IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Acheson v. Nova Scotia (Environment and Labour), **2006 NSSC 211**

Date: 20060818
Docket: S.H. 257876A
Registry: Halifax

IN THE MATTER OF THE ENVIRONMENT ACT 1994-95, c.1

Between:

Sandra Acheson and Peter DeWolfe

Appellants

v.

Minister of Environment and Labour representing
Her Majesty the Queen in Right of the Province of Nova Scotia

Respondent

Judge:	The Honourable Justice Margaret J. Stewart
Heard:	June 27, 28 and 30, 2006, in Halifax, Nova Scotia
Counsel:	Ronan W. Holland, for the appellants Blake Wright, Article Clerk, for the appellants Catherine J. Lunn, for the respondent Misty Morrison, Law Student, for the respondent

[1] This is an appeal from the decision of the Minister of Environment and Labour (the Minister) made under the authority of s. 138 of the *Environment Act* R.S.N.S. 1994-95, c.1 (the *Act*) involving an application for infilling of a waterway known as Marshall Flowage on which the appellant, Sandra Acheson's (Acheson) property borders.

BACKGROUND

[2] The appellants, Acheson and Peter DeWolfe, (DeWolfe) appeal the Minister's October 7, 2005 decision denying the appeal by the appellants of the refusal by an Administrator of the Department of Environment and Labour (DOEL) to approve a large infill surrounded by a rock wall extending into the waters of Marshall Flowage. The four foot rock wall is 150 feet across and tapers back to a height of approximately one foot for a distance of 100 feet creating the sides of the infill. The infill and retaining wall was completed in September 2003 to prevent flooding and erosion to the Acheson property. Watercourse alteration approval sought after the fact, in late October of 2003 was denied by the DOEL

Administrator on September 23, 2004, pursuant to s. 52 of the *Act* because firstly, the infill is likely to impart an adverse effect as it may impair or damage the aquatic and near shore environment; secondly, it would threaten the health and integrity of the aquatic echo system and thirdly, it does not promote the best interests of water-resource management and conflicts with the mandate of other Government Agencies, specifically the (The Department of Fisheries and Oceans; (DFO).

[3] A site visit had been conducted by DOEL when they received a complaint in October 2003 and further visits included personnel from DFO. While DeWolfe was present, a biologist with DFO visited the site on October 14, 2003 and provided a written response to DOEL dated December 3, 2003, indicating DFO did not support the application to infill, as it encroached on the natural shore line which is used by fish for habitat.

[4] Section 137 of the *Act* permits an appeal from the decision of the Administrator to the Minister. The Minister's October 7, 2005 decision denying the appellants October 21, 2004, appeal from the Administrator's decision states the adverse affects from the activity to be unacceptable and notes that advice had

been received from DFO, " that the infill has encroached on the natural shore line which is aquatic habitat for shelter, feeding and protection from large predators".

[5] Marshall Flowage, near Lochabar Mines in Sheet Harbour consists of the East River and the part of the land around the East River acquired by Nova Scotia Power Inc.'s (NSPI) predecessor by expropriation in 1926. It is part of a 80 year old hydro water system. Water is moved from various supplies of water down through Marshall Flowage. Marshall Falls Dam was built in 1926 and re-built in 1933. "The water moves on down through two power houses, a canal and so on." Beside being influenced by the weather, the water level in Marshall Flowage fluctuates through the operation of the Dam within a specific operating range set by NSPI and the water is only brought down significantly during construction and maintenance, with the most recent event being in 2001. It is NSPI's position that in 1949 it sold off the portion of the expropriated land above the 198.5 elevation level and retained the rest, so the rock wall and infill placed by the appellants, if below the 198.5 elevation level is on land expropriated for Marshall Flowage and belongs to NSPI. The Acheson property was purchased by Acheson in 1995. Her deed references land on the water side as being "the ordinary high water mark of Marshall Flowage as shown on said plan". To date, there is no resolve of this

boundary issue which only came to light because of the appellants questioning the need for approval and is not an issue before this court. There is no question that the appellants were able to and did comply with the requirements of the *Act* when completing the watercourse alteration application in October 2003; specifically, by providing Acheson's deed. It was done in good faith. Central to the determination made by the Minister is whether Marshall Flowage is a watercourse.

Legislative Background

[6] The two pieces of applicable legislation are the *Act* and Activities Designation Regulations (ADR). They were concisely addressed in the respondent's brief.

[7] Part V of the *Act* deals with approvals and certificates. Section 50 of the *Act* provides:

> Prohibition
>
> 50 (1) No person shall knowingly commence or continue any activity designated by the regulations as requiring an approval unless that person holds the appropriate approval.

> (2) No person shall commence or continue any activity designated by the regulations as requiring an approval, unless that person holds the appropriate approval.

[8] Section 53(1) stipulates that, "An application for an approval shall be made in a form prescribed by the Minister and accompanied by the information stipulated by the Minister."

[9] Under provision 56(1) the Minister has the power to issue or refuse to issue an approval.

[10] Upon consideration of an application for approval statutory provision 52 of the *Act* states:

> Decision not to approve proposed activity
>
> 52 (1) Where the Minister is of the opinion that a proposed activity should not proceed because it is not in the public interest having regard to the purpose of this Act, the Minister may, at any time, decide that no approval be issued in respect of the proposed activity if notice is given to the proponent, together with reasons.
>
> (2) When deciding, pursuant to subsection (1), whether a proposed activity should proceed, the Minister shall take into consideration such matters as whether the proposed activity contravenes a policy of the Government or the Department,

> whether the location of the proposed activity is unacceptable or whether adverse effects from the proposed activity are unacceptable.

[11] The *Act* specifies under s. 54(2) that the Minister's decision must be rendered "within sixty days of receipt of the completed application" unless the Minister notifies the applicant otherwise within ten days.

[12] Under s. 66 the statute grants broad powers to make regulations which include, *inter alia:*

> 66 (1) The Governor in Council may make regulations
>
> (a) designating activities or any class of activities for which an approval or certificate of qualification is required, and specifying the kind of approval or certification of qualification required;
>
> . . .
>
> (f) generally, respecting any matter necessary or advisable to effectively carry out the intent and purpose of this Part.

[13] Section 3(1) of the *ADR* stipulates that, "Any activity designated in these regulations requires an approval from the Minister or an Administrator designated by the Minister". Division I of the *ADR* addresses water approvals. Section 5(1)

designates the various purposes necessitating the alteration or use of a watercourse or water resource that constitute an activity. The specific purposes/uses enumerated in the *ADR* which are applicable to the case at bar are:

> **n**) the placement of rock or other erosion material in a surface watercourse; or
>
> **o**) any other alteration of a surface watercourse or the flow of the water therein, is designated as an activity.

[14] Section 137 of the *Act* provides for an appeal to the Minister of a decision of an Administrator:

> **Appeal to Minister**
>
> 137(1) A person who is aggrieved by a decision or order of an administrator or person delegated authority pursuant to Section 17 may appeal by notice in writing, stating concisely the reasons for the appeal, to the Minister.
>
> (2) The notice of appeal may be in a form prescribed by the Minister.
>
> (3) The Minister shall notify the appellant, in writing, of the decision within thirty days of receipt of the notice of appeal.
>
> (4) The Minister may dismiss the appeal, allow the appeal or make any decision or order the administrator could have made.

(5) The administrator and the appellant shall take such action as is necessary to implement the decision of the Minister disposing of the appeal. 1994-95, c. 1, s. 137.

[15] Section 138 of the *Act* provides for the subject appeal:

Appeal to Supreme Court

138 (1) Subject to subsection (2), a person aggrieved by

(b) a decision of the Minister pursuant to Section 137;

. . .

may, within thirty days of the decision or order, 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, 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.

. . .

(3) The judge on the hearing of an appeal may consider and hear evidence as to whether or not the matter that aggrieves the appellant is necessary to provide for the preservation and protection of the environment.

Standard of Review

[16] In *Pushpanathan v. Canada (Minister of Citizenship & Immigration)* [1998] 1 S.C.R. 1982, the Supreme Court of Canada prescribed a four step pragmatic and functional analysis to determine the standard which should be employed in reviewing administrative decisions. Subsequent Supreme Court decisions have established that a standard of review must be addressed at the outset of every application for judicial review or statutory appeal to a court, involving adjudicative decisions and the exercise of administrative discretion in those contexts. The appropriate standards will be correctness, reasonableness *simpliciter* or patent unreasonableness.

[17] Each individual issue involved in a particular decision may require a different standard of review, so that each issue needs to be addressed separately, as to what standard to apply.

[18] The pragmatic and functional approach, however, does not apply when addressing issues of procedural fairness.

[19] The four “contextual factors” of which the cumulative effect is to be considered in order to determine the appropriate standard are; 1) the presence, absence, and wording of a privative clause or statutory mechanism for review; 2) relative expertise of the tribunal and court with respect to the particular issues; 3) the purpose of the legislative scheme and provisions in issue; 4) the nature of the question, whether it be “policy”, facts, law, mixed facts and law.

[20] The applicable standard of review will be identified, as the issues raised by the appellants require that they be considered.

Issues:

The parties have identified several issues in this appeal:

a) What is the appropriate standard of review?

   i) in regard to determination of whether Marshall Flowage is a “watercourse” within the meaning of s. 3(be) of the *Act* or a “water resource” within the meaning of s. 3(bc) of the *Act;*

   ii) in regard to the determination of whether the infill by the appellants is an “activity” as defined in s. 3(a) of the *Act;*

b) Is Marshall Flowage a "watercourse" within the meaning of s. 3(be) of the *Act?*

c) Is Marshall Flowage a "water resource" within the meaning of s. 3(bc) of the *Act?*

d) Did the Minister err at law in determining the infilling conducted by the Appellants is an "activity" within the meaning of s. 3(a) of the *Act*?

(e) What is the appropriate standard of review in regard to the exercise of ministerial discretion, if indeed that was what the Minister was exercising?

(f) Did the Minister meet the standard when he exercised his discretion under Part V of the *Act* and denied the application to infill, when the appropriate standard of review is applied?

(g) Did the Minister err at law in breaching the duty of fairness by failing to give the appellants an opportunity to a hearing?

(h) Did the Minister err at law in failing to give adequate or any reasons for his decision?

(i) Did the delay in rendering a decision to the application and to the s. 137 appeal and in not disclosing both the DFO response to DOEL dated December 3, 2003 and discussions at the May 11, 2004 meeting constitute procedural unfairness?

Issue #1

What is the appropriate standard of review in regard to a determination of the definition of "activity"(s. 3(a) of the *Act*), "water resource" (s. 3(bc) of the *Act*) and "watercourse" (s. 3(be) of the *Act*)? Do the meanings apply and if so was the standard met?

[21] The respondent does not dispute the appellants position that interpretation of legislation such as the *Act* and *ADR* is a pure legal function, requiring the court to apply a standard of "correctness" on determining whether the Minister in exercising his discretion, incorrectly interpreted the language of ss. 3(a),(bc) and (be) of the *Act*, so as not to require his approval. Had the parties not agreed, I would still select correctness as the standard of review. My own assessment is necessary. The nature of the problem before the Minister is one of statutory interpretation. The interpretation of these terms is a question of law and the appropriate standard of review is one of correctness *(Canada) Director of Investigation and Research, Competition Act, v. Southam* [1997] 1 S.C.R. 748 at p. 766-768.

Issue #2

Is Marshall Flowage a "watercourse" within the meaning of s. 3 (be) of the *Act*, and is the infilling conducted by the appellants an "activity" within the meaning of s. 3(a) of the *Act*?

[22] When undertaking a correctness review, the reviewing judge follows her own reasoning process to arrive at the result she judges correct. The question to be asked is whether the Minister's decision as to the definition of watercourse and activity, as it applies to Marshall Flowage, is correct. If my conclusion differs materially from the conclusion of the Minister, then the Minister is incorrect (*Law Society of N.B. v. Ryan* [2003] 1 S.C.R. 349 at (para 50); *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)* [2005] N.S.C.A. 141 (at para 43)).

[23] Under s. 3 (be) "watercourse" is defined as:

> (be) "watercourse" means
>
> (i) the bed and shore of every river, stream, lake, creek, pond, spring, lagoon or other natural body of water, and the water therein, within the jurisdiction of the Province, whether it contains water or not, and
>
> (ii) all ground water

[24] In seeking to quash the Minister's decision to deny their approval to infill, the appellants' claim their land is being flooded by flowage and insofar as the water comes up over and above their property line, there is no need for approval by DOEL, as Marshall Flowage is an artificial waterway, and/or waterway which does not fall within the definition of either watercourse and/or of water resource in the *Act* and therefore the Minister erred in so deciding. In other words, Marshall Flowage is not "a watercourse" as defined by s. 3 (be) of the *Act* and accordingly, the work carried out by the appellants is not a designated activity under the regulations and thus the prescription of carrying out such activities without approval under s. 50 of the *Act* does not apply.

[25] The respondent contends that Marshall Flowage is a "watercourse" within the definition of a watercourse pursuant to s. 3 (be) of the *Act*, regardless of whether it is, or is not "natural" watercourse and therefore the appellants cannot infill a watercourse without the appropriate approval from the Minister.

[26] The Minister argues s. 3 (be) is not an exhaustive definition. By applying the rules of statutory interpretation, one determines the legislature intended to

create two classifications or categories separated by the disjunctive and not conjunctive use of the word “or” as suggested by Davison, J. in *Corkum v. Nash,* [1990] N.S.J. No. 423; affrm'd on appeal [1991] N.S.J. No. 482. The first part of the definition enumerates certain types of bodies of water with no qualifying use of the word “natural”. Marshall Flowage could fall under either lake or river body type. It originates as the East River and the damming of it artificially alters the water levels within a specified range depending on demand and usage by the NSPI for its hydro operations. On rare occasions, the level is lowered substantially to do repair work. If the legislature had intended to exclude artificially created waterways, the Minister argues then historically in 1972 it would not have removed the exemptions to the watercourse definition clause listed in the 1919 predecessor *Water Act* and artificial bodies of water would have been stated as another exemption in the current provision. The deliberate act of the legislature in removing exemptions to the definition of “watercourse” points towards the intention of the legislature to permit inclusion of artificially created bodies of water. The other half of the definition which centres on the words “or other natural body of water” requires the body of water to be “natural”. The Minister contends even though Marshall Flowage is a natural watercourse that has been altered artificially, it has been in existence for well over 80 years and such a

waterway, in the context of the law, becomes akin to a natural waterway, subject to the rules of law applicable to natural watercourses.

[27] Concluding as I do, that Marshall Flowage falls within the definition of watercourse in the *Act* because it is a natural body of water despite the fact that the East River, a natural watercourse has been altered artificially by a dam so as to affect its shore/bank in a specified range, is to interpret it firstly in a manner which least alters the existing law both as to interpretation of the definition and context, secondly; continues to construe the *Act* strictly so as not to encrouch on the property rights of citizens and finally gives credence to the legislature's intention to permit the Province to take control of watercourses in order that watercourses and the water are preserved for the benefit of the public, inclusive of using a suitable waterway for power purposes and in a manner protective of the environment, and having safe ecological systems and habitat.

[28] Although the definition of “watercourse” under s. 3 (be) of the *Act* requires the body of water to be natural, a waterway such as Marshall Flowage can still qualify within the definition in spite of the fact that it may have partially originated by artificial means. The rational for this, as stated by the Crown in its

brief, is that "if maintained over a long period of time, the waterway, in the context of the law, becomes akin to a natural watercourse, subject to the rule of law applicable to natural watercourses." Guidance afforded by LaForest, in *Water Law in Canada* 1973**,** in clarifying a natural watercourse within the context of the law remains the leading authority. At page 375 and 376, after commenting on different indicia of permanency, the manner in which the water flows and whether there is a need for each criteria constituting a watercourse to be present or not when clarifying water as a natural watercourse, he stated:

> "Water flowing in an artificial ditch is not regarded as a natural watercourse. There is, however, some suggestion that where there is evidence to indicate that an artificial watercourse has been constructed with a view to becoming a permanent waterway, the rules applicable to natural watercourses will apply. For instance, the Rideau canal has been held to be a watercourse to which the doctrine of riparian rights applies. And where an artificial watercourse is created by splitting a stream, so that the natural flow continues, but in an artificial channel, the flow has been treated as the equivalent of a natural watercourse with the rights and obligations attendant thereto. . . . Regard must be had to the circumstances surrounding the existence of the artificial watercourse, and emphasis must be placed on such question as whether the watercourse is temporary or permanent, the circumstances under which it was built, and the manner in which it has been used and enjoyed**. . .**
>
> Before presuming to make any general observations as to the classification of a watercourse, it would seem relevant to bear in mind an observation made by Beck J. in the Alberta case of **Oliver v. Francis**, he suggested that the application of general principles may properly differ from jurisdiction to jurisdiction. The truth is that it is extremely difficult to lay down a categorical definition of surface water, or of a natural watercourse. Local situations, customs, usages and

> requirements play a small part in establishing the classification of a particular flow.

[29] In *McLennan v. Meyer,* [2004] O.J. No. 510; affirmed on appeal, O.J. No. 4665, the Justice analysed the legal definition of the term "natural watercourse" and determined that a permanent man made watercourse with defined bed, visible banks, and recurrent flow of water, is a natural watercourse if it has been maintained for a sufficient length of time. At page 68, Martin, J. elaborated;

> "With respect to the legal definition of a natural watercourse, I have been referred to a great number of authorities by both counsel. I am indebted to them for their assistance but it is not my intention to review each of the authorities. Counsel has referred me to Corpus Juris Secundum, Volume 93, C.J.S., wherein on the subject of natural watercourses, the following is said, inter alia:
>
> > It has been said that no definition of a natural watercourse can be given that will apply to all cases, and while the common idea is a river, stream, or brook with a permanent flow, the legal meaning is not so confined. The term has been frequently defined by the courts and as so defined a "natural watercourse" is one made by the natural flow of the water caused by the general superficies of the surrounding land from which the water is collected into one natural channel....
>
> It is frequently stated that it is essential that a watercourse have a definite channel in which the water must flow, and a definite well defined bed, and well defined banks or well marked sides framing a definite channel. It has, however, been said that these statements while ordinarily correct and sufficient are not always strictly followed, are not

> exclusive, and, therefore, are not essential. If a watercourse has a well defined and substantial existence, it will not lose its character as such because the flow of the steam is not sufficiently strong to create a bed and banks for itself, or to wear out a channel or canal having definitely well marked sides and banks.
>
> A natural watercourse does not lose its character as such by the fact that a part of its channel has been artificially created, and it is not necessary that a watercourse should originate exclusively as a work of nature. It may be created as a result of the settlement of adjacent territory, and in its creation it may be aided by the hand of man. Thus, if a permanent man made watercourse has a defined bed, visible banks, and a recurrent flow of water, it should be considered a natural watercourse if it has been maintained for a sufficient length of time.
>
> A natural watercourse does not cease to be such because of artificial changes, and particularly if the changes have been continued for a prescriptive time. Thus the character of a watercourse is not changed because of the artificial deepening or straightening of the channel, or by reason of the stream being confined in a pipe, or beause it is used as a conduit to carry other waters, or because a pond is created by a dam. A watercourse does not lose its character as such because it is artificially obstructed, and all the water diverted there from, as where the water has all been dammed at a place far up the steam no matter for how long a period.
>
> One of the essentials of a watercourse is that there be a definite and permanent, in the sense of periodic; source of water supply, but the particular source of supply is immaterial . . .”

[30] Here, Marshall Flowage was created by artificially flooding by NSPI of an existing natural watercourse, East River in the 1920's and has existed continually as a water way since that time. The dam causes the water of the East River to spill over its banks creating new shores within a specified range set and controlled by NSPI. A course is always present within that range and only seriously effected on a few occasions for major repairs to the dam. There is a permanent natural source for the flow with an outlet as it follows and flows through the system. It is not

surface water spread over a track of land caused by unusual freshlets. The water does not flow in an unconfined or unrestricted manner. It always flows within a range except in exceptional circumstances. The outer limits of the range reveals evidence of a shoreline sufficient to create the ecosystem referred to by the biologist, Craig Hominick.

[31] A permanent fixture, the Marshall Flowage was created in the 1920's by damming an existing bed of water of the East River for purposes of providing power. As such, it fitted into the 1919 *Water Act* definition of watercourse as it was part of suitable water way for such a purpose. The 1919 *Water Act* definition of watercourse specifically exempted small brooks "unsuitable for power purposes". It has been used for this purpose ever since. It maintains the watercourse characteristics of having permanent source for the flow, defined water bed, current flow of water that proceeds through the chain of systems, confined or restricted within a set range with discernable shore at the upper range that can, although on very rare occasions, given its purpose be lowered to accommodate repairs. Artificial changes to the water way do not eliminate its character as a natural watercourse. Marshall Flowage is a natural body for the purposes of s. 3 (be) of the *Act*. On a standard of correctness the Minister's decision to treat

Marshall Flowage as “watercourse” necessitating application and approval for designated activity under s. 5 of the ADR is correct.

[32] There is no issue that the Minister did not err at law in determining the infill with rock work conducted by the Appellants is an “activity” within the meaning of s. 3 (a) of the *Act* and s. 5 of ADR.

> S. 3 (a) of the **Act** defines an “activity” as;
>
> “An activity or part of an activity prescribed by the regulations.”

[33] S. 5 (1) of the ADR designates some 15 items as activities requiring approval inclusive of s. 3 (n) and (o) activities which denote the placement of rock or other erosion protection material on a surface watercourse. The actiity being considered here required approval before it was permitted.

[34] For interpretation purposes in the case at bar, the only difference in the definition of watercourse between the 1989 *Water Act* and the *Act* is that the 1989 *Water Act* has more enumerated bodies of water listed. In holding, before the harbour in question would be said to become within the definition of

"watercourse" in the 1989 *Water Act*, it had to come within the genus of "other natural body of water", Justice Davison in *Corkum v. Nash,* supra made a determination, subsequently upheld by the appeal court, that, "the requirements are conjunctive". He then proceeded to apply the doctrine of ejusdem generis to assist in statutory interpretation, having found the phrase, "other natural bodies of water" to be ambiguous and general. Applying a strict interpretation of the *Water Act*, he found the harbour not to fall into the same genus as the specific words and therefor not to fall within the definition of watercourse. I appreciate the court in *Corkum v. Nash* in addressing the harbour did not consider the specific issue of whether the definition of watercourse includes artificially created waterways. As noted by Justice Davison, however, all the general rules of construction suggest a restricted meaning.

[35] I cannot accede to the disjunctive use of the word "or" so as to encompass both artificial and natural enumerated bodies of water and if need be other natural bodies of water. In the phrase, "or other natural bodies of water", the word other is used and it qualifies the word natural, not the words natural and artificial bodies of water. If the enumerated bodies of water are both natural and artificial and as argued by the Minister, the definition of watercourse is not exhaustive, why then

did the legislature not include the word artificial in the phrase, especially given that the definition of watercourse no longer reads “includes” but rather states “means”.

[36] In light of my finding, there is no need to interpret the words water resource.

Issue #3

What is the appropriate standard of review in regards to the Minister's decision?

[37] On the one hand, the appellants assert a standard of correctness, being the least deferential standard. Central to their position is their assertion that the Minister's s. 137 impugned decision is not a purely discretionary Ministerial decision, requiring substantial deference, as the discretion to make unlimited discretionary decisions is given to and exercised by the Administrator in the first instance under the “very clear” wording of s. 52. They argue both the wording of s. 137 and the very fact it is an appeal, suggests this is something other than a purely discretionary Ministerial decision. Because this is a statutory right of appeal of a non-discretionary decision, with right to hear evidence, they assert that

this implies the full right to have the issue determined on the merits, replacing the Minister's decision, if need be with what I decide. The remedy, however, sought by the appellants is quashing of the Minister's decision rather than this court's determination. If the latter is indeed the court's role, which I do not accept, then, as no evidence was led to challenge the Minister's position as it relates to preservation and protection of the environment, the denial of the approval would be the result.

[38] On the other hand, the respondent submits that the impugned decision is the result of Mministerial discretion afforded under s. 137 after a thorough review of the file. Ministerial decisions of a discretionary nature such as this command significant deference despite the statutoral mechanism of appeal. The more discretion that is left to a decision maker, the more reluctant the court should be to interfere. The respondent submits the standard of review is one of patent unreasonableness, being the standard most deferential to the decision maker.

[39] Reservations expressed about the Minister not rendering a decision of discretionary nature under s. 137, given the two tiered appeal process involving the Minister and the clear broad discretion afforded the Administrator under s. 52,

at first instance are not warranted either on an interpretation of the provisions or on the case law.

[40] Under s. 137 (4), the Minister "may dismiss the appeal, allow the appeal or make any decision or order the Administrator could have made" under her very broad s. 52 powers. Powers whereby the Administrator may at any time decide that no approval be issued s. 56(1). There is nothing in the language of s. 137(4) directing or mandating the way the Minister has to decide. The language in its use of the word "may" is discretionary and the very thing it is providing discretion for is about making any decision under s. 52 that could be made. S. 137 does not abrogate the provisions of s. 52. It embraces them.

[41] Case law also supports that what is before the court for review is clearly an exercise of Ministerial discretion. (*DRL Environmental Services, Demolition Resources Limited v. Nova Scotia (Attorney General),* [2004] N.S.J. No. 461 at para. 30; *Nova Scotia (Minister of Environment and Labour) v. Praetz,* [2004] N.S.J. No. 107 at para. 38).

[42] As previously noted, addressing the pragmatic and functional approach to determine the applicable standard of review requires an examination and weighing of the four contextual factors; the presence, absence and wording of any primitive clause or statutory mechanism for review; the expertise of the tribunal; the purpose of the statute in issue as a whole and the provisions in issue in particular; and the nature of the problem.

[43] There is no privative clause to heighten the degree of deference to be accorded. However, the absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a lower standard. It does not eliminate a standard of patent unreasonableness. It is only one factor of four in arriving at the standard of review. *(Brighton v. Nova Scotia (Minister of Agriculture and Fisheries)*, [2002] N.S.J. No. 298 at para. 17; *DRL Environmental Services, Demolition Resources Ltd. v. Nova Scotia (Attorney General)*, supra; *Nova Scotia (Minister of Environment and Labour) v. Praetz,* supra, and *Julie Marie Pinsonnault-Sinn v. Minister of Environment and Labour for the Province of Nova Scotia* [2004] N.S.S.C. No. 206). The statutory right of appeal indicates less deference needs to be accorded. As previously noted, this appeal involves a review of a Minister's discretionary decision.

[44] The second factor is expertise. In *Canada (Director of Investigations and Research, Competition Act) v. Southam Inc.*, 1 [1997] 1 S.C.R. 748, S.C.C. Iacobucci, J. noted at para. 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 needs consider in settling on a standard of review.

[45] There are three aspects to assessing expertise; characterization of the expertise of the decision maker, consideration of the court's own expertise relative to that of the decision maker, and identification of the specific nature of the issue in question relative to the expertise of the decision maker (*Pushpanathan v. Canada Minister of Citizenship and Immigration,* [1998] S.C.J. No. 46 para.33.)

[46] As did Justice Haliburton in *DRL Environmental Services, Demolition Resources Ltd. v. Nova Scotia,* supra para. 27, I also accept, as a general rule, the proposition also advanced here on behalf of the Minister that ministerial decisions, "are based on a public mandate relating to the administration of their department to determine matters of public interest and to balance competing public rights. By virtue of their status they are, in effect, experts in public policy. A Minister also

has the benefit of specialist advice from within his or her department." As a matter of policy, the expertise of the Federal Department of Fisheries and Oceans is also sought out by this Minister when approvals are applied for relating to the Minister's management and supervision of water resources under Part X.

[47] In continuing to consider ministerial decisions of a discretionary nature, Justice Haliburton went on, as did Justice Pickup in *Praetz,* supra para. 37 and MacDonald, A.C.J.S.C.(as he then was) in *Brighton*, supra para. 23, to quote from *Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)***,** [2001] 2 S.C.R. 281, paras. 58-59:

> "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."
>
> ....Accordingly, the appropriate standard of review in this case is patent unreasonableness."

[48] Here, the exercise of the power turns on the Minister's appreciation of public interest in protecting the environment which is a function of public policy in its fullest sense. As stated by the respondent, the decision of the Minister entails him exercising discretionary authority in promoting as mandated, the protection, enhancement and sustainability of the environment and in ensuring the health and integrity of aquatic ecosystems, protecting habitats for animals and plants, and taking into consideration technical information, inclusive of local knowledge, and promulgating the department's role as a regulator in protecting the environment. Unquestionably, the Ministers' decisions involved a large measure of policy governed around environmental considerations.

[49] On issues of environmental education, environmental emergencies, environmental research, government policies, standards, objectives, guidelines and other means to protect the environment, the Minister possesses greater expertise than does the court. The department has the staff with the scientific and technical knowledge to oversee and regulate the environment. This expertise supports a high level of deference to the Minister's decision.

[50] The third factor is the purpose of the *Act* as a whole and Part V, Approvals and Certificates in particular, being the provisions implicated on this review.

[51] The much quoted explanation and elaboration on this factor which overlaps with expertise is Bastarache, J. comments at para. 36 in *Pushpanathan v. Canada,* supra,

> " . . . Where the purposes of the statute and the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balance between different constituencies, then the appropriateness of court supervision diminishes. ... While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint. The polycentricity principle is a helpful way of understanding the variety of criteria developed under the rubric of the 'statutory purpose'."

[52] The *Act* is about protection and remediation based upon policy concerns. As stated by Coughlan, J. in *Fairmount Developments Inc. v. Nova Scotia (Minister of Environment)***,** supra para. 45, "The purpose of the *Environment Act* is to support and promote the protection, enhancement and prudent use of the environment, while recognizing certain specific goals. It is a polycentric issue involving a balancing of various contingencies and factors to achieve its purpose.

It is more political than legal in nature. Thus, the appropriateness of the court's supervision diminishes suggesting great deference." I am unable to accede to the appellants' proposition that this case is distinguishable given the environmental concern of an oil spill. The Minister is charged with effecting the purpose of the *Act.* The department is designated, as the lead agency of the Government to ensure the health and integrity of aquatic ecosystems. The approval or rejection of a listed activity such as infill of a watercourse is at the heart of regulations of the environment. It entails a factual consideration of a particular application involving the balancing of the applicants interest and the public interest of promoting the protection, enhancement and prudent use of the environment and of ensuring the health and integrity of the water resource. This suggests a high level of deference rather than exacting scrutiny.

[53] The fourth and final factor is the nature of the problem. The nature of the problem affects the standard of review in three main ways (*The Capital District Health Authority v. The Nova Scotia Government and General Employees Union,* (2006) N.S.C.A. No. 85 para. 48); "First, the more the question is concerned with matters of fact, the more deference will generally be due. Second, the nature of the question relates to how much deference is due to the tribunal on account of its

expertise. The more the question lies within the core area of the tribunal's expertise, the more deference is due to the tribunal." With respect to the question of mixed law and fact, this factor will call for more deference if the question is fact intensive and less deference, if the question is law intensive. (*Dr. Q. v. College of Physicians and Surgeons of British Columbia,* [2003] S.C.J. NO. 18 para. 34).

[54] In my view, the precise question here about how the Minister, given the adverse effects, did not approve of the activity on the watercourse, once determining the latter to be a water way fitting the definition, is fact specific. The Minister's discretion is mainly exercised on a factual determination of potentially adverse effects. It does however, include policy considerations in respect to the severity of impact of potential adverse effects which involves questions of law. It seems to me to be a question at the fact intensive end of the spectrum of questions of mixed law and fact. As previously noted, it is also a question which lies at the core of the Minister's expertise. These two considerations support a high level of deference to the Minister's solution of these issues.

[55] Considering the factors, I find the appropriate standard of review to be patent unreasonableness and turn now to determination as to whether there was anything patently unreasonable in the Minister's exercise of discretion and denial of the application to infill Marshall Flowage.

Issue # 4

Did the Minister meet the standard of patent unreasonableness when he exercised his discretion and decided to uphold the denial of the application to infill?

[56] When applying the standard of patent unreasonableness, there is considerable deference owed to the decision maker. Unless there is obvious error, bordering on absurd, the court should not interfere. (*Voice Construction Ltd. v. Construction and General Workers Union, Local No. 92,* [2003] S.C.C.A. No. 9).

[57] Relying on a standard of correctness, the appellants challenge the significance of the evidence supporting the Minister's decision, specifically, references by the biologist to a natural shore line in circumstances where the water level fluctuates and the lack of proof through testing and sampling and the lack of

details and explanation about the adverse affects from the activity which were rendered unacceptable by the Minister.

[58] Pursuant s. 17, the Administrator is the Minister, as he or she is delegated his powers and duties pursuant to the *Act*. On appeal, the Minister under s. 137 may make any decision his Administrator could have made under s. 52 and s. 56(1). The latter affords him the right to issue or refuse to issue an approval, at his discretion. The former grants him wide latitude in deciding whether the activity will be granted approval with focus on whether the activity "is not in the public interest with regard to the purpose of this *Act*". Pursuant to s. 52(2) he is mandated to consider the acceptability of adverse affects, the acceptability of the location of the proposed activity and whether it contravenes a policy of the Government or Department.

[59] Filed on the hearing of this appeal were all the pertinent file information the Minister had before him when he considered the appellants' s. 137 appeal, specifically: 1) notes and communication forms of departmental inspectors who during onsite visits had opportunity to observe first hand the shore line and the overall site; 2) October 7, 2003 Occurance report; 3) field inspectors' reports by

departmental inspectors dated October 7 and 16, 2003; 4) the October 28, 2003 application for approval by the appellants; 5) DFO aerial habitat biologist, Craig Hominick's December 3, 2003 report referencing his onsite visit of October 14, 2003, conversations with inspector concerning immediate stabilization and removal measures, assessment and stated position of the DFO that the unauthorized infill and construction, such as it existed, negatively impacted on fish habitat and his inability to support the application; 6) notice of s. 137 appeal and supporting documentation inclusive of photographs as well as notice of s. 138 appeal with supporting documents inclusive of the Minister's September 23, 2004 and October 7, 2005 decision letters and also affidavits of the appellants and the respondent's two inspectors, DFO biologist and NSPI consultant. All of the respondent's affiants were cross examined. Craig Hominick, on cross examination commented and elaborated on his affidavit and provided extensive information that remained unchallenged about the site he knew to be a flowage area, and about the existence of fish aquatic habitat in the area of the infill, and resulting impact on the fish and the fish habitat, in the circumstances, what eco-systems consisted of, his role and methodology without variation for this site, his sources of information, and his reviewing role under the *Fisheries Act* of water alteration applications received by the Province and specifically this application. His

decision was based on the visual information of the site on October 14, 2003, combined with information on fish species present and background knowledge on their life cycle stages and feeding requirements. The Minister's letters of September 23, 2004 and October 7, 2005 set out his reasons and address each of the statutory factors that he is mandated under s. 52(2) to consider.

[60] The respondent is correct in its submission that there was sufficient information before the Minister to rationally support his decision to deny the application. Adverse affects is defined to mean an affect that impairs or damages the environment. Concerns regarding the extent of the infill, the existence of aquatic habitat in flowage areas, potential for damage to the shore line, the concerns of DOF in regard to the shore line and aquatic life, as the basis for being unable to support the proposed activity, all support the goals and purpose of protecting the environment and support government policy in creating and maintaining a sustainable environment.

[61] One of the things the court on hearing an appeal may consider and hear evidence about, is whether or not the matter that aggrieves the appellant is necessary to provide for the preservation and protection of the environment; i.e.,

the context of the decision. (S. 138 (3)). With no evidence to the contrary, the aggrieved matter of denying approval of infill remains on the evidence before this court, under s. 138 (3) necessary to provide for the preservation and protection of the environment rendering the decision reasonable. In May of 2005, Craig Hominick, Biologist, confirmed the content of his December 2003 report to DeWolfe and repeated to him that the area covered by the infill was considered fish habitat and told him DFO would not have approved the project had they reviewed the plan ahead of time, meaning prior to October 2003's construction of the infill with rocks. His position remains constant and indeed, unaltered on this appeal. Inspector, Scott Morash's evidence on cross that there was nothing that the appellants could have or could do in the circumstances to have the project approved, remained unchallenged. The denial is necessary to provide for the preservation and protection of the environment.

[62] In face of all this and my review of the record, filed affidavits, and cross examination it is impossible to accede to the Minister having made any error bordering on absurdity in his decision so as not to meet the standard of patent unreasonableness. The decision is not irrational. I decline to interfere and quash the decision on this basis.

Issue #5

Did the Minister breach procedural duty of fairness under the common law and/or by legislation in regards to sufficiency of reasons, opportunity to be heard, disclosure of information, and delay in reasons?

[63] The reasons given by the Minister in his October 7, 2005 letter, highlighting the adverse affects from the activity adequately meet the requirements for reasons thereby the common law duty of fairness for same is not breached. This is especially true when read in the context of the entire file inclusive of the September 23, 2004 reasons of the Administrator which the Minister upheld. The mandatory consideratinos of s. 52 are addressed. The ultimate position with respect to the water way being within the definition of watercourse speaks for itself. The delay in rendering the Administrator's decision centres around the issue and the appellants were advised of that in June of 2004. It was an issue very much in the forefront for DeWolfe.

[64] The common law duty of fairness can be found to be applicable in the absence of any statutory regime. As I understand the appellants position, they acknowledge that the application of the natural justice principle of the right to be heard does not in all cases require that a formal hearing be convened and that is

not what is being suggested or sought; but, at the very minimum the requirement of "*audi alteram partem"* requires that they would have the right of response to any material such as expert opinions relevant to the decision making process. Indeed, this is what is afforded them by regulation provision s. 7 (2) Approvals Procedure Regulations (APR). Determination of the extent and limits of the duty of procedural fairness requires a consideration of what that duty may reasonably require of an authority in the way of specific procedural rights, in a particular legislation and administrative context and what should be considered to be a breach of fairness in particular circumstances. (*Potter v. Halifax Regional School Board*, supra at para. 54.)

[65] The Administrator in rendering her denial of approval letter dated September 23, 2004 some 10½ months after receipt of the completed application failed to comply with the stated 60 days as well as the 10 day notice of delay pursuant to s. 54(2) of the *Act.* The Minister in rendering his denial of appeal letter dated October 13, 2005 some 12 months after the s. 137 appeal notice failed to comply with the stated 30 days, pursuant to s. 137(3) of the *Act*. The Administrator in not providing DFO's biologist, Craig Hominick's December 3, 2003 report that she had requested to the appellants failed to comply with s. 7(2)

APR. The appellants equate the words spoken in the presence of the Inspector and Fishery Officers on May 11, 2004 at Sheet Harbour and referenced in the inspector's notes as written information that should have been provided to them pursuant to s. 7(2). They argue these delays in providing decisions and the failure to disclose a core report and a position are statutory breaches procluding them with the latter the opportunity to be heard. Therefore, these failures of the Minister to comply with statutory requirements vitiates the Minister's decision on the grounds of procedural fairness.

[66] Section 7(1) and (2) of the APR provide the appellants shall be given an opportunity to respond to written and oral information received by the Administrator during the review of the application. The sections read:

> Review of application
>
> 7(1) During the review of an application, an Administrator may request oral information or additional written information from
>
> . . . (c) a local authority, the Government, a Government agency or the Government of Canada or any agency or department of [the] Government of Canada; and . . .

> 2) An applicant shall be given an opportunity to respond to information received under clauses 1(b), (c) or (d).

[67] It is the respondent's position that a breach of a procedural provision including the word “shall” does not effect the validity of the Minister's decision. The time provision in s. 54 (2) and s. 137 (3) for decision rendering and the disclosure provision of s. 7(2) of the APR for written information, are all procedural provisions containing directory and not mandatory language. Finding a procedural provision directory does not necessarily vitiate the resulting decisions. The court has to find substantial prejudice caused by non compliance with statutory formality to void the exercise of Ministerial discretion. In support, reference is made by the respondent's counsel to a number of cases as well as quotes from two administrative law texts.

[68] Sara Blake, Administrative Law in Canada (3rd) Ed. 201, Butterworths at pages 10 and 88, although focussing on tribunals, comments on rules and time limits on rendering decisions. At page 10 she states:

> "The type of enactment prescribing the rule, whether it be statute enacted by the legislature or a directive issued by the tribunal is not determinative. Procedural rules prescribed by the tribunal are more flexible simply because the tribunal has the power to change them. However, though a tribunal cannot amend procedure prescribed by statute or regulation, it may be permitted reasonable latitude in interpretation.
>
> How do you determine which rules are fixed and which are not? This issue requires a common sense approach to the circumstances of each case. If non-compliance with a procedural rule is likely to cause prejudice to a party's right to be heard, compliance with the rule may be mandatory. Prejudice must be proven with evidence. It will not be assumed simply from proof of non-compliance with the rule. In addition, the extent to which compliance with the procedural rule serves the public interest and the purposes of the legislation is also relevant. These should not be defeated by overly strict adherence to procedural rules. The nature and importance of the party's interests that are at stake in the proceeding may also be relevant."

[69] Dealing with time limits on rendering decisions, she states at page 88:

> **3. Time Limits on Rendering Decisions**
>
> "Some statutes require tribunals to render a a decision by a specified time limit. These time limits are not mandatory because "the right of a party should not be lost or in any way prejudiced as a result of dilatory conduct on the part of a board over which it has little or no control". Their purpose is to encourage tribunals to act expeditiously. Where no time limit is stipulated, tribunals should endeavour to render decisions with dispatch. If they fail to do so, a party may apply to court for an order compelling the tribunal to decide. However, delay on the part of the tribunal in deciding an application is excusable where investigation is required before the decision can be made."

[70] Jones and de Villars, Principles of Administrative Law, [4th ed.], 2004 at page 156, commenting on the view that procedural requirements for public duties should generally be read as being directory and not mandatory, quotes from Maxwell on The Interpretation of Statutes, [10th ed.] 1953 at 376-77:

> "A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power. Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the legislature. But when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative."

[71] Earlier the authors acknowledged distinguishing between mandatory and directory statutory provisions can be an exceedingly tricky task.

[72] When the word "shall" is "mandatory" or "directory" in its effect was discussed by the Supreme Court of Canada in British Columbia (Attorney General) v. Canada (Attorney General), [1994] 2 S.C.R. 41. Focussing on the topic of failed procedural preconditions introduced by Professor Wade in Administrative Law [6th ed.], 1988, at pp. 245-46 which reads:

> "If the authority fails to observe such a condition, is its action ultra vires? The answer depends upon whether the condition is held to be mandatory or directory. Non-observance of a mandatory condition is fatal to the validity of the action. But if the condition is held to be merely directory, its non-observance will not matter for this purpose. In other words, it is not every mission or defect which entails the drastic penalty of invalidity."

The court went on in paras. 147 and 148 to comment on the question to be asked, and noting it to be a "vague and expedient principle:

> 147 In particular, I think it is relevant to note that in Reference re Manitoba Language Rights, [1985] S.C.R. 721, this Court commented upon the doctrinal basis of the Normandin distinction. The Court stated (at p. 741):
>
> > The doctrinal basis of the mandatory/directory distinction is difficult to ascertain. The "serious general inconvenience or injustice" of which Sir Arthur Channell speaks in Montreal Street Railway Co. v. Normandin, supra, appears to lie at the root of the distinction as it is applied by the courts.
>
> In other words, courts tend to ask, simply: would it be seriously inconvenient to regard the performance of some statutory direction as an imperative?
>
> 148 There can be no doubt about the character of the present inquiry. The "mandatory" and "directory" labels themselves offer no magical assistance as one defines the nature of a statutory direction. Rather, the inquiry itself is blatantly result-oriented. In Reference re Manitoba Language Rights, supra, this Court cited R. ex rel. Anderson v. Buchanan (1909), 44 N.S.R. 112 (C.A.), per Russell J., at p. 130, to make the point. It is useful to make it again. Russell J. stated:
>
> > I do not profess to be able to draw the distinction between what is directory and what is imperative, and I find that I am not alone in suspecting that, under the authorities, a provision may become directory if it is very desirable that compliance with it should not have been omitted, when that same provision would have been held to be imperative if the necessity had not arisen for the opposite ruling.

> The temptation is very great, where the consequences of holding a statute to be imperative are seriously inconvenient, to strain a point in favor of the contention that it is mere directory.....

> Thus, the manipulation of mandate and direction is, for the most part, the manipulation of an end and not a means. In this sense, to quote again from Reference re Manitoba Language Rights, supra, the principle is "vague and expedient" (p. 742). This means that the court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is informed by the usual process of statutory interpretation . But the process perhaps evokes a special concern for "inconvenient" effects, both public and private, which will emanate from the interpretive result."

[73] The Nova Scotia Court of Appeal in *Potter v. Halifax Regional School Board* (2002) N.S.C.A. 88, dealt with Ministerial Regulations calling for procedures to meet requirements in provisions using the word "shall". After noting s. 9(3) of the Interpretation Act, R.N.S. 1967, c. 235 states, "shall" is to be construed as imperative, the court, who quoted Sara Blake on Administrative Law in Canada, supra page 10 on the issue of whether procedural provision is mandatory or directory, indicated: "However, as indicated above, the word of itself is not determinative". The fact that neither the Act (being the *Education Act*) or the Ministerial Regulations, as in the case at bar, contained no penalty or remedy for failure to comply/observe any procedural provisions was significant in showing them to be directory. Also, the purpose of the legislation relating to public interest, as in the case at bar was also observed as a significant factor. The

courts found procedural irregularity pertaining to reports and notes to public under the statute, did not result in prejudice to the extent as to require judicial intervention.

[74] The Newfoundland Court of Appeal in *Newfoundland and Labrador (Rural Newfoundland Constabulatory Public Complaints Commissioner) v. Oates* (2003) NLCA 40, faced with the same *Interpretation Act* provision as in the Nova Scotia Act, determined failed procedural provisions employing the word "shall" to be directory, so as not to render the procedure invalid and void and not to violate the exercise of statutory power. In the process of addressing mandatory v. directory, the appeal court applied three major rules for interpretation. In summary, the are to have regard for 1) the intention/purpose of the legislation by careful consideration of the whole scope of the statute; 2) prescription of the act; i.e, distinction between performance of duties public in nature and not focussed on the private rights of individuals being directory and matters relating to power or privilege being mandatory; 3) possibility of prejudice to the parties.

[75] The theme appears to be, have regard for elements of prejudice, serious inconvenience, and the purpose and prescription of the statute in making the assessment.

[76] In addressing the merits of the matter, the timing in which a decision is rendered is not of significant importance. Obviously, earlier decisions are for the benefit of the recipient and in the context of this legislation to the public. Here, tardiness in regards to the Administrator's September 2004 decision, centres around the fact in June of 2004, when he contacted the appellants, the inspector was still waiting to receive legal advice on the definition of watercourse and to then review the file with the supervisor. Why not earlier and within 10 days stated in the *Act* is a matter of protocol that should be addressed in this age of computers and programs for flagging matters which are requirements. The delay was no more than the investigation needing to be complete. Informal requests were made by DeWolfe of the inspector concerning the status of the Minister's decision which was eventually rendered but twelve months after receipt of the appeal notice. The detailed process with a multitude of considerations including consultations with other departments taking considerable time to arrive at something other than a snap decision was elaborated upon by inspector Scott

Morash. Obviously, the delay in decision making, occurring post event, and application and appeal did not impair the appellants' ability to effectively participate in the process.

[77] Unlike the time delay, certainly the disclosure of the biologist's December 3, 2003 report letter goes to the merits of the decision. In the context of the *Act,* to protect, enhance and preserve use of the Environment, the Minister's exercise of his discretion relies on the DFO expertise/input and here, it was a major focus of his determinations. It was provided to the appellants not by way of the inspector, but by the biologist through DeWolfe contacted on May 9, 2005. This was some seven months after the Administrator's decision and six months after they completed their appeal notice but five months before the Minister's decision.

[78] Thus, exposure to an actual copy of the biologist's letter did not happen before the Administrator released her September 23, 2004 letter rejecting approval. On cross the inspector stated it is not the practice. Nor, did she appear to be aware of any directives to provide other department's positions, as a matter of course to applicants, at any time. This strikes me as an area that particularly needs to be addressed by way of established protocol. Unquestionably,

information which goes to the merits of the Minister's decision is very important but that, in and of itself is not the sole deciding element in the analysis of mandatory v. directory.

[79] Before appealing the Administrator's decision, the appellants who had every opportunity to contact the department made no inquiries and sought no explanation as to the content of the issues in the September 2004 letter which highlighted both conflicts with DFO mandates and water resource management interests inclusive of habitats, all being concerns reflected in the December 2003 biologist's letter. Upon receipt of the letter in May of 2005, the appellants did not seek to expand on their appeal documentation, in light of the biologist's written comments and oral phone discussion that day, where he elaborated further on his previous October 3, 2003 comments on mitigation measures of heavy duty filter fabric placement along the edge of the infill to deal with future impact of the infill on the fish habitat via silt and advised DFO would never have approved this project had it reviewed the plan a head of time. The Minister's decision was not forthcoming for another five months. In October 2003, DeWolfe was aware and knew enough to attempt to make sure the material fill he was using did “not have a toxic effect on the environment”. The appellants were certainly aware that the

DFO and a “specialist” looked at the site in October of 2003 and there was concerns of some kind related to the water and its contents. He was asked to put in place measures “to prevent silt and sediment from further reaching into the water, thereby further impacting on fish habitat”.

[80] The focus of the biologist's December 2003 letter could not have been a complete unknown to the appellants on application after the fact and on appeal to the Minister. Certainly, the Administrator's letter of September 23, 2004 rejecting approval highlighted the very contents and provided some idea of the DFO's position with respect to the application and reasons why. Although not in receipt of the letter, the information they felt to be insufficient on application was provided with sufficient details when they appealed to the Minister. The source for elaboration and explanation was available. I question both the degree of surprise concerning the contents of the December 2003 letter, given the directions from the “specialist” and the Administrator's letter and the inability without it to highlight any potential proposals or resolutions they felt feasible in addressing such issues on appeal. Even on receipt in May of 2005, the s.137 appeal remained undecided for a further five months.

[81] The evidence of prejudice to the appellants due to failure to disclose DFO's letter and delay in finding out the results of the application and appeal is not serious or significant in the circumstances. Putting aside there being an issue of ownership which could leave any issue of infill moot if owned by NSPI, the impact on the appellants' rights is also not serious.

[82] Any failure to comply perfectly with allowing a response to the December 3, 2003 DFO letter would have little significance to the appellants' ability to officially participate in the process and in the overall decision not to allow the activity, given there was no indication before this court through cross examination or affidavit evidence addressing steps or additional information that a case could be made out by the appellants, the constant negative position of the biologist, inclusive of prior to the activity occurring and now, as well as that of the inspector, Scott Morash, who on cross, negated the availability of any potential compromised position in these circumstances.

[83] Having regard to the individual circumstances of the breaches, assuming same against the entire legislative scheme inclusive of many technical considerations and applying the factors of performance of a major public interest

component and no serious inconvenience or prejudice, then substantial support exists for the position that the breaches are permissive and do not validate the decision of the Minister and I so find. I am of the view that the provisions for rendering decisions and disclosing information are directory and that any such breach would not be of a nature as to cause prejudice to the extent as to require quashing of a Minister's decision. The failure to comply in these particular circumstances is not a breach of fairness.

[84] As for any other potential s. 7 (1) and (2) APR breaches, I attribute no significance to any oral exchange between the fishery officers at the restaurant in Sheet Harbour on May 11, 2004 with the inspector present and the biologist at another table. The opportunity to respond to information about what needs to be done around removal of fill material and lead into its removal finds it true context in the December 3, 2003 letter and not notes flowing from a discussion.

Disposition

[85] The appeal is dismissed. I will entertain representations from the parties with respect to costs, if costs are an issue.

J.