

Nova Scotia Aquaculture Review Board

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

- and -

IN THE MATTER OF: Applications made by KELLY COVE SALMON LTD. for a
BOUNDARY AMENDMENT and for the cultivation of ATLANTIC
SALMON (*Salmo salar*) – AQ#1205x

**BOOK OF AUTHORITIES OF
THE REGION OF QUEEN'S MUNICIPALITY**

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Aquaculture Licence and Lease Regulations, NS Reg 347/2015

This regulation replaces NS Reg 15/2000.

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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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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

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 sublicense 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 Administrator 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 plants or other species	\$250.00	\$250.00

Amendment to add finfish to a non-finish operation	\$1000.00	\$1000.00
Amendment to add or change species, other than to add finfish to a non-finish 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 type	Application Fee	
	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-fish operation	\$2000.00	\$2000.00
Amendment to add or change species, other than to add finfish to a non-fish 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
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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
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N.S. Regulation	In force date*	How in force	Royal Gazette Part II Issue
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*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
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

ad. = added
am. = amended

fc. = fee change
ra. = reassigned

rep. = repealed
rs. = repealed and substituted

Provision affected	How affected
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)	

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.

24 OCT 2023

Judicial Review of Administrative Action in Canada

Judicial Review of Administrative Action in Canada

Part IV. Review of Administrative Procedure

Chapter 12. Review of the Decision-Making Process

III. The Fact-Finding Process

§ 12:8. Burden of Proof

Judicial Review of Administrative Action in Canada § 12:8

Judicial Review of Administrative Action in Canada |

Donald J.M. Brown, John M. Evans

Part IV. Review of Administrative Procedure

Chapter 12. Review of the Decision-Making Process

III. The Fact-Finding Process

§ 12:8. Burden of Proof

Legal Topics

In the absence of a statutory provision to the contrary,¹ generally the person who asserts a proposition bears the burden or onus of proving it.² A distinction must sometimes be made, however, between the onus or burden of proof respecting a particular fact or issue, and the onus of proof as to the overall matter. Thus, although the overall burden of proof may be on an applicant or complainant, it may shift in the course of the proceeding to the respondent³ in certain circumstances, such as, for example, where only that party has access to the relevant information,⁴ where an appropriate rebuttable presumption is applicable,⁵ or where sufficient evidence has been led to establish a *prima facie* case.⁶ Nevertheless, if a tribunal errs as to which party should bear the burden

of proof, the courts will intervene,⁷ as they will if it is unclear on whom the burden was placed.⁸

Specifically, it has been held that it is open to a labour board to require proof by an employer of a legitimate business purpose in relation to its prohibition against organizing.⁹ But, unlike dismissal cases in which the onus is commonly on the employer to show just cause, and unlike denial of employment insurance benefit claims where the burden is on the Commission,¹⁰ it has been held that a union bears the burden of showing why discipline should be reduced.¹¹ And a professor seeking tenure should bear the burden of proof,¹² as should a person seeking to establish that another was not eligible for a job competition.¹³ It has also been held that the complainant in a human rights proceeding bears the onus of proof,¹⁴ at least to establish a *prima facie* case.¹⁵ Likewise, the burden rests with the Competition Commissioner to prove the anti-competitive effects of a merger.¹⁶ On the other hand, in professional discipline hearings, the overall onus rests with the professional body,¹⁷ as it does with a hospital in connection with the revocation of hospital privileges,¹⁸ and with the assessor in assessment disputes.¹⁹

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Footnotes

- 1 E.g. [Veterans Review and Appeal Board Act, S.C. 1995, c. 18, s. 39](#), as appl'd in [Quann v. Canada \(Attorney General\)](#), 2013 FC 460 at [paras. 38ff](#) (doubt to be resolved in favour of applicant).
- 2 E.g. [Morabito v. British Columbia \(Securities Commission\)](#), 2022 BCCA 279 at [paras. 89-97](#) (onus in application for revocation or variation order made under *Securities Act* lies on Applicant to show

that the order sought would not be prejudicial to the public interest); [Ekama v. Canada \(Minister of Citizenship and Immigration\), 2020 FC 105 at para. 43](#) (burden on applicant to satisfy immigration officer that she met requirements for permanent resident status); [Owusu v. Canada \(Minister of Citizenship and Immigration\), 2004 FCA 38](#) (onus in application for humanitarian and compassionate relief lies with applicant); **see also** [Gao v. Canada \(Minister of Citizenship and Immigration\), 2014 FC 59 at para. 36](#) (applicant bears the burden of proof on a balance of probabilities that he or she would be at risk of persecution); [Island Telecom Inc. v. Prince Edward Island \(Regulatory and Appeals Commission\) \(1999\), 176 D.L.R. \(4th\) 356 \(PEICA\)](#) (burden on taxpayer to disprove assessor's assumptions).

- 3 **E.g.** [Kelly v. Alberta \(Energy Resources Conversation Board\), 2009 ABCA 349 at paras. 42-4](#); [Canada \(Attorney General\) v. Purcell, \[1996\] 1 F.C. 644 at para. 35 \(FCA\)](#).
- 4 **E.g.** [Armstrong v. Canada \(Attorney General\), 2018 FC 184 at para. 18](#) (in connection with personnel evaluation, information within control of respondent); [Moses v. Agriculture Financial Services Corp. Appeal Committee \(2005\), 43 Alta. L.R. \(4th\) 266 \(Alta. Q.B.\)](#); [Cadillac Fairview Corp. v. R.W.D.S.U. \(1989\), 42 Admin. L.R. 214 \(Ont. C.A.\)](#) (business purpose).
- 5 **E.g.** [Cadillac Fairview Corp. v. R.W.D.S.U. \(1989\), 42 Admin. L.R. 214 \(Ont. C.A.\)](#); **see also** [Central Broadcasting Co. v. Canada \(Labour Relations Board\), \[1977\] 2 S.C.R. 112](#). **Compare** [Bouchard v. Manitoba \(Workers' Compensation Board\) \(1997\), 144 D.L.R. \(4th\) 760 \(Man. C.A.\)](#).
- 6 **E.g.** [Dowlut v. Ontario \(Commissioner of Social Services\) \(1985\), 11 Admin. L.R. 54 \(Ont. Div. Ct.\)](#); [Godbout v. Alberta \(Driver Control Board\), \[1998\] 6 W.W.R. 694 \(Alta. Q.B.\)](#).

- 7 **E.g.** [Party A v. British Columbia \(Securities Commission\)](#), 2021 BCCA 358 at paras. 246–250, 252 (Commission erred in placing impossible burden on applicant seeking to have freeze order revoked); [The Deputy Minister of Finance v. Cutting Edge Athletic Supplies Inc.](#), 2021 MBOB 38 at para. 25 (failure to properly and consistently apply burden of proof); [Deputy Minister of Finance v. S M Industries Ltd.](#), 2021 MBOB 91 at paras. 11-13, 43-44; **[Nemeth v. Canada \(Justice\)](#)**, [2010] 3 S.C.R. 281 (SCC) (minister placed burden on wrong party respecting extradition of refugee) at paras. 106ff; [Canada v. Landry](#) (2010), 404 N.R. 255 (FCA) (Tax Court judge wrongly put burden on agency, rather than taxpayer) at para. 41; [Lockerbie & Hole Industrial Inc. v. Alberta \(Human Right and Citizenship Comm'n, Director\)](#) (2009), 7 Alta. L.R. (5th) 248 (Alta. O.B.) (human rights tribunal put onus on wrong party), aff'd [2011 ABCA 3](#); [Macdonald v. Canada \(Attorney General\)](#) (2007), 315 F.T.R. 237 (FC) (inmate did not have onus to produce names of adverse witnesses); [Gogol v. British Columbia \(Workers' Compensation Board\)](#) (2008), 76 Admin. L.R. (4th) 37 (BCSC) (workers' compensation appeals tribunal reversed burden of proof); Nova Scotia ([Director of Assessment](#)) v. [Knickle](#) (2007), 260 N.S.R (2d) 49 at paras. 15–16 (NSCA). **See also** [R. v. Li](#) (2008), 92 O.R. (3d) 343 (Ont. C.A.) (for *Criminal Code* Review Board hearings in Ontario, there is no burden of proof on any party; board had erred in putting onus on hospital).
- 8 **E.g.** [Rahman v. Canada \(Minister of Citizenship and Immigration\)](#), 2009 FC 768. **See also** [Law Society of Upper Canada v. Evans](#) (2008), 91 O.R. (3d) 163 at paras. 43–8 (Ont. Div. Ct.) (confusion as to burden did not affect result).
- 9 [Cadillac Fairview Corp. v. R.W.D.S.U.](#) (1989), 42 Admin. L.R. 214 (Ont. C.A.).

- [10](#) [Canada \(Attorney General\) v. Morris \(1999\), 173 D.L.R. \(4th\) 766 \(FCA\); Canada \(Attorney General\) v. Purcell, \[1996\] 1 F.C. 644 \(FCA\) \(burden shifts\); McDonald v. Canada \(Employment & Immigration Commn.\) \(1991\), 50 Admin. L.R. 258 \(FCA\).](#)
- [11](#) [Kingston General Hospital v. Ontario Public Service Employees' Union Local 444, 2013 ONSC 1752 at paras. 38-9 \(Div. Ct.\).](#)
- [12](#) [Assn. of Professors of University of Ottawa v. University of Ottawa \(1978\), 19 O.R. \(2d\) 271 \(Ont. Div. Ct.\).](#)
- [13](#) [Sawyer v. Dionne \(1989\), 254 A.P.R. 74 \(NBOB\), rev'd on other grounds \(1990\), 106 N.B.R. \(2d\) 25 \(NBOB\).](#)
- [14](#) [**E.g.** Base-Fort Patrol Ltd. v. Alberta Human Rights Commn. \(1982\), 23 Alta. L.R. \(2d\) 372 \(Alta. O.B.\).](#)
- [15](#) [Gadowsky, Re \(1980\), 120 D.L.R. \(3d\) 516 \(Alta. O.B.\).](#)
- [16](#) [**Commissioner of Competition v. CCS Corp.**, 2015 SCC 3 at para. 192.](#)
- [17](#) [**E.g.** Miller v. Saskatchewan Psychiatric Nurses' Assn. \(1992\), 103 Sask. R. 61 \(Sask. O.B.\). **See also e.g.** College of Physicians and Surgeons of Ontario v. Beitel, 2013 ONSC 1599 at para. 34 \(Ont. Div. Ct.\) \(burden of proof effectively placed on applicant\).](#)
- [18](#) [**E.g.** Hicks v. Langley Memorial Hospital \(1992\), 16 Admin. L.R. \(2d\) 38 \(BCSC\).](#)
- [19](#) [**E.g.** Gardentree Village Inc. v. Winnipeg \(City\) Assessor \(2009\), 240 Man. R. \(2d\) 317 \(Man. C.A.\).](#)

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Supreme Court of Canada

Quebec (Attorney General) v. Canada (National Energy Board)

1994 CarswellNat 8, 1994 CarswellNat 1496, [1994] 1 S.C.R. 159, [1994] 3 C.N.L.R. 49, [1994] S.C.J. No. 13, 112 D.L.R. (4th) 129, 14 C.E.L.R. (N.S.) 1, 163 N.R. 241, 20 Admin. L.R. (2d) 79, 46 A.C.W.S. (3d) 141, J.E. 94-363, EYB 1994-67299

**GRAND COUNCIL OF CREES (OF QUEBEC) and CREE REGIONAL
AUTHORITY v. ATTORNEY GENERAL OF CANADA, ATTORNEY
GENERAL OF QUEBEC, HYDRO-QUÉBEC and NATIONAL ENERGY BOARD**

SIERRA LEGAL DEFENCE FUND, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, CULTURAL
SURVIVAL (CANADA), FRIENDS OF THE EARTH and SIERRA CLUB OF CANADA (intervenor)

Lamer C.J.C., La Forest, L Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: October 13, 1993
Judgment: February 24, 1994
Docket: Doc. 22705

Counsel: *Robert Mainville, Peter W. Hutchins and Johanne Mainville*, for appellants
Jean-Marc Aubry, Q.C., and René LeBlanc, for respondent Attorney General of Canada
Pierre Lachance and Jean Robitaille, for respondent Attorney General of Quebec
Pierre Bienvenu, Jean G. Bertrand and Bernard Roy, for respondent Hydro-Québec
Judith B. Hanebury, for respondent National Energy Board
Gregory J. McDade and Stewart A.G. Elgie, for intervenors

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s. 91¶2

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s. 118 [re-en. S.C. 1990, c. 7, s. 32]

s. 119.02 [en. S.C. 1990, c. 7, s. 34]

s. 119.03 [en. S.C. 1990, c. 7, s. 34]

s. 119.06(2) [en. S.C. 1990, c. 7, s. 34]

s. 119.07 [en. S.C. 1990, c. 7, s. 34]

s. 119.08 [en. S.C. 1990, c. 7, s. 34]

s. 119.09 [en. S.C. 1990, c. 7, s. 34]

s. 119.093 [en. S.C. 1990, c. 7, s. 34]

National Energy Board Act and to repeal certain enactments in consequence thereof, An Act to amend the, S.C. 1990, c. 7 —

s. 32

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s. 2

s. 2 "initiating department"

s. 2 "proposal"

s. 3

s. 4(1)

s. 5

s. 6

s. 8

s. 10

s. 12

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s. 6(1)

s. 6(2)(y)

s. 6(2)(z)

s. 6(2)(aa)

s. 15(m)

The judgment of the court was delivered by *Iacobucci J.*:

1 This appeal arises from the decision of the respondent National Energy Board ("the Board") to grant to the respondent Hydro-Québec licences for the export of electrical power to the states of New York and Vermont. This decision followed lengthy public hearings at which the Grand Council of the Crees (of Quebec) and the Cree Regional Authority ("the appellants"), along with other concerned groups, made numerous submissions.

2 The Attorneys General of Quebec and of Canada appeared as respondents to this appeal, as did the Board. The Court also heard the joint submissions of the Sierra Legal Defence Fund, the Canadian Environmental Law Association, Cultural Survival (Canada), Friends of the Earth and the Sierra Club of Canada ("the interveners").

3 The appellants argued before the Federal Court of Appeal that the Board erred in several respects in granting the licences. The respondents Hydro-Québec and the Attorney General of Quebec claimed that the Board erred in making the granting of the licences conditional on the successful completion of environmental assessments of the power generation facilities contemplated by Hydro-Québec for future construction. The Federal Court of Appeal rejected the argument of the appellants, and concluded

that the Board had erred in imposing the conditions impugned by the respondents. The Court of Appeal severed these conditions, and allowed the licences to stand. The appellants now appeal to this Court.

I. Facts

4 On July 28, 1989, Hydro-Québec applied to the Board for licences to export blocks of power to New York and Vermont. These applications involved nine blocks of power which were to be provided over periods ranging from five to twenty-two years, pursuant to two agreements signed with the U.S. power companies that covered a total of 1 450 MW of power and were projected to generate nearly \$25 billion in income for Hydro-Québec. The purpose of the export was to raise sufficient revenue such that Hydro-Québec would be able to implement its development plan for expansion to meet the constantly rising demand for the provision of electrical services within the province.

5 The Board held public hearings during the months of February and March of 1990 on the application for licences for export. A number of interested parties, including the appellants, took part. At the time the applications were filed, the Board was required by s. 118 of the *National Energy Board Act*, R.S.C. 1985, c. N-7, to satisfy itself both that the power sought to be exported was not needed to meet reasonably foreseeable Canadian requirements at the relevant times, and that the price to be charged by the power authority was just and reasonable. After the hearings but prior to the Board's ruling, s. 118 was modified by the *Act to amend the National Energy Board Act and to repeal certain enactments in consequence thereof*, S.C. 1990, c. 7 ("Bill C-23"). These two explicit criteria were removed from the statute, leaving only the requirement that the Board is to have regard to all conditions that appear to it to be relevant. The parties made submissions before the Board on the effect of these amendments.

6 On September 27, 1990, the Board granted the export licences, subject to a list of conditions. The appellants appealed the Board's decision to grant the licences to the Federal Court of Appeal. The respondents Hydro-Québec and the Attorney General of Quebec also appealed the decision of the Board, challenging the validity of the imposition of two of the conditions to the licences, which related to environmental assessment of future generating facilities. The Federal Court of Appeal unanimously dismissed the appellants' appeal and allowed the appeal of Hydro-Québec and the Attorney General of Quebec. The Court of Appeal severed the two conditions but otherwise allowed the licences to stand.

II. Relevant Statutory Provisions

7 *National Energy Board Act*, R.S.C. 1985, c. N-7 (as amended by S.C. 1990, c. 7):

2. In this Act,

.....

"export" means, with reference to

(a) electricity, to send from Canada by a line of wire or other conductor electricity produced in Canada, ...

22.(1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.

24.(1) ... hearings before the Board with respect to the issuance, revocation or suspension of certificates or of licences for the exportation of gas or electricity or the importation of gas or for leave to abandon the operation of a pipeline shall be public.

119.02 No person shall export any electricity except under and in accordance with a permit issued under section 119.03 or a licence issued under section 119.08.

119.03 (1) Except in the case of an application designated by order of the Governor in Council under section 119.07, the Board shall, on application to it and without holding a public hearing, issue a permit authorizing the exportation of electricity.

(2) The application must be accompanied by the information that under the regulations is to be furnished in connection with the application.

119.06 (1) The Board may make a recommendation to the Minister, which it shall make public, that an application for exportation of electricity be designated by order of the Governor in Council under section 119.07, and may delay issuing a permit during such period as is necessary for the purpose of making such an order.

(2) In determining whether to make a recommendation, the Board shall seek to avoid the duplication of measures taken in respect of the exportation by the applicant and the government of the province from which the electricity is exported, and shall have regard to all considerations that appear to it to be relevant, including

.....
(b) the impact of the exportation on the environment;

.....
(d) such considerations as may be specified in the regulations.

119.07 (1) The Governor in Council may make orders

(a) designating an application for exportation of electricity as an application in respect of which section 119.08 applies; and

(b) revoking any permit issued in respect of the exportation.
.....

(3) Where an order is made under subsection (1),

(a) no permit shall be issued in respect of the application; and

(b) any application in respect of the exportation shall be dealt with as an application for a licence.

119.08 (1) The Board may, subject to section 24 and to the approval of the Governor in Council, issue a licence for the exportation of electricity in relation to which an order made under section 119.07 is in force.

(2) In deciding whether to issue a licence, the Board shall have regard to all conditions that appear to it to be relevant.

119.09 (1) The Board may, on the issuance of a permit, make the permit subject to such terms and conditions respecting the matters prescribed by the regulations as the Board considers necessary or desirable in the public interest.

(2) The Board may, on the issuance of a licence, make the licence subject to such terms and conditions as the Board may impose.

119.093 (1) The Board may revoke or suspend a permit or licence issued in respect of the exportation of electricity

.....
(b) where a holder of the permit or licence has contravened or failed to comply with a term or condition of the permit or licence.

8 *National Energy Board Part VI Regulations, C.R.C. 1978, c. 1056:*

6. (1) Every applicant for a licence for the exportation of power shall furnish to the Board such information as the Board may require.

(2) Without restricting the generality of subsection (1), the information required to be furnished by any applicant described in subsection (1) shall, unless otherwise authorized by the Board, include

.....
(y) evidence that the applicant has obtained any licence, permit or other form of approval required under any law of Canada or a province respecting the electrical power proposed to be exported;

(z) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price

(i) would recover its appropriate share of the costs incurred in Canada,

(ii) would not be less than the price to Canadians for equivalent service in related areas, and

(iii) would not result in prices in the country to which the power is exported being materially less than the least cost alternative for power and energy at the same location within that country; and

(aa) evidence on any environmental impact that would result from the generation of the power for export.

15. Every licence for the export of electric power and energy is subject to such terms and conditions as the Board may prescribe and, without restricting the generality of the foregoing, is subject to every statement set out by the Board in the licence respecting

.....
(m) the requirements for environmental protection.

9 *Environmental Assessment and Review Process Guidelines Order, SOR/84-467:*

2. In these Guidelines,

.....
"proposal" includes any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility.

3. The Process shall be a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

4.(1) An initiating department shall include in its consideration of a proposal pursuant to section 3

(a) the potential environmental effects of the proposal and the social effects directly related to those environmental effects, including any effects that are external to Canadian territory; and

(b) the concerns of the public regarding the proposal and its potential environmental effects.

5.(1) Where a proposal is subject to environmental regulation, independently of the Process, duplication in terms of public reviews is to be avoided.

(2) For the purpose of avoiding the duplication referred to in subsection (1), the initiating department shall use a public review under the Process as a planning tool at the earliest stages of development of the proposal rather than as a regulatory mechanism and make the results of the public review available for use in any regulatory deliberations respecting the proposal.

6. These Guidelines shall apply to any proposal

.....
(b) that may have an environmental effect on an area of federal responsibility;

8. Where a board or an agency of the Government of Canada or a regulatory body has a regulatory function in respect of a proposal, these Guidelines shall apply to that board, agency or body only if there is no legal impediment to or duplication resulting from the application of these Guidelines.

10.(1) Every initiating department shall ensure that each proposal for which it is the decision making authority shall be subject to an environmental screening or initial assessment to determine whether, and the extent to which, there may be any potentially adverse environmental effects from the proposal.

(2) Any decisions to be made as a result of the environmental screening or initial assessment referred to in subsection (1) shall be made by the initiating department and not delegated to any other body.

12. Every initiating department shall screen or assess each proposal for which it is the decision-making authority to determine if

(a) the proposal is of a type identified by the list described under paragraph 11(a) [one that would not produce any adverse environmental effects], in which case the proposal may automatically proceed;

(b) the proposal is of a type identified by the list described under paragraph 11(d) [one that would produce significant adverse environmental effects], in which case the proposal shall be referred to the Minister for public review by a Panel;

(c) the potentially adverse environmental effects that may be caused by the proposal are insignificant or mitigable with known technology, in which case the proposal may proceed or proceed with the mitigation, as the case may be;

(d) the potentially adverse environmental effects that may be caused by the proposal are unknown, in which case the proposal shall either require further study and subsequent rescreening or reassessment or be referred to the Minister for public review by a Panel;

(e) the potentially adverse environmental effects that may be caused by the proposal are significant, as determined in accordance with the criteria developed by the Office in cooperation with the initiating department, in which case the proposal shall be referred to the Minister for public review by a Panel; or

(f) the potentially adverse environmental effects that may be caused by the proposal are unacceptable, in which case the proposal shall either be modified and subsequently rescreened or reassessed or be abandoned.

III. Judgments Below

A. National Energy Board, Decision No. EH-3-89, August 1990 (Fredette, Gilmour and Bélanger, Members)

10 The Board wrote lengthy reasons for its decision, which set out in some detail the status of the applicant, Hydro-Québec, the nature of the licences for which Hydro-Québec was applying, and the evidence of the applicant as it related to surplus, price, and fair market access, the three criteria expressly set out in the former provisions of the *National Energy Board Act*. The Board also considered the nature of the export markets, the reliability of the system proposed for implementing the export contracts, and the environmental impact of the exports for which the applications were made.

11 The Board noted that, were the licences to be granted, sufficient power could be generated to service the contracts by the combined use of the existing facilities of Hydro-Québec as well as those contemplated by its development plan. In other words, the exports did not require the use of facilities other than those existing, or already planned. However, the Board found that some of the facilities contemplated by the development plan for future construction would need to be built earlier than if no power were to be exported. The Board then examined the submissions of the various interveners, along with those of the appellants, as to the advisability of granting the licences.

12 In its disposition of the application, the Board noted that the amendments to the *National Energy Board Act* had removed the express requirement that the Board satisfy itself that the power to be exported was surplus to reasonably foreseeable Canadian requirements, and that the price to be charged was just and reasonable in the public interest. Nonetheless, there was nothing in the amended Act which would preclude the Board from taking these factors into account. The Board therefore explicitly

considered the issues of cost recovery and whether pricing was competitive to rates charged within Canada. On the issue of cost recovery, the Board concluded (at p. 30):

The Board notes that Hydro-Québec did provide information on the magnitude of the revenues expected to be generated by the proposed export sales and that these would be significant, totalling more than \$24 billion ... In addition Hydro-Québec provided some details on the methodology used in carrying out its feasibility study as well as on the economic, financial and other relevant assumptions underlying that analysis. The Board has examined this information and finds that the methodology and assumptions described are reasonable.

The Board was accordingly persuaded that the export price charged would provide for recovery of the applicable costs incurred in Canada.

13 In evaluating the environmental impact of the application, the Board considered itself bound by both its own Act and by the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-4676 ("the EARP Guidelines Order"). The Board held (at pp. 37-38):

The Board recognizes that when electric utilities negotiate long-term system-to-system firm sales agreements, there can be circumstances in such arrangements that require capacity to come from generating facilities to be built at some future date and for which the necessary detailed environmental assessments have not been completed at the time of the export application. The proposed export contracts now before the Board have been negotiated on this basis. Nonetheless, for the Board to reach its decision on Hydro-Québec's applications, and at the same time meet its obligations under the Act and *EARP Guidelines Order*, it must take into account the environmental impacts arising from the construction of such future facilities.

14 The Board granted the applications subject to several conditions. In particular, in order to satisfy itself that the electricity to be exported would originate from facilities that had been subjected to the appropriate environmental reviews, the Board attached to the licence the following two conditions:

10. This licence remains valid to the extent that

(a) any production facility required by Hydro-Québec to supply the exports authorized herein, for which construction had not yet been authorized pursuant to the evidence presented to the Board at the EH-3-89 hearing that ended on 5 March 1990, will have been subjected, prior to its construction, to the appropriate environmental assessment and review procedures as well as to the applicable environmental standards and guidelines in accordance with federal government laws and regulations.

(b) Hydro-Québec, following any of the environmental assessment and review procedures mentioned in subcondition (a), will have filed with the Board

i) a summary of all environmental impact assessments and reports on the conclusions and recommendations arising from the said assessment and review procedures;

ii) governmental authorizations received; and

iii) a statement of the measures that Hydro-Québec intends to take to minimize the negative environmental impacts.

15 11. The generation of thermal energy to be exported hereunder shall not contravene relevant federal environmental standards or guidelines.

B. Federal Court of Appeal, [1991] 3 F.C. 443 (Pratte, Marceau and Desjardins JJ.A.)

16 Writing for the Federal Court of Appeal, Marceau J.A. dealt first with the validity of conditions 10 and 11 to the licence. He noted that the Board had imposed those conditions so as to meet its perceived mandate under the EARP Guidelines Order. In

his view, this raised the questions of the application of this Order to the Board, and to Hydro-Québec as an agent of the Crown in right of the Province, as well as the question of the constitutional validity of the Order itself.

17 However, Marceau J.A. held that he did not have to deal with these concerns, since it was clear that, in this case, the imposition by the Board of the conditions to the licence emanated from its concerns as to the potential effects of the eventual construction of the production facilities planned to meet the increased demand for electrical power. Marceau J.A. held that the Board had no jurisdiction to make the granting of a licence to export certain goods subject to conditions which pertained to their production. He stated (at pp. 450-451):

The factors which may be relevant in considering an application for leave to export electricity and the conditions which the Board may place on its leave clearly cannot relate to anything but the export of electricity. Section 2 of the Act defines what is meant by export (in French "*exportation*") in the case of electricity:

2. ... export means, with reference to

(a) power, to send from Canada by a line of wire or other conductor power produced in Canada ...

It seems clear that, as it is understood in the Act with respect to electricity, export does not cover production itself, and it is only reasonable that this should be so. Of course, anyone wishing to export a good must produce it or arrange for it to be produced elsewhere, but when he produces it or arranges for its production elsewhere he is not exporting it, and when he is exporting it he is not producing it.

I do not think anyone would dispute for a moment that in considering an application for leave to export electricity, the Board must be concerned about the environmental consequences, since the public interest is involved. ... However, the only question can be as to the environmental consequences of the export, namely the consequences for the environment of "[sending] from Canada ... power produced in Canada".

18 Marceau J.A. held that the Board had therefore exceeded its jurisdiction in affixing to the licence conditions 10 and 11. That did not mean, however, that the entire decision was vitiated. Marceau J.A. found the two sections to be severable from the remainder of the licence.

19 Marceau J.A. then considered the contention of the appellants that the Board erred in its decision to grant the licences. The appellants argued that the Board erred in taking into account the amendments to the *National Energy Board Act* which came into force while its decision was reserved. In the version of the Act in force at the time of the application, and at the time of the subsequent hearing, applicants for licences were required to satisfy the Board that the export price charged would recover the appropriate share of the costs incurred in Canada. This condition was deleted from the version of the Act in force at the time that the decision was rendered. The appellants argued that, in following the new provisions, the Board applied the requirement of cost recovery incorrectly.

20 Marceau J.A. noted that the new Act was designed to deregulate and simplify the licence application process. The express requirement of cost recovery had been deleted. The new provisions simply required the Board to take into consideration all factors which appeared to it to be relevant. Marceau J.A. held that the Board was correct in considering itself bound by the new provisions of the Act. Nonetheless, he found that, even if he was incorrect in so concluding, the argument of the appellants did not lead anywhere. The Board chose, despite the amendments, to analyze the application in light of the former price criteria.

21 The appellants argued in the alternative that, if the Board did consider the issue of cost recovery, it could not have concluded that this requirement was met, since there was no direct evidence before the Board on this point. Marceau J.A. agreed that the evidence on this point was not direct in all respects. In particular, the financial data relating to proposed production facilities was reviewed by an accountant, who then testified as to its veracity. He held, however, that nothing required the Board to decide this point on direct evidence. There was persuasive indirect evidence before it. To reevaluate the weight of this evidence was not a task for the courts, since appeals from decisions of the Board were limited by s. 22 of the *National Energy Board Act* to questions of law or jurisdiction.

IV. Issues On Appeal

22 Although the parties to this appeal have made numerous specific allegations of error on the part of the Board and of the Court of Appeal, discussed individually below, the issues in this appeal can be reduced to the following three questions:

1. Did the Federal Court of Appeal err in holding that the National Energy Board acted within its jurisdiction in granting the export licences to the respondent Hydro-Québec?
2. Did the Federal Court of Appeal err in holding that the National Energy Board erred in the exercise of its jurisdiction in its imposition of conditions 10 and 11 of the licences?
3. If the Federal Court of Appeal was not in error with respect to these two findings, did it nonetheless err in holding that conditions 10 and 11 were severable from the rest of the licences?

V. Analysis

23 The appellants challenge on a number of grounds the validity of the decision of the Board to grant the export licences. First, the appellants argue that the Board did not properly conduct the required social cost-benefit review. Second, they argue that the failure of the Board to require that Hydro-Québec disclose in full the assumptions and methodologies on which its cost-benefit review was based breached the requirements of procedural fairness by depriving the appellants of the opportunity for full participation in the review process. Third, the appellants argue that the Board owed them a fiduciary duty in the exercise of its decision-making power, and that the requirements of this duty were not fulfilled. Fourth, the appellants assert that the decision of the Board affects their aboriginal rights, and that the Board is therefore required to meet the justification test set out by this Court in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. Finally, the appellants submit that the Board failed to follow the requirements of its own Act and of the EARP Guidelines Order in conducting its environmental impact assessment. I will consider each of these arguments in turn.

A. Social Cost-Benefit Review

24 The appellants argue that the Board was required to carry out a social cost-benefit review which would consider all direct and indirect costs, including economic and social costs, arising from the exports for which the licences were sought. The appellants claim that, in relying on solely the indirect evidence of Hydro-Québec and the fact that the proposal had been approved by the government of Quebec, the Board failed to carry out this review properly. The duty to carry out such a review is ostensibly found in the *National Energy Board Part VI Regulations*, s. 6(2)(z)(i), which states:

6. (1) Every applicant for a licence for the exportation of power shall furnish to the Board such information as the Board may require.

(2) Without restricting the generality of subsection (1), the information required to be furnished by any applicant described in subsection (1) shall, unless otherwise authorized by the Board, include

.....

(z) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price

(i) would recover its appropriate share of the costs incurred in Canada ...

25 It appears that both the *Canadian Electricity Policy*, September 1988, and the Board's own internal report, entitled *The Regulation of Electricity Exports*, June 1987, interpret this requirement to mean that all direct and indirect costs, including environmental, land use, and economic costs ("social costs"), should be considered. However, I need express no opinion on the correctness of these interpretations or on whether the requirement in the regulations that the applicant for a licence furnish such evidence also means that the Board is required to consider it, especially in light of s. 119.08(2) of the Act, which gives the Board the discretion to determine which considerations are relevant to its decision, and of the terms of s. 6(2) itself, which

gives the Board the authority to dispense with proof of any of the items specifically enumerated thereafter. In this case, it is clear that the Board considered that evidence of the nature and recoverability of such costs was relevant to its decision (reasons of the Board, at p. 29).

26 While the respondents are correct in asserting that the principle of curial deference applies to the weighing of the evidence by the Board in the exercise of its discretion, this principle cannot be invoked to save a decision for which there is no foundation in the evidence or that is based on irrelevant considerations. Once the Board decides that a particular factor is relevant to its decision, there must be some evidence to support the conclusion reached relating to it. The Board must not act unreasonably in evaluating the evidence it requests to make its decision: *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722.

27 However, in this appeal, it cannot be said that the Board was without evidence on which it could reasonably have concluded that the consideration of cost recoverability was satisfied. The Board, in its decision, summarized the evidence given by Hydro-Québec on this point as follows (at p. 13):

Hydro-Québec did not supply the Board with copies of the cost-benefit analyses for the advancement of the facilities required to meet its obligations under the two contracts. Nevertheless it did provide information on the methodology, assumptions and the revenues used in the private and social cost-benefit analyses. It also underlined that the costs and benefits associated with the environmental impacts of the advancement of production facilities had been considered, including the funds necessary to compensate, if required, the economic losses resulting from impacts on forests, trapping regions or even agricultural lands.

The Applicant provided additional proof to demonstrate that the export price would allow recovery of the appropriate costs in Canada while maintaining the confidentiality of certain of its financial information. To that end, Hydro-Québec hired a chartered accountant whose mandate was to undertake verification of the accuracy of the assessment ...

The accountant testified before the Board and was cross-examined by the appellants.

28 It is, of course, insufficient for Hydro-Québec to ask the Board simply to accept a bare assertion that all costs will be recovered. However, that is not what happened in this case. Hydro-Québec provided evidence on which the Board could reasonably conclude that the requirement in s. 6(2)(z)(i) was met. This is evident from the conclusions of the Board, which state (at pp. 30-31):

The Board notes that Hydro-Québec did provide information on the magnitude of the revenues expected to be generated by the proposed export sales and that these would be significant, totalling more than \$24 billion ... In addition, Hydro-Québec provided some details on the methodology used in carrying out its feasibility study as well as on the economic, financial and other relevant assumptions underlying that analysis. The Board has examined this information and finds that the methodology and assumptions described are reasonable ... The fact that the provincial government has concurred with Hydro-Québec by approving the export contracts ... suggests to the Board that the exports are projected to yield net benefits to Québec.

... Intervenors raised concerns with regard to potential adverse environmental impacts outside of Québec but any specific costs that might be associated with such impacts were not identified. There were no other identified costs ...

Finally, the Board is convinced that the parties to these contracts have negotiated at arm's length and under free market conditions. The Board thus has no reason to believe that there would not be net benefits accruing from the proposed exports.

29 The intervenors argued that the final sentence in this passage shows that the Board made its decision in the absence of positive evidence on cost recovery. When the sentence is read in context, however, it indicates rather that the Board was satisfied on the evidence before it that the relevant costs would be recovered. The Board cannot simply rely on the conclusions of the respondent as to cost recovery without evaluating their validity, but that does not appear to have been the situation here.

Moreover, a prohibition on the reliance on the unsubstantiated affirmations of the applicant should not be transformed into a duty on the Board to conduct its own independent analysis where such an undertaking is unnecessary.

30 The Board did consider relevant to the issue of cost recovery, in addition to the evidence presented by Hydro-Québec, the fact that the export contracts had received the approval of the Province. Evidence of such approval is expressly referred to in s. 6(2)(v) of the Part VI Regulations as a factor which the Board may wish to consider. The appellants contend, however, that this approval is irrelevant to the s. 6(2)(z)(i) cost-benefit analysis, as the orders-in-council pursuant to the *Hydro-Québec Act*, R.S.Q., c. H-5, under which provincial approval was given, require only that the contracts be consistent with sound financial management, not that they be in the public interest. Section 24 of the *Hydro-Québec Act* requires Hydro-Québec to maintain the rates charged for power at a sufficient level to defray operating expenditures and interest on its debt. In my view, sound financial management of a public utility is part of the public interest. While such a factor is obviously only one of the many relevant considerations in such a determination, it cannot be said that evidence of governmental approval is wholly irrelevant in the context of cost recovery, such that the Board committed a jurisdictional error in considering it.

31 I also reject the appellants' argument that the mere fact that all contracts in Quebec require such approval renders consideration of this factor by the Board an improper delegation of its decision-making power. The Board must, of course, make its own decision as to whether the cost-benefit requirement is satisfied. It cannot delegate that responsibility to the Government of Quebec or to any other body. In this case, for such a delegation to have occurred, the Board would have had to treat the mere existence of government approval as sufficient in and of itself to satisfy the cost-benefit requirement, without any independent consideration of the issue. But that was not the case here. Therefore, it cannot be said that there was any jurisdictional error committed by the Board in this aspect of its decision.

B. Opportunity for Fair Participation in the Review Process

32 Given my conclusions on the nature and scope of the cost-benefit review undertaken by the Board, the appellants' arguments relating to procedural fairness can be dispensed with rather simply. The appellants argue that the Board breached the requirements of procedural fairness in failing to require disclosure to the appellants by Hydro-Québec of all information pertinent to the issue of cost recovery. In particular, they point to the failure of the Board to require Hydro-Québec to reveal in full the assumptions and methodologies on which its cost-benefit analysis was based.

33 In general, included in the requirements of procedural fairness is the right to disclosure by the administrative decision-maker of sufficient information to permit meaningful participation in the hearing process: In *Canada (Canadian Radio-Television & Telecommunications Commission) v. London Cable TV Ltd.*, [1976] 2 F.C. 621 (C.A.), at pp. 624-625. The extent of the disclosure required to meet the dictates of natural justice will vary with the facts of the case, and in particular with the type of decision to be made, and the nature of the hearing to which the affected parties are entitled.

34 The issue in this case, then, is not the sufficiency of the disclosure made by Hydro-Québec. That relates to the question, discussed above, of whether there was evidence before the decision-maker on which it could reasonably have reached the decision which it did: *Parke, Davis & Co. v. Fine Chemicals of Canada Ltd.*, [1959] S.C.R. 219, at p. 233, per Rand J. Rather, the issue is whether the Board provided to the appellants disclosure sufficient for their meaningful participation in the hearing, such that they were treated fairly in all the circumstances: *Martineau v. Matsqui Institution* (1979), [1980] 1 S.C.R. 602, at pp. 630-631; *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, at p. 654; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, at p. 226, per McLachlin J. (dissenting on another ground).

35 In carrying out its decision-making function, the Board has the discretion to determine what evidence is relevant to its decision. It has not been shown that, in this case, the discretion was improperly exercised so as to result in inadequate disclosure to the appellants. As noted above, the Board had sufficient evidence before it to make a valid finding that all costs would be recovered. The appellants were given access to all the material that was before the Board. The Board specifically found that the appellants themselves presented no evidence of added social costs, and did not call into question the veracity of Hydro-Québec's report. Therefore, it cannot be said that, on the basis, the Board erred in its decision to grant the licences.

C. Fiduciary Duty

36 The appellants claim that, by virtue of their status as aboriginal peoples, the Board owes them a fiduciary duty extending to the decision-making process used in considering applications for export licences. The appellants' argument is that the fiduciary duty owed to aboriginal peoples by the Crown, as recognized by this Court in *R. v. Sparrow*, supra, extends to the Board, as an agent of government and creation of Parliament, in the exercise of its delegated powers. The duty applies whenever the decision made pursuant to a federal regulatory process is likely to affect aboriginal rights.

37 The appellants characterize the scope of this duty as twofold. They argue that it includes the duty to ensure the full and fair participation of the appellants in the hearing process, as well as the duty to take into account their best interests when making decisions. The appellants argue that such an obligation imports with it rights that go beyond those created by the dictates of natural justice, and that in this case, at a minimum, the Board should have required disclosure to the appellants of all information necessary to the making of their case against the applications. The respondents to this appeal, on the other hand, dispute both the existence of a duty, and, if it does exist, that the Board failed to meet it.

38 It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. R.*, [1984] 2 S.C.R. 335. Nonetheless, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed. The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.

39 Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is quasi-judicial: *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 385. While this characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.

40 It is for this reason that I do not find helpful the authorities cited to me by the appellants as indicative of this evolving trend: *Gitludahl v. British Columbia (Minister of Forests)* (August 13, 1992), Doc. Vancouver A922935, Newbury J. (B.C. S.C.), unreported, and *R. v. Dick* (June 3, 1992), Doc. Ottawa T-951-89, (Fed. T.D.), unreported [reported [1993] 1 C.N.L.R. 50]. Those cases were concerned, respectively, with the decision-making of the Minister of Forests, and the conduct of the Crown when adverse in interest to aboriginal peoples in litigation. The considerations which may animate the application of a fiduciary duty in these contexts are far different from those raised in the context of a licence application before an independent decision-making body operating at arm's length from government.

41 Therefore, I conclude that the fiduciary relationship between the Crown and the appellants does not impose a duty on the Board to make its decisions in the best interests of the appellants, or to change its hearing process so as to impose superadded requirements of disclosure. When the duty is defined in this manner, such tribunals no more owe this sort of fiduciary duty than do the courts. Consequently, no such duty existed in relation to the decision-making function of the Board.

42 Moreover, even if this Court were to assume that the Board, in conducting its review, should have taken into account the existence of the fiduciary relationship between the Crown and the appellants, I am satisfied that, for the reasons set out above relating to the procedure followed by the Board, its actions in this case would have met the requirements of such a duty. There is no indication that the appellants were given anything less than the fullest opportunity to be heard. They had access to all the evidence that was before the Board, were able to make submissions and argument in reply, and were entitled to cross-examine the witnesses called by the respondent Hydro-Québec. This argument must therefore fail for the same reasons as the arguments relating to the nature of the review conducted by the Board.

D. Aboriginal Rights

43 This Court, in *R. v. Sparrow*, supra, recognized the interrelationship between the recognition and affirmation of aboriginal rights constitutionally enshrined in s. 35(1) of the *Constitution Act, 1982*, and the fiduciary relationship which has historically existed between the Crown and aboriginal peoples. It is this relationship that indicates that the exercise of sovereign power may be limited or restrained when it amounts to an unjustifiable interference with aboriginal rights. In this appeal, the appellants argue that the decision of the Board to grant the licences will have a negative impact on their aboriginal rights, and that the Board was therefore required to meet the test of justification as set out in *Sparrow*.

44 It is obvious that the Board must exercise its decision-making function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act, 1982*. Therefore, it must first be determined whether this particular decision of the Board, made pursuant to s. 119.08(1) of the *National Energy Board Act*, could have the effect of interfering with the existing aboriginal rights of the appellants so as to amount to a prima facie infringement of s. 35(1).

45 The respondents in this appeal argue that it cannot. They assert that, with the signing by the appellants of the James Bay and Northern Quebec Agreement, incorporated in the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32 ("the *James Bay Act*"), the appellants ceded and renounced all aboriginal rights except as set out in the Agreement. Since the act of granting a licence neither requires nor permits the construction of the new production facilities which the appellants claim will interfere with their rights, and since the Agreement itself provides for a participatory review process to authorize the construction of such facilities, Hydro-Québec and the Attorney General of Quebec argue that no prima facie infringement results from the decision of the Board.

46 The evaluation of these competing arguments requires an examination and interpretation of the Agreement as embodied in the *James Bay Act*. The appellants, however, requested that this question be determined without reference to the Agreement or to the Act, since its interpretation and application form the subject of other legal proceedings involving the parties to this appeal. The appellants accordingly placed no reliance on this document in their assertion of a breach of aboriginal rights.

47 In my view, it is not possible to evaluate realistically the impact of the decision of the Board on the rights of the appellants without reference to the *James Bay Act*. The respondents assert that the rights of the appellants are limited to those set out in this document. The validity of this assertion cannot be tested without construing the provisions of the Agreement.

48 Moreover, even assuming that the decision of the Board is one that has, prima facie, an impact on the aboriginal rights of the appellants, and that the appellants are correct in arguing that, for the Board to justify its interference, it must, at a minimum, conduct a rigorous, thorough, and proper cost-benefit review, I find, for the reasons expressed above, that the review carried out in this case was not wanting in this respect.

E. Environmental Impact Assessment

49 Given that the social cost-benefit analysis appears to have been reasonable, the sole remaining ground on which the decision of the Board can be impugned relates to the environmental impact assessment carried out by the Board. It must be determined both whether the Board followed the procedures for such an assessment set out in the *National Energy Board Act* and in the EARP Guidelines Order, and whether the imposition of conditions 10 and 11 was a valid mechanism for fulfilling these requirements. If it is found that the conditions imposed by the Board caused it to exceed, or alternately to fail to exercise, its jurisdiction, it must also be determined whether the conditions are severable, and the Order of the Board nonetheless remains valid.

(a) The National Energy Board Act

50 It is clear, and indeed it does not appear to have been seriously contested by the parties that, while the Board in making its decision was bound by the Act as amended, it was nonetheless entitled to require evidence of the factors listed in the former

Act, since s. 119.08(2) of the amended Act gives to the Board the mandate to consider any matters which it deems relevant in the circumstances.

51 The proper interpretation of the scope of the Board's inquiry is found by looking at the procedural framework created by the Act as a whole. The procedure for the issuing of permits for the export of electricity is set out in Division II of Part VI of the Act. In the version of the Act in force at the time that the initial application was made by Hydro-Québec, each applicant was required to apply for a licence, and the factors which the Board was to consider in its determination whether to grant the licence were explicitly listed.

52 By the terms of the Act as amended by Bill C-23, the Board is in general now required, on application and without a public hearing, to issue permits for export (s. 119.03). However, the Board may recommend to the Minister that the granting be delayed and that an inquiry be held. Section 119.06(2) provides that, in determining whether to make such a recommendation:

... the Board shall seek to avoid the duplication of measures taken in respect of the exportation by the applicant and the government of the province from which the electricity is exported, and shall have regard to all considerations that appear to it to be relevant, including

.....
(b) the impact of the exportation on the environment:

.....
(d) such considerations as may be specified in the regulations.

53 If the Minister accepts this recommendation, the application is designated as one to which s. 119.08 applies, and a licence is required rather than a permit. The enumerated factors which the Board was required to take into account at this stage, in considering whether a licence should be granted, were eliminated by the amendments to the Act. Now, the section simply provides:

119.08 ...

(2) In deciding whether to issue a licence, the Board shall have regard to all considerations that appear to it to be relevant.

54 Section 6 of the Part VI Regulations governs the information that must be furnished to the Board in an application for a licence. The section gives the Board the power both to request any information that it might require, and to dispense with the provision of any evidence that it deems unnecessary. However, s. 6(2) nonetheless sets out a long list of factors that must be furnished by the applicant unless the Board otherwise authorizes. The subsections relevant to this appeal are ss. 6(2)(z) and 6(2)(aa), which require:

(z) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price

(i) would recover its appropriate share of the costs incurred in Canada,

(ii) would not be less than the price to Canadians for equivalent service in related areas ...

(aa) evidence on any environmental impact that would result from the generation of the power for export.

55 In this case, the Board considered the environmental effects of the actual transmission of the electricity to the United States, and the resulting effects on the U.S. environment, and found them to be either neutral or beneficial. The real area of concern for negative environmental impact, as raised by the appellants and other parties appearing at the public hearing, was the future construction of production facilities, as contemplated by the development plan, to meet increased needs for power. The Board specifically found that these planned facilities would have to be built to meet the projected increase in the domestic demand for electrical power even if the licences were not approved. The Board also found that, if the licences were granted, the construction of some of these contemplated facilities would take place earlier than would otherwise be necessary. Finally, the Board held that the additional environmental effects occurring solely as a result of the acceleration of construction would be negligible.

56 However, the Board found that the potential environmental effects of the actual construction of these future facilities were not known with certainty. It therefore imposed conditions 10 and 11 to the licences, which require compliance with federal standards, and successful completion of existing review processes. In this appeal, the prime dispute in the area of environmental impact is whether the Board was entitled to consider, as relevant to its decision to grant the licences sought, the environmental impact of the construction by Hydro-Québec of these future facilities.

57 The Court of Appeal in this case found that, in deciding whether to grant a licence, the Board was limited solely to the consideration of the environmental effects of export as that term is defined in the *National Energy Board Act*. As noted above, s. 2 of the Act provides:

"export" means, with reference to

(a) electricity, to send from Canada by a line of wire or other conductor electricity produced in Canada ...

58 As mentioned above, the Court of Appeal (at pp. 450-451) interpreted the section to mean that [[1991] 3 F.C. 443]:

... the Board's jurisdiction still is and has always been the granting of leave to export electricity. The factors which may be relevant in considering an application for leave to export electricity and the conditions which the Board may place on its leave clearly cannot relate to anything but the export of electricity ...

It seems clear that, as it is understood in the Act with respect to electricity, export does not cover production itself, and it is only reasonable that this should be so. Of course, anyone wishing to export a good must produce it or arrange for it to be produced elsewhere, but when he produces it or arranges for its production elsewhere he is not exporting it, and when he is exporting it he is not producing it.

I do not think anyone would dispute for a moment that in considering an application for leave to export electricity, the Board must be concerned about the environmental consequences, since the public interest is involved. The Board's function in this respect is in any case confirmed in several enactments. However, the only question can be as to the environmental consequences of the export, namely the consequences for the environment of "[sending] from Canada ... power produced in Canada".

59 The Board is specifically permitted by s. 119.06(2) of the *National Energy Board Act* to take into consideration, in its decision whether to recommend to the Minister that the matter proceed by way of a licence application with a public review rather than by the issuance of a permit, both the environmental effects of the exportation of the electricity, and, as specified in the Regulations, the effects on the environment of the generation of the power for export. Once a licence application review process is instituted, s. 119.08(2) of the Act gives to the Board the power to consider all factors which appear to it to be relevant. In my opinion, given that the Board is permitted at the earlier stage to take such factors into account, it would be inconsistent to prohibit the Board from having regard to such factors at this later stage, although such concerns continue to be relevant.

60 I am of the view that the Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of power by a line of wire across the border. To limit the effects considered to those resulting from the physical act of transmission is an unduly narrow interpretation of the activity contemplated by the arrangements in question. The narrowness of this view of the Board's inquiry is emphasized by the detailed regulatory process that has been created. I would find it surprising that such an elaborate review process would be created for such a limited inquiry. As the Court of Appeal in this case recognized, electricity must be produced, either through existing facilities or the construction of new ones, in order for an export contract to be fulfilled. Ultimately, it is proper for the Board to consider in its decision-making process the overall environmental costs of granting the licence sought.

61 However, such a task is particularly difficult in this case, given the Board's finding that, although existing facilities were not sufficient to service the contracts, the new facilities contemplated would have to be built in any event to supply increasing domestic needs. The approval of the application for the licences would therefore simply have the effect of accelerating

construction of these facilities, and the environmental effects of the acceleration alone were found not to be significant. Nevertheless, in my opinion, the Board did not err in giving some weight to the environmental effects of the construction of the planned facilities. To say that such effects cannot be considered unless the Board finds that, but for the export contracts, the facilities would not be constructed, is to create a situation in which the construction of a generating facility may be contemplated solely for the purpose of fulfilling the demands of a number of export contracts, but because no one export contract can be said to be the cause of the facility's construction, its environmental effects will never be considered.

62 A better approach is simply to ask whether the construction of new facilities is required to serve, among other needs, the demands of the export contract. If this question is answered in the affirmative, then the environmental effects of the construction of such facilities are related to the export. In these circumstances, it becomes appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power.

63 The respondents expressed concern that giving such a scope to the inquiry of the Board might then bring into its contemplation areas which are more properly the subject of provincial regulation and control. I hasten to add that no constitutional question was raised in this appeal, and I expressly refrain from making any determinations relating to the interpretation of the provisions of the *Constitution Act, 1867*. However, it is nonetheless important that the jurisdiction of the Board be delineated in a manner that respects these concerns. Obviously, while matters relating to export clearly fall within federal jurisdiction according to s. 91(2) of the *Constitution Act, 1867*, as part of the federal government power over matters relating to trade and commerce, it is undeniable that a proposal for export may have ramifications for the operation of provincial undertakings or other matters under provincial jurisdiction.

64 In defining the jurisdictional limits of the Board, then, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern. At the same time, however, the scope of its inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective. In this regard, I find helpful the reasons of this Court in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, a decision released after the Federal Court of Appeal had rendered judgment in this case.

65 In *Oldman River* this Court considered, among other issues, the constitutional validity of the EARP Guidelines Order. La Forest J., for the majority, concluded, in words I find apposite to this appeal (at p. 64):

It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.

Therefore (at p. 65):

... the solution to this case can more readily be found by looking first at the catalogue of powers in the *Constitution Act, 1867* and considering how they may be employed to meet or avoid environmental concerns. When viewed in this manner it will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting.

66 As noted earlier, the vires of the *National Energy Board Act* is not in dispute in this appeal. If in applying this Act the Board finds environmental effects within a province relevant to its decision to grant an export licence, a matter of federal jurisdiction, it is entitled to consider those effects. So too may the province have, within its proper contemplation, the environmental effects of the provincially regulated aspects of such a project. This co-existence of responsibility is neither unusual nor unworkable. While duplication and contradiction of directives should of course be minimized, it is precisely this dilemma that the EARP Guidelines Order, specifically ss. 5 and 8, is designed to avoid, and that the Board attempted to reduce with the imposition of conditions 10 and 11 to the licences.

67 It is also worth noting that the Board is the forum in which the environmental impact attributable solely to the export, that is, to the impact of the increase in power output needed to service the export contracts, will be considered. A focused assessment of these effects may be lost if subsumed in a comprehensive evaluation by the province of the environmental effects of the

projects in their totality. In this way, both levels of government have a unique sphere in which to contribute to environmental impact assessment.

68 I conclude, therefore, that the Board did not exceed its jurisdiction under the *National Energy Board Act* in considering the environmental effects of the construction of future generating facilities as they related to the proposed export, an area of federal responsibility. The Board is permitted by s. 15 of the Regulations to the Act to attach conditions to the licences which it grants, including conditions relating to environmental protection: s. 15(m). The only issue that remains, then, is whether in imposing conditions 10 and 11, the Board failed to meet its obligations under the EARP Guidelines Order.

(b) The EARP Guidelines Order and the Validity of Conditions 10 and 11

69 That the EARP Guidelines Order applied to the Board in its decision whether to grant the export licences does not appear to be in serious dispute. The EARP Guidelines Order applies to all "initiating departments", defined in s. 2 as "any department that is, on behalf of the Government of Canada, the decision making authority for a proposal". "Proposal" is also defined in s. 2, as "any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility".

70 The key feature to be extracted from these somewhat circular definitions is that the application of the EARP Guidelines Order to the Board relates to the aspect of Hydro-Québec's undertakings for which it has decision-making authority, that is, the decision to grant a licence permitting export. That does not artificially limit the scope of the inquiry to the environmental ramifications of the transmission of power by a line of wire, but it equally does not permit a wholesale review of the entire operational plan of Hydro-Québec. Section 6(b) of the EARP Guidelines Order makes it clear that "[t]hese Guidelines shall apply to any proposal ... that may have an environmental effect on an area of federal responsibility". As will be evident from the reasons which follow, I am of the view that the Board in its decision struck an appropriate balance between these two extremes.

71 The main goal of the Process created by the EARP Guidelines Order is that "the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision-making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel." The overarching purpose of the EARP Guidelines Order is to avoid, in situations in which multiple regulatory steps impinge on an undertaking or proposal, disregard for the fundamentally important matter of the protection of the environment.

72 The EARP Guidelines Order also notes explicitly, as mentioned above, that duplication in review is to be avoided (ss. 5(1) and 8), although the initiating department is prohibited from delegating its task of environmental screening or initial assessment to any other body: s. 10(2). The Board in this case was therefore required by s. 12 of the EARP Guidelines Order to determine whether the export proposal would not produce any adverse environmental effects, would produce significant adverse environmental effects, would produce effects which were insignificant or mitigable with known technology, or would produce effects which were unknown. In the words of the Board (at pp. 34-35):

In conducting a screening of electricity export proposals, the Board examines the potential environmental and corresponding social effects in and outside of Canada, of the production, transmission, and end use of the electricity proposed to be exported. The purpose of such a screening is to enable the Board to reach one of the conclusions required in section 12 of the EARP Guidelines Order.

73 The Board noted that Hydro-Québec had provided information that approval of the export arrangements would mean that the facilities contemplated by its general development plan would be built two to six years earlier than anticipated. Hydro-Québec took the position that the effect of permitting the exports on the environmental impact of the implementation of the plan would be insignificant. As a result, it did not provide information on the overall impact of the construction and operation of the planned facilities. The Board noted (at pp. 37-38):

Hydro-Québec argued only that the early construction and operation of facilities to serve the exports would not result in significant environmental impacts and consequently it provided no evidence on this point. Specifically, Hydro-Québec did not provide a comprehensive environmental assessment of the impact of the construction and operation of facilities

required to support the proposed exports. In this regard, the Board is of the view that the issue of environmental impact does not hinge on whether or not it should consider the impact of the construction and operation of facilities or only the impact of their advancement. Sufficient evidence was provided indicating that major hydro-electric facilities such as those required to meet the proposed exports do have environmental effects. Hydro-Québec itself did not deny this. The issue rather is whether, on balance, the environmental consequences are acceptable or mitigable. This, the Board does not know at this time.

The Board recognizes that when electric utilities negotiate long-term system-to-system firm sales agreements, there can be circumstances in such arrangements that require capacity to come from generating facilities to be built at some future date and for which the necessary detailed environmental assessments have not been completed at the time of the export application. The proposed export contracts now before the Board have been negotiated on this basis. Nonetheless, for the Board to reach its decision on Hydro-Québec's applications, and at the same time meet its obligations under the Act and EARP Guidelines Order, it must take into account the environmental impacts arising from the construction of such future facilities.

74 However, it was apparent that all the facilities in issue would be subject at later dates either to provincial review under the James Bay Agreement or to review by other federal departments under the EARP Guidelines Order or other enactments. Therefore, the Board held (at pp. 39-40):

The Board is also of the view that, to the extent that Hydro-Québec's future facilities are subjected to the EARP Guidelines Order review process, or any equivalent review process, and are subsequently accepted for construction, the environmental and social impacts of these projects, as well as the related public concerns, will have been adequately addressed ... The Board is therefore satisfied that to the extent that such reviews take place and the facilities are accepted for construction, then the environmental impact of the construction and operation of the facilities required to support the proposed exports will be known and mitigable with known technology.

In order to satisfy itself that these reviews would be carried out, the Board attached conditions 10 and 11 to the licences.

75 The respondents challenge the validity of conditions 10 and 11 on the grounds that the jurisdiction of the Board in considering an application for an export licence does not extend to the environmental effects of the construction and operation of facilities which will generate the power to be exported. As noted above, I am of the view that the jurisdiction of the Board can properly encompass such a review. The appellants, however, also challenge the validity of these conditions. They argue that to approve the Board's transfer of the responsibility for environmental review to these future processes is to permit the Board to avoid its responsibilities under the EARP Guidelines Order.

76 The conclusion of the Board in this case appears to have been, not surprisingly, that the environmental effects of the construction and operation of the planned facilities were unknown. The Board is therefore required by s. 12(e) of the Guidelines Order to see either that the proposal is subjected to further study and subsequent rescreening, or that it is submitted to a public review. In my view, the conditions imposed by the Board meet in substance this obligation. They do not amount to an improper delegation of the Board's responsibility under the EARP Guidelines Order. Rather, they are an attempt to avoid the duplication warned against in the Order, while continuing the jurisdiction of the Board over this matter.

77 In the same way that the EARP Guidelines Order does not require an initiating department to wait for the results of a public review before proceeding with a proposal (see *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1989), 4 C.E.L.R. (N.S.) 201 (Fed. T.D.), affirmed [1991] 1 F.C. 641 (C.A.)), it does not require the Board to suspend its decision-making until the environmental assessment of all future generating facilities is completed. In this appeal, it is presently unclear exactly when and to what extent these contemplated facilities will be used to fulfil the requirements of the export contracts. This will not be known with certainty until those portions of the contract arise for completion. It is not unreasonable for the Board to exert some control over the timing of this process, while at the same time waiting for the results of environmental reviews which will be tailored to the specifications of the facilities as they are actually constructed.

78 This case appears to me to be just such a situation where the nature of the proposal means that the flexibility of the process set out in the EARP Guidelines Order is helpful. In this regard, I adopt the words of Reed J. of the trial division of the Federal Court in *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229, where she stated (at p. 264):

It is not disputed that it is preferable to identify potential environmental concerns relating to a project before private sector developers (or public sector developers for that matter) proceed to a final design. It is also desirable to use the process as a planning tool and to avoid duplication. I am not convinced however that it is useful to consider whether the Guidelines Order requires the assessment of [a] proposal at the concept stage or at a more specific design stage. What is required may very well depend on the type of project being reviewed. What does seem clear is that the assessment is required to take place at a stage when the environmental implications can be *fully* considered (section 3) and when it can be determined whether there may be *any* potentially adverse environmental effects (subsection 10(1)). [Emphasis in original.]

79 The Board retains the power, through s. 119.093(1) of the *National Energy Board Act*, to revoke the licences if the conditions are not fulfilled. The conditions relate to contemplated environmental review and regulation in the federal sphere. By proceeding in this way, the full environmental effects of the proposals are known to the Board before the construction is to proceed, and before the decision to grant the licences is irrevocable. At the same time, duplication is minimized and Hydro-Québec is not required to provide concrete evidence of the effects of proposals for future construction still some years away. The Board has thus fulfilled its mandate under the EARP Guidelines Order in a manner which, I would add, is not unreasonable in the circumstances.

VI. Conclusion And Disposition

80 At issue in this appeal are jurisdictional facts. While it is the proper function of this Court to determine whether the Board erred in the exercise of its jurisdiction, this Court will not interfere with the factual findings of the Board on which it bases that exercise, where there is some evidence to support its findings. I conclude that the appellants were given a full and fair opportunity to be heard before the Board, and that the Board had sufficient evidence to reach the conclusions which it did. In particular, I find that the Order as set out by the Board neither exceeded nor avoided the scope of the Board's review in the area of the environmental impact of the proposed exports.

81 The reinstatement of the Order as made by the Board is not the result sought by either the appellants or the respondents Hydro-Québec and the Attorney General of Quebec. This does not mean, however, that such a result is beyond the jurisdiction of this Court. Both the appellants and the respondents appealed the decision of the Board to the Federal Court of Appeal. These appeals were consolidated, and the Court ruled that the appeal of the present appellants should be dismissed, and the appeal of the respondents allowed. It is this decision, in toto, that the appellants appeal to this Court.

82 I am of the view that the Court of Appeal erred in allowing the appeal of the respondents, and that it should have dismissed both appeals. This Court has jurisdiction to make the order that the Court below should have made. Accordingly, the appeal is allowed, the judgment of the Federal Court of Appeal is set aside, and the Order of the Board restored. Given the nature of the result, each party will bear its own costs here and in the Court below.

Appeal allowed.

DECISION and ORDER

NSARB 2020-001 to 003

NOVA SCOTIA AQUACULTURE REVIEW BOARD

IN THE MATTER OF: applications made by **GRAND PASS OYSTERS LTD.** for **NEW MARINE SHELLFISH LICENCES/LEASES** in **LA GRANDE PASS, YARMOUTH COUNTY** for the **SUSPENDED CULTIVATION** of **AMERICAN OYSTERS**.

BEFORE: Jean McKenna, Chair
Michael McKinnon, Board Member

HEARING DATE: October 20, 2020

DECISION DATE: November 17, 2020

Pursuant to s.45 of the *Fisheries and Coastal Resources Act*, S.N.S. 1996, c.25 (as amended) Grand Pass Oysters Ltd. ("Grand Pass") is applying for new marine shellfish licences, involving three contiguous blocks in "La Grande Pass", Yarmouth County. The applications are separate, (Bar Rock, Calf Island, and Fox Island) but are being considered as one, as the entire parcel would be required for the operation.

On October 20, 2020, the Nova Scotia Aquaculture Review Board held a hearing to consider the application. The documents created and reviewed pertaining to this hearing are found on the website of the Nova Scotia Aquaculture Review Board.

The process is governed by the *Aquaculture Licence and Lease Regulations* (O.I.C. 2015-338, N.S. Reg. 347/2015). Pursuant to those regulations, Grand Pass was first required to complete a "scoping process" and submit a development plan. The initial request for an option to lease was submitted on May 27, 2018. The proposal included the nature of the development, the boundaries of the proposed area, the species, method of cultivation, stages to be cultivated, scale of the operation, site size, expected annual harvest, and anticipated date of stocking. The applicant was also required to describe any benefit to the community, a description of the applicants current aquaculture activity, his knowledge and experience, a basic market plan, financial ability to carry out the development, and a plan for public engagement during the scoping process.

The Applicant proposes cultivating the American Oyster species using the suspended cultivation method.

Mr. Raymond d'Entremont, sole director and president of Grand Pass, complied with these requirements, including a community consultation meeting. His application was then submitted to the Department of Fisheries and Aquaculture ("the Department") on February 21, 2019. At that point, a "Review Team" was assembled, which included Nathaniel Feindel, Manager of Aquaculture Development and Marine Plant Harvesting, Aquaculture Advisor Lewis Clancey, GIS Analyst Matthew King, Aquaculture Biologist Danielle St. Louis, and Dr. Anthony Snyder (Aquatic Animal Health).

That group determined that there was sufficient information to proceed to the "network review" stage. The network from which input/comments were sought consisted of:

- a) Fisheries and Oceans Canada – Maritimes Region
- b) Canadian Food Inspection Agency
- c) Transport Canada
- d) Environment and Climate Change Canada -Shellfish Water Classification Program
- e) Environment and Climate Change Canada – Canadian Wildlife Services
- f) Nova Scotia Environment - Inspection, Compliance & Enforcement
- g) Nova Scotia Environment - Protected Areas Branch
- h) Nova Scotia Agriculture
- i) Nova Scotia Community, Culture, and Heritage
- j) Nova Scotia Department of Lands and Forestry
- k) Municipality of the District of Argyle.

Mr. Feindel's affidavit filed with the Board details the steps taken to process the application and attaches the responses of the various network agencies. Mr. Feindel also testified at the Board hearing. It should be noted that Mr. Feindel's extensive education and experience qualify him as an expert in the field of aquaculture.

Mr. Raymond d'Entremont also testified before the Board, and his power point presentation was entered as an exhibit. His CV and his initial application for an option to lease are contained in Mr. Feindel's affidavit.

During and following the network review stage, the Review Team conducts its own internal review of the application, the "Verification and Evaluation Stage". Also included in the verification and evaluation were Megan Greenwood (Licensing Coordinator for the La Grande Pass Applications), Roland Cusack (Chief Veterinary Officer), , Robert Ceschiutti (Manager of Licensing and Leasing), Dr. Gregor Reid (then Manager, Farm Operations) and Bruce Hancock (Executive Director of Aquaculture).

At this stage, the Department assesses whether the application is technically feasible.

The *Aquaculture Licence and Lease Regulations* made pursuant to the *Fisheries and Coastal Resources Act* frame and direct the factors that the Nova Scotia Aquaculture Review Board must take into consideration in its decision-making process:

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;

The “network review” process, and the responses of the reviewers, provide much of the expert evidence to assist the Board in reaching a decision. This evidence was supplemented by the viva voce evidence given by Mr. d'Entremont, Mr. Feindel, and Mr. Robert Ceschiutti, Manager of Licensing and Leasing in the Department. As well, the Board heard evidence from Mr. Stanley “Ernie” Porter, a member of the public, who is currently in the process of making his own application for an oyster production site near Antigonish.

There were no applications for intervenor status, and no other public comment.

We will address each of the s.3 criteria separately. Ms. Alison Campbell, legal counsel for the Department, correctly points out that first criteria, “the optimum use of marine resources” is essentially a finding that the Board must make, after reviewing all of the other s.3 factors.

3 (b) The contribution of the proposed operation to community and economic development

Mr. d'Entremont has identified some 29 local services and suppliers that his operation would use, mostly local, and all within the boundaries of the Province. In addition, he anticipates 3 seasonal and 3 fulltime employees will be utilized. While this is not a large employment base, the project, like many small, local, businesses will add value to the community. Many small businesses, taken together, may contribute as much or more than a single mega-business.

Mr. d'Entremont also noted the high demand for oysters, and that a neighboring site, Ruisseau Oysters, cannot keep up with demand; one of his markets will be Ruisseau. He says that some New Brunswick farmers would also provide a market.

The Municipality of the District of Argyle has been actively encouraging aquaculture development within the region; they have invested in the industry by creating a “business park on the sea”. They have gathered data on water conditions, and have created an interactive, online map for use by potential investors.

The Review Team assessed the feasibility of the production plan proposed in the La Grande Pass Applications. They reported that American oyster is a suitable species to be cultivated in Nova Scotia. Nova Scotia oyster aquaculture leases produced \$2.5 million worth of oysters in 2018. As well, the production of oysters aligns with the current provincial priorities as oysters (along with Rainbow Trout and Atlantic Salmon) are the Department's top three priority species for aquaculture.

Some concern was expressed regarding the financial viability, given that the time to reach full production is usually 4-6 years. However, it is the intention of the applicant to bring “cocktail size” oysters to market initially, as they can be harvested after 3 years.

The Board is satisfied that this criterium has been met by this proposal.

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

According to Mr. Feindel's affidavit, the Department of Fisheries and Oceans (DFO) was consulted. DFO reviewed the application to assess "the death of fish by means other than fishing; the harmful alteration, disruption or destruction of fish habitat; the killing, harming or harassing of aquatic species listed under the *Species at Risk Act* (SARA) and the destruction of their critical habitat." Regarding fish habitat, DFO concluded that species likely to be affected by the proposed site included: Atlantic herring, winter flounder, American eel, American lobster, American oyster, sea scallop, and various species of clam and crab. DFO found that the installation of anchors and shading of light from the oyster cages had the potential to cause negative impacts, however, these negative effects were determined to be low. DFO also concluded that although some species listed in the *Species at Risk Act* (SARA) used the area in the vicinity of the proposed site, there was no critical habitat in the vicinity. As a result, DFO determined that there were no prohibited effects on SARA listed species likely to occur.

DFO also examined the potential impact of the proposed site on fisheries. It was noted that the proposed site is located in the lucrative and ecologically and biologically significant "Lobster Bay area". A number of fisheries operate in the vicinity including the commercial lobster fishery, inshore clam fisheries, commercial harvesting of marine plants and, recreational fisheries for groundfish.

The Applicant reported that there was lobster fishing and rockweed harvesting in the area of the La Grande Pass applications. He states there will be no great impact on these existing fisheries activities. He was required to conduct public consultation during the scoping phase and reported that no concerns were raised by lobster fishers, or any other commercial fishers during that process. The Review Team advised that the establishment of the proposed lease will pose minimal risk to the fishing industries within the area of the proposed lease space and immediate vicinity, and in fact the lease space may have positive effects on the fisheries of the area. Oyster will be filtering the water and potentially decreasing turbidity, allowing more light to penetrate the water and support the photosynthetic growth of the marine plants, like rockweed, in the area. The establishment of infrastructure for the farm can create artificial habitat for lobsters, their prey species and other lower level trophic level species that will result in the attraction of higher level trophic species like; lobster, crabs, mackerel, herring flounder, etc. therefore, potentially increasing the biodiversity of the area.

The Network Agencies did not raise any concerns regarding the impact on other fisheries.

DFO recommended that the Applicant be advised of a number of Federal Acts and Regulations that must be complied with if the Applicant's site was approved, and Grand Pass was advised.

The Board notes that there was no objection heard from commercial fishers to the proposal, nor did any commercial fishers or indigenous groups fishing commercially, or under treaty/indigenous rights, apply for intervenor status or to participate as members of the public before the Board.

The Board is satisfied that the plan as proposed will not disrupt other fishery activities in the area, although Grand Pass must consult with Lobster Fishery Area 34 Advisory Committee, and of course, upon approval of the application by the Board, it is obligated to consult and comply with Transport Canada requirements regarding other marine traffic .

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

The Review Team assessed many aspects of the oceanographic environment, including wind data presented by the applicant, risk to the structural integrity of the operation from waves or current, water salinity, water temperature ,water depth and water quality. The details of their review, and input, are contained in the affidavit of Nathaniel Feindel, and the results satisfy the Board that the oceanographic and biophysical characteristics of the surrounding waters are suitable for this project.

3 (e) The other users of the public waters surrounding the proposed aquacultural operation and 3 (f) the public right of navigation;

As noted above, other users include commercial lobster fishery, inshore clam fisheries, commercial harvesting of marine plants and, recreational fisheries for groundfish. The Department of Fisheries and Oceans (DFO) noted that the commercial lobster fishery in the area runs from the last Monday in November to May 31 of each year, and the area is minimally fished for food, social and ceremonial purposes by Indigenous persons year round. The applicant was advised to consult with the Lobster Fishing Area 34 Advisory Committee which meets bi-annually in June and October.

Robert Ceschiutti, the Manager of Licensing and Leasing in the Department of Fisheries and Aquaculture, is responsible for consultations with Mi'kmaq communities respecting established or asserted Mi'kmaq Aboriginal or treaty rights in the context of decisions or activities relating to specific aquaculture sites. On July 12, 2019, Brennan Goreham, the Aquaculture Administrator, sent a letter of offer to consult to the following 11 communities:

- a) Acadia First Nation
- b) Annapolis Valley First Nation
- c) Eskasoni First Nation
- d) Glooscap First Nation

- e) L'sitkuk (Bear River First Nation)
- f) Membertou First Nation
- g) Paqtnkek First Nation
- h) Pictou Landing First Nation
- i) Potlotek (Chapel Island) First Nation
- j) Wagmatcook First Nation
- k) We'koqma'q First Nation

The offer to consult included some detail on the Grand Pass application, including the GPS coordinates of the proposed sites.

On August 14, 2019, a response was received from Twila Gaudet, Director of Consultation for the Kwilmu'kw Maw-klusuaqn (KMKNO), confirming they wished to proceed with consultation. The KMKNO is the body representing these communities in negotiations. Ms. Gaudet was provided with a link to the online development plan of the applicant. On February 14, 2020, Ms. Gaudet advised that “There are many recorded archeological sites inland and around Lobster Bay. It is imperative that Mi'kmaq access to fish for food, social, and ceremonial (FSC) purposes is not impeded, as well as treaty-based fisheries, including the ability to fish for a moderate livelihood. It is requested that all information and correspondence be forwarded to KMKNO to facilitate the flow of the process and communication”.

In response, on May 8, 2020, Mr. Ceschiutti advised of the status, directed her to the documents online, and confirmed that there was no information to date to indicate that there would be any impact on FSC or treaty-based fishery, and that if approved, the sites would have to comply with direction from Transport Canada to comply with the *Navigable Waters Act* which protects public right of navigation.

Ms. Gaudet responded that she trusted that KMKNO would be advised by the Department of Fisheries and Aquaculture if and when the application was approved.

Nova Scotia Communities, Culture and Heritage was also consulted. They noted “no immediate archeological concerns, although it is ascribed “elevated archeological potential” to the area, and recommended that a condition of any license be a requirement that the operator contact the Coordinator of Special Places if any Archeological artifacts are recovered or observed.

There was concern expressed by Environment and Climate Change Canada - Canadian Wildlife Service (CWS) of potential threat to critical habitat of Eastern Baccharis, a threatened plant species which is potentially in the vicinity of the applicant's land-based property. The concern is related to his possible development of a wharf and landing for his aluminum work vessel. They asked that no coastal clearing or destruction occur, and that Grand Pass use existing infrastructure. That is consistent with the applicant's plan., and the Department advises

that will incorporate those concerns and conditions in the Applicant's farm management plan, upon approval of the application.

The Board is satisfied that there will be no interference with other users of the public waters, or the public right of navigation, and as such, will be controlled by Transport Canada, as well as the required Farm Management Plan, should the application be approved.

3 (g) The sustainability of wild salmon

According to Mr. d'Entremont, there are no salmon runs in the proximity of the proposed operation, and DFO did not identify any potential risks to wild salmon. There was no evidence before the Board that the operations would have any impact on the wild salmon population.

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

There are currently no other aquaculture sites in the public waters immediately surrounding the proposed site, although the applicant has mentioned one other facility in the area. The concern would appear to be biosecurity. Mr. Feindel advises that this can and will be addressed in the applicants Farm Management Plan.

Conclusion:

After assessing all of the required criteria, against the backdrop of the extensive expert and other evidence provided to the Board, the Board is satisfied that the proposed Grand Pass oyster plan represents the optimum use of marine resources.

IT IS ORDERED that:

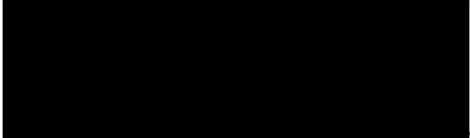
The application is allowed subject to any terms and conditions imposed by Transport Canada, subject to the requirements of a Farm Management plan pursuant to the *Aquaculture Management Regulations* NS Reg. 348/2015, as amended, and subject to the terms and conditions below:

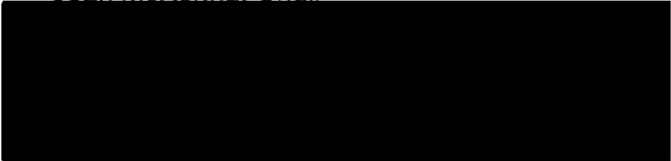
- 1. The operator must contact the Coordinator of Special Places if any archeological artifacts are recovered or observed as recommended by the Department of Communities, Culture and Heritage.**
- 2. The operator must consult with the Lobster Fishing Area 34 Advisory Committee as recommended by Fisheries and Oceans Canada.**

DATED at Halifax, Nova Scotia this

17th day of November

, 2020.


Jean McKenna, Chair


Michael McKinnon, Board Member

DISTRIBUTION: Alison Campbell, Solicitor on behalf of the Department of Fisheries and Aquaculture
Raymond d'Entremont, Grand Pass Oysters Ltd.
Jean McKenna, Chair, Nova Scotia Aquaculture Review Board
Michael McKinnon, Board Member, Nova Scotia Aquaculture Review Board