists who drafted the report. It is not clear, though, how this comports with the precautionary principle or the overall aims of the *ESA*. As noted in *Wilderness Committee*, *supra*, perfection should not become the enemy of the good. Even where there is a lack of useful information, it is the Minister's duty to ensure this information is gathered before the expiry of the timeframe. There is likely no entity better situated to get this information than the Minister and his appointed teams. If the Minister is simply unable or unwilling to ensure some core habitat is set out in a recovery or management plan, then he will be in breach of the *ESA*.

[81] The Record provides no explanation for why, despite efforts to support the population from the 1930s, comprehensive data around Moose population has not been generated. There is no specific evidence of a lack of resources that affected the ability to obtain or develop data. Recognizing that collecting data on a small roving population of Moose has inherent difficulties, no explanation has been provided as to why there is still, in the Respondent's words, "a complete lack of scientific basis for designating any geographic area as core habitat for the Mainland Moose".

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[82] In short, there is no explanation for the breach of s. 15(4)(h) as it relates to the Mainland Moose. With no explanation from the Minister, I conclude that omitting core habitat decision was unreasonable in view of the Minister's statutory duties.

(3) Whether the Mainland Moose "review" published by the Minister was reasonable under s. 15(11).

[83] Subsection 15(11) of the *ESA* requires that "[r]ecovery plans and management plans shall be reviewed every five years to determine the progress of the recovery of the species and whether any changes or modifications are required". The *ESA* does not define "review", nor does the term appear in this context anywhere else in the *ESA*. The purpose of the review is to determine the progress of species recovery and whether any changes are necessary. Given the above analysis, review of the recovery and management plans is imperative after five years. If no review occurs, the Minister is in breach of this section.

[84] The Mainland Moose recovery plan was prepared in 2007, meaning a review was due in 2012. There are two documents in the Record that the Respondents suggest meet this requirement. With respect to the 2012 "Endangered Mainland Moose Special Management Practices", counsel submits that "while perhaps not explicitly a full review," it shows that "facets of the 2007 Recovery Plan were being reviewed, considered, and applied." This would be five years after the 2007 plan was released, though counsel also concedes that this 2007 plan was not formally approved until 2012. The Respondents also point to the "Action Plan for the Recovery of the Eastern Moose (*Alces alces americana*) in Mainland Nova Scotia," dated 2014-2018. The Action Plan purports to "complement" the 2007 recovery plan "by reporting on progress achieved to date on the actions identified in the Recovery Plan and by identifying the specific tasks and actions required to move forward and achieve the recovery objectives". The report includes a table of action items with status updates. The Respondents also point out that a new recovery team was appointed for the Mainland Moose in August 2019, with updates pending. The Respondent submits that this "is logical given that there would be new information on Mainland Moose in the intervening time, making it more logical to revise a status report than simply review a recovery plan."

[85] The Applicants say no meaningful review has occurred. They say the 2014-2018 plan is not a review of the 2007 plan, but only an extension. It does not address whether actions taken under the 2007 plan were appropriate or out of date. The new report does not review population estimates, which are based on 2003

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data (although the 2012 document relies on Moose observations from 1999-2011). The Applicants also cite the 2018 Departmental Report on Recommendations of the Auditor General which states that the Moose plan is "out of date" and is "to be revised" by June 2018 (p. 543). It appears that the Department is implementing actions based on a 12-year-old plan with 16-year-old population data.

[86] Under the *SARA*, the federal minister must report on the implementation and progress of every recovery strategy within five years of it being published, and that report must be published (s. 46). A *SARA* recovery strategy sets out essential features of the species, and an action plan sets out specific actions in relation to a recovery strategy. The minister must prepare one or more action plans per recovery strategy (s. 47). Action plans must also be reported on every five years. Therefore, the *SARA* contemplates publication of a report on each species' review, dealing with implementation of the recovery strategy or action plan and discussing its progress towards the objectives. The review report must also discuss any ecological and socio-economic impacts incurred as a result of the plan being implemented (s. 55).

[87] Unlike the *SARA* system, there is no requirement to create an action plan for a recovery plan under the *ESA*. In 2016, the Minister published an action plan, which appears to align with the definition of action plan under the *SARA*. In considering whether the 2016 action plan may be deemed a "review" under the *ESA*, a review of other provincial endangered species legislation is helpful. While some statutes require the minister to review a plan or strategy after five years (e.g. the Ontario *Endangered Species Act* at s. 12.2), only the federal *SARA* requires the minister to produce a published report or document.

[88] *Vavilov* indicates that the decision maker's task is to "interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue" (para. 121). There is little authority on the meaning of "review" in the context of endangered species legislation that would provide guidance on whether the Respondents' proposed interpretation is reasonable. The term has, however, been considered in other areas. In *Saskatoon (City) v Plaxton* (1989), 33 C.P.C. (2d) 238, 1989 CarswellSask 235 (Sask. C.A.), a personal injury settlement provided that payment of the solicitor/client account would be subject to review and approval by a public trustee. Cameron J.A., for the majority, discussed the term "review" outside of an adjudicative context:

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> 26 The words, too, are not altogether free of ambiguity. "Review" is occasionally taken in popular use as meaning little more than a first instance "looking over" or "examination". In its legal sense, of course, it usually means more than that, as implying a formal, second instance "re-examination" or "reconsideration", with a view to revision or redetermination if something be found wrong or lacking...

[89] I also consider other definitions of "review." For instance, *The Concise Oxford Dictionary of Current English*, 8th ed., defines "review" as a transitive verb as follows:

1. Survey or look back on
2. Reconsider or revise
3. Hold a review of (troops etc.)
4. Write a review (of a book, play, etc.)
5. View again

[90] Definition (2) is most instructive here, suggesting a two-pronged understanding of "review", similar to the discussion in *Plaxton*: it can mean looking something over again (i.e. reconsidering), and may also mean actual revision. I conclude that a reasonable interpretation of "review" under the *ESA* is more than "looking over", but also requires reconsideration and, if necessary, revision to address changing circumstances. This interpretation comports with the purpose of the *ESA*, which is to ensure the protection of species in a timely manner.

[91] Unlike the *SARA*, the *ESA* does not expressly require the Minister to produce a report or document as a result of statutory review. Although, there is some qualifying language in s. 15(11), the form of the review is open to interpretation by the Minister, though transparency and public accountability would suggest that there should be some public indication that a review occurred. Otherwise, there is little guidance regarding what "review" looks like under the *ESA*, suggesting the legislature intended to give the Minister a degree of discretion.

[92] The Respondents rely on the 2012 "Special Management Practices" document and the 2014-2018 Action Plan as documents constituting a "review". I also have regard to the Departmental Report on Recommendations of the Auditor General, which updates the status of Moose recovery, and the 2011 Memo from the recovery team to Bob Petrie, which refers to the 2007 plan and indicates that different population census methodology is needed.

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[93] Based on the principles of statutory interpretation and taking into account the applicable standard of review, I conclude it was open to the Minister to interpret the term "review" as something less substantive than what the Applicants call for. Considering the various documents put forward by the Respondents to demonstrate review of the Mainland Moose plan, it is reasonable to conclude that a review occurred with the 2014-2018 action plan. Although that document does not expressly deal with whether changes or modifications of the 2007 plan are required, it can be inferred that the recovery team concluded that no major changes were necessary. The Applicants have not provided any authority for their assertion that a review must be critical of the original plan. The Minister's broader interpretation of "review" is not precluded by the *ESA* or by any relevant factual or legal constraints. The Minister's conclusion that the documents provided, specifically the 2014-2018 action plan, constitute a "review" as required by s. 15(11) of the *ESA* is reasonable.

[94] That being said, the Respondents' brief confirms that the 2012 document is not a "full review." I would agree. It is a two-page document that makes no reference to the 2007 plan and that uses different population data, from observations in 1999-2011 as opposed to the 2003 data relied on in the 2007 recovery plan. Because this document does not address developments since 2007, it does not fall within a reasonable interpretation of a "review" under the *ESA*.

[95] As a result of this characterization of the 2012 document, the review did not occur until 2013, when the 2014-2018 Action Plan was published. Therefore, the review was late by one year under the five-year timeline. There being no explanation for this failure to comply with the statute, I must conclude that the failure to complete the review within the statutory timeline was unreasonable.

(4) Whether the Minister's "adoption" of federal recovery plans for the Eastern Wood Pewee and the Wood Turtle was reasonable under s. 15(9).

[96] The Applicants allege that the Minister unreasonably failed to produce a recovery plan for the Wood Turtle within the required timeframe (s. 15(1)(b)) and to produce a management plan for the Eastern Wood Pewee within the required timeframe (s. 15(10)) was unreasonable. The Respondents assert that the Minister adopted a federal plans in respect of these two species. Subsection 15(9) of the ESA states, in part, that "where a recovery plan has been prepared in another jurisdiction for the endangered or threatened species, the Minister may adopt that recovery plan in lieu of the requirements of subsection (1)."

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Eastern Wood Pewee

[97] The Eastern Wood Pewee is a migratory songbird found in several provinces. It was listed as vulnerable in 2013. Under s. 15(10) the Minister had three years to prepare a management plan (i.e. by 2016). There is no plan or other document, federal or otherwise, dedicated to the recovery of the Eastern Wood Pewee in the Record, nor is there any information about the habitat or threats faced by the species. In oral submissions, the Respondents conceded that the court could infer that no report exists for the Eastern Wood Pewee.

[98] The Respondents say waiting for federal cooperation on this species is reasonable, as due to the national presence of the species, a management strategy requires coordination with the still-incomplete federal plan. They refer to a 2012 Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") report on the Eastern Wood Pewee, but this report does not appear in the Record. The Applicants also cite the 2018 Departmental Report on Recommendations of the Auditor General, which acknowledges that a management plan and team for the Eastern Wood Pewee is not yet in place in Nova Scotia.

[99] Subsection 15(9) allows the Minister to adopt a recovery plan for an endangered or threatened species "in lieu of" appointing a recovery team and preparing a recovery plan under s. 15(1). It does not address management plans for vulnerable species, a matter addressed in s. 15(10), and which has no equivalent of s. 15(9). I conclude that this omission precludes an interpretation of the ESA allowing the Minister to adopt a federal plan (under s. 15(9)) for a species listed as vulnerable.

[100] When the legislature intends to refer to both recovery plans and management plans in the *ESA*, it does so (see, e.g., s. 15(11), regarding reviews of both recovery and management plans). To accept the Respondent's position that the Minister adopted (or will adopt) a federal management plan for the Eastern Wood Pewee requires re-writing the plain language of the statute. As such, the Minister has failed to prepare a management plan in the allotted time for the Eastern Wood Pewee, and has provided no explanation for this failure. This failure is therefore unreasonable in view of s. 15(10).

[101] I also note that the Eastern Wood Pewee was assessed as "special concern" (the federal equivalent of vulnerable) in 2012, but was not actually listed as such under the *SARA* until 2017. The federal minister has three years from the date the species was listed to publish a proposed management plan. The provincial

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management strategy was due in 2016. I note this because, even by the Respondents' reasoning, the federal minister's obligation to begin preparing its management plan did not commence until after the provincial equivalent was due.

Wood Turtle

[102] The Wood Turtle was listed as vulnerable in 2000, and re-listed as threatened in 2013, giving the Minister until 2015 to prepare a recovery plan. The Minister did not prepare a management plan, or appoint a recovery team and prepare a recovery plan, within these timelines. The Respondents say the Department adopted the 2016 federal "Proposed Recovery Strategy for Wood Turtle (*Glypytemys insculpta*)" by participating in its drafting and implementation.

[103] No formal means of adoption is indicated in the *ESA*. Questions arose during oral submissions as to how the Minister, or the public for that matter, can know when time for the five-year review starts to run if there is no formal indication of approval or adoption. The Respondents said the time begins when the federal report is published. This suggests that "adoption" is automatic.

[104] The Applicants say there is no evidence that the Minister adopted the federal strategy for Wood Turtle. Although the Respondents did not refer to it in submissions, in their Notice of Participation, they cite a 2014 e-mail from the provincial Director of Wildlife to an official involved on the federal plan as apparent evidence of adoption. The Applicants say a private e-mail from 2014 cannot constitute formal "adoption" of a plan that did not exist until 2016. They also submit that "adopting" requires some positive act to bring the plan into the provincial regime and begin its implementation. As such, they argue, the recovery plan for the Wood Turtle was four years late at the time of filing.

[105] In the 2018 Departmental Report, a chart entry indicates that a plan exists for the Wood Turtle, dated 2012, to be revised in 2017. The same chart, under "planned action", states "federal plan developed in collaboration with the provinces, to be completed and approved." This suggests that the Department did not consider the federal plan to be "completed" at that time. The Applicants also say this shows no intention to "adopt" the plan as the Minister's own.

[106] As noted earlier, the federal plan was not published until 2016, so that the federal government was late by the *SARA* timelines, since the Wood Turtle was listed as threatened under *SARA* in 2010. Pursuant to s. 42(1), the federal minister had two years (until 2012) from the species listing to publish a proposed recovery

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strategy, but it was not published until 2016. Section 43 of the *SARA* provides that the public has 60 days to file written comments on the proposed strategy, after which the minister has 30 days to consider comments and finalize the strategy by publishing it in the registry. That period has long expired. The Intervenor argues that it cannot be reasonable for the Minister to await federal action when the federal authorities are not complying with timelines under their own statute.

[107] It is unnecessary to interpret "adopt" in this case, because s. 15(9) permits adoption of a recovery plan that is "in existence before the coming into force of this Act" or that "has been prepared in another jurisdiction for the endangered or threatened species..." The phrase "has been prepared" is in the past tense, indicating, based on the plain language, that the plan must already be prepared or completed before it can be adopted in lieu of the requirements of s. 15(1). According to the 2018 Departmental Report, the Nova Scotia team believed the federal plan was waiting "to be completed and approved." This implies that at that time, the federal plan for the Wood Turtle was *being* prepared, but had not *been* prepared.

[108] By comparison, s. 15(8) states that the Minister "may, to the extent possible, prepare a recovery plan in co-operation with other jurisdictions where the endangered or threatened species is also found". This contemplates a situation where the Minister prepares a recovery plan together with another jurisdiction. It is limited by the phrase "to the extent possible", suggesting there are occasions where this option is not available to the Minister – such as where doing so would result in failing to adhere to a statutory deadline. On a plain reading, s. 15(9) does not indicate an intention to permit the Minister to avoid the duties under s. 15(1) by "adopting" a plan that will not be complete until the s. 15(1) deadline passes.

[109] Moreover, the federal deadline to create a recovery plan for the Wood Turtle after it was re-listed as threatened was 2015. Even by passively "adopting" the 2016 proposed federal plan, the Minister was late by one year. The 2016 proposed federal plan for the Wood Turtle was not complete at the time a plan became due under the *ESA*. The Minister may not adopt a plan pursuant to s. 15(9), which then satisfies the requirements of s. 15(1), that is incomplete. To do so ignores the clear language of s. 15(9), and is therefore unreasonable.

[110] In the alternative, I will review the interpretation of "adopt". A plain reading of s. 15(9) indicates that "adopt" is not qualified by any surrounding language. The word does not appear anywhere else in the *ESA*. Generally speaking, collaborating on or adopting another jurisdiction's plan comports with the purpose of the *ESA*.

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Paragraph 2(1)(c) emphasizes a "national co-operative approach to the conservation of species at risk." The imperative timelines throughout the *ESA*, however, also indicate a legislative intent that time is of the essence.

[111] The *Concise Oxford Dictionary* defines "adopt" as follows:

1. Take (a person) into a relationship, esp. another's child as one's own.
2. Choose to follow (a course of action etc.).
3. Take over (an idea etc.) from another person.
4. Choose as a candidate for office.
5. *Brit*. (of a local authority) accept responsibility for the maintenance of (a road etc.).
6. Accept; formally approve (a report, accounts, etc.).

[112] *Black's Law Dictionary*, 10th ed., like the *Concise Oxford*, refers to "adopt" in the Parliamentary context: "[a] deliberative assembly's act of agreeing to a motion or the text of a resolution, order, rule, or other paper or proposal, or of endorsing as its own statement the complete contents of a report." The *Dictionary of Canadian Law* provides the following:

> 1. To accept a contract as binding; to select; to choose. 2. A witness may adopt a videotaped statement … 3. To take on responsibility for a child as if the child were one's own biological child. 4. A local government adopts a bylaw where it approves or accepts the bylaw.

[113] The equivalent *SARA* section in the federal statute is more detailed:

> 44 (1) If the competent minister is of the opinion that an existing plan relating to a wildlife species meets the requirements of subsection 41(1) or (2), and the plan is adopted by the competent minister as the proposed recovery strategy, he or she must include it in the public registry as the proposed recovery strategy in relation to the species.
>
> (2) The competent minister may incorporate any part of an existing plan relating to a wildlife species into a proposed recovery strategy for the species.

[114] Under the *SARA*, the adopted plan must conform to the federal requirements for recovery plans. From this section, it appears that to "adopt" means taking on an entire existing plan as the federal government's own, while to "incorporate" refers to parts of an existing plan. Notably, if the federal minister wishes to adopt another

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jurisdiction's plan as the federal plan, the plan must be published in the public registry. There is therefore no doubt when the five-year review period begins.

[115] The Respondents' argument that "adopt" includes passive acceptance by virtue of collaborating with another jurisdiction is not persuasive. One problem with this interpretation is that the Minister is not obligated to adopt another jurisdiction's plan simply because Nova Scotia collaborated on it. Subsection 15(9) is permissive – the Minister "may" adopt the other jurisdiction's plan. It cannot be assumed that just because another jurisdiction has published a plan that Nova Scotia assisted with, Nova Scotia has adopted that plan as its own.

[116] The scheme of the *ESA* requires transparency and cooperation amongst all interested actors. The purpose section emphasizes this, committing Nova Scotia to a "national co-operative approach" (s. 2(c)) and declaring that "all Nova Scotians share responsibility for the conservation of species at risk" (s. 2(d)). Nova Scotians, including indigenous populations, must have an opportunity for "meaningful participation" regarding species at risk (ss. 2(e) and (f)). Further, s. 16 provides that the Minister may enter into agreements with landowners if their land is implicated in a recovery plan. However, with no reporting requirements, it is possible that private lands could be implicated in another jurisdiction's plan without the owners' knowledge or consent (see ss. 17 and 19). While s. 21 ensures that a copy of any recovery plan is provided upon request, a member of the public who has no notice that another jurisdiction's plan has been adopted cannot request something they do not know exists. Therefore, to interpret "adopt" under the *ESA* as purely passive is not a reasonable interpretation of the provision. There must be some affirmative act or notice that another jurisdiction's plan has been adopted. Any interpretation of "adopt" under the *ESA* must incorporate the requirement that the Minister accepts responsibility for another jurisdiction's existing plan and implements it in Nova Scotia in lieu of a plan prepared under s. 15(1), with some method for interested persons to receive notice.

[117] The issue here is not the precise definition of "adopt" for the purposes of s. 15(9) of the *ESA*, but only whether the decision made, or the position taken, by the Minister is reasonable in light of the relevant factual and legal constraints. Given all the circumstances, I conclude it is not. An interpretation of "adopt" in s. 15(9) that does not include some form of positive approval or action, allowing interested members of the public to be made aware that another jurisdiction's plan has now become Nova Scotia's plan, is unreasonable. Further, nothing in the relevant provisions suggests that the Minister can forego provincial deadlines in favour of a late, but collaborative, recovery plan. Collaboration is contemplated "to the extent

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possible" in preparing a plan with another jurisdiction under s. 15(8), but there is no such language in relation to adopting an already-prepared plan under s. 15(9). As such, I conclude the failure to observe the deadline is unreasonable.

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Remedy

[118] The applicants seek multiple remedies, including declarations, *mandamus*, and ongoing supervision by the court. For the reasons which follow, I am prepared to order certain declarations and *mandamus* in relation to some relief sought, but not ongoing supervision by the Court.

Declarations

[119] The Applicants say declarations will "ensure that the Minister fulfils his duties under the *ESA* to species at risk, and avoid the need to launch fresh judicial reviews for those species beyond the six Representative Species and for those species that may be designated as at-risk in the future." The Applicants seek the following declarations:

> (1) failure to prepare a recovery plan for the Wood Turtle within the statutory deadline at s. 15(1);
>
> (2) failure to appoint a recovery team for Canada Warbler within the statutory deadline at s. 15(1);
>
> (3) failure to appoint a recovery team for the Ram's-head Lady Slipper within statutory deadline at s. 15(1);
>
> (4) failure to prepare a recovery plan for the Ram's-head Lady Slipper within statutory deadline at s.15(1);
>
> (5) failure to prepare a management plan for the Eastern Wood Pewee within the statutory deadline at s. 15(10);
>
> (6) failure to set out core habitat for Black Ash in its recovery plan per s. 15(4)(h);
>
> (7) failure to set out core habitat for the Mainland Moose in its recovery plan per s. 15(4)(h); and
>
> (8) failure to review the Mainland Moose recovery plan within the statutory deadline per s. 15(12);

[120] The Respondents do not dispute that where an imperative deadline under the *ESA* is missed, a declaration should result. However, they argue that several of the proposed declarations are moot, because the Minister appointed recovery teams for various species in 2019, after the judicial review was filed. Specifically, the Respondents say the following issues are moot:

(1) the appointment of a recovery team for the Canada Warbler;

(2) review of the Mainland Moose recovery plan;

(3) the appointment of a recovery team for Ram's-head Lady Slipper; and

(4) creation of a recovery plan for Ram's-head Lady Slipper.

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[121] The Respondents further say that if (2) and (4) are not moot, then they are premature, because new recovery teams have been appointed and recovery plans are in progress for these species.

[122] Declaratory relief is generally issued "to clarify the law on a particular point…": Sara Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis Canada, 2017) at 255. A declaration may only issue where there is a live controversy. In *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12, Abella J. stated:

> 11 ... The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v. R.* (1979), [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. [Emphasis added.]

[123] The Respondents do not dispute the court's jurisdiction or the justiciability of the issues. However, they take issue with the "live controversy" requirement. They argue it would be a waste of judicial resources to decide issues that are "hypothetical" or "academic."

[124] A declaration may be appropriate where a government actor has refused to uphold its statutory duties, or in order to clarify a point of law. In *Daniels*, *supra*, the applicants sought a declaration that Metis and non-status Indians were "Indians" under the *Constitution Act, 1867*. Neither federal nor provincial governments would take responsibility for their governance, though the federal government had conceded that non-status Indians were "Indians" for some purposes. The court held that a "declaration would guarantee both certainty and accountability thereby easily reaching the required jurisprudential threshold of offering the tangible practical utility of the resolution of a longstanding jurisdictional dispute" (para 15).

[125] Like the present case, *Sequence Bioinformatics Inc v Health Research Ethics Authority for Newfoundland and Labrador*, 2019 NLSC 21, involved a statutory timeline. The applicant company applied for approval of certain research. Despite a

legislated 30-day timeline, more than a year later, the applicant had no answer. It obtained an order for *mandamus* compelling the respondent to process its application. The respondent subsequently rejected the application. The applicants then sought a declaration that the legislation required the application to be processed within 30 days. Although the application had been rejected, the court held that a live dispute remained regarding interpretation of the timeline:

> [28] The legislation provides no means for the Applicants to have the issue of the timelines appropriate for the review of their Application resolved. They could satisfy themselves with the Respondent's interpretation, but that would not resolve the disagreement.
>
> [29] A declaration would settle the difference of opinion between the parties and, additionally, would provide guidance to all other proponents of projects involving health research with human subjects. To that extent, it is desirable that the Court undertake the requested analysis of section 9(4) of the Act and make a declaration as to its scope and application.

[126] The court issued a declaration requiring the board to consider applications under the legislation within 30 days of receipt, even though the underlying issue – the applicant's application – had already been decided.

[127] In *Western Canada Wilderness Committee*, *supra*, Mactavish J. held that declaratory relief may address past conduct despite subsequent rectification:

> [63] The Ministers submit that declaratory relief should not be granted in this case. According to the Ministers, the fact that they have conceded that they were legally required to meet the statutory timelines for the posting of proposed recovery strategies and that they failed to do so means that declarations would serve no practical utility.
>
> [64] In support of this contention, the respondents rely on the decision of the Supreme Court of Canada in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 14, where the Court stated that "Courts generally do not make declarations in relation to matters not in dispute between the parties to the litigation"...
>
> [65] While this is unquestionably true as a general proposition, the Court has a broad discretionary power in relation to the granting of declaratory relief, and there are cases where the granting of such relief may nevertheless be appropriate... This is just such a case.
>
> [66] Declaratory relief may address the legality of government action, both prospectively and retrospectively: *Reece v. Edmonton (City)*, 2011 ABCA 238, 335 DLR (4th) 600, at para. 163, per Chief Justice Fraser, dissenting, but not on

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> this point. Moreover, public officials are not above the law. If an official acts contrary to a statute, the Courts are entitled to so declare: see *Singh v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 757, 372 F.T.R. 40, at para. 40, citing *Canada v. Kelso*, [1981] 1 S.C.R. 199 at 210. [Emphasis added.]

[128] The Respondents raise the question of mootness. The leading case on the doctrine of mootness continues to be *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342. By the time the matter reached the Supreme Court of Canada, the impugned *Criminal Code* sections had been struck down. Addressing the question of whether this rendered the instant appeal moot, Sopinka J. said, for the court, at 353:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant. [Emphasis added.]

[129] If a dispute has effectively been resolved the court has discretion to declare the matter moot and refuse to hear it on its merits. *Borowski* provides guidelines for exercising this discretion. Sopinka J. said, at 358-362:

> The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system

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> and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context...
>
> ...
>
> The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. ... It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants. The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.
>
> ...
>
> There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law.
>
> ...
>
> The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

[130] Is there a live dispute in this case? Some measures were taken in 2019, including creation of recovery teams for Canada Warbler and Ram's-head Lady Slipper, and progress on review of the Mainland Moose recovery plan and a recovery plan for Ram's-head Lady Slipper. Consequently, some discrete issues no longer require the court's attention to bring about Ministerial action. However, these steps do not cancel the failure to observe statutory timelines arising from the Minister's apparent interpretation of the *ESA*. Declarations may result where there is a dispute over unsettled law, or where a government actor fails to comply with its statutory mandate. In this case, given all of the information contained in the Record, the Minister has exhibited a chronic and systemic failure to implement action required under the *ESA*. This systemic failure is verified in the Record: see, for instance, the 2016 Auditor General's Report; the 2018 Departmental Report on

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Recommendations of Auditor General; and the 2018 Lahey Report. These failures are apparent in the Auditor General's Report, which included the following conclusions:

> **Overall conclusions:**
>
> • Species at risk need to be a greater priority for Natural Resources
>
> • Department not fully managing conservation and recovery of species at risk
>
> • Department is not carrying out planning and completing species recovery activities satisfactorily
>
> • Some success in achieving biodiversity goals; more work needed
>
> **What we found in our audit:**
>
> • Eight of 14 plans for species at risk were not done; some plans were more than seven years late
>
> • Four plans due for review are one to four years late. This means actions taken may not be the most effective.
>
> • Natural Resources coordination and communication with species recovery teams needs improvement...

[131] This situation is similar to *Western Canada Wilderness Committee*, *supra*, where the court said:

> 92 It is simply not acceptable for the responsible Ministers to continue to miss the mandatory deadlines that have been established by Parliament. In the circumstances of these cases, it is therefore both necessary and appropriate to grant the applicants the declaratory relief that they are seeking, both as an expression of judicial disapproval of the current situation and to encourage future compliance with the statute by the competent ministers.

[132] Similarly, in this case, the controversy regarding the meaning and application of section 15 is still a live one.

[133] Alternatively, if there is no live issue and the matter is moot, I conclude that this is an appropriate case to exercise the court's discretion to decide the issues. There are collateral consequences to a finding that the Minister failed to meet his statutory obligations at the time of filing. For example, while the Minister has appointed some new teams for the named species, there are still no recovery and

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management plans in place for these species, as a direct consequence of the dispute that has not been resolved, other species remain unaddressed. In *Western Canada Wilderness Committee*, *supra*, the court said:

> 93 Indeed, the issues that were originally raised by these applications are "genuine, not moot or hypothetical" insofar as there remain numerous species at risk for which the posting of proposed recovery strategies is long overdue: *Danada Enterprises Ltd. v. Canada (Attorney General)*, 2012 FC 403, 407 F.T.R. 268 at para. 67. I am, moreover, satisfied that a declaration will serve a useful purpose and will have a "practical effect" in resolving the problems identified by these cases: see *Solosky*, above, at 832-833.

[134] The Applicants' concerns are not tied to the species specifically selected, but to all species at risk in the province, towards which the Minister has the same duties. A decision on the merits will enable future litigants to challenge any future failure to uphold the timelines again. I am not convinced that deciding these issues now will unduly tax court resources. In the event of a future failure to observe timelines, an existing decision interpreting the Minister's duties, and interpreting the ESA generally, will reduce the likelihood of litigation. Furthermore, issuing declarations here does not conflict with necessary deference to the administrative decision maker. This judicial review involves upholding the rule of law by ensuring the Minister adheres to the statutory mandate.

[135] I am satisfied that the declarations requested by the Applicants should issue. For clarity, the Court declares that the following unreasonable failures exist:

> (1) failure to prepare a recovery plan for the Wood Turtle within the statutory deadline at s. 15(1);
>
> (2) failure to appoint a recovery team for Canada Warbler within the statutory deadline at s. 15(1);
>
> (3) failure to appoint a recovery team for the Ram's-head Lady Slipper within the statutory deadline at s. 15(1);
>
> (4) failure to prepare a recovery plan for the Ram's-head Lady Slipper within the statutory deadline at s.15(1);
>
> (5) failure to prepare a management plan for the Eastern Wood Pewee within the statutory deadline at s. 15(10);
>
> (6) failure to set out core habitat for Black Ash in its recovery plan per s. 15(4)(h);
>
> (7) failure to set out core habitat for the Mainland Moose in its recovery plan per s. 15(4)(h); and

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(8) failure to review the Mainland Moose recovery plan within the statutory deadline per s. 15(12);

Mandamus

[136] The Applicants seek *mandamus* in the following terms:

(1) the Minister must ensure the Black Ash recovery plan is revised within six months of this judgment to include the identification of core habitat;

(2) the Minister must prepare a management plan for the Eastern Wood Pewee within one year of this judgment;

(3) the Minister must ensure the recovery plan for the Mainland Moose is properly reviewed within six months of this judgment;

(4) the Minister must ensure the Mainland Moose recovery plan is revised within six months of this judgment to include the identification of core habitat;

(5) the Minister must prepare a recovery plan for the Ram's-head Lady Slipper within six months of this judgment; and

(6) the Minister must prepare a recovery plan for the Wood Turtle or properly adopt the federal strategy within six months of this judgment.

[137] An order of *Mandamus* compels the performance of a public duty. The governing principles were summarized in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (Fed. C.A.), at para. 45, affirmed at [1994] 3 S.C.R. 1100. In Nova Scotia, Murphy J. summarized the governing principles in *Sand, Surf & Sea Ltd v Nova Scotia (Minister of Transportation & Public Works)*, 2005 NSSC 233:

> [22] The Nova Scotia Court of Appeal in *Smith's Field Manor Development Ltd. v. Halifax*, [1988] N.S.J. No. 56, and in *Armoyan Group Ltd. v. Halifax*, [1994] N.S.J. No. 68, adopted the summary of the elements required to issue a mandamus order which was set out as follows in *Rawdon Realities Limited v. Rent Review Commission* (1983), 56 N.S.R. (2d) 403 (N.S.S.C.):
>
> > In order for mandamus to lie, or an order in the nature of mandamus to lie, there must be, first of all, standing, a sufficient legal interest in the parties making the application. There must also be no other legal remedy, equally convenient, beneficial and appropriate. Thirdly, there must be a duty to the applicant by the parties sought to be coerced to do the act requested. Fourthly, the duty owed must not be one of a discretionary nature, but may be established either at common law, or by statute. Fifthly, the act requested to be done must be required at the time of the application, not at some future date. Sixthly, there must be a request to do the act and that request must have been refused.

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> [23] The requirements for mandamus to issue may be summarized as: (1) a clear legal right at the time of the application; (2) a corresponding duty that is public and specific; (3) there must be no discretion open to the official; and (4) there must have been demand and refusal...
>
> [24] Where a tribunal refuses to exercise its discretion, a Court may order it to do so by mandamus, but will not direct which way to decide...
>
> [25] As with all prerogative remedies, mandamus may be denied in the exercise of the Court's discretion.

[138] The *mandamus* dispute here centres on the questions of whether a duty was owed (standing); whether there was a prior demand and refusal; and whether there is any practical benefit to the order.

[139] The Applicants concede that two issues are moot for *mandamus* purposes. In 2019 the Minister appointed recovery teams for the Canada Warbler (March 22) and the Ram's-head Lady Slipper (May 15). The Respondents argue that *mandamus* is also moot with respect to the review of the Mainland Moose recovery plan and the recovery plan for the Ram's-head Lady Slipper. Alternatively, they say, *mandamus* would be premature on those issues due to the recent steps. For example, they say the Ram's-head Lady Slipper recovery plan is not yet prepared because the recovery team was only appointed in May 2019.

[140] I am not satisfied that there is a principled basis to distinguish between the issues on which the Minister took action after the judicial review application was filed, and those where no action has been taken. To find otherwise would implicitly suggest that a decision-maker can cure a serious failure to observe statutory duties by taking action after a *mandamus* application is filed, essentially placing the onus on the interested parties to take legal action before the Minister is required to comply with his or her duties. As such, I regard the scope of the prospective *mandamus* order to be the items listed above, excluding the two items conceded by the Applicants.

Standing

[141] The first element of *mandamus* is standing, that is, the applicant must have "a sufficient legal interest" (see *Sand, Surf & Sea* at para. 22, and the cases cited there). The Respondents did not raise any preliminary challenge to the Applicants' standing (for instance, by way of summary judgment), but the burden is on the Applicants to show they have met the test for *mandamus*, which has a standing component. The Respondents argued in oral submissions that because those who

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are directly affected by the decision are non-humans, *mandamus* is not available, because no person has standing; although the Applicants may have standing to advance the claim (which is not disputed), the Respondents argue, they are not owed a duty and cannot make out the standing requirement for *mandamus*.

[142] In *Apotex*, supra, addressing the requirement that the duty must be owed to the applicant (para. 45), the court noted that "[h]istorically, this issue has been framed as one concerning standing to bring a mandamus application. The Supreme Court has considerably loosened the requirements for standing over the decades..." (fn. 6).

[143] The Appellants rely on public interest standing as the basis for their entitlement to *mandamus*. Public interest standing is concerned with "maintaining the rule of law", as Bryson J.A. wrote, for the court, in *Canadian Elevator Industry Education Program (Trustees of) v Nova Scotia (Elevators and Lifts Act)*, 2016 NSCA 80, at para 13. He cited *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138, where the majority said, at 145, that "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication." The test for public interest standing was set forth in *Canadian Council of Churches v. R.*, [1992] 1 SCR 236 at 253:

> It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

[144] In summary, there must be a serious issue to be tried; the Applicant must show a "genuine interest" in the subject matter; and there must be no other reasonable and effective manner for the case to come before the Courts. In *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45, at para 2, Cromwell J., for the Court, said the three factors should not be assessed like a checklist, but rather seen as "interrelated considerations to be weighed cumulatively… in light of their purposes" (para 36). The factors should be "applied purposively and flexibly" (para 37).

[145] The Applicants rely on *Great Lakes United v. Canada (Minister of the Environment)*, 2009 FC 408, for the proposition that if they meet the test for public interest standing, they also meet the threshold for standing in the *Apotex*

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mandamus test. In *Great Lakes United*, the applicants sought *mandamus* compelling the federal Minister of the Environment to require reporting of certain pollutants for mining facilities under the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33. The minister did not dispute standing. The court commented on public interest standing:

> 68 The Applicants cite and rely upon *Distribution Canada Inc. v. Minister of National Revenue*, [1993] 2 F.C. 26 (Fed. C.A.), at paragraph 24 for the requirements of when a duty is owed to an applicant:
>
> > ...the matter raised by the appellant is one of strong public interest and there may be no other way such an issue could be brought to the attention of the court, were it not for the efforts of the appellant.
>
> 69 The Applicants submit that this finding has been interpreted by the Federal Court of Appeal to permit public interest standing where "the matter raised...is one of strong public interest and there may be no other way such an issue could be brought to the attention of the Court, were it not for the efforts of the [public interest litigant]": *Harris v. R.*, [2000] 4 F.C. 37 (Fed. C.A.) at paragraph 53 and *Apotex* at paragraph 45. In the current case, this aspect of the *Apotex* test is conflated with the test for public interest. The Applicants submit that in cases where environmental protection has been at issue, public interest groups have regularly been granted standing to seek *mandamus*: *Friends of the Old Man River Society* and *Sierra Club of Canada* at paragraph 32. [Emphasis added.]

[146] While *Apotex* does not address standing in detail as a free-standing issue, the court did suggest that a relaxed threshold for standing may be incorporated into the "balance of convenience" aspect of the *mandamus* test (para. 45):

> 107 The jurisprudence reveals three factual patterns in which the balance of convenience test has been implicitly acknowledged. First, there are those cases where the administrative cost or chaos that would follow upon the order's issue is obvious and unacceptable... It is noteworthy that in most of these cases the duty in question was owed to the public at large rather than the individual applicant. In this sense, the law of mandamus and the law of standing may be said to intersect. This relationship was implicitly acknowledged by Desjardins J.A. in *Distribution Canada v. M.N.R.*, *supra*, at page 39:
>
> > I am, for my part, inclined to think that with the addition of the *Finlay* case, the jurisprudence does not clearly exclude the possibility of extending standing to a proceeding in *mandamus* where there is public interest to be expressed and there is no other reasonable way for it to be brought to court.
>
> Whether the "balance of convenience" test may be employed as an ostensive vehicle by which standing requirements may be further relaxed I leave for another day.

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[147] The Court in *Apotex* left the door open for the conclusion drawn in *Great Lakes United*. Other cases have suggested that meeting the test for public interest standing is sufficient for *mandamus* purposes. In *Finlay v Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at para 35, the court held that previous case law did not "clearly exclude such recognition" for persons with public interest standing to bring a non-constitutional challenge by way of declaration. Courts have subsequently held that because *mandamus* was not excluded by *Finlay*, this reasoning should apply to that remedy as well.

[148] A summary of the development of the law of public interest standing in relation to *mandamus* appeared in *Gauchier v Cunningham*, 2013 ABQB 713:

> 75 In *Distribution Canada Inc. v. Minister of National Revenue*, [1993] 2 F.C. 26 (Fed. C.A.), the court noted at para 23 that the notion of public interest was enlarged in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.), due to the court's concern that "it should have discretion to recognize public interest standing to bring an action for a declaration when there was no other reasonable way the matter could be brought to Court." The court further commented in *obiter* at para 23 that *Thorson v. Canada (Attorney General) (No. 2)* (1974), [1975] 1 S.C.R. 138 (S.C.C.); *MacNeil v. Nova Scotia (Board of Censors)* (1975), [1976] 2 S.C.R. 265 (S.C.C.); *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 (S.C.C.) and *Finlay* had not clearly excluded "the possibility of extending standing to a proceeding in *mandamus* where there is a public interest to be expressed and there is no other reasonable way for it to be brought to court."
>
> 76 In my view, standing can be extended to a third party if they have a genuine interest in the resolution of the issue and there is no other reasonable and effective manner in which the issue may be brought before the court.

[149] Whether public interest standing overlays the second part of the *Apotex* test or instead is considered at the "balance of convenience" stage is somewhat ambiguous, as each of the above-cited decisions were decided before *Apotex*. However, the caselaw supports the view that if there is a legally enforceable duty, the applicants have made out the common law test for public interest standing, and there is no alternative recourse, *mandamus* may be appropriate, even where the duty is not owed directly to the applicants. The court still retains discretion not to order *mandamus* even where the test is made out. This view of the law appears to reflect a general expansion of public interest standing in administrative law cases, particularly where there is no other reasonable way to bring a matter to court.

[150] Returning to the test for public interest standing, the Applicants have established a serious issue to be tried. This is not a high bar. The question must be

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important or "far from frivolous" (see *Downtown Eastside* at para. 42). It cannot be disputed that the issues raised here meet that standard, being integral to the Minister's duties under the *ESA*.

[151] I am satisfied that the Applicants have also established they have a "genuine interest" in the matter. The Applicants include local non-profit naturalist groups, as well as Mr. Bancroft, a naturalist and a former employee of the Department of Lands and Forests. While the Applicants conceded there may be other groups in Nova Scotia with similar interests, that does not preclude their interest as public litigants.

[152] As to the third factor, no one suggests the species themselves are capable of bringing an application, and the *ESA* does not provide for penalties or other consequences against the Minister where deadlines have been breached. There are no alternative routes to compel the Minister to meet his duties under the *ESA*. The species need people like Mr. Bancroft and organizations like the other Applicants and the Intervenor to take such action and speak for them. It would be absurd if no person or interested entity could bring such reviews under the *ESA* to hold government to account. How else would the Mainland Moose, Ram's- head Lady Slipper, Canada Warbler, Black Ash, Wood Turtle or Eastern Wood Pewee find protection when and if a government failed to reasonably execute its duties and responsibilities?

[153] I am satisfied that the Applicants have met the threshold to be considered public interest litigants for the purpose of *mandamus*.

Demand and refusal

[154] The Respondents deny that there was a demand that the Minister comply with the *ESA*, and subsequent refusal. The Applicants say there have been demands directed to the Minister since 2012 in letters and reports, and the Minister has "constructively" refused to meet these demands by failing to fulfill his legal duties over a long period of time.

[155] The caselaw regarding what constitutes a "demand" suggests a fairly low threshold. The applicants in *Great Lakes United*, *supra*, relied on letters to the Minister requesting that he fulfill his statutory duties, though there was no analysis of the issue. In *Armoyan Group Ltd v. Halifax (County)* (1994), 129 N.S.R. (2d) 83, [1994] N.S.J. No. 68 (C.A.), the city failed to either approve or reject the applicant's proposal within the 30-day window allotted by the governing statute. A

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letter requesting that the proposal be either approved or rejected satisfied the "demand" requirement.

[156] Additional case law discusses what constitutes a refusal. Whether delay can constitute refusal has been considered in immigration cases. In *Bhatnager v Canada (Minister of Employment & Immigration)*, [1985] 2 FC 315, the court said:

> 4 The decision to be taken by a visa officer pursuant to section 6 of the Regulations with respect to issuing an immigrant visa to a sponsored member of the family class is an administrative one and the Court cannot direct what that decision should be. But *mandamus* can issue to require that some decision be made. Normally this would arise where there has been a specific refusal to make a decision, but it may also happen where there has been a long delay in the making of a decision without adequate explanation... [Emphasis added.]

[157] There is caselaw discussing whether *mandamus* is appropriate where the respondent has taken steps to respond to the demand. In *Nautica Motors Inc v. Canada (Minister of National Revenue)*, 2002 FCT 422, the minister issued an interim HST assessment in response to the applicant's demand, but not a final assessment that would confirm whether a refund was payable. The court considered this an effective refusal to process the returns (para. 47).

[158] Similarly, in *Armoyan*, *supra*, after the applicant wrote to the respondent asking for its proposal be approved or rejected, the respondent replied that it was awaiting a response from a municipal department, which required further steps be taken before responding. No final approval or rejection was issued, despite the statutory timeline. Matthews J.A. said, for the court:

> 27 The appellant clearly indicated that it was seeking endorsed approval of Morris Lake Estates. Equally clear were its reasons for that request. DEW fully understood the appellant's position as did the development officer. Unfortunately the option of an appeal to the Board was not open to the appellant until the development officer pursuant to s. 105(3)(c) of the Act notified the appellant of her refusal. The appellant is effectively stymied. It obviously disagrees with the position taken by DEW. As matters stand it must bend to the will of DEW or the application is simply in limbo. It can resubmit its application but it is obvious: the same result will follow. The "final approval" granted by the development officer by letter of July 13, 1993 is not sufficient for the needs of the appellant and was so recognized by that officer as is evident from the final two paragraphs of that letter earlier quoted. As matters now stand the development officer would never be required to decide whether to approve or refuse the application for endorsed approval and the appellant has no recourse.

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[159] The Court of Appeal held that *mandamus* was justified. This further supports the conclusion that inaction without adequate explanation amounts to refusal in some circumstances.

[160] In some circumstances, action taken may be sufficient to establish that no refusal occurred. In *Goose Bay Outfitters Ltd v Newfoundland and Labrador (Minister of Tourism, Culture & Recreation)* (2002), 214 Nfld. & P.E.I.R. 326, [2002] N.J. No. 153 (Nfld. T.D.), the applicant fishing lodge sought *mandamus* requiring enforcement of regulations prohibiting the operation of unlicensed tourist establishments. The court discussed refusal:

> 24 On the evidence it cannot be said that, in response to Goose Bay Outfitters Limited position, the Minister took no action, or that he refused to act on the demand of the Applicant. In order to succeed on this issue the Applicant would have to show that the Respondent refused to perform the act which it is sought to have performed by legal remedy and which the Respondent had a duty to perform and over which the Respondent had no discretion. In *Northern Lights Fitness Products Inc. v. Canada (Minister of National Health & Welfare)* (1994), 75 F.T.R. 111 (Fed. T.D.) at page 115 Tremblay-Lamer, J. sated at paragraph 16:
>
> > "The nature of the duty owed is to enforce the law, and only complete inaction in this respect may give rise to a judicial remedy. An important distinction must be drawn between requiring a government body to take some enforcement action, which the court can do, and determining the manner of enforcement, which the court cannot do."
>
> The court held there was no legal duty to act. The manner of enforcement was discretionary, and there was no statutory deadline, so there was no benchmark that the court could use to say whether the delay was justified.

[161] The caselaw, then, suggests that whether a particular response, action, or delay constitutes a refusal is fact-specific. It will depend on what is being asked for and the specific provisions of the statute involved. The more discretion the minister has, the more likely that some action will suffice. However, where there is a clear legal duty to act, and such action does not take place, saying that the work is in progress is likely insufficient (see *Distribution Canada Inc., supra,* at para 9).

[162] The Applicants identify several instances where they say a demand was made for the Minister's duty to be carried out. The Respondent says these alleged demands are "for the most part, vague" and are insufficient for *mandamus*."

[163] As early as 2012, in a letter to the Minister, regarding the Mainland Moose, the Intervenor pointed out that core habitat had not been identified and asked that,

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if the recovery plan for the Moose were not amended, an explanation by provided. The Minister replied, reiterating the information in the existing recovery plan.

[164] The next alleged demand is a memorandum dated March 16, 2015, from Dr. Boates, manager for biodiversity at the Department of Natural Resources, to the Minister. Dr. Boates has no direct interest in this judicial review. His memorandum refers to a report by the Intervenor which "raised concerns about the low number of recovery plans in place, the lack of critical habitat protection and in particular, lack of progress on the recovery of Mainland Moose." (The Intervenor's report itself was found inadmissible in this matter: *Bancroft v Nova Scotia (Lands and Forestry)*, 2019 NSSC 205).

[165] The Applicants also refer to a 2016 Audit in which the Office of the Auditor General noted various failures of the Department of Natural Resources to meet its duties under the *ESA*. The Audit found that numerous plans were not completed while others were late. Some species received attention by the Department while others received little to none. The Audit recommended, *inter alia*, that the Department "establish recovery teams, and develop and review recovery and management plans for species at risk, as required under the *Endangered Species Act*" and that plans for all listed species should be reviewed to "amend or develop appropriate practices, as guided by recovery plans, to protect their habitat."

[166] A 2018 Departmental report addressed the 2016 audit recommendations. The report indicated the Department's agreement with the recommendation to "develop and review recovery and management plans for species at risk, as required under the *Endangered Species Act*", and stated that it had shifted resources to address it. The recovery plan for the Ram's-head Lady Slipper was still "in progress", and data was being collected on the Mainland Moose, and its plan would be updated once the data had been assessed. Otherwise, the report does not refer to any of the other species named in this application. The Respondents say this report indicates that there was "*no* refusal" [emphasis theirs].

[167] The fourth alleged demand cited by the Applicants consists of sections of the *Independent Review of Forest Practices in Nova Scotia* by William Lahey (the Lahey Report). While this report dealt primarily with forestry practices, it also reviewed the *Endangered Species Act*, concluding that the *ESA* "must be fully and rigorously implemented in respect to forests on both Crown and private land – as it currently is not" (p. iii). It also noted that there "are 46 species listed as threatened or endangered… but there are no regulations respecting core habitat" (para. 53). Finally, another alleged demand for adherence to the Act appeared in Dr. Lahey's

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recommendation for the Department to "ensure, as an immediate priority, that the [*ESA*] is fully implemented on Crown land, including the completion of recovery plans that identify and make provision for protection of core habitat for species at risk located on Crown lands" (para. 18).

[168] Finally, the Applicants point to a 2018 letter from the Applicant Mr. Bancroft to the Department, referring to both Mainland Moose and Canada Warblers. Mr. Bancroft wrote, "[w]e respectfully ask that you and your department abide by the mandatory obligations in the *Endangered Species Act*."

[169] I conclude that the memo from Dr. Boates does not assist the Applicants, but the other instances of demands are valid. The Record establishes that by 2012 the Department had notice of claims that it was failing to perform mandatory duties under the *ESA*. The Intervenor's 2012 letter specifically calls on the Department to identify core habitat for the Mainland Moose. The 2016 audit and the Lahey Report are more general, stating repeatedly that the Department was failing to meet its mandatory duties under the *ESA*, particularly regarding recovery and management plans. The Lahey Report refers to inadequate efforts at identifying core habitat under the *ESA*. Both documents recommend that the Department comply with the *ESA*. Lastly, Mr. Bancroft expressly requested action on the Minister's obligations.

[170] The Respondents offer no authority for their position that the Applicants show that specific demands were made in respect of every specific point. I conclude that this would be too high a threshold in these circumstances. There is likewise no authority suggesting that demands made by persons other than the Applicants cannot support *mandamus*. Ample time passed after each demand, but compliance did not occur. Therefore, this is not a case where the Respondents can rely on ongoing efforts or communication to show there was no refusal. The delay is sufficient to constitute refusal in these circumstances.

[171] Accordingly, I conclude that *mandamus* lies on the issues identified above.

Mandamus **timelines**

[172] The Applicants request specific timelines on the orders for *mandamus*, of varying lengths depending on the status of the species. During submissions, I inquired into the rationale behind the requested timelines, and specifically the basis for the proposed timelines of six months and one year on the various specific items.

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[173] *Mandamus* orders with timelines have been issued in immigration cases where there has been unreasonable delay (see *Douze v Canada (Minister of Citizenship & Immigration)*, 2010 FC 1337, at paras 31-34; *Thomas v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 164, at paras 29-33). The justification for these timelines was a chronic failure by the minister to proceed in a timely fashion, and sufficient passage of time that there was no reason to further delay compliance with the relevant statute.

[174] Where timelines are imposed on *mandamus* orders, the amount of time must be responsive to the legal and factual context of each case. The Applicants submit that for Black Ash, there is ample information available in the existing recovery plan to address core habitat, and any new studies could be completed in six months. The Eastern Wood Pewee is the only species for which the Applicants seek a timeframe of one year. For that species there is no existing plan, and more time is necessary despite the management plan already being three years late at the time of filing.

[175] I am not persuaded that the requested timelines are appropriate here. It does not follow from the caselaw that a deadline will necessarily be attached to a *mandamus* order, and I am not convinced that such deadlines would be helpful. Accordingly, the Applicants shall have an order for *mandamus* in the terms set out above, with the exception of the timelines.

Supervision

[176] The Applicants seek an order for supervision by the court of the Minister's compliance with the order, in the following terms:

> The Minister shall, within 45 days of the date of this judgment, file an affidavit with this court and provide a copy to the Applicants that identifies all species at risk listed under the Act, including those addressed in this Application, for which, as of that date, the Minister has failed to undertake any of the mandatory requirements under s. 15 of the Act and which identifies the outstanding requirements; and
>
> The Minister shall, within six months after the date of this judgment and then every three months thereafter, file an affidavit with this court and provide a copy to the Applicants containing a progress report on achieving the mandatory requirements under s. 15 of the Act for the species at risk listed under the Act.

[177] These requests for relief essentially ask the court to monitor the Minister's implementation of section 15 regarding all species at risk in Nova Scotia, including

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those not named in this Application. The relief requested is onerous, requiring the Minister to compile progress reports and deliver them to the court every three months, indefinitely.

[178] The *Civil Procedure Rules* do not preclude the remedy of supervision (or "reporting"). Rule 7.11 uses open-ended language, permitting the court to grant "any order in the court's jurisdiction", including, at Rule 7.11(e), "an order providing anything formerly provided by prerogative writ..." In *Nova Scotia (Minister of Agriculture) v. Rocky Top Farm*, 2017 NSCA 2, Saunders J.A. said, "[Rule 7.11] does not lessen, modify or abrogate the Supreme Court's inherent jurisdiction, as expressly provided for in s. 41(g) of the *Judicature Act*" (para 95). Therefore, if supervision is a remedy available to this Court, through inherent jurisdiction or otherwise, then it is available on judicial review.

[179] Inherent jurisdiction is a procedural concept that should not be used to effect changes in substantive law (*Goodwin v Rodgerson*, 2002 NSCA 137, at para. 17). In *Ocean v Economical Mutual Assurance Co*, 2009 NSCA 81, the Court of Appeal noted at para 77 that inherent jurisdiction "does not bestow an unfettered right to do what, in the judge's opinion, is fair as between the parties. A court's resort to its inherent jurisdiction must be employed within a framework of principles relevant to the matter in issue" (para. 77).

[180] The Applicants point to two cases in support of this Court retaining jurisdiction to supervise: *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62. and *Western Canada Wilderness Committee, supra*. The majority in *Doucet-Boudreau* confirmed that supervisory relief is a remedy available to a superior court:

> 71 Although it may not be common in the context of *Charter* remedies, the reporting order issued by LeBlanc J. was judicial in the sense that it called on the functions and powers known to courts. In several different contexts, courts order remedies that involve their continuing involvement in the relations between the parties... Superior courts, which under the Judicature Acts possess the powers of common law courts and courts of equity, have "assumed active and even managerial roles in the exercise of their traditional equitable powers" (K. Roach, *Constitutional Remedies in Canada* (loose-leaf), at para. 13.60). A panoply of equitable remedies are now available to courts in support of the litigation process and the final adjudication of disputes...

[181] Supervision is therefore not purely a *Charter* remedy and is available to superior courts in other contexts. In *Doucet-Boudreau*, the respondents argued that retaining jurisdiction would offend the *functus officio* doctrine. The majority

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rejected this argument, stating that "nothing in the *Judicature Act* appears to remove from a trial judge the power to hear reports on the implementation of his or her order" (para. 82).

[182] Although *Doucet-Boudreau* dealt with section 24 of the *Charter*, much of the discussion is transferable to the administrative law framework. Both areas of law deal with judicial oversight of the legislature and those to whom it delegates power. Like section 24 of the *Charter*, Rule 7.11 is permissive in terms of the remedies it allows. This is not an unlimited power; the remedy must be responsive to the complaint and not go further than necessary to give effect to the court's decision. Supervision was necessary in *Doucet-Boudreau* because of the risk that declarations would not be followed by the government:

> 66 LeBlanc J. obviously considered that, given the Province's failure to give due priority to the s. 23 rights of its minority Francophone populations in the five districts despite being well aware of them, there was a significant risk that such a declaration would be an ineffective remedy. Parents such as the appellants should not be forced continually to seek declarations that are essentially restatements of the declaration in *Mahe*. Where governments have failed to comply with their well understood constitutional obligations to take positive action in support of the right in s. 23, the assumption underlying a preference for declarations may be undermined. [Emphasis added.] In *Mahe*, *supra*, at p. 393, Dickson C.J. recognized this possibility:
>
> > As the Attorney General for Ontario submits, the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met; the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right. Once the Court has declared what is required in Edmonton, then the government can and must do whatever is necessary to ensure that these appellants, and other parents in their situation, receive what they are due under s. 23. [Emphasis in *Doucet-Boudreau*.]
>
> This Court's judgment in *Mahe* speaks to all provincial and territorial governments. LeBlanc J. was entitled to conclude that he was not limited to declaring the appellant parents' rights and could take into consideration that the case before him was different from those in which declarations had been considered appropriate and just.
>
> 67 Our colleagues LeBel and Deschamps JJ. suggest that the reporting order in this case was not called for since any violation of a simple declaratory remedy could be dealt with in contempt proceedings against the Crown. We do not doubt that contempt proceedings may be available in appropriate cases. The threat of contempt proceedings is not, in our view, inherently more respectful of the

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> executive than simple reporting hearings in which a linguistic minority could discover in a timely way what progress was being made towards the fulfilment of their s. 23 rights. More importantly, given the critical rate of assimilation found by the trial judge, it was appropriate for him to grant a remedy that would in his view lead to prompt compliance. Viewed in this light, LeBlanc J. selected a remedy that reduced the risk that the minority language education rights would be smothered in additional procedural delay. [Emphasis added.]

[183] While LeBlanc J. could rely on *Mahe v. Alberta*, [1990] 1 S.C.R. 342, a case ordering virtually the same declarations sought by the applicants before him, when he made his order, there is no such precedent for section 15 of the *ESA*. This case raises novel issues, interpreting language that has not been interpreted before. Consequently, it would be premature to order supervisory relief in this case. The government has not had a chance to respond to this decision, and I am not prepared to infer beforehand that there is a significant risk that the Minister will not comply.

[184] Furthermore, there is nothing before the court to establish why other species' plans were neither created nor implemented. In *Doucet-Boudreau* there was evidence that politics played a role in the delay, as it appeared that a successive government reneged on an earlier government's promise. There was also evidence that parents had been seeking French-language schools in Nova Scotia since 1984. There were very clear demands emanating from the Applicants regarding their assertion of rights under the *Charter*.

[185] Moreover, the Applicants seek supervision encompassing the entirety of section 15 of the *ESA*, which includes many subsections not dealt with in this judgment. Further disputes may arise that, in effect, turn the supervisory hearings into adversarial litigation.

[186] In *Western Canada Wilderness Committee*, *supra*, supervision was ordered by agreement of the parties, but the judge adjourned the *mandamus* requests. Several issues were premature: she could not order that a recovery strategy be posted by a certain date because the federal legislation required other steps first. Therefore, there was no duty to act established. The judge agreed it was appropriate to order supervisory relief in lieu of *mandamus* to ensure the minister eventually posted the recovery strategies:

> 125 I concur with the parties that it is appropriate for the Court to retain jurisdiction in this matter. This would obviate the need for the applicants to start over with fresh applications for *mandamus* to compel the performance of the Ministers' statutory duties in the event that final recovery strategies are not posted

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> in the public registry in a timely manner. This would obviously be a more efficient use of the resources of all concerned.

[187] The court in *Western Canada Wilderness Committee*, *supra*, adjourned the *mandamus* applications *sine die*, with the court retaining jurisdiction over the applications. The scope of supervision was narrower than that sought here, relating to adjourned *mandamus* issues concerning named species. The Applicants' supervision request goes far beyond this, requesting indefinite court supervision of the implementation of section 15 in respect of all species at risk.

[188] Whether it is appropriate to invoke the court's power of supervision depends on the circumstances of each case. This case does not deal with any gaps in legislation. There is no procedural abuse to remedy. It is not necessary to invoke inherent jurisdiction to resolve injustice or inequity; the declaratory and *mandamus* relief should achieve justice here. It is not necessary to do more at this stage to give effect to the court's order. There is no evidentiary basis upon which to assume that the Minister will not comply with the *ESA* obligations under the order absent court supervision. This does not, of course, mean that supervision could never be appropriate in applications of this kind. Time will tell.

Conclusion

[189] In accordance with the foregoing reasons, the application for judicial review is allowed in part. The Minister's conduct in failing to observe non-discretionary, statutory duties imposed by section 15 of the *ESA* was unreasonable. The Respondents did not provide evidence that would explain the repeated failures to uphold the clear language of the statute, whether due to lack of resources or other reasons. The Minister's conduct is therefore unreasonable, as described above. The Applicants are entitled to declarations to that effect, and an order of *mandamus* as set out above.

[190] If the parties cannot agree on costs, they may provide written submissions within 30 days.

Brothers, J.

2020 NSSC 175 (CanLII)

Tab 6

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DECISION and ORDER **NSARB 2024-001**

NOVA SCOTIA AQUACULTURE REVIEW BOARD

IN THE MATTER OF: applications made by **C&G AQUACULTURE** for a **NEW MARINE AQUACULTURE LICENCE and LEASE** for **SUSPENDED, BOTTOM CULTURE WITH GEAR, and BOTTOM CULTURE WITHOUT GEAR** of **AMERICAN OYSTER (*Crassostrea virginica*), BAY SCALLOP (*Argopecten irradians*), QUAHOG (*Mercenaria mercenaria*), and RAZOR CLAM (*Ensis directus*) - AQ#1448** in **MERIGOMISH HARBOUR, PICTOU COUNTY.**

BEFORE: Coleen Morrison, Vice Chair of the Board and Chair of the Hearing
Tim Cranston, Chair of the Board
Damien Barry, Board Member

HEARING DATE(S): **Session 1** November 25, 2024

DECISION DATE: December 23, 2024

Introduction

[1] C&G Aquaculture (the Applicant or C&G) has applied for a new marine shellfish aquaculture license and lease (AQ#1448) in Merigomish Harbour, Pictou County. The proposed cultivation methods are suspended shellfish, bottom shellfish cultivation with gear and bottom shellfish cultivation without gear. The anticipated species are American oyster, quahog, bay scallop and razor clam.

[2] Following extensive consultations between the Applicant, the Department of Fisheries and Aquaculture (DFA), various departments and agencies, and the public, followed by the requisite public hearing, the Aquaculture Review Board (the Board) has decided to issue the license and lease in respect of Q#1448, subject to the development of a farm management plan (Farm Management Plan) which includes eel grass monitoring.

Background

[3] In 2013, the Province of Nova Scotia tasked an independent panel to develop a regulatory framework for aquaculture in Nova Scotia. Following extensive study and consultation, Meinhard Doelle and William Lahey produced the report titled *A New Regulatory Framework for Low-Impact/High-Value Aquaculture in Nova Scotia* [Doelle Lahey Report] in 2014. The report's authors suggested aquaculture regulation to be guided by the concept that aquaculture that integrates economic prosperity, social well-being and environmental sustainability is characterized by low impact and high value. They explained that this meant that, ideally, social and environmental impacts were low and decreasing over time while aquaculture had positive economic and social value, increasing over time.

[4] This work formed the basis for a new legislative and regulatory framework governing aquaculture in the province, namely the *Fisheries and Coastal Resources Act* 1996 c.25 as amended (the Act). The purpose of the Act, as set out in Part 43A, is to:

(a) recognize that aquaculture is a legitimate and valuable use of the Province's coastal resources;

(b) ensure aquaculture is conducted under conditions and in accordance with controls that protect the environment;

(c) provide a predictable and efficient regulatory environment for business and public confidence;

(d) ensure equity, fairness and compatibility in access to, and utilization of, public water resources for aquaculture;

(e) ensure that members of the public have access to information with respect to the regulatory process and an opportunity to participate in the process;

(f) ensure that regulations governing aquaculture are achievable, contain incentives for compliance and are enforceable;

(g) ensure that coastal communities derive positive social and economic benefits from aquaculture;

(h) ensure that aquaculture is conducted with due regard to the health, well-being and recovery of species at risk; and

(i) ensure that the regulation of aquaculture contributes to the productive development of the Province's coastal resources.

[5] The legislation also established the Board under section 48(1) of the Act, giving it the authority, *inter alia*, to decide upon the grant of aquaculture licenses and leases. The Board is independent of the Minister, who is bound by the conclusions and direction of the Board [section 52 of the Act].

[6] In deciding on applications for marine aquaculture sites, the Board is mandated, pursuant to rule 3 of the *Aquaculture Licence and Lease Regulations* N.S. Reg. 347/2015 amended to N.S. Reg. 186/2019 (the Regulations), to consider the following eight factors (Rule 3 Factors):

(a) the optimum use of marine resources;

(b) the contribution of the proposed operation to community and Provincial economic development;

(c) fishery activities in the public waters surrounding the proposed aquacultural operation;

(d) the oceanographic and biophysical characteristics of the public waters surrounding the proposed aquacultural operation;

(e) the other users of the public waters surrounding the proposed aquacultural operation;

(f) the public right of navigation;

(g) the sustainability of wild salmon and

(h) the number and productivity of other aquaculture sites in the public waters surrounding the proposed aquacultural operation;

[7] Mr. Bouchie of C&G Aquaculture is local to the area of the lease. He is well experienced in aquaculture, in particular, oyster cultivation. He plans to cultivate oysters, for the moment, with the possible introduction of razor clam, quahog and bay scallops in the future. The contemplated gear type includes "BOBR" devices (using, for example 64 lines of 150m each) and other gear such as "Oyster Gro" cages, bags and trays on bottom. It is anticipated that significant portions of the proposed lease site could be used year-round, with smaller segments appropriate for seasonal use only. The site is approximately 24 hectares, which comprises less than 0.1% of Merigomish Harbour. The Applicant anticipates that the site will produce, at capacity, 1.6 million oysters. Advantages of the site include its proximity to existing aquaculture sites offering processing infrastructure. The location's water depths, shelter and ice formation are likewise favourable, as is the distance to homes. Mr. Bouchie believes the Applicant's activities will not interfere with the limited recreational boating in the area and suggests that having people on the water will enhance recreational boat safety. He explains that commercial and private fishing activity is minimal.

[8] As mandated by the application process, the Applicant undertook public outreach to the local community, including but not limited to recreational users, commercial fishermen and nearby landowners. His responses appear to have satisfied most concerns.

[9] On September 21, 2021, shortly before the expiration of the option to lease which was granted on September 23, 2020, C&G submitted this application (the Application) to the Department of Fisheries and Aquaculture, pursuant to section 11 of the Regulations.

[10] The Application then underwent the detailed review and analysis required under section 14 of the Regulations. This included consultation with stakeholders, namely the Federal Department of

Fisheries and Oceans Canada (DFO), the Canadian Food Inspection Agency, Transport Canada, Environment and Climate Change Canada – Canadian Shellfish Water Classification Program, and Canadian Wildlife Service (ECCC), the Nova Scotia Department of Environment and Climate Change (CCHT), the Nova Scotia Department of Agriculture (DoA), the Nova Scotia Department of Municipal Affairs and Housing, the Nova Scotia Department of Communities, Culture, Tourism and Heritage, the Nova Scotia Department of Natural Resources and Renewables and the Nova Scotia Office of L'nu Affairs (OLA). These agencies provided responses, including guidance and recommendations to DFA based on their respective mandates. DFA reported the results to the Applicant and facilitated responses to questions and comments of these network partners of DFA.

[11] The issues and questions raised during consultations included:

(a) DFO provided information, advice and recommendations involving the presence of eelgrass habitat. It concluded that, based on available information, including satellite imagery, it is unlikely that the approval of the application would result in severe impacts to eelgrass in Merigomish Harbour, noting that the proposed site covers "approximately 2% of the harbour's eelgrass" and expert review of available satellite imagery showed what appeared to be a large quantity of dense and healthy eelgrass throughout the Harbour. DFA indicated it would work with DFO to ensure its advice and recommendations are incorporated into the requisite Farm Management Plan. These include measures to mitigate impacts on eelgrass.

(b) ECCC's Canadian Wildlife Services Division provided operational advice and recommendations that were referred to Mr. Bouchie. These included beneficial practices to avoid issues with migratory birds, shorebirds, waterfowl, seaducks and colonial nesters.

(c) DoA advised of significant agriculture, particularly livestock-related agriculture, near the proposed site. It identified a risk of impact from bacterial load build-up, particularly after heavy rainfall. DFA noted these issues are dealt with through the Canadian Shellfish Sanitation Program, which the operator must adhere to.

(d) CCHT noted twelve pre-contact archaeological sites in the vicinity of the proposed lease site, two of which intersected with it. Underwater investigations were suggested, and DFA provided side scan sonar data for CCHT's review. The side scan sonar data was reviewed by Aaron Taylor, an archaeologist and Ian Spooner, an environmental geoscientist, who concluded that based on the bathymetric data and geomorphological conditions at or near the proposed site, there is little potential for impacting pre-contact settlement, primarily owing to a lack of fresh water nearby. The DFA report indicated that if the application is approved, it will work with the Applicant to ensure the advice and recommendations provided by CCHT are incorporated into the Farm Management Plan or conditions of license.

(e) OLA, more particularly the Pictou Landing First Nation, raised no issues and provided advice on the duty to consult with the Mi'kmaq of Nova Scotia, which DFA did upon deciding to proceed with the application.

[12] The DFA subsequently conducted its internal technical review and analysis as explained by Mr. Nathanial Feindel, Manager of Aquaculture Development and Marine Plant Harvesting, in his affidavit and oral testimony. The DFA review includes assessing the production plan, infrastructure, services/suppliers, and employment. The Applicant provided information that allowed DFA to assess Mr. Bouchie's general knowledge of farming, infrastructures and environmental conditions. DFA assessed the site design, determining that the estimate provided by the Applicant was reasonable for the initial establishment of the site. DFA noted that ultimately the maximum number of lines, cages, tumblers and other equipment will be determined by how the site performs in its ability to support aquaculture. It also concluded that the estimated production level was reasonable and within standard industry practices in this Province. DFA approved of the seven to ten-year estimate Mr. Bouchie provided for reaching full production on the basis this "illustrates the applicant's willingness to develop their operation in a methodical, stepwise fashion." DFA noted that this methodical approach will facilitate ongoing assessment and modifications to optimize the site. DFA also concluded that the existing infrastructure was acceptable for development of the lease.

[13] The review by DFA found that the Applicant identified well-known service suppliers in the vicinity of Merigomish Harbour who might be relied upon for products and services. It also considered the estimate of 1-2 full-time and two seasonal staff to be reasonable estimates of anticipated employment levels. DFA anticipated that, given the scale of the operation, the primary economic contribution would be employment, even if spin-offs from service support of farming, processing and sales were possible.

[14] As part of its review mandate, DFA considered the commercial fishing activities relating to lobster and groundfish near the proposed site that take place outside the harbour. Commercial fisheries for quahogs and oysters are conducted within the harbour. Quahogs are collected by recreational harvesters in the vicinity of the site. DFA noted that the network partners, in particular DFO, whose jurisdiction includes commercial fisheries, did not advise of any adverse impacts to commercial fisheries when reviewing the application.

[15] DFA, through its review team, assessed several oceanographic and biophysical factors of the proposed site as well. It found the sheltered nature of the site and the low profile of lease infrastructure meant that anticipated winds or waves should not be problematic. Because of the location of the proposed site, currents within the ranges identified by the Applicant were expected even if research showed speeds in excess of 50cm/s in the main channel of the harbour. The current was not anticipated to affect the proposed screw anchors and concrete moorings. The salinity near the site ranged from 11.3 to 23.2ppt. Noting optimal salinity for oyster growth is 20-20ppt with minimum and maximum of 5 and 35 respectively, DFA concluded salinity was acceptable. In doing so, it noted that the wild and recreational fisheries in the area suggested the salinity is acceptable for shellfish growth. Temperature data for the proposed lease ranged from -2 to 29C, which was found to be within the known tolerance for shellfish. DFA noted that if temperatures exceed the tolerable range and appear to affect health or behaviour, husbandry and culture practices can be adapted to address such changes. Water depth analysis indicated that the more shallow zones within the lease boundaries could not be used in winter. However, the

Applicant divided the proposed lease into five production zones, recognizing that the ability to utilize a particular zone might be seasonal. DFA was satisfied that the water depth at the site was suitable for the intended purpose.

[16] DFA also considered the site's environmental carrying capacity, recognizing that available seston (small plant, phytoplankton, plankton and inorganic matter) would limit carrying capacity as this is what oysters feed upon. It is well recognized that, generally, too little or too much seston adversely affects aquaculture. Local research concluded that aquaculture in the area could be increased with minimal concern. DFA, noting the potential identified by a partner regarding agricultural run-off, considered the potential for nutrient loading and anticipated that the proposed aquaculture could mitigate detrimental effects, possibly reducing the likelihood of events such as algal blooms or epiphyte growth.

[17] DFA's review team considered water quality at the site, noting the classification for Merigomish Harbour is "approved," meaning oysters can be freely harvested and depuration is not necessary. It also considered underwater video footage provided by the Applicant, noting the presence of eelgrass. The concern with respect to eelgrass involves the potential impact on fish and fish habitat, aquatic species at risk and aquatic invasive species. DFO provided recommendations for mitigation measures to minimize any impact on eelgrass, for example limiting the sinking of gear in winter areas where eelgrass is not present. It was noted that the impact on a bay-wide scale of eelgrass would not be severe.

[18] DFA's review team thoroughly reviewed these factors concluding that the site design recognized and accounted for oceanographic and biophysical characteristics. Similarly, it concluded that the side scan sonar data analysed by experts, suggested that the site location had low potential for impacting pre-contact settlement.

[19] DFA's review also included an assessment of other users of the public waters surrounding the proposed site. It was noted that Mr. Bouchie has local experience working on a nearby site and would be familiar with the regional and seasonal users of the area. DFA also notes the Applicant undertook public engagement described in his development plan and scoping report. The team also contemplated impacts on wildlife under this factor, noting that one network partner had no concerns and the second offered management practices to mitigate potential damage. DFA confirmed that incorporating the suggested management practices into the FMA would address the concerns.

[20] DFA recognized the Applicant's outreach to users, including recreational kayakers, fishers, and landowners. The team noted that Mr. Bouchie acknowledged and provided suggestions that might allow for shared use of the area. One concern, namely roosting sea birds, was addressed, for example, by the nature of the chosen equipment, which should prevent or, at least reduce, roosting.

[21] DFA assessed the factor of the public right of navigation, noting that Transport Canada did not raise concerns. The review team noted that Mr. Bouchie will require Canadian Navigable Waters

Act approval before the site is developed, assuming it is approved. Transport Canada will complete its consideration following Board approval.

[22] DFA noted that in respect of the factor involving the sustainability of wild salmon, the nearest salmon runs were approximately 3 and 4.5 km distant, and as such, the review team was satisfied that the site would not impact the sustainability of wild salmon.

[23] Regarding the number and productivity of other aquaculture sites in the surrounding public waters, DFA noted that eleven other leases in Merigomish Harbour represent 2.72% of the harbour. The proposed site would add 0.84%. The review team was satisfied that the site operations would not affect the production of other existing sites in the area.

Public Response

[24] No person or entity sought intervenor status in respect of this proceeding.

[25] In addition to the outreach efforts, including a public meeting and direct outreach, three written submissions were received from members of the public. Mr. Andrew Thompson, along with his parents, Bryce and Donna Thompson offered their feedback. Mr. Dale Webb, also submitted written submissions.

Summary of Written Responses and Oral Presentations

Mr. Thompson's Submissions

[26] Mr. Andrew Thompson is a local commercial harvester of oysters and quahogs who expressed concerns regarding the proposed license and lease. He takes issue with the Applicant's characterization of the commercial harvesting in the harbour as being "very little". He explains that he has harvested in the area for the last 12 years and continues to do so, adding that a number of other fishermen are doing the same. He adds that he has witnessed numerous recreational boaters and kayakers.

[27] Mr. Thompson also objects to the Applicant's statement that there are a minimal number of quahogs in the area, stating that he believes there is a "large quantity". He invites a study of the number of quahogs and oysters and also whether the lease site could be a quahog nursery. In addition, Mr. Thompson questions the Applicant's statement that there are no adverse economic impacts, pointing to the income generated by his fishing in the area.

[28] When commenting on the fishery activity in the area, he notes that beyond the "substantial bed of oysters and quahogs, the lease could impact lobster fishermen, commercial fishermen or Indigenous fisheries. He advises he has seen "numerous lobsters in the area" and speculates it

could easily become a future fishing area. He states he has observed rock crab fishermen in the area.

[29] Mr. Thompson alleges the Applicant has contacted only leaseholders in the harbour rather than all commercial fishermen who harvest oysters, quahogs and rock crabs in the area.

[30] Mr. Thompson also takes issue with the information in the application package involving exchanges with Mr. Bouchie involving a purported statement by Mr. Thompson indicating Mr. Bouchie he should apply for the entire cove. Mr. Thompson had (describe background).

[31] Mr. Thompson suggests the alternative of moving the lease area away from the shoreline to permit the existing fishery to continue.

Mr. Bryce and Ms. Donna Thompson's Submissions

[32] Mr. Thompson's parents, Bryce and Donna, also filed brief written responses regarding the criterion of fisheries activities in the public water surrounding the proposed site. They sought modifications to the lease to allow continued recreational quahog and oyster harvesting in the area. They also commented that the lease would reduce their son's ability to harvest oysters and quahogs, thereby reducing his income to support his family.

Conclusion Thompsons' Submissions

[33] We will disregard Mr. Thompson's speculations, involving, for example, whether a future lobster or rock crab fishery might be possible. However, we recognize the truth in his heartfelt statements about the loss of harvest area having an economic impact. However, we also recognize that a sizeable area remains in which he can continue to harvest. The lease area is tiny in comparison to available fishing areas. In addition, we are mindful that prior to the Applicant making this application, Mr. Thompson himself held similar lease rights and had intended to make his own application. One has to ask if he would consider these same concerns well raised by Mr. Thompson had he decided to proceed?

Mr. Webb's Submissions

[34] Mr. Dale Webb identifies himself as a commercial oyster and quahog fisherman in the Merigomish area. He states that he is against the lease being granted as he feels "as it is, there is already too many leases in the area". He is of the view that it would affect the "livelihood of many" as it would take away from commercial fishing. Again, we recognize the sentiment that loss of harvest area is difficult for commercial fishermen and have considered this carefully when making our determination. However, we must also take into consideration the fact that DFO made no

mention whatsoever of the Application having any negative impacts on commercial fishermen in their analysis.

Ms. Nelson's Submissions

[35] Ms. Hanna Nelson attended the oral hearing to provide oral submissions. She identified herself as co-owner of ShanDaph Oyster Co. Inc., a successful leaseholder and licensee in the area of the proposed lease. Currently, ShanDaph employs Mr. Bouchie and is responsible for providing his training and the aquaculture expertise he has acquired. Ms. Nelson strongly supports the Applicant in its planned operations. She is an articulate advocate for the aquaculture industry, particularly in this Province. She utilized the time allocated to her to explain aquaculture's benefits, including the sustainability of oysters as a blue food. She described the need to develop the industry that she believes is characterized by great local potential. She also discussed some of the many roadblocks currently hindering development of the industry. She was very clear in her opinion and belief that the proposed lease and license would positively impact the area.

[36] During the Hearing, it was revealed that ShanDalph now owns the one privately owned island near the lease. As such, Hanna and her business are the landowners most affected by the proposed lease, and she is clearly in favour of the planned operations.

Summary of Opposition to the License and Lease

[37] The application process contemplates community outreach to the local community with the goal of understanding and, to the extent possible, addressing concerns. Of the handful of fishermen who Mr. Thompson advises fish in the area of the lease, two objected. The sentiment was expressed that giving up harvesting grounds is difficult and creates some degree of economic hardship for commercial fishermen who work hard to provide for themselves and their families.

[38] The Applicant states that the site was chosen due to its minimal impact on landowners, recreational users and commercial fishers [section 4.1 of the application package]. There do not seem to be significant concerns from landowners and minimal levels of concern from recreational users.

Analysis

[39] The statute mandates the consideration of the eight factors set out in s. 3 of the Regulations. These will now be considered, and in doing so, we are mindful of the stated purpose in Part 43A (d) of the Act of ensuring equity, fairness and compatibility in access to, and utilization of, public water resources for aquaculture. It is also clear that different factors exist for different prospective sites. It is, therefore, appropriate for us to accord different weights to each factor in a context-specific assessment. We have begun the analysis with what we believe is the primary concern of the

arising out of the consultation, namely the shared resource that is our coastline and adjacent waters.

Fishery Activities in the Surrounding Public Waters

[40] The Applicant indicates that many local boats are involved in commercial fishing activities, but much of the fishing is done outside the harbour. However, as noted above, at least two commercial fishermen, Mr. Thompson and Mr. Webb, indicate they would be impacted to an unspecified extent through the loss of access to the lease site.

[41] Mr. Bouchie suggested, during his testimony at the hearing, that fishing at or near the lease site takes place a few days a season. He also commented that Mr. Thompson appeared to be interested in a lease himself at one time and that he found it difficult to reconcile this with the position that the commercial fishermen need to retain the lease area for fishing.

[42] Be that as it may, Andrew Thompson stated that harvesting in the area contributed to the generation an income to support his family. There is, however, no suggestion that the area of the lease contributes significantly to Mr. Thompson or Mr. Webb's yearly catch. Testimony from Mr. Bouchie suggests that the lease area is a small portion of the area available to the fishermen. Had Mr. Thompson and Mr. Webb provided information to support a claim that the loss of the lease area resulted in a substantial loss to them, this criterion might have been decided differently. However, absent such information we can only speculate as to the economic significance and given what we know, it appears that the effect is modest. We note presuming otherwise would have the effect of creating an insurmountable barrier to aquaculture development. As to Mr. Thompson's reference to "others" who are affected, we note that these individuals did not voice their concerns. Similarly, speculations on future fisheries that might or might not be viable are of limited value given we are assessing the potential for use of the area that appears to us to be viable here and now.

[43] Finally, we note that the DFO did not raise concerns regarding the operations' impact on commercial fisheries. Therefore, we find that, on balance, this factor favours the grant of the lease and license.

[44] Lease areas will, by definition, reduce the area available for commercial fishing. The issue at the heart of this consideration is appropriate balance. With less than 3% of the harbour allocated to leases in general and less than 1% reserved for this lease, we find the proper balance favours permitting this relatively small area to be reserved for aquaculture.

Contribution to Community and Provincial Economic Development

[45] The Applicant believes the operation will employ one or two full-time and two seasonal staff. Mr.

Bouchie has provided a listing of suppliers who will have found a new customer in C&G. The DFA review team found these estimates provided to be reasonable. In reaching this conclusion, DFA assessed the production plan, finding the species, culture methods, equipment, seed, stocking and production volume, concluding the estimated production level as reasonable. DFA observes that other economic contributions to the community and province depend on the farm's success.

[46] We find that given Mr. Bouchie's expertise, extensive training, and the support of colleagues from ShanDaph and other operations in the area, the business has every chance of success. Therefore, it is reasonable to expect additional economic contributions in the future. We would add, nearby ShanDaph being a well-established operation, is indicative of the suitability of the site generally. It is hoped the Applicant will share a similar level of success, thereby providing additional economic benefits in due course. This would be consistent with the Doelle Lahey Report principle of a positive economic and social value increasing over time.

[47] Of the individuals making submissions, two touched on this criterion of contribution to economic development. Both Mr. Bouchie and Ms. Nelson described our province's significant underutilization of coastal areas for aquaculture. Both conveyed the importance of increasing the critical mass of producers. They also noted the potential for agricultural tourism. It would be a mistake to consider the economic impact of the Applicant in isolation. Adding C&G to the existing operations, enhances the likelihood the industry can acquire critical mass to grow and extend into new areas such as agricultural tourism. In addition, Mr. Bouchie testified that he actively assists others with applications and amendments. He also supports new developments, including through the provision of knowledge and guidance. Clearly, Mr. Bouchie is a strong advocate for the industry, and we believe he will be successful, not just in his own business but also in contributing to aquaculture development in Nova Scotia.

[48] The only point on which we disagree with the Applicant is the statement that there are "no adverse economic impacts." We recognized that, to some extent, the commercial fisherman will experience adverse economic benefits. However, particularly because there is no evidence that such an effect would be substantial, we find that, on balance, this factor nonetheless favours the grant of the lease and license.

Oceanographic and Biophysical Characteristics

[49] By all accounts the lease site offers very favourable conditions for aquaculture. For example, the current speeds and wave heights fall within the preferred ranges. A combination of sheltered and exposed areas facilitates the ability to modify operations to overcome difficulties. We note that DFA's review team did not have serious concerns regarding wind data, wave data, current data, salinity, temperature, water depth, carrying capacity and water quality.

[50] The DFO has noted the presence of eelgrass at the site. Underwater footage provides a baseline against which any effect of the operations can be measured. The DFO has suggested mitigation measures to preserve eelgrass and noted that on a bay-wide scale, it is unlikely that the operations would have a severe impact on it.

[51] We find the site well chosen. This is no surprise, given Mr. Bouchie's training, skills, and understanding of farming practices and local conditions. This factor favours the grant of the license and lease.

Other Users of the Surrounding Public Waters

Other users have been broadly identified as recreational and wildlife.

Recreational Users

[52] The views and practices of commercial fishermen have been discussed above. In addition, the Applicant identifies recreational fishermen, boaters (including kayakers) and campers. Other than speculation, there is little to suggest that recreational users would be adversely affected.

[53] Mr. Bouchie notes that the site has low traffic with no infrastructure on the islands nearby, not to mention an abundance of mosquitos in more favourable times of year. He believes that having people on the water would benefit the boaters and kayakers as it offers a measure of safety to those engaging in recreational activities nearby. We find this to be a sensible observation. In addition, Mr. Bouchie explains that the aquaculture equipment does not prevent, for example, kayakers or other small boaters from passing. He also notes the shallow depth to the east, tends to keep many larger boaters at bay.

[54] Mr. Thompson indicates that he is aware of recreational users but provides no details of how they would be affected. The Thompsons speak of the recreational harvest of quahogs. Mr. Bouchie submits that there are other equally suitable areas for this recreational activity.

[55] The Board is satisfied that with the small footprint of the lease relative to the harbour and the availability of alternative sites, recreational quahog harvesters and boaters will not be unduly disadvantaged by the presence of the lease.

Wildlife

[56] We note that the DFA review team's consultation with ECCC was favourable. ECCC, for example, identified the area as important to migratory birds and suggested mitigation measures to avoid negative effects. It lists several beneficial management practices to assist the Applicant in mitigating potential damage to wildlife. DFA notes it will work with the Applicant to incorporate these recommendations into the anticipated farm management plan. This satisfies us that wildlife is unlikely to be adversely affected.

Public Right of Navigation and Sustainability of Wild Salmon

[57] No evidence was presented that the sites would impact the factors of public right of navigation and wild salmon.

Number and Productivity of Other Aquaculture Sites

[58] We note there are eleven existing aquaculture sites in Merigomish Harbour. The total leased area comprises 2.72% of the harbour. The proposed lease site would represent 0.84% of the harbour area. DFA concluded that the proposed aquaculture operation would not affect existing site production. We concur.

[59] There is no indication that an additional operation in the area cannot be supported. We find the presence of multiple operations in the same area to be a positive factor, as the Applicant plans to use the facilities owned by others, thus simplifying its own operations and bolstering those of another. Mr. Bouchie's information suggests a fairly tight-knit group of aquaculturists in the area willing to share resources and expertise. Again, this factor favours the grant of the license and lease.

Optimum Use of Marine Resources

[60] We are fortunate to live in a province with an abundance of coastline. However, it is important to be cognizant of the fact that the Applicant requests the right to derive a business and livelihood from a miniscule portion of that coastline.

[61] The area near Pig Islands is largely uninhabited, and as such, the lease area has minimal, if any, impact on surrounding residents, all of whom are more than 700m away. Mr. Bouchie has noted that the remoteness of the proposed location was an important factor in site selection.

[62] The shallow water limits commercial fisheries other than the handful of commercial oyster and quahog fishermen who fish the area several days each season. The depth also limits recreational users. The sheltered nature of the site and ice formation make it a desirable location for aquaculture. It is situated near other aquaculture operations, and it is anticipated by all that C&G will contribute to that industry in the Merigomish Harbour and beyond.

[63] According to the Oxford Canadian Dictionary, 2nd edition, "optimal" means the best possible compromise between opposing tendencies. Therefore, the question is what is the appropriate compromise or balance between competing interests.

[64] The work done by C&G and DFA during the application process addressed concerns raised by the various network partners through the use of the farm management plan. As such, in this case, the unaddressed competing interest is limited to conflict between the planned aquaculture site and a relatively small amount of occasional commercial fishing associated with the site area.

[65] We are sympathetic to and have considered seriously, Mr. Thompson's point that every dollar counts when raising a family. However, even if considered at the microscopic level of how many individuals or families benefit or are harmed and to what extent this is the case, the aquaculture operation is likely to support, or help support at least one or two or more families, even ignoring the spin-off benefit to providers of goods and services to the operation. Loss of the site area to fishing will have a limited impact on a handful of commercial fishermen who fish in the area a few days a season and are able to focus efforts elsewhere. Because of this, we consider that the most equitable use of the marine resource that is the area of the lease site is for aquaculture. Weighed against the detriment of fishing area loss are many benefits, including economic development of an undeveloped area, a new customer for local and regional business, growth and development of an important and underdeveloped industry and enhanced safety for recreational boaters.

Decision

[66] We are convinced the proposed operation aquaculture has low impact and high value and, therefore, meets the requirement of aquaculture that offers economic prosperity, social well-being and environmental sustainability. We are of the view after considering the Application in its totality that social and environmental impacts are now low and will likely decrease over time with an effective farm plan that mitigates, for example, any resulting damage to eelgrass. The Farm Management Plan incorporates the practices suggested by ECCC and the advice and recommendations provided by CCHT. We are also hopeful the aquaculture operation will have a positive economic and social value, that increases over time. The Board wishes Mr. Bouchie and C&G every success in the future.

DATED at Irish Cove, Nova Scotia this **23rd** day of **DECEMBER 2024**.

[redacted]

Coleen Morrison, Chair of the Hearing
and Vice Chair of the Board

[redacted]

Tim Cranston, Chair of the Board

[redacted]

Damien Barry, Board Member

DISTRIBUTION:

Alex Bouchie, Applicant.
Alison Campbell, Solicitor on behalf of the Department of Fisheries and Aquaculture.
Caitlin E. Menczel-O'Neill, Solicitor on behalf of the Department of Fisheries and Aquaculture.

Tab 7

SUPREME COURT OF NOVA SCOTIA

Citation: *Eastern Canadian Structures Limited v. MasTec Canada Incorporated*, 2025 NSSC 68

Date: 20250220
Docket: Hfx No. 460890
Registry: Halifax

2025 NSSC 68 (CanLII)

IN THE MATTER OF: *The Builders' Lien Act*, being Chapter 277, S.N.S.2004, as amended

Between:

Eastern Canadian Structures Limited

Plaintiff

and

MasTec Canada Inc.

Defendant

and

Structural Panels Inc., Central Erectors Inc., Allsteel Builders (2) Limited and Crane-Tec Service Inc.

Third Parties

DECISION ON SUMMARY JUDGMENT MOTION

Judge: The Honourable Justice Scott C. Norton

Heard: January 31, 2025, in Halifax, Nova Scotia

Decision: February 20, 2025

Counsel: Christopher W. Madill and Calvin DeWolfe, for the Applicant, Allsteel Builders (2) Limited
Nathan Sutherland and Dakota Bernard, for the Respondent, Eastern Canadian Structures Limited
Michael Brenton, KC, for the Respondent, Structural Panels Inc.
Susan Fader, for MasTec Canada Inc.
Michael Brooker, KC, for Crane-Tec Services Inc.

2025 NSSC 68 (CanLII)

By the Court:

Introduction

[1] The claims at issue in this summary judgment motion relate to work performed installing exterior insulated metal panels at a converter station site in Woodbine, Nova Scotia as part of the Maritime Link project. I am the case management judge for this proceeding.

[2] MasTec Canada Inc. ("MasTec") was the general contractor responsible for construction of the converter station. MasTec contracted with Eastern Canadian Structures Limited ("Eascan") to supply and install exterior metal panels for that building. Eascan issued a purchase order to Structural Panels Inc. ("SPI") for the manufacture and supply of the panels. Eascan issued a purchase order to Allsteel Builders (2) Limited ("Allsteel") to install the panels.

[3] MasTec and Eascan have claimed against each other in relation to deficiencies in the panels. Eascan has Third Party claims against Allsteel and SPI seeking contribution towards any damages owed to MasTec. SPI has a crossclaim against Allsteel.

[4] The issue is whether summary judgment should be granted dismissing the claims by Eascan and SPI against Allsteel.

Preliminary Evidentiary Rulings

[5] In its rebuttal brief, Allsteel raised the following evidentiary issues:

1. Whether the Affidavit of Richard Tse (the "Tse Affidavit") filed by SPI is inadmissible, given that it has not been filed in the form of a proper expert report under *Rule* 55.
2. Whether portions of the Affidavit of Nick Bain (the "Bain Affidavit") and the Affidavit of Kyle Rogers (the "Rogers Affidavit") filed by SPI ought to be struck as improper opinion evidence.

[6] Opinion evidence is presumptively inadmissible under the rules of evidence. An opinion is an inference from observed fact. There are two exceptions to the general exclusionary rule for opinion evidence. First, lay witnesses are permitted to offer opinions or conclusions where:

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> they are in a better position than the trier of fact to form the conclusion;
>
> the conclusion is one that persons of ordinary experience are able to make;
>
> the witness, although not expert, has the experiential capacity to make the conclusion; and,
>
> the opinions being expressed are merely a compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without regard to conclusions.
>
> (Paciocco, *The Law of Evidence*, Eighth Edition, (Toronto: Irwin Law, 2020), at page 239).

[7] The second exception is that an expert witness is permitted to offer opinions where the trier of fact does not have the special knowledge or experience required to make the relevant and worthwhile inference the expert witness is offering. The Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23, directed that expert evidence can only be admitted if the party calling it satisfies a two-stage test on the balance of probabilities. This two-step test is summarized by Paciocco, *supra*, at pages 250-251:

> At stage 1, the proponent of the evidence must establish that the evidence meets the threshold requirements of admissibility. These are the four "Mohan factors":
>
> - the expert evidence must be logically relevant to a material issue;
> - the expert evidence must be necessary to assist the trier of fact, in the sense that the expert deals with a subject matter about which ordinary people are unlikely to form a correct judgment without assistance;
> - the expert evidence must not run afoul of any other exclusionary rule…; and,
> - expert witnesses must be properly qualified, in the sense that they possess special knowledge and experience going beyond that of the trier of fact in the matters testified to, and in the sense that they are able and willing to carry out their primary duty to the court to provide evidence that is impartial, independent and unbiased.
>
> For opinions based on novel science, contested science, or science used for a novel purpose, there is a fifth Stage 1 factor: the underlying science must be reliable for its purpose.
>
> Stage 2 operates if these four (or five) preconditions are met. At Stage 2, the "discretionary gatekeeping" stage, the trial judge undertakes a balancing analysis to determine if the evidence ought to be admitted, given its potential benefits and associated risks. At this stage, the judge considers such factors as probative value and prejudice, necessity, reliability and the absence of bias.

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[8] In addition to the admissibility rules under the law of evidence, *Civil Procedure Rule* 55 prescribes the procedures required to put expert evidence before the court "at the trial of an action or hearing of an application in court". *Rule* 55.02 prescribes: "A party may not offer an expert opinion at the trial of an action or hearing of an application in court unless an expert's report, or rebuttal expert's report, is filed in accordance with this Rule" (emphasis added).

[9] On a motion for summary judgment, responding parties must put their best foot forward with admissible evidence to show that there is an issue of material fact. A "material fact" is one that would affect the result at trial: *Shannex Inc. v. Dora Construction Ltd*., 2016 NSCA 89, at paras. 34-36.

[10] The *Civil Procedure Rules* do not contain any prescription on the use of expert evidence on a motion. *Rule* 22.15 addresses the rules of evidence on a motion:

> (1) The rules of evidence apply to the hearing of a motion, including the affidavits, unless these Rules or legislation provides otherwise.
>
> (2) Hearsay not excepted from the rule of evidence excluding hearsay may be offered on any of the following motions:
>
> (a) an *ex parte* motion, if the judge permits;
>
> (b) a motion on which representations of fact, instead of affidavits, are permitted, if the hearsay is restricted to facts that cannot reasonably be contested;
>
> (c) a motion to determine a procedural right;
>
> (d) a motion for an order that affects only the interests of a party who is disentitled to notice or files only a demand of notice, if the judge or the prothonotary hearing the motion permits;
>
> (e) a motion on which a Rule or legislation allows hearsay.
>
> (3) A party presenting hearsay must establish the source, and the witness' belief, of the information.
>
> (4) A judge, prothonotary, commissioner, or referee may act on representations of fact that cannot reasonably be contested.

[11] As stated by Justice Cromwell, writing for the court in *White Burgess*, *Rule* 55 "does not change the rules of evidence by which expert opinion is determined to be admissible or inadmissible."

[12] Allsteel argues that any expert report filed on the motion must satisfy *Rule* 55 because any evidence that a trial judge cannot admit cannot be material. With

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respect, I disagree with this logic. The judgment of Fichaud J.A. in *Shannex* stated, in para. 34:

> …
>
> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. …
>
> [emphasis added]

[13] The duty of a party responding to a motion for summary judgment is to put their best foot forward. At para. 36 of *Shannex*, Justice Fichaud explains what it means for a party responding to a motion for summary judgment to "put his best foot forward":

> [36] **"Best foot forward":** Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": Rules 13.04(4) and (5); *Burton*, para. 87.

[14] It is not for the court at the summary judgment motion to decide the issue of material fact, only identify that one exists. Expert evidence proffered at the summary judgment motion may show a genuine issue of material fact exists without being conclusive on the issue. This is because, as is the situation in this proceeding, discovery examinations may not have been held or completed, and additional evidence may be required to obtain a report that is compliant with *Rule* 55.

[15] This court has previously held that *Rule* 55 does not apply to interlocutory motions: *Layes v. Bowes*, 2020 NSSC 345, aff'd 2021 NSCA 50 (without discussion on this point). A motion for summary judgment is an interlocutory motion. There is nothing in the summary judgment Rule that distinguishes it for the purpose of considering expert opinion evidence.

[16] I note that the motion before the court in Nova Scotia that led to the Supreme Court of Canada decision in *White Burgess* was a motion for summary judgment. On a preliminary evidentiary ruling, the motion judge struck the affidavit on the basis that the expert was biased. On appeal to the Nova Scotia Court of Appeal, the

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majority held that the motion judge erred in law in finding the expert evidence inadmissible. The Supreme Court of Canada decision concluded with the following finding, at para. 62:

> [62] There was no basis disclosed in this record to find that Ms. MacMillan's evidence should be excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. I agree with the majority of the Court of Appeal who concluded that the motions judge committed a palpable and overriding error in determining that Ms. MacMillan was in a conflict of interest that prevented her from giving impartial and objective evidence: paras. 136-50.

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[17] The matter was returned to the Supreme Court of Nova Scotia for decision on the summary judgment motion: *Abbott and Haliburton Co. Ltd. v. White Burgess Langille Inman*, 2018 NSSC 47. Ms. MacMillan's affidavit was considered on the motion. She was cross-examined on the affidavit. Justice Smith granted summary judgment for the defendants, stating in part:

> [131] The Plaintiffs were obliged to put their best foot forward by leading evidence to demonstrate that there are material issues of fact and law which require a trial. They provided the evidence of Ms. MacMillan as to standard of care, but led no evidence on duty of care, causation or loss – all necessary elements to succeed at trial in a negligence claim.

[18] No level of court in *White Burgess* raised any concern with expert affidavit evidence being used on the summary judgment motion.

[19] Richard Tse is a civil engineer and has experience in the design, manufacture and installation of insulated metal panels. His affidavit, filed January 17, 2025, attaches at Exhibit "B" a draft report. He attests that the findings, opinions and conclusions expressed in the Draft Report are true and that a final copy of the report will be commissioned by counsel for SPI following the discovery examinations in the proceeding.

[20] No objection was taken to Mr. Tse's affidavit or draft report based on its admissibility under the rules of evidence. Mr. Tse was not cross-examined. I am satisfied that Mr. Tse's affidavit and draft report are admissible on the *White Burgess* test. I find that its probative value outweighs any prejudice, it is necessary to assist me on the motion, it is reliable and there is no evidence of bias.

[21] The affidavit of Nick Bain filed by SPI on January 17, 2025, attaches a memorandum of Mr. Bain's observations during his visits to the Woodbine site in

October 2016. Mr. Bain draws certain inferences from those observations that relate to the reasonableness of the installation practices and the technical cause of the damage to the panels (the "Bain Memo"). For example, "it was concluded that the overall quality of material supplied by (SPI) for this project is more than acceptable", and "these installation practices could both individually and cumulatively cause damage to Rockwell panels that may not be apparent until the panel has gone through a full thermal cycle".

[22] Further, para. 9 of Mr. Bain's affidavit is opinion evidence because it draws an inference from technical expertise regarding the impact of panel specifications on installation difficulty.

[23] The Bain Memo contains opinion evidence that does not meet the *White Burgess* test. There is not evidence before the court upon which to qualify Mr. Bain as an expert. He had not provided the court with any undertaking that his opinions are impartial, independent and unbiased. While the factual observations made in the Bain Memo are admissible, the opinions are not and will not be considered by me in determining this motion.

[24] The affidavit filed by SPI on January 17, 2025, from Kyle Rogers also attaches the Bain Memo and at para. 12 of the affidavit endorses the findings and recommendations contained in it. This is also improper opinion evidence for the same reasons.

Facts

[25] On March 30, 2016, Eascan contracted with SPI to manufacture interior and exterior insulated metal wall panels for use on and in the Maritime Link Converter Station in Woodbine, Nova Scotia. The specifications for the wall panels were provided to SPI by Eascan. On May 30, 2016, Allsteel accepted a purchase order from Eascan to install exterior insulated panels at the converter station.

[26] Discussions between Allsteel, Eascan, and SPI about the installation of the SPI panels at the Woodbine site began in early August 2016. Between August 2 and September 21, 2016, Allsteel communicated with Eascan and SPI about the method of installation they intended to use, which involved a vacuum suction lifting apparatus referred to as a "CladBoy". Allsteel was provided with materials from SPI which recommended suction devices be used in the installation.

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[27] The first full length wall panels were installed on the Woodbine converter building in late September 2016. They were installed using the CladBoy. On September 30, 2016, personnel on site noticed the appearance of deformities on the outside surface of certain panels, which resembled rippling or bubbling in the exterior material. There is disagreement about whether the deformities are aesthetic only or impact on the structural and functional integrity of the panels.

[28] These same deformities were observed at the converter station being constructed at Bottom Brook, Newfoundland, where the SPI panels were being installed by Central Erectors Inc. Allsteel did not install any panels for approximately one week after the deformities were first noticed on September 30, 2016.

[29] On October 7, 2016, new installation instructions were provided by Eascan to Allsteel. These instructions involved lifting future panels into place using metal channel stiffeners on either side of the panel to brace them during the lifting process. Allsteel began hoisting panels according to these new instructions, but similar deformities occurred. After the new installation method proved unsuccessful, Allsteel was left to standby and await further instructions.

[30] After approximately two weeks of further standby, Allsteel was provided with additional instructions for installation on October 19, 2016. Allsteel followed these instructions, but the SPI panels continued to exhibit the same deformity. Allsteel personnel observed that the deformity to the SPI panels appeared to occur when the panels were exposed to sunlight, which was not noticeable immediately upon installation. Panels which had been installed but not yet exposed to sunlight generally would not display any issues.

[31] On November 16, 2016, SPI issued a memorandum which offered an explanation as to why the deformity occurred upon sunlight exposure. The explanation, which read as follows, attributed the deformity to manufacturing, not installation practices, and suggested that it is purely aesthetic in nature:

> As a result of the combination of the dark steel and external fastening method, the panel is unable to properly thermally bow and retract resulting in a bunching of steel due to over stressing of the steel. The subsequent crease is a result of the steel having no area to expand and cannot be absorbed by the mineral fiber cores bow. Although aesthetically unpleasing, the structural integrity remains intact as the ripple accounts for a very small portion of the overall panel…

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[32] Kyle Rogers, President of SPI and author of the memorandum, attests in his affidavit that he did not intend this memorandum to suggest that the distortions present in the panels could not have been caused by Allsteel's installation practices, rather, his intention was to propose remedial measures to address the distortion concerns which would lessen the impact of damage caused to the panels on installation.

[33] On November 21, 2016, correspondence from MasTec again referenced that the same deformities were occurring at the Bottom Brook site in Newfoundland and noted that MasTec was considering abandoning the SPI panels in favour of the Kingspan panels that Allsteel initially believed would be used for the job.

[34] On November 24, 2016, MasTec terminated its contract with Eascan because of concerns with the "long term reliability" of the panels, the "delamination / bucking defects" in panels at both the Woodbine and Bottom Brook jobsites, and associated construction schedule delay.

[35] On November 28, 2016, MasTec placed a purchase order with Kingspan for insulated panels to be used at the Woodbine and Bottom Brook jobsites instead of the SPI panels. On January 26, 2017, MasTec officially approved a purchase order for Allsteel to directly handle the installation of the Kingspan panels at the Woodbine site.

Summary Judgment

[36] Summary judgment on evidence in an action is governed by *Rule* 13.04. Under *Rule* 13.04(1), summary judgment must be granted when a judge is satisfied that: (1) there is no genuine issue of material fact for trial of the claim or defence, and (2) the claim or defence requires determination only of a question of law and a judge exercises the discretion provided in *Rule* 13.04 to answer the question.

[37] The law of summary judgment in this province has been the subject of extensive analysis by this court and the Court of Appeal. The test on a motion for summary judgment on the evidence was articulated by Justice Fichaud in *Shannex, supra*. This framework was recently confirmed and applied in *Arguson Projects Inc. v. Gil-Son Construction Limited*, 2023 NSCA 72, at paras. 33-42.

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Analysis

Shannex Question 1: Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?

[38] As stated above, a material fact is one that would affect the result. The moving party has the onus to show by evidence that there is no genuine issue of material fact. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question "Yes".

[39] It is the evidence on the motion that must be considered to determine if there is a dispute of material fact. Bald assertions in an affidavit without more in terms of an evidentiary foundation will not give rise to a dispute of material fact.

[40] Here, SPI and Eascan allege that Allsteel failed to follow the manufacturer's instructions and industry standards in relation to the installation of the metal wall panels causing or contributing to the deformities. Allsteel says that the factual landscape invites the commonsense inference that Allsteel had nothing to do with the deformities in the panels and there is no expert evidence to suggest otherwise.

[41] With respect, I disagree. Determining what caused the deformities in the metal wall panels is a clear genuine issue of material fact. A judge on a summary judgment motion can only draw an inference of fact based on undisputed facts before the court and if the inference is strongly supported by the facts: *Fares Construction Limited v. Lead Structural Formwork Limited*, 2024 NSSC 52.

[42] The cause of the deformities in the panels must be determined before the court can decide, by inference or otherwise, whether such cause would have occurred but for any act or omission by Allsteel.

[43] The admissible affidavit evidence establishes, beyond mere bald assertions, that there are disputes of fact about whether Allsteel performed its work properly and followed the manufacturer's (SPI's) instructions when installing the metal panels. The admissible factual observations contained in the Bain Memo are that a review of the installation process disclosed that several manufacturer's recommended practices were being overlooked. For example, the crew did not spin the panel to minimize the suction bond between panels as stated in the manufacturer recommendations. Even when this procedure and the reason for it was explained to the crew, it was not implemented by the crew.

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[44] Richard Tse opines that the handling and installation practices of Allsteel, as observed by Mr. Bain and described in his memo, likely stressed the panels.

[45] There is clearly conflicting evidence as to whether Allsteel followed the recommended manufacturer's instructions for proper installation of the panels. There is conflicting evidence as to whether the deformities are aesthetic or structural and there is a clear dispute of fact as to what caused the deformities. These are genuine material disputed facts relevant to determining if Allsteel breached its contract or was negligent.

[46] As stated in *Arguson*, at the *Shannex* question 1 stage, I am to look at facts that stand on their own but relate to causation. Here, there are clear disputes of fact which, when placed in the context of the pleadings, lead to a dispute over causation. I am not permitted on this motion to undertake any qualitative or quantitative analysis of the evidence or weigh the sufficiency of the facts, whether they are disputed or otherwise. The question is whether there is a genuine issue of material fact. If there is, I must conclude that summary judgment is not available: *Burton Canada Company v. Coady*, 2013 NSCA 95, at para. 33.

[47] The onus is on Allsteel to show by evidence that there is no genuine issue of material fact. They have failed to do so. The motion for summary judgment fails at stage 1.

Conclusion

[48] The motion is dismissed with costs payable to the Respondents. If the parties cannot agree on costs, I direct that they provide me with their written submissions within three weeks of this decision.

Norton, J.

2025 NSSC 68 (CanLII)

Tab 8

CERTIFIED TRUE COPY OF AN ORIGINAL DOCUMENT

Stacy Bruce Digitally signed by Stacy Bruce Date: 2022.01.28 13:44:48 -04'00'

DECISION and ORDER **NSARB 2021-001**

NOVA SCOTIA AQUACULTURE REVIEW BOARD

IN THE MATTER OF: application made by **KELLY COVE SALMON LTD.** for a **BOUNDARY AMENDMENT TO MARINE FINFISH LICENCE AND LEASE AQ#1039** in **ANNAPOLIS BASIN, DIGBY COUNTY**.

BEFORE: Jean McKenna, Chair
Michael McKinnon, Board Member
Richard Patterson, Board Member

HEARING DATE: November 15 to 18, 2021

DECISION DATE: January 28, 2022

[1] The application of Kelly Cove Salmon Ltd. (KCS) for an amendment to lease AQ#1039 (Rattling Beach) was heard by the Board, November 15 to18, 2021, in Yarmouth, Nova Scotia. Rattling Beach is located on the Annapolis Basin. The application is for an amendment to the boundaries, in order to bring the farm infrastructure entirely within the lease. The farm has been in operation on the site since 2004. The number and configuration of cages, as well as the farmstock, has not changed since then, and will not change with the boundary amendment.

The issue:

[2] The issue in this case is straightforward. What, if any, impact will the proposed "operation" (a boundary amendment only) have, in considering the eight factors set out in s. 3 of the *Aquaculture Lease and Licence Regulations* (**O.I.C. 2015-338 (October 26, 2015), N.S. Reg. 347/2015 amended to O.I.C. 2019-322 (effective November 12, 2019), N.S. Reg. 186/2019), made pursuant to the** *Fisheries and Coastal Resources Act,* **S.N.S. 1996, c. 25.** ("the Act").

[3] The short answer is none, with the possible exception of 3(b), the contribution of the proposed operation to community and provincial economic development. This "proposed operation" consists only of redrawing a line on the water, so to speak. If the application is refused, the farm would continue to exist, but the cages, and therefore the production of stock would be reduced by 80%, with an obvious consequential negative impact on economic development.

[4] However, the applicant and the intervenor, perhaps with an abundance of caution, have approached the question as though it is "should the farm exist at all". Since that approach was taken, and a great deal of material has been generated on both sides of the question, we will also examine the issue from the broader perspective.

Facts:

[5] In 2004, KCS acquired lease AQ#1039, and installed an array of 20 cages. Some portions of the farm infrastructure were located outside of the original lease boundaries, including some cages or portion of cages, and the moorings. The lease dimensions had been created in 1993. There was no evidence before the Board of criteria used by the Province in creating the original site dimensions in 1993, however there was no issue taken by the Province then, or since, with the number and array of cages on the lease, or with the stocking density or quantity of salmon. As well, then, and in 2004, the regulations did not require the mooring lines to be within the lease boundaries, and perhaps the government of the day did not turn their mind to the dimensions needed to encompass moorings as well as cages.

[6] The array of cages and stocking density has not changed since 2004 and will remain unchanged should the application be allowed. If the application is not allowed, KCS would have to place all moorings and all cages within the original boundary, which would necessarily reduce the number of cages on the farm to three or four from the present 20.

[7] In 2008, the Province, in discussion with the aquaculture industry, decided to bring all older pre-2008 sites into boundary compliance simply by amending the boundaries to encompass the mooring lines and anchors.

[8] Accordingly, KCS applied for amendments to its three Shelburne Harbour farms; it was told by the Province to complete those changes before commencing application for its Rattling Beach farm. Those amendments were approved in 2011 by the Province.

[9] KCS was ready to proceed with boundary amendment application for Rattling Beach, but the Province directed KCS to wait until 2012, and then later, until 2013, to do the Rattling Beach amendments. However, in 2013, the Province placed a moratorium on all applications pending completion of the just commissioned Doelle-Lahey report on aquaculture.

[10] The Commission consulted with numerous interested parties, including the Atlantic Salmon Federation, the Nova Scotia Aquaculture Association, the Ecology Action Centre, the Nova Scotia Fisheries Sector Council, the Union of Nova Scotia Municipalities, the Nova Scotia Salmon Association, and the Coastal Coalition of Nova Scotia. Members of the public were encouraged to participate, including Ronald Neufeld, (who later filed a 3-volume affidavit in this matter "in support of" Intervenor Dr. Hemming). At the time Mr. Neufeld had been expressing concerns about the boundary violations at the Rattling Beach site. On December 19, 2013, Barry McPhee, Acting Executive Director of the Nova Scotia Department of Fisheries and Aquaculture (DFA), in responding to his concerns, stated "I would encourage you to participate in the Doelle–Lahey panel". Whether he did or not is unknown.

[11] In 2014, the report, "A New Regulatory Framework for Low Impact / High Value Aquaculture in Nova Scotia" (the Doelle – Lahey Report") was issued. Although some participants, including the Ecology Action Centre, had called for a moratorium on marine open pen sites, a moratorium was not recommended. The authors concluded:

> "In this report, we conclude that a fundamental overhaul of the regulation of aquaculture in Nova Scotia is called for. We conclude that this overhaul should be guided by the idea that aquaculture that integrates economic prosperity, social well-being and environmental sustainability is one that is low impact and high value. By this, we mean aquaculture that combines two fundamental attributes: it has a low level of adverse environmental and social impact, which decreases over time; and from the use of coastal resources it produces a positive economic and social value, which is high and increases over time. A number of participants in our process urged us to conclude that marine-based fin-fish facilities – and more particularly, salmon farms – cannot be sustainably operated, and to recommend that a permanent moratorium be imposed on this kind of aquaculture. Our conclusion, after careful consideration of the state of the science and opportunities to reduce impacts through effective regulations, is that the regulatory framework should not be prohibitory at a provincial scale. Instead, we recommend fundamental changes to the regulation of aquaculture, which we conclude can address the serious and legitimate concerns raised without foreclosing the opportunity associated with this sector of the industry."

[12] The legislation and regulations were altered in 2015 following the release of the Doelle – Lahey Report, and KCS was finally advised to either reconfigure its gear within the existing lease boundaries or to apply for an adjudicative boundary amendment:

> 1) License holder shall submit a scheduled re-alignment plan on or before October 26, 2016 to Nova Scotia Environment. The scheduled re-alignment plans must receive approval from NSE and will be required to provide the detailed steps the license holder plans to take to move all equipment and produce back within the lease boundaries and must also provide the proposed schedule for completion of these tasks; or
>
> 2) License holder shall submit an application for an adjudicative or administrative amendment on or before October 26, 2016 to DFA's Aquaculture Division. The format for these applications and review process is stipulated in the new *Aquaculture License and Lease Regulations*. DFA should be contacted for specific questions about these processes.

[13] The directive was issued by the Nova Scotia Department of Environment (NSE). KCS chose the latter option.

[14] As noted, KCS would not be adding or altering the infrastructure on site, nor changing the farm stock volume. This brings us to this hearing, some 13 years after the initial amendment plan, and some four years after Kelly Cove embarked on the new process by way of its application of November 22, 2017.

Chronology:

[15] In 2004, KCS acquired the Rattling Beach lease and license, and installed an array of 20 cages. That array continues to exist; however, some cages and most moorings are, and always were, outside the lease boundaries. According to the evidence of Jeffrey Nickerson, Business Development Manager of KCS, GPS technology in 2004 was somewhat less accurate than it is today.

[16] In 2007, Mr. Ronald Neufeld moved to Port Wade on the Annapolis Basin, close to another KCS lease site, and some 2-3 km across the basin from Rattling Beach.

[17] In 2008, the Province, in consultation with the aquaculture industry in Nova Scotia, recognized that a number of farms in the province were operating outside of their boundaries. A decision was made that they should be brought back into compliance through boundary amendments.

[18] In 2010-2011, KCS applied for, and was granted, amendments to the boundaries of three sites that it operated in Shelburne Harbour. The Province had directed KCS to delay its application for the Rattling Beach amendments until Shelburne was complete. When that was completed, KCS was instructed by the Province to wait until 2012, and then again, until 2013, to pursue the Rattling Beach amendment.

[19] In 2012, when KCS began to install a new farm on the Port Wade site, Mr. Neufeld became interested in the Rattling Beach operations. He concluded that portions of the Rattling Beach farm fell outside the original lease boundaries (this was never in dispute; it had been known since at least 2008). He brought his concerns to his MLA, Hon. Stephen McNeil (later, Premier Stephen McNeil). He met with Mr. McNeil and also raised his concern with various staff people.

[20] In 2013, the Province placed a moratorium on any further applications pending completion of the work of the Doelle-Lahey Commission. Mr. Neufeld continued to express his concern about the boundaries to DFA. In December 2013, he was advised by DFA that they were working with the operator on the issue, and he was encouraged to participate in the Doelle –Lahey panel. There is no evidence to show that he did so. He does not appear to have expressed his concerns to KCS directly.

[21] In 2014, Mr. Neufeld continued to investigate the Rattling Beach site. He took measurements with his hand-held GPS, and the odometer in his vehicle. He moved from Port Wade to Shelburne, although he states in his affidavit that he continued to periodically contact former neighbours regarding the Rattling Beach site. (Although his affidavit is filed in support of the Hemming intervention, he does not at any point mention Dr. Hemming or Dr. Hemming's issues regarding an alleged impact of Rattling Beach farm on his property). Mr. Neufeld became active with the "Protect Liverpool Bay" community group, who with some other groups, including Healthy Bays Network, (HBN), St. Mary's Bay Protectors (SMBP) oppose all marine open pen farming.

[22] In November 2014, the Doelle – Lahey report was released.

[23] In 2015, the governing legislation and regulation was amended (the *Act*, supra).

[24] On April 27, 2016, KCS submitted an application for renewal of its licence and lease for the Rattling Beach site. In 2016, Ronald Neufeld had been living in the Shelburne area for some two years but continued to voice his concern with the operation of the farm. Specifically, and solely, that the farm was operating outside of the lease boundaries.

[25] On July 11, 2016, DFA renewed the lease and licence for the site, but noted that all equipment and product were to be within the lease boundaries, and that KCS would be required to submit either a boundary amendment application or a site realignment application to NSE on or before October 26, 2016. A similar directive had been issued by NSE in May 2016. The difference between the two directives was that DFA required that the submission be made to NSE, while the NSE required the submission be made to DFA.

[26] On October 26,2016 Kelly Cove submitted its applications.

[27] On March 17, 2017, KCS held a public information meeting in Digby. It was properly advertised in the community. It was attended by approximately ten members of the public who generally supported the proposal. Mr. Neufeld, still vigorously focusing on Rattling Beach boundaries, complained that the public meeting should have taken place before the application was made. He did not attend the public meeting.

[28] On August 17, 2017, DFA informed KCS that the development plan submitted would have to be revised, and that a scoping report would have to be completed (the scoping would include the aforementioned public meeting).

[29] On November 22, 2017, KCS submitted its revised Application Package, including the Development Plan along with its Baseline Assessment Report Addendum, Boundary Amendment Addendum and it's Scoping Report.

[30] On December 4, 2017, DFA confirmed receipt of KCS's request for an aquaculture boundary amendment with respect to AQ#1039 and advised that the application would proceed to the internal review stage of the renewal process.

Legislative framework:

[31] Boundary amendments are governed by s.49 of the *Act*:

> **49** The Review Board shall, with respect to marine areas not designated as aquaculture development areas, make decisions with respect to
>
> (a) an application for an aquaculture licence or aquaculture lease;
>
> (b) where an existing aquaculture licence or aquaculture lease authorizes the production of shellfish or aquatic plants but not finfish species, an application to amend the aquaculture licence or aquaculture lease to authorize the production of a finfish species; and

> c) an application to amend an aquaculture licence or aquaculture lease to change the boundaries of an existing aquaculture site if the change results in an increase in the area of the aquaculture site. 2015, c. 19, s. 9.

This section brings this matter to the Board.

[32] However, the Administrator appointed under the *Act* is empowered to make some decisions without the necessity of proceeding with the full process and ultimate involvement of the Review Board:

> **54A (1)** The Minister shall appoint an employee of the Department to act as Administrator and make decisions with respect to
>
> (a) applications for aquaculture licences or aquaculture leases in designated aquaculture development areas only;
>
> (b) applications for aquaculture licences for land-based aquaculture sites;
>
> (c) applications to amend aquaculture licences or aquaculture leases except those applications referred to in clauses 49(b) and (c); .....

[33] Thus, an application such as the one currently before the Board, **must** go through the formal Board process, including the steps leading up to it.

[34] In order to reach a decision on an application, the Board must consider eight factors as set out in s. 3 of the regulations:

> (a) the optimum use of marine resources;
>
> (b) the contribution of the proposed operation to community and Provincial economic development;
>
> (c) fishery activities in the public waters surrounding the proposed aquacultural operation;
>
> (d) the oceanographic and biophysical characteristics of the public waters surrounding the proposed aquacultural operation;
>
> (e) the other users of the public waters surrounding the proposed aquacultural operation;
>
> (f) the public right of navigation;
>
> (g) the sustainability of wild salmon;

(h) the number and productivity of other aquaculture sites in the public waters surrounding the proposed aquaculture operation;

[35] Although the application in the case does not involve any change whatsoever of gear, species, farm stock, farm methods, or infrastructure, the legislation requires KCS to go through the same lengthy process as it would if it was applying for an entire new operation as opposed to simply bringing its boundaries into compliance.

[36] It is notable that the section 3 factors refer to "the proposed operation". Applying the factors in this case, which does not contemplate a new "operation", does result in an awkward and cumbersome fit for what actually entails drawing an invisible line on the water around an operation that has been in place since 2004. " Operation" is not defined in either the *Act* or *Regulations*, and this process is not included in the category of administrative amendments. However, KCS is clearly required by statute to go through the process and apply the eight factors to the facts of the case. The statutory requirements follow:

Consultations on adjudicative amendment application

14 (1) On receipt of a completed application for an adjudicative amendment, the Minister must appoint an employee of the Department to undertake consultations with any of the following as required under the laws of the Province or of Canada with respect to the application:

(a) a department or agency of the Government of Nova Scotia;

(b) a department or agency of the Government of Canada.

(2) In addition to any required consultation referred to in subsection (1), the Minister may appoint an employee of the Department to undertake consultations with any person, group of persons or organization that the Minister considers necessary in the circumstances.

[37] Bodies consulted by DFA in this case included:

1. Fisheries and Oceans Canada
2. Canadian Food Inspection Agency
3. Transport Canada
4. Environment and Climate Change Canada
5. Nova Scotia Environment
6. Nova Scotia Department of Agriculture
7. Nova Scotia Community, Culture and Heritage
8. Nova Scotia Department of Lands and Forestry
9. Nova Scotia Department of Fisheries and Aquaculture (Inland Fisheries)
10. Office of Aboriginal Affairs (Now L'Nu Affairs)

[38] Mr. Nathan Feindel is the Manager of Aquaculture Development and Marine Plant Harvesting with DFA. He testified that the consultation process involved an ongoing dialogue with the various network partners, in particular with the Federal Department of Fisheries and Oceans (DFO). There was a series of communications between DFA and DFO beginning in March 2018 until December 2020, resulting in DFO's Initial Letter of Advice, dated October 11, 2019, attaching the Canadian Science Advisory Secretariat report dated August 2019 (the "CSAS Report") and DFO's Addendum Letter of Advice dated December 1, 2020.

[39] As part of the network consultation, on March 20, 2018, the application documents were provided to the Office of Aboriginal Affairs (OAA, now Office of L'Nu Affairs.) That office is the government department which advises all departments on Mi'kmaq consultation. It advised DFA that consultation with the Mi'kmaq was not necessary, as ",,,there was no new equipment, species, harvesting methods, yield, or structural change associated with the project".

[40] Ultimately, all network consultations were finally completed, with none of the network partners having any issues with the proposal. A summary of the outcomes is attached as Appendix "A" to these reasons.

[41] On February 5, 2021, following completion of the internal review, DFA submitted the application to the Review Board. The lengthy delay from the time from KCS submitting the application, to referral to the Review Board, was apparently the result of difficulty in getting response from some of those bodies, as well as requests for further information from some of those bodies. Dealing with DFO was particularly time consuming. The delay was certainly unreasonable, however the process, and the regulations, were new.

Review Board proceedings:

[42] Parties to the proceedings are Kelly Cove Salmon Ltd., the Nova Scotia Department of Fisheries and Aquaculture, and the intervenor, Dr. Gregory Hemming. Parties are entitled to call witnesses, present documentary evidence and examine and cross examine witnesses.

[43] Anyone who can show in an unsworn application that satisfies the Board that they are "**substantially and directly affected by the hearing**" can become an intervenor, and thereby a party. Similar language is employed in most legislation and practice rules in many fields of litigation and is certainly not unique to the Nova Scotia fisheries and aquaculture regulatory regime. The rationale for the restriction is set out in the decision of Leblanc, J., in *Specter v Nova Scotia* 2011 NSSC 333, stated:

> "In my view, how the test for standing is phrased is largely irrelevant. It does not matter whether a statute uses the phrase, "person aggrieved", "person directly affected", or "direct and personal interest". What matters is the interpretation that is given to these phrases. This necessarily involves a textual, contextual, and purposive analysis of the applicable legislation. Involved in this interpretation is the concern of courts that an overly broad interpretation will allow mere "busybodies" to flood the courts with litigation challenging public decisions."

[44] This Board does not consider the unsuccessful intervenors (St. Mary's Bay Protectors (SMBP), Ecology Action Centre (EAC), and Healthy Bays Network (HBN)) in this case to be 'busybodies'. However, their interest was in opposition to marine open pen aquaculture in general (as can be seen from much of the material that they eventually put before the Board as members of the public) and not focused in any way on this site or the impact of a boundary amendment.

[45] Without becoming a party, a member of the public can otherwise participate. The regulations permit members of the public, who may not be "substantially and directly affected by the hearing" to give a sworn oral statement at the conclusion of the hearing, or to submit an unsworn written statement. Such individuals do not have the legislated status of a "party", in that they are not able to call witnesses, or participate in examination or cross examination of witnesses. They may, however, be questioned by the parties if they make an oral statement.

[46] Dr. Hemming was granted intervenor status by decision dated March 25, 2021. In Dr. Hemming's application, he stated that he was "rewilding" his property, and that his property was on the shores of the Annapolis Basin and located approximately 2.5 km from the farm. He said that the Rattling Beach boundary amendment would impact on his rewilding project. He therefore claimed that he would be "substantially and directly affected".

[47] However, shortly after the Board granted intervenor status to Dr. Hemming, Mr. Robert Grant, solicitor for KCS, pointed out that in fact, Dr. Hemming's property was actually some 14.5 km away from Rattling Beach. Nonetheless, having reached a decision based on Dr. Hemming's (unsworn) application, the Board was prepared to allow Dr. Hemming to continue to act as an intervenor, where his location, and any possible impact would be subjected to his sworn evidence, and that of any other witnesses that he might choose to call. As it was, neither the location, or possible impact on his "rewilding project", was ever addressed by any of his witnesses in the course of the hearing, nor did he himself file an affidavit or testify, although he was present throughout (discussed below).

[48] An intervenor application was filed on behalf of St. Mary's Bay Protectors (SMBP) by Gwen Wilson. SMBP, a community group with a general interest in opposition to open pen aquaculture, formed in response to lease options in St. Mary's Bay. On March 19, 2021, the SMBP application was rejected. Ms. Wilson also submitted a request to make an oral sworn statement at the hearing but was not present when called during the hearing.

[49] Healthy Bay Network (HBN) also filed an intervenor application. HBN, located out of Pleasantville on the south shore of Nova Scotia, said that it represents various community organizations across the province, united in opposition to open pen aquaculture. They showed no specific or implicit "substantial and direct affect" of the proposed boundary expansion of the KCS site; they were concerned with the broader concept of open pen farms. Their application for intervenor status was rejected on March 24, 2021. Mr. Ronald Neufeld of Protect Liverpool Bay Association (PLBA) later filed an affidavit purported to be in support of Dr. Hemming's submissions as an intervenor. Mr. Derek Purcell of HBN also subsequently filed a written submission. Neither addressed Dr. Hemming's location or issue or mentioned Dr. Hemming.

[50] The Ecology Action Centre's (EAC) Simon Ryder Burridge applied for intervenor status. While it expressed a broad interest in open pen aquaculture, it did not establish a substantial and direct connection to the KCS site, or particularly, to the boundary amendment. Its application was rejected on March 24, 2021. Mr. Ryder Burridge later filed his own affidavit ostensibly "in support of" Dr. Hemming who had been give party status; he also provided a written public submission. He made no reference to Dr. Hemming, Dr. Hemming's farm location, or Dr. Hemming's rewilding concern in his affidavit, rather mostly just expressed the EAC general opposition to open pen salmon farms.

[51] It is essential to point out that the role of this Board is not to provide a platform for general opposition to, or support of, open pen aquaculture in general. Rather, we must consider **this** application (KCS / Rattling beach farm) in relation to **this** site, and the impact, if any, of changing the lease boundary. To this question, and this question only, we must apply the eight factors set out in S..3 of the regulations. There may be many other actual or potential lease / licence sites within the coastal waters of the province, with varying characteristics. Some may be suitable, some unsuitable. There may be many potential operators, of varying experience, knowledge, infrastructure, and skill sets. But to repeat, in this hearing we must consider the merits of the Rattling Beach boundary amendment, and more particularly, the potential impact of **this** boundary amendment application. At the end, we must decide whether to allow the amendment, and allow the farm to continue to operate as it has since 2004, or reject the application, thereby requiring it to contain its entire infrastructure within the lease boundary as originally drawn in 1994. Unfortunately, much of the evidence and argument on the current application was not so focused, but will be addressed.

Application of the eight factors:

[52] The simple answer to each of the eight factors, is really to paraphrase the answer provided to DFA by OAA; as there are no new equipment, species, harvesting methods, yield, or structural change associated with the project, there can be no impact of the boundary expansion on any of the factors.

[53] However, since so much information gathering and evidence has now been laid before the Board, and since we are required by statute to consider the eight factors, we will do so in some detail. In so doing, we will also consider whether reducing the size of the farm would have any impact. We must keep in mind that there are only two answers: either we allow the amendment, or refuse it, thereby resulting in a smaller lease than what has been utilized since 2004.

a) The optimum use of marine resources:

[54] The utilization of this small section of the Annapolis Basin has been in place since 2004, without challenging or in any way restricting other uses. To put some perspective on it, the boundary amendment would officially extend the site boundary a further 160 m into the 23,000 m long Annapolis Basin (from the tidal power plant at the mouth of the Basin, to Rattling Beach), without changing a mooring or cage position.

[55] The use of the site to efficiently produce thousands of kg of food is surely an optimum

use of the small portion of the Annapolis Basin. Salmon farming converts feed to food much more efficiently, and with a much smaller footprint, than does, for example beef production.

[56] We conclude that the re-drawing of the boundary to encompass the infrastructure represents the optimum use of marine resources.

b) The contribution of the proposed operation to community and Provincial economic development

[57] The evidence of Jeffrey Nickerson establishes that the farm as currently operated, makes a considerable contribution to the economic well-being, in particular to the town and region of Digby. The parent company, Cooke Aquaculture, employs 205 full time, year-round Nova Scotians on its several leases in Nova Scotia. It has an annual Nova Scotia payroll of ten million dollars, and approximately 10% of its overall return relates to the Digby operation. Jobs include feed and maintenance technicians, fish health and environmental management professionals, technical support and administrative positions. KCS's operations in the Annapolis Basin represent approximately 30% of the value brought over to the Digby wharf. KCS also employs and contracts with a variety of local suppliers including divers, mechanics, boat repair facilities, hardware providers, welders, heavy equipment operators, crane operators, marine suppliers, distribution companies, environmental consultants, electricians, boat brokers, boat builders, engine suppliers, hotels, restaurants and ferries. It also employs people at the feed manufacturing facility in Truro, which supplies its Nova Scotia and New Brunswick farm operations. Mr. Nickerson testified that KCS contracts with three hatcheries in Nova Scotia for the supply of Atlantic salmon smolts and Rainbow/Steelhead trout (one of the three hatcheries supplies only trout), and also works with the Millbrook First Nation Fish Hatchery.

[58] To allow the application will allow this economic contribution to continue. There was no evidence on behalf of the other parties as to the impact of refusing the application, although Mr. Nickerson did speak to the inevitable reduction in production (from 20 cages down to three or four) if it was necessary to move the farm operations entirely inside of the original lease boundaries,. It is easy to conclude that the result would at best, reduce the economic contribution, and at worse, make it unviable.

[59] We are satisfied that this farm does make a genuine contribution to community and Provincial economic development.

c) Fishery activities in the public waters surrounding the proposed aquacultural operation;

[60] As noted above, the only evidence of any interference with other fishery operations at this site was the occasional entanglement of lobster gear with mooring lines, and KCS assisted fishers with clearing gear. KCS does not, in any way, prohibit any other type of fishing within the utilized area, and no objection was raised by any fishers, whether by intervention, written, or oral statement.

[61] The Board is satisfied that this farm does not cause any significant negative impact to other fishery activities.

d) The oceanographic and biophysical characteristics of the public waters surrounding the proposed aquacultural operation:

[62] Section 4 of the Development Plan addresses in detail the oceanographic and biophysical characteristics of the public waters surrounding the farm, including the wind conditions, waves, tides, currents, salinity, temperature, oxygen, bathymetry, baseline monitoring and site design. This site would be considered a high energy site, and KCS is experienced with operations of such sites.

[63] All conditions are continuously monitored in real time, in person and remotely, and reported as required. The DFA Environmental Monitoring Program (EMP), explained by Jessica Feindel, DFA Manager of Aquaculture Operations, monitors marine finfish operations and examines the relationship between the operation and surrounding marine environment. The EMP is a risk-based program to monitor the impact of organic deposition on the sea floor (e.g. the fecal matter and waste feed from the farm).

[64] Ms. Feindel explained that the EMP reviews data to ensure that the conditions below the pens are monitored to ensure that oxic conditions are maintained on the sea floor beneath the cages. As this site has been in operation for many years, the Board has the advantage of seeing, not only what should occur, or might occur, but what has occurred. Ms. Feindel testified that the Rattling Beach farm has experienced only two hypoxic conditions between 2004 and 2020, once in 2011 and once in 2017. She had no concern, as the farm immediately corrected the issue that had caused the conditions. In 2011, it replaced the netting material, thereby reducing the organic debris accumulated during net cleaning. It also began to use remotely operated ROV's to ensure net cleaning occurred more regularly.

[65] The later incident was the result of a broken feed hose, which was repaired. The farm also implemented staff training, equipment, and practices to allow earlier detection.

[66] There was no evidence before the Board to indicate that reducing the farm operation to fit the original 1994 boundaries would have any impact, other than reducing the size of the footprint.

e) The other users of the public waters surrounding the proposed aquacultural operation;

[67] Other users include recreational boaters, kayakers, and fishers. Although the site is described as Rattling Beach, there is no actual "beach" near the site; the bottom drops off rapidly from the shoreline.

[68] The Kwilmu'kw Maw-klusuaqn (KMKNO) filed a written submission. The KMKNO works on behalf of most of the Nova Scotia Mi'kmaq communities in negotiations and consultation with the federal and provincial governments. Its involvement, and particularly that of the Bear River community, was said to relate to traditional harvesting within the area of the proposed boundary. The details of the consultation issue will be dealt with below. However,

there is no evidence that harvesting, whether by Mi'kmaq or any other fishers have been disrupted by the use of the site by KCS since the onset of operations in 2004.

[69] KMKNO also referenced the use of beaches along the Annapolis Basin as summer campsites. However, there is no "beach" area near the Rattling Beach site, as the shoreline follows the contours of the adjacent hillside and drops off precipitously.

[70] KMKNO also referred to possible archeological artifacts on the site, however it did not advert to any evidence that would suggest the presence of the cages would interfere with any archeological material, as the only portion of the infrastructure that touches the seabed are the mooring anchors.

[71] The St. John / Digby ferry operates from a wharf nearby, and when the amendment was first proposed, the ferry operators expressed concern. However, those concerns were alleviated when they realized that that the farm itself, including infrastructure, would not expand beyond its actual operations over the years.

[72] There has been no evidence presented to suggest that the amendment of the boundary to incorporate the farm as it has existed since 2004, would have any impact on other users. Nor is there any evidence to suggest that refusing the application, thereby reducing the size of the physical farm operation, would be beneficial. The Board is satisfied that other users of these water will not be negatively impacted by this boundary amendment.

f) The public right of navigation

[73] Transport Canada was consulted as part of the network agency review process. Transport Canada reported there had been no issues with the current farm location and no issues with the proposed alteration to its boundaries to accommodate the existing infrastructure. As noted, the operators of the Digby / St. John ferry initially expressed concern, however, they had initially understood the action infrastructure would be expanded. In the result, with no changes actually occuring, there are no longer any concerns.

[74] We conclude that allowing the farm to continue as it is presently located will have no impact on the public right of navigation.

g) The sustainability of wild salmon:

[75] While evidence was heard on all of the eight criteria, the focus of dispute was the sustainability of wild salmon. Within that element, the concerns addressed were primarily risk of "sea lice" and other pathogens potentially contaminating a wild salmon population, and escaped farm salmon introgression with wild salmon.

[76] In his final written submission on behalf of the applicant, Mr. Robert Grant summarized the position of KCS:

> "The evidence before the Board strongly supports the conclusion that neither the Rattling Beach Farm nor the proposed amendment to the lease boundaries at Rattling

Beach will pose a risk to wild salmon or to the sustainability of wild salmon. Kelly Cove submits the evidence supports the following conclusions:

(a) There is no population of wild salmon likely to come into close enough proximity to the Rattling Beach Farm to be affected by it;

(b) The infrastructure, procedures and training for the Rattling Beach Farm operation are effective in keeping farmed fish within its pens, from introduction to harvesting, thereby mitigating risk of introgression with wild salmon, if they are present;

(c) Salmon sea lice are historically not a problem at Rattling Beach and there is an array of treatments and management tools available to address potential infestations;

(d) Given that the cycle for farmed salmon at this Farm coincides with that of wild salmon (if they are present), the risk associated with sea lice is exceedingly low;

(e) Farmed fish are vaccinated and healthy when they are introduced to the Farm and are carefully monitored by veterinarians throughout their growth for prevention and treatment of disease. The risk of transmittal of disease to wild salmon, if they are present, is exceedingly low.

[77] Sea lice are a parasite of sorts, that exist in the wild salmon population. They particularly pose a risk to smolts, who's small body mass makes them more vulnerable. They are typically present on wild salmon, and they require a marine environment to thrive. When wild salmon leave the salt water to spawn in freshwater rivers, they lose the sea lice.

[78] Much of this issue must necessarily be addressed by way of expert opinion evidence. The limits regarding the admissibility of expert opinion are reflected in the law of evidence, common law, statute and by way of civil procedure rules in most jurisdictions It is also addressed directly in the *Act*:

> **30 (3)** A party is not entitled to present the evidence of an expert witness at an adjudicative hearing unless
>
> (a) the evidence is in the form of a report that includes the expert's name, address and qualifications, along with a statement of the substance of the expert's proposed evidence; and
>
> (b) the party has provided the evidence to the Review Board and each of the other parties as required by subsection (5).

[79] Jonathan Carr was called to offer expert opinion evidence "on behalf of" intervenor Gregory Hemming. Mr. Carr's qualifications were not challenged, and his report was properly tendered. Mr. Carr is employed by the Atlantic Salmon Federation as Vice president of Research and Environment and is well qualified to provide expert opinion on the potential

impact of open pen salmon on the wild salmon population. His affidavit contained the expert opinion prepared by himself and Dr. Sutton, also of the Atlantic Salmon Federation.

[80] In his written document Mr. Carr expressly limited his opinion to three issues:

1. What impacts, if any, has the farm had on Atlantic salmon?
2. Will the **continued operation** of the farm impede wild Atlantic salmon recovery efforts?
3. Are there steps the applicant could take to avoid or mitigate impacts on wild salmon in the event that the application is approved?

[81] We note, again, that we are not here to address the "continued operation" of this farm. We are here to consider what might be the impact of the boundary amendment, considering the eight factors. It is notable that Mr. Carr (although well qualified to offer opinion evidence on salmon farming, and it's potential impact on wild salmon), did not address this issue directly, nor did he address the specific concern expressed by his ostensible client, Dr. Hemming, in his successful intervenor application (Dr. Hemming's rewilding of his property some 14.5 km from the Rattling Beach site). Nor does Mr. Carr address the actual subject of this application, i.e. whether the impact of allowing or refusing this boundary amendment would impact wild salmon population. Rather, he spoke primarily to the "continued operation" of the farm.

[82] In cross examination, Mr. Carr agreed that before any attempts were made at salmon aquaculture in the basin, the Bear and Annapolis Rivers were almost entirely devoid of a wild salmon population. By 1994, the population was so low that it was not sustainable.

[83] He acknowledged that commercial salmon fishing was abolished in the area, and was eventually, recreational, and Indigenous fishing, but the salmon did not return to the rivers.

[84] He agreed that regarding the Basin, there were other probable factors that impacted the presence of salmon in the basin and feeder rivers. He agreed that the increased acidity of the rivers, from acid rain, coupled with the naturally acidic soil in the area would affect the salmon presence. He acknowledged that the tidal power dam at the mouth of the Annapolis River impeded / prevented salmon return as did agricultural runoff from the numerous farms in the area. He acknowledged that until it ended in May 2018, commercial salmon fishing, particularly off Greenland and the Faroe Islands had had a massive impact on the wild salmon population. He agreed that IUU (illegal, unauthorized, unregulated) fishing continued to impact the Atlantic salmon population.

[85] His expert opinion relies extensively on international research, on open pen salmon farming in general. His desired remedy would seem to be seems to be stopping open pen aquaculture operations altogether, or alternatively, imposing conditions on the operator. His views are reflective of the position of unsuccessful intervenor applicants Mr. Neufeld and Mr. Ryder – Burridge of the Ecology Action Centre. As noted, both Mr. Neufeld and Mr. Ryder–Burridge filed affidavits ostensibly in support of Dr. Hemming. Dr. Hemming did not file an affidavit himself, nor did he testify.

Sea lice

[86] According to Mr. Carr, sea lice on farm salmon could potentially contaminate wild salmon which pass in the vicinity of the Rattling Beach pens , either as mature salmon, returning in the fall to the Annapolis or Bear River to spawn, or as smolts returning from the rivers to the sea in the spring. He relies heavily on studies done in Norway, which is a world leader in salmon aquaculture. The industry in Norway produces approximately € 6.5 billion in revenue annually, and a single farm will often be larger than all of the existing farm sites in Nova Scotia, combined. He agreed in cross examination that the Norwegian farms are located in close proximity to each other, in the confines of the narrow Norwegian Fjords, such that wild salmon travelling to or from rivers would have to pass multiple farm sites to reach their destination. He also agreed that the various farm sites in Norway would, at any given time, contain different growth stages of the fish, from smolt to adult.

[87] He did not dispute, and acknowledged, that KCS stocked smolt in all of their cages at the site in the spring of the year, and that the stock remained there until harvest, approximately 18 months later. He also agreed that when those smolt were initially placed in the cages, they were coming from a freshwater environment, where they had been grown, and they would therefore be lice free. Any subsequent contamination would have to be by way of transfer from wild fish on the journey to spawn in the rivers. In the result, at least in the spring of year one, there would be no risk of contamination from farm fish to wild smolt leaving the rivers on the way to the sea.

[88] When the farm fish were approaching maturity the following spring, any wild smolt leaving the rivers could be vulnerable to lice which may have later been transferred to the farm fish from wild fish. However, he agreed that the very powerful tidal flow from the Annapolis Basin to the Bay of Fundy, through the "gap" would tend to move any wild smolt through quickly, reducing the opportunity for contamination. Mr. Carr acknowledged that there was likely only a "low chance" that smolts returning to the sea from the Annapolis Basin would be contaminated by sea lice from the pens.

[89] The return of wild salmon (if any) to the rivers generally occurs in the fall. In year one of the farm fish, the wild salmon would potentially introduce sea lice to the farm salmon. In year two, any wild smolt leaving the rivers could potentially be contaminated by lice from farm fish, but this would typically take place in late fall, when the lice on both wild and farm fish would be lower as a result of lower water temperatures. The evidence is that the wild fish reaching the ocean would eventually become contaminated with lice count much heavier than those monitored on the Rattling Beach farm.

[90] KCS uses cage monitoring to control sea lice infestation.

[91] Dr. Anthony Snyder is an aquatic animal health veterinarian with DFA. Dr. Snyder stated in his affidavit that KCS's FMP, sets the tolerance limit for lice contamination. It was approved by DFA, and sets out the action threshold for sea lice as follows: (a) April, May and June: 0.5 female adult louse per fish; (b) July – September: one adult female louse per fish; and (c) October – December: 0.5 female adult louse per fish. This tolerance level is actually much more conservative than that required by DFA, and is much, much lower than the counts in mature wild salmon, over 14 per fish.

[92] KCS monitors and is required to report counts on a weekly basis, from April 1 until January 15. In the event that the tolerance limits are exceeded, interventions used, (in order of effectiveness success) include (a) mechanical treatments such as fresh water, warm bath water or high-pressure water (hydolicer) to remove the lice from the fish, (b) in- feed treatments, all of which need to be approved by Heath Canada for use; and (c) harvesting.

[93] Interventions must be approved by DFA.

[94] KCS is also considering the use of lumpfish as a cleaner fish in the pens (the use of lumpfish is being considered in the future, but, although in use in Newfoundland, it has yet to approved for use in Nova Scotia).

[95] Dr. Snyder also stated in his affidavit that other farm practices to control impact of lice and other pathogens include, in addition to the monitoring program, a multi-factorial approach to address finfish pests including control of stock and density, ensuring proper space between the farms and good husbandry. The three-month fallow period between harvest and re-stocking the farm also mitigates against sea lice as there is no host in the pen.

[96] Dr. Snyder stated in his affidavit that the stocking density on this site is 25 kg. / m (3) and meets the Nova Scotia standard. He also states that the cage array of 20 is suitable for this site.

[97] The intervenor states in its closing submissions that, at the time of the hearing, KCS was experiencing a sea lice infestation at the Rattling Beach site. That is not correct.

[98] Mr. Nickerson stated in his direct evidence, that shortly before the hearing, KCS's Victoria Beach farm experienced an increase in sea lice. KCS notified DFA and consulted with its veterinary staff to implement a treatment plan to address the sea lice. The treatment plan began with enhanced monitoring, followed by an in-feed treatment. At the time of the hearing, KCS was about to use it's $15 million treatment vessel to utilize a warm water bath to remove the sea lice from the fish at Victoria Beach. The lice would be removed, collected, and disposed of at an onland compost facility.

[99] In the event that treatment was unsuccessful, the fish would be harvested.

[100] At the same time, as a precaution, KCS intensified its sea lice monitoring at the Rattling Beach site.

Introgression of escaped farm salmon with wild salmon:

[101] The farm is stocked with smolt bred from the St. John River strain. One expressed concern by Mr. Carrr, is with the potential impact of introgression of farm salmon into wild salmon as a result of "escapees" from the cages. KCS has had minimal events of possible escapes; on one occasion, a hole was seen in the site of one of the pens, however, they quickly had staff on site to repair the damage.

[102] On another occasion, a seal was found within the outer containment net, but outside of the cage itself. No damage was seen to the cage, and there was no indication of any escapes. Here again, KCS uses state of the art mitigation, which appears to be successful. KCS uses containment engineering as well as age monitoring to avoid such losses. They now use a steel lined netting twine to prevent seals simply chewing through the cage, and as noted, they also use an outer "containment" net. They have remotely viewed cameras, operating 24 hours a day.

[103] KCS maintains detailed sanitation practices, both in transferring fish when stocking, and in harvesting the fish.

[104] They are already intending to begin a genetic tracing approach in 2023 (recommended as an option by Mr. Carr, who apparently didn't realize this), where the farm fish is identified before being transferred to the cages. This will enable source identification of any possible escapees, or introgression, in fish offsite. Mr. Carr notes that it is a practice followed in the State of Maine, where Cooke Aquaculture operates the majority of salmon farms. Mr. Carr strongly supports this practice, although he agrees that it needs to be accompanied by river monitoring, which does occur in Maine, but has yet to be undertaken in Nova Scotia. Such a practice would have to be approved by DFO.

[105] As with health management of its farm stock, the actions in this regard are not entirely altruistic – healthy fish are needed for healthy production levels, as are fish quantities. There is no motivation for a good fish farmer to take a casual approach to managing quantity and quality of its product.

[106] And the mitigation practices are not simply left up to the devices of KCS. As testified by Dr. Snyder and Jessica Feindel, the Province actively regulates and monitors this and other farms in the province.

[107] The operator is required to produce a farm management plan. The FMP regulatory requirements contain very extensive, detailed provisions, controlling the farm operations:

> **Farm Management Plan and record of amendments**
>
> **5** **(1)** An aquaculture licence holder must prepare a Farm Management Plan in accordance with these regulations.
>
> **(1A)** Before the initial stocking of their aquaculture site, an aquaculture licence holder must notify the Minister that they have prepared their Farm Management Plan, and make it available for review and approval by the Minister.
>
> **(2)** An aquaculture licence holder must keep a record of any amendments to their Farm Management Plan, to be provided as required as part of an audit under Section 38.

Required content for Farm Management Plan

6 **(1)** A Farm Management Plan must include any information required by the Minister, including sections for all of the following:

(a) fish health management, in accordance with Section 9;

(b) environmental monitoring, in accordance with Sections 10 to 13;

(c) farm operations, in accordance with Section 14;

(d) containment management, in accordance with Section 15, for holders of aquaculture licences for finfish in marine aquaculture sites.

(2) Each procedure contained in a Farm Management Plan must include any of the following that apply with respect to that procedure:

(a) critical control points;

(b) critical control limits;

(c) details about how the procedure is to be monitored;

(d) details about corrective actions to be taken.

(3) The Minister may establish minimum requirements for the procedures referred to in subsection (2)

Adherence to Farm Management Plan

8 An aquaculture licence holder must adhere to the procedures contained in their Farm Management Plan and must keep records that

(a) verify adherence to the procedures; and

(b) demonstrate that effective action was taken at critical control points.

Fish health content

9 **(1)** The fish health section of a Farm Management Plan must include any information and procedures the Minister requires to ensure the effective management of fish health at an aquacultural operation, including all of the following:

(a) for a holder of an aquaculture licence for shellfish, shellfish husbandry;

(b) for a holder of an aquaculture licence for finfish, all of the following:

(i) finfish husbandry and welfare,

(ii) veterinary care and disease surveillance practices,

(iii) culling and mass stock depopulation practices;

(c) biosecurity measures;

(d) general emergency measures, other than culling or mass stock depopulation practices.

(2) In addition to the procedures required by subsection (1), the fish health section of a Farm Management Plan for an aquacultural operation in which trout or salmon is farmed at a marine aquaculture site must include procedures for managing sea lice.

(3) The holder of an aquaculture licence for finfish in a marine aquaculture site must prepare an updated fish health section of their Farm Management Plan for approval for each production cycle, at a time determined by the Minister.

Environmental monitoring content for finfish in marine aquaculture site

10 (1) For a holder of an aquaculture licence for finfish in a marine aquaculture site, the environmental monitoring section of a Farm Management Plan must include any information and procedures the Minister requires to ensure the effective environmental monitoring of the site, including all of the following:

(a) processes for measuring oxic conditions within the boundaries of the site and at any other locations determined by the Minister;

(b) the monitoring schedule and associated process for reporting results;

(c) sampling locations for each monitoring event;

(d) processes for assessing and reporting on the stocking levels associated with monitoring events;

(e) a mitigation plan.

(2) Any information resulting from the environmental monitoring procedures required by subsection (1) must be submitted by the aquaculture licence holder to the Minister on annual basis, at a time determined by the Minister.

Farm operations content

14 The farm operation section of a Farm Management Plan must include any information the Minister requires to ensure the responsible operation of an aquacultural operation, including information and procedures that are consistent with industry best practices relating to all of the following:

(a) storing and disposing of feed, fuel, lubricants and chemicals;

(b) removing and disposing of accumulated refuse and decommissioned farm supplies and equipment;

(c) retrieving any gear or debris from the aquacultural operation that has broken loose;

(d) interactions with wildlife;

(e) maintaining the site in good order;

(f) noise.

Containment management content

15 The containment management section of a Farm Management Plan for a holder of an aquaculture licence for finfish in a marine aquaculture site must include information and procedures related to all of the following:

(a) operating procedures that limit the risk of a breach;

(b) processes for installing and maintaining infrastructure in place to limit the risk of a breach;

(c) responses to breaches;

(d) areas of potential impact if a breach occurs;

(e) management of the site if unusual events or severe weather occurs;

(f) schedules for reporting all of the following:

(i) initial farm stocking,

(ii) inventory levels during production,

(iii) audits of the containment management system;

(g) proof of a professional engineer's approval of the design of the structures in place for containment management;

(h) a finfish marking plan.

[108] There has been no evidence before the Board that would suggest that there has been any breach of the FMP conditions required, and in fact, all of the evidence is that it has been fully compliant. It has been pro-active, and has invested heavily, to follow international best practices.

Precautionary principle (Spraytech SCC)

[109] Mr. Carr, particularly in cross-examination, accepts and approves of all mitigation efforts taken by KCS. However, he states in his written summary:

> There is insufficient information provided to **conclusively determine** whether the existing farm has had or is currently having a negative impact on wild Atlantic salmon. Based on available information, it is reasonable to conclude the farm has likely had a negative impact on wild Atlantic salmon, the magnitude of which remains unknown.

[110] The intervenor argues that this reflects the "precautionary principle", as referred to by the Supreme Court of Canada in ***114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)***, *[2001] 2 S.C.R. 241, 2001 SCC 40* and it.should be applied, and that the KCS application should be refused.

[111] In **Spraytech,** the Court was considering the jurisdiction of a municipality to impose a pesticide control bylaw. While not weighing the application of the principle, it agreed that it could justify the municipal intervention into pesticide control. The Court stated:

> The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle", which is defined as follows at para. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990):
>
> > In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[112] The precautionary principle does not prohibit development; it requires mitigation measures even in an absence of "full scientific certainty" of "serious or irreversible damage".

[113] In this case, despite Mr. Carr's ongoing reliance on what he describes as "absence of evidence", we note the off-stated concept that it is impossible to prove a negative. Aside from that, the Board has heard an abundance of evidence that even before regulatory and statutory change (and since), this site has been well managed, and indeed, has strong mitigation efforts in place. All farms are closely regulated and monitored by professional staff at DFA. As well, we remind, again, that what is proposed here is only a boundary change to incorporate what has been in place over the years.

[114] In this case, Mr. Carr has produced no evidence that the dimensions of the Rattling Beach farm as it now sits, without any change in its infrastructure or production, will have any impact on any local salmon population. He has shown however, the possibility of a risk to salmon by the presence of any salmon farm. We find that appropriate mitigation is in place to deal with potential damage.

[115] The Board is satisfied that the re-drawing of the lease boundaries will have no impact on the sustainability of wild Atlantic salmon.

h) The number and productivity of other aquaculture sites in the public waters surrounding the proposed aquaculture operation;

[116] There is one other salmon site in the basin, the "Port Wade" site, also operated by KCS. There are also clam and rockweed lease and licenses. More recently, the Bear River First Nation was awarded four or five experimental oyster leases in the Annapolis Basin. There is no evidence to suggest that these leases could be impacted in any way by allowing the Rattling Beach boundary to be expanded.

[117] In its submissions, the intervenor argues that KCS has been in "serious violation" of its licence for 17 years; in the result the application should be refused. Approval, he argues, leaves KCS unaccountable (paragraph 98, Intervenor submissions). With respect, that is very much an overstatement. In fact, the sole "violation" has been openly and transparently operating outside of the site boundaries (primarily by mooring location), without any apparent impact on other users. Moreover, in his focus on open pen aquaculture in general rather than this application in particular, the intervenor has failed to address any impact of such a violation, on wild salmon populations.

[118] Not only has the operation been openly operating outside its lease boundaries since 2008, KCS has been attempting to move forward an application for boundary amendment when the Province decided that all equipment should be within the original lease boundaries.

[119] Its cage arrays, numbers and stocking volumes have satisfied the Province and have been approved at every stocking event.

[120] KCS acknowledges that it is operating outside its lease boundaries; It is what brings this matter to the Board. It has been attempting to amend since 2008 and its efforts were repeatedly postponed by the Province. It has on the other hand, throughout its operations, fully complied with the requirements of its FMP and has set its own high standards.

Duty to consult the Nova Scotia Mi'kmaq

[121] Was there a duty to consult in this case? The foundation and nature / extent of the duty was described by the Supreme Court of Canada, in **Haida Nation *v.* British Columbia (Minister of Forests)**, [2004] 3 S.C.R. 511, 2004 SCC 73

> "The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates **conduct that might adversely affect it: " (**emphasis added)

[122] The duty was again articulated in **Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43 (CanLII), [2010] 2 SCR 650**

The Court reiterated the elements of the duty:

> The Court in *Haida Nation* answered this question as follows: the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35). This test can be broken down into three elements: 1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

The Court went on to consider the issue of the crown conduct:

> "The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy".

[123] As noted above, as part of the network consultation, on March 20, 2018, DFA provided the application documents to the Office of Aboriginal Affairs (OAA) (now L'Nu Affairs). That office advised that "Aboriginal consultation is necessary on amendments to existing projects only when the crown anticipates new or novel impacts (established or potential) on Aboriginal or treaty rights. No new equipment, species, harvesting methods, yield, or structural change is associated with this proposed boundary amendment, therefore OAA does not recommend consulting with the Mi'kmaq on Aquaculture Boundary Amendment Application 1039".

[124] In accordance with that advice, the Province did not initiate formal consultation.

[125] However, that is not to say that KCS did not engage the Mi'kmaq.

[126] Mr. Jeffery Nickerson is the Business Development Manager with KCS. In his affidavit, he describes several informal contacts with Bear River First Nation. In his affidavit, he details direct contact with First Nations:

> As detailed in section 5.1.7 of Kelly Cove Salmon's Application Package filed in support of this application, the Bear River First Nation, Acadia First Nation and Annapolis Valley First Nation are located near the Rattling Beach farm. In January 2018, I attended the annual Sea Farmers Conference at The Hotel Halifax. The conference was organized by the Aquaculture Association of Nova Scotia. I am (and was at the time) the vice president of the Association. Several First Nations were in attendance with both Eskasoni First Nation and Waycobah First Nation speaking of their interest and experience in aquaculture. Also in attendance was Chief Dee Potter of Bear River First Nation. During the lunch break, I introduced myself to Chief Potter and we had a short discussion. I told her there could be ways our organization and her community could work mutually together, such as helping to market some of their product through our distribution network, and/or advising and assisting them if they pursued aquaculture in the area. She mentioned they were interested in farming oysters in the Annapolis Basin and St. Mary's Bay. They have since acquired several oyster leases. I also offered salmon to Bear River First Nation for ceremonies as we have done over the years for other First Nations. We ended the conversation with an agreement to meet in the future, but, despite a number of attempts, I have not been able to successfully contact her to arrange the meeting.
>
> I had a similar conversation with then Chief Googoo of Waycobah First Nation at the SeaFarmers Conference. Since then, we have developed a relationship with Waycobah First Nation where we provide expertise on marine cage farming and processing their trout. Additionally, we market all of their trout for them. In return, they have taught us much about the Mi'kmaq culture and traditions. I also met Chief Gerald Toney of Annapolis Valley First Nation at the SeaFarmers Conference. As with Chief Potter, I told him that there could be ways for us to work together. Chief Toney and I planned to meet again to continue our discussion. Chief Toney also agreed to meeting with me to discuss the application and Kelly Cove Salmon's operations in Nova Scotia. More recently, my colleague Ms. Hewitt advised me, and I verily believe, that she emailed Chief Potter's office on or about February 12, 2019 and stated that Kelly Cove Salmon would like to meet to discuss the application and Kelly Cove Salmon's operations in Nova Scotia. On or about February 19, 2019, Ms. Hewitt received a reply from Chief Potter's office which stated, "I'll be in touch with a date as soon as one becomes available. I will say that right now we are quite busy with the end of the fiscal year fast approaching". Ms. Hewitt advised me, and I verily believe, that on or about, February 12 and 14, 2021, she called Chief Robinson to discuss Kelly Cove Salmon's operations in Nova Scotia. We have received no response. At no time since Kelly Cove Salmon has been operating at Rattling each has the Bear River First Nation, the Acadia First Nation or he Annapolis Valley First Nation contacted Kelly Cove Salmon with comments or concerns "

[127] Nothing further was heard from any First Nations community directly, or from the KMKNO, until April 1, 2021, in the form of correspondence from Ms. Twila Gaudet, Director of

Consultation for the KMKNO, to Mr. Robert Ceschiutti, Manager of Licensing and Leasing with DFA . She stated:

> "The purpose of this letter is to request consultation under the *Terms of Referenece Mi'kmaq-Nova Sotia – Canada Consultation process.* . It has been brought to our attention that Kelly Cove Salmon Ltd. have been operating unlawfully outside it's intended boundary for the past 15 years in the Annapolic Basin . Therefore in this case, where the boundary ammendent will allow this ongoing operation which has impeded traditional harvesting and the exercising of \mi'kmaq rights in that location and surronuding area , consultation should have been initiated on this aquaculture lease as well.. The basin has always served as an important resource to the Mi'kmaq. Bear River Community who continue to utilize the area for traditional practices. Also, the Mi'kmaq continuously state their concerns regarding threats to our wild stock, including risk of exposure to contagious disease, virus , and parasites when it comes to operations such as Kelly Cove Salmon Ltd. Thus consultation is expected and required and the boundary amendment should not be approved."

[128] On April 26, 2021, Mr. Ceschiutti responded, explaining that as there were no changes in current production levels, species harvested, gear in use, or location to occur, there could be therefore no new anticipated adverse impacts to established or credibly asserted Aboriginal or treaty rights, and that consultation was not required.

[129] Nothing further was heard from the KMKNO until August 26, 2021, just prior to the scheduled hearing of August 31. Ms. Gaudet, in a letter to the Board, reiterated her concerns and asked that the application be denied until meaningful consultation has taken place, and that a declaration be made by the Board as to their "unlawful operation" (although outside of the regulated time limit for public written comments, in the circumstances, Ms. Gaudet's letter was placed on the record as a written public comment).

[130] The hearing date was adjourned, due to an unforeseeable event effecting one of the panel members, and was reconvened on November 15, 2021.

[131] KMKNO filed a further written comment with the Board on November 1, 2021. Ms. Gaudet stated that if the farm operations continue, all Mi'kmaw will be negatively affected, particularly Bear River. She again refers to traditional harvesting, and the use of beach areas on the basin. She speaks of the traditional porpoise harvest, and the underwater archeology at the site. As noted above, there is no beach area at the Rattling Beach site. Basin porpoise have been classified as endangered, and there is no porpoise harvest in the basin.

[132] As noted, impact on underwater archeology would not be impacted, as only the anchors actually contact the seabed.

[133] She also references concern about impact on the health of other species. There is no evidence before the Board that other species will be impacted by simply re-aligning the boundary.

[134] The Board agrees that in this case there was a knowledge of the history of First Nations, particularly Bear River, in the basin, and the rivers flowing into it. However, as was stated in advice from OAA, acting as the provincial government body with expertise on the issue of consultation, there was no Crown conduct, anticipated or real, that might impact the rights that existed.

[135] If, however, we are wrong in that regard, and there was a duty to consult, that duty was met, although perhaps not in a formal sense.

[136] In *Haida Nation,* McLachlin, C.J. described the content of the duty, when a duty is found to exist.

> "The content of the duty, however, varies with the circumstances, as discussed more fully below. **A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties.** The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty. "

[137] We conclude that in the facts of this case, the duty was on the low end of the scale, and notice was sufficient. That "notice" took the form of Mr. Nickerson's (and later his office) discussions and engagement with Chief Robinson, and was supplemented by the public meeting held by the applicant (who do not have a duty to consult), and also by the transparent and very publicly accessible information on the application. Certainly, direct contact with the KMKNO would have been preferable, in a formal sense, but the contact was made directly with the Chief of the First Nations community which could be most impacted by any adverse activity. It was open to Chief Robinson, at that time, to reach out to the KMKNO to press for formal consultation, and we do not fault her for not doing so.

[138] We therefore conclude that there was non-duty to consult, as the mere redrawing of the lease boundary could not be seen to have any potential adverse impact on First Nations' rights. If we are wrong in that regard, we conclude that consultation was at the very low end of the scale, and notice was sufficient to meet that duty.

[139] We also note that the impacts alleged by the KMKNO are vague, and non-specific as to potential adverse impacts on Aboriginal rights. For example, it does not explain how this ongoing operation has impeded traditional harvesting, and the exercise of traditional rights. Ms. Gaudet asserts that "it was brought to her attention", that Kelly Cove has been operating "unlawfully" outside its boundaries for the past 15 years. We have no information as to who, what, or how, the matter was brought to her attention just prior to April 1, 2021.

[140] Finally, we note that her concerns relate to what she considers prior and continuing breaches, not "novel adverse impacts. Such breaches, if any, do not generate a duty to consult (*Haida Nation, supra.)*.

Public written comments

[141] Public comments were received from:

(a) Andre Thiffault dated March 9, 2021;
(b) Ronald Neufeld dated April 24, 2021;
(c) Derek Purcell on behalf of Healthy Bays Network dated April 25, 2021;
(d) Simon Ryder-Burbidge on behalf of the Ecology Action Centre dated April 25, 2021;
(e) Wendy Watson on behalf of the Association for the Preservation of the Eastern Shore dated August 9, 2021; and
(f) Twila Gaudet, Director of Consultation on behalf of Kwilmu'kw Maw-klusuaqn Negotiation Office ("KMKNO") dated November 1, 2021.

[142] Mr. Thiffault lives adjacent to the property. He was concerned with noise, fish escapes, "massive fish die-offs", antibiotics, and a site offensive to tourists' views. He suggested that KCS followed the rule, only when they knew they were being watched. He wanted the operation removed. However, the evidence at the hearing negated most of those concerns. We note we have heard no concerns expressed by the many tourism operators in the area, including from Digby Pines Resort, one of the prime tourist facilities in Nova Scotia. We can appreciate that noise can certainly be a factor, but have heard almost no evidence on that factor, other than a complaint at the Port Wade site, where KCS agreed to make an adjustment to its blower, and we trust that DFA and KCS will keep a close eye and make best efforts to mitigate noise where possible.

[143] Mr. Neufeld, in addition to his three-volume affidavit, also filed a written comment. He argues that there is little, if any, economic benefit to Nova Scotia from the farm. He describes his own personal observation of sea lice at the Port Wade site, pointing to two incidents since 2012 confirming sea lice. The evidence heard in the course of the hearing noted above counter his concerns with sea lice. He speaks to fish escapes and says that escapes from Rattling Beach have been devastating to the Bear River wild salmon. He refers to a television documentary. His comment is entirely factually incorrect; as noted above, since 1994, long before salmon were ever farmed at Rattling Beach, Atlantic Salmon were almost non-existent in Bear River, and there is no evidence, even from Mr. Carr, or any other sworn witness, of any "massive fish escape".

[144] In addition to his affidavit filed "on behalf of " Dr. Hemming, Mr. Ryder – Burridge of the Ecology Action Centre, also filed written comments. Again, part of the concerns expressed were in relation to non-compliance with lease boundaries. As noted repeatedly, in the course of the hearing, and in this decision, that is what brings us here.

[145] In his written comment, Mr. Snyder-Burridge attempts to introduce his "expert" opinion on several issues. As noted above, admissibility of expert opinion evidence is restricted. Section 30 (3) (a) and (b) of the regulations (noted above) set criteria on the admissibility of expert opinion. In addition, the general rules of evidence apply, that is, that expert opinion evidence can only be provided by an individual who qualified. (such as Mr. Carr). Mr. Ryder Burridge, although very focused on the plight of wild salmon in general, is not qualified to give expert opinion evidence.

[146] Mr. Ryder Burridge also takes issue with the process, which excluded EAC from intervenor status. He states:

> " In our view, a submission like that which follows is not necessarily easily put together by individual citizens, communities or other local entities near open net-pen aquaculture sites. Such reviews can be timely, costly or out-of-reach for many who might wish to bring constructive arguments to bear. This is a role that the EAC adopts on behalf of concerned citizens and communities who care deeply about the natural environment in Nova Scotia, but who cannot fully participate in processes like this one due to time or resource constraints "

[147] With respect, there is nothing to prevent EAC or any other body or individual from offering support to a party / intervenor. Indeed, that appears to have happened in this case, by way of "piggy-backing" on Dr. Hemming's status. It is notable that nowhere in evidence offered on behalf of Dr. Hemming is his name even mentioned nor is his particular concern, and he did not file an affidavit or testify. He also did not explain the "mistake" in his application, regarding his property distance from the Rattling Beach farm.

[148] Mr. Ryder Burridge also expresses concerns regarding willingness / ability of DFA to apply and enforce the requirements of the act and regulations.

> "The ARB must consider the multi-year noncompliance of AQ#1039 as part of its assessment of the optimum use of marine resources and reject the proponent's application for lease expansion until such time as proper regulatory enforcement protocols and site re-alignments have taken place. "

[149] With respect, the evidence before the Board clearly establishes that KCS has been pressing to correct the lease boundary since 2008, and that is what brings us here. As well, the evidence makes it abundantly clear that DFA has reporting requirements, and professional staff who are fully engaged in ensuring proper operation of all aspects of this and other farms throughout the province.

[150] Mr. Derek Purcell of HBN filed a written comment. He acknowledged the information and documents available on the webpage and appreciated the transparency.

[151] He expressed a concern regarding the noise. He did say that when he visited the area and spoke to some local residents, they were not concerned about noise, but did say perhaps they were just used to it. He asks that a "releasable" condition be attached to the FMP, regarding noise, and quantification. The issue of noise is not a matter than could be affected by allowing a new line to be drawn on the water. However, as noted, we do suggest that KCS and DFA ensure that noise is minimized to the extent possible.

[152] Mr. Purcell goes on to express concerns regarding the lease boundary violations, and that the application be refused until these violations are resolved. Again, we emphasize that the precise reason that we are here, is to consider the boundary issue, which KCS has been trying to address since 2008.

[153] Mr. Purcell then wanders into the field of expert opinion. He is not qualified to offer

expert opinion, nor does his opinion meet the statutory requirements. He goes on to attack DFO practice in protecting Atlantic salmon. While we do not agree that there is any issue whatsoever regarding those efforts (note the greatest delay in bringing this application forward was the detailed interaction with DFO), this request is well beyond the mandate of this Board. He also expresses concerns about the lack of data available to DFA in their review, but with respect, we have volumes of data before us to allow this Board to reach a conclusion.

[154] He also expresses concerns about cumulative effects of antibiotics, etc. in the basin, and again, the DFO threshold. We note the detailed evidence before the Board regarding use of chemical treatment of the fish, the approvals necessary, and the rarity of use. We also have detailed evidence regarding the mitigation efforts to control accumulation of debris beneath the cages (referred to above).

[155] He then discusses impact on wild salmon. We have reviewed above, the impact, and we agree that the mitigation efforts, and controls and limits set by DFA and other enforcement bodies, are reasonable.

[156] Wendy Watson Smith of the Association for Preservation of the Eastern Shore also filed a written statement. She challenged issues she has had with leases in Ship Harbour and Owls Head Harbour, and argues that the action of DFA / DFO into "potential organic loading, pesticides, and drugs on other fish stock in the Annapolis Basin. She maintains that DFA is not capable of regulating the industry. However, the evidence before the Board shows a highly regulated industry with ongoing, effective interaction with KCS.

[157] The Board is satisfied that there will be no negative, or any, impact of this amendment on any of the eight statutory conditions. As noted, to apply the conditions to a lease amendment which is in effect, re-drawing a line on the water, is a difficult fit. It has generated an enormous amount of material, which would be relevant to a case involving new activity.

[158] The application of Kelly Cove Salmon Ltd. lfor an amendment to the boundary of lease AQ#1039 is allowed.

DATED at Halifax, Nova Scotia this **28th** day of **January** , 2022.

Jean McKenna, Chair

Richard Patterson, Board Member

Michael McKinnon, Board Member

DISTRIBUTION: Alison Campbell, Solicitor on behalf of the Department of Fisheries and Aquaculture
Robert Grant, Solicitor on behalf of Kelly Cove Salmon Ltd.
Sarah McDonald, Solicitor on behalf of Dr. Gregory Hemming

SCHEDULE A

SUMMARY OF NETWORK CONSULTATIONS

[i] The following are summaries of the individual network agency consultations DFA undertook regarding the adjudicative boundary amendment application for lease #1039. Please see the appendices outlined in Table 1to review the associated documents related to each of the following network agency summaries.

[ii] **Fisheries and Oceans Canada (DFO)** reviewed the application according to their legislative mandate, which includes the Fisheries Act, Species at Risk Act (SARA), Oceans Act and applicable regulations. Some initial questions were raised in discussions by DFO requiring clarification from the applicant. These questions are outlined and addressed in KCS Addendum Report, which was provided to DFA and DFO for review. DFO completed its review and submitted a Letter of Advice (LOA) accompanied by a Canadian Science Advisory Secretariat (CSAS) Science Response. The LOA provided a summary of the results of DFO's risk assessment to inform of risks posed to fish and fish habitat and identify where additional avoidance and mitigation measures could be applied.

[iii] Clarification was required/requested by DFA on DFO's LOA and CSAS response. DFO submitted a modified table with responses and also submitted an Addendum to the LOA that provide additional context related to site specifics and DFO's review process.

[iv] The application was reviewed by various DFO sections to assess the following: the deposit of deleterious substances, serious harm to fish or fish habitat, and the killing, harming or harassing of aquatic species listed under SARA and the destruction of their critical habitat.

[v] The assessment by DFO was supported by a modelling exercise that described the "Predicted Exposure Zones for Deposits of Deleterious Substances". DFO's review was also supported by an assessment of "Fish and Fish Habitat" of the area based on their databases and expert knowledge to determine what fish and fish habitat were in the area and if it was susceptible to aquaculture effects. Finally, DFO looked at a number of "Pathways of Effects" that considered potential aquaculture related stressors and their potential effects on fish and fish habitat. These potential stressors included physical alteration of habitat structure, alteration in light, noise, release of nutrients and organic material, release of chemicals, release of farmed fish, and the release of pathogens and sea lice.

[vi] DFO determined that, because no critical habitat was identified in the predicted exposure zones, the Annapolis Basin and the proposed lease boundaries, it is unlikely that the residual negative effects will result in further serious harm to fish or fish habitat; or the killing, harming or harassing of aquatic species listed under SARA or the destruction of their critical habitat.

[vii] Based on DFO's assessment of the application; information, advice, and recommendations were provided to DFA which were considered by the department in a number of ways. DFO provided some recommendations which DFA referred to the applicant as information awareness recommendations for the applicant to consider to ensure they were compliant with

DFO's legislated mandate. This was accomplished by providing DFO's letter of advice and associated documents to the applicant. DFO also provided advice and recommendations to the DFA regarding sections of the Marine Finfish Farm Management Plan (FMP).The FMP for licence/lease #1039 (which is currently approved for implementation) will be re-reviewed by DFA after a decision on the application is made by the Nova Scotia Aquaculture Review Board (NSARB). DFO did identify that information which will reside in the FMP may have informed a more precise assessment of the residual risk of the application. However, DFO advised that the information was not needed as the residual risk was below the thresholds of unacceptable impacts. If the application is approved, DFA will work with DFO to ensure the advice and recommendations provided are appropriately incorporated into the FMP for licence/lease #1039. DFA also considered the advice, recommendations and information provided by DFO directly into DFA's review and recommendations to the board.

[viii] **Canadian Food Inspection Agency (CFIA)** reviewed the application and did not raise any questions with the proposed operation regarding their mandate. Transport Canada (TC) reviewed the application and identified concerns regarding the proximity to the ferry terminal and an expansion towards the terminal. DFA provided additional context and clarification to TC regarding the application and that the current configuration was not an expansion beyond what TC had reviewed through their Navigation Protection Program (NPP). TC confirmed with the applicant that the current gear configuration on site is what was approved in 2017 through TC's NPP and is currently marked accordingly. TC also followed up with the Princess of Acadia ferry operator and confirmed that there are no issues with the proposed amendment and no complaints had been received to date. TC concluded that there were no outstanding concerns with the proposed boundary amendment.

[ix] **Environment and Climate Change Canada (ECCC) –Canadian Shellfish Sanitation Program (CSSP)** reviewed this application and did not raise any questions with the proposed operation regarding their mandate. CSSP is not relevant to marine finfish applications.

[x] **Environment and Climate Change Canada (ECCC) -Canadian Wildlife Services Division (CWS)** reviewed the application and had comments requiring clarification. The additional information requested by CWS was provided by the applicant and DFA. Upon review of the additional information, CWS determined that there were no further comments.

[xi] Based on CWS's assessment of the application; information, advice, and recommendations were provided to DFA which were considered by the department in a number of ways. CWS provided some recommendations DFA referred to the applicant, which were an information awareness recommendation for the applicant to consider to ensure they were compliant with CWS's legislated mandate. CWS also provided advice and recommendations, which DFA will in corporate into the FMP, as necessary. The FMP for licence/lease #1039 (which is currently approved for implementation) will be re-reviewed by DFA after a decision on the application is made by the NSARB. If the application is approved, DFA will work with CWS to ensure the advice and recommendations provided are appropriately incorporated into the FMP for licence/lease #1039. NFA also considered the advice, recommendations and information provided by CWS directly into DFA's review and recommendations to the board.

[xii] **Nova Scotia Environment (NSE)** reviewed the application and did not raise any questions or concerns with the proposed boundary amendment with regards to their mandate.

[xiii] **Nova Scotia Department of Agriculture** reviewed the application and determined that due to the straightforward nature of the boundary amendment to the existing site, they did not have any concerns or objections with the application from an agricultural perspective.

[xiv] **Nova Scotia Communities, Culture and Heritage (CCH)** reviewed the application and did not have any archaeological concerns as no gear, notably anchors, will be moved to support the boundary amendment. It is advised that if any archeological artifacts are recovered or observed at any time, a Coordinator of Special Places Program at CCH should be contacted. This can be accomplished by incorporating a Standard Operating Procedure (SOP) for reporting to CCH, into the applicant's FMP.

[xv] **Nova Scotia Department of Lands and Forestry - formally Department of Natural Resources** reviewed the application and noted that the proposed expansion lies within the Department of Natural Resources' designated Significant Habitat for overwintering wildfowl. However, the Department indicated that due to the limited extent of this development, it should not impact the biodiversity interests of the Significant Habitat area.

[xvi] **Nova Scotia Department of Fisheries and Aquaculture - Inland Fisheries Division** reviewed the application but due to the marine environment where this site is located, the department did not have any concerns from and inland fisheries perspective.

SUMMARY OF CONSULTATIONS WITH THE MI'KMAQ OF NOVA SCOTIA

[xvii] Nova Scotia Department of Fisheries and Aquaculture provided the application and associated documents to the Office of Aboriginal Affairs (OAA) for their review to provide advice to DFA on requirements regarding consultation with the Mi'kmaq of Nova Scotia. It was recommended that consultation with the Mi'kmaq was not necessary for the aquaculture boundary amendment application #1039 as no new equipment, species, harvesting methods, yield or structural change are associated with the proposal.

Tab 9

CERTIFIED TRUE COPY OF AN ORIGINAL DOCUMENT Stacy Bruce Digitally signed by Stacy Bruce Date: 2024.02.01 16:31:33 -04'00'

DECISION and ORDER **NSARB 2022- 001-002-003**

NOVA SCOTIA AQUACULTURE REVIEW BOARD

IN THE MATTER OF: applications made by **TOWN POINT CONSULTING INC.** for **NEW MARINE SHELLFISH LICENCES/LEASES AQ#1442, AQ#1443 and AQ#1444** in **ANTIGONISH HARBOUR, ANTIGONISH COUNTY** for the **SUSPENDED CULTIVATION** of **AMERICAN OYSTERS.**

BEFORE: Jean McKenna, Chair
Coleen Morrison, Vice Chair
Roger Percy, Board Member

HEARING DATES: **Session 1** June 7 to June 10, 2023
Session 2 September 26 to 28, 2023

DECISION DATE: January 5, 2024

[1] In 2013, the Province of Nova Scotia created a commission to review and make recommendations as to the development of aquaculture in Nova Scotia. In 2014, the commission released its report. (**The Final Report of the Independent Aquaculture Regulatory Review for Nova Scotia** [The Doelle-Lahey Panel]

[2] The Commission had consulted with numerous interested parties, including the Atlantic Salmon Federation, the Nova Scotia Aquaculture Association, the Ecology Action Centre, the Nova Scotia Fisheries Sector Council, the Union of Nova Scotia Municipalities, the Nova Scotia Salmon Association, and the Coastal Coalition of Nova Scotia. Members of the public were encouraged to participate,

[3] Although some participants, including the Ecology Action Centre had called for a moratorium on marine open pen sites, a moratorium was not recommended. The authors concluded:

> "In this report, we conclude that a fundamental overhaul of the regulation of aquaculture in Nova Scotia is called for. We conclude that this overhaul should be guided by the idea that aquaculture that integrates economic prosperity, social well-being and environmental sustainability is one that is low impact and high value. By this, we mean aquaculture that combines two fundamental attributes: it has a low level of adverse environmental and social impact, which decreases over time; and from the use of coastal resources, it produces a positive economic and social value, which is high

and increases over time. A number of participants in our process urged us to conclude that marine-based fin-fish facilities – and more particularly, salmon farms – cannot be sustainably operated, and to recommend that a permanent moratorium be imposed on this kind of aquaculture. Our conclusion, after careful consideration of the state of the science and opportunities to reduce impacts through effective regulations, is that the regulatory framework should not be prohibitory at a provincial scale. Instead, we recommend fundamental changes to the regulation of aquaculture, which we conclude can address the serious and legitimate concerns raised without foreclosing the opportunity associated with this sector of the industry."

[4] In response, the Province generated a new legislative and regulatory framework governing aquaculture in Nova Scotia **(Fisheries and Coastal Resources Act 1996 c.25 as amended).**

[5] The purpose of the legislation is as set out in the Act:

Part 43A The purpose of this Part is to

(a) recognize that aquaculture is a legitimate and valuable use of the Province's coastal resources;

(b) ensure aquaculture is conducted under conditions and in accordance with controls that protect the environment;

c) provide a predictable and efficient regulatory environment for business and public confidence;

(c) ensure equity, fairness and compatibility in access to, and utilization of, public water resources for aquaculture;

(d) ensure that members of the public have access to information with respect to the regulatory process and an opportunity to participate in the process;

(e) ensure that regulations governing aquaculture are achievable, contain incentives for compliance and are enforceable;

(f) ensure that coastal communities derive positive social and economic benefits from aquaculture;

(g) ensure that aquaculture is conducted with due regard to the health, well-being and recovery of species at risk; and

(h) ensure that the regulation of aquaculture contributes to the productive development of the Province's coastal resources. 2015, c. 19, s. 5

[6] That framework included the creation of this Board (Aquaculture Review Board), which is independent of government. The Board conducts hearings into, i*nter alia*, applications for new aquaculture development, such as this one. The Board's mandate is set out in the Act and Regulations:

Public Hearing

[7] **51** Where the Minister refers an application to the Review Board, the Review Board shall hold a public hearing as prescribed. 2015, c. 19, s. 9.

52 (1) Upon receiving a decision of the Review Board made pursuant to Section 49, the Minister shall, in accordance with the decision,

(a) issue the aquaculture licence or aquaculture lease;

(b) issue the aquaculture licence or aquaculture lease, subject to any conditions the Review Board considered appropriate;

(c) reject the application for the aquaculture licence or aquaculture lease; or

(d) amend the aquaculture licence or aquaculture lease.

[8] The Board is independent of the Minister, and the Minister is bound by the conclusions and direction of the Board.

[9] In reaching a conclusion, the Board is required to consider the factors set out in s. 3 of the Regulations:

3 In making decisions related to marine aquaculture sites, the Review Board or Administrator must take all of the following factors into consideration:

(a) the optimum use of marine resources;

(b) the contribution of the proposed operation to community and Provincial economic development;

(c) fishery activities in the public waters surrounding the proposed aquacultural operation;

(d) the oceanographic and biophysical characteristics of the public waters surrounding the proposed aquacultural operation;

(e) the other users of the public waters surrounding the proposed aquacultural operation;

(f) the public right of navigation;

(g) the sustainability of wild salmon;

(h) the number and productivity of other aquaculture sites in the public waters surrounding the proposed aquacultural operation.

[10] Town Point Consulting (TPC) is a corporation created by Ernie Porter, for the purpose of pursuing the development of oyster aquaculture in Antigonish Harbour. Mr. Porter is a resident of “Town Point”, a peninsula near the mouth of the Harbour. He is an engineer by profession and was former Chairmen and President of Lindsay Construction until his retirement.

[11] In accordance with the regulations, TPC applied for an option to lease in Antigonish Harbour. The application was granted on March 28th, 2019, for a period of six months. As per section 8 of the Aquaculture Licence and Lease Regulations, the option to lease was extended for an additional six months, expiring on March 28, 2020.

[12] In accordance with section 11 of the Aquaculture Licence and Lease Regulations, the application was received by the Department of Fisheries and Aquaculture (DFA) on January 27, 2020, prior to the expiry of the option to lease.

[13] The application was for three marine aquaculture licences and leases for the suspended cultivation of American oyster (Crassostrea virginica) in Antigonish Harbour, Antigonish County:

- AQ#1442 Antigonish Harbour, Antigonish County (3.2 ha)
- AQ#1443 Antigonish Harbour, Antigonish County (20.21 ha)
- AQ#1444 Antigonish Harbour, Antigonish County (13.38 ha)

[14] Pursuant to the regulatory requirements, TPC conducted the required scoping process. In this case, Mr. Porter initially contacted his immediate neighbours, and later expanded the contact to more remote residents, as well as to wild oyster harvesters. He recorded notes of these meetings. He invited anyone interested to come to his property and view his proposal and the progress to date.

[15] Dr. David Garbery is head of the Department of Aquatic Resources at St. Francis Xavier University. Dr. Garbery was initially concerned about the potential impact of the farm on the ecology of the harbour. He also was concerned about information and misinformation circulating in the community at large and proposed a community information meeting which included presentations by Mr. Porter, scientists, and a group organized in opposition to the project, “Friends of Antigonish Harbour” (FOAH). The meeting was well publicized and well attended.

[16] The application was reviewed, in accordance with the regulations, by “stakeholders”, Fisheries and Oceans Canada, Canadian Food Inspection Agency, Transport Canada, Environment and Climate Change Canada – Canadian Shellfish Water Classification Program, Environment and Climate Change Canada – Canadian Wildlife Service, Nova Scotia Department of Environment (now Department of Environment and Climate Change), Nova Scotia Communities, Culture and Heritage (now Department of Communities, Culture, Tourism and Heritage), Nova Scotia Department of Agriculture, Nova Scotia Department of Lands and Forestry (now Department of Natural Resources and Renewables), Office of Aboriginal Affairs (now Office of L’nu Affairs) and Nova Scotia Municipal Affairs (now Department of Municipal Affairs and Housing).

[17] On December 22, 2022, the application was accepted by the Minister as complete and was forwarded to the Board. The hearing was conducted in Antigonish, NS, on June 7-10, 2023, and Sept. 26-28, 2023.

[18] Seventeen applications for Intervenor Status were received by the Board, and status was granted to all of them. Some of the individual applicants for intervenor status who are opposed to the application are also members of FOAH. As FOAH was granted intervenor status, they clearly could not be represented individually and also as a member of the organization, and so chose to 'withdraw' from FOAH and seek status on their own. Moreover, given the considerable overlap in the positions, the Board then determined that a number of individual applicants, as well as the five commercial fishermen, would be consolidated into three groups, as follows:

- **Group 1:** Mary Jo MacDonald, Patrick MacDonald, Lucy MacDonald, Richard Wilgenhof, Alena Wilgenhof, Sian Newman-Smith, Rick Turner, Rowan McLean, Peter Bowler, Colleen Bowler, Friends of Antigonish Harbour, Sheila MacKinnon Hudon, William Hudon, May Goring, Manfred Goring, Antigonish Harbour Watershed Association, Rod Brady, and Mike MacDonald
- **Group 2:** Bill Brophy, Tim Brophy, Duncan Brophy, Daryl Beaton, and Brendon Doyle
- **Group 3:** Mark Genuist, Stephen Feist, and the Community Liaison Committee

[19] Three citizen groups were included in the decision for Intervenor status.

[20] The Antigonish Harbour Watershed Association describes itself as

> “...an informal community group to advocate for the environmental health of Antigonish Harbour”.

It anticipates significant environmental impact by the TPC project, which it describes as a “large commercial operation”. As a volunteer citizens group, AHWA does data collection in conjunction with the “Community Aquatic Monitoring Program” (CAMP) near the proposed lease sites. Its application was filed by Susan Ross. Ms. Ross did not testify at the hearing.

[21] The Friends of Antigonish Harbour (FOAH) is a group of citizens opposed to the project, for a variety of reasons. FOAH 's application was filed by Peter Bowler, (who individually was granted status along with his wife, Colleen Bowler). Colleen and Peter Bowler are from Texas, USA, and are seasonal residents of Town Point. Their property borders that of Ernie Porter. FOAH's application states that it was

> "...formed to protect the environmental health of the sensitive ecology of Antigonish Harbour, ensure the safe access to Antigonish Harbour by First Nations, local commercial and recreational fishermen, boaters, birdwatchers and other recreational users."

They allege "dramatic" reduction in use of the area by recreational and commercial users, and loss of property value as well as potential rental income from some of their waterfront properties. They are adamantly opposed to the proposal.

[22] The Community Liaison Committee (CLC) is an organization created when the proposal first became public (see reference above to Dr. David Garbery). It describes itself as follows:

> "The Community Liaison Committee (CLC) is made up of a number of people who are directly and indirectly affected by this proposal. The committee includes people who live on the Antigonish Harbour; fish either commercially or recreationally in the Harbour; use the Antigonish Harbour for recreation, sailing and kayaking and conduct academic research in the Harbour. The Committee members are interested in the impact that this project will have on the Antigonish Harbour, the immediate community, the Antigonish area, and the province of Nova Scotia. This committee includes Councilors from the Municipality of the County of Antigonish, a local fisher, two residents who live on Antigonish Harbour, two members from the Antigonish Boat Club, a St. Francis of Xavier professor, the former CAO for the Town of Antigonish and concerned citizens".

The members of the CLC include:

- Stephen Feist - CLC Chair: Past CAO for the Town of Antigonish and active member of a number of community groups; he is current president of the Antigonish Boat Club
- Sean Day - Co-Chair: Former Planner at the Town of Antigonish, past president of the Antigonish Boat Club which operates from Seabright on Antigonish Harbour
- Dr. David Garbury: Biology Professor at St. FX and head of the Aquatic Resources Program,
- Hughie Stewart: Deputy Warden of the Municipality of the Country of Antigonish
- Owen McCarren: Warden of the Municipality of the County of Antigonish and recently retired as Area Manager of the Dept. of Natural Resources.
- Archie Mackenzie: fisherman, quarry operator, and an active member of several fishing-related organizations.
- Marc Genuist: a retired CBC journalist who has lived in Antigonish part-time for 15 years and permanently for 5 years. Marc and his partner live in Town Point. Their

waterfront property has a direct view over two of the proposed lease sites of the harbour. They use the harbour regularly to swim and kayak.

- Jim Lerikos, past president of The Antigonish River Association, Director, and past president of the Antigonish Eastern Shore Tourist Association.
- Dr. Roger Porter, a member of the Antigonish River Association and The Ecology Action Center.
- Paul MacIsaac, Senior Aquatic Operations Technician at Dalhousie University, Faculty of Agriculture.
- Ryan Smith: Local resident and former executive assistant for Randy Delory, a previous MLA for Antigonish region.

The CLC application was filed by Stephen Feist and was represented at the hearing by Marc Genuist and Stephen Feist, who both testified at the hearing.

[23] Subsequently, several intervenors from Group 1 withdrew and renounced their intervenor status, as follows:

- Mary Jo MacDonald, Patrick MacDonald, Alena Wilgenhof, Sian Newman-Smith, Rick Turner, Rowan McLean, Colleen Bowler, Shiela MacKinnon Hudon, William Hudon, May Goring, Antigonish Harbour Watershed Association and Rod Brady.

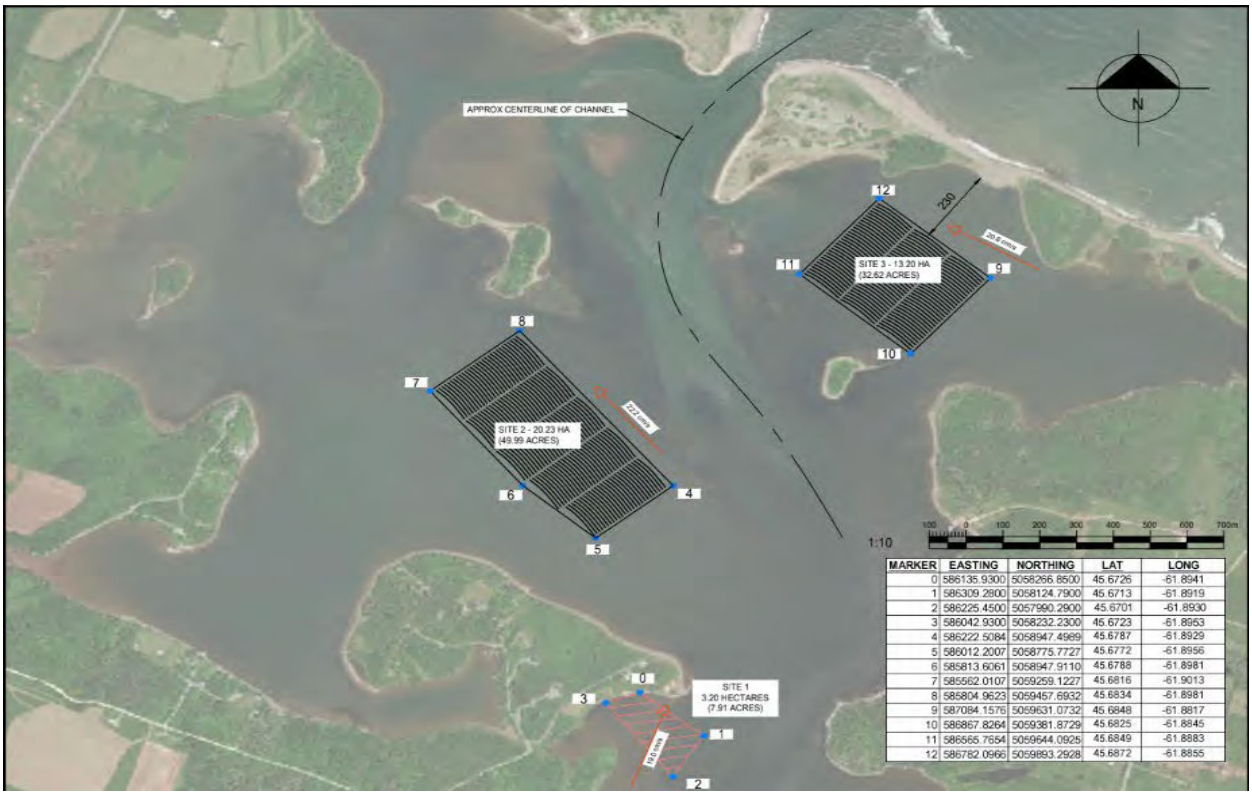
[24] It was argued during the hearing that Mr. Porter had attempted to block a certain Mr. Ed Pencer from becoming a member of the CLC. Mr. Porter did say in an e-mail that he was not comfortable with Mr. Pencer, however he testified that this related to a negative piece that Mr. Pencer had written in a local newspaper. Mr. Porter, in any event, would have no control over who would or wouldn't form part of CLC, and Mr. Pencer was pressed to join (he did not).

[25] The individual applicants for status expressed a variety of concerns, for and against the application. The interests included recreational uses of the harbour (canoeing, kayaking, sailing, fishing etc.), impact on view from properties, impact on property value, impact on local tourism, impact on commercial fishing, impact on the ecology of the harbour, and contribution (or lack thereof) to the local economy.

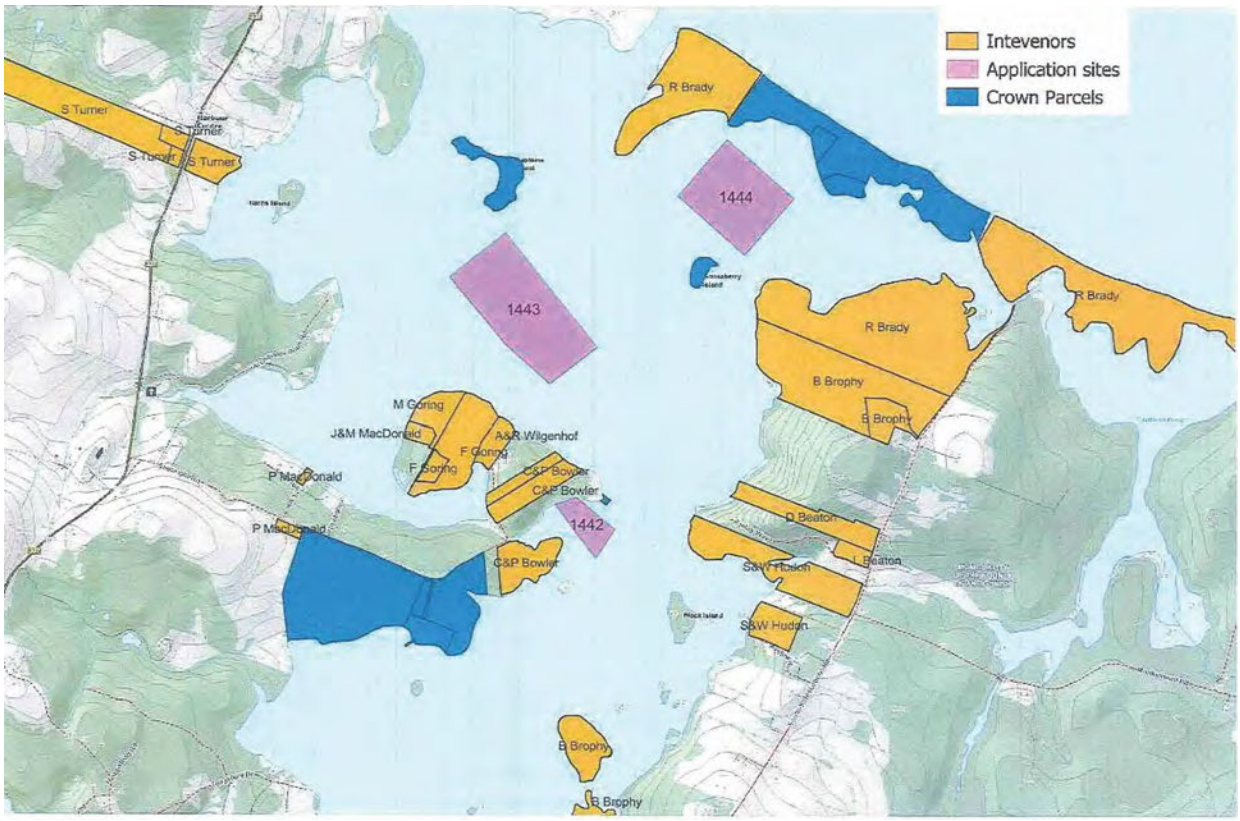
Analysis

[26] The harbour maps below depict the proposed site locations, as well as the locations of property owned by the various individual intervenors. The lease area boundaries together constitute approximately 2% of the entire area of Antigonish Harbour. The BOBR cages are arranged in rows, with 10m spacing between each row. There is a 20m gap between the parallel cages and the edge of the lease. Less than 1% of the harbour could be potentially “shaded”, and visible if the proposed lease sites and corresponding licences are approved. The anchoring system would be contained underwater, within the lease boundaries. The lease boundaries, anchors, etc. would all be marked in accordance with the requirements of Transport Canada.

Map A – Adjacent Property Owners



Map B – Application Sites



Map C – Overlay of Adjacent Property Owners and Application Sites

Consideration of the eight factors:

[27] As noted above, the Board is required to consider the eight factors set out in s. 3 of the Regulations. Specifically:

(a) the optimum use of marine resources;

(b) the contribution of the proposed operation to community and Provincial economic development;

(c) fishery activities in the public waters surrounding the proposed aquacultural operation;

(d) the oceanographic and biophysical characteristics of the public waters surrounding the proposed aquacultural operation;

(e) the other users of the public waters surrounding the proposed aquacultural operation;

(f) the public right of navigation;

(g) the sustainability of wild salmon;

(h) the number and productivity of other aquaculture sites in the public waters surrounding the proposed aquacultural operation.

Factor a) the optimum use of marine resources.

[28] This issue will be addressed following review of the remaining factors.

b) the contribution of the proposed operation to community and Provincial economic development.

[29] Mr. Porter, in his evidence, testified that it anticipated employment of 10 individuals with a fully built out farm. It also plans to use the newly developed "BOBR" equipment for growing, TPC in its submissions argues that the operations will provide employment to local harvesters, residents, and countless indirect benefits to local businesses from the sale of oysters; maintenance and repair of equipment; provision of necessary farm services and supplies, the local design and fabrication of the Oyster-Matic work platform (developed by Ernie Porter for use with BOBR aquaculture facilities); tourism and recreational potential, etc. If granted, TPC says that the oyster farm will make a genuine contribution to community and provincial economic development.

[30] In its application, TPC says that:

> "... construction of the proposed depuration facility is the largest construction component of the project and would be a welcome addition to the project list for Bio-Novations, Kells Enterprises, Quality Concrete, Highland Building Supplies, and many other local companies. In total, this building project would represent an injection of about $1.5 million into the local economy. Construction of the marine portion of the farm would represent a further expenditure of about $780k for materials and equipment excluding labour and HST. This investment would be distributed over the first three years of farm operation. One of the most significant and beneficial aspects of the development of this farm is employment. We estimate during the development of the farm in the first three years there will be direct wages paid of about $370,000.00 in addition to our own sweat equity. This does not include wages to employees of contractors who may be hired to work on the land-based nursery and depuration facility. Then, after the farm settles into the routine of managing the fully developed operation, wages will be about $350k annually. The productivity of the proposed farm is planned to be between two and three million oysters per year.

[31] The farm gate value of the product after the farm reaches full production is expected to be $1.0-1.5 million at wholesale prices annually. We plan to work with our marketing partner, Afishionado Fish Mongers, to develop markets in larger centres outside of Nova Scotia and in the process realize a portion of the marketing value of our product. At this point, the unit price should increase from about $0.50 to about $0.75 which would increase the farm gate value of farm production to be between $1.5 and $2.25 million annually. This represents a significant increase in economic output from this marine resource than is presently realized from collection of natural production alone.

[32] Each sale of BOBR and Oyster-Matic for an operation capable of producing one million oysters per year would generate about $350,000.00 in sales of Canadian made products. We plan to market this technology first in Atlantic Canada, then North America and ultimately internationally. Our farm will be a key player in establishing the viability and performance comparison of our technology relative to competing systems. We cannot accurately predict the economic activity resulting from this cooperation but expect it to be greater than the farm itself".

[33] The opposing Intervenor Groups (Groups 1 and 2), argue that the contribution, if any, to economic development is overstated, that few will be employed, directly or indirectly. and that there will be a negative impact on tourism.

[34] In their brief, they challenge TPC as follows:

- There is no "close analysis" by TPC on how many positions would be seasonal versus "off-season", and that seasonal workers are a limited resource in Nova Scotia

- While Mr. Porter has asserted the operation will add $1-2 Million annually to the GDP, he has offered no evidence for this representation.

- The evidence adduced in the Cranford Report that the low current speeds measured at the lease sites restricts the supply of food particles to the oyster and limits oyster stocking densities and growth seriously undermines the asserted economic contribution that the operation will make to the community or Province.

- Although Mr. Porter testified that the lease sites, if approved, would act as the principal demonstration site for the BOBR technology, a new form of suspended culture technology created by Mr. Porter in partnership with Mr. Philip Docker. He also testified that the BOBR system would generate economic value from an "oyster tourism" perspective. TPCI included various opinion articles that spoke generally to oyster farm tourism in other regions of Canada and the United States. However, the opponent group argues that the BOBR units had been in use at the lease sites in Merigomish

Harbour owned by Mr. Docker for approximately four years, since 2019, but that TPC “opted” not to call Mr. Docker as a witness (but neither did Intervenor Groups 1 and 2).

- The opponents argue that Mr. Porter did not provide evidence of any significant volume of BOBR sales resulting from the BOBR use in Mr. Docker’s Aquaculture Leases despite what they describe as an online marketing page.

- They maintain that TPC has not provided the Board with sufficient evidence on which to make a finding of what this contribution would be.

- The opponents say that any contribution to the local economy would be offset by the negative impact on the anticipated losses to the five commercial fishermen, (part of the opponent group), as well as the wild oyster harvesters. such as Jamie Davidson who wrote to the Board, the opponents argue diminution of tourism revenue based on converting the existing natural harbour into an “industrial site”.

- The opponents argue that there is a negative impact on tourism. They maintain that tourism is drawn to the area by the natural environment and beautiful views. They see the presence of “industrial” oyster aquaculture as being very much a negative. This is contrasted with the evidence (and common knowledge) of the impact of oyster farming on PEI tourism where it is part of the “branding” of the island.

[35] The Board is satisfied that the evidence of Town Point does provide a reasonable 'forecast' of the economic benefit to the surrounding community. The initial proposed investment, while of short duration, is reasonably projected, and is as detailed as possible in its application documents. While the future success and direct benefit is less precise, only the proposed number of oysters started on the site can be seen as an absolute. The growth rate projected by TPC's expert could prove to be wrong (as suggested by Dr. P. Cranford), however that is a risk to be faced by TPC, who relies on the evidence of Dr. Garbery and Dr. Grant.

[36] There is undisputed evidence that the growth using the BOBR system is much better than the more traditional system used in shellfish aquaculture.

[37] A negative impact on tourism has not been clearly established by the opponents to the project.

[38] While waterfront property owners do have views of the harbour, public views from the roads alongside the harbour are limited, and the best viewing sites and tourist attractions are from Mahoney's Beach and Dunn's Beach. As well, the low profile of the BOBR units minimizes their visibility. Furthermore, mere visibility does not equate to the subjective description of 'unsightly’.

Factor c) Fishery activities in the public waters surrounding the proposed aquacultural operation.

Factor e) The other users of the public waters surrounding the proposed aquacultural operation.

Factor f) The public right of navigation.

[39] These three factors will all be addressed together in this section.

[40] In the application package, TPC reported the following as “other users of the public waters surrounding the proposed aquaculture operation”:

- Commercial oyster harvesters
- Commercial lobster fishermen
- Recreational fishers
- Recreational power boaters
- Recreational sail boaters
- Kayakers, canoers, and paddle boarders
- One existing oyster leaseholder
- Float plane operator

[41] The intervenors in Group 2 include five commercial fishermen who are based in Antigonish Harbour: Bill Brophy, Tim Brophy, Duncan Brophy, Daryl Beaton and Brendan Doyle. Mr. Bill Brophy testified on behalf of the group.

[42] In preparing his application, Mr. Ernie Porter contacted Bill Brophy, who spoke to him on behalf of the Brophy family. Mr. Porter had asked him to review “the enclosed plan, to ensure it does not impede your normal transit route. If you feel this layout may be a concern, please let us know.... we would be available to meet with you....”

[43] Mr. Brophy did attend the public meeting organized by CLC and did not express particular concerns at that time. Darrell Beaton had a short telephone discussion with Mr. Porter, and according to a notation by Mr. Porter in the application package, he had no concerns, as long as their route for lobster fishing was not obstructed. He was very busy at the time and did not have time to meet. None of the other fishermen, responded.

[44] Darrell Beaton later filed a written submission. As an intervenor, he is not entitled to separately make a written submission, however, part of his comment was that contrary to Mr. Porter's notation in the application package, he did not agree with the application. On that basis, the Board decided to allow his written submission.

[45] Although initially supportive, Mr. Beaton had apparently come to believe that AQ#1444 would in fact block his route from his lobster berth (next to Dunn’s Beach) to the bay. He felt that a portion of AQ#1444 would block his transit route to lobster fishing.

[46] This was inconsistent with the testimony of Bill Brophy.

[47] Mr. Brophy testified “on behalf of” the five fishermen. He has lived all his life on the harbour, his home is on the south side of the harbour, just southeast of Gooseberry Island. He said that the five commercial fishermen variously fish lobster, crab, tuna, herring, mackerel, and groundfish. He fishes for lobster, tuna, and crab. Lobster is usually fished in St George's Bay (outside of Antigonish Harbour), from May 1-June 30, although there is a minimal amount of lobster fishing in the harbour at the end of the season. Snow crab is fished off Chetticamp, and the boats remain there through the season, which begins “when the ice is gone”. Tuna is fished “everywhere, from August 1 until September or October.

[48] We conclude that the only actual commercial fishing in the harbour is the minimal amount of lobster fishing late in the season.

[49] Mr. Brophy’s lobster boat has a 660-horsepower engine and draws three-to-four feet. He said if the aquaculture gear was sunk, for instance to allow passage through the northern route in an unusual ice condition, he was not sure if it would interfere with passage, it would depend on depth.

[50] All five fishermen in Group 2 have employees for crew, from one to four, depending on the fishery.

[51] One of his routes to the bay runs parallel to Dunn's Beach, and the other runs southerly, between Gooseberry Island and the shore, then northerly through the channel to the west of Captains' Island. However, although both routes are shown on a map created by Mark MacDonald for FOAH, Mr. Brophy confirmed that he has actually only used the much shallower northern route on one occasion. That was in 2017, when the crab season opened early as a result of some right-whale presence, while Antigonish Harbour was still blocked by ice. To get to the crab fishery off Chetticamp, he had to use the northern route.

[52] The regular route is not normally blocked by lease AQ#1444, however, he testified the fishermen set out in the early morning, when there is little light, and there may be fog present, making electronic navigation difficult. In addition to using electronic navigation, they depend on navigating off the visibility of the trees on Gooseberry Island.

[53] Mr. Brophy did testify that if the lease boundary was moved back beyond the sand spit which extends northeasterly from Gooseberry Island, he would have no problem. In fact, Mr. Porter, in his submissions post hearing, has indicated that he would be willing to shift his proposed southeast boundary to accommodate concerns about interference with the Gooseberry Island route.

[54] Mr. Brophy also said they had concerns about possible loose gear or floating lines, which could be caught in a propeller. He acknowledged that lobster gear sometime broke free, at least in St. George's Bay, although not in the Harbour. However very little lobster fishing was done in the Harbour.

[55] There was no evidence as to the existence of any such loose gear, or how it would be dealt with by TPC. No doubt that is an issue that could be dealt with at such time as it might occur. Unlike loose gear from lobster fishing, etc., it would be immediately identifiable as TPC gear.

[56] Mr. Brophy also confirmed that the usual lobster fishing took place in St. George's Bay, and that there was only sporadic fishing inside the harbour, in the late season.

[57] In May of 2022, Darrell Beaton observed a marker buoy in the channel which runs to the northeast of lease AQ#1443. He retrieved it and the attached technical instrument anchored in place (on the bottom) with a heavy chain. He mentioned it to Mr. Brophy, but neither took any steps to identify the owner, or the purpose. He apparently saw the chain as a potential hazard to navigation (despite the fact that it was on the bottom). Mr. Brophy testified that he himself had sailed through and over it several times without incident. Mr. Beaton simply tossed the device and gear behind his shed. Although Mr. Brophy testified that there were no markings or contact information on the instrument, a photograph presented to him at the hearing shows that there were in fact two telephone numbers.

[58] Mr. Brophy testified that they had at some point in July of 2022, reported it to a federal fisheries officer, and he claims that they contacted Transport Canada after the Town Point application was filed.

[59] In fact, the instrument had been placed by DFA, along with three others. It was an Acoustic Dopler Current Profiler, (“ADCP”); a form of current meter, one of four that had been placed. It is a very costly piece of technical equipment, The records of three of those current meters were included in the affidavit of Nathan Feindel of DFA. Those records demonstrate results for three locations (Ferry Point, Antigonish Harbour, and Reef Island.), for a 48-day period, in June 2022. Information about the missing device did not become known until shortly before the hearing was underway. In July of 2023, Dr. Jeffrey Barrell of the federal

Department of Fisheries and Oceans (DFO), confirmed that it was the missing instrument, and at that point, he was able to download data collected up until the time of its removal.

[60] Dr Barrell, for privacy reasons, was unwilling to disclose the name of the individual who had removed this very valuable instrument but did say that the person was a member of one of the intervenors in the current application.

[61] We were subsequently informed by Mr. Rogers, counsel for the intervenor group that includes the five commercial fishermen, that the individual was Mr. Beaton. Data from the instrument was allowed in evidence and was included in the affidavit of Nathan Feindel.

[62] A review of the evidence and documents satisfies the Board that as long as the usual navigation routes are not obstructed, there will be minimal, if any, impact on the commercial fisherman, and that it is the intention of TPC to accommodate their locations, in particular AQ#1444, to the extent that there is any impact.

Wild oyster harvesters

[63] Other commercial users of the Harbour include several wild oyster harvesters. They were consulted by TPC, and on August 7, 2019. They (Ken Fraser, Mike MacIntosh, Jamie Davison, and Steven Taylor) had reached a written agreement with TPC on the lease locations. The agreement required TPC to ensure that TPC “...stay a minimum of 50 feet offshore and avoid all areas identified as past harvest areas, generally any area of greater low tide depth of 3 feet will be acceptable”. However, in correspondence to the Board, on April 30, 2023, Mr. Davison said that TPC leases would include areas that have low tide depth of less than three feet, and that TPC had therefore broken the agreement.

[64] Mr. Davison was not called to testify. It is not clear to the Board why it was that why he concluded that TPC had broken the agreement, as there was then and is now, no gear in the water, although a review of the navigation chart does seem to show the Northeastern edge of AQ#1443 impinging in one portion on noted depths of less than 3 feet. However, the actual BOBR units would be some 20m from the parallel edge of the lease.

[65] The sketch signed by Mr. Davison and the others was not drawn with precision. However, although we are not clear on where his harvest area is located, the Board is satisfied that it would not be a difficult matter to slightly adjust whatever portion of the oyster farm might impact the wild oyster harvest locations.

[66] Ernie Porter in his testimony acknowledged that the agreement existed, and does agree to avoid the harvest areas, with depth as a guideline.

Recreational fishermen

[67] Several members of the public, in either intervenor applications or written submissions, state that they were recreational fishermen in the harbour. Some had concerns, some did not. Most did not describe what species they fished, or where. Mr. Bowler in his evidence said that he was a recreational fisherman and included a photo of him fishing in his presentation materials. There was no specific filed evidence regarding what species were fished, or where the fishing took place, although Mr. Bowler did say that it was “where the fish were”, which is at the mouth of the harbour. The Board is satisfied that the leases will not interfere with recreational fishers, and if indeed they fish in the leased areas, given the distance between lines of BOBR units, and the ability to navigate through the sites the impact will be minimal.

Piping Plover habitat

[68] Piping Plover are small shorebirds. There are two subspecies of Plover in North America. The *melodus* subspecies breeds along the Atlantic coast of Canada and the United States while the *circumcinctus* subspecies breeds near the Great Lakes and in the Prairie Provinces (exhibit 69 – Piping Plover *melodus* subspecies (*Charodrius melodus melodus*): recovery strategy (amended) and action plan, 2022).

[69] Both subspecies nest in similar beach conditions from the low water mark to the upper beach and dune crest and are not considered to react differently to potential disturbances.

[70] Piping Plover currently receive protection under **the Migratory Bird Convention Act (MCBA - SS:58 (5.1 & 5.2)** SNS 1998 c. 11 as amended.
-habitat protection on non-federal lands) and the **Nova Scotia Endangered Species Act**.

[71] Plovers are designated endangered species under both the **Nova Scotia Species at Risk Act (S.N.S. 1998, c.11)** and federally under the **Species at Risk Act (SARA -S.C. 2002, c2).**

[72] Dunn’s Beach is listed as critical habitat for Plover.

[73] In the process of preparing its application, TPC contacted Birds Canada for information regarding potential impact on piping plover habitat. Birds Canada responded, pointing out some potential issues, and in December 2019, TPC retained the services of Dillon Consulting to further evaluate the issues.

[74] On January 16, 2020, TPC obtained a report from Dillon Consulting “**Assessment of Potential Impacts to Nesting Piping Plovers as a Result of a Proposed Marine Shellfish Aquaculture Lease Site in Antigonish Harbour, Nova Scotia”.** In that report, it was

concluded that the proposed 230 m distance from AQ#1444 to the Dunn's Beach dune crest was sufficient to prevent any potential disturbance of piping plovers.

[75] On October 7, 2020, as part of the network consultation process, DFA forwarded a copy of the TPC application package to Rachel Gautreau, Environment and Climate Change Canada, Canadian Wildlife Service (CWS). A reply was requested by December 7. A follow up reminder was sent on November 24. Ms. Gautreau responded on the same day, indicating they would respond shortly. She also mentioned that FOAH had been in contact with her.

[76] On December 7, 2020, Ms. Gautreau responded: “The proposed lease is also less than 300 m from Gooseberry Island, a nesting island for 2 species of gulls. We recommend that proposed lease AQ#1444 be relocated to an alternate location at least 300 m from all areas of Dunn’s Beach Sandspit and Gooseberry Island”. She also recommended no access to Dunn's Beach or Gooseberry Island by project staff, and / or equipment.

[77] On March 3, 2021, TPC responded to DFA: “We understand the sensitivity of plover habitat on Dunn’s Beach. The scientists we have consulted on this matter stated that plovers use the ocean facing beach and are unlikely to use the harbour side of the beach. They also stated that a 200m buffer is reasonable and has been demonstrated to work in other situations involving more disruptive operations adjacent to plover habitat. Is it possible to revise the requirement for a 300m setback and agree on a 250m buffer instead, given that this buffer would be from the harbour side of the beach and plovers use the ocean side which is further away. Some portions of Dunn’s Beach are wooded with a boulder harbour shore – not plover habitat. Is it necessary to apply the setback requirements to these portions of the Dunn’s Beach peninsula? “

[78] TPC also asked for data regarding the presence of nesting gulls on Gooseberry Island, as Mr. Porter stated that his expert, Dr. Tony Miller, had only ever noted black backed gulls nesting there, and that species were not usually disturbed unless they were approached on foot.

[79] On March 9, 2021, DFA contacted Ms. Gautreau, provided the TPC response, and suggested a meeting within a week, with DFA to discuss options. Ms. Gautreau did not respond and DFA sent follow-up correspondence to Ms. Gautreau on May 17, May 27, June 21, and July 16th. On October 28, 2021, Ms. Gautreau responded. She did not offer any further information justifying the recommended 300m buffer zones. She provided data showing the last recorded observation of nesting gulls on Gooseberry, in 2013. She expressed annoyance that Mr. Porter and an expert from St Francis Xavier had walked on Gooseberry Island (Mr. Porter testified that they had walked below the low water mark, while doing a video to demonstrate their point).

[80] Chris Kennedy, the author of the 2020 Dillon report, was qualified as an expert on piping plovers. He testified that both plover subspecies nest in similar beach conditions from

the low water mark to the upper beach and dune crest. He explained that this is because the seaward side creates the more sandy, grassy conditions favored for nesting. The species are not considered to react differently to potential different disturbances.

[81] Mr. Kennedy walked Dunn's Beach a week prior to the hearing. He testified that he observed an abandoned plover's nest at the western tip of Dunn's Beach (a sandy, grassy area). He also noted commercial fishing vessels at "Captain's Pond", adjacent to the eastern end of the beach. He said that research shows the level of disturbance of nesting plovers as highest for pedestrian traffic, then for pets, and then predation by other species (such as gulls).

[82] He considered the CWS-recommended 300m buffer zone for the plovers to be excessive. He did not see the need for any buffer zone to protect the gulls on Gooseberry Island and noted that it was not an active colony.

[83] It should be noted however that existing marine aquaculture leases for American oyster co-exist in proximity to protected and ecologically sensitive areas in other parts of the Maritimes where plover habitat exists (e.g., Melmerby Beach Park, N.S., Waterside Beach Provincial Park, N.S., and Darnley Basin, Malpeque, PEI.).

[84] As noted above, in their network response to the oyster lease application for AQ#1444, CWS (exhibit 10, appendix E) suggested that "boats and equipment should stay at least 300m from Dunn's Beach sandspit and Gooseberry Island during spring and summer…". No basis for this recommendation was ever provided. However, Dunn's Beach now has a provincial park designation. It is a popular site for recreation and is frequented by pedestrians and kayakers. The Board viewed the site, it showed a well-used ATV-sized track along the rocky dune crest, with a primarily sandy and grassy section on the outer side.

[85] Mr. Kennedy noted that there is currently other infrastructure in the protected beach area (an active commercial wharf) and users that regularly transit close to these sites by boat (fishermen, recreational boaters including sea-do users, and kayakers). This was confirmed by a number of witnesses, including fisherman Bill Brophy.

[86] The lease is located within the harbour while critical plover habitat is situated on the spit and ocean side of the beach.

[87] The closest point to AQ#1444 is a forested area which would eliminate any potential chances of plover disturbance in that location from activity on the water. Also, according to the proponent's application, all project development work and ongoing operations will occur from the water and there will be no onshore activities at Dunn's Beach.

[88] Ironically, gulls on Gooseberry, which CWS would like to protect, are a known predator of piping plovers. Gulls are already habituated to boat traffic and are unlikely to be disturbed should nesting occur in the future (exhibit 36).

[89] The 2020 Dillon Consulting Limited study (exhibit 23) included a literature review and assessment of Antigonish Harbour. As noted, biologist Chris Kennedy concluded" the current lease sites are unlikely to cause disturbance to plovers".

[90] It appears that plovers flush from their nests most frequently by off leash pets, humans and much less by vehicular traffic. Set-back distances are normally established on a case-by-case basis. Literature is scarce about appropriate distances to protect plover. In Alberta, for example, they range from 50-200m for oil industry activities (AMEP 2011). Environment Canada recommends an upper limit of 250m for the oil industry (EC 2009). This 250m setback is for the most obtrusive industry activities. Nowhere is there reference to buffers of 300m. The US Fish and Wildlife Service recommends 50m buffers around nests on their Atlantic coastline (USFWS 1994).

[91] In light of the conflicting opinions in the CWS and Dillon reports, the DFA requested a report from the Centre for Marine Applied Research (CMAR). On May 5, 2023, CMAR provided a report which considered the CWS recommendations for 300m buffer zones around Gooseberry Island and Dunn's Beach. They commented:

> "The Canadian Wildlife Service (CWS) has recommended 300m buffers around piping plover (*Charadris melodus*) habitat and historical nesting areas of two gull species, the herring gull (*Larus argentatus*) and great black-backed gull (*Larus marinus*), relative to a proposed oyster lease in Antigonish Harbour, Nova Scotia. Piping plovers are known to nest on Dunns Beach, within 300 m of the northern boundary of one of the proposed lease areas (#1444). The two gull species have historically nested on Gooseberry Island within 300 m of the southern boundary of the proposed lease area, but do not appear to have nested there the previous few years.
>
> There are three possible options for the potential implementation of these buffers. The first option would be to implement both buffers out of an abundance of caution. This option would make culture on proposed lease AQ#1444 untenable as only 16% of the proposed lease could be used for culture. The second option would be to implement only the buffer around the piping plover habitat. This would enable culture on a smaller portion of the lease area (7.72 hectares) and provide an opportunity to study possible interactions with the piping plovers to inform future buffer status. Finally, the third option would be to negate both CWS proposed buffers, ensure aquaculture best practices and mitigation steps are followed, while studying potential interactions with the piping plovers to inform any future management decisions including buffers. "

[92] It is questionable whether any buffer zone is reasonable, considering all the other activities that take place. The evidence was that the beach is regularly used for recreation by kayakers, walkers, and picnickers, while jet skis and commercial fishers travel through the waters. This activity will no doubt increase now that the beach has been designated as a provincial park. We also note that plovers are land based, and that the TPC operation would be water based. However, to possibly minimize the risk, the Board finds that the compromise position of TPC is preferable, that is, a 250m buffer from the bay side, beginning at the dune crest, but with monitoring taking place to ensure there is no active nesting in the harbour side. There should be no presence of work or equipment anywhere on Dunn's Beach.

[93] Should plover activity be observed in that area (between the dune crest and the harbour), active operation of AQ#1444 should cease until such time as the plover activity has ended. This can be incorporated into the farm management plan. This reflects the fact that the noted observation of any plover nesting (an abandoned nest) took place at the extreme tip of Dunn's Beach.

[94] We also consider the proximity of oyster aquaculture to other locales, as noted in the first Dillon report. It provides the opportunity for further research on the impact, if any, of adjacent aquaculture on plovers. Ultimately, the farm management plan can provide the best outcome.

[95] There will be no buffer around Gooseberry Island, but as with Dunn's Beach, there should be no presence of work or equipment on Gooseberry Island.

Recreational boaters / power boats, canoes, kayaks, and sail boats

[96] Mark MacDonald testified as to overlay maps that he had created for FOAH. He also testified as to his personal recreational use. He no longer sails although he once did. He is a kayaker and testified that a favorite summer activity is to paddle across to Dunn's beach and spend time there. He also was involved with the individuals, who in 2019 placed buoys, demarking what is described on one of his maps as “NAV”, covering most of Graham’s Cove, and then out into the deeper portion of the harbour adjacent to Town Point (Map C, Mark MacDonald affidavit). He admitted that the “navigation area was one which he, as well some other individuals including Richard Wilgenhof, had marked and forwarded to Transport Canada, asking that it be designated a “navigation area”. This was done in 2019 in response to Ernie Porter's proposed oyster farm. The requested navigation area cuts off the southwestern corner of site AQ#1443.

[97] There was no response other than acknowledgement of receipt by Transport Canada, nor was there any evidence as to what if any impact that designation would have had on the farm, or any other use of the harbour.

[98] Access to Graham's Cove is not blocked by AQ#1443, nor is the apparent main navigation channel out of the harbour.

[99] Mark MacDonald’s daughter, Lucy MacDonald, was unavailable to testify, but was permitted to file her affidavit, which described her use of the harbour with her small dinghy-style sailboat. She says that her access to the harbour is impeded, although an examination of the Transport Canada navigation charts does not support that position. She does not mention how often she sails, nor does she explain how sailing a small dinghy with a centreboard retractable keel could be impacted. Although certainly the BOBR coverage would slightly restrict sailing in at most 1% of the harbour, mostly in shallow areas, the main channel is undisturbed.

[100] As well, the leases themselves only occupy 2% of the harbour, and the BOBR units, only a small portion of that area.

[101] Mr. Bowler also testified as to some kayaking. He admits that he is not an experienced kayaker and at present, would not have the skill to paddle through the TPC BOBR arrays.

[102] Richard Wilgenhoff also testified. His property crosses Town Point with access to the harbour and to Graham's Cove. He purchased his property in 2003 and moved there permanently in 2018. He has a guest house on the property and has thoughts of someday possibly using it as a vacation rental property. He has a “speed boat” and a “rubber boat”, and his wife has a sailboat. His speed boat draws two feet, the sailboat has a retractable keel, He has a boat launch on the harbour side of the property, and a dock and a mooring in Graham's Cove. The launch is only used in the spring and fall. AQ#1443 does not overlap his launch area, although he suggests it could impact if launching in poor conditions. He agreed that he would not normally launch in difficult conditions, although the conditions could change quickly. As with the Lucy MacDonald evidence, the navigation charts do not support his argument. It in fact demonstrates some 600 feet of water from the edge of AQ#1443.

[103] As noted, he was one of the individuals that participated in marking the proposed “navigation area”, and he agreed that Mr. Porter had changed the original lease location in response to their initial concerns.

[104] Marc Genuist, (CLC) is an avid kayaker, not just locally, but also in PEI and New Brunswick. He testified that he often kayaks in and around various oyster farms, without difficulty. He also volunteers and teaches kayaking at the local boat club.

[105] Stephen Feist (CLC Chair) is an avid kayaker and sailor. In his affidavit, he states that the proposed lease areas would not impact on his uses. He also says that there is very little recreational boating in the harbour.

[106] Many of the written submissions came from recreational kayakers and boaters, who do not see the sites as having any impact on them. As noted above, there is a 10m gap between each row of BOBR's, and 20m from the edge of the lease.

[107] The Board is satisfied that the leases will not significantly (if at all) impact commercial fishing, recreational fishing, or navigation.

Factor g) the sustainability of wild salmon

[108] There was no evidence presented that the sites would have any impact on wild salmon.

[109] Several submissions were received regarding the potential impact on Mi'kmaq rights and concerns. As well, Mr. Bowler in his application for intervenor status, expressed concerns for First Nations access to the harbour. One written submission expressed such concerns, however, Paqtnkek Mi'kmaw Nation, which farms oysters in Pomquet Harbour, submitted strong support for the project.

Factor d) the oceanographic and biophysical characteristics of the public waters surrounding the proposed aquacultural operation.

[110] The Applicant relies on three expert witnesses to demonstrate the suitability of the proposed sites for oyster aquaculture:

- Dr. Jon Grant is a biological oceanographer and longstanding professor in the Department of Oceanography at Dalhousie University who is responsible for a body of literature on aquaculture that is as substantial as any in the world (exhibits 25 and 45).
- Professor David Garbary is a biologist and professor at St. Francis Xavier University, having expertise in marine plants including eel grass (exhibits 24 and 42)
- Mr. Robin Stuart is an aquaculture manager and consultant with many years of local aquaculture experience (exhibit 26).

[111] Intervenor Groups 1 & 2 rely on the expert report(s) and testimony of

- Dr. Peter Cranford, currently the proprietor of Emeritus Marine, who, for the majority of his career was a research scientist with the Habitat Ecology Section, Ecosystem Research Division with Fisheries and Oceans Canada at the Bedford Institute of Oceanography, as well as an adjunct professor at Dalhousie University (Ex 19)

Carrying capacity

[112] Dr. Grant's opinion considered carrying capacity of Antigonish Harbour for oyster culture. He explained that carrying capacity of suspension feeding bivalve aquaculture site is a key consideration in assessing whether adequate resources exist to permit growth of the organisms. As suspension feeders, oysters derive their primary nutrition from phytoplankton. Phytoplankton supply is self-limiting in that a stocking density of oysters that exceeds the available phytoplankton results in smaller yields. He explains that as an estuary, Antigonish Harbour is flushed by tides daily that carry phytoplankton in with the coastal water. As such, the balance between tidal renewal of plankton and ingestion by oysters forms the basis of ecological carrying capacity, one of the major concepts in aquaculture management.

[113] Dr. Grant explained that carrying capacity can be measured directly by increasing oyster stock until their growth is compromised, but the more practical approach is to estimate carrying capacity using a simulation model. Dr. Grant, in collaboration with researchers elsewhere, developed these types of models in the late 1980's. Such models are now in widespread use, often with detailed computer simulation requiring data relating to oyster bioenergetics and tidal calculations called spatial models. These models have been applied to multiple sites in the Maritimes including bays and estuaries. Such investigations require extensive resources.

[114] Dr. Grant used a similar spatial model, albeit based on more accessible calculations. He considers it to be a valid screening model to indicate whether there is any concern that the site would be close to carrying capacity. The model is calculated as an index comparing the volume of water filtered by oysters compared to water renewal in the bay owing to tidal flow. The so called "Dame index" has already been used numerous times in coastal waters, including in his research on Prince Edward Island. He explained that oyster bioenergetics are well known having been studied extensively. In these studies, oysters have been placed in tanks with known concentrations of particles and allowed to feed. The reduction of particles is associated with water volume in which the particles are suspended and used to calculate a clearance rate expressed in litres per hour. The tidal height and depth of an estuary can be used to estimate the tidal prism or volume of water exchange per day.

[115] Dr. Grant's calculations suggest that the proposed three million oysters included in the proposed lease could filter 18 million litres of water per day. The time required to filter the entire harbour would be 83 days. In comparison, the tidal prism renewal time for the harbour is 0.76 days. As such, the tide renews harbour water 109 times faster than 3,000,000 oysters could deplete it. Essentially, the proposed volume of oysters can only filter 1.2% of the harbour water per day. He concluded that this degree of variation is "noise" and could never be detected in a sampling program, and as such 3,000,000 will not result in a significant drawdown of phytoplankton.

[116] Dr. Peter Cranford holds a different view. He was asked by Intervenor Groups 1 and 2 to prepare a report detailing his analysis and conclusion regarding the impacts of the

proposed lease sites. His conclusion was that the environmental conditions associated with the proposed sites are not optimal for oyster aquaculture in general. He concluded that the proposed aquaculture sites present a threat to fish habitat, species, populations, communities, fisheries, and ecosystem function and that there is a high likelihood that these ecological impacts will result if the development plan is approved.

[117] Dr. Cranford stated that most experts agree that oyster aquaculture impacts are unlikely if tidal currents are sufficient to supply the oysters with sufficient food and disperse waste over a large area. He says that, for example current velocities of 20-25 cm/s are required to disperse oyster deposits and limit the potential for adverse impacts from seabed organic enrichment. He accepts that the flow rates in Antigonish harbour are high (0.8 day flushing rate) but notes the sites are in shallow water thus would not experience the same flow rate as the channel. He is critical of the measurements taken by TPC which he describes as a “homemade drifter consisting of a surface buoy attached to a brick”.

[118] Dr. Cranford moored his own current sensor at 1.5 metres above the seabed in what he considered to be the centre of the three leases. The measurements were taken for approximately one day and attempted to capture spring and neap tide effects. The range of measurements at leases AQ#1442 and AQ#1443 was from 0 cm/s, which is expected as the tide turns, to approximately 14 cm/s and generally rose and fell reflecting the normal tidal pattern. The values associated with site AQ#1444 ranged from 0 to approximately 10 cm/s during the spring tide, and 0 to approximately 14 at the neap tide.

[119] Dr. Cranford could offer no explanation for the counterintuitive sampling results showing lower flow during the stronger spring tides, compared to neap tides. He calculated average speeds across the sites ranging from 3.8 to 5 cm/s, concluding that this was too slow for oyster aquaculture. However, we note that he relied upon prior studies showing that oysters are capable of growth with flow rates as low as 1 cm/s, and indeed confirmed this when questioned.

[120] In his report, Dr. Cranford relies on studies that suggest current speeds less than 10cm/s are not suitable for oyster aquaculture, to reach his conclusions regarding the viability of the lease sites for oyster aquaculture. This seems to ignore that there is evidence that slower speeds are still capable of supporting oyster aquaculture.

[121] Current speeds aside, Dr. Grant’s more general view regarding Dr. Cranford’s scientific approach is:

> “The use of a single current speed to address whether oyster waste particles will be deposited is an incredibly simplistic approach. Even the paper that Cranford cites (Gadeken et al. 2021) recognizes that depositional dynamics are understood by shear stress estimates, not single point current measurements.”

[122] He also notes that while Dr. Cranford disputes the current speeds taken by the Applicant, these are substantiated by the DFO using their Acoustic Doppler Current Profiler. He adds that DFA has decades of experience using this device to assess aquaculture sites.

[123] Aside from the issues with current speed measurements specifically, Dr. Grant is highly critical of Dr. Cranford's expert report which purports to assess risk using data from what was essentially a "one day study". In fact, Dr. Grant goes so far as to say, "As a long-term colleague, I am concerned that such an inadequate effort has emerged from an experienced scientist".

[124] Dr. Cranford candidly admitted that cost precluded using a more long-term evaluation.

[125] We find that Dr. Grant's sentiment rings true. We agree that drawing such conclusions, and in particular Dr. Cranford's conclusion of that:

> "Data reported herein supports a high level of confidence in the conclusion that the proposed project activities will interact with the local environment in ways that are expected to adversely impact fish habitat, ecological processes, species, populations, communities and fisheries."

[126] Based on his very abbreviated sampling data, this conclusion is the very antithesis of scientific endeavour. When questioned, Dr. Cranford accepted that the sites would be affected by localized eddies and that strong winds (we note maximums may be as high as 96 kms/hr) combined with tidal current could contribute to eddies with much higher current speeds. He also accepted that re-suspension of organic matter does not have to be continuous, but rather adequate flushing may occur more occasionally, such as daily or weekly. Yet these timeframes on the order of a week were not accounted for in Dr. Cranford's sampling plan which was limited to an extremely contracted sampling period of a matter of a few days. Even as non-scientists, this sampling frequency seems to us to be remarkably deficient.

[127] We therefore conclude Dr. Cranford's methodology was fundamentally flawed and cannot agree with the Intervenor Groups 1 and 2 position that he is the most important witness since he applied scientific principles to the actual site. In relying on so little data and drawing such extreme conclusions we consider basic scientific principles to have been ignored rather than relied upon. We therefore favour the analysis and opinion provided by Dr. Grant over Dr. Cranford in respect of the issue of current speeds and carrying capacity at the proposed lease sites.

[128] Dr. Cranford also bases the aforementioned prospective detrimental impacts outlined in his report on what he considers to be a reduced capacity to receive oyster bio deposits without adversely impacting fish habitat. While admitting that such data is not required in respect of bivalve aquaculture, Dr. Cranford nonetheless goes on to rely on what are again,

limited samples comprising cores taken on two days in November, to draw conclusions regarding suitability of the lease sites. As pointed out by Dr. Grant, the methodology used by Dr. Cranford for sulfide analysis is not recognized at this time by regulators in Nova Scotia. However, that concern aside, there are additional issues with Dr. Cranford's work.

[129] In spite of the fact that some of the sampling appears to have been less than rigorous, (for example with no controls or measurements of depth at which the cores were taken), Dr. Cranford appears confident in concluding that all three lease sites have poor to bad sediment quality "apparently resulting from the inability of the low tidal currents to disperse deposited particular organic matter entering the sites from natural sources, such as land run-off and eelgrass detritus." He concludes from these two days of sampling three locations, at each of the three sites, that the ability of the environment to incorporate organic matter deposition has already been exceeded. Yet, he accepts that seasonal variability exists. He also appears to accept that that eel grass is present, even under these less than desirable conditions.

[130] Dr. Cranford goes on to detail the detrimental effect on fish habitat created by the aerobic decomposition process concluding:

> "The cumulative oxygen demand of the oysters and organically enriched sediments could reduce oxygen concentrations in these shallow, poorly flushed waters to the point where there is a high likelihood that hypoxic (low oxygen) conditions detrimental to fish health will occasionally develop in the water column in and around these shallow leased areas".

[131] Dr. Grant's opinion regarding this research was that Dr. Cranford used superficial sampling to characterize the entire outer harbour. He is of the view that speculation regarding the benthic health of the harbour would require detailed sampling at multiple locations. He notes that in addition, Dr. Cranford neglected consideration of sediment organic matter, grain size and porosity- all being factors that would be standard in respect of any benthic assessment. As Dr. Grant describes it "the recognized method for assessing the risk of organic enrichment does not come from a few sulfide samples" stating that it is depositional modelling that is instead used. He also notes that while surface sediments at fin fish aquaculture sites are a key regulatory variable, this is not a requirement for leasing of oyster sites. We note Dr. Cranford did admit that the presence of sulfides was not a parameter that is reviewable in terms of lease grants for oyster aquaculture.

[132] In addition, Dr. Grant is critical of Dr. Cranford's reliance on his data to conclude that there is risk of hypoxia to the entire water column, including oysters. He notes that he has never observed widespread water column hypoxia from oyster aquaculture in any Canadian site. Again, we find that Dr. Grant's interpretation of the alleged detriment associated with benthic deposits in Antigonish Harbour to be based on more sound scientific principles than Dr. Cranford's.

[133] We have considered the words of Mr. Stuart, that there is no better environmental barometer in an estuary than an oyster. We note that oysters were plentiful in Antigonish Harbour prior to development of the surrounding land. In addition, we note natural populations continue to exist, even if their numbers are reduced compared to what was present historically. Finally, in the unlikely event that Dr. Cranford's dire predictions, in whole or in part, are realized, it is the lease holder who may be expected to feel the effects of reduced capacity first. In light of the foregoing, and mindful of the fact that benthic monitoring is not a requirement of the regulatory framework, we do not consider benthic monitoring to be necessary going forward unless and until there is some evidence, such as substantially reduced oyster growth, that this is needed. We note in this regard that DFA has confirmed its ability to require and manage benthic monitoring under the farm management plan and that it will be possible to use DFO established procedures should this become necessary.

Eel Grass

[134] Dr. Jeffrey Barrell, a DFO scientist, completed a report on eel grass coverage in the lease sites. He reported a generally patchy and fragmented distribution of eel grass in the estuary. He noted patchy distribution that could not be considered to be continuous beds. In addition, he noted evidence of visible damage to the plants attributable to green crabs. Of the three sites AQ#1443 appeared to contain the highest concentration of eel grass. Dr Barrel questions the extent to which his sampling, one week after hurricane Dorian, might have affected his results. He provides suggestions for enhanced collection of data in the future which we consider to be very helpful.

[135] Dr. Garbary conducted a study in the summer and fall of 2022 in which 20 random samples were collected in the general area of the lease sites. No living or dead eel grass was found in any of the cores. He relies on these findings to conclude that 20 years after the collapse of eel grass in Antigonish Harbour, this area has reached a new steady state in which the eel grass is unable to regenerate. Dr. Garbary's findings have been criticized by the opponents as being anecdotal. We agree in part. As is the case with respect to Dr. Cranford's, and to some extent Dr. Barrell's work, limited sampling frequency and area calls into question the value of the results and the commensurate opinions. However, the discrepancy between Dr. Barrell's findings and those of Dr. Garbary is at least supportive of the conclusion that monitoring of the lease sites with a view to determining impact on eel grass in the vicinity would be best.

[136] We note that Professor Garbary's research suggests that contrary to what is argued by the opponents, the proposed oyster leases are unlikely to have a detrimental impact on eel grass populations in the harbour. To the extent his research results are accurate, and there is now limited eel grass at or near the sites, this may be true. However, the data before the Board appears, on balance, inconclusive regarding the quantity and quality of eel grass in close proximity to the sites.

[137] We note the main concern in respect of eel grass may be shading from the oyster cages. Since the lease area represents 2% of the harbour, and the cages do not cover the entire lease area, we note it is only an exceptionally small part of the harbour which could potentially be affected by the proposed aquaculture operations.

[138] We also note that DFO recommends eelgrass monitoring be put in place if the leases are approved by the Board. We agree with the recommendation that monitoring at 1, 3 and 5 years of operation should be included in the farm management plan. However, we suggest that any monitoring plan should also take into account the size of any affected area relative to the size of the harbour. Additionally, noting that the experts suggest eel grass may, at the moment, be declining in Antigonish Harbour, we suggest any monitoring strategies consider the possibility for natural decline, unrelated to increased oyster populations.

Factor h) The number and productivity of other aquaculture sites in the public waters surrounding the proposed aquacultural operation.

[139] There is only one other aquaculture site in the harbour, a bottom harvest oyster lease at the west side of Graham's Cove. It is operated by Sam McKinley. A letter from Mr. McKinley was included in the TPC application and was not disputed by Intervenor Groups 1 and 2. Mr. McKinley was very supportive of the TPC proposal. He saw possible benefit to his own operation and believed that the TPC oysters would result in increased oyster larvae in the harbour. He also saw potential for making use of TPC's depuration facility as he currently sends his product to Pictou for depuration. He noted "Antigonish Harbour produces great oysters!"

Factor a) Optimum use of marine resources

[140] There are many harbours in Nova Scotia, and for centuries, these harbours have provided sources of food, routes for trade and commerce, and centres for human habitation. The less remote have always been “working harbours”. The same is true of Antigonish Harbour, but its current use as a working harbour is minimal. Present activity in this harbour consists of recreational use, commercial fishing (with fishers resident in the harbour, but conducting fishing activity outside of the harbour), wild oyster harvesting, and a small oyster aquaculture lease.

[141] “Optimum” does not mean perfection. However, if this application is allowed, it would add to those existing uses, provided that it does not do so at the expense of the other uses.

[142] Speaking for the Aquaculture Association of Nova Scotia, Michelle Sampson pointed out that Nova Scotia lags far behind other maritime provinces in aquaculture development;

New Brunswick and Prince Edward Island production is, respectively, four and twelve times the value of that produced in Nova Scotia. She also pointed out the positive impact of tourism.

[143] The Board is satisfied that this relatively small operation will add to the existing uses. We are satisfied that it can be done without damage to the ecosystem, including eelgrass and piping plovers. It will be sited, with minor amendments, in such a way to respond to the concerns of those who navigate the harbor for commercial and recreational uses. We recognize that to some, the BOBR system is seen as unsightly, but we also note that the relatively low profile of the gear, as well as the distance from most shoreline properties will considerably reduce what some see negatively.

Will it be economically viable? That is a risk that TPC is prepared to take.

[144] Intervenor Groups 1 and 2 attacked the integrity of Mr. Porter. In its final submissions, it suggested the following:

a. The incentivization for TPC to disrupt plovers is a live issue informed by Mr. Porter's demonstrated lack of care when it comes to the protection and preservation of the plover and gulls. In his evidence Mr. Porter:
    - Went onto Gooseberry Island in contravention of the directions set out by CWS.
b. Initially argued that a 250-meter buffer was sufficient in the March Correspondence, which changed to a 230-meter buffer and as of the date of the hearing has become a 100-meter buffer.
c. Preferred the hearsay conclusions of Dr. Tony Miller (which were to TPC's benefit and who was not called to testify) to those of Rachael Gautreau of the CWS, responsible for endangered species protection and conservation.
d. Referred to Ms. Gautreau as an "advocate" for endangered and migratory birds, in his testimony.
e. In his testimony referred derogatorily to black backed gulls as "seagulls" that could be seen in any parking lot.

[145] In the view of Intervenor Groups 1 and 2, that evidence lessens confidence that if the Application were approved, TPC would act cautiously when operating in close proximity to Dunn's Beach and Gooseberry Island, as TPC would be incentivized to avoid having them nest nearby.

[146] We disagree. Mr. Porter's evidence was that he and Dr. Miller went around the edge of Gooseberry, below the low tide line, to video the presence, or absence, of gull nesting. Furthermore, there was no 'direction' from Ms. Gautreau, and in fact she would have no authority to do any more than make a recommendation to DFA.

[147] Rachel Gautreau's opinions were no less hearsay than those of Dr. Miller. As with Dr. Miller, she did not testify. And as with Dr. Miller, neither party called her as a witness. Indeed, it is astonishing that even after repeated requests from DFA to explain her position, to consider further input from Mr. Porter, and to meet with DFA and / or Mr. Porter, her only response was to simply state that she had not changed her view. She refused to even discuss alternative options, such as were later suggested in the CMAR report.

[148] If Mr. Porter did refer to Ms. Gautreau as an "advocate" for piping plovers; he actually agreed with the suggestion put to him in cross examination that she should be an advocate for piping plovers.

[149] The reference by Mr. Porter to gulls on Gooseberry Island as "parking lot seagulls", simply highlights the fact that the black backed gulls are not an endangered or protected species. And ironically, Ms. Gautreau was keen to protect them, although they are a known predator of piping plovers on the adjacent Dunn's Beach.

[150] There were several other collateral efforts by the opponents to attack the credibility and integrity of Ernie Porter. They raised his placement of a boulder on a narrow strip of ungranted land which ran along the harbour edge and to the Porter property. Mr. Porter testified that in fact he had placed the boulder there some seven years earlier to prevent ATVs from transiting to his property. Aside from the ATV use, the route was rarely used. The community at large had never expressed concerns prior to the initiation of the oyster project. However, as the project developed, he received correspondence from Nova Scotia Department of Transportation, requesting the boulder be removed. In response, Mr. Porter did so. The Department also indicated that they would be prepared to consider a transfer of the land in question to Mr. Porter.

[151] Mr. Porter, in his evidence, characterized the boulder controversy as a "stage prop", used by the FOAH opponents. He said that they had even cleared the grass around the boulder to create the impression of frequent public use. We agree.

[152] The opponents of the project also characterized the pre-application work done by Mr. Porter in building his land-based depuration facility. They suggested that he proceeded to do this work without a permit, implying that Mr. Porter was a 'scofflaw' of sorts. In his evidence, Mr. Porter testified that he did in fact have permission from the Municipality for the work, however, he did not realize (nor did the Municipality) that only the land-based portion of the work was governed by the permit. However, the work included some piping to the water below the ordinary high-water mark. Mr. Porter's opponents seem to have brought the issue to the attention of the authorities. It was reviewed over a one-year period by the Department, and finally, a means was created to approve the piping without change.

[153] We are entirely satisfied with the integrity and transparency of Ernie Porter. He demonstrated his patience in moving forward through the lengthy process and he has

demonstrated willingness to modify various aspects of the project to respond to the concerns of others, from the outset, and to the very concluding submissions. He has been completely transparent. He has invited anyone interested to visit his property and learn about the gear he proposed to use. He took part in a well-attended public meeting organized by an independent individual. Much of what he did was faced with strong headwinds from a highly organized group, who sought to challenge his every step.

Oral submissions

[154] Roger Porter (no relation to Ernie Porter) said that he had been asked to oppose the application and was told by an unknown individual that Ernie Porter was not being candid. He met with Mr. Porter, read various background papers, and concluded that the leases were not obstructive, and would be a positive benefit to the community.

[155] Ronald Fraser taught school in Antigonish for 35 years. His family and ancestors have owned property at Seabright, and he has always spent summers at the family cottage. He has a view of all three leases from his property, which is 800 -1000 metres away. He is concerned about access to a beach on Town Point, which he says was blocked by Ernie Porter, and he is concerned about waste material from the leases impacting the health of the harbour. He is also concerned about the potential impact of drifting and damaged gear from the leases.

[156] Michelle Sampson is the director of the Aquaculture Association of Nova Scotia. She said the TPC project is optimal. She notes that New Brunswick and PEI respectively, produce four and twelve times the market value of farmed oysters, as Nova Scotia. She says that the production can contribute to tourism through branding, as demonstrated in Prince Edward Island. She noted that the Ivany Report recommended co-operation and collaboration among communities. She said that shellfish exports are small in Nova Scotia, and the opportunity for development is immense.

[157] Sean Day has lived in Antigonish for 30 years and was the Director of Planning and Development for Antigonish. He is currently a private consultant, and he is the current president of the Antigonish Boat Club. He says the unobstructed harbour channel is 250 metres wide, and a sailboat can tack even under storm conditions. He sees the BOBR system as being storm resistant and the low profile will have minimal impact on views. He says that for the last 20 years, boating in the harbour has been minimal, but he sees the oyster development as attracting tourism.

Written submissions highlights:

[158] Written submissions were received from 143 individuals and businesses. Some writers

were local, and some owned property in the harbour. There was some duplication in the written submissions. Some were also members of FOAH, and should not act through FOAH, and at the same time, submit a written comment. However, the Board did review and consider their comments.

[159] Some writers presented “expert” opinion evidence (their own, or papers and research reports by others). There is a strict evidentiary limit on the use of expert opinion, both in the higher courts, and in this tribunal, and so those submissions should not be considered. Some writers supported the project, others opposed it. The basis for the opposition and support of the project matches the concerns and support expressed throughout the hearing, by lay and expert witnesses. These include environmental concerns (eel grass, piping plovers, habitat for other species), interference and non-interference with recreation and harbour navigation, impact of views of the farm, property value impact, impact on tourism, contribution to economy.

[160] All of the submissions have been reviewed. They are for the most part sincere, although a few unfortunately engaged in personal attacks on the transparency and integrity of TPC and Ernie Porter.

[161] Their views are based on the information available to them until the cutoff date, two weeks before the hearing. Some of the writers had attended the CLC meeting, some had also met with Ernie Porter, some had done their own research.

[162] The writers expressed views for or against the project on essentially the same basis as those who testified. These included:

- impact on tourism related business
- sustainability
- transparency and integrity of TPC
- economic impact
- effect on the ecosystem
- impact on recreational use of the harbour
- views of the site from private property impacting property values
- ”industrialization” of Town Point

[163] These concerns were helpful in highlighting concerns of the public in general, and as such, have all been addressed within the evidence and submissions of the parties.

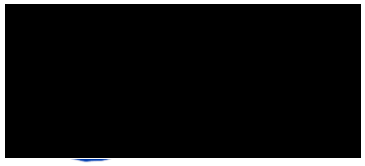
Decision

[164] In conclusion, the applications of Town Point Consulting for AQ #1442, AQ#1433, and AQ#1444, are all approved, subject to the development of the Farm Management Plan, which must include the piping plover mitigation and monitoring plan using the 250m buffer as described above, as well as eel grass monitoring. TPC must make any necessary adjustments to its cages and equipment to ensure that there is no intrusion on the wild oyster existing harvesting areas.

[165] The Applicant should also make his proposed adjustment to AQ# 1444, to minimize any interference with the southern navigation route from the Harbour.

DATED at Halifax, Nova Scotia this 5 day of **January**, 2024.

Jean McKenna, Chair



Coleen Morrison, Vice Chair

Roger Percy, Board Member

DISTRIBUTION: Sarah Shiels, Solicitor on behalf of Town Point Consulting Inc.
Alison Campbell, Solicitor on behalf of the Department of Fisheries and Aquaculture
Peter Rogers, Solicitor on behalf of Groups 1 and 2.
Marc Genuist, Representative on behalf of Group 3.

Tab 10

White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants and R. Brian Burgess *Appellants*

v.

Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop's Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors & Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, formerly Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann's Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier's Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O'Leary Farmers' Co-operative Ass'n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer's Supplies Limited, 508686 N.B. INC. operating as T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White's Construction Limited, D. J. Williams and Sons Limited and Woodland Building Supplies Limited *Respondents*

and

Attorney General of Canada and Criminal Lawyers' Association (Ontario) *Interveners*

White Burgess Langille Inman, faisant affaire sous la raison sociale WBLI Chartered Accountants et R. Brian Burgess *Appelants*

c.

Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop's Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors & Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, auparavant Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann's Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier's Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O'Leary Farmers' Co-operative Ass'n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer's Supplies Limited, 508686 N.B. INC. faisant affaire sous la raison sociale T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White's Construction Limited, D. J. Williams and Sons Limited et Woodland Building Supplies Limited *Intimées*

et

Procureur général du Canada et Criminal Lawyers' Association (Ontario) *Intervenants*

2015 SCC 23 (CanLII)

Indexed as: White Burgess Langille Inman *v.* Abbott and Haliburton Co.

2015 SCC 23

File No.: 35492.

2014: October 7; 2015: April 30.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Evidence — Admissibility — Expert evidence — Basic standards for admissibility — Qualified expert — Independence and impartiality — Nature of expert's duty to court — How expert's duty relates to admissibility of expert's evidence — Forensic accountant providing opinion on whether former auditors were negligent in performance of duties — Former auditors applying to strike out expert's affidavit on grounds she was not impartial expert witness — Whether elements of expert's duty to court go to admissibility of evidence rather than simply to its weight — If so, whether there is a threshold admissibility requirement in relation to independence and impartiality.

The shareholders started a professional negligence action against the former auditors of their company after they had retained a different accounting firm, the Kentville office of GT, to perform various accounting tasks and which in their view revealed problems with the former auditors' work. The auditors brought a motion for summary judgment seeking to have the shareholders' action dismissed. In response, the shareholders retained M, a forensic accounting partner at the Halifax office of GT, to review all the relevant materials and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out M's affidavit on the grounds that she was not an impartial expert witness.

The motions judge essentially agreed with the auditors and struck out M's affidavit in its entirety. The majority of the Court of Appeal concluded that the motions judge erred in excluding M's affidavit and allowed the appeal.

Répertorié : White Burgess Langille Inman *c.* Abbott and Haliburton Co.

2015 CSC 23

N° du greffe : 35492.

2014 : 7 octobre; 2015 : 30 avril.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Wagner et Gascon.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Preuve — Admissibilité — Preuve d'expert — Normes fondamentales d'admissibilité — Expert qualifié — Indépendance et impartialité — Nature de l'obligation de l'expert envers le tribunal — Rapport entre l'obligation de l'expert et l'admissibilité de son témoignage — Opinion d'une juricomptable sur la négligence possible des vérificateurs précédents dans l'exercice de leurs fonctions — Requête en radiation de l'affidavit de l'expert présentée par les vérificateurs précédents au motif que l'expert n'était pas un témoin expert impartial — Les éléments de l'obligation de l'expert envers le tribunal jouent-ils au regard de l'admissibilité du témoignage plutôt que simplement de la valeur probante de celui-ci? — Dans l'affirmative, l'indépendance et l'impartialité constituent-elles un critère d'admissibilité?

Les actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie après avoir engagé un autre cabinet comptable, GT, de Kentville, pour effectuer diverses tâches comptables, qui, selon eux, avaient révélé des erreurs par les vérificateurs précédents. Les vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action. En réponse, les actionnaires ont fait appel à M, une associée en juricomptabilité du cabinet GT de Halifax, pour qu'elle examine tous les documents pertinents et rédige un rapport de ses constatations. Son affidavit expose ces dernières, notamment que les vérificateurs, selon elle, ne se sont pas acquittés de leurs obligations professionnelles envers les actionnaires. Les vérificateurs ont présenté une requête en radiation de l'affidavit de M au motif qu'elle n'était pas un témoin expert impartial.

Le juge des requêtes s'est dit d'accord avec les vérificateurs pour l'essentiel et a radié intégralement l'affidavit de M. Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit de M et ont accueilli l'appel.

2015 SCC 23 (CanLII)

Held: The appeal should be dismissed.

The inquiry for determining the admissibility of expert opinion evidence is divided into two steps. At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four factors set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 (relevance, necessity, absence of an exclusionary rule and a properly qualified expert). Evidence that does not meet these threshold requirements should be excluded. At the second discretionary gatekeeping step, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence.

Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her. These concepts, of course, must be applied to the realities of adversary litigation.

Concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework. A proposed expert witness who is unable or unwilling to fulfill his or her duty to the court is not properly qualified to perform the role of an expert. If the expert witness does not meet this threshold admissibility requirement, his or her evidence should not be admitted. Once this threshold is met, however, remaining concerns about an expert witness's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. Absent challenge, the

Arrêt : Le pourvoi est rejeté.

La démarche qui permet de déterminer l'admissibilité du témoignage d'opinion de l'expert est scindée en deux. Dans un premier temps, celui qui veut présenter le témoignage doit démontrer qu'il satisfait aux critères d'admissibilité, soit les quatre critères énoncés dans l'arrêt *R. c. Mohan*, [1994] 2 R.C.S. 9, à savoir la pertinence, la nécessité, l'absence de toute règle d'exclusion et la qualification suffisante de l'expert. Tout témoignage qui ne satisfait pas à ces critères devrait être exclu. Dans un deuxième temps, le juge-gardien exerce son pouvoir discrétionnaire en déterminant si le témoignage d'expert qui satisfait aux conditions préalables à l'admissibilité est assez avantageux pour le procès pour justifier son admission malgré le préjudice potentiel, pour le procès, qui peut découler de son admission.

L'expert a l'obligation envers le tribunal de donner un témoignage d'opinion qui soit juste, objectif et impartial. Il doit être conscient de cette obligation et pouvoir et vouloir s'en acquitter. L'opinion de l'expert doit être impartiale, en ce sens qu'elle découle d'un examen objectif des questions à trancher. Elle doit être indépendante, c'est-à-dire qu'elle doit être le fruit du jugement indépendant de l'expert, non influencée par la partie pour qui il témoigne ou l'issue du litige. Elle doit être exempte de parti pris, en ce sens qu'elle ne doit pas favoriser injustement la position d'une partie au détriment de celle de l'autre. Le critère décisif est que l'opinion de l'expert ne changerait pas, peu importe la partie qui aurait retenu ses services. Ces concepts, il va sans dire, doivent être appliqués aux réalités du débat contradictoire.

C'est sous le volet « qualification suffisante de l'expert » du cadre établi par l'arrêt *Mohan* qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter. Le témoin expert proposé qui ne peut ou ne veut s'acquitter de son obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle. S'il ne satisfait pas à ce critère d'admissibilité, son témoignage ne devrait pas être admis. Or, dès lors qu'il y est satisfait, toute réserve qui demeure quant à savoir si l'expert s'est conformé à son obligation devrait être examinée dans le cadre de l'analyse coût-bénéfices qu'effectue le juge dans l'exercice de son rôle de gardien.

L'idée, en imposant ce critère supplémentaire, n'est pas de prolonger ni de complexifier les procès et il ne devrait pas en résulter un tel effet. Le juge de première instance doit déterminer, compte tenu tant de la situation particulière de l'expert que de la teneur du témoignage proposé, si l'expert peut ou veut s'acquitter de sa principale obligation envers le tribunal. En l'absence d'une

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expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met. However, if a party opposing admissibility shows that there is a realistic concern that the expert is unable and/or unwilling to comply with his or her duty, the proponent of the evidence has the burden of establishing its admissibility. Exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

In this case, there was no basis disclosed in the record to find that M's evidence should be excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. The majority of the Court of Appeal was correct in concluding that the motions judge committed a palpable and overriding error in determining that M was in a conflict of interest that prevented her from giving impartial and objective evidence.

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Applied: *R. v. Mohan*, [1994] 2 S.C.R. 9; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; **adopted:** *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, leave to appeal refused, [2010] 2 S.C.R. v; **referred to:** *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *Graat v. The Queen*, [1982] 2 S.C.R. 819; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th)

contestation, il est généralement satisfait au critère dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte. Toutefois, si la partie qui s'oppose à l'admission démontre un motif réaliste de croire que l'expert ne peut ou ne veut s'acquitter de son obligation, il revient à la partie qui produit la preuve d'en établir l'admissibilité. La décision d'exclure le témoignage à la première étape de l'analyse pour non-conformité aux critères d'admissibilité ne devrait être prise que dans les cas manifestes où l'expert proposé ne peut ou ne veut fournir une preuve juste, objective et impartiale. Dans les autres cas, le témoignage ne devrait pas être exclu d'office, et son admissibilité sera déterminée à l'issue d'une pondération globale du coût et des bénéfices de son admission.

La notion d'apparence de parti pris n'est pas pertinente lorsqu'il s'agit de déterminer si le témoin expert pourra ou voudra s'acquitter de sa principale obligation envers le tribunal. Lorsque l'on se penche sur l'intérêt d'un expert ou sur ses rapports avec une partie, il ne s'agit pas de se demander si un observateur raisonnable penserait que l'expert est indépendant ou non; il s'agit plutôt de déterminer si la relation de l'expert avec une partie ou son intérêt fait en sorte qu'il ne peut ou ne veut s'acquitter de sa principale obligation envers le tribunal, en l'occurrence apporter au tribunal une aide juste, objective et impartiale.

En l'espèce, le dossier ne révèle aucun élément qui permette de conclure que le témoignage de M devrait être exclu parce que celle-ci ne pouvait ou ne voulait rendre devant le tribunal un témoignage juste, objectif et impartial. La majorité de la Cour d'appel a eu raison de conclure que le juge des requêtes avait commis une erreur manifeste et dominante en estimant que M était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial.

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396; *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68, rev'd [1995] 1 Lloyd's Rep. 455; *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456; *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187; *R. v. Docherty*, 2010 ONSC 3628; *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394; *Handley v. Punnett*, 2003 BCSC 294; *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (QL); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240; *Hutchingame v. Johnstone*, 2006 BCSC 271; *Alfano v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19; *United City Properties Ltd. v. Tong*, 2010 BCSC 111; *R. v. INCO Ltd.* (2006), 80 O.R. (3d) 594; *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115; *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77; *R. v. Violette*, 2008 BCSC 920; *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367; *R. (Factortame Ltd.) v. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003] Q.B. 381; *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464; *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474; *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067; *FGT Custodians Pty. Ltd. v. Fagenblat*, [2003] VSCA 33; *Collins Thomson v. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500; *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (1993); *Tagatz v. Marquette University*, 861 F.2d 1040 (1988); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (2014); *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166; *R. v. Demetrius*, 2009 CanLII 22797; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44; *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284; *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97; *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385.

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Alan D'Silva, *James Wilson* and *Aaron Kreaden*, for the appellants.

Jon Laxer and *Brian F. P. Murphy*, for the respondents.

Michael H. Morris, for the intervener the Attorney General of Canada.

Matthew Gourlay, for the intervener the Criminal Lawyers' Association (Ontario).

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Alan D'Silva, *James Wilson* et *Aaron Kreaden*, pour les appelants.

Jon Laxer et *Brian F. P. Murphy*, pour les intimées.

Michael H. Morris, pour l'intervenant le procureur général du Canada.

Matthew Gourlay, pour l'intervenante Criminal Lawyers' Association (Ontario).

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The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction and Issues

[1] Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted. The question on this appeal is whether one of these basic standards for admissibility should relate to the proposed expert's independence and impartiality. In my view, it should.

[2] Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

[3] Applying these principles, I agree with the conclusion reached by the majority of the Nova Scotia Court of Appeal and would therefore dismiss this appeal with costs.

II. Overview of the Facts and Judicial History

A. *Facts and Proceedings*

[4] The appeal arises out of a professional negligence action by the respondents (who I will call the shareholders) against the appellants, the former auditors of their company (I will refer to them as the auditors). The shareholders started the action after they had retained a different accounting firm, the

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction et questions en litige

[1] Le témoignage d'expert peut constituer la pièce maîtresse dans la recherche de la vérité tout comme il peut présenter des dangers particuliers. Pour se prémunir contre ces dangers, la Cour depuis une vingtaine d'années resserre graduellement les règles d'admissibilité et renforce le rôle de gardien du juge de première instance. Ainsi, l'admission du témoignage d'expert est subordonnée au respect de certaines normes fondamentales. La question à trancher dans le cadre du présent pourvoi est de savoir si l'indépendance et l'impartialité de l'expert que l'on se propose de citer comme témoin devraient compter au nombre de ces normes fondamentales d'admissibilité. À mon avis elles devraient l'être.

[2] Le témoin expert a l'obligation particulière d'apporter au tribunal une aide juste, objective et impartiale. La personne que l'on se propose de citer à ce titre, mais qui ne peut ou ne veut se conformer à cette obligation, n'a pas la qualification pour témoigner à titre d'expert et ne devrait pas y être autorisée. Des réserves moins fondamentales quant à l'indépendance et à l'impartialité de l'expert devraient jouer dans l'analyse globale des coûts et des bénéfices de l'admission du témoignage.

[3] Appliquant ces principes, je partage la conclusion à laquelle sont parvenus les juges majoritaires de la Cour d'appel de la Nouvelle-Écosse et suis d'avis de rejeter le présent pourvoi avec dépens.

II. Rappel des faits et historique judiciaire

A. *Les faits et la procédure*

[4] Le présent pourvoi découle d'une action pour négligence professionnelle intentée par les intimées (ci-après « les actionnaires ») contre les appelants, les anciens vérificateurs de leur compagnie (ci-après « les vérificateurs »). Les actionnaires ont intenté cette poursuite après avoir engagé un autre cabinet

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Kentville office of Grant Thornton LLP, to perform various accounting tasks and which in their view revealed problems with the auditors' previous work. The central allegation in the action is that the auditors' failure to apply generally accepted auditing and accounting standards while carrying out their functions caused financial loss to the shareholders. The main question in the action boils down to whether the auditors were negligent in the performance of their professional duties.

[5] The auditors brought a motion for summary judgment in August of 2010, seeking to have the shareholders' action dismissed. In response, the shareholders retained Susan MacMillan, a forensic accounting partner at the Halifax office of Grant Thornton, to review all the relevant materials, including the documents filed in the action, and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out Ms. MacMillan's affidavit on the grounds that she was not an impartial expert witness. They argued that the action comes down to a battle of opinion between two accounting firms — the auditors' and the expert witness's. Ms. MacMillan's firm could be exposed to liability if its approach was not accepted by the court and, as a partner, Ms. MacMillan could be personally liable. Her potential liability if her opinion were not accepted gives her a personal financial interest in the outcome of the litigations and this, in the auditors' submission, ought to disqualify her from testifying.

[6] The proceedings since have been neither summary nor resulted in a judgment. Instead, the litigation has been focused on the expert evidence issue; the summary judgment application has not yet been heard on its merits.

comptable, Grant Thornton srl, de Kentville, pour effectuer diverses tâches comptables, qui, selon eux, avaient révélé des erreurs par les vérificateurs précédents. Les actionnaires reprochent essentiellement aux vérificateurs de ne pas avoir appliqué les normes de vérification et comptables généralement reconnues et de leur avoir ainsi causé une perte. La principale question dans le cadre de l'action est de savoir si les vérificateurs ont fait preuve de négligence dans l'exercice de leurs fonctions.

[5] En août 2010, les vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action. En réponse, les actionnaires ont fait appel à M^me^ Susan MacMillan, une associée en juricomptabilité du cabinet Grant Thornton de Halifax, pour qu'elle examine tous les documents pertinents, notamment ceux déposés dans le cadre de l'action, et rédige un rapport de ses constatations. Son affidavit expose ces dernières, notamment que les vérificateurs, selon elle, ne se sont pas acquittés de leurs obligations professionnelles envers les actionnaires. Les vérificateurs ont présenté une requête en radiation de l'affidavit de M^me^ MacMillan au motif qu'elle n'était pas un témoin expert impartial. Ils ont fait valoir que l'action se résumait à une bataille d'opinions entre deux cabinets comptables, en l'occurrence celui des vérificateurs et celui du témoin expert. Le cabinet de M^me^ MacMillan pourrait être tenu responsable si sa démarche n'était pas acceptée par le tribunal et, en tant qu'associée, M^me^ MacMillan pourrait être tenue personnellement responsable. Sa responsabilité potentielle — si son opinion n'était pas acceptée — se traduit par un intérêt financier personnel dans le règlement du litige; or, de l'avis des vérificateurs, cela devrait suffire à la rendre inhabile à témoigner.

[6] Depuis, l'instance a été tout sauf sommaire et ne s'est toujours pas soldée par un jugement. Le litige a plutôt porté sur la question du témoignage de l'expert; la requête en jugement sommaire n'a pas encore été entendue sur le fond.

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B. *Judgments Below*

(1) Nova Scotia Supreme Court: 2012 NSSC 210, 317 N.S.R. (2d) 283 (Pickup J.)

[7] Pickup J. essentially agreed with the auditors and struck out the MacMillan affidavit in its entirety: para. 106. He found that, in order to be admissible, an expert's evidence "must be, and be seen to be, independent and impartial": para. 99. Applying that test, he concluded that this was one of those "clearest of cases where the reliability of the expert . . . does not meet the threshold requirements for admissibility": para. 101.

(2) Nova Scotia Court of Appeal: 2013 NSCA 66, 330 N.S.R. (2d) 301 (Beveridge J.A., Oland J.A. Concurring; MacDonald C.J.N.S. Dissenting)

[8] The majority of the Court of Appeal concluded that the motions judge erred in excluding Ms. MacMillan's affidavit. Beveridge J.A. wrote that while the court has discretion to exclude expert evidence due to actual bias or partiality, the test adopted by the motions judge — that an expert "must be, and be seen to be, independent and impartial" — was wrong in law. He ought not to have ruled her evidence inadmissible and struck out her affidavit.

[9] MacDonald C.J.N.S., dissenting, would have upheld the motions judge's decision because he had properly articulated and applied the relevant legal principles.

III. Analysis

A. *Overview*

[10] In my view, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met,

B. *Les juridictions inférieures*

(1) Cour suprême de la Nouvelle-Écosse : 2012 NSSC 210, 317 N.S.R. (2d) 283 (le juge Pickup)

[7] Le juge Pickup s'est dit d'accord avec les vérificateurs pour l'essentiel et a radié intégralement l'affidavit de M[me] MacMillan (par. 106). Il était d'avis que, pour être admissible, le témoignage de l'expert [TRADUCTION] « doit être indépendant et impartial et être perçu comme tel » (par. 99) et, partant, a conclu qu'il s'agissait de l'un des « cas les plus évidents où la fiabilité de l'expert [. . .] ne satisfait pas aux critères d'admissibilité » (par. 101).

(2) Cour d'appel de la Nouvelle-Écosse : 2013 NSCA 66, 330 N.S.R. (2d) 301 (le juge Beveridge, avec l'appui de la juge Oland; le juge en chef MacDonald est dissident)

[8] Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit de M[me] MacMillan. Le juge Beveridge a écrit que, si le tribunal peut, en vertu de son pouvoir discrétionnaire, écarter le témoignage de l'expert pour cause de partialité réelle, le critère retenu par le juge des requêtes, en l'occurrence que l'expert « doit être indépendant et impartial et être perçu comme tel », était mal fondé en droit. Il n'aurait pas dû déclarer inadmissible le témoignage de M[me] MacMillan ni radier son affidavit.

[9] Le juge en chef MacDonald, dissident, était d'avis de confirmer la décision du juge des requêtes, parce que ce dernier avait selon lui exposé et appliqué correctement les principes juridiques pertinents.

III. Analyse

A. *Aperçu*

[10] Selon moi, l'expert a l'obligation envers le tribunal de donner un témoignage d'opinion qui soit juste, objectif et impartial. Il doit être conscient de cette obligation et pouvoir et vouloir s'en acquitter. S'il ne satisfait pas à ce critère, son témoignage ne devrait pas être admis. Or, dès lors qu'il y est satisfait,

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however, concerns about an expert witness's independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence. This common law approach is, of course, subject to statutory and related provisions which may establish different rules of admissibility.

B. *Expert Witness Independence and Impartiality*

[11] There have been long-standing concerns about whether expert witnesses hired by the parties are impartial in the sense that they are expressing their own unbiased professional opinion and whether they are independent in the sense that their opinion is the product of their own, independent conclusions based on their own knowledge and judgment: see, e.g., G. R. Anderson, *Expert Evidence* (3rd ed. 2014), at p. 509; S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at p. 783. As Sir George Jessel, M.R., put it in the 1870s, "[u]ndoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them": *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358, at p. 374.

[12] Recent experience has only exacerbated these concerns; we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 52. As observed by Beveridge J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in miscarriages of justice": para. 105. Other reports outline the critical need for impartial and independent expert evidence in civil litigation: *ibid.*, at para. 106; see the Right

les réserves quant à l'indépendance ou à l'impartialité du témoin expert devraient être examinées dans l'évaluation globale des coûts et des bénéfices de l'admission du témoignage. Cette démarche issue de la common law cède le pas bien sûr aux dispositions législatives et connexes établissant dans certains cas des règles d'admissibilité différentes.

B. *Impartialité et indépendance du témoin expert*

[11] Les préoccupations quant à savoir si les témoins experts retenus par les parties sont impartiaux — c'est-à-dire s'ils expriment leur opinion professionnelle sans parti pris — et indépendants — c'est-à-dire si leur opinion est le fruit des conclusions auxquelles ils sont parvenus de façon indépendante en se fondant sur leurs propres connaissances et jugement — ne datent pas d'hier (voir, p. ex., G. R. Anderson, *Expert Evidence* (3e éd. 2014), p. 509; S. N. Lederman, A. W. Bryant et M. K. Fuerst, *The Law of Evidence in Canada* (4e éd. 2014), p. 783). Comme le soulignait Sir George Jessel, maître des rôles, dans les années 1870, [TRADUCTION] « [i]l existe indubitablement une tendance naturelle à faire quelque chose d'utile pour celui qui nous emploie et nous rémunère bien. C'est tout à fait naturel et si infaillible que nous voyons constamment des personnes qui se considèrent, non pas comme des témoins, mais comme les mandataires rémunérés de la personne qui les emploie » (*Lord Abinger c. Ashton* (1873), L.R. 17 Eq. 358, p. 374).

[12] L'expérience récente n'a fait qu'aviver ces préoccupations; nous savons que trop bien que le manque d'indépendance et d'impartialité d'un expert peut donner lieu à de très graves erreurs judiciaires (*R. c. D.D.*, 2000 CSC 43, [2000] 2 R.C.S. 275, par. 52). Comme l'a souligné le juge Beveridge dans la présente affaire, la *Commission sur les poursuites contre Guy Paul Morin : Rapport* (1998), rédigé par l'honorable Fred Kaufman, et le *Rapport de la Commission d'enquête sur la médecine légale pédiatrique en Ontario* (2008), de l'honorable Stephen T. Goudge, donnent deux exemples concrets de cas où [TRADUCTION] « [l]'opinion apparemment solide et impartiale, mais erronée, d'un scientifique expert a joué un rôle de premier plan dans des erreurs judiciaires » (par. 105). D'autres rapports mettent en évidence la nécessité cruciale que l'expert

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Honourable Lord Woolf, *Access to Justice: Final Report* (1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).

[13] To decide how our law of evidence should best respond to these concerns, we must confront several questions: Should concerns about potentially biased expert opinion go to admissibility or only to weight?; If to admissibility, should these concerns be addressed by a threshold requirement for admissibility, by a judicial discretion to exclude, or both?; At what point do these concerns justify exclusion of the evidence?; And finally, how is our response to these concerns integrated into the existing legal framework governing the admissibility of expert opinion evidence? To answer these questions, we must first consider the existing legal framework governing admissibility, identify the duties that an expert witness has to the court and then turn to how those duties are best reflected in that legal framework.

C. *The Legal Framework*

(1) The Exclusionary Rule for Opinion Evidence

[14] To the modern general rule that all relevant evidence is admissible there are many qualifications. One of them relates to opinion evidence, which is the subject of a complicated exclusionary rule. Witnesses are to testify as to the facts which they perceived, not as to the inferences — that is, the opinions — that they drew from them. As one great evidence scholar put it long ago, it is "for the jury to form opinions, and draw inferences and conclusions, and not for the witness": J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; reprinted 1969), at p. 524; see also C. Tapper, *Cross and Tapper on Evidence* (12th ed. 2010), at p. 530. While various rationales have been offered for this exclusionary rule, the most convincing is probably that these ready-formed inferences are not helpful to the trier of fact and might even be misleading: see, e.g., *Graat v. The Queen*, [1982] 2

soit impartial et indépendant dans les procès civils (*ibid.*, par. 106; voir le très honorable lord Woolf, *Access to Justice : Final Report* (1996); l'honorable Coulter A. Osborne, *Projet de réforme du système de justice civile : Résumé des conclusions et des recommandations* (2007)).

[13] Pour déterminer la meilleure solution en droit de la preuve à ces préoccupations, il nous faut nous poser plusieurs questions. Est-ce que les réserves au sujet du parti pris possible d'un expert jouent au regard de l'admissibilité de son témoignage ou seulement de la valeur probante de ce dernier? Dans le premier cas, devrait-on y répondre par un critère d'admissibilité, par un pouvoir discrétionnaire permettant d'écarter la preuve ou les deux? Quand justifient-elles que soit exclu un témoignage? Enfin, comment la solution s'inscrit-elle dans le cadre juridique actuel régissant l'admissibilité des témoignages d'experts? Pour répondre à ces questions, nous devons d'abord nous pencher sur ce cadre juridique, circonscrire les obligations du témoin envers le tribunal, puis voir comment ces dernières s'intègrent le mieux dans le cadre juridique.

C. *Le cadre juridique*

(1) La règle d'exclusion des témoignages d'opinion

[14] La règle générale moderne selon laquelle toute preuve pertinente est admissible est assortie de nombreuses exceptions. L'une d'elles a trait au témoignage d'opinion, lequel fait l'objet d'une règle d'exclusion complexe. La déposition des témoins doit relater les faits qu'ils ont perçus, et non présenter les inférences, ou opinions, qu'ils en tirent. Comme l'a dit il y a longtemps un éminent spécialiste de la preuve, [TRADUCTION] « c'est au jury de se faire une opinion et de tirer des inférences et des conclusions, pas au témoin » (J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; réimprimé 1969), p. 524; voir également C. Tapper, *Cross and Tapper on Evidence* (12e éd. 2010), p. 530). Même si plusieurs raisons ont été avancées pour expliquer cette règle d'exclusion, la plus convaincante est probablement celle selon laquelle ces inférences toutes faites ne sont

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S.C.R. 819, at p. 836; *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. HEV-137 "General rule against opinion evidence".

[15] Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge. As Prof. Tapper put it, "the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is therefore allowed to state his opinion about such matters, provided he is expert in them": p. 530; see also *R. v. Abbey*, [1982] 2 S.C.R. 24, at p. 42.

(2) The Current Legal Framework for Expert Opinion Evidence

[16] Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

[17] We can take as the starting point for these developments the Court's decision in *R. v. Mohan*, [1994] 2 S.C.R. 9. That case described the potential dangers of expert evidence and established a four-part threshold test for admissibility. The dangers are well known. One is that the trier of fact will inappropriately defer to the expert's opinion rather

pas utiles au juge des faits et peuvent même l'induire en erreur (voir, p. ex., *Graat c. La Reine*, [1982] 2 R.C.S. 819, p. 836; *Halsbury's Laws of Canada : Evidence* (2014 réédition), par. HEV-137 « General rule against opinion evidence »).

[15] Cependant, ce ne sont pas tous les témoignages d'opinion qui sont exclus. L'exception qui nous intéresse plus particulièrement dans le présent pourvoi est celle qui s'applique au témoignage d'opinion d'un expert sur des questions qui exigent des connaissances spécialisées. Pour reprendre les propos du professeur Tapper, [TRADUCTION] « le droit reconnaît que, dans la mesure où les questions exigent des connaissances ou des compétences particulières, les juges et les jurés ne sont pas forcément en mesure de tirer une véritable conclusion d'après les faits relatés par les témoins. Le témoin est par conséquent admis à faire part de son opinion sur ces questions, pourvu qu'il soit un expert en la matière » (p. 530; voir également *R. c. Abbey*, [1982] 2 R.C.S. 24, p. 42).

(2) Le cadre juridique actuel régissant le témoignage d'opinion d'un expert

[16] Depuis au moins le milieu des années 1990, la Cour a répondu à nombre de préoccupations concernant l'incidence d'une preuve d'expert d'une valeur douteuse sur le déroulement de l'instance. La jurisprudence a clarifié et resserré les critères d'admissibilité, établi de nouvelles exigences de fiabilité, notamment en ce qui concerne la preuve issue de sciences nouvelles, et renforcé l'important rôle de « gardien » du juge qui consiste à écarter d'emblée les témoignages dont la valeur ne justifie pas la confusion, la lenteur et les frais que leur admission risque de causer.

[17] Nous pouvons prendre comme point de départ de cette nouvelle tendance la décision de la Cour dans l'affaire *R. c. Mohan*, [1994] 2 R.C.S. 9. Cet arrêt a mis en lumière les dangers du témoignage d'expert et établi un critère à quatre volets pour en évaluer l'admissibilité. Ces dangers sont bien connus. Il y a notamment le risque que le juge des faits

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than carefully evaluate it. As Sopinka J. observed in *Mohan*:

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. [p. 21]

(See also *D.D.*, at para. 53; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at paras. 25-26; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 46.)

[18] The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 90, leave to appeal refused, [2010] 2 S.C.R. v. The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: *J.-L.J.*, at para. 56. The risk of "attornment to the opinion of the expert" is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D.D.*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination (*D.D.*, at para. 55); the risk of admitting "junk science" (*J.-L.J.*, at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 76.

[19] To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility

s'en remette inconsidérément à l'opinion de l'expert au lieu de l'évaluer avec circonspection. Comme le souligne le juge Sopinka dans l'arrêt *Mohan* :

> La preuve d'expert risque d'être utilisée à mauvais escient et de fausser le processus de recherche des faits. Exprimée en des termes scientifiques que le jury ne comprend pas bien et présentée par un témoin aux qualifications impressionnantes, cette preuve est susceptible d'être considérée par le jury comme étant pratiquement infaillible et comme ayant plus de poids qu'elle ne le mérite. [p. 21]

(Voir également *D.D.*, par. 53; *R. c. J.-L.J.*, 2000 CSC 51, [2000] 2 R.C.S. 600, par. 25-26; *R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272, par. 46.)

[18] Il s'agit de préserver le procès devant juge et jury, et non pas d'y substituer le procès instruit par des experts. Il y a un risque que le jury [TRADUCTION] « soit incapable de faire un examen critique et efficace de la preuve » (*R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, par. 90, autorisation d'appel refusée, [2010] 2 R.C.S. v). Le juge des faits doit faire appel à son « jugement éclairé » plutôt que simplement trancher la question sur le fondement d'un « acte de confiance » à l'égard de l'opinion de l'expert (*J.-L.J.*, par. 56). Le danger de « s'en remettre à l'opinion de l'expert » est également exacerbé par le fait que la preuve d'expert est imperméable au contre-interrogatoire efficace par des avocats qui ne sont pas des experts dans ce domaine (*D.D.*, par. 54). La jurisprudence aborde un certain nombre d'autres problèmes connexes : le préjudice qui pourrait éventuellement découler d'une opinion d'expert fondée sur des informations qui ne sont pas attestées sous serment et qui ne peuvent pas faire l'objet d'un contre-interrogatoire (*D.D.*, par. 55); le danger d'admettre en preuve de la « science de pacotille » (*J.-L.J.*, par. 25); le risque qu'un « concours d'experts » ne distraie le juge des faits au lieu de l'aider (*Mohan*, p. 24). Un autre danger bien connu associé à l'admission de la preuve d'expert est le fait qu'elle peut exiger un délai et des frais démesurés (*Mohan*, p. 21; *D.D.*, par. 56; *Masterpiece Inc. c. Alavida Lifestyles Inc.*, 2011 CSC 27, [2011] 2 R.C.S. 387, par. 76).

[19] Pour parer à ces dangers, la Cour dans l'arrêt *Mohan* a établi une structure de base à deux volets

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of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25; see also *Sekhon*, at para. 43). *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect — a residual discretion to exclude evidence based on a cost-benefit analysis: p. 21. This is the second component, which the subsequent jurisprudence has further emphasized: Lederman, Bryant and Fuerst, at pp. 789-90; *J.-L.J.*, at para. 28.

[20] *Mohan* and the jurisprudence since, however, have not explicitly addressed how this "cost-benefit" component fits into the overall analysis. The reasons in *Mohan* engaged in a cost-benefit analysis with respect to particular elements of the four threshold requirements, but they also noted that the cost-benefit analysis could be an aspect of exercising the overall discretion to exclude evidence whose probative value does not justify its admission in light of its potentially prejudicial effects: p. 21. The jurisprudence since *Mohan* has also focused on particular aspects of expert opinion evidence, but again without always being explicit about where additional concerns fit into the analysis. The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role.

[21] So, for example, the necessity threshold criterion was emphasized in cases such as *D.D.* The majority underlined that the necessity requirement exists "to ensure that the dangers associated with expert evidence are not lightly tolerated" and that "[m]ere relevance or 'helpfulness' is not enough": para. 46. Other cases have addressed the reliability of the science underlying an opinion and indeed technical evidence in general: *J.-L.J.*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239. The question remains, however, as to where the cost-benefit analysis

définissant les règles d'admissibilité du témoignage d'opinion d'un expert. En premier lieu, celui qui cherche à faire admettre une preuve d'opinion émanant d'un expert doit démontrer qu'elle satisfait à quatre critères : (1) la pertinence; (2) la nécessité d'aider le juge des faits; (3) l'absence de toute règle d'exclusion; (4) la qualification suffisante de l'expert (*Mohan*, p. 20-25; voir également *Sekhon*, par. 43). L'arrêt *Mohan* insiste par ailleurs sur le rôle important du juge du procès pour déterminer si une preuve d'expert par ailleurs admissible devrait être exclue parce que sa valeur probante est surpassée par son effet préjudiciable — un pouvoir discrétionnaire résiduel permettant d'exclure une preuve à l'issue d'une analyse coût-bénéfices (p. 21). Il s'agit du second volet de la structure, mis en évidence par la jurisprudence ultérieure (Lederman, Bryant et Fuerst, p. 789-790; *J.-L.J.*, par. 28).

[20] L'arrêt *Mohan* et la jurisprudence ultérieure ne précisent toutefois pas comment cette analyse « du coût et des bénéfices » s'inscrit dans l'analyse globale. La Cour dans cet arrêt procède à l'analyse coût-bénéfices relativement à certains des quatre critères, mais elle fait aussi observer qu'une telle analyse peut relever de l'exercice d'un pouvoir discrétionnaire général qui permet d'exclure une preuve dont la valeur probante ne justifie pas son admission, compte tenu de ses effets potentiellement préjudiciables (p. 21). Depuis l'arrêt *Mohan*, la jurisprudence s'est également intéressée à des aspects particuliers du témoignage d'opinion d'un expert, mais souvent sans expliciter la place qu'occupent ces autres préoccupations dans l'analyse. Cependant, la jurisprudence, dans son ensemble, tend indubitablement à resserrer les critères d'admissibilité et à renforcer le rôle de gardien du juge.

[21] Par exemple, le critère de nécessité a été mis en évidence dans des décisions telles que *D.D.* La majorité y souligne que l'exigence de nécessité « vise à ce que les dangers liés à la preuve d'expert ne soient pas traités à la légère », ajoutant que « [l]a simple pertinence ou "utilité" ne suffit pas » (par. 46). D'autres décisions ont abordé la fiabilité des principes scientifiques à la base d'une opinion et, en fait, des éléments de preuve techniques en général (*J.-L.J.*; *R. c. Trochym*, 2007 CSC 6, [2007] 1 R.C.S. 239). Toutefois, on ne sait toujours pas où exactement,

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and concerns such as those about reliability fit into the overall analysis.

[22] *Abbey* (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach.

[23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.

[24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

dans l'analyse globale, s'inscrivent l'analyse coût-bénéfices et les préoccupations comme celles relatives à la fiabilité.

[22] L'arrêt *Abbey* (ONCA) a apporté des précisions utiles en scindant la démarche en deux temps. Je suis d'avis de l'adopter, à peu de choses près.

[23] Dans un premier temps, celui qui veut présenter le témoignage doit démontrer qu'il satisfait aux critères d'admissibilité, soit les quatre critères énoncés dans l'arrêt *Mohan*, à savoir la pertinence, la nécessité, l'absence de toute règle d'exclusion et la qualification suffisante de l'expert. De plus, dans le cas d'une opinion fondée sur une science nouvelle ou contestée ou sur une science utilisée à des fins nouvelles, la fiabilité des principes scientifiques étayant la preuve doit être démontrée (*J.-L.J.*, par. 33, 35-36 et 47; *Trochym*, par. 27; Lederman, Bryant et Fuerst, p. 788-789 et 800-801). Le critère de la pertinence, à ce stade, s'entend de la pertinence logique (*Abbey* (ONCA), par. 82; *J.-L.J.*, par. 47). Tout témoignage qui ne satisfait pas à ces critères devrait être exclu. Il est à noter qu'à mon avis, la nécessité demeure un critère (*D.D.*, par. 57; voir D. M. Paciocco et L. Stuesser, *The Law of Evidence* (7e éd. 2015), p. 209-210; *R. c. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, par. 13; *R. c. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, par. 72).

[24] Dans un deuxième temps, le juge-gardien exerce son pouvoir discrétionnaire en soupesant les risques et les bénéfices éventuels que présente l'admission du témoignage, afin de décider si les premiers sont justifiés par les seconds. Cet exercice nécessaire de pondération a été décrit de plusieurs façons. Dans l'arrêt *Mohan*, le juge Sopinka parle du « facteur fiabilité-effet » (p. 21), tandis que, dans l'arrêt *J.-L.J.*, le juge Binnie renvoie à « la pertinence, la fiabilité et la nécessité par rapport au délai, au préjudice, à la confusion qui peuvent résulter » (par. 47). Le juge Doherty résume bien la question dans l'arrêt *Abbey*, lorsqu'il explique que [TRADUCTION] « le juge du procès doit décider si le témoignage d'expert qui satisfait aux conditions préalables à l'admissibilité est assez avantageux pour le procès pour justifier son admission malgré le préjudice potentiel, pour le procès, qui peut découler de son admission » (par. 76).

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[25] With this delineation of the analytical framework, we can turn to the nature of an expert's duty to the court and where it fits into that framework.

D. *The Expert's Duty to the Court or Tribunal*

[26] There is little controversy about the broad outlines of the expert witness's duty to the court. As Anderson writes, "[t]he duty to provide independent assistance to the Court by way of objective unbiased opinion has been stated many times by common law courts around the world": p. 227. I would add that a similar duty exists in the civil law of Quebec: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at para. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011), c. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, art. 22 (not yet in force); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), at pp. 14 and 121.

[27] One influential statement of the elements of this duty are found in the English case *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.). Following an 87-day trial, Cresswell J. believed that a misunderstanding of the duties and responsibilities of expert witnesses contributed to the length of the trial. He listed in *obiter dictum* duties and responsibilities of experts, the first two of which have particularly influenced the development of Canadian law:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation . . . .

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise . . . . An expert witness in the High Court should

[25] Le cadre analytique ainsi délimité, penchons-nous sur la nature de l'obligation de l'expert envers le tribunal et voyons comment elle s'inscrit dans ce cadre.

D. *L'obligation de l'expert envers le tribunal*

[26] Les grandes lignes de l'obligation du témoin expert envers le tribunal sont peu contestées. Comme Anderson l'écrit : [TRADUCTION] « L'obligation de fournir une aide indépendante au tribunal sous la forme d'avis objectif et exempt de parti pris a été énoncée à de nombreuses reprises par les tribunaux de common law un peu partout dans le monde » (p. 227). J'ajouterais qu'une obligation semblable existe en droit civil québécois (J.-C. Royer et S. Lavallée, *La preuve civile* (4e éd. 2008), par. 468; D. Béchard, avec la collaboration de J. Béchard, *L'expert* (2011), c. 9; *Loi instituant le nouveau Code de procédure civile*, L.Q. 2014, c. 1, art. 22 (non en vigueur); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), p. 14 et 121).

[27] On trouve dans l'arrêt anglais *National Justice Compania Naviera S.A. c. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.), un énoncé des éléments de cette obligation qui fait autorité. Au terme d'un procès de 87 jours, le juge Cresswell a conclu qu'une méconnaissance des obligations et responsabilités des témoins experts avait contribué à prolonger le procès. Il a dressé, dans une remarque incidente, une liste des obligations et responsabilités des experts, dont les deux premiers points ont particulièrement influencé l'évolution du droit canadien :

[TRADUCTION]

1. Le témoignage de l'expert présenté à la Cour devrait être le produit indépendant de l'expert n'ayant subi quant à la forme ou au fond aucune influence dictée par les exigences du litige et être perçu comme tel . . .

2. Le rôle du témoin expert consiste à fournir une aide indépendante au tribunal sous la forme d'avis objectif et exempt de parti pris sur des questions relevant de son champ d'expertise [. . .] La personne qui témoigne

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never assume the role of an advocate. [Emphasis added; citation omitted; p. 81.]

(These duties were endorsed on appeal: [1995] 1 Lloyd's Rep. 455 (C.A.), at p. 496.)

[28] Many provinces and territories have provided explicit guidance related to the duty of expert witnesses. In Nova Scotia, for example, the *Civil Procedure Rules* require that an expert's report be signed by the expert who must make (among others) the following representations to the court: that the expert is providing an objective opinion for the assistance of the court; that the expert is prepared to apply independent judgment when assisting the court; and that the report includes everything the expert regards as relevant to the expressed opinion and draws attention to anything that could reasonably lead to a different conclusion (r. 55.04(1)(a), (b) and (c)). While these requirements do not affect the rules of evidence by which expert opinion is determined to be admissible or inadmissible, they provide a convenient summary of a fairly broadly shared sense of the duties of an expert witness to the court.

[29] There are similar descriptions of the expert's duty in the civil procedure rules in other Canadian jurisdictions: Anderson, at p. 227; *The Queen's Bench Rules* (Saskatchewan), r. 5-37; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 11-2(1); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 4.1.01(1); *Rules of Court*, Y.O.I.C. 2009/65, r. 34(23); *An Act to establish the new Code of Civil Procedure*, art. 22. Moreover, the rules in Saskatchewan, British Columbia, Ontario, Nova Scotia, Prince Edward Island, Quebec and the Federal Courts require experts to certify that they are aware of and will comply with their duty to the court: Anderson, at p. 228; Saskatchewan *Queen's Bench Rules*, r. 5-37(3); British Columbia *Supreme Court Civil Rules*, r. 11-2(2); Ontario *Rules of Civil Procedure*, r. 53.03(2.1); Nova Scotia *Civil Procedure Rules*, r. 55.04(1)(a); Prince Edward Island *Rules of Civil Procedure*, r. 53.03(3)(g); *An Act to establish the new Code of*

comme expert devant la Haute Cour ne doit jamais s'arroger le rôle de défenseur. [Je souligne; référence omise; p. 81.]

(La Cour d'appel a confirmé ces obligations ([1995] 1 Lloyd's Rep. 455 (C.A.), p. 496).)

[28] Plusieurs provinces et territoires ont des directives expresses en ce qui concerne l'obligation du témoin expert. En Nouvelle-Écosse, par exemple, les *Règles de procédure civile* prévoient que le rapport d'expert, signé par ce dernier, déclare notamment qu'il fournit une opinion objective pour prêter assistance à la cour; qu'il est disposé à se former un jugement indépendant dans l'assistance qu'il prête à la cour; que son rapport comprend tout ce qu'il considère comme pertinent par rapport à l'opinion exprimée et attire l'attention sur tout ce qui pourrait mener raisonnablement à une conclusion différente (al. 55.04(1)a), b) et c)). Même si ces exigences n'ont aucune incidence sur les règles de preuve sur l'admissibilité d'une opinion d'expert, elles résument bien la conception assez largement partagée de l'obligation d'un témoin expert envers le tribunal.

[29] L'obligation de l'expert est définie de façon similaire dans les règles de procédure civile d'autres provinces et territoires du Canada (Anderson, p. 227; *Règles de la Cour du Banc de la Reine* de la Saskatchewan, règle 5-37; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, par. 11-2(1); *Règles de procédure civile*, R.R.O. 1990, Règl. 194, par. 4.1.01(1); *Règles de procédure*, Y.D. 2009/65, par. 34(23); *Loi instituant le nouveau Code de procédure civile*, art. 22). De plus, les règles de la Saskatchewan, de la Colombie-Britannique, de l'Ontario, de la Nouvelle-Écosse, de l'Île-du-Prince-Édouard, du Québec et des Cours fédérales en la matière exigent que les experts certifient qu'ils sont informés de leur obligation envers le tribunal et s'en acquitteront (Anderson, p. 228; *Règles de la Cour du Banc de la Reine* de la Saskatchewan, par. 5-37(3); *Supreme Court Civil Rules* de la Colombie-Britannique, par. 11-2(2); *Règles de procédure civile* de l'Ontario,

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Civil Procedure, art. 235 (not yet in force); *Federal Courts Rules*, SOR/98-106, r. 52.2(1)(*c*).

[30] The formulation in the Ontario *Rules of Civil Procedure* is perhaps the most succinct and complete statement of the expert's duty to the court: to provide opinion evidence that is fair, objective and non-partisan (r. 4.1.01(1)(a)). The *Rules* are also explicit that this duty to the court prevails over any obligation owed by the expert to a party: r. 4.1.01(2). Likewise, the newly adopted *Act to establish the new Code of Civil Procedure* of Quebec explicitly provides, as a guiding principle, that the expert's duty to the court overrides the parties' interests, and that the expert must fulfill his or her primary duty to the court "objectively, impartially and thoroughly": art. 22; Chamberland, at pp. 14 and 121.

[31] Many of the relevant rules of court simply reflect the duty that an expert witness owes to the court at common law: Anderson, at p. 227. In my opinion, this is true of the Nova Scotia rules that apply in this case. Of course, it is always open to each jurisdiction to impose different rules of admissibility, but in the absence of a clear indication to that effect, the common law rules apply in common law cases. I note that in Nova Scotia, the *Civil Procedure Rules* explicitly provide that they do not change the rules of evidence by which the admissibility of expert opinion evidence is determined: r. 55.01(2).

[32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's

par. 53.03(2.1); *Règles de procédure civile* de la Nouvelle-Écosse, al. 55.04(1)a); *Rules of Civil Procedure* de l'Île-du-Prince-Édouard, al. 53.03(3)(g); *Loi instituant le nouveau Code de procédure civile*, art. 235 (non en vigueur); *Règles des Cours fédérales*, DORS/98-106, al. 52.2(1)*c*)).

[30] Les *Règles de procédure civile* de l'Ontario énoncent sans doute le plus succinctement et complètement l'obligation de l'expert envers le tribunal, en l'occurrence celle de rendre un témoignage d'opinion qui soit équitable, objectif et impartial (al. 4.1.01(1)a)). Les *Règles* prévoient également expressément que cette obligation l'emporte sur toute obligation de l'expert envers la partie qui l'a engagé (par. 4.1.01(2)). De même, la *Loi instituant le nouveau Code de procédure civile* du Québec prévoit expressément, parmi ses principes directeurs, que la mission première de l'expert envers le tribunal prime les intérêts des parties et qu'il doit l'accomplir « avec objectivité, impartialité et rigueur » (art. 22; Chamberland, p. 14 et 121).

[31] Bon nombre de règles de procédure ne font que reprendre l'obligation à laquelle le témoin expert est tenu envers le tribunal en common law (Anderson, p. 227). À mon avis, c'est le cas des *Règles* de la Nouvelle-Écosse en la matière. Bien sûr, il est loisible à chaque province ou territoire d'établir des règles d'admissibilité différentes, mais à défaut d'indication claire en ce sens, ce sont les règles de la common law qui s'appliquent dans les affaires de common law. Je souligne qu'en Nouvelle-Écosse, les *Règles de procédure civile* disposent expressément qu'elles n'ont aucune incidence sur les règles de preuve servant à déterminer si l'opinion d'expert est admissible (par. 55.01(2)).

[32] Trois concepts apparentés sont à la base des diverses définitions de l'obligation de l'expert, à savoir l'impartialité, l'indépendance et l'absence de parti pris. L'opinion de l'expert doit être impartiale, en ce sens qu'elle découle d'un examen objectif des questions à trancher. Elle doit être indépendante, c'est-à-dire qu'elle doit être le fruit du jugement indépendant de l'expert, non influencée par la partie pour qui il témoigne ou l'issue du litige. Elle doit être exempte de parti pris, en ce sens qu'elle ne doit pas

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position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

favoriser injustement la position d'une partie au détriment de celle de l'autre. Le critère décisif est que l'opinion de l'expert ne changerait pas, peu importe la partie qui aurait retenu ses services (P. Michell et R. Mandhane, « The Uncertain Duty of the Expert Witness » (2005), 42 *Alta. L. Rev*. 635, p. 638-639). Ces concepts, il va sans dire, doivent être appliqués aux réalités du débat contradictoire. Les experts sont généralement engagés, mandatés et payés par l'un des adversaires. Ces faits, à eux seuls, ne compromettent pas l'indépendance, l'impartialité ni l'absence de parti pris de l'expert.

E. *The Expert's Duties and Admissibility*

[33] As we have seen, there is a broad consensus about the nature of an expert's duty to the court. There is no such consensus, however, about how that duty relates to the admissibility of an expert's evidence. There are two main questions: Should the elements of this duty go to admissibility of the evidence rather than simply to its weight?; And, if so, is there a threshold admissibility requirement in relation to independence and impartiality?

[34] In this section, I will explain my view that the answer to both questions is yes: a proposed expert's independence and impartiality go to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

(1) Admissibility or Only Weight?

(a) *The Canadian Law*

[35] The weight of authority strongly supports the conclusion that at a certain point, expert evidence should be ruled inadmissible due to the expert's lack of impartiality and/or independence.

E. *Les obligations de l'expert et l'admissibilité de son témoignage*

[33] Comme nous l'avons vu, il existe un large consensus quant à la nature de l'obligation de l'expert envers le tribunal. Il n'en va toutefois pas de même du rapport entre cette obligation et l'admissibilité du témoignage de l'expert. Deux questions importantes se posent : les éléments de l'obligation de l'expert jouent-ils au regard de l'admissibilité du témoignage plutôt que simplement de la valeur probante de celui-ci et, dans l'affirmative, l'indépendance et l'impartialité constituent-elles un critère d'admissibilité?

[34] Dans la présente section, j'explique pourquoi je réponds par l'affirmative à ces deux questions : l'indépendance et l'impartialité de l'expert proposé jouent au regard de l'admissibilité de son témoignage plutôt que simplement de la valeur probante de celui-ci, et l'obligation de l'expert constitue un critère d'admissibilité. Une fois qu'il est satisfait à ce critère, toute réserve qui demeure quant à savoir si l'expert s'est conformé à son obligation devrait être examinée dans le cadre de l'analyse coût-bénéfices qu'effectue le juge dans l'exercice de son rôle de gardien.

(1) Admissibilité ou valeur probante?

a) *Le droit canadien*

[35] La jurisprudence dominante appuie solidement la conclusion qu'il convient, à un certain point, de juger inadmissible le témoignage de l'expert qui fait preuve d'un manque d'indépendance ou d'impartialité.

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[36] Our Court has confirmed this position in a recent decision that was not available to the courts below:

> It is well established that an expert's opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision maker (J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at No. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011), chap. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, s. 22 (not yet in force)). However, these factors generally have an impact on the probative value of the expert's opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily "disqualify" the expert (L. Ducharme and C.-M. Panaccio, *L'administration de la preuve* (4th ed. 2010), at Nos. 590-91 and 605). For expert testimony to be inadmissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would consider that the expert is not independent. Rather, what must be determined is whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case (D. M. Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565, at pp. 598-99).
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> (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 106)

[37] I will refer to a number of other cases that support this view. I do so by way of illustration and without commenting on the outcome of particular cases. An expert's interest in the litigation or relationship to the parties has led to exclusion in a number of cases: see, e.g., *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Gen. Div.) (proposed expert was the defendant's lawyer in related matters and had investigated from the outset of his retainer the matter of a potential negligence claim against the plaintiff); *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187 (S.C.J.) (expert was the party's lawyer in related U.S. proceedings); *R. v. Docherty*, 2010 ONSC 3628 (expert was the defence counsel's father); *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394 (expert was also a party to the litigation); *Handley v. Punnett*,

[36] La Cour vient de confirmer cette position dans un arrêt dont ne disposaient pas les juridictions inférieures :

> Il est acquis que l'expert doit fournir une opinion indépendante, impartiale et objective, en vue d'aider le décideur (J.-C. Royer et S. Lavallée, *La preuve civile* (4e éd. 2008), nº 468; D. Béchard, avec la collaboration de J. Béchard, *L'expert* (2011), chap. 9; *Loi instituant le nouveau Code de procédure civile*, L.Q. 2014, c. 1, art. 22 (non encore en vigueur)). Par contre, ces facteurs influencent généralement la valeur probante de l'opinion de l'expert et ne sont pas toujours des obstacles incontournables à l'admissibilité de son témoignage. Ils ne rendent pas non plus le témoin expert nécessairement « inhabile » (L. Ducharme et C.-M. Panaccio, *L'administration de la preuve* (4e éd. 2010), nos 590-591 et 605). Pour qu'un témoignage d'expert soit inadmissible, il faut plus qu'une simple apparence de partialité. La question n'est pas de savoir si une personne raisonnable considérerait que l'expert n'est pas indépendant. Il faut plutôt déterminer si le manque d'indépendance de l'expert le rend de fait incapable de fournir une opinion impartiale dans les circonstances propres à l'instance (D. M. Paciocco, « Unplugging Jukebox Testimony in an Adversarial System : Strategies for Changing the Tune on Partial Experts » (2009), 34 *Queen's L.J.* 565, p. 598-599).
>
> (*Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3, par. 106)

[37] Je renvoie à plusieurs autres affaires pour étayer mon opinion. Je procède ainsi pour illustrer mon propos, sans émettre d'avis sur l'issue des affaires en question. Dans certaines, l'intérêt de l'expert dans le procès ou ses liens avec l'une des parties ont mené à l'exclusion (voir, p. ex., *Fellowes, McNeil c. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Div. gén.) (l'expert proposé était l'avocat de la défenderesse dans une affaire connexe et, dès le début de son mandat, il avait monté un dossier en vue d'une poursuite pour négligence contre la demanderesse); *Royal Trust Corp. of Canada c. Fisherman* (2000), 49 O.R. (3d) 187 (C.S.J.) (l'expert était l'avocat d'une des parties dans une instance connexe introduite aux États-Unis); *R. c. Docherty*, 2010 ONSC 3628 (l'expert était le père de l'avocat de la défense); *Ocean c. Economical Mutual Insurance Co.*, 2010 NSSC

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2003 BCSC 294 (expert was also a party to the litigation); *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (QL) (S.C.J.) (expert was effectively a "co-venturer" in the case due in part to the fact that 40 percent of his remuneration was contingent upon success at trial: para. 7); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240 (expert's retainer agreement was inappropriate); *Hutchingame v. Johnstone*, 2006 BCSC 271 (expert stood to incur liability depending on the result of the trial). In other cases, the expert's stance or behaviour as an advocate has justified exclusion: see, e.g., *Alfano v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19.

[38] Many other cases have accepted, in principle, that lack of independence or impartiality can lead to exclusion, but have ruled that the expert evidence did not warrant rejection on the particular facts: see, e.g., *United City Properties Ltd. v. Tong*, 2010 BCSC 111; *R. v. INCO Ltd.* (2006), 80 O.R. (3d) 594 (S.C.J.). This was the position of the Court of Appeal in this case: para. 109; see also para. 121.

[39] Some Canadian courts, however, have treated these matters as going exclusively to weight rather than to admissibility. The most often cited cases for this proposition are probably *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115, and *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77. *Klassen* holds as admissible any expert evidence meeting the criteria from *Mohan*, with bias only becoming a factor as to the weight to be given to the evidence: see also *R. v. Violette*, 2008 BCSC 920. Similarly, the court in *Gallant* determined that a challenge to expert evidence that is based on the expert having a connection to a party or an issue in the case

315, 293 N.S.R. (2d) 394 (l'expert était également partie au litige); *Handley c. Punnett*, 2003 BCSC 294 (l'expert était également partie au litige); *Bank of Montreal c. Citak*, [2001] O.J. No. 1096 (QL) (C.S.J.) (l'expert était effectivement « coentrepreneur » dans cette affaire, notamment en raison du fait que 40 p. 100 de sa rémunération dépendait de l'issue favorable du procès (par. 7)); *Dean Construction Co. c. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240 (les termes du mandat de l'expert étaient discutables); *Hutchingame c. Johnstone*, 2006 BCSC 271 (la responsabilité de l'expert risquait d'être engagée, selon l'issue du procès)). Dans d'autres affaires, l'attitude ou le comportement de l'expert, qui s'était fait le défenseur d'une partie, a justifié l'exclusion (voir, p. ex., *Alfano c. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. c. Bank of Nova Scotia*, 2003 BCSC 617; *Gould c. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19).

[38] Dans un grand nombre d'autres affaires, les tribunaux, tout en acceptant en principe qu'un manque d'indépendance ou d'impartialité pouvait mener à l'exclusion du témoignage de l'expert, ont néanmoins estimé qu'il n'y avait pas lieu d'écarter ce témoignage eu égard aux faits particuliers de l'espèce (voir, p. ex., *United City Properties Ltd. c. Tong*, 2010 BCSC 111; *R. c. INCO Ltd.* (2006), 80 O.R. (3d) 594 (C.S.J.)). C'est le point de vue qu'a adopté la Cour d'appel dans le cas qui nous occupe (par. 109; voir également par. 121).

[39] Toutefois, certains tribunaux canadiens étaient d'avis que ces questions jouaient exclusivement au regard de la valeur de la preuve, et non au regard de son admissibilité. Les décisions les plus souvent citées à cet égard sont sans doute *R. c. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115, et *Gallant c. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77. Dans la première, le tribunal a déclaré admissible tout témoignage d'expert qui satisfaisait aux critères énoncés dans l'arrêt *Mohan* et précisé que le parti pris n'entrait en jeu que lorsqu'il s'agissait de déterminer la valeur probante du témoignage de l'expert (voir également

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or a possible predetermined position on the case cannot take place at the admissibility stage: para. 89.

[40] I conclude that the dominant approach in Canadian common law is to treat independence and impartiality as bearing not just on the weight but also on the admissibility of the evidence. I note that while the shareholders submit that issues regarding expert independence should go only to weight, they rely on cases such as *INCO* that specifically accept that a finding of lack of independence or impartiality can lead to inadmissibility in certain circumstances: R.F., at paras. 52-53.

(b) *Other Jurisdictions*

[41] Outside Canada, the concerns related to independence and impartiality have been addressed in a number of ways. Some are similar to the approach in Canadian law.

[42] For example, summarizing the applicable principles in British law, Nelson J. in *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367 (Q.B.), underlined that when an expert has an interest or connection with the litigation or a party thereto, exclusion will be warranted if it is determined that the expert is unwilling or unable to carry out his or her primary duty to the court: see also H. M. Malek et al., eds., *Phipson on Evidence* (18th ed. 2013), at pp. 1158-59. The mere fact of an interest or connection will not disqualify, but it nonetheless may do so in light of the nature and extent of the interest or connection in particular circumstances. As Lord Phillips of Worth Matravers, M.R., put it in a leading case, "[i]t is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence": *R. (Factortame Ltd.) v. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003]

R. c. Violette, 2008 BCSC 920). De même, dans la deuxième, la cour a statué que la contestation du témoignage de l'expert fondée sur l'existence d'un rapport entre ce dernier et l'une des parties ou une question en litige ou sur une préconception de sa part ne pouvait être formulée à l'étape de l'admissibilité (par. 89).

[40] Je conclus que selon la conception prédominante en common law canadienne, l'indépendance et l'impartialité ont une incidence non seulement sur la valeur de la preuve, mais aussi sur son admissibilité. Je signale que, même s'ils soutiennent que les questions concernant l'indépendance de l'expert ne devraient jouer qu'au regard de la valeur probante, les actionnaires invoquent des affaires comme *INCO*, dans laquelle le tribunal reconnaît expressément qu'une conclusion quant au manque d'indépendance ou d'impartialité peut entraîner l'inadmissibilité dans certaines circonstances (m.i., par. 52-53).

b) *Ailleurs dans le monde*

[41] À l'extérieur du Canada, les questions d'indépendance et d'impartialité ont été abordées de diverses façons, dont certaines s'apparentent à la démarche canadienne.

[42] Par exemple, résumant les principes applicables en droit britannique, le juge Nelson, dans l'arrêt *Armchair Passenger Transport Ltd. c. Helical Bar Plc*, [2003] EWHC 367 (Q.B.), a souligné que lorsque l'expert a un intérêt dans un litige ou un rapport avec celui-ci ou avec une partie, l'exclusion est justifiée s'il est établi que l'expert ne peut ou ne veut pas s'acquitter de sa principale obligation envers la cour (voir également H. M. Malek et autres, dir., *Phipson on Evidence* (18e éd. 2013), p. 1158-1159). Le simple fait d'avoir un intérêt ou un rapport ne rend pas quelqu'un inhabile à témoigner, sauf dans certaines circonstances, selon la nature et l'importance de l'intérêt ou du rapport. Comme lord Phillips de Worth Matravers, maître des rôles, l'explique dans un arrêt de principe : [TRADUCTION] « Il est toujours souhaitable qu'un expert n'ait aucun intérêt réel ou apparent dans l'issue d'un procès dans lequel il témoigne, mais une telle neutralité n'est pas automatiquement essentielle à l'admissibilité de son témoignage »

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Q.B. 381, at para. 70; see also *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Comm.); *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Ch. D.); *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067 (Ch. D.), at paras. 312-17.

[43] In Australia, the expert's objectivity and impartiality will generally go to weight, not to admissibility: I. Freckelton and H. Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (5th ed. 2013), at p. 35. As the Court of Appeal of the State of Victoria put it: ". . . to the extent that it is desirable that expert witnesses should be under a duty to assist the Court, that has not been held and should not be held as disqualifying, in itself, an 'interested' witness from being competent to give expert evidence" (*FGT Custodians Pty. Ltd. v. Fagenblat*, [2003] VSCA 33, at para. 26 (AustLII); see also Freckelton and Selby, at pp. 186-88; *Collins Thomson v. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500).

[44] In the United States, at the federal level, the independence of the expert is a consideration that goes to the weight of the evidence, and a party may testify as an expert in his own case: *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir. 1993), at p. 1019; *Tagatz v. Marquette University*, 861 F.2d 1040 (7th Cir. 1988); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014), at p. 1321. This also seems to be a fair characterization of the situation in the states (*Corpus Juris Secundum*, vol. 32 (2008), at p. 325: "The bias or interest of the witness does not affect his or her qualification, but only the weight to be given the testimony.").

(c) *Conclusion*

[45] Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to

(*R. (Factortame Ltd.) c. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003] Q.B. 381, par. 70; voir également *Gallaher International Ltd. c. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Comm.); *Meat Corp. of Namibia Ltd. c. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Ch. D.); *Matchbet Ltd. c. Openbet Retail Ltd.*, [2013] EWHC 3067 (Ch. D.), par. 312-317).

[43] En Australie, l'objectivité et l'impartialité de l'expert jouent généralement au regard de la valeur de la preuve, et non de son admissibilité (I. Freckelton et H. Selby, *Expert Evidence : Law, Practice, Procedure and Advocacy* (5e éd. 2013), p. 35). Pour reprendre les propos de la Cour d'appel de l'État de Victoria : [TRADUCTION] « . . . dans la mesure où il est souhaitable que les témoins experts aient l'obligation d'aider le tribunal, on ne devrait pas juger inhabile à témoigner un expert du seul fait qu'il est "intéressé" » (*FGT Custodians Pty. Ltd. c. Fagenblat*, [2003] VSCA 33, par. 26 (AustLII); voir également Freckelton et Selby, p. 186-188; *Collins Thomson c. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. c. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. c. Chipman*, [2003] FCA 796, 131 F.C.R. 500).

[44] Aux États-Unis, au niveau fédéral, l'indépendance de l'expert joue au regard de la valeur de la preuve, et une partie peut témoigner à son propre procès à titre d'expert (*Rodriguez c. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir. 1993), p. 1019; *Tagatz c. Marquette University*, 861 F.2d 1040 (7th Cir. 1988); *Apple Inc. c. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014), p. 1321). Il semble que la situation soit à peu près la même à l'échelle des États (*Corpus Juris Secundum*, vol. 32 (2008), p. 325 : [TRADUCTION] « Le parti pris ou l'intérêt du témoin n'influe pas sur son habilité à témoigner, mais seulement sur la valeur probante de son témoignage. »).

c) *Conclusion*

[45] Conformément à ce qui me semble le courant prédominant dans la jurisprudence canadienne, je suis d'avis que le manque d'indépendance et d'impartialité d'un expert joue au regard tant de l'admissibilité de son témoignage que de la valeur du

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the evidence if admitted. That approach seems to me to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gatekeeping role of trial judges. Binnie J. summed up the Canadian approach well in *J.-L.J.*: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility" (para. 28).

(2) The Appropriate Threshold

[46] I have already described the duty owed by an expert witness to the court: the expert must be fair, objective and non-partisan. As I see it, the appropriate threshold for admissibility flows from this duty. I agree with Prof. (now Justice of the Ontario Court of Justice) Paciocco that "the common law has come to accept . . . that expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded": "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 *Can. Crim. L.R.* 135, at p. 152 (footnote omitted). The expert witnesses must, therefore, be aware of this primary duty to the court and able and willing to carry it out.

[47] Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. As Prof. Paciocco aptly observed, "if inquiries about bias or partiality become routine during *Mohan voir dires*, trial testimony will become nothing more than an inefficient reprise of the admissibility hearing": "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565 ("Jukebox"), at p. 597. While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my

témoignage, s'il est admis. Cette façon de voir semble s'accorder davantage avec l'économie générale de notre droit en ce qui concerne les témoignages d'experts et l'importance que notre jurisprudence accorde au rôle de gardien exercé par les juges de première instance. Le juge Binnie cerne bien l'optique canadienne dans l'arrêt *J.-L.J.* : « La question de l'admissibilité d'une preuve d'expert devrait être examinée minutieusement au moment où elle est soulevée, et cette preuve ne devrait pas être admise trop facilement pour le motif que toutes ses faiblesses peuvent en fin de compte avoir une incidence sur son poids plutôt que sur son admissibilité » (par. 28).

(2) Teneur du critère

[46] J'ai déjà exposé l'obligation du témoin expert envers le tribunal : il doit être juste, objectif et impartial. Selon moi, le critère d'admissibilité découle de cette obligation. Je suis d'accord avec le professeur Paciocco (maintenant juge de la Cour de justice de l'Ontario), selon qui [TRADUCTION] « la common law en est venue à concevoir [. . .] que les témoins experts ont l'obligation d'aider le tribunal, qui l'emporte sur celle qu'ils doivent à la partie qui les cite. Le témoin qui ne peut ou ne veut s'acquitter de cette obligation n'est pas habile à exercer son rôle d'expert et devrait être exclu » (« Taking a "Goudge" out of Bluster and Blarney : an "Evidence-Based Approach" to Expert Testimony » (2009), 13 *Rev. can. D.P.* 135, p. 152 (note de bas de page omise)). Par conséquent, les témoins experts doivent être conscients de leur obligation principale envers le tribunal et pouvoir et vouloir s'en acquitter.

[47] L'idée, en imposant ce critère supplémentaire, n'est pas de prolonger ni de complexifier les procès et il ne devrait pas en résulter un tel effet. Comme le souligne le professeur Paciocco, à raison : [TRADUCTION] « . . . si les débats sur la partialité deviennent chose courante pendant un voir-dire de type *Mohan*, le témoignage qui sera donné au procès ne sera plus qu'une répétition inefficace de l'audience sur l'admissibilité » (« Unplugging Jukebox Testimony in an Adversarial System : Strategies for Changing the Tune on Partial Experts » (2009), 34 *Queen's L.J.* 565 (« Jukebox »), p. 597). Sans aller jusqu'à affirmer qu'il faut présumer l'indépendance

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view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.

[48] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.

[49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise,

et l'impartialité de l'expert si elles ne sont pas contestées, je pense qu'en l'absence d'une telle contestation, il est généralement satisfait au critère dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte.

[48] Une fois que l'expert a produit cette attestation ou a déposé sous serment en ce sens, il incombe à la partie qui s'oppose à l'admission du témoignage de démontrer un motif réaliste de le juger inadmissible au motif que l'expert ne peut ou ne veut s'acquitter de son obligation. Si elle réussit, la charge de démontrer, selon la prépondérance des probabilités, qu'il a été satisfait à ce critère d'admissibilité incombe toujours à la partie qui entend présenter le témoignage. Si elle n'y parvient pas, le témoignage, ou les parties de celui-ci qui sont viciées par un manque d'indépendance ou d'impartialité, devrait être exclu. Cette démarche est conforme à la règle générale du cadre établi dans l'arrêt *Mohan*, et généralement en droit de la preuve, selon laquelle il revient à la partie qui produit la preuve d'en établir l'admissibilité.

[49] Ce critère n'est pas particulièrement exigeant, et il sera probablement très rare que le témoignage de l'expert proposé soit jugé inadmissible au motif qu'il ne satisfait pas au critère. Le juge de première instance doit déterminer, compte tenu tant de la situation particulière de l'expert que de la teneur du témoignage proposé, si l'expert peut ou veut s'acquitter de sa principale obligation envers le tribunal. Par exemple, c'est la nature et le degré de l'intérêt ou des rapports qu'a l'expert avec l'instance ou une partie qui importent, et non leur simple existence : un intérêt ou un rapport quelconque ne rend pas d'emblée la preuve de l'expert proposé inadmissible. Dans la plupart des cas, l'existence d'une simple relation d'emploi entre l'expert et la partie qui le cite n'emporte pas l'inadmissibilité de la preuve. En revanche, un intérêt financier direct dans l'issue du litige suscite des préoccupations. Il en va ainsi des liens familiaux étroits avec une partie et des situations où l'expert proposé s'expose à une responsabilité professionnelle si le tribunal ne retient pas son opinion. De même, l'expert qui, dans sa déposition ou d'une autre manière, se fait le défenseur d'une partie ne peut ou ne veut manifestement pas s'acquitter de

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assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

[50] As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

[51] Having established the analytical framework, described the expert's duty and determined that compliance with this duty goes to admissibility and not simply to weight, I turn now to where this duty fits into the analytical framework for admission of expert opinion evidence.

F. *Situating the Analysis in the Mohan Framework*

(1) The Threshold Inquiry

[52] Courts have addressed independence and impartiality at various points of the admissibility test. Almost every branch of the *Mohan* framework has been adapted to incorporate bias concerns one

sa principale obligation envers le tribunal. Je tiens à souligner que la décision d'exclure le témoignage à la première étape de l'analyse pour non-conformité aux critères d'admissibilité ne devrait être prise que dans les cas manifestes où l'expert proposé ne peut ou ne veut fournir une preuve juste, objective et impartiale. Dans les autres cas, le témoignage ne devrait pas être exclu d'office, et son admissibilité sera déterminée à l'issue d'une pondération globale du coût et des bénéfices de son admission.

[50] Comme nous l'avons vu en examinant la jurisprudence anglaise, la décision de permettre ou non à un expert de témoigner malgré son intérêt dans un litige ou son rapport avec celui-ci dépend de leur importance et des faits. La notion d'apparence de parti pris n'est pas pertinente lorsqu'il s'agit de déterminer si le témoin expert pourra ou voudra s'acquitter de sa principale obligation envers le tribunal. Lorsque l'on se penche sur l'intérêt d'un expert ou sur ses rapports avec une partie, il ne s'agit pas de se demander si un observateur raisonnable penserait que l'expert est indépendant ou non; il s'agit plutôt de déterminer si la relation de l'expert avec une partie ou son intérêt fait en sorte qu'il ne peut ou ne veut s'acquitter de sa principale obligation envers le tribunal, en l'occurrence apporter au tribunal une aide juste, objective et impartiale.

[51] Nous avons posé le cadre analytique, défini l'obligation de l'expert et établi que le respect de cette dernière joue au regard de l'admissibilité, et non simplement de la valeur probante. Voyons ensuite où cette obligation s'inscrit dans le cadre analytique régissant l'admissibilité du témoignage d'opinion d'un expert.

F. *L'analyse au sein du cadre établi par l'arrêt Mohan*

(1) L'analyse fondée sur les critères d'admissibilité

[52] Les tribunaux ont abordé la question de l'indépendance et de l'impartialité à divers stades de l'examen des critères d'admissibilité. Presque tous les volets du cadre établi par l'arrêt *Mohan* ont servi

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way or another: the proper qualifications component (see, e.g., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166; *R. v. Demetrius*, 2009 CanLII 22797 (Ont. S.C.J.)); the necessity component (see, e.g., *Docherty*; *Alfano*); and during the discretionary cost-benefit analysis (see, e.g., *United City Properties*; *Abbey* (ONCA)). On other occasions, courts have found it to be a stand-alone requirement: see, e.g., *Docherty*; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (Ont. S.C.J.); *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284. Some clarification of this point will therefore be useful.

[53] In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework: S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), at 12:30.20.50; see also *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, at para. 21; Lederman, Bryant and Fuerst, at pp. 826-27; *Halsbury's Laws of Canada: Evidence*, at para. HEV-152 "Partiality"; *The Canadian Encyclopedic Digest* (Ont. 4th ed. (loose-leaf)), vol. 24, Title 62 — Evidence, at §469. A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts: Hill, Tanovich and Strezos, at 12:30.20.50; Paciocco, "Jukebox", at p. 595.

(2) The Gatekeeping Exclusionary Discretion

[54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge

à l'examen des préoccupations relatives au parti pris : la qualification requise (voir, p. ex., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. c. Kasamekas*, 2010 ONSC 166; *R. c. Demetrius*, 2009 CanLII 22797 (C.S.J. Ont.)); la nécessité (voir, p. ex., *Docherty*; *Alfano*); et l'analyse coût-bénéfices, qui appelle l'exercice d'un pouvoir discrétionnaire (voir, p. ex., *United City Properties*; *Abbey* (ONCA)). À d'autres occasions, les tribunaux en ont fait un critère distinct (voir, p. ex., *Docherty*; *International Hi-Tech Industries Inc. c. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership c. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (C.S.J. Ont.); *Prairie Well Servicing Ltd. c. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284). Des précisions s'imposent donc.

[53] À mon avis, c'est sous le volet « qualification suffisante de l'expert » du cadre établi par l'arrêt *Mohan* qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter (S. C. Hill, D. M. Tanovich et L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5e éd. (feuilles mobiles)), 12:30.20.50; voir également *Deemar c. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, par. 21; Lederman, Bryant et Fuerst, p. 826-827; *Halsbury's Laws of Canada : Evidence*, par. HEV-152 « Partiality »; *The Canadian Encyclopedic Digest* (Ont. 4e éd. (feuilles mobiles)), vol. 24, titre 62 — Evidence, §469). Le témoin expert proposé qui ne peut ou ne veut s'acquitter de cette obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle. En abordant cette préoccupation sous le volet de la « qualification suffisante de l'expert », les tribunaux pourront s'attacher à évaluer les risques importants que présentent les experts qui ont un parti pris (Hill, Tanovich et Strezos, 12:30.20.50; Paciocco, « Jukebox », p. 595).

(2) Le pouvoir discrétionnaire du juge en tant que « gardien »

[54] La constatation que le témoignage de l'expert satisfait aux critères ne met pas fin à l'analyse. Conformément au cadre établi dans la foulée de l'arrêt *Mohan* dont nous avons discuté précédemment,

must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

G. *Expert Evidence and Summary Judgment*

[55] I must say a brief word about the procedural context in which this case originates — a summary judgment motion. (I note that these comments relate to the summary judgment regime under the Nova Scotia rules and that different considerations may arise under different rules.) It is common ground that the court hearing the motion can consider only admissible evidence. However, under the Nova Scotia jurisprudence, which is not questioned on this appeal, it is not the role of a judge hearing a summary judgment motion in Nova Scotia to weigh the evidence, draw reasonable inferences from evidence or settle matters of credibility: *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348, at paras. 42-44, 87 and 98; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385, at paras. 6 and 12. Taking these two principles together, the result in my view is this. A motions judge hearing a summary judgment application under the Nova Scotia rules must be satisfied that proposed expert evidence meets the threshold requirements for admissibility at the first step of the analysis, but should generally not engage in the second step cost-benefit analysis. That cost-benefit analysis, in anything other than the most obvious cases of inadmissibility, inevitably involves assigning weight — or at least potential weight — to the evidence.

le juge doit encore tenir compte des réserves émises quant à l'indépendance et à l'impartialité de l'expert lorsqu'il évalue la preuve à l'étape où il exerce son rôle de gardien. Il peut être utile de concevoir la pertinence, la nécessité, la fiabilité et l'absence de parti pris comme autant d'éléments d'un examen en deux temps, qui entrent en ligne de compte à la première étape, celle qui sert à déterminer s'il est satisfait aux critères d'admissibilité, et jouent également un rôle à la deuxième, dans la pondération des considérations concurrentes globales relatives à l'admissibilité. Au bout du compte, le juge doit être convaincu que les risques liés au témoignage de l'expert ne l'emportent pas sur l'utilité possible de celui-ci.

G. *Témoignage d'expert et jugement sommaire*

[55] Je me dois de glisser quelques mots sur le contexte procédural dans lequel s'inscrit le présent pourvoi, en l'occurrence celui d'une requête en jugement sommaire. (Mes commentaires concernent le régime des jugements sommaires établi par les règles de la Nouvelle-Écosse. Je reconnais que d'autres considérations sont susceptibles de jouer dans un autre régime.) Il est bien reconnu que le tribunal saisi de la requête ne peut examiner que la preuve admissible. Cependant, suivant la jurisprudence néo-écossaise, qui n'est pas remise en question dans le présent pourvoi, il n'appartient pas au juge saisi d'une requête en jugement sommaire, en Nouvelle-Écosse, de soupeser la preuve, de tirer des inférences raisonnables de celle-ci ou de trancher des questions de crédibilité (*Coady c. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348, par. 42-44, 87 et 98; *Fougere c. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385, par. 6 et 12). Si l'on considère ces deux principes ensemble, le résultat est à mon avis le suivant. Le juge saisi d'une requête en jugement sommaire en vertu des règles de procédure de la Nouvelle-Écosse doit être convaincu que le témoignage de l'expert proposé satisfait aux critères d'admissibilité à la première étape de l'analyse; en règle générale, il doit toutefois se garder de passer à la seconde étape, celle de l'analyse coût-bénéfices. Cette analyse, sauf dans les cas d'inadmissibilité les plus manifestes, appelle inévitablement l'attribution d'une valeur — ou, à tout le moins, d'une valeur possible — à la preuve.

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H. *Application*

[56] I turn to the application of these principles to the facts of the case. In my respectful view, the record amply sustains the result reached by the majority of the Court of Appeal that Ms. MacMillan's evidence was admissible on the summary judgment application. Of course, the framework which I have set out in these reasons was not available to either the motions judge or to the Court of Appeal.

[57] There was no finding by the motions judge that Ms. MacMillan was in fact biased or not impartial or that she was acting as an advocate for the shareholders: C.A. reasons, at para. 122. On the contrary, she specifically recognized that she was aware of the standards and requirements that experts be independent. She was aware of the precise guidelines in the accounting industry concerning accountants acting as expert witnesses. She testified that she owed an ultimate duty to the court in testifying as an expert witness: A.R., vol. III, at pp. 75-76; C.A. reasons, at para. 134. To the extent that the motions judge was concerned about the "appearance" of impartiality, this factor plays no part in the test for admissibility, as I have explained earlier.

[58] The auditors' claim that Ms. MacMillan lacks objectivity rests on two main points which I will address in turn.

[59] First, the auditors say that the earlier work done for the shareholders by the Kentville office of Grant Thornton "served as a catalyst and foundation for the claim of negligence" against the auditors and that this "precluded [Grant Thornton] from acting as 'independent' experts in this case": A.F., at paras. 17 and 19. Ms. MacMillan, the auditors submit, was in an "irreconcilable conflict of interest, in that she would inevitably have to opine on, and choose between, the actions taken and standard of care exercised by her own partners at Grant Thornton" and those of the auditors: A.F., at para. 21. This first submission, however, must be rejected.

H. *Application*

[56] J'aborde maintenant l'application de ces principes aux faits de l'espèce. À mon humble avis, le dossier appuie largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage de M^me^ MacMillan était admissible pour l'instruction de la requête en jugement sommaire. Bien sûr, ni le juge des requêtes ni la Cour d'appel ne disposaient du cadre que j'établis dans les présents motifs.

[57] Le juge des requêtes n'a pas conclu que M^me^ MacMillan avait un parti pris, qu'elle n'était pas impartiale ou qu'elle se faisait le défenseur des actionnaires (motifs de la C.A., par. 122). Au contraire, M^me^ MacMillan a reconnu expressément connaître les normes et exigences voulant que l'expert soit indépendant. Elle était également au fait des directives précises dans le milieu de la comptabilité applicables aux comptables cités comme témoins experts. Elle était consciente à titre de témoin expert de sa principale obligation envers le tribunal (d.a., vol. III, p. 75-76; motifs de la C.A., par. 134). Même si, selon le juge des requêtes, il faut une « apparence » d'impartialité, ce facteur ne constitue pas un critère d'admissibilité, comme je l'explique précédemment.

[58] La prétention des vérificateurs selon laquelle M^me^ MacMillan manquerait d'objectivité repose sur deux principaux points que j'aborde successivement.

[59] D'abord, les vérificateurs soutiennent que le travail fait antérieurement à l'intention des actionnaires par le bureau de Grant Thornton à Kentville [TRADUCTION] « a servi de catalyseur et de fondement à l'action pour négligence » intentée contre les vérificateurs et que cela « empêche [Grant Thornton] d'agir comme expert "indépendant" en l'espèce » (m.a., par. 17 et 19). Selon les vérificateurs, M^me^ MacMillan se trouvait dans « une situation de conflit d'intérêts irréductible qui la forçait inévitablement à commenter et approuver les mesures prises et la norme de diligence observée soit par ses propres partenaires chez Grant Thornton » soit par les vérificateurs (m.a., par. 21). Ce premier argument doit cependant être rejeté.

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[60] The fact that one professional firm discovers what it thinks is or may be professional negligence does not, on its own, disqualify it from offering that opinion as an expert witness. Provided that the initial work is done independently and impartially and the person put forward as an expert understands and is able to comply with the duty to provide fair, objective and non-partisan assistance to the court, the expert meets the threshold qualification in that regard. There is no suggestion here that Grant Thornton was hired to take a position dictated to it by the shareholders or that there was anything more than a speculative possibility of Grant Thornton incurring liability to them if the firm's opinion was not ultimately accepted by the court. There was no finding that Ms. MacMillan was, in fact, biased or not impartial, or that she was acting as an advocate for the shareholders. The auditors' submission that she somehow "admitted" on her cross-examination that she was in an "irreconcilable conflict" is not borne out by a fair reading of her evidence in context: A.R., vol. III, at pp. 139-45. On the contrary, her evidence was clear that she understood her role as an expert and her duty to the court: *ibid.*, at pp. 75-76.

[61] The auditors' second main point was that Ms. MacMillan was not independent because she had "incorporated" some of the work done by the Kentville office of her firm. This contention is also ill founded. To begin, I do not accept that an expert lacks the threshold qualification in relation to the duty to give fair, objective and non-partisan evidence simply because the expert relies on the work of other professionals in reaching his or her own opinion. Moreover, as Beveridge J.A. concluded, what was "incorporated" was essentially an exercise in arithmetic that had nothing to do with any accounting opinion expressed by the Kentville office: C.A. reasons, at paras. 146-49.

[62] There was no basis disclosed in this record to find that Ms. MacMillan's evidence should be

[60] Le cabinet professionnel qui découvre ce qu'il estime être une négligence professionnelle ou ce qui pourrait l'être n'est pas d'emblée interdit de donner son opinion en tant que témoin expert. Dès lors que le travail initial est fait de façon indépendante et impartiale et que l'expert proposé comprend son obligation d'apporter au tribunal une aide juste, objective et impartiale et qu'il peut s'acquitter de cette obligation, il est satisfait au critère relatif à la qualification sur ce plan. Or, rien ne permet de penser ici que le cabinet Grant Thornton a été engagé pour exprimer un point de vue dicté par les actionnaires, ni qu'il y ait eu plus qu'une hypothétique possibilité que le cabinet soit tenu responsable envers ces derniers si, en fin de compte, le tribunal n'avait pas retenu son opinion. Le juge n'a pas conclu que M[me] MacMillan avait un parti pris, qu'elle a manqué d'impartialité ou qu'elle s'était faite le défenseur des actionnaires. De plus, l'argument des vérificateurs selon lequel M[me] MacMillan a en quelque sorte « admis » en contre-interrogatoire se trouver dans une situation de « conflit d'intérêts irréductible » n'est pas corroboré par une interprétation raisonnable de son témoignage dans son contexte (d.a., vol. III, p. 139-145). Au contraire, il ressort clairement de son témoignage qu'elle comprenait son rôle d'expert et son obligation envers le tribunal (*ibid.*, p. 75-76).

[61] Deuxièmement, M[me] MacMillan ne serait pas indépendante, puisqu'elle avait « incorporé » une partie du travail fait par son cabinet au bureau de Kentville. Cette prétention est également non fondée. D'abord, je n'accepte pas qu'un expert ne satisfasse pas au critère de la qualification suffisante, dans la mesure où il est question de son obligation de rendre un témoignage juste, objectif et impartial, simplement parce qu'il se fonde sur le travail d'autres professionnels pour se faire une opinion. De plus, comme le juge Beveridge l'a conclu, ce qui a été « incorporé » consistait essentiellement en un exercice arithmétique qui n'avait rien à voir avec quelque opinion comptable qu'aurait exprimée le bureau de Kentville (motifs de la C.A., par. 146-149).

[62] Le présent dossier ne révèle aucun élément qui permette de conclure que le témoignage de

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excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. I agree with the majority of the Court of Appeal who concluded that the motions judge committed a palpable and overriding error in determining that Ms. MacMillan was in a conflict of interest that prevented her from giving impartial and objective evidence: paras. 136-50.

IV. Disposition

[63] I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Stikeman Elliott, Toronto.

Solicitors for the respondents: Lenczner Slaght Royce Smith Griffin, Toronto; Groupe Murphy Group, Moncton.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Henein Hutchison, Toronto.

M[me] MacMillan devrait être exclu parce que celle-ci ne pouvait ou ne voulait rendre devant le tribunal un témoignage juste, objectif et impartial. Je conviens avec la majorité de la Cour d'appel que le juge des requêtes a commis une erreur manifeste et dominante en estimant que M[me] MacMillan était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial (par. 136-150).

IV. Dispositif

[63] Je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelants : Stikeman Elliott, Toronto.

Procureurs des intimées : Lenczner Slaght Royce Smith Griffin, Toronto; Groupe Murphy Group, Moncton.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Henein Hutchison, Toronto.

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