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. 94th) 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.