DECISION ON INTERVENOR STATUS **NSARB 2021-001**

NOVA SCOTIA AQUACULTURE REVIEW BOARD

IN THE MATTER OF: application made by **KELLY COVE SALMON LTD.** for a **BOUNDARY AMENDMENT** to **AQ#1039** in **ANNAPOLIS BASIN, DIGBY CONTY** for the **SUSPENDED CULTIVATION** of **ATLANTIC SALMON.**

BEFORE: Jean McKenna, Chair
Michael McKinnon, Board Member
Richard (Dick) Patterson, Board Member

An application has been made under section 23 of the Aquaculture Licence and Lease Regulations by **St. Mary's Bay Protectors (SMBP)** for intervenor status at the adjudicative hearing referenced above.

The Nova Scotia Aquaculture Review Board has the authority to grant intervenor status under section 23 of the Aquaculture Licence and Lease Regulations. Subsection 23(4) of those regulations provides as follows:

> (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.

REVIEW OF APPLICATION:

As part of its considerations in determining whether an intervenor applicant is substantially and directly affected by a hearing, the Board references the factors set out in section 3 of the Aquaculture Licence and Lease Regulations.

The Board has received and reviewed the submitted application materials, filed on behalf of St. Mary's Bay Protectors. The Board has decided that they do not qualify for intervenor status. They base their application on two items:

1) As an organization, SMBP has a direct and substantial interest in ensuring the lawful and effective regulation of open pen net farms in its local bays, and in protecting and preserving the local marine and coastal ecosystems, and,
2) SMBP's core members are local citizens, lobster fishers, and business owners who will be substantially and directly affected on an individual basis by the NSARB's decision on this application.

Their core members include Gwen Wilson, a resident of Sandy Cove; Rick Wallace, a resident of Freeport; Cassie Melanson, a lobster fisher in St. Mary's Bay, and the Bay of Fundy; Mark Melanson, her husband who fishes with her; Monica Stark, of Freeport, whose husband is a lobster fisher in St Mary's Bay; and Katherine Kirk, a resident of Freeport.

None of these individuals live adjacent, or close to, the Rattling Bach site, or even on the Annapolis Basin. Their fishing activity takes place in St. Mary's Bay.

In order to be granted intervenor status, the applicant must be substantially and directly affected, by the hearing.

The applicants rely on the decision in Specter v Nova Scotia 2011 NSSC 333. In considering a request for standing, Justice Leblanc noted as follows:

[61] "In my view, how the test for standing is phrased is largely irrelevant. It does not matter whether a statute uses the phrase, “person aggrieved”, “person directly affected”, or “direct and personal interest”. What matters is the interpretation that is given to these phrases. This necessarily involves a textual, contextual, and purposive analysis of the applicable legislation. Involved in this interpretation is the concern of courts that an overly broad interpretation will allow mere “busybodies” to flood the courts with litigation challenging public decisions.

[62] The key question to ask is whether a potential applicant has an economic, commercial, legal, or personal interest in a decision that is sufficiently delineated from the concerns of the general public so as to make them a “person aggrieved”.

[63] The interests of adjacent property owners may fall into any of these categories. What may set adjacent property owners apart from other potential applicants is that their proximity to the place affected by a decision makes them sufficiently different from other potential applicants."

There is nothing about these applicants that delineates these individuals, or the group that they represent, from any other concerned citizen. While they have demonstrated a concern about aquaculture in the past, they have no connection to the Rattling Beach site, either by residence, or by the fishing activity of several of them. The group's name, and the geographic focus of their organization is not the Annapolis Basin, but St. Mary's Bay.

We certainly do not characterize these individuals as "busybodies". Community interest in aquaculture and other endeavors is commendable, but their interest is clearly not sufficient to allow them to participate in the process as a party. They are not shut out, by any means; the legislation and regulations recognize the importance of public input; they can make an oral statement, or a written submission. They are however, not permitted to call witnesses or cross examine the witnesses presented by the parties, or by any other possible intervenors.

DECISION:

The application of St. Mary's Bay Protectors for intervenor status is denied.

Pursuant to subsection 23(5) of the Aquaculture Licence and Lease Regulations, a decision made by the Board with respect to intervenor status is final.

DATED at Halifax, Nova Scotia this 19th day of March, 2021.

Jean McKenna
Chair, Nova Scotia Aquaculture Review Board

RECEIVED
By Nova Scotia Aquaculture Review Board at 1:51 pm, Mar 12, 2021

Nova Scotia Aquaculture Review Board
P.O. Box 2223, Halifax, Nova Scotia, B3J 3C4
AQUACULTURE.BOARD@NOVASCOTIA.CA

INTERVENOR STATUS APPLICATION

Instructions

Please submit this form to the Aquaculture Review Board (Board) no later than ***ten calendar (10) days*** after the publication date of the public hearing notice. You may attach additional pages if necessary.

Intervenor Status Applications will only be processed if they are received by the Board on or before 4:30 pm (local Nova Scotia time) on the deadline date, without leave of the Board.

A person applying for intervenor status for more than one application must complete and submit individual Intervenor Status Applications forms for each application.

Pursuant to s.23 of the *Aquaculture Licence and Lease Regulations*, the Board will decide on this Intervenor Status Application within ten (10) days of receipt and will notify you of the decision no later than five (5) days after the decision is made.

All information provided to the Board on this form and any additional pages submitted (the "form information") will become a part of the record of the hearing. Should your application for intervenor status be accepted, the form information will be disclosed to the other parties to the hearing.

You are also advised that the form information may be subject to an access request under the *Freedom of Information and Protection of Privacy Act* ("FOIPOP") and may, as a result, be released unless the information is exempt from disclosure under FOIPOP.

Please refer to the *Aquaculture Licence and Lease Regulations*, s.23 (attached) for more information on Intervenor Status Requests.

Application

Please read the entire application before responding. **(Print clearly or type)**.

1. Please identify the aquaculture lease application that you are requesting intervenor status for:

   Lease Number: 1039 Hearing Date: May 10, 2021

2. Name of Applicant: St. Mary's Bay Protectors

3. Civic Address: Freeport Community Development Association, 247 Highway 217, Freeport, NS, B0V 1B0

4. Mailing Address: (if different than above) PO Box 39, 247 Highway 217, Freeport, NS, B0V 1B0

5. Phone Number(s): (902) 834-2866

6. Email Address*: info@protectourbay.ca

7. Preferred method of communication: ■email* ☐Mail ☐Other:_____
   *Unless otherwise notified, email will be the preferred method of communication

8. Specifically describe how the proposed aquaculture activities may substantially and directly affect you:

See attached submission.

9. Describe your existing uses, if any, of the proposed lease site, and state whether the identified uses are recreational or commercial:

See attached submission.

Nova Scotia Aquaculture Review Board
P.O. Box 2223, Halifax, Nova Scotia, B3J 3C4
AQUACULTURE.BOARD@NOVASCOTIA.CA

10. Describe your existing uses, if any, of the area surrounding the proposed lease site, and state whether the identified uses are recreational or commercial:

See attached submission.

11. Please provide any other information which you consider relevant to your application for intervenor status including any affiliations, if any:

See attached submission.

12. Declaration

By signing and submitting this form, I acknowledge that I have read, understand and accept the above statements regarding the collection, use, and disclosure of the personal information provided on this form. I also hereby certify that the information provided on this form is true and correct to the best of my knowledge and belief.

Gwen Wilson Digitally signed by Gwen Wilson Date: 2021.03.10 17:19:21 -04'00'

Signature of Applicant

10/03/2021

Date

For Internal Office Use Only

Notice Date: March 3, 2021

Date Received: March 12, 2021

Decision Date: March 19, 2021

Decision: ☐Approved ☑Denied

Decision Notes: _____

Applicant Notification Sent: March 22, 2021

Notification to Parties Sent: N/A

Nova Scotia Aquaculture Review Board
P.O. Box 2223, Halifax, Nova Scotia, B3J 3C4
AQUACULTURE.BOARD@NOVASCOTIA.CA

Additional Information on Intervenor Requests

Excerpt from the Aquaculture Licence and Lease Regulations

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.*

In making decisions on intervenor request, the Board will reference the regulated factors below to determine whether the intervenor applicant is directly and substantially affected by the hearing pursuant to section 23(4) above.

Excerpt from the Aquaculture Licence and Lease Regulations

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;

VANCOUVER CALGARY TORONTO OTTAWA HALIFAX

ecojustice

Sarah McDonald &
Caitlin Urquhart
1801 Hollis Street, Suite 520
Halifax, NS B3J 3N4
Tel: 902-417-1700 ext. 643/647
Fax: 902-417-1701
Email: smcdonald@ecojustice.ca
curquhart@ecojustice.ca
File No.: 2044

March 12, 2021

Sent via e-mail to:
AQUACULTURE.BOARD@NOVASCOTIA.CA

Nova Scotia Aquaculture Review Board
6th Floor, World Trade and Convention Centre
1800 Argyle Street
Halifax, NS B3J 2R5

Dear Aquaculture Review Board members,

We are counsel for the St. Mary's Bay Protectors (**SMBP**) for the purpose of this Application. Please accept this submission as SMBP's Intervenor Status Application for the upcoming Aquaculture Review Board (**ARB**) hearing regarding Kelly Cove Salmon Ltd. (**Kelly Cove**)'s application for a boundary amendment to AQ#1039.

SMBP is a grassroots community group based in the Digby area. Its membership is comprised of local citizens, lobster fishers and business owners concerned about the economic prosperity, social well-being, and environmental sustainability of their coastal resources. SMBP and its members are dedicated to preventing the expansion of open net pen salmon farming in their local bays, and to ensuring the effective, transparent, and lawful regulation of existing operations.

SMBP squarely meets the test for intervenor status before the ARB as set out in s 23(4) of the *Aquaculture Licence and Lease Regulations* (the ***Regulations***). SMBP must therefore be granted intervenor status at the upcoming ARB hearing.

(1) Legal Context

The *Regulations* require the ARB to grant intervenor status to "[…] any person requesting it who, in the opinion of the Review Board, is substantially and directly affected by the hearing."[1] In making decisions with respect to intervenor status, the ARB is also required to take 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;

[1] *Aquaculture Licence and Lease Regulations*, NS Reg 347/2015, s 23(4).

(c) fishery activities in the public waters surrounding the proposed aquacultural operation;
(d) the oceanographic and biophysical characteristics of the public waters surrounding the proposed aquacultural operation;
(e) the other users of the public waters surrounding the proposed aquacultural operation;
(f) the public right of navigation;
(g) the sustainability of wild salmon; and
(h) the number and productivity of other aquaculture sites in the public waters surrounding the proposed aquacultural operation.[2]

The test for intervenor status before the ARB has not yet been judicially interpreted – however, Nova Scotia's Supreme Court has made it clear that standing provisions under the *Fisheries and Coastal Resources Act* (***FCRA*** or the **Act**) must be interpreted broadly and liberally.[3] The factors listed above, which must be weighed by the ARB when evaluating applications for intervenor status, also suggest that the Board must take an expansive and holistic view of the "substantially and directly affected" test.

Like all statutes, the *FCRA* and its *Regulations* must be construed in accordance with the following universally accepted principle:

> […] the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[4]

One of the *FCRA*'s explicit purposes is to "foster community involvement in the management of coastal resources."[5] The Act's emphasis on community involvement is again repeated in "Part V: Aquaculture." Section 43A provides that "[t]he purpose of this Part is to […] ensure that members of the public have access to information with respect to the regulatory process and an opportunity to participate in the process."[6]

The *Regulations*' provisions on intervenor status reflect the Minister of Fisheries and Aquaculture's commitment to increasing transparency and public participation in the regulatory process following the release of the Final Report of the Independent Aquaculture Regulatory Review for Nova Scotia (the **Doelle-Lahey Report**) in 2014. The Doelle-Lahey Report concluded, among other things, that the aquaculture industry had lost credibility in Nova Scotia and that a regulatory overhaul was needed to restore public trust in the process.[7] In response, prior to enacting the current *Regulations*, Minister Colwell made a number of public statements

---

[2] *Ibid*, s 3.
[3] *Specter v Nova Scotia (Fisheries and Aquaculture)*, 2011 NSSC 333 at paras 56-72 [*Specter*] [**Book of Authorities, Tab 1**]; *Brighton v Nova Scotia (Agriculture and Fisheries)*, 2002 NSSC 160 at para 7 [**BOA, Tab 2**].
[4] *Driedger on the Construction of Statutes*, as quoted in *Nova Scotia Real Estate Commission v Lorway (cob Lorway MacEachern)*, 2013 NSSC 291 at para 15.
[5] *Fisheries and Coastal Resources Act*, SNS 1996, c 25, s 2(f).
[6] *Ibid*, s 43A(e).
[7] Meinhard Doelle & William Lahey, *A New Regulatory Framework for Low-Impact/High-Value Aquaculture in Nova Scotia: The Final Report of the Independent Aquaculture Regulatory Review for Nova Scotia* (Halifax, NS: Province of Nova Scotia, 2014) at 20-23 [**Appendix A**].

emphasizing the importance of transparency and public participation. For instance, he declared that "[…] it's important that industry and the public have a venue where they can go to make their case."[8]

Given this context, SMBP respectfully submits that the test for intervenor status must be interpreted broadly and liberally so as to encourage the participation of a wide variety of stakeholders before the ARB. This is consistent with the clear purpose of the *FCRA* and with the Minister's intention when drafting the updated *Regulations* in 2015.

PLBA's interpretation is also consistent with case law from Nova Scotia's Supreme Court. In *Specter*, Justice LeBlanc had to determine whether two individuals had standing under the *FCRA* to appeal the Minister's decision to approve amendments to aquaculture licences held by Kelly Cove. Subsection 119(1) of the *FCRA* provides that "[a] person aggrieved by a decision of the Minister may, within thirty days of the decision, appeal on a question of law or on a question of fact, or on a question of law and fact, to a judge of the Supreme Court of Nova Scotia […]" The key question was therefore whether the appellants were "persons aggrieved."

In making his decision, Justice LeBlanc opined on the test for standing:

> In my view, how the test for standing is phrased is largely irrelevant. It does not matter whether a statute uses the phrase, "person aggrieved," "person directly affected," or "direct and personal interest." What matters is the interpretation that is given to these phrases […]
>
> The key question to ask is whether a potential applicant has an economic, commercial, legal, or personal interest in a decision that is sufficiently delineated from the concerns of the general public so as to make them a "person aggrieved."[9]

As described in more detail below, SMBP's interest in the hearing has two primary facets:

(1) As an organization, SMBP has a direct and substantial interest in ensuring the lawful and effective regulation of open net pen salmon farms in its local bays, and in protecting and preserving its local marine and coastal ecosystems; and
(2) SMBP's core members are local citizens, lobster fishers and business owners who will be substantially and directly affected on an individual basis by the ARB's decision on this application.

SMBP submits that either of these factors is sufficient to meet the test for intervenor status before the ARB.

---

[8] Paul Withers, "Nova Scotia promises new aquaculture regime for fish farms," April 21, 2015, online: <https://www.cbc.ca/news/canada/nova-scotia/nova-scotia-promises-new-aquaculture-regime-for-fish-farms-1.3042724> [**Appendix B**].
[9] *Specter, supra* note 3 at paras 61-62.

The Nova Scotia Utility and Review Board (**NSUARB**), applying a similar standing test, has confirmed that organizations whose objects relate directly to the matter at issue before the Board should be granted intervenor status.[10]

In *Ashcroft Homes Inc*, the NSUARB considered whether the Park to Park Community Association (the **Association**) should be granted intervenor status in an appeal from the decision of a Halifax Regional Municipality Development Officer. The test applied by the NSUARB was whether the Association had a "real and substantial interest" in the subject matter of the proceeding.[11] The NSUARB granted intervenor status to the Association on the basis that, among other things, the Association's objects related directly to the geographic area at issue in the appeal.[12]

The NSUARB also based its decision to grant intervenor status to the Association in part on its conclusion that a majority of the Association's members could be adversely affected by the appeal.[13] Similarly, Nova Scotia's Supreme Court has granted standing to a "group of concerned citizens," many of whom were property owners in the vicinity, to appeal a decision by the Minister of Agriculture and Fisheries under the *FCRA* to allow a fin fish farm in Northwest Cove, Lunenburg County.[14]

(2) St. Mary's Bay Protectors

SMBP is a grassroots community group composed of local citizens, lobster fishers and business owners who are concerned about the impact of marine-based salmon farming on the region's economic prosperity, social wellbeing, and coastal environment. SMBP is organized as a committee of the Freeport Community Development Association (the **Association**), and receives limited resources and funding through the Association.

SMBP was originally founded in 2018 in response to the Department of Fisheries and Aquaculture (**DFA**)'s announcement that Cermaq Canada had been granted a number of options to lease in St. Mary's Bay. SMBP's members were profoundly concerned about the potential impacts of a significant open net pen salmon farming expansion in St. Mary's Bay on the local marine environment, and particularly on lobster populations in St. Mary's Bay and the Bay of Fundy. Since that time, SMBP has expanded its areas of interest to encompass the existing open net pen sites in St. Mary's Bay and the Annapolis Basin, as well as elsewhere in the Province.

SMBP's broad objective is to educate the public about the impacts of open net pen aquaculture on marine ecosystems and on lobster populations specifically. SMBP is opposed to the expansion of the open net pen aquaculture industry in St. Mary's Bay, the Annapolis Basin, and across Nova Scotia. In the long term, SMBP's ultimate goal is to ensure the removal of all open net pen salmon farms from Nova Scotia waters.

---

[10] *Ashcroft Homes Inc (Re),* 2016 NSUARB 166 at paras 24-26 [**BOA, Tab 3**].
[11] *Ibid* at para 21.
[12] *Ibid,* at para 24.
[13] *Ibid,* at para 25.
[14] *Brighton, supra* note 3 at paras 1, 7.

Since SMBP's inception, the group has engaged in numerous activities to draw attention to the various environmental and other issues associated with open net pen salmon farming, to advocate against the industry's expansion in St. Mary's Bay, and to call for the lawful and effective regulation of existing open net pen sites in the Annapolis Basin and elsewhere in Nova Scotia. Those activities include the following:

a. Hosting public information sessions on Digby Neck and in the Town of Digby on the impacts of open net pen salmon aquaculture on the marine environment and the lobster fishery;
b. Presenting to Digby Municipal Council on January 27, 2020, following which Council passed a motion opposing the expansion of open net pen salmon aquaculture in St. Mary's Bay;
c. Hosting an online petition against the Cermaq's planned expansion into St. Mary's Bay, which gathered over 6,800 signatures;[15]
d. Presenting to Annapolis Municipal Council and Annapolis Town Council on the environmental impacts of open net pen salmon aquaculture; and
e. Retaining counsel to send a letter to Minister of Fisheries and Aquaculture Keith Colwell and then-Minister of Environment Gordon Wilson requesting that the Ministers require Kelly Cove to come into compliance with its lease boundaries at various sites, including AQ#1039, until such time as its lease expansion applications are lawfully approved in accordance with the required regulatory process.[16]

With respect to item (e) above, SMBP is profoundly concerned that Kelly Cove has been operating outside of its lease boundaries with impunity at site AQ#1039 for at least the past 11 years. DFA, and subsequently NSE, have consistently been made aware of this illegal activity, but have declined to take any enforcement action (as outlined in the appended letter to Ministers Colwell and Wilson). Importantly, DFA has filed a statement with the ARB on this issue (the "Report on Performance Review"). If granted intervenor status, SMBP intends to lead extensive evidence on this critical point.

SMBP's objects and activities relate directly to Kelly Cove's application to expand its lease boundary at site AQ#1039, which will be the subject matter of the ARB hearing. As a result, SMBP meets the "substantially and directly affected" test under s 23(4) of the *Regulations* and must be granted intervenor status before the Board.

(3) SMBP's Members

SMBP's core steering committee is composed of six members, many of whom will be substantially and directly affected by any decision made with respect to Kelly Cove's proposal to

[15] The petition is available here: <https://www.change.org/p/province-of-nova-scotia-protect-st-mary-s-bay-baie-ste-marie-ban-open-net-fish-farms-in-nova-scotia?utm_source=share_petition&utm_medium=custom_url&recruited_by_id=abbd2b10-f2c1-11e6-be83-c59b8a7fbfe2>.
[16] Letter to the Honourable Ministers Colwell and Wilson, January 12, 2021 [**Appendix C**].

expand its lease boundaries at site AQ#1039 in the Annapolis Basin. In addition, SMBP has 151 local citizens on its mailing list, and 700 followers on its Facebook page.

SMBP's steering committee members are as follows:

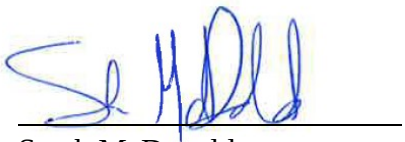
(1) Gwen Wilson: resident of the local fishing community of Sandy Cove, Digby Neck.
(2) Rick Wallace: resident of the local fishing community of Freeport, Long Island.
(3) Casie Melanson: resident of Mink Cove, Digby Neck. Ms. Melanson is a lobster fisher based in Sandy Cove, who fishes in St. Mary's Bay and in the Bay of Fundy adjacent to the Annapolis Basin. Ms. Melanson and her husband employ three full time and three part time workers as part of their lobster fishing business.
(4) Matt Melanson: resident of Mink Cove, Digby Neck, and husband of Casie Melanson. Mr. Melanson fishes lobster with his wife and employs a number of workers, as described above.
(5) Monica Stark: resident of Freeport, Long Island. Ms. Stark's husband is a lobster fisherman who fishes in St. Mary's Bay, and whose earnings as a fisherman contribute significantly to the family income.
(6) Katherine Feiel: resident of the local fishing community of Freeport, Long Island.

The impacts of the potential expansion of local open net pen salmon aquaculture operations on the members of SMBP's steering committee are also sufficient to meet the "substantially and directly affected" test. SMBP should therefore be granted intervenor status in this proceeding.

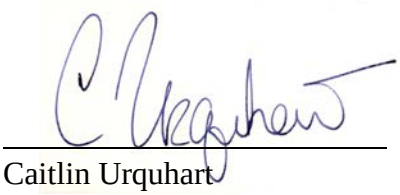
(4) Conclusion

SMBP's objectives and activities relate directly to Kelly Cove's application to expand its lease boundaries at site AQ#1039. In addition, a majority of the members of SMBP's steering committee will be substantially and directly affected by the Board's decision in this matter. In our respectful submission, the Board must grant intervenor status to SMBP in accordance with s 23(4) of the *Regulations.*

Best regards,



Sarah McDonald
Barrister & Solicitor



Caitlin Urquhart
Barrister & Solicitor

Encl.

APPENDIX "A"

A New Regulatory Framework for Low-Impact/High-Value Aquaculture in Nova Scotia

The Final Report of the
Independent Aquaculture Regulatory Review for Nova Scotia

[The Doelle-Lahey Panel]

2014

Meinhard Doelle & William Lahey

Schulich School of Law

Dalhousie University

ISBN: 978-1-55457-647-0

This document is available on the Internet at
http://www.aquaculturereview.ca/

CONTENTS

aquaculture's success in meeting the objectives of the framework will ultimately depend on how it is developed, managed and conducted by the industry.

Finally, in light of the feedback we received on performance-based versus prescriptive regulation, we have adjusted some of our specific recommendations in order to ensure we have the right combination between the two kinds of regulation. Specifically, in recommending a change of the basic architecture of the system from one extensively based on administrative discretion to one more strongly based on legislated responsibilities, we have adjusted, where appropriate, the language we use to leave appropriate and necessary scope for administrative decision making, adaptability and flexibility. The key rationale for these adjustments, which are noted where they have been made, is to ensure that the proposed regulatory framework has both the strength of a more-detailed statutory foundation and the necessary scope to deal with the variable and changing conditions in a diverse industry.

3. FOUNDATIONAL ELEMENTS OF THE REGULATORY FRAMEWORK

A regulatory framework includes, but is much more than, the rules of regulation. Regulation encompasses rules (and other kinds of regulatory standards), but it also encompasses the policy choices behind those rules and standards and the entire process by which the rules and standards are implemented and enforced.

The effectiveness of a regulatory framework therefore depends on many variables and factors in addition to the content of the rules and standards. Our process leads us to conclude that the current regulatory framework is not working optimally because of a number of factors that will not be addressed by changing the rules of aquaculture in Nova Scotia. Although we think changes in the rules are also required, these changes will not be effective in producing the improvement in regulation that we think is required unless these other factors are addressed.

3.1 Attitudes

The regulation of aquaculture in Nova Scotia reflects an attitude within the provincial government that needs to change if regulation is to become effective and trusted as being effective. The attitude in question is one that assumes that the concerns held by members of the public and local communities about the impact of the industry, especially about the environmental impact of marine-based fin-fish aquaculture, are overstated, unsubstantiated and based on a not-in-my-backyard syndrome. It is an attitude that is too quick to blame opposition to the industry on those complaining and not sufficiently critical of the industry's responsibilities for the opposition it faces. In the regulatory process, these attitudes manifest themselves as insufficiently rigorous and transparent regulation, which often ends up being understandably perceived as more concerned with defending the industry from its opponents than keeping the industry accountable for its performance and impact.

Within the industry, we saw evidence of a similar set of attitudes at play. To be fair, we heard many people from the industry speak of the industry's accountability for the opposition it faces,

and also to the role that the industry must play in gaining and maintaining public and community support. But we also detected a tendency to portray opposition as illegitimate, in some cases because it came from those who summer in Nova Scotia but do not live here year-round or because it was perceived as being orchestrated or bankrolled by national and international environmental groups that are dedicated to the destruction of the industry for ideological reasons. Sometimes, it was suggested to us that the difficulty the industry faces in getting new sites approved by regulators is the reason why the industry has lost social licence, overlooking the more likely possibility that the industry's loss of social licence accounts for the difficulties the industry increasingly faces in a regulatory process that seems to us to be geared to support the growth of the industry.

From the community perspective, we of course recognize the right of members of the public to hold whatever views they wish to hold about the industry or the role of the government in promoting it or regulating it. We are particularly aware that many who spoke to us live close to aquaculture operations while we do not, and that for many, frustration with the current regulatory process has understandably shaped their current view of the industry. That said, we are left with the view that the demonization of the industry we sometimes heard occasionally came close to overshadowing the very real problems we heard about that the regulatory framework must clearly address.

Some of the calls for regulatory protection that were conveyed to us were disproportionate to the risks posed by aquaculture and to how comparable levels of risk created by other industries are addressed. We not only understand the inability of regulators to meet those expectations, we also question whether it would be sensible public policy for them to do so given the level of resources such an effort would require. We also must comment that although there are very real and legitimate concerns about the impact that certain kinds of aquaculture may have on other ways of making a living, we question the unwillingness we sometimes heard to acknowledge any value in the wealth and jobs created by aquaculture, an industry that has been in the province for at least 40 years and that is currently worth almost $50 million dollars in annual sales.[47]

Sometimes, this unwillingness seemed to reflect the kinds of attitudes to economic development that the One Nova Scotia Commission concluded are working against Nova Scotia's very viability as a province. It seems clear to us that for the benefit of all Nova Scotians, it will be critical that a new regulatory approach to the industry be accepted by those suspicious of the industry – both as a fresh start and as an opportunity by government and industry to establish constructive relationships with local communities and other users of coastal waters. While changes in attitude within government and industry are a precondition for progress, an openness to change among those who have felt disenfranchised by the regulatory process in the past will be a critical ingredient to reaching the goal of ensuring that aquaculture contributes to sustainable prosperity, particularly in rural Nova Scotia.

[47] As was pointed out to us during the public meetings we held to receive feedback on our draft report, this number does not reflect the net economic benefit to Nova Scotia. It is merely a number that offers a sense of the size of the industry.

3.2 Social Licence

Social licence refers to the informal permission that society or a segment of society, such as a local community, does or does not give to an industry, an activity or a project. The relationship between social licence and formal regulation is complex. On the one hand, effective regulation can help to create, reinforce and sustain social licence. On the other hand, the presence or absence of social licence can be one of the key determinants of the effectiveness of regulation.

Our conclusion is that the aquaculture industry in Nova Scotia, particularly marine-based salmon farming, has a social licence problem.[48] Fair or unfair, this reflects a perception that the industry is a significant polluter of the marine environment, using practices that are not sustainable for ecosystems, or the health of the fish that are farmed, or the wild fish or other aquatic life that comes into proximity with "open-net pens," frequently called "feed lots" by their detractors.

In our process, we heard polarized views on the question of social licence. From an industry perspective, the message sometimes seemed to be that social licence depends on industry and regulators staring down the unreasonable opposition and working with those in society who are prepared to have an open mind and to accept the facts. From an oppositional perspective, we sometimes were flatly told that no amount of regulation could solve the social licence problems of an inherently unsustainable industry. But from both perspectives, we also heard many more nuanced opinions that recognized the vital contribution that regulation could make in helping the industry's social licence problem by helping the industry avoid or fix the problems it has encountered in the past.

Our conclusion is that for fin-fish aquaculture to develop in Nova Scotia, the social licence problem will have to be addressed. If the development of fin-fish aquaculture continues in the absence of improved social licence, there is a real possibility that the social licence of aquaculture in general may come into doubt. Already, we see some evidence of that happening. Our process leads us to the conclusion that the social licence problem is deeper than the ineffectiveness and non-responsiveness of the current regulatory framework. But it also leads us to conclude that the social licence issue cannot be addressed unless the effectiveness of the regulatory framework is significantly improved and is seen to be improved in visible and tangible ways.

This does not mean additional levels and layers of regulation and oversight for the purpose of showing an increase in regulation. Even if that approach mitigated the social licence gap, which is unlikely, it would cause other kinds of barriers to the health of the industry. What it does mean, at a

[48] In our draft report, we said, "There seems to be widespread agreement that marine-based fin-fish aquaculture does not currently enjoy high social licence in Nova Scotia or across Canada." The ACFFA stated that this was incorrect because research commissioned by the aquaculture industry shows high support for aquaculture in the communities in which the industry operates and because opinion surveys conducted by Corporate Research Associates shows that the majority of Nova Scotians support the expansion of salmon farming. We do not agree that this shows our original statement was incorrect, but we do accept that it was worded too broadly. Meanwhile, given all that we heard in our process, including from most of those we spoke to from the industry, we can and do conclude that the industry has a social licence problem. What differs is what people attribute this problem to, as we indicate in the following sentences. For some, it is the conduct or track record or business model of the industry. For others it is because of well-financed ideological campaigns of opposition and/or weak or inconsistent government policy or decision making.

minimum, is regulation that deals directly and responsively with the real and legitimate issues that the industry must address if it is to enjoy better social licence.

We think, however, that Nova Scotia should aim higher than the minimum. Our mandate asked us to consider the regulation of aquaculture in light of the *Environmental Goals and Sustainable Prosperity Act*[49] and the priority it places on development that is sustainable because it integrates economic, social and environmental aspirations. In that context, we propose below that one of the goals of the new regulatory framework should be to contribute to a Nova Scotia brand of sustainable aquaculture that produces the highest-value products for the lowest possible environmental impact while maximizing social value.

3.3 Discretion

All regulatory frameworks give discretion to the regulator. In complex regulatory frameworks that govern the conduct of an industry, it is typical for the regulator to be given considerable discretion by the legislation that implements the framework. This is essential to the ability of regulators to deal with variations among the nature, scale and context of the activities that are regulated. It is also essential to the ability of the regulatory framework to evolve and change to reflect changing conditions driven by economics, technological innovation, new scientific knowledge or changing social values.

There is, however, a balance to be struck between the extent of the reliance on discretion and the laying out of the basic elements of the regulatory framework in legislation, whether it be in the statute enacted by the legislature or in the regulations that get made as authorized by the statute. Too much reliance on discretion can mean that the regulatory framework is little more than the sum total of the specific decisions made by the regulator. This is a problem on multiple levels. Regulators are provided with little guidance in how they are to carry out their work. Regulated businesses can be unsure of what is expected of them and uncertain of when and how those expectations will change. The protection provided to the people and the values the regulations are intended to protect can be uncertain and variable. Most broadly, there can be a concern that the framework is delegating not just administrative but law-making authority to regulators without making them subject to the kinds of transparency and accountability generally applied to law-making.

Our conclusion is that the regulatory framework currently in place under the *Fisheries and Coastal Resources Act*[50] and Regulations is too heavily dependent on regulatory discretion.[51] We believe that a number of the concerns we heard from communities and from industry about the current

---

[49] SNS 2012 c 42.

[50] SNS 1996 c 25; as amended by SNS 1999 c 2; as amended by SNS 2001 c 6, s 108; as amended by SNS 2005 c 50, s 1; as amended by SNS 2010 c 51; as amended by SNS 2012 c 22 [hereinafter "SNS 2012 c22"].

[51] This conclusion is also reached by ECELAW, which recommends that "government regulators should consider establishing a regulatory framework for aquaculture that reduces Ministerial discretion, providing a more consistent and predictable regulatory approach" in the report *Aquaculture Regulation in Nova Scotia: Overview of the Regulatory Framework and Considerations for Regulatory Reform*, 22–23. In providing feedback on our draft report, the ACFFA questioned this conclusion, saying it was not supported by evidence and facts. All we can say is it is one of the core conclusions we came too over the course of our mandate, and it is supported by feedback we have received throughout our process from a broad range of stakeholders.

APPENDIX "B"

Nova Scotia

Nova Scotia promises new aquaculture regime for fish farms

Independent Nova Scotia Aquaculture Review Board will have final say on future fish farm sites

Paul Withers · CBC News · Posted: Apr 21, 2015 5:56 PM AT | Last Updated: April 21, 2015

Keith Colwell, the Minister of Fisheries and Aquaculture, is promising more transparency and rigour when it comes to regulating fish farms. (CBC)

Nova Scotia's Liberal government delivered its response Tuesday to a stinging report on the province's aquaculture regime, promising more transparency and rigour when it comes to regulating fish farms.

"We need stronger oversight, more proactive release of information. This is the first step to make it a reality," Fisheries and Aquaculture Minister Keith Colwell told reporters in Halifax.

On Tuesday, Colwell introduced amendments to the Fisheries and Coastal Resources Act. Detailed regulations will follow in coming months.

The amendments create an independent three-member Nova Scotia Aquaculture Review Board that will have final approval on future fish farm sites after holding public hearings.

"We think it's important that industry and the public have a venue where they can go to make their case," Colwell said.

"We want to make sure this is not a political decision."

Big issue is mistrust

Two Dalhousie law professors — Meinhard Doelle and Bill Lahey — spent more than a year studying aquaculture. Their December 2014 report concluded the environmental risks can be mitigated but an overhaul is needed to restore the industry's credibility in coastal Nova Scotia.

Here's how the Department of Fisheries and Aquaculture responded:

- Province will set out coastal areas suitable for sites.
- Existing operations grandfathered but will eventually have to conform to new regime, requiring industry to carry out prescribed scientific testing.
- Idle sites will have year to get into production.
- Current moratorium on applications expected to be lifted by summer.
- Future applications processed within a year.

Tom Smith, the executive director of the Aquaculture Association of Nova Scotia, supported the government's direction.

"We are already developing codes of practice in consultation with government that will define how responsible farming is delivered that will meet future regulations," Smith told CBC News.

"We feel government supports the growth of the industry."

Environmentalist Ray Plourde, of the Ecology Action Centre, called the amendments "baby steps with more questions than answers."

He said Nova Scotia has avoided committing to the recommendations contained in the Doelle Lahey report.

"They are missing the most important thing — the regulatory advisory committee, which is a multi-stakeholder panel to implement the package of recommendations from Doelle Lahey," he said.

"The minister has gone off on his own."

APPENDIX "C"

VANCOUVER CALGARY TORONTO OTTAWA HALIFAX

ecojustice

Sarah McDonald
smcdonald@ecojustice.ca
520-1801 Hollis St
Halifax, NS B3J 3N4
902-417-1700, ext 643
File No: 1014

The Honourable Keith Colwell
Minister of Fisheries and Aquaculture
Department of Fisheries and Aquaculture
6th floor (Suite 607), WTCC
1800 Argyle Street
Halifax, Nova Scotia B3J 2R5
MINDFA@novascotia.ca

The Honourable Gordon Wilson
Minister of Environment
Department of Environment
Barrington Tower
1894 Barrington Street, Suite 1800
P.O. Box 442
Halifax, NS B3J 2P8
Minister.Environment@novascotia.ca

Sent via electronic mail to: MINDFA@novascotia.ca
and Minister.Environment@novascotia.ca

January 12, 2021

Dear Ministers Colwell and Wilson,

We write to you on behalf of our clients, the Protect Liverpool Bay Association, the St. Mary's Bay Protectors, the Association for the Preservation of the Eastern Shore, the Atlantic Salmon Federation, Brad Armstrong, and Geoff LeBoutillier.

Our clients are deeply concerned that the Department of Fisheries and Aquaculture (**DFA**) and the Department of Environment (**NSE**) continue to facilitate ongoing lease and licence violations at five aquaculture sites operated by Kelly Cove Salmon Ltd (**KCS**). Those five sites are as follows: AQ#0742 (Brier Island); AQ#1006 (Saddle Island); AQ#1039 (Rattling Beach); AQ#1040 (Victoria Beach); and AQ#1205 (Coffin Island). The evidence available to our clients shows that KCS has been operating in consistent violation of its lease at each of these sites for the past 5-11 years (depending on the site in question), with the knowledge of DFA and NSE.

Furthermore, rather than supporting NSE in taking appropriate enforcement action against KCS, in 2016 DFA knowingly accepted lease expansion applications from KCS for all five sites that did not comply with the requirements in the *Aquaculture Lease and Licence Regulations* (***Regulations***).[1] In particular, KCS failed to hold a single public information meeting for any of the five applications prior to submitting them to DFA, in violation of s 12(2) of the *Regulations* (although some time later, KCS did hold public meetings for the Rattling Beach and Coffin Island sites). Although KCS needs the Aquaculture Review Board (**ARB**) to approve its lease expansions, it has been over four years since the company submitted its applications to DFA and

[1] NS Reg 347/2015, ss 12, 13.

the Department has yet to refer them to the ARB for a public hearing. Meanwhile, the evidence suggests that KCS continues to operate outside its lease boundaries at all five sites.

Despite promises of increased public transparency and accountability, it is clear that neither of your Departments has meaningfully altered its approach to the regulation of aquaculture in response to the Doelle-Lahey Report and the reformed regulatory scheme. By facilitating ongoing violations of the *Fisheries and Coastal Resources Act*[2](the ***Act***) and the *Regulations*, and by continuing to deny affected communities their right to weigh in on KCS's lease expansion applications, DFA and NSE are fundamentally undermining their own regulatory scheme and subverting the rule of law.

Our clients request immediate action to resolve these pressing issues. In particular, they demand the following:

(1) That Minister Colwell reject KCS's noncompliant applications for lease expansions at sites AQ#0742, 1006, and 1040, and require KCS to hold public information meetings as required by the *Regulations* prior to submitting any further applications for those sites; and
(2) That Ministers Colwell and Gordon direct their Departments to require KCS to come into compliance with its lease boundaries at all five noncompliant sites until such time as its lease expansion applications are lawfully approved by the ARB following the required public hearings.

I. Background

(a) The Signatories

Our clients are community groups and individuals who are heavily engaged in, and concerned about, the current regulation and potential expansion of the open net pen (**ONP**) finfish aquaculture industry[3] in Nova Scotia. Among other things, they are concerned about DFA and NSE's willingness and capacity to ensure that both the industry and the Departments themselves operate within the confines of the existing legislative and regulatory scheme.

The **Protect Liverpool Bay Association** (**PLBA**) is a community group based in Liverpool, Nova Scotia, and has over 800 followers on its Facebook page. The group advocates to keep Liverpool Bay and the Province's oceans as a whole free from the destructive impacts of ONP finfish farming. PLBA has engaged in numerous activities to draw attention to the various environmental issues associated with ONP aquaculture. These activities include hosting numerous community education sessions on aquaculture related issues; organizing public rallies in both Liverpool and Halifax; presenting before the Council of the Region of Queens Municipality; and collecting signatures on a petition that was subsequently tabled at Province House by MLA Kim Masland.

[2] SNS 1996, c 25.
[3] All references to ONP aquaculture in this letter are intended to refer specifically to ONP finfish aquaculture.

The **St. Mary's Bay Protectors** (**SMBP**) is a committee of the Freeport Community Development Association and is based in the Digby area. Like PLBA, SMBP advocates for a ban on ONP finfish farming in Nova Scotia. The committee has over 700 followers on its Facebook page, and has collected over 6,800 signatures on a petition calling for a permanent moratorium on ONP fish farming in Nova Scotia. SMBP has also presented to the Digby Municipal Council, and has hosted public meetings to educate the community about the risks of ONP operations.

The **Association for the Preservation of the Eastern Shore** (**APES**) is community group with a membership base that spans numerous communities on the eastern shore of Nova Scotia. APES was originally formed in 2012, when eastern shore communities united to oppose the proposed development of ONP finfish farms in their harbours. Today, the APES continues to advocate against this practice, and strongly opposes Cooke's plans to expand its ONP operations in Nova Scotia. During the Halifax Regional Municipality elections in October 2020, APES conducted and published a survey of each of the District 2 candidates' views on open net pen finfish aquaculture. APES also recently campaigned against the renewal of the leases and licences for the Owl's Head-Ship Harbour sites, which have been the subject of numerous community complaints about abandoned gear.

The **Atlantic Salmon Federation** (**ASF**) is a world-leading science and advocacy organization dedicated to conserving and restoring wild Atlantic salmon. ASF conducts its own research on the impacts of ONP aquaculture on wild salmon populations, and advocates both for better regulation of the existing aquaculture industry and for a transition away from ONP salmon farming given the industry's significant documented impacts on wild salmon.

Brad Armstrong has been a volunteer Conservation Director with the organization Friends of Nature for the past 10 years. In that position, he has worked on numerous issues related to the protection of both terrestrial and aquatic ecosystems. In particular, he supports the Twin Bays Coalition, which advocates against ONP salmon aquaculture in Mahone Bay and St. Margaret's Bay.

Geoff LeBoutillier has long been an advocate for aquaculture reform. He founded the St. Margaret's Bay Stewardship Association, and co-founded the Twin Bays Coalition. In addition, he helped create and steer the province-wide Healthy Bays Network, which advocates against ONP aquaculture in the Province and counts PLBA, APES, SMBP, and ASF among its member organizations.

(b) The Doelle-Lahey Report

ONP finfish farming has a controversial history in Nova Scotia. In 2013, following a number of publicly divisive applications for new ONP projects, the Province imposed a moratorium on new marine-based aquaculture site applications and appointed an independent panel to analyze and recommend changes to the applicable regulatory scheme.[4]

[4] Meinhard Doelle & William Lahey, *A New Regulatory Framework for Low-Impact/High-Value Aquaculture in Nova Scotia: The Final Report of the Independent Aquaculture Regulatory Review for Nova Scotia* (Halifax, NS: Province of Nova Scotia, 2014) at 1 [**Appendix A**].

The Doelle-Lahey Panel's report (the **Doelle-Lahey Report** or the **Report**) called for a fundamental overhaul of the regulation of aquaculture in Nova Scotia. The Report outlined a comprehensive vision for the future of aquaculture regulation in the Province, and made a number of particularly relevant recommendations about the need to increase regulatory transparency and step up enforcement practices.

The Doelle-Lahey Report noted that the public distrust and lack of confidence in the regulation of aquaculture in the Province stemmed from the perception that the process was opaque and biased. As a result, the Report emphasized that the new framework should be defined by transparency and openness. Among other things, the Report stated that all documentation relating to regulatory enforcement, including public complaints and action taken in response to those complaints, should be available to the public. [5]

The Doelle-Lahey Report further emphasized the importance of effective monitoring, compliance, and enforcement in the aquaculture sector. It noted that public trust and confidence in the regulatory system were also dependent on, among other things, a higher level of regulatory scrutiny and the enforcement of regulations and licence requirements. **[6]** This is particularly important for finfish aquaculture given its "[…] greater potential to cause environmental harm in addition to harm to wild fish and marine animals if it is not conducted in accordance with regulatory requirements."[7]

The adverse environmental impacts of ONP salmon farming, and particularly the industry's impacts on wild salmon populations, are well documented and were recognized in the Doelle-Lahey Report.[8] In the interest of brevity, we will not explore those impacts in the body of this letter, but reports by the federal Committee on the Status of Endangered Wildlife in Canada,[9] the Department of Fisheries and Oceans (as it then was),[10] and the House of Commons Standing Committee on Fisheries and Oceans[11] are appended for your convenience.

(c) Legislative and regulatory amendments

Following the Doelle-Lahey Report, in 2015 the Province brought in new legislation and regulations with the goal of reforming aquaculture regulation and restoring social licence to the industry. In speaking to the Province's bill amending the aquaculture-related provisions in the *Fisheries and Coastal Resources Act,* Minister Colwell emphasized that the purpose of the amendments was to increase regulatory transparency and enhance oversight of the industry:

---

[5] *Doelle-Lahey Report, supra* at 56-60.
[6] *Ibid* at 114-117.
[7] *Ibid* at 115.
[8] *Ibid* at 8-13.
[9] COSEWIC, *Assessment and Status Report on the Atlantic Salmon in Canada* (Ottawa: Committee on the Status of Endangered Wildlife in Canada, 2010) at 41, 100-101, 103 [**Appendix B**].
[10] Fisheries and Oceans Canada, *Recovery Strategy for the Atlantic Salmon (*Salmo salar*), inner Bay of Fundy populations* (Ottawa: Fisheries and Oceans Canada, 2010) at 23-24 [**Appendix C**].
[11] House of Commons, Standing Committee on Fisheries and Oceans, *Wild Atlantic Salmon in Eastern Canada* (January 2017) at 10 & 25 [**Appendix D**].

> Yesterday I introduced an amendment to the Fisheries and Coastal Resources Act that signals a more transparent, rigorous approach to regulating aquaculture in Nova Scotia. We are beginning the process to implement the advice we received from Professors Doelle and Lahey […]
>
> Mr. Speaker, that we need stronger oversight and more proactive releases of information when it comes to aquaculture in Nova Scotia was clear from the advice that we received in the Doelle-Lahey report. This is the first step to make that reality and build trust between the public, government, and industry.[12]

Minister Colwell made similar statements to the media when the *Aquaculture Licence and Lease Regulations* were made in October 2016. Among other things, he said the new regulations would provide a "more accountable and responsible approach to aquaculture" and predicted they would restore public confidence in the industry.[13]

II. Ongoing lease and licence violations at ONP sites operated by Kelly Cove Salmon Ltd.

Unfortunately, Minister Colwell's promises have not been realized. Although the 2015 statutory amendments and the new *Regulations* created a new regulatory scheme with an increased focus on public engagement and transparency in decision-making, DFA (and now NSE)'s regulatory practices have not followed suit. Not only have DFA and NSE disregarded consistent and ongoing lease and licence violations at the five ONP sites listed above, but DFA has effectively granted KCS *de facto* lease expansions at these sites without requiring the company to go through the approval process set out in the new *Regulations*, including the extensive public engagement mandated under that scheme. The actions of both Departments are therefore contrary to law – not to mention that they fundamentally undermine DFA's own regulatory scheme for the aquaculture industry, erode the public trust, and subvert the rule of law.

(a) DFA & NSE's failure to enforce the regulatory scheme

As noted above, this letter addresses concerns with respect to five salmon aquaculture sites in the Province, all operated by KCS, a division of Cooke Aquaculture Inc. These sites are as follows: AQ#0742 (Brier Island); AQ#1006 (Saddle Island); AQ#1039 (Rattling Beach); AQ#1040 (Victoria Beach); and AQ#1205 (Coffin Island).[14]

Evidence obtained from both DFA and NSE suggests that KCS has been operating in consistent violation of its leases and licences at each of these sites for the past 5-11 years, depending on the site in question.[15] The most recently available Google satellite imagery likewise confirms that

---

[12] Nova Scotia, House of Assembly, *Hansard*, 62nd Assembly, 2nd Sess, Vol 15, No 52 (23 April 2015) at 4177 (online: <https://nslegislature.ca/legislative-business/hansard-debates/assembly-62-session-2/house_15apr23>).
[13] CBC News, "New Nova Scotia aquaculture regulations 'more accountable," October 26, 2015, online: < https://www.cbc.ca/news/canada/nova-scotia/nova-scotia-aquaculture-fish-farms-moratorium-1.3288661>.
[14] Current leases and licences for each of these sites, with the exception of AQ#1006, are available on DFA's website: https://novascotia.ca/fish/aquaculture/public-information/.
[15] DFA Aquaculture Site Inspection Form (AQ#0742), August 28, 2015, p 1-8; NSE Aquaculture Site Inspection Form (AQ#0742), November 9, 2018; Lease inspection chart (AQ#0742), January 2019; DFA notes& sketch from lease inspection (AQ#1039), February 3, 2010; DFA notes from lease inspection (AQ#1039), May 7, 2013; DFA

between 2019 and 2020 KCS continued to operate outside of its lease and licence boundaries at each of these five sites.[16] Configuring their sites in this way may allow KCS to have more cages, and more fish, on each of their sites than the size of their lease and licence would otherwise permit.[17] The lease boundaries may also be important when it comes to minimizing environmental impacts caused by waste loads, and impacts to adjacent fisheries.[18] Further, as you know, operating outside lease and licence boundaries is in direct violation of s 55(2)(b) of the *Regulations* and is an offence pursuant to s 110(f) of the *Act.*

DFA has received consistent complaints from the public about lease and licence violations at sites AQ#1039 and 1040 since approximately 2013.[19] Likewise, since NSE took over aquaculture-related enforcement in 2016 that Department has received numerous complaints of violations at AQ#0742, 1039, 1040, and 1205.[20] Despite this high level of engagement, and the Departments' own knowledge of consistent lease and licence violations, there is no evidence that the situation has been rectified. This is particularly disturbing in light of the Doelle-Lahey Report's recommendations on effective and transparent enforcement, and Minister Colwell's clear public commitment to follow the Report and move toward higher levels of accountability for both DFA and the industry.[21]

(b) DFA's unlawful *de facto* approval of Kelly Cove's lease expansions

---

Aquaculture Site Inspection Form (AQ#1039), June 11, 2014; Lease inspection chart (AQ#1039), June 13, 2014; Letter from DFA to KCS noting lease violations (AQ#1039), May 11, 2015; DFA Aquaculture Site Inspection Form (AQ#1039), September 3, 2015, p 1-18; DFA Aquaculture Lease Inspection Report (AQ#1040), July 10, 2012; DFA Aquaculture Lease Inspection Report (AQ#1040), May 7, 2013; Lease inspection chart (AQ#1040), June 13, 2014; DFA Aquaculture Site Inspection Form (AQ#1040), September 3, 2015, p 1-17; NS Inspection Report (AQ#1205), August 25, 2015; Lease inspection chart (AQ#1205), August 27, 2015; DFA Lease inspection chart (AQ#1205), May 19, 2016 [**Appendix E**]. See also Google Earth satellite images collected from 2009 and 2011 showing lease and licence violations at AQ#1006 [**Appendix F**]. Note that Google Earth imagery does not show all equipment related to the site – for example, it does not show anchors and may not show all buoys.

[16] See Google Earth satellite images for AQ#0742 (2019), 1006 (2019), 1039 (2020), 1040 (2020) and 1205 (2019) [**Appendix G**].

[17] DFA has historically refused to release information on cage configuration and stocking on the basis that it is confidential business information.

[18] B.T. Hargrave, "A traffic light decision system for marine finfish aquaculture siting," Ocean & Coastal Management 45 (2002) 215-235 at 220-221 [**Appendix H**].

[19] Email from Ron Neufeld & Kathaleen Milan to Minister of Fisheries and Aquaculture & others, May 16, 2013; Email from Ron Neufeld to DFO, cc'ing Minister of Fisheries and Aquaculture, May 20, 2013; Email chain between Ron Neufeld & Kathaleen Milan and Barry MacPhee (DFA), November 3, 2013 - December 19, 2013; Letter from Ron Neufeld & Kathaleen Milan to Stephen McNeil, July 28, 2014; Ron Neufeld comments on AQ#1039 lease/licence renewal application, June 2016; Ron Neufeld comments on AQ#1040 lease/licence renewal application, June 2016 [**Appendix I**].

[20] Email chain between Ron Neufeld and Devon Wadden (NSE), July 24, 2017 - November 1, 2017, with attached letter from Ron Neufeld & Kathaleen Milan, July 24, 2017; Email chain between Ron Neufeld and Orlando Fraser (NSE), January 8, 2018; Email chain between Ron Neufeld and Orlando Fraser (NSE), February 8, 2018; Email chain between Ron Neufeld and Orlando Fraser (NSE), June 8 - July 27, 2018 [**Appendix J**].

[21] Nova Scotia, House of Assembly, *Hansard*, 62nd Assembly, 2nd Sess, Vol 15, No 38 (1 April 2015) at 3227 (online: < https://nslegislature.ca/legislative-business/hansard-debates/assembly-62-session-2/house_15apr01>); Nova Scotia, House of Assembly, *Hansard*, 62nd Assembly, 2nd Sess, Vol 15, No 52 (23 April 2015) at 4177 (online: <https://nslegislature.ca/legislative-business/hansard-debates/assembly-62-session-2/house_15apr23>).

Although the information available to us indicates that KCS continues to operate in violation of its leases and licences at each of the five sites listed above, it appears that NSE did attempt to take some enforcement action back in the spring of 2016. On May 31, 2016, after the new regulatory scheme was put in place and NSE took over enforcement from DFA, NSE issued a letter to aquaculture operators flagging "[…] a few of the compliance issues the department is working to address […]"[22] With respect to the ongoing lease violations issue, NSE indicated as follows:

> NSE Conservation Officers will enforce a **deadline of October 26, 2016** for lease and licence holders to exercise one of the options below if their site is not in compliance with the licence issued by the Department of Fisheries and Aquaculture (DFA).
>
> Options:
>
> 1. Licence Holders [sic] shall submit a scheduled re-alignment plan on or before October 26, 2016 to Nova Scotia Environment. These scheduled re-alignment plans must receive approval from NSE and will be required to provide the detailed steps a licence holder plans to take to move all equipment and produce back within their lease boundaries and must also provide the proposed schedule for completion of these tasks; or
> 2. **Licence holders shall submit an application for an adjudicative or administrative amendment on or before October 26, 2016 to DFA's Aquaculture Division**. The format for these applications and their review process is stipulated in the new *Aquaculture Licence and Lease Regulations.* DFA should be contacted for specific questions about these processes.
>
> Please note that after October 26, 2016, any licence holders operating off-lease who have not provided a scheduled re-alignment plan to NSE for approval or an application for an adjudicative or administrative amendment to DFA will be considered non-compliant and in violation of the above Act and regulations and could face additional enforcement action[23] [emphasis added].

Subsection 49(c) of the *Act* requires any application to expand the boundaries of an existing aquaculture licence or lease to go through an **adjudicative** amendment process. As noted in Mr. Fuller's letter, the adjudicative amendment application process is outlined in detail in the *Regulations.* Among other things, s 12(1) of the *Regulations* provides that a lease or licence holder must complete a scoping process **before** applying for an adjudicative amendment. That scoping process must include at least one public information meeting organized by the proponent and held in "[…] the most appropriate community closest to the location of the site […]"[24] The adjudicative amendment submitted to DFA must include a report on the scoping process carried

[22] Letter from Adrian Fuller (Executive Director, NSE) to aquaculture operators, May 31, 2016 at pp 1-2 [**Appendix K**].
[23] *Ibid* at pp 2-3.
[24] *Aquaculture Licence and Lease Regulations*, *supra* at s 12(2).

out under s 12, which presumably includes a report on the public information meeting.[25] Following DFA's review of adjudicative amendment applications, the Minister must refer all applications to the ARB for a public hearing.[26]

In response to NSE's letter, KCS submitted lease expansion applications for AQ#0742,[27] 1006,[28] 1039,[29] and 1040[30] on October 24, 2016. It appears that KCS also submitted a lease expansion application for AQ#1205 prior to the NSE deadline – however, we have been unable to confirm the exact date of submission, as DFA has consistently delayed disclosing that application.[31] In any event, on October 31, 2016, Lynn Winfield, Licensing Coordinator for DFA, sent a letter to KCS confirming that its amendment applications for all five sites would "[…] now proceed to the review stage of the amendment process."[32]

In its 2016 lease expansion applications for AQ#0742, 1039, and 1040, KCS indicated that the boundary amendment application was being filed "[…] **to encompass the existing occupation**, including all cages, mooring lines and anchors."[33] Similarly, KCS filed an entirely new boundary amendment application for AQ#1205 in 2019, in which it noted that "[a] boundary amendment application is being filed **to fully encompass existing cages, mooring lines and anchors within lease boundaries**."[34]

KCS did not hold a single public consultation meeting on any of its 2016 lease expansion applications prior to submitting the applications to DFA, contrary to s 12(2) of the *Regulations.* The applications for AQ#0742, 1006, 1039, and 1040 as originally submitted to DFA make no mention of a public consultation meeting, and we were unable to find public notices of consultation meetings for any of the five sites sent out prior to the October 26, 2016 deadline. As a result, we conclude that all five applications for adjudicative amendments as submitted to DFA in October 2016 were noncompliant with the *Regulations.*

Over a year later, KCS submitted a report to DFA on public engagement conducted for the AQ#1039 lease expansion application.[35] That public engagement consisted of a single public meeting held in Digby on March 30, 2017 – five months after the application was submitted to

---

[25] *Ibid* at s 13(a).
[26] *Ibid* at s 16.
[27] Kelly Cove Salmon Ltd., Boundary Amendment Application for Site #0742, October 24, 2016 [**Appendix L]**.
[28] Kelly Cove Salmon Ltd., Boundary Amendment Application for Site #1006, October 24, 2016 [**Appendix M**].
[29] Kelly Cove Salmon Ltd., Boundary Amendment Application for Site #1039, October 24, 2016 [**Appendix N**].
[30] Kelly Cove Salmon Ltd., Boundary Amendment Application for Site #1040, October 24, 2016 [**Appendix O**].
[31] Email chain between Ron Neufeld and Crystal McGraw (IAP Administrator), November 26, 2020 [**Appendix P**].
[32] Letter from Lynn Winfield (DFA) to Jeff Nickerson (KCS), October 31, 2016 [**Appendix Q**].
[33] KCS, Boundary Amendment Application for Site #0742, *supra* at "Aquaculture Amendment Application" form (p Site 0742-2); KCS, Boundary Amendment Application for Site #1039, *supra* at "Aquaculture Amendment Application" form; KCS, Boundary Amendment Application for Site #1040, *supra* at "Aquaculture Amendment Application" form (p Site 1040-2). Note that the publicly available version of the boundary amendment application for Site #1006 does not include the "Aquaculture Amendment Application" form, so we do not know if that application includes a similar statement.
[34] Kelly Cove Salmon Ltd., Liverpool Bay Finfish Marine Aquaculture Development Plans, March 6, 2019, Section 1: Liverpool Bay Applications, at "Aquaculture Amendment Application" form [**Appendix R**].
[35] Boundary Amendment Application for Site #1039, *supra.* See "Report on Public Engagement During Scoping" at the very end of the document.

DFA. This arguably does not resolve the issue of noncompliance with the *Regulations*, as s 12 requires the full scoping process (including public engagement) to be completed **before** applying for an adjudicative amendment. In addition, in March 2019 KCS submitted an entirely new lease expansion application for AQ#1205, which includes a community engagement report.[36] This presumably makes the earlier application redundant, although it is unclear precisely what happened to it. However, **no public meetings have been held with respect to the lease expansion applications for AQ#0742, 1006 or 1040**.

DFA was made aware that these applications were noncompliant – but instead of addressing the issue, it denied the existence of the applications entirely. In response to an inquiry from a member of the public on that very point in September 2018, Bruce Hancock, Director of Aquaculture, stated as follows:

> As part of our regulatory framework transition, aquaculture licence and lease holders that believed they were operating outside of their lease boundaries were required to notify the Department of their plans to submit a boundary amendment application by October 26, 2016.
>
> Applications related to these plans will follow the regulatory process for adjudicative and administrative applications including scoping and public consultations.

Note that Mr. Hancock's email was sent almost two years **after** DFA had received noncompliant applications for all five sites.

There is no evidence available to us demonstrating that DFA has asked KCS at any point in the past four years to hold public meetings for the AQ#0742, 1006, or 1040 expansion applications, or that DFA has otherwise tried to move any of these five applications through the approval process. Rather, it appears that DFA has used the mere **existence** of these applications to justify allowing KCS to continue operating in violation of its current leases and licences. For instance, in a June 2016 letter from Bruce Hancock, Director of Aquaculture, to KCS, Mr. Hancock wrote as follows with respect to AQ#1205:

> With respect to Kelly Cove Salmon Ltd.'s specific request that they be allowed to operate on their current equipment footprint until their amendment application is either approved or rejected, NSDFA agrees to that course of action provided that the company:
>
> - submits a map to NSDFA compiled by an independent third party within 30 days of the date of this letter, that shows the current lease boundaries and the location of your equipment;
> - submits a complete boundary amendment application to NSDFA prior to October 26, 2016;

[36] Kelly Cove Salmon Ltd., Liverpool Bay Finfish Marine Aquaculture Development Plans, *supra*, Section 4: Community Engagement Report (online: <https://novascotia.ca/fish/aquaculture/Routine-disclosure-of-Kelly-Cove-Salmon-site-application-documents.pdf>).

- marks the site according to provincial requirements; and
- does not further extend its current footprint.[37]

Over four years after Mr. Hancock's letter, KCS has not been granted approvals to expand its lease and licence boundaries at AQ#1205 or any of the other sites listed herein, and the evidence suggests that it continues to operate outside of its current boundaries at all five sites. It therefore appears that DFA has, whether implicitly or explicitly, effectively granted KCS long-term interim approvals for these lease and licence expansions **without any statutory basis for doing so.** Not only does this undermine the Province's own regulatory scheme, with its commitments to increased public engagement and transparency, but it erodes public trust in DFA's willingness to properly regulate the industry and subverts the rule of law.

III. Conclusion

In light of this egregious conduct, our clients request the following action:

(1) That Minister Colwell reject KCS's noncompliant applications for lease expansions at sites AQ#0742, 1006, and 1040, and require KCS to hold public information meetings as required by the *Regulations* prior to submitting any further applications for those sites; and
(2) That Ministers Colwell and Gordon direct their Departments to require KCS to come into compliance with its lease boundaries at all five noncompliant sites until such time as its lease expansion applications are lawfully approved by the ARB following the legally mandated public hearings.

We respectfully request a response by **Friday, March 12, 2021.** Our clients are open to meeting with your Departments in the presence of counsel to resolve their concerns.

We look forward to hearing from you.

Regards,

Sarah McDonald
Barrister & Solicitor

[37] Letter from Bruce Hancock (DFA) to KCS, June 3, 2016 [**Appendix S**]. Although we requested all correspondence between DFA and KCS regarding the adjudicative amendment applications for sites AQ#0742, 1039 and 1040 under the *Freedom of Information and Protection of Privacy Act,* SNS 1993, c 5, and despite the Minister's public statements about transparency under the new legislative scheme, DFA denied our request on the basis that all 281 responsive pages were "business confidential information." See letter to Ron Neufeld from Loretta Robichaud (Deputy Minister), November 12, 2020 and "Applicant Copy" of FOI results [**Appendix T**].

Book of Authorities on the Application to Intervene
in application to amend AQ#1039

Contents

SUPREME COURT OF NOVA SCOTIA

Citation: Specter v. Nova Scotia (Fisheries and Aquaculture), 2011 NSSC 333

Date: 20110901
Docket: Hfx. No. 350371
Registry: Halifax

Between:

Marian Specter and Herschel Specter

Appellants

v.

Minister of Fisheries and Aquaculture and Kelly Cove Salmon Ltd.

Respondents

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	August 16, 2011, in Halifax, Nova Scotia
Counsel:	Marc Dunning with Dillon Trider, for the Appellants Darlene Willcott, for the Respondent, Minister of Fisheries and Aquaculture A. William Moreira, Q.C., for the Respondent, Kelly Cove Salmon Ltd.

By the Court:

[1] The appellants, Marian and Herschel Specter, appeal, pursuant to s. 119 of the *Fisheries and Coastal Resources Act*, SNS 1996, c 25 (hereafter "*Act*"), a decision of the Minister of Fisheries and Aquaculture (hereafter "Minister") to grant the respondent, Kelly Cove Salmon Ltd. (hereafter "Kelly Cove"), amendments to three of its aquaculture licenses.

[2] Both the Minister and Kelly Cove brought preliminary motions, pursuant to Rule 12 of the *Nova Scotia Civil Procedure Rules*, seeking to summarily dismiss the appeal on the basis that it was not filed in time and that the appellants lacked standing. These motions were consolidated and heard together.

[3] For the reasons that follow, both motions are dismissed.

Background

[4] The appellants own and reside on property in Shelburne County that fronts onto Shelburne Harbour.

[5] In 2006, 2007 and 2010, Kelly Cove obtained three aquaculture licenses (0983, 0602 and 1192 respectively) from the Minister, to operate fish farms in Shelburne Harbour. Site 0602 was approximately 875 metres from the appellants' property, and Sites 0983 and 1192 were approximately 2 and 2.25 kilometers from the appellants' property. The appellants' property is listed on Kelly Cove's survey plan for Site 0602.

[6] In 2009, the appellants learned that Kelly Cove was seeking amendments to its three licenses. Concerned about water quality and other problems, allegedly associated with the fish farms, the appellants became actively involved in the amendment process. Between the end of 2009 and the spring of 2011, the appellants communicated with various federal and provincial officials with respect to the amendment application.

[7] The appellants were made aware of some of the proposed changes to Kelly Cove's licenses, though not all of the details. In particular, in December 2010, as part of the amendment process, Transport Canada provided approval of the final

amended site coordinates. The appellants were made aware of this decision and the site coordinates approved by Transport Canada.

[8] The appellants learned that the new sites would be larger and closer to the appellant's property; Site 0602 would be moved to within approximately 240 metres of the appellants' property and Sites 0983 and 0602 would be moved to within approximately 1.2 and 1.7 kilometres respectively.

[9] The appellants continued to communicate with the Minister regarding their concerns with the application to amend the site licenses. On February 1, 2011, the Minister wrote the appellants acknowledging their concerns regarding the proposed amendments. The Minister informed the appellants that no decision had been made, and that there was no plan for a public hearing on the amendments.

[10] On March 9, 2011, the Minister granted Kelly Cove's application for an amendment to its aquaculture licenses for Sites 0983, 0602, and 1192. This decision was not immediately communicated to the appellants or to the general public. The Minister does not have a process for publishing such decisions on the Ministry's website or elsewhere.

[11] The Minister states that he communicated his decision to the appellants on March 14, 2011, but does not state the method of this communication. The appellants state that they never received this communication. On March 24, 2011, the Minister emailed his March 14, 2011 letter to the appellants, which they received. The Minister's email informed the appellants that the application for amendments was granted, but provided no further details as to the specifics of the amendments.

[12] On April 5 and 9, 2011, the appellants wrote the Minister requesting the date the amended licenses were approved and copies of the amended licenses. On April 18, 2011, the appellants' counsel wrote the Minister requesting same, and explaining that this information was necessary for the appellants to properly consider a potential appeal under the *Act*.

[13] By letter dated May 9, 2011, the Minister provided the appellants' counsel with the requested information. Appellants' counsel received this letter on May 12, 2011. On June 13, 2011, the appellants filed an appeal of the Minister's decision, pursuant to s 119 of the *Act*, seeking a remedy of *certiorari*.

Issues

[14] These preliminary motions raise the following issues:

1. Should the appeal be dismissed because it was not filed in time?

2. Should the appeal be dismissed because the appellants' lack standing?

Analysis

Should the appeal be dismissed because it was not filed in time?

Legislation and Positions of the Parties

[15] Section 119 of the *Act* provides a right of appeal to "aggrieved persons" "within thirty days of the decision." That section reads:

> (1) A person aggrieved by a decision of the Minister may, within thirty days of the decision, appeal on a question of law or on a question of fact, or on a question of law and fact, to a judge of the Supreme Court of Nova Scotia and the decision of that court is final and binding on the Minister and the appellant, and the Minister and the appellant shall take such action as may be necessary to implement the decision.
>
> (2) The decision of the court pursuant to subsection (1) is final and there is no further appeal to the Nova Scotia Court of Appeal.

[16] The *Act* does not define "person aggrieved" or "decision".

[17] The appellants submit that the Minister was without jurisdiction to grant the amendments. The appellants argue that there is no time limit to bring an appeal for *certiorari* where the appeal is based on an absence of jurisdiction or *ultra vires*. In the alternative, the appellants argue that the timeline to appeal under s. 119 of the *Act* only began when the details of the decision were communicated to them. In the further alternative, the appellants ask the Court to exercise its discretion to extend the time period during which the appeal is to be commenced.

[18] The respondents argue, citing *Johnston v. Law Society of Prince Edward Island* (1991), 80 D.L.R. (4th) 725, 1991 CanLII 2754 (PE SCAD) [*Johnston*], that there is a distinction between a decision that is made without jurisdiction and a decision made that exceeds jurisdiction. The respondents submit that statutory

limitation periods apply to *certiorari* applications where the decision-maker exceeded his jurisdiction, but had the jurisdiction to make the decision if a different approach was followed. The respondents further submit that the Minister's decision, at most, falls into this "exceeds jurisdiction" category.

[19] The respondents further argue that the thirty day time limit began to run on the day the Minister issued the amended licenses to Kelly Cove (March 9, 2011) or, at the latest, on the day the Minister communicated this decision to the appellants (March 24, 2011), and not on the day the appellants received the details of the decision (May 12, 2011).

[20] The respondents further argue that this Court lacks the jurisdiction to extend the timeline for filing an appeal under the *Act*. In the alternative, the respondents submit that this Court should not exercise its jurisdiction to extend the timeline.

The Impact of a Jurisdictional Challenge on Timeliness

[21] In *Re Trecothic March* (1905), 37 SCR 79, the Supreme Court of Canada held that a statutory limitation period could not limit the writ of *certiorari*, sought

outside the limitation period, where the decision of an inferior tribunal was being challenged for want of jurisdiction. More recently in *Bassett v. Canada* (1987) 35 DLR (4th) 537, 1987 CarswellSask 250 at para. 47 (Sask CA) [*Bassett*], the Saskatchewan Court of Appeal concluded, relying on *Re Trecothic Marsh* and other cases:

> I conclude therefore, that an application for an order in the nature of certiorari to quash judgments, orders, or proceedings based on an excess or absence of jurisdiction or *ultra vires* can be brought without reference to time limits.

[22] Bassett was followed by this Court in *Cowan v. Aylward*, 2001 NSSC 54 [*Cowan*].

[23] The respondents cite *Johnston* for the proposition that there is a distinction between a decision that is made without jurisdiction and a decision made that exceeds jurisdiction. *Johnston* does not stand for this proposition. In *Johnston*, the Court concluded that there was no want of jurisdiction for the decision-maker to enter upon a hearing of the matter. Moreover, the Court distinguished the matter from *Bassett* on the basis that the appellant's complaint dealt with natural justice challenges, which it held were not true jurisdictional issues.

[24] In my view, there is no distinction between a decision that is made without jurisdiction and a decision made that exceeds jurisdiction. In both cases, the decision-maker lacks the legal authority to make the decision that they made. To take the famous case of *Roncarelli v. Duplessis*, [1959] SCR 122 as an example, it mattered not that the Quebec Liquor Commission could have revoked the appellant's liquor license, what mattered was that the Commission was not authorized under the law to revoke the appellant's license *because* he was a Jehovah's Witness.

[25] The Minister reminds this Court of *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*], and the Supreme Court of Canada's caution that courts should not be overzealous in labeling matters jurisdictional questions. This reminder is somewhat misplaced. In *Dunsmuir*, the Supreme Court of Canada's caution was on the perils of returning to the jurisdiction/preliminary question doctrine in determining the appropriate standard of review, not on the common law doctrine that an *ultra vires* decision could be challenged outside a statutory limitation period.

[26] In fact, in *Dunsmuir*, the Court, at para. 29, reiterated the role judicial review plays in upholding the rule of law:

> Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers [citations omitted].

[27] The rule of law requires fidelity to both the spirit and substance of the law. A decision made without jurisdiction is the same as a decision that exceeds jurisdiction. Both types of decisions are unlawful and *ultra vires* the decision-maker. Both types of decisions are reviewable by courts. Suffice to say, as this Court held in *Cowan*, I too agree with the Saskatchewan Court of Appeal's dicta in *Bassett*: a statutory time limit does not prohibit a late application for *certiorari* based on excess *or* absence of jurisdiction.

[28] This does not mean that an appellant can wait forever to bring their appeal and then simply rely on an argument that the decision was *ultra vires* the decision-

maker. Where such an appellant is excessively late, they may be exposed to an argument of laches or undue delay.

[29] Nor can an appellant, seeking *certiorari*, simply avoid a statutory time limit by arguing lack of jurisdiction. There must be an arguable basis for the appellant's contention that the decision-maker exceeded or was without jurisdiction.

[30] However, in this case, there is an arguable basis that the Minister exceeded his jurisdiction. Section 59(2) of the *Act* states that "[w]here, in the opinion of the Minister, the proposed amendment is substantial and may have a detrimental impact on other uses of marine resources, the Minister shall follow the procedure set forth for a new license application". In granting the license amendments, the Minister followed the license amendment procedure in the *Act*, and not the new license procedure.

[31] While the new sites were in the same general geographic location, and of approximately the same size, they all possessed entirely different coordinates; none of the new sites shared any boundaries with the previous sites. There is also

evidence that the sites may have a detrimental impact on other uses of marine resources, particularly in the intertidal zone. In these circumstances, there is an arguable case that the amendment procedure was not appropriate, and that the Minister should have followed the procedure for granting new licenses.

[32] On this basis, I find that the appellants' appeal is not untimely. I would dismiss the Minister's motion.

Statutory Time Limit

[33] In the event that I am wrong on the impact of an arguable jurisdictional challenge, I now turn to the issue of the relevant decision date under the *Act*.

[34] The *Act* does not define what constitutes a "decision" within the meaning of s. 119. The *Act* does not say that the thirty day limitation period begins to run once the decision is communicated to the appellants. If "decision" in s. 119 of the *Act* means the date a copy of the amended licenses were provided to the appellants then their Notice of Appeal was not filed late. However, if "decision" means the date the Minister issued the amended licenses or the date the Minister

communicated that decision to the appellants, then the appellants' Notice of Appeal was filed late.

[35] In *Central Halifax Community Association v. Halifax (Regional Municipality)*, 2007 NSCA 39, per MacDonald, CJNS [*Central Halifax*], the Court of Appeal considered when the six month time period to bring a *certiorari* application began to run under Rule 56.06 of the *Nova Scotia Civil Procedure Rules (1972)*. The Court of Appeal held that it was the date of the decision and not the date of communication that started the clock: "Had the Supreme Court, in its wisdom and authority to make rules desired the six month clock to begin when the aggrieved party is notified of the decision, it could have easily done so" (*Central Halifax*) at para. 22. Consistent with this decision, under the new Rules, the time period begins to run either 25 days after *communication* of the decision or 6 months after the decision, whichever is shorter.

[36] In *Rockwood Community Assn. Ltd. v. Halifax (Regional Municipality*), 2011 NSSC 91 [*Rockwood*] and *Eco Awareness Society v. Antigonish*, 2010 NSSC 461 [*Eco Awareness*], both municipal planning cases where it was communication

that started the limitation period, this Court held that communication of the decision, and not the reasons for the decision, was what started the time period.

[37] In my view, the logic of the Court of Appeal in *Central Halifax*, and the decisions of this Court in *Rockwood* and *Eco Awareness*, would be determinative of the meaning of "decision" in s. 119, were it not for this Court's decision in *Brighton v. Nova Scotia (Minister of Agriculture and Fisheries)*, 2002 NSSC 160 [*Brighton*].

[38] In *Brighton*, a case dealing precisely with the issues raised in these motions, MacDonald, ACJ (as he then was) considered when the thirty day period in s. 119 of the *Act* began. MacDonald, ACJ held, at para. 9:

> While the Appellants knew in July of 2001 that the project would be approved and that there would be "progressive" conditions, the details of these conditions were not official until the documentation was actually released in October. It is agreed by all that these conditions formed an important part of the Minister's decision. The Minister relies on them to justify his decision and the Appellants seek to amend them as alternative relief. In order for the Appellants to make a reasoned decision on whether to appeal, they would have to know exactly what it is they would be appealing. This was not known until October 18, 2001 when the actual documents with conditions were issued. For the purposes of s. 119, I find this to be the triggering date.

[39] The parties in this case disagree on the meaning of this passage.

[40] The appellants focus on the comment that without the details of the decision they cannot reasonably be expected to file a Notice of Appeal with grounds of appeal. The appellants submit that this position is supported by Rule 7.19(3), which requires a copy of the decision where available, or otherwise a summary of the decision, to be provided with the Notice of Appeal; Rule 7.19(5) also states that "[a] copy of a written decision that is appealed from must be filed with the notice of appeal."

[41] The respondents contend that MacDonald, ACJ held it was the issuance of the licenses that mattered, and not the provision of the licenses to the potential appellants.

[42] In my view, the appellants' interpretation is correct. In *Brighton*, MacDonald, ACJ held that the conditions of the license, and not just the fact that it was granted, formed an integral part of the "decision". MacDonald, ACJ further held that the appellants had to know the full nature of the decision in order to make a reasoned decision on whether to exercise their statutory right of appeal.

[43] MacDonald, ACJ concluded that the appellants did not become aware of those details until the actual documents were issued. I am not convinced by the Minister's argument that MacDonald, ACJ meant the date the limitation period began was the date the license was issued. MacDonald, ACJ was clearly focused on the appellants becoming aware of the details of the decision; this coincidentally occurred on the same day the license was issued. It was the acquisition of knowledge that MacDonald, ACJ found to be relevant, not the mere issuance of the license.

[44] In my view, *Brighton* stands for the proposition that the thirty day statutory limitation period in s. 119 of the *Act* starts on the day that the full reasons of the decision, in the form of the complete license(s), are communicated to persons that have been actively involved in the amendment/approval process. I recognize that this conclusion is somewhat inconsistent with the decisions in *Rockwood, Eco Awareness,* and *Skycharter Limited v. Minister of Transport* (1997), 125 FTR 307 [*Skycharter*]; however, I am of the opinion that there is a reasoned basis for following *Brighton* in the circumstances.

[45] The first reason to follow *Brighton* is the principle of comity. As this Court held in *Silver v. Fulton*, 2011 NSSC 127 at para. 40: "comity requires that I follow the decision of another justice of the Supreme Court of Nova Scotia, which dealt with similar facts and issues, as long as that decision was not manifestly wrong or doing so would create an injustice". This case deals with very similar facts and issues as *Brighton*. The respondents have not shown that *Brighton* was wrongly decided or that following it would create an injustice, therefore, comity requires that I follow the decision.

[46] The second reason to follow *Brighton* is that the alternative cases cited by the respondents are all distinguishable. *Skycharter* was a case dealing with the meaning of the term "decision" in s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. *Rockwood* and *Eco Awareness* were cases dealing with Rule 7 judicial review applications of planning decisions.

[47] None of these three cases dealt with a situation where the enabling statute also provided "aggrieved persons" with a right of appeal. None of these three cased dealt with a situation where the enabling statute encouraged participation of the community in the decision-making process. Moreover, all of these three cases

dealt with situations where the fact a decision was made was sufficient to ground a judicial review application.

[48] In the circumstances of an appeal under s. 119 of the *Act*, MacDonald, ACJ concluded that the mere fact a decision was made was insufficient, and that the details of the license mattered: "In order for the Appellants to make a reasoned decision on whether to appeal, they would have to know exactly what is they would be appealing." The appellants did not know what they were appealing until they had a copy of the license.

[49] The respondents argue that this Court lacks the jurisdiction to extend the thirty day period in s. 119 of the *Act*. I disagree. In my view, the Court does have jurisdiction to extend the deadline for filing an appeal, but only upon a motion by the appellants.

[50] The *Act* authorizes an appeal to the Supreme Court and prescribes a time period during which the appeal is to be commenced. Where that is the case, s. 50 of the *Judicature Act* provides that "the Court may make rules respecting extension of the time period, notwithstanding that the time period has expired".

[51] Rule 94.03 is such a Rule, which reads:

> (1) A person who wishes to obtain an extension of a period referred to in Section 50 of the *Judicature Act* may make a motion in an appeal or in reference to an intended appeal.
>
> (2) A judge may determine the motion by exercising a discretion similar to that recognized by Rule 2.03, of Rule 2 - General.

[52] This Rule authorizes the Court to extend a statutory limitation period, but only upon a motion by the appellants. The appellants have not filed such a motion. Counsel for the appellants submits that all the necessary information is available before the Court to decide an extension request. In my view, a motion is necessary, otherwise the Court would be acting without jurisdiction. I do not think resort to inherent jurisdiction is appropriate in this case because there is a procedural avenue that the appellants could have followed.

[53] If the appellants had filed a motion to extend time or if I am wrong on the application of inherent jurisdiction, I would allow the appellants' motion to extend time on the basis of the test described in *Farrell v. Casavant*, 2010 NSCA 71 at para. 17.

[54] It is true that the appellants' delay is somewhat lengthy, but I find that their intention was to pursue an appeal of the Minister's decision and that they have an arguable case. They were clearly concerned about the amendment process and were actively involved throughout. The appellants erroneously were under the impression that the time limit did not start until the details of the decision were communicated to them. Additionally, both the Minister and Kelly Cove did not suffer any significant prejudice. Given the varying ways in which *Brighton* can be interpreted, it would be unfair to not allow an extension.

[55] However, since a motion to extend time was not made, I am not prepared to grant an extension of time.

Should the appeal be dismissed because the appellants' lack of standing?

[56] The appellants cite Thomas Crowell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) for the proposition that there are three factors to consider in determining whether someone is a "person aggrieved":

1) The nature of the relationship between the appellant and the challenged decision;

2) The statutory scheme out of which the decision was issued; and

3) The merits of the complaint.

[57] The appellants submit that an analysis of these factors shows that they have standing, particularly in light of this Court's decision in *Brighton*.

[58] The respondents admit that the appellants have an interest in the decision, but submit that that interest does not rise to a sufficient level to allow them standing. The respondents contend that this Court's decision in *Brighton* was modified by the decisions in *RK v. HSP*, 2009 NSCA 2 [*RK*], *Polycorp Properties Inc. v. Halifax (Regional Municipality)*, 2011 NSSC 241 [*Polycorp*], and that a more restrictive approach is now taken to standing. In the alternative, Kelly Cove argues that the appellants should only be granted standing with respect to Site 0602, because that is the only site close enough to their property to cause issues in the intertidal zone.

[59] "Public interest groups and individual advocates have usually been denied standing to challenge administrative action that raises environmental concerns, for lack of an identifiable special interest of their own" (Donald JM Brown Y John M Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Canvasback, 2010) §4.3443. For example, in *Friends of Public Gardens v. Halifax (City)* (1985), 68 NSR (2d) 433, 13 Admin LR 272 (SCTD), the applicant was denied standing to challenge the City of Halifax's decision not to designate certain properties near the Halifax Public Gardens as "heritage property".

[60] However, adjacent landowners have been granted standing to challenge the issuance of permits or government decisions governing land use. In *Oakland/Indian Point Residents Assn. v. Seaview Properties Ltd.*, 2008 NSSC 209, the Court allowed the applicant standing to challenge a subdivision plan and development permits, noting that some of the members of the applicant association were adjacent landowners to the proposed condo development at issue. In *Lord Nelson Hotel Ltd. v. Halifax (City)* (1972), 4 NSR (2d) 753, 33 DLR (3d) 98 (CA) [Lord Nelson Hotel], the Court of Appeal found that an adjacent landowner had standing to challenge the City of Halifax's re-zoning of neighbouring property.

[61] In my view, how the test for standing is phrased is largely irrelevant. It does not matter whether a statute uses the phrase, “person aggrieved”, “person directly affected”, or “direct and personal interest”. What matters is the interpretation that is given to these phrases. This necessarily involves a textual, contextual, and purposive analysis of the applicable legislation. Involved in this interpretation is the concern of courts that an overly broad interpretation will allow mere “busybodies” to flood the courts with litigation challenging public decisions.

[62] The key question to ask is whether a potential applicant has an economic, commercial, legal, or personal interest in a decision that is sufficiently delineated from the concerns of the general public so as to make them a “person aggrieved”.

[63] The interests of adjacent property owners may fall into any of these categories. What may set adjacent property owners apart from other potential applicants is that their proximity to the place affected by a decision makes them sufficiently different from other potential applicants.

[64] A zoning by-law change has the potential to affect property values of immediate neighbours much more than it does property owners further away (see eg. *Lord Nelson Hotel*). Air pollution has the potential affect an asthmatic living close to the source of pollution much more than an asthmatic living further away (See eg. *Court v. Alberta (Environmental Appeal Board)*, 2003 ABQB 456).

[65] Creation of a uranium mine tailings pond just beyond one's fence is quite different than creation of a tailings pond hundreds of miles away (See eg. *Shiell v. Atomic Energy Control Board* (1995), 98 FTR 75). Clearcut logging on a lakeshore impacts lakeshore hoteliers in different ways than tourists (See eg. *Berg v. British Columbia (Attorney General)* (1991) 48 Admin LR 82 (BC (SC)).

[66] In *Brighton*, this Court considered the meaning of "persons aggrieved" in s. 119 of the *Act*. The Court noted the provisions in the *Act* that encouraged the public's participation, and ultimately concluded that the appellants, who were a group of concerned citizens had standing.

[67] The respondents do not argue that *Brighton* was wrongly decided or that it is clearly wrong, rather, they suggest that subsequent jurisprudence has modified the decision. I disagree.

[68] The decisions that the respondents refer to do not consider *Brighton*. Neither the decision in *RK* nor *Polycorp* proffers a singular test for standing. To the contrary, in *Polycorp*, this Court recognized the importance of context in determining standing:

> In my view, the history of the interpretation of the word "aggrieved" **in the planning context** in Nova Scotia demonstrates, at a minimum, that an aggrieved person must suffer some legal prejudice to have standing as an applicant [emphasis added].

[69] This case is analogous to *Brighton*. The respondents have not shown that the decision in *Brighton* was clearly wrong or that it has been modified by subsequent jurisprudence. The respondents have not shown that following *Brighton* would work an injustice, therefore, comity requires that I follow the decision.

[70] In the context of an appeal pursuant to s. 119 of the *Act*, I am not prepared to depart from the approach to standing taken by MacDonald, ACJ in *Brighton*.

[71] In this case, the decision at issue authorized the movement of an industrial food production facility - an aquaculture fish farm - to within approximately 240 metres of an adjacent coastal landowner. The owner of the fish farm admits that water clouding in the vicinity can occur, as well as increased algae and slime in the intertidal zone.

[72] One of the purposes of the *Act* is to "foster community involvement in the management of coastal resources". The value of the appellants' property may be impacted by this decision. The appellants' use of the intertidal zone immediately adjacent to their property may also be impacted by this decision. This potential impact will affect the appellants in ways that are significantly different from the general public. In my view, these appellants are at least as affected as the appellants in *Brighton*, if not more so. As such, the appellants are "persons aggrieved" within the meaning of the *Act*, and they should be granted standing.

[73] I reject Kelly Cove's submission that the Minister's decision should be parsed, and the appellants granted standing only with respect to Site 0602. Kelly Cove made a single amendment application to the Minister. The Minister made a single decision with respect to this application that affected three different sites.

[74] An attack of *ultra vires* would apply to all of the licenses and not just Site 0602. There may be evidence at the hearing that the appellants' interests were affected by other sites. At this time, it would not be appropriate to limit the appellants' appeal to only the amendment of Site 0602.

Conclusion

[75] Under the common law, a statutory time limit does not prohibit a late appeal for *certiorari* based on excess *or* absence of jurisdiction where there is an arguable basis for the jurisdictional challenge and the appeal does not constitute undue delay. Here, the appellants have an arguable case that the Minister's decision exceeded his jurisdiction. The respondents have not argued undue delay. Therefore, even though the appellants' appeal was not filed in time, it should not

be dismissed as untimely. The Minister's motion to dismiss the appeal on the basis of timeliness is refused.

[76] Assessments of standing are highly contextual. In *Brighton*, this Court analyzed the meaning of "persons aggrieved" in s. 119 of the *Act* and granted a group of concerned citizens standing. The respondents have not shown that the decision in *Brighton* was clearly wrong or that it has been modified by subsequent jurisprudence. Following *Brighton*, and given the appellants' proximity to the amended fish farming sites, as well as their admitted negative impacts on the intertidal zone, I find that the appellants are "persons aggrieved" by the Minister's decision. Accordingly, the appellants have standing to bring this appeal. Kelly Cove's Motion to Dismiss for lack of standing is refused.

[77] It would not be appropriate to limit the appellants' appeal to Site 0602 only. The Minister's decision was a singular decision in response to a singular application. A challenge that the decision-maker was *ultra vires* would apply to all three of the sites. Further, there may be evidence at the hearing that the appellants' interests were affected by other sites. Therefore, I reject Kelly Cove's

alternative submission that the appellants' standing should be limited to only Site 0602.

[78] Unless the parties settle the issue of costs, I request that they provide their written submission not later than September 30, 2011.

J.

Date: June 21, 2002
Docket: SH 175312

IN THE SUPREME COURT OF NOVA SCOTIA
Cite: Brighton et al. v. The Queen et al. [2002] NSSC 160

BETEEN:

RACHEL BRIGHTON, of Northwest Cove, in the County of Lunenburg; **JOANNE CARLOS,** of Southwest Cove, in the said County; **PETER COBBOLD**, of Northwest Cove aforesaid; **JOHN DUNSWORTH**, of Southwest aforesaid; **LAURA DUNSWORTH**, of Southwest Cove aforesaid; **PHILIP GUEST**, of Hubbards, in the County of Halifax, **ARNOLD HARNISH**, of Mill Cove, in the County of Lunenburg; **PHILIP LAMONT**, of Southwest Cove aforesaid; **OLYMPIO MARTINS**, of Northwest Cove aforesaid; **LANCE MILLER**, of Northwest Cove aforesaid; **CAROL VAUGHAN**, of Southwest Cove aforesaid, and **ALAN WILSON**, of Southwest Cove aforesaid

Applicants

-and-

HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF NOVA SCOTIA, represented in this behalf by the Minister of Agriculture and Fisheries, and **AQUAFISH TECHNOLOGY INCORPORATED**, a body corporate

Respondents

DECISION (Appeal)

Heard before: The Honourable Associate Chief Justice Michael MacDonald on April 10, 2002 at Halifax, Nova Scotia

Decision Released: June 21, 2002

Counsel: A. William Moreira for the Appellants
Edward A. Gores for the Respondent Crown
James J. White for the Respondent Aquafish Technology Incorporated

MacDonald, A.C.J.:

[1] A group of concerned citizens has appealed the Minister of Agriculture and Fisheries' decision to allow a fin fish farm in Northwest Cove, Lunenburg County.

BACKGROUND

[2] In September of 1999, Aquafish Technology Incorporated ("Aquafish") applied to the Nova Scotia Department of Fisheries and Aquaculture (the "Department") under the *Fisheries and Coastal Resources Act*, S.N.S. 1996, c.25 (the *FCRA*) for a license and lease to operate a fin fish net cage aquaculture farm in Northwest Cove, near Horse Island. The proposed site is proximate to Aquafish's existing "Tilley Cove" operation. Following the submission of copious documentation and a detailed review by the Department, the Minister, in July of 2001, announced his approval of the project. The relevant lease and license, with detailed conditions were issued on October 18, 2001.

[3] At paragraph 5 of their brief, the Appellants have conveniently listed the various "milestones" in the process:

> 5. Various milestone dates during the course of consideration and processing of this application were:
>
> | | |
> |---|---|
> | Sept 7/99 | Application filed |
> | Jan 6/00 | Public meeting called by Provincial Department |
> | Mar 13/00 (?) | First screening level environmental assessment filed |
> | May 9, 2000 | Second screening level environmental assessment filed |
> | January 4, 2001 | Third screening level environmental assessment filed |
> | April 20, 2001 | DFO issues results of its review of third environmental assessment |
> | July 26, 2001 | Provincial Department says in a press release that "the proposed site has been given the go-ahead..." |

October 18, 2001	Provincial Department issues the Lease and Licence which are the subject of this appeal
November 16, 2001	This appeal commenced

[4] Section 119 of the *Act* provides for the subject Appeal:

> 119 (1) A person aggrieved by a decision of the Minister may, within thirty days of the decision, appeal on a question of law or on a question of fact, or on a question of law and fact, to a judge of the Supreme Court of Nova Scotia and the decision of that court is final and binding on the Minister and the appellant, and the Minister and the appellant shall take such action as may be necessary to implement the decision.
>
> (2) The decision of the court pursuant to subsection (1) is final and there is no further appeal to the Nova Scotia Court of Appeal. 1996, c. 25, s. 119.

ISSUES

[5] The parties have identified several issues as follows:

1. Whether the Appellants are "aggrieved persons" so as to trigger my jurisdiction to hear this Appeal,

2. Whether the Appeal was filed within the prescribed 30 day period, and if not whether I should allow an extension.

3. The appropriate standard of review when considering the Minister's decision.

4. In applying the appropriate standard of review, should the Minister's decision be :

    a. set aside, or alternatively,

    b. should the conditions be amended?

[6] I will deal with each issue in order.

1. Are the Appellants "aggrieved persons"?

[7] Because the Appellants filed no documentation to show that they have been directly prejudiced by this decision, the Respondent Crown suggests that they do not meet the threshold of "aggrieved persons" so as to have standing to prosecute this Appeal. I reject this submission. One need look no further than to the voluminous record to quickly realize that the Appellants were most interested in the outcome of this application and directly involved in the process. In fact the Minister saw fit to write many of them personally when his decision was announced *(Volume IV, Tab 449)*. Given the scope of the *FCRA* generally and the circumstances surrounding this process in particular, the Appellants meet the standard contemplated under s. 119. They have standing to process this Appeal.

2. The Timeliness of the Appeal

[8] As noted the Minister decided to grant the license and lease in July of 2001. Upon doing so, he issued a press release and wrote directly to many of the residents. The Crown argues that this triggered the 30 day appeal period. The Appellants, on the other hand, assert that the clock could only begin to run when the announcement was made official by the actual issuing of the lease and licence. This was on October 18, 2001, thereby making the November 16th filing timely.

[9] Again, I decide this issue in favour of the Appellants for the following reasons: While the Appellants knew in July of 2001 that the project would be approved and that there would be "progressive" conditions, the details of these conditions were not official until the documentation was actually released in October. It is agreed by all that these conditions formed an important part of the Minister's decision. The Minister relies on them to justify his decision and the Appellants seek to amend them as alternative relief. In order for the Appellants to make a reasoned decision on whether to appeal, they would have to know exactly what it is they would be appealing. This was not known until October 18, 2001 when the actual documents with conditions were issued. For the purposes of s. 119, I find this to be the triggering date.

[10] The Appeal is therefore timely and there is no need for me to extend the filing time.

3. The Appropriate Standard of Review

[11] Before considering the merits of the Minister's decision, I must consider the level of deference (if any) it deserves. In other words, I must assess the scope of judicial review. In fact, I view this as the most important issue before me.

[12] On one hand, the Appellants assert that because this is an appeal, it is essentially a *decision de novo* allowing me to replace the Minister's decision with what I would have done had the decision been up to me. On the other hand the Crown submits that the impugned decision is the result of ministerial discretion, following an exhaustive review. It would therefore command significant deference despite the right to appeal. It maintains that for me to decide otherwise would effectively transform the Court into an "academy of science". Given its importance to my ultimate disposition, this issue therefore requires a detailed review.

[13] At the outset, it is important to note that, despite the statutory appeal, my role is essentially to review a minister's discretionary decision. Section 48 of the *Act* identifies this discretion:

> Issue of Licences
>
> 48 After completing the consultation referred to in clause 47(a) and after receiving a recommendation, if any, from a regional aquaculture development advisory committee pursuant to clause 47(b), the Minister *may*
>
> (a) issue the aquaculture licence or aquaculture lease;
>
> (b) issue the aquaculture licence or aquaculture lease, subject to any *conditions the Minister deems appropriate*
>
> (c) refer the application to a public hearing; or
>
> (d) reject the application for the aquaculture licence or aquaculture lease.
>
> [Emphasis added]

[14] In the face of such ministerial discretion, I find that an appeal court should not simply substitute its opinion for that of the decision maker. I say this based, in large measure, on recent jurisprudence from the Supreme Court of Canada.

[15] Specifically, there have been four Supreme Court of Canada decisions offering guidance in this area.

[16] *In Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, the Supreme Court of Canada assessed the "standard of review" for the British Columbia Competition Tribunal. Moving away from the more rigid approach previously taken, the Court introduced a pragmatic and functional approach; explaining the range of standards available as a spectrum with a more exacting end and a more deferential end. In *Southam*, the statute governing the tribunal did not have a privative clause and indeed provided a right of appeal. At paragraph 32, Iacobucci J. stated:

> Where the statute confers a right of appeal, an appellate court need not look to see whether the tribunal has exceeded its jurisdiction by breaching the rules of natural justice or by rendering a decision that is patently unreasonable. The manner and standard of review will be determined in the way that appellate courts generally determine the posture they will take with respect to the decisions of courts below. In particular, appellate courts must have regard to the nature of the problem, to the applicable law properly interpreted in the light of its purpose, and to the expertise of the tribunal.

[17] Further, discussing the lack of privative clause, at paragraph 46 Iacobucci J. added:

> That Parliament granted such a broad, even unfettered right of appeal, as if from a judgment of a trial court, perhaps counsels a less-than-deferential posture for appellate courts than would be appropriate if a privative clause were present. However, as this Court has noted several times recently, the absence of a privative clause does not settle the question.

[18] These statements were made in the face of appeal provisions more liberal than those of the *FCRA.* Interestingly, Iacobucci J., in *Southam*, found the expertise of the tribunal to be the most significant criteria. Referring to other Supreme Court of Canada decisions, such as *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, he noted at paragraph 50:

> Expertise, which in this case overlaps with the purpose of the statute that the tribunal administers, is the most important of the factors that a court must consider in settling on a standard of review.

[19] Ultimately at paragraph 28, the Court settled on the standard of reasonable *simpliciter:*

> In other words, a court, in reviewing the Tribunal's decision, must inquire whether that decision was reasonable. If it was, then the decision should stand. Otherwise it must fall.

[20] In 1998, the Supreme Court of Canada decided *Pushpanathan v. Canada (Minister of Citizenship and Immigration),* [1998] 1S.C.R. 982. This case sets out, in clear terms, the factors to be considered in determining the "standard of review". They are:

1. Whether there is a privative clause

2. The expertise of the decision maker

3. The purpose of the *Act* as a whole and the provision in particular

4. The nature of the problem: A question of law or fact

[21] Again the Court emphasized that the absence of a privative clause does not imply a high standard of scrutiny, where the other factors would suggest a lower one. At paragraphs 32 and 35 it again emphasized the significance the decision maker's expertise:

> 32 Described by Iacobucci, J. in *Southam, supra*, at para. 50, as "the most important of the factors that a court must consider in settling on a standard of review", this category includes several considerations. If a tribunal has been constituted with a particular expertise with respect to achieving the aims of an *Act*, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the *Act*, then a greater degree of deference will be accorded. In *Southam*, the Court considered of strong importance the special make-up and knowledge of the *Competition Act* tribunal relative to a court of law in determining questions concerning competitiveness in general, and the definition of the relevant product market in particular...
>
> 35 In short, a decision which involves in some degree the application of a highly specialized expertise will militate in favour of a high degree of deference, and towards a standard of review at the patent unreasonableness end of the spectrum.

[22] The Supreme Court further took the opportunity to consider the "standard of review" for a government Minister's decision in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services),* [2001] 2 S.C.R. 281. In *Mount Sinai,* the Court recognized that ministerial decisions of a discretionary nature have ordinarily been accorded very high levels of deference. Citing

Maple Lodge Farms Ltd. v. Government of Canada, [1982] 2 S.C.R. 2 L'Heureux-Dubé, J. states at paragraph 56:

> The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options.

[23] At paragraph 58, she continues:

> Decisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should generally receive the highest standard of deference, namely patent unreasonableness. This case shows why. The broad regulatory purpose of the ministerial permit is to regulate the provision of health services "in the public interest". This favours a high degree of deference, as does the expertise of the Minister and his advisors, not to mention the position of the Minister in the upper echelon of decision makers under statutory and prerogative powers. The exercise of the power turns on the Minister's appreciation of the public interest, which is a function of public policy in its fullest sense.

[24] The Court in *Maple Lodge Farms* went on to hold that the "standard of review" required was that of patent unreasonableness; albeit in the absence of a privative clause or an expressed right of appeal.

[25] Finally, the Supreme Court returned to this issue in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3. In a unanimous judgement, the Court held that a reviewing court should adopt a deferential position with regard to ministerial decisions, setting them aside only if they were patently unreasonable (in the sense of being either arbitrarily or rendered in bad faith). It emphasized that a reviewing court should not re-weigh the factors or interfere merely because it would have come to a different conclusion.

[26] Following the test laid out in *Southam* and *Pushpanathan*, the Court in *Suresh* concluded that the ultimate question is what the legislature intended. Of unique importance to the case at bar, is that the ministerial discretion under review in *Suresh* came from the *Immigration Act*. Significantly, that legislation (as interpreted by the Supreme Court), like the *FCRA*, provides for an appeal, albeit only with leave. Nonetheless the Supreme Court in *Suresh* concluded that decisions involving ministerial discretion were to be reviewed on the standard of patent unreasonableness. In other words, to be set, aside such decisions would have to have been made arbitrarily, in bad faith, without evidentiary support, or where the Minister failed to consider the relevant factors. In

reaching this conclusion the Court, at paragraph 38, compared its role to that of government:

> This standard appropriately reflects the different obligations of Parliament, the Minister and the reviewing court. Parliament's task is to establish the criteria and procedures governing deportation, within the limits of the Constitution. The Minister's task is to make a decision that conforms to Parliament's criteria and procedures as well as the Constitution. The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold her decision. It cannot set it aside even if it would have weighted the factors differently and arrived at a different conclusion.

[27] Having reviewed these four leading Supreme Court of Canada decisions, I will now apply the four factors enunciated in *Southam* and *Pushpanathan,* to the facts at Bar.

The Lack of a Privative Clause

[28] The *FCRA* provides a right of appeal similar to that in the *Immigration Act* where in *Suresh* the Supreme Court directed a *patently unreasonable* test. Like the *Immigration Act*, the *FCRA* has no privative clause, and under the *FCRA*, the appeal is limited to "either fact, law or mixed fact and law". Interestingly, the *FCRA* allows no further appeal from my decision. I find this to be significant. Had the legislature intended me conduct a *hearing de novo* (as the appellants contend) then one would expect a corresponding right to appeal my decision. Therefore, despite the lack of a privative clause, I see my role as more supervisory in nature. In turn, this would command a higher level of deference.

The Minister's Expertise

[29] The next factor to consider is the relative expertise of the decision -maker. As stated earlier, this is arguably the most significant factor favoring deference. When considering this factor in *Suresh* the Supreme Court considered not only the Minister's personal expertise, but also that of his/her advisors. Significantly s. 47 of the *FCRA* provides for broad consultation:

> 47 Before making a decision with respect to the application, the Minister
>
> (a) shall consult with

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

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

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

[30] Of course, the greater the level of expert consultation, the higher the level of deference. In the case at bar, there was significant input from many experts.

Legislative Purpose

[31] The next factor is the purpose of the *Act* as a whole and of the impugned provision in particular. The *Act's* purpose is set out in Section 2:

2 The purpose of this *Act* is to

(a) consolidate and revise the law respecting the fishery

(b) encourage, promote and implement programs that will sustain and improve the fishery, including aquaculture;

(c) service, develop and optimize the harvesting and processing segments of the fishing and aquaculture industries for the betterment of coastal communities and the Province as a whole;

(d) assist the aquaculture industry to increase production;

(e) expand recreational and sport-fishing opportunities and ecotourism;

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

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

> (h) increase the productivity and competitiveness of the processing sector by encouraging value-added processing and diversification. 1996, c.25. s.2.

[32] These purposes suggest *inter alia* an intention to promote the aquaculture industry while balancing other interests such as tourism and the environment. As stated in *Pushpanathan,* where the purpose seems to be more political than legal, then the appropriateness of court supervision diminishes. This therefore suggests a high level of deference in the case at bar.

The Nature of the Problem

[33] The last factor involves the nature of issue facing a particular tribunal; the more factual in nature, the higher the level of deference . In the case at bar, the Minister's decision was primarily factual. It involved a scientific review followed by a factual determination as to the merits of the application. This involved balancing the promotion of the aquaculture industry against environmental and community concerns. Therefore, in the case at bar, this criterion also suggests a high level of deference.

Standard of Review - Conclusion

[34] Considering all these factors and applying the guidance provided by the above mentioned Supreme Court of Canada decisions, (particularly *Mount Sinai* and *Suresh),* I find the appropriate standard of review in the case at Bar to be at least reasonableness *simpliciter* if not patent unreasonableness. Given the importance of respecting a Minister's discretion, I say this even in the face of the relevant appeal provisions.

4. Merits of the Minister's Decision

Should it be set aside?

[35] Having reviewed the detailed record and the able submissions of counsel, I am not prepared to set the Minister's decision aside. In the circumstances, this decision was not unreasonable. It was the product of an extremely comprehensive consultative process. A public hearing was held pursuant to S. 48(c) of the *Act*. A full environmental assessment (that supported the project)was produced (*Volume I, Tab 20*). It satisfied not only the issuing Minister, but also other provincial government departments (*Volume I, Tab 44*). As well the project was approved by the Federal Minister of Fisheries and Oceans following that department's independent review under the *Navigable*

Waters Protection Act, R.S.C. 1985, c.N-22 (*Volume II, Tab 93*). This voluminous record clearly establishes that the Minister had a reasonable basis for his conclusion.

[36] Furthermore, there is nothing to suggest that the Minister's decision was either arbitrary or exercised in bad faith.

[37] In reaching this conclusion, I have considered the Appellants' submissions both individually and cumulatively. I will briefly summarize most of them.

[38] The Appellants suggest that the decision was based upon irrelevant considerations such as sending a message to the Federal Government and the business community that licenses would be granted even in the face of strong community opposition. They cite examples at paragraphs 23 to 25 of their brief:

> 23. The Briefing Note to the Minister is at Record, Vol. 1, Tab 33. It states in part:
>
> "Aquaculturists outside of Nova Scotia, who have been investing in the province over the past two years, are looking for a signal of support from the province. Issuing this site demonstrates the province's recognition that aquaculture is a legitimate user of the coastal resources."
>
> 24. A document headed "Advice to the Minister, CONFIDENTIAL", at Record, Vol 1, Tab 34, states in part:
>
> "We have been asking DFO to be fair to aquaculture and to allow it to develop. Approving this site in the face of opposition will demonstrate our commitment to our position with the federal government.
>
> Issuing this site will increase investor confidence in the Nova Scotia aquaculture industry by outside companies. Access to new sites has been identified as the #1 impediment to future growth of the industry.
>
> A positive response will curtail momentum of those who simply don't want aquaculture in their yard."
>
> 25. Somewhat more pointed advice to the Minister is found in an email from Greg S. Roach (Aquaculture Executive Director Fisheries and Aquaculture Service) to Leo J. Muise (Director Aquaculture) dated July 24, 2001 (Record, Vol. 1 Tab 36, last page):
>
> "I would suggest adding these bullets to the one pager:

> A positive response to NWC will curtail the momentum of those who simply don't want aquaculture on their areas (NIMBY syndrome) and think they can get rid of legitimate operators by mounting a smear campaign or political lobby.
>
> The dept has been pressuring DFO to be fair to Aquaculture in NS and allow it to develop. Approving this site in the face of strong local opposition and political pressure will demonstrate to the federal government that we talk the talk and walk the walk.'"

[39] When placed in context, these remarks (although not directly attributable to the Minister) are not necessarily irrelevant considerations. The Government of Nova Scotia has identified a properly regulated fish farming industry as representing potential economic growth. These comments depict the government's determination to encourage this industry even in the face of strong opposition by local residents. Whether this represents sound government policy is a question for the electorate and not the Courts.

[40] The Appellants also suggest bad faith on the part of Government in that Aquafish's approval was a foregone conclusion thereby rendering the public hearings meaningless. At paragaraph 29 of their brief, they refer to the following e-mail from Mr. Alan Chandler who chaired the public meeting on behalf of the Minister:

> 29. On January 7, 2000, the day following the public meeting, Alan Chandler, who had chaired the meeting, reported by email to (among others) Mr. Muise as follows (Record, Vol 2, Tab 140):
>
> > "I briefed Peter extensively on the hearing. My message was that the site should proceed for all the reasons we have discussed in the past..."
>
> It is submitted that if senior officials of the Provincial Department had "discussed in the past" reasons why, and having heard local opposition had decided that, "the site should proceed" even before materials necessary to support the application were in hand, the decision-making process has been demonstrated to have been "not in good faith" and the Court should overturn the impugned decisions for this reason alone.

[41] The fact that servants within Government may have expressed earlier opinions does not taint the Minister's decision making process. Before the Minister made his final decision, he ordered a full environmental assessment, a public hearing

and met personally with concerned citizens. These are all indicators of an open and impartial process.

[42] The Appellants further highlight what they term as the "overwhelming community opposition" to this project with corresponding minimal economic advantage. There is no doubt that the Minister's decision was extremely controversial. However not every controversial decision is necessarily unreasonable. Again this decision reflects government policy to promote this fledgling industry even in the face of intense community opposition. It is also clear that the Minister viewed the economic advantages from a province-wide as opposed to a local community perspective (*Volume IV, Tab 446*).

[43] The environmental assessment contained in the Jacques Whitford Report has come under a detailed attack by the appellants and other concerned citizens. (Paragraphs 42 to 45 of the Appellants' brief; exhibit "C" of the Philip Lamont affidavit). A project of this type has, by its very nature, wide ranging repercussions. It raises a myriad of environmental, social, and economic concerns. While not as detailed and or as definitive as the Appellants would like, this report is nonetheless very comprehensive and detailed. Despite the Appellants' spirited and articulate objections, I find that it was not unreasonable for the Minister to rely on this report when making his decision.

[44] The Appellants also argue the Minister with this decision is embarking on a dangerous leap of faith with too many unanswered questions. In short, they submit that he should have "erred on the side of caution" as prescribed by both the preamble and s. 30 of the *Oceans Act* S.C. 1996, c.31. I agree with the Appellants that whether legislatively directed or not, the Minister is under a duty to proceed cautiously in circumstances such as these. However, considering the limited term of the license, the stringent conditions, and the ongoing monitoring provisions, I find that the Minister has in fact proceeded cautiously.

[45] In short, I find that there is nothing either individually or cumulatively to suggest that the Minister acted unreasonably in making his, albeit highly controversial, decision. I repeat that it is not for the Courts to impose what it would do. As a matter of policy, courts cannot usurp the function of government and become "academies of science".

Should the conditions be amended?

[46] Furthermore, I find that it would be equally inappropriate for me to amend the Minister's conditions. Despite the statutory right of appeal, they are discretionary and to be what he "deems appropriate" [S. 48(b) of the *FCRA*].

[47] I have already found these conditions to be stringent. They total 53 in number.

[48] Without repeating all of them, the more important safeguards include:

a. A three year performance review with Province's right to cancel should the Province "in its sole discretion" conclude the performance to be unsatisfactory. (clause 3)

b. Strict controls over the size of stock and handling of waste combined with ongoing video monitoring. (Conditions 1 to 9)

c. Strict controls over and monitoring of diseases and consequential mortalities.(Conditions 26 to 29 and 36)

d. Monitoring results to be provided not only to Government but also to the community liaison committee (condition 53)

e. Environmental sensitivity training for employees.(condition 44)

[49] Considering their scope and detail, these conditions are not unreasonable from the Court's perspective. It would be inappropriate to tinker with them in the circumstances.

DISPOSITION

[50] The Appeal is dismissed. I trust the parties can agree on costs. Otherwise, I invite your written submissions by June 28th, 2002. When the issue of costs is resolved, I expect counsel for Respondent Crown to present the order, (after counsel for both Aquafish and the Appellants have consented as to form).

Michael MacDonald
Associate Chief Justice

DECISION **2016 NSUARB 166**
M07610

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE HALIFAX REGIONAL MUNICIPALITY CHARTER

- and -

IN THE MATTER OF an Appeal by **ASHCROFT HOMES INC.** from the decision of the Development Officer which refused to issue a development permit for a proposed student residence with accessory uses at 5900 Inglis Street, Halifax, Nova Scotia

BEFORE: Roland A. Deveau, Q.C., Vice Chair

APPELLANT: **ASHCROFT HOMES INC.**
Nancy G. Rubin, Q.C.

RESPONDENT: **HALIFAX REGIONAL MUNICIPALITY**
E. Roxanne MacLaurin, LL.B.

COUNSEL: **SAINT MARY'S UNIVERSITY**
Kevin Latimer, Q.C**.**

PARK TO PARK COMMUNITY ASSOCIATION
SCOTT ARMOUR MCCREA
COMMUNITY COALITION OF SOUTH END HALIFAX
Michael P. Scott, LL.B.
Robert M. Purdy, Q.C.

SAINT THOMAS AQUINAS-CANADIAN MARTYRS PARISH and the ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX
Deacon Dan Daley

PRELIMINARY HEARING DATE: September 13, 2016

DECISION DATE: **September 19, 2016**

DECISION: **Requests for intervenor status granted by the Board.**

I INTRODUCTION

[1] This is a Decision of the Nova Scotia Utility and Review Board ("Board") respecting requests for intervenor status in an appeal by Ashcroft Homes Inc. ("Ashcroft" or "Appellant") from the decision of a Development Officer for Halifax Regional Municipality ("HRM"), who refused to issue a development permit for a proposed university student residence having two towers of 27 and 31 storeys, with accessory uses, at 5900 Inglis Street, Halifax, Nova Scotia.

[2] The Ashcroft appeal is made under s. 262(3) of the *Halifax Regional Municipality Charter,* S.N.S. 2008, c. 39, as amended ("*HRM Charter*"). In the Board's ultimate disposition of the appeal, it will have to determine whether the Development Officer's decision complies with the land-use by-law.

[3] Under the *HRM Charter*, a tight timeline is established for the efficient conduct of planning appeals. Upon filing of the appeal, the Board convened a conference call with legal counsel for Ashcroft and HRM on August 18, 2016, to set a hearing date and to establish a timeline for the pre-hearing disclosure of evidence. Further, in accordance with its normal practice in planning appeals, the Board directed Ashcroft to serve a copy of the Notice of Public Hearing on all assessed owners of land within a distance of 500 feet of the property which is the subject of the appeal.

[4] Six potential intervenors originally requested formal standing in this matter: the Saint Thomas Aquinas-Canadian Martyrs Parish; the Roman Catholic Episcopal Corporation of Halifax; St. Mary's University ("SMU" or "University"); the Park to Park Community Association ("Park to Park"); the Community Coalition of South End Halifax ("Community Coalition"); and Scott Armour McCrea.

[5] The burden of proof is upon the individual or group that seeks intervenor status to show that the Board should grant formal standing.

[6] The Preliminary Hearing on this matter was held September 13, 2016, at the Board's Offices, in Halifax, Nova Scotia. Ashcroft was represented at the hearing by Nancy G. Rubin, Q.C., while HRM was represented by its counsel, E. Roxanne MacLaurin, LL.B. With respect to the proposed intervenors, the University was represented by Kevin Latimer, Q.C., and Park to Park was represented by Michael P. Scott, LL.B.

[7] At the Preliminary Hearing, the Community Coalition and Mr. McCrea indicated that they were withdrawing their requests for standing. Instead, they both decided to support Park to Park in its intervention.

[8] The subject property is located on the southern side of Inglis Street in the south end of the Halifax peninsula. The 1.21 acre property is owned by the Roman Catholic Episcopal Corporation of Halifax and is the location of the Canadian Martyrs Church ("Church"). The University owns the land to the west, south and east of the subject property. The SMU campus effectively surrounds the Church property.

[9] In 2008, the parishes of Canadian Martyrs and Saint Thomas Aquinas, on Oxford Street, amalgamated. The parish decided to sell the Canadian Martyrs property and to use the proceeds to modernize and upgrade Saint Thomas Aquinas Church, and to build a new parish centre. Ashcroft was the successful bidder in an RFP process, which received substantial interest from developers. The sale is subject to approval by the Vatican, which had not been received at the time of the Preliminary Hearing.

[10] Ashcroft proposes to develop residential accommodation for university students comprised of a building with two towers of 27 and 31 storeys.

[11] According to HRM, the subject property is identified as being zoned U-1 (Low-Density University Zone) and U-2 (High-Density University Zone) under the Halifax Peninsula Land Use By-law, South End ("LUB"). Indeed, the University's surrounding campus carries the same zoning. However, in its pre-filed material, and in submissions at the Preliminary Hearing, Mr. Latimer, legal counsel for the University, submitted that the Church property is depicted as U-2, in error, on HRM's zoning map.

II SUBMISSIONS

[12] Both Ashcroft and HRM stated that they do not oppose formal standing by the Roman Catholic Episcopal Corporation of Halifax, the Saint Thomas Aquinas-Canadian Martyrs Parish, and the University. However, Ashcroft argues that the participation of these intervenors should be limited to the issue before the Board in this appeal, i.e., that being the scope of the appeal under the *HRM Charter* of whether the Development Officer's decision complies with the LUB.

[13] In his submissions at the hearing, Mr. Scott indicated that his client is a registered non-profit society. Its objects in the Memorandum of Association include:

> The name of the Society is: Park to Park Community Association.
>
> On a volunteer and non-profit basis, the objects of the Society are:
>
> 1) To actively promote the protection of the neighbourhoods in Halifax's South End including Gorsebrook Park, Victoria Park and Point Pleasant Park and specifically the area within the South End Area Plan of the Halifax Municipal Planning Strategy…
>
> 2) To educate and inform residents about zoning and planning guidelines
>
> 3) To oppose inappropriate development and maintain the character of the area which is primarily low rise, medium density housing.

> 4) To advocate for the protection of the South End Area Plan and to participate in reviews and upgrades as necessary.
>
> [Park to Park letter, September 9, 2016, p. 3]

[14] In support of its request for intervenor status, Park to Park described the composition of its members and the concerns of the Association and its members:

> Park to Park Community Association represents over 91 individual members in the south end of Halifax and 74% of these members not only consider themselves to be affected by this proposed development but also live within the 500' notification area as identified by the NSUARB. Such a massive, high density, student housing project located in such close proximity to single family residential housing brings with it a whole host of issues that can create significant impacts arising from the differing lifestyles of the student population during their university years. The area is not even identified for development in HRM's Centre Plan.
>
> …
> To support our efforts to protect this parkland, which likely will be affected by significant shadowing and wind forces, we are providing as evidence of the fact that Park to Park has a real and substantial interest in this appeal, our efforts to support Gorsebrook Park in the last year or more with a letter from Councillor Waye Mason and communication with Trees Canada/Sierra Club who recently planted over 35 trees in the park and engaged the neighbourhood in what trees they wanted.
>
> [Park to Park letter, September 9, 2016, pp. 1-2]

[15] Further, Park to Park submitted that the proposed development would negatively impact its members in the enjoyment of their own properties, and their neighbourhood generally, as well as impacting the values of their properties:

> With the advent of the Ashcroft Homes proposal of two multi unit (27 and 31 story) towers on the Canadian Martyrs property, our neighbourhood is at risk. We are of the opinion that the fabric of the neighbourhood will be irrevocably damaged, clearly inflicting both loss of enjoyment in our neighbourhood and financial losses for many.
>
> [Park to Park letter, September 7, 2016, p. 2]

[16] In addition, Park to Park filed an email dated September 9, 2016, from Tim Margolian of Six Eight Realty Group, who stated that, in his opinion, the proposed development "could certainly have a negative effect on property values of these private homes going forward".

[17] HRM indicated its view that Park to Park should be granted formal standing.

[18] However, Park to Park's request for intervenor status was opposed by Ashcroft. Ms. Rubin submitted:

> With respect to Park to Park, while its objects in relation to protection of Gorsebrook Park shadowing may potentially have qualified it, there is nothing in the Record, nor any information which establishes on an objective basis that Gorsebrook Park will be affected by the Development Officer's decision.
>
> Likewise, to the extent that Park to Park (or its members) plan to adduce evidence with respect to impacts on property values, noise and construction effects, student parties and shadowing, again, these are all outside the scope of this appeal and what's at issue.
>
> …
> Denying full standing as intervenors to Park to Park, the Coalition and Mr. McCrea keeps the focus of the appeal properly where it should be – on the correctness of the Development Officer's decision. Those obviously and most immediately impacted – SMU and the Church – in addition to the Developer and the Municipality may be full participants.
>
> [Ashcroft submission, September 12, 2016, pp. 2-4]

III ANALYSIS AND FINDINGS

[19] The applicable test to be applied by the Board in considering intervenor requests in such appeals was set out by the Board in *Northern Construction Enterprises Inc. v. Halifax Regional Municipality,* 2012 NSUARB 149, affirmed on appeal, without discussion on this issue, 2015 NSCA 43 (CanLII):

> [78] The burden of proof is on the proposed Intervenors to establish that they should be granted status to intervene in the appeal and thus participate in the hearing on the merits. This they must do on the civil burden, i.e., the balance of probabilities.
>
> [79] Section 209(a) of the *HRMC* sets out the definition of "aggrieved person", as does s. 191 of the *MGA*. Aggrieved persons may appeal certain decisions, but under s. 262(3) of the *HRMC*, the only person who can appeal a refusal by a development officer to grant a development permit is the applicant (in this case, Northern). The right of an appeal of an "aggrieved person" pertains to a decision of council only.
>
> [80] As stated by the Board in an earlier decision in this appeal [2012 NSUARB 105] on the issue of extending the area for notice:
>
> > [27] In the absence of case law, or legislative guidance, on the subject, the Board finds that the policy underlying the 500 foot rule embodies a simple idea: it is a good thing to ensure people are aware of land use disputes occurring close to properties they own. <u>This policy doesn't say that such people are automatically entitled to participate as</u>

> parties in an appeal before the Board, but merely says that they are to receive notice.
>
> [2012 NSUARB 105, p. 8]

[81] Rule 25(2) of the Board's *MGA Rules* provides that Notice of Public Hearing be published "…advising that any aggrieved person has the right to intervene and participate in the public hearing". The Board finds that such a statement, just as the giving of notice to persons within a prescribed area, does not mean that any member of the public has the right to intervene. The person must be aggrieved.

[82] In the absence of any definition of aggrieved person in the *MGA Rules*, the Board considers that it ought to take guidance from the definition in the applicable statute, which in this case is s. 209(a) of the *HRMC*, which provides:

> 209 In this Part and Part IX, unless the context otherwise requires
>
> (a) "aggrieved person" includes
>
> (i) an individual who bona fide believes the decision of the Council will adversely affect the value, or reasonable enjoyment, of the person's property or the reasonable enjoyment of property occupied by the person,
>
> (ii) an incorporated organization, the objects of which include promoting or protecting the quality of life of persons residing in the neighbourhood affected by the Council's decision, or features, structures or sites of the community affected by the Council's decision, having significant cultural, architectural or recreational value, and
>
> (iii) an incorporated or unincorporated organization in which the majority of members are individuals referred to in subclause (i).

[83] This section, and the parallel provision of the *MGA*, has been considered by the Board in many previous cases. (See, for example*, Federation of Nova Scotian Heritage v. Peninsula Community Council,* [2004] NSUARB 108; *Re Heartland Resources Inc*., [2005] NSUARB 39; *Re D & M Lightfoot Farms Ltd.,* [2005] NSUARB 117; *Re Becker*, [2009] NSUARB 59; and *Re Eco Awareness Society*, [2010] NSUARB 102). Rather than undertake an extensive review of the case law here, the Board has drawn several principles from the cases, i.e., the definition is not exhaustive; there must be an objective aspect to the *bona fide* belief; the belief should not be speculative; distance is not a determinative factor; each case must be determined on its facts; the burden is on the person claiming to be aggrieved; and, the Board may look to the common law test, as articulated by the Supreme Court of Canada in *Friedmann*, requiring the person to "...genuinely suffer, or [be] seriously threatened with, any form of harm prejudicial to his interests whether or not a legal right is called into question". [Emphasis in original]

[20] The *Utility and Review Board Regulations* also provide that "interested persons" may participate in Board proceedings if they have a real and substantial interest in the subject matter to be canvassed in the hearing:

> **Interested person**
> **6** The Board shall permit any person who is determined by the Board to have a real and substantial interest in the subject-matter of the proceeding to participate in the hearing.

[21] Thus, while the right of an “aggrieved person” to appeal to the Board relates to a decision of Council only, the Board considers that where the matter involves a refusal of a development permit by a development officer (which can only be appealed under s. 262(3) by the applicant), any other individual or organization may intervene in the appeal provided they can show a real and substantial interest in the subject-matter of the proceeding. The scope of the appeal may differ from that found in a matter involving an appeal from a decision of Council, but any such interested persons may participate in the hearing on the basis of the applicable jurisdiction of the Board.

[22] Further, in assessing whether someone has a real and substantial interest, the Board considers that the principles enumerated in *Northern Construction* are to be applied, including the definition of “aggrieved person” and the common law test in *British Columbia Development Corp. v. Friedmann (Ombudsman)*, [1984] 2 S.C.R. 447.

[23] With respect to the present matter, HRM and Ashcroft do not oppose formal standing in this matter by the Saint Thomas Aquinas-Canadian Martyrs Parish, the Roman Catholic Episcopal Corporation of Halifax, and the University. The Board notes that these parties represent, respectively, the owners of the subject property itself, as well as the immediately adjacent lands. Accordingly, the Board grants them intervenor status.

[24] With respect to Park to Park, the Board notes that the Memorandum of Association of the organization itself provides that its objects include the “protection of the neighbourhoods in Halifax’s South End including Gorsebrook Park”, which is located

in close proximity to the subject property, as well as the protection of "the area within the South End Area Plan of the Halifax Municipal Planning Strategy".

[25] The Board finds, on the balance of probabilities, that an overwhelming majority of Park to Park's individual members *bona fide* believe, on an objective basis, that the proposed development will adversely affect the value, or the reasonable enjoyment, of their property. Almost three quarters of its members reside within 500 feet of the subject property. Also, while they are not permitted to directly appeal the Development Officer's decision under the *HRM Charter,* the Board is satisfied that, in the words of *Friedmann*, they may "genuinely suffer… or [be] seriously threatened with, any form of harm prejudicial to [their] interests".

[26] Taking all of the above into account, the Board concludes that Park to Park should be granted standing as an Intervenor, able to participate in the proceeding.

IV SCOPE OF APPEAL

[27] While this Preliminary Hearing was held to determine the various requests for formal standing, the Board considers it appropriate to outline the scope of the appeal to be considered during the hearing on the merits to be held commencing October 19th.

[28] As noted earlier in this Decision, Ashcroft submitted that the participation of all intervenors in this proceeding should be strictly confined to the issue before the Board in this appeal, i.e., whether the Development Officer's decision complies with the LUB.

[29] Ms. Rubin submitted that the scope of the appeal should be limited to the basis of the Development Officer's reasons for his refusal of the development permit.

Thus, she suggested the primary issue to be canvassed at the hearing is whether the proposed development qualifies as university student accommodation under the LUB. She submitted that potential issues raised by the intervenors in their submissions should not be addressed, including adverse wind or shadow effects from the proposed development; a suggestion that the proposed development is not consistent with a "Master Plan" prepared by the University; or that the zoning map incorrectly showed the U-2 Zone as applying to the subject property. In the latter case, she noted that there is a process outlined in the *HRM Charter* for an application to the Supreme Court for the quashing of a by-law.

[30] As noted earlier in this Decision, the present appeal by Ashcroft is made under s. 262(3) of the *HRM Charter*, which provides:

> **262 (3)** The refusal by a development officer to
>
> (a) issue a development permit; or
> (b) approve a tentative or final plan of subdivision or a concept plan,
>
> may be appealed by the applicant to the Board.

[31] The nature of this appeal is quite different from that of other types of planning appeals under the *HRM Charter*. Specifically, it is different in scope from an appeal from the approval or refusal by a Council to amend a land-use by-law, or from a decision by a Council to approve or refuse a development agreement, or an amendment thereto. In the latter cases, the test to be applied by the Board involves its determination of whether Council's decision reasonably carries out the intent of the municipal planning strategy ("MPS"): see ss. 265(1)(a)-(c).

[32] However, the scope of the appeal in the present matter is set out in s. 265(2):

> **265 (2)** An applicant may only appeal a refusal to issue a development permit on the grounds that the decision of the development officer does not comply with the land-use by-law, a development agreement, an order establishing an interim planning area or an order regulating or prohibiting development in an interim planning area. [Emphasis added]

[33] Thus, while appeals under s. 265(1) of the *HRM Charter* typically involve the consideration and balancing of policies in the MPS by Council, the present appeal under s. 265(2) involves a much narrower focus, i.e., whether the development officer's decision complies with the LUB. The standard of review which applies to each is also different. In the former, the standard of review is that of reasonableness, while in the latter it is based on the correctness standard: see *Halifax (Regional Municipality) v. United Gulf Developments Ltd.,* 2009 NSCA 78 (CanLII).

[34] The parties in this appeal are cautioned that their participation at the hearing on the merits must be guided by the scope of the appeal outlined under the *HRM Charter*. As the Board noted in *Re R & N Farms Limited*, 2010 NSUARB 4, at para. 101:

> The participation of the intervenors does not change the single issue before the Board in this appeal. The intervenors are limited to presenting evidence and arguments addressing that issue under MGA s. 250(2).

[35] It is noted that s. 250(2) of the *Municipal Government Act,* S.N.S. 1998, c. 18, as amended, respecting appeals originating outside HRM is the equivalent provision to s. 265(2) of the *HRM Charter*.

[36] However, while the Board is mindful of Ms. Rubin's submission that the scope of this appeal is limited to the correctness of the Development Officer's decision to refuse a development permit under the LUB, the interpretation of the LUB is not conducted in isolation. First, the *HRM Charter* provides that the provisions in the LUB must enable the policies in the MPS to be carried out:

> **Adoption of land-use by-law or amendment**
> **234 (1)** Where the Council adopts a municipal planning strategy or a municipal planning strategy amendment that contains policies about regulating land use and development, the Council shall, at the same time, adopt a land-use by-law or land-use by-law amendment that enables the policies to be carried out.
>
> **(2)** The Council may amend a land-use by-law in accordance with policies contained in the municipal planning strategy on a motion of the Council or on application.
>
> **(3)** The Council may not adopt or amend a land-use by-law except to carry out the intent of a municipal planning strategy.
>
> **Content of land-use by-law**
> **235 (1)** A land-use by-law must include maps that divide the planning area into zones.
>
> **(2)** A land-use by-law must
> (a) list permitted or prohibited uses for each zone; and
> (b) include provisions that are authorized pursuant to this
> Act and that are needed to implement the municipal planning strategy.
> [Emphasis added]

[37] Further, the Courts have held that a review of the MPS may assist in interpreting the LUB. In *J & A Investments Ltd. v. Halifax (Regional Municipality)*, [2000] N.S.J. 92 (S.C.), where the meaning of an LUB was in issue, Justice Davison reasoned that s. 219(1) of the *Municipal Government Act* [which is the equivalent provision to s. 234(1) of the *HRM Charter*] means that an MPS may be used to help determine the intent of the LUB.

[38] In *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation,* 2010 NSCA 38, Fichaud, J.A., noted:

> Though the MPS does not amend the LUB, the MPS' intent should be the LUB's backbone. For that reason, the MPS may be an interpretive tool to elicit meaning from ambiguity in the LUB: *Bay Haven Beach Villas Inc v. Halifax (Regional Municipality),* 2004 NSCA 59 (CanLII), ¶ 26; *Heritage Trust of Nova Scotia v. Nova Scotia (Utility and Review Board)* (1994), 1994 CanLII 4114 (NSCA), 128 N.S.R. (2d) 5 (CA), at ¶ 123; *Archibald*, ¶ 24(8).
>
> [para. 47]

[39] Accordingly, while the thrust of the hearing on the merits will no doubt focus on the interpretation of the LUB as it relates to the facts of this particular appeal, it

would be inconsistent with the direction given by the Court of Appeal to exclude from possible consideration the provisions of the MPS, including its reference to the SMU Master Plan or its policies relating to land-use designations for the subject property. Those issues, if raised, are more appropriately left to the hearing on the merits so that such matters can be considered with the benefit of an evidentiary and legal context.

[40] That having been said, the issue to be decided remains whether the Development Officer's decision complies with the LUB, on the correctness standard. During the hearing on the merits, the Board will be diligent to ensure the evidence and submissions remain relevant to this determination.

V CONCLUSION

[41] The Board grants formal standing in this appeal to Saint Mary's University, the Roman Catholic Episcopal Corporation of Halifax, the Saint Thomas Aquinas-Canadian Martyrs Parish, and the Park to Park Community Association.

[42] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 19th day of September, 2016.

_____

Roland A. Deveau