SUPREME COURT OF NOVA SCOTIA
Citation: *Rudderham v. Nova Scotia (Environment)*, 2019 NSSC 86

Date: 20190314
Docket: Hfx No. 471414
Registry: Halifax

Between:

Stacey Lee Rudderham, Dwight Ira Isenor, Shubenacadie Watershed Environmental Protection Society, and Bill Horne

Appellants

v.

Nova Scotia (Minister of Environment) and Scotian Materials Limited

Respondents

D E C I S I O N

Judge:	The Honourable Justice Glen G. McDougall
Heard:	July 5 and September 13, 2018, in Halifax, Nova Scotia
Written Decision:	March 14, 2019
Counsel:	William Mahody, Q.C. and Paul Miller, for the Appellants Jeremy Smith and Alison Campbell, for the Respondent Nova Scotia Minister of Environment Peter Rogers, Q.C., for the Respondent Scotian Materials

By the Court:

Introduction

[1] Aggregate is essential to Nova Scotia's economy and its public and private infrastructure. But the news that a quarry is coming to the area is rarely welcomed by local residents. People living near the proposed operation often raise concerns about dust, noise, traffic, adverse impacts on drinking water, reduced property values, and damage to the environment as a whole.

[2] Quarries and other industrial operations are regulated by the Province. To operate a quarry, a proponent must obtain an industrial approval from the Minister of Environment or Nova Scotia Environment staff. When considering a proponent's application, the Minister may refuse to issue an approval where, in the Minister's opinion, the proposed activity is not in the public interest. In this case, the appellants say the Minister and his staff failed to protect the public interest when they approved an application by Scotian Materials Limited to operate a 3.99-hectare quarry in Goffs, NS. Having been unsuccessful in their appeals to the Minister, they now appeal to this court.

Background

[3] Scotian Materials Limited has intended to construct, operate and maintain a quarry on its property in Goffs, Halifax Regional Municipality, for some time. In 2011, Scotian, operating under the name Northern Construction and Suppliers Ltd., applied for an industrial approval under Part V of the *Environment Act*, S.N.S. 1994-95, c.1. At that time, NSE directed that Northern seek approval from Halifax Regional Municipality and undertake consultation with the public. Northern then applied to HRM for a development permit and held a public meeting.

[4] In April 2012, HRM refused the permit on the basis that many of the quarry's proposed operations, including crushing and screening rock, comprised "extractive facilities" that were prohibited under HRM's Land Use By-law. Northern Construction appealed the development officer's decision to the Nova Scotia Utility and Review Board, and filed an application before this court for a declaration that the by-law prohibiting extractive facilities was invalid. Both matters eventually came before the same panel of the Nova Scotia Court of Appeal, which released a pair of decisions: *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, 2015 NSCA 43, and *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, 2015 NSCA 44,

leave to appeal denied: [2015] S.C.C.A. No. 262 ("*Northern Construction*"). In *Northern Construction*, the Court of Appeal held that HRM, with its by-law, had trespassed into the Province's jurisdiction to regulate the location of quarries. As a result, Northern's proposed project did not require municipal approval.

[5] Following the release of the Court of Appeal decisions, Scotian reinitiated its application. Nova Scotia Environment issued the approval in September 2015, triggering multiple appeals under s. 137 of the *Environment Act*. Minister Andrew Younger allowed one of these appeals and cancelled Scotian's approval on the basis of insufficient public consultation. Several other s. 137 appeals were subsequently dismissed as moot by a new Minister, Randy Delorey.

[6] In response to the decisions of Ministers Younger and Delorey, Scotian and several other parties filed appeals to the Supreme Court under s. 138 of the Act. These proceedings were subsequently consolidated. On January 22, 2016, while the litigation was still ongoing, Scotian submitted a new application to NSE for a substantially similar 3.99-hectare quarry at the same site. In January 2017, Scotian withdrew its appeal of Minister Younger's decision.

[7] Scotian was granted industrial approval No. 2016-095664 by NSE Administrator Lori Skaine on June 19, 2017. The appellants, Stacey Lee Rudderham and Dwight Ira Isenor, Shubenacadie Watershed Environment Protection Society ("SWEPS"), and Bill Horne, each appealed the decision under s. 137 of the Act. Acting Minister Leo Glavine dismissed all three appeals on November 16, 2017.

[8] The appellants brought further appeals to this court under s. 138 of the Act. These three appeals were consolidated by consent order issued on January 16, 2018. A motion was heard on May 22, 2018, to supplement the record and to amend the notices of appeal. The motion to add to the record was dismissed, but the amendments were allowed.

Grounds of Appeal

[9] The grounds of appeal are set out across three separate notices of appeal. The appellants challenge the Minister's decisions on a single procedural ground and on multiple substantive grounds. The procedural challenge relates to the public consultation process. The appellants say Scotian made substantial changes to the proposed quarry operation after the consultation period ended, including the decision to quarry below the water table. They allege that the Minister breached

the duty of procedural fairness by granting the approval without requiring further consultation. As to substance, the appellants say the Minister's decisions were unreasonable on the following grounds:

1) The Minister erred in permitting blasting to occur within 800 metres of Highway 102;

2) The Minister erred by permitting blasting to occur within 800 metres of the Department of Transportation and Infrastructure Renewal ("TIR") weigh scales and the Maritimes and Northeast Pipeline;

3) The Minister erred in failing to order, or in failing to consider whether to order, an environmental assessment pursuant to the *Environmental Assessment Regulations*, N.S. Reg. 26/95;

4) The Minister erred in failing to adequately consider certain statutory considerations and relevant evidence, in particular:

    a) The municipal planning documents for Halifax Regional Municipality, as required by s. 213 of the *Halifax Regional Municipality Charter*, SNS 2008, c. 39;

    b) The economic impact of the quarry, particularly on the Aerotech Business Park;

    c) Concerns raised by the reports of Dr. R. F. Favreau submitted with the appeal, including the possibility of flyrock and the long-term effects of ground vibrations;

    d) The impact that the quarry may have on groundwater and wells in the area.

Several other grounds were abandoned at the hearing.

Legal Framework and Standard of Review

Appeal procedure under the *Environment Act* generally

[10] The approval was granted according to the procedure outlined in Part V of the *Environment Act*. Section 50 prohibits a person from carrying out activities that require an approval without having obtained that approval. Division V of the

Activities Designation Regulations, N.S. Reg. 47/95, deals with industrial approvals. Section 13(f) provides that the construction, operation or reclamation of "a quarry where a ground disturbance or excavation is made for the purpose of removing aggregate with the use of explosives" is a designated activity that requires an approval.

[11] To obtain an approval, the proponent must make an application in the manner prescribed by the regulations. In addition to the information outlined in the regulations, an applicant may be required to submit "any additional information the Minister considers necessary": s. 53(2). Once in receipt of a completed application, the Minister has broad discretion under the Act to issue or refuse to issue an approval. The Minister may issue an approval subject to any terms and conditions that she decides are appropriate. Section 56 states, in part:

> 56 (1) The Minister may issue or refuse to issue an approval.
>
> …
>
> (2) The Minister may issue an approval subject to any terms and conditions the Minister considers appropriate to prevent an adverse effect.
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> (3) Without restricting the generality of subsection (2), the Minister may require rehabilitation plans, implementation schedules and security from the approval holder.
>
> (4) In environmentally sensitive areas, the terms and conditions of an approval may be more stringent, but may not be less stringent, than applicable terms and conditions provided in the regulations or standards adopted or incorporated by the Minister.

[12] Section 52(1) provides that the Minister may, at any time, decide not to issue an approval where he is of the opinion that a proposed activity "is not in the public interest, having regard to the purpose of this Act". In making that decision, the Minister must consider "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": s. 52(2).

[13] Although the *Environment Act* refers to the Minister making decisions on industrial approvals, in practice, this power is delegated to a staff member of NSE (called an "Administrator") pursuant to s. 17 of the Act. When an Administrator makes a decision under s. 56, appeals (if any) are governed by s. 137 of the Act. Appeals under s. 137 are heard by the Minister personally. The appeal procedure in the Act and regulations is left largely undefined. Under s. 137(4), the Minister

"may dismiss the appeal, allow the appeal or make any decision or order the administrator could have made." In practice, when a s. 137 appeal is filed, the file is sent to an NSE staff member called the "Reviewer". The Reviewer examines the evidence in the file for relevance, reviews the grounds of appeal and makes recommendations to the Minister in a document called an "Appeal Review Report". The Minister then receives the Appeal Review Report and the record as prepared by the Reviewer and makes the final decision.

[14] A person aggrieved by a decision of the Minister under s. 137 then has a further right of appeal to the Supreme Court of Nova Scotia under s. 138(1)(b):

> 138 (1) Subject to subsection (2), a person aggrieved by
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> …
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> (b) a decision of the Minister pursuant to Section 137;
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> …
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> 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.

The Supreme Court's decision is final and there is no further appeal to the Nova Scotia Court of Appeal: s. 138(6).

[15] Broadly speaking, the procedure and analysis governing a s. 138 appeal is that of a judicial review. As stated by Hood J. in *Sipekne'katik v. Nova Scotia (Environment)*, 2017 NSSC 23:

> [13] Hearings *de novo* have not been the practice followed to date in *Environment Act* appeals. They have been dealt with as judicial reviews. *Sipekne'katik* has provided a bound volume of authorities where the reasonableness standard has been applied to decisions pursuant to the *Environment Act*. …

Standard of review

[16] Issues of procedural fairness are not subject to a standard of review analysis. As Justice Hood explained in *Sipekne'katik*:

> [40] The authorities are clear that the issue of procedural fairness is not subject to a standard of review analysis. It is a two-step process: first to determine the content of the duty of procedural fairness and then to determine if the procedure was fair. I am to consider whether the means by which the Minister arrived at her decision was fair in the context of the level of procedural fairness called for.

[17] In Sara Blake, *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis Canada Inc., 2017), the author says the following about review on the basis of procedural fairness:

> 8.41 The question of procedural fairness is concerned with the process followed by the tribunal to reach its final decision. The standard of review analysis discussed above applies only to the merits of the decision. It does not apply to the question of whether fair procedure was followed.
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> 8.42 **A tribunal decision may be set aside for procedural error only if it resulted in manifest unfairness or actual prejudice to the applicant's right to be heard.** Minor procedural lapses or technical irregularities are not grounds to set aside a decision. **What is required is fair procedure, not perfection.**
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> [*Emphasis added*]

[18] In *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, the Supreme Court of Canada set out the following non-exhaustive list of factors that are relevant in determining the content of procedural fairness:

(a) "the nature of the decision being made and the process followed in making it" (para. 23);

(b) "the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'" (para. 24);

(c) "the importance of the decision to the individual or individuals affected" (para. 25);

(d) "the legitimate expectations of the person challenging the decision" (para. 26); and,

(e) "the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances" (para. 27).

[19] On all remaining issues in this appeal, the parties agree that the proper standard of review is reasonableness. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, the Supreme Court of Canada described reasonableness in the following terms:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[20] The Court expanded on the meaning of deference in the context of judicial review:

> 48 … What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. … We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision" …
>
> 49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" … In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[21] Insufficient or unsatisfactory reasons, alone, are not enough to find a decision unreasonable. In *Newfoundland and Labrador Nurses' Union v.*

Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] S.C.J. No. 62, Abella J., for the Court, stated:

> 14 Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses - one for the reasons and a separate one for the result … **It is a more organic exercise - the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.** This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
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> 15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). **This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.**
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> 16 Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. **A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion** … **In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.**
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> [*Emphasis added*]

[22] In *Sorflaten v. Nova Scotia (Environment)*, 2018 NSSC 55, Chipman J. held that the Minister of Environment's decisions require the balancing of potentially competing interests and are entitled to "the greatest deference from the Court":

> [28] … The primary purpose of the *Environment Act* is not solely to "protect" the environment. The stated purpose of the Act is to support and promote the protection, enhancement, and prudent use of the environment, while recognizing a list of goals outlined in s. 2(a) through (j), including recognizing "the linkage between economic and environmental issues" and "encouraging the development and use of environmental technologies, innovations and industries". In any event, when I return to the purpose of the *Environment Act*, I am of the view that the polycentric goals make environmental regulation subject to the greatest deference from the Court. In my view, it is for the Minister tasked with making the decision

> to consider the various policy choices. Such decisions require a balancing of potentially competing interests in meeting the goals of the Act.

[23] The expertise of the Minister's staff is another important factor favouring a high level of deference. In *Elmsdale Landscaping Ltd. v. Nova Scotia (Environment)*, 2009 NSSC 358, Duncan J. observed:

> [32] The *Act* provides a substantial degree of discretion to the Minister. To assist him he has the benefit of departmental expertise.
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> [33] For example, in this case the application was presented to the Department by Jacques Whitford, a well known engineering consulting firm with expertise in environmental and geotechnical engineering. They employed the services of an engineer, among others, to address a series of issues that were relevant to the establishment of the quarry and satisfying the Department that the granting of approval was appropriate.
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> [34] The application was reviewed by, among others a Regional Engineer and an Inspection Specialist. There was consideration at first instance of the impact on water courses and the operation of the quarry. There was a requirement for survey drawings, blast design, soil and geology, environmental controls and rehabilitation plans. …
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> …
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> [36] It is not only these individual topics that require expertise to assess. The Department staff must also have the capability of understanding and assessing the cumulative result of the information tendered in relation to each of these headings in determining how, if at all, the application meets the purposes of the *Act* and how it should be disposed of. …
>
> [37] **This is an expertise that is greater than that of a court.** Such expertise favors a greater degree of deference to the Minister's decision making.
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> [*Emphasis added*]

[24] In *Rudderham v. Nova Scotia (Environment)*, 2018 NSSC 172, Justice Hood noted at para. 38 that "[t]he role of the hearing judge is to determine if the decision of the Minister was reasonable" and that "[c]redibility of the evidence is … not the issue for the reviewing court".

[25] With these principles in mind, I will consider each of the appellants' grounds.

The Public Consultation Process

[26] Details of the public consultation process undertaken in this case are found in Scotian's application filed on January 22, 2016, and in the "Report for Consultative Process for the Goffs Quarry" ("Consultation Report") filed in February 2016. In the application, Scotian described the public consultation undertaken in its previous applications. It noted that consultation for the current application was still ongoing, and that all new public comments received would be summarized and submitted to NSE in a subsequent report.

[27] According to the application, Scotian submitted a public notice for publication in the Chronicle Herald on December 12 and 14, 2015. The notice advised that Scotian was proposing to operate a quarry, and that members of the public were invited to submit questions and comments until January 27, 2016. Scotian also created a website to supplement the newspaper distribution of the public notice. The website, intended by Scotian to be "the main tool of the consultative process", contained project details, a summary of the project's current status, maps, videos, and common questions and answers. The public was able to submit comments and questions via the website, and any responses were made available for public viewing. Scotian noted that the website would be active not only during the public comment period, but also during the project's operation period.

[28] Scotian planned to hold an open house on January 19 and 20, 2016, for the public to ask questions and provide comments to its staff. It also planned to engage First Nations groups and to identify and engage various stakeholders, including Transport Canada, NavCanada, Halifax International Airport Authority, and Maritimes & Northeast Pipeline ("M&NP").

[29] In February 2016, Scotian submitted the Consultation Report to NSE. The report detailed the results of Scotian's consultations, and included a table entitled "Summary of Issues and Concerns Raised and Proponent's Responses, 2016". This table summarizes 26 concerns raised by members of the public and provides Scotian's response and proposed resolution to each one. Scotian also reiterated that its website would remain online during the quarry's operation period as an ongoing communication tool. NSE was apparently satisfied with Scotian's efforts and issued an approval on June 19, 2017, without requiring further public consultation.

[30] The appellants say Scotian made two crucial changes to its proposed quarry operation after consultation concluded, and that these changes effectively nullified the initial public consultation. First, Scotian decided, contrary to its earlier

representations, that it would quarry below the water table. The appellants say Scotian became aware that it would be quarrying below the water table no later than July 7, 2016, but failed to notify the public of this change until November 2016 when the plans were disclosed through a FOIPOP application. Second, Scotian moved the quarry footprint closer to the pipeline. The appellants argue that Scotian carried out public consultations for one project – a quarry entirely above the water table and with a particular footprint – but proceeded to develop something different, with a greater potential to cause harm to the public. They say the Minister's decision to approve this "new" project without further consultation breached the duty of procedural fairness.

[31] According to the appellants, applying the *Baker* factors, the public consultation in this case is clearly unacceptable. They say the public had a legitimate expectation that they would be notified in a reasonably timely manner of any substantial changes to the proposed quarry operations and given an opportunity to fully voice their concerns.

[32] Scotian and the Minister of Environment acknowledge that in July 2016, a determination was made, based on the findings of a hydrogeological assessment, that the proposed quarry would be required to operate below the water table. Additional studies were then requested and conducted before approval was given to operate below the water table. Both respondents deny, however, that the appellants were deprived of an opportunity to fully voice their concerns on this or any other issue.

[33] The evidence on the alleged change to the quarry footprint is less straightforward. In their brief, the appellants say Scotian moved the quarry footprint closer to the Maritime & Northeast Pipeline. This is important, they say, because Scotian also changed the blasting direction away from Highway 102 and toward the pipeline. As proof of the change, the appellants cite only a letter dated March 16, 2016, from their counsel, Paul Miller, to Katherine MacLeod, P.Eng, at NSE, in which Mr. Miller states that "[i]t appears that Scotian Materials has now posted a new location and new configuration of its proposed quarry on its website, along with the previous location and configuration." He adds that he is enclosing "…a copy of the mapping, with distances, of the newest location and configuration of the proposed quarry." The enclosed document depicts the proposed quarry site, and sets out distances to relevant landmarks. The diagram indicates, for example, that the quarry site is 201 metres from the pipeline. The following notation appears in the lower right hand corner of the document: "PLEASE NOTE THE

PROPERTY LINES INDICATED ON THIS PLAN ARE FOR REFERENCE ONLY. THEY ARE NOT SURVEY ACCURATE IN ANY WAY."

[34] During oral argument, the appellants relied on two additional documents to show that the footprint had changed. They referred first to the Consultation Report, where, at page 3, Scotian indicates that "[t]he proposed development is approximately 250 m from the pipeline". The appellants then referred to a survey map submitted as part of a November 2016 memorandum from Golder Associates, Scotian's consultant, responding to questions about blasting raised by NSE. That survey shows a distance of 199 metres from the site of "Blast 1" to the pipeline. The appellants say this establishes that Scotian reduced the distance from the quarry to the pipeline by twenty percent after the initial public consultation period ended. However, the site plan submitted with Scotian's application in January 2016 and the formal survey plan submitted in February 2016 also indicate a distance of 199 metres from that area of the quarry to the pipeline. In my view, the evidence in the record falls short of establishing that the quarry footprint changed.

[35] The consultation process challenged by the appellants took place before the Administrator issued the industrial approval. The level of procedural fairness to be afforded to interested third parties at the application stage of an *Environment Act* industrial approval was considered in *Margaree Environmental Association v. Nova Scotia (Environment)*, 2012 NSSC 296. In that case, the appellant environmental association argued that procedural fairness was owed both while the proponent's application for approval to operate an oil well was being considered by the Minister's delegate, and during the period of the appeal under s. 137. Counsel for the Minister argued that, at the application stage, procedural fairness was only owed to the proponent, and not to third parties. Applying the *Baker* factors, MacAdam J. held that there was a "low level" duty owed to third parties at the application stage, which was met by the dialogue between the interested third parties and NSE:

> [16] A review of the factors outlined in *Baker*, supra., suggests that there was a duty of procedural fairness owed at the first stage. Although the issuance of the approval by Ms. MacKinnon was more in the nature of an administrative act than a judicial or adjudicative decision, and was subject to a right of appeal for anyone aggrieved by the decision, it is clear that the decision was important to those persons living in close proximity to the proposed oil well. There was no suggestion that either the Minister or any official had represented to the appellant, or anyone, any particular form of hearing or right to intervene in the application for the permit. Therefore the factor of legitimate expectations is not present.

> [17] On the evidence it appears that the appellant's first participation in the proceeding was by filing a notice of appeal, followed by a written submission in support. However, officers and directors of the appellant were in communication with officials of the Department of Environment, even before the permit was approved by Ms. MacKinnon. **The issuance of the permit being essentially an administrative act, any duty of procedural fairness would be at what would be described as a "low level". The Act does not mandate any form of notice by the Department. However, as noted, there were two public meetings organized by PetroWorth at which the proposed drilling was discussed. The record also shows correspondence and telephone calls by officials of the Department with interested citizens, including many who are officers and directors of the appellant. There is nothing in the record to suggest the appellant was denied the opportunity to voice its concerns about the proposed well drilling and the potential risks to local residents as well as to the public at large.**
>
> [18] **In the absence of any specific mandated form of procedural fairness, I am satisfied that the duty of procedural fairness that arose at the approval stage was met by the dialogue between the Department and those persons who expressed concerns about the risks associated with granting the approval for the well drilling, including individuals who were officers, directors and/or members of the appellant**. As the appellant itself had, at that time, not shown an interest in the matter, there was no duty of fairness owed to it. **Any duty of fairness owed to individuals, including officers and directors of the appellant, as well as other local residents, who had shown such an interest, was met by the Department receiving and responding to their concerns.** In the absence of mandatory procedures for involvement of third parties, which did not exist, the Minister, and his delegate, met their obligation of procedural fairness.
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> [*Emphasis added*]

[36] The same reasoning applies in this case. The issuance of the approval was an administrative act, requiring a lower level of procedural fairness than a judicial or adjudicative decision. The *Environment Act* also provides a statutory right of appeal for anyone aggrieved by the Administrator's approval, which further supports reduced procedural protections. When assessing the third factor – the importance of the decision to the affected individuals – it is helpful to revisit the *Baker* decision, where the Court stated:

> 25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. **The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.** This was expressed, for

> example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:
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> > A high standard of justice is required when the right to continue in one's profession or employment is at stake ... . A disciplinary suspension can have grave and permanent consequences upon a professional career.
> >
> > [*Emphasis added*]

[37] The decision to issue an approval for a quarry that will operate below the water table roughly 1.5 kilometres from the nearest subdivision is important to concerned citizens like the appellants. That said, it does not demand the high level of procedural protection that applies to a decision that could lead to (for instance) deportation or professional disqualification. The appellants' concerns are similar to those raised in *Margaree*, where the proponent intended to operate an oil well in a residential area close to watercourses, residences, and a sensitive watershed ecosystem.

[38] The fourth factor, legitimate expectations, was the main focus of the appellants' argument that they were denied procedural fairness. In *Canadian Administrative Law*, 2d ed., (Markham: LexisNexis Canada Inc., 2015), Guy Régimbald explains the doctrine of legitimate expectation at p. 340:

> The doctrine of legitimate expectation is an extension of the rules of natural justice and procedural fairness, and implies procedural entitlements in relation to administrative decision-making. Where the doctrine applies, it can create a procedural right to make representations or to be consulted with respect to a decision. Thus, representations or conduct of a minister or other public authority that can be characterized as clear, unambiguous and unqualified, or the departure from normal established practices, may induce a legitimate expectation that individuals or groups will be consulted before a decision is taken contrary to their interests.
>
> Even if no specific representations were made, legitimate expectations can arise from the fact that a decision maker has consistently followed the same procedure in the past. Moreover, if representations have been made with respect to a substantive result, the procedural rights will be increased. Failure to live up to the undertaking may breach procedural fairness.

[39] Similarly, in *Administrative Law in Canada*, 6th ed., Sara Blake writes:

> 2.52 Fairness may require consistency in procedure. A tribunal may reasonably be expected to follow the same procedures it has followed in the past, provided the evidence of past practice is clear and unequivocal. Similarly, clear and unequivocal promises should be kept. If a tribunal has promised that it will

> consult certain persons before making its decision, those persons have a legitimate expectation that they will be consulted, even if there is no statutory or other right to be consulted. However, the existence of a past procedural practice or policy does not give rise to a legitimate expectation unless it reflects the tribunal's common practice, it is directly applicable in the circumstances and the persons seeking to enforce it knew of it and relied on it. …
>
> …
>
> 2.54 It is not enough to show that a legitimate expectation was not met. Prejudice to the party's right to be heard must also be shown, including proof of detrimental reliance. …

[40] It is therefore not enough for the appellants to establish that they expected further consultation following any change to the proposed quarry operation. That expectation must be grounded in the representations or conduct of the Minister or NSE, or in a deviation from their past procedure. The appellants' submissions on this factor are set out at p. 13 of their brief:

> .. [T]he Minister chose a process whereby Scotian would be required to actively disclose its plans and receive comments on the same. Particularly on issues as key as quarrying below the water table and moving the footprint of the quarry, the public had a legitimate expectation that they would be notified in a reasonably timely manner. This change to Scotian's plans has the potential to impact the health and access to water of residents in the area, who thereby have a strong interest in having an opportunity to fully voice their concerns.

[41] No specific form of public consultation is mandated by Part V of the *Environment Act* or NSE's *Pit and Quarry Guidelines*. All that is required is that the application for an approval include a description of any public consultation undertaken or proposed by the applicant: *Approval and Notification Procedures Regulations*, N.S. Reg. 17/201, 3at s. 6(1)(u) ("*Approval Regulations*"). Section 8(3) of the *Approval Regulations* allows the Minister, during the review of an application, to "require that the applicant provide a consultative process in the area where the activity or the proposed activity is or may be located".

[42] The appellants have not established that their expectation of further consultation following changes to the proposed operation is grounded in any representations or conduct of the Minister or NSE. Nova Scotia Environment's acceptance of Scotian's public consultation proposal and its report summarizing the consultation results is not tantamount to the Minister "choosing" a particular process. Nor have the appellants shown that not ordering further consultation (beyond Scotian's continued acceptance of comments through its website) constituted a departure from the normal established practices of NSE or the

Minister. I therefore find, as in *Margaree*, that legitimate expectations are not in play here.

[43] Finally, less procedural fairness is owed where the statute allows the decision maker to choose its own procedure, or where the agency is an expert in setting the procedure in the circumstances. While an applicant must submit certain information in support of an application, as prescribed by the *Approval Regulations*, there are no mandatory procedures for third-party involvement in the application process under Part V of the Act. It follows that NSE and the Minister are left with considerable discretion as to how, and when, public input will be solicited for the purposes of an application for an industrial approval. This factor suggests a lower level of procedural fairness is owed to the appellants.

[44] Having considered each of the *Baker* factors, I am satisfied that the same "low level" duty of procedural fairness found in *Margaree* applies in this case. The next question is whether that low level duty was met. Did the consultation process in this case provide the appellants with a fair opportunity to be heard?

[45] While it would have been preferable for Scotian to have disclosed its intention to quarry below the water table earlier than it did, I find that there was no significant prejudice to the appellants' right to be heard. Scotian updated its website on November 10, 2016, to reflect its intention to seek approval to quarry beneath the water table. This section of the website included a link enabling members of the public to contact Scotian with questions or comments. Nova Scotia Environment also continued to accept and review submissions. On November 15, Stacey Rudderham sent a nine-page letter to Katherine MacLeod, P.Eng, at NSE outlining her concerns regarding potential adverse impacts on the water supply and the environment. It is clear from the letter that she and other concerned citizens had raised these issues with NSE many times in the past. The letter opened as follows:

> Ms. MacLeod,
>
> As per documents received last week through a FOIPOP request, the proponent has disclosed that they are seeking permission to quarry below the water table . **In much of our communications with you and your department for the past five years, we have pointed out several times, how incredibly delicate the water table is in our area and our concerns that the proponent will impact it.** While we all live with and deal with water conservation on a daily basis, we have accepted the fact that on occasion we will have to have a truck load of water delivered, or we will have to live with a shorter life span on our pumps, or we may have to re-frack or re-drill. Many of us have had any one or more of these

> experiences already. **We have reiterated these FACTS to your office, repeatedly. We also continually have tried to communicate our concerns about the wetlands and the watershed.**
>
> [*Emphasis added*]

[46] Ms. Rudderham's submission included various diagrams and topographical images which, in her view, showed that Scotian had intentionally provided misleading and incomplete details about the site and the adverse impacts that could result from quarrying below the water table.

[47] On November 18, 2016, the Stop the Fall River Quarry group, whose membership includes Ms. Rudderham and Mr. Isenor, sent a letter to Administrator Lori Skaine at NSE. It was copied to Bill Horne, another of the appellants. The letter began with the group expressing its dissatisfaction with the outcome of an earlier meeting with Ms. Skaine:

> We met in a boardroom at NSE, and while all of our participation in this meeting was initially restricted you agreed to meet with us as requested. We met in numbers, to ensure that our witness to the conversation was solid, and to ensure that all of our issues were covered. We expected that as promised you would hear our concerns and, as you promised, look into each of them. Several weeks after the meeting, you sent a select list of issues you were looking into as a result of the meeting, and that list was not reflective of all the issues we communicated to you. We note you may not have taken as many notes during out meeting as we did, so we felt you had possibly not realized the extended list we anticipated. We responded with a complete list of our concerns as they were discussed. As well, one member added an item to the request list for follow up, after essentially being told the Well Log Database was too complicated for her to use.
>
> Your response received by this group on November 16, 2016 was incomplete, and misinformed. We would ask you to consider the following points when preparing further responses to this letter. We are not satisfied with your selective version of what our concerns are, and since you did not respond per the list provided to you, we do not accept your response email as a complete reply. The issues that are being reviewed further are essentially the gravest and most pertinent, but they do not eliminate the other issues we have communicated to you, and that is the reason we have decided to write to you again today. You have some errors and inaccuracies in your response that we will highlight within this letter.

The letter went on to address various issues, including quarrying below the water table.

[48] The fairness of the public consultation in relation to the water table issue was raised by the appellants in their original appeals before the Minister. It was

specifically addressed in the decision letter to Mr. Horne, where the Minister stated at p. 2:

> It was determined during the review of SML's application that dewatering or operating below the water table would occur. NSE worked with SML to obtain further information to confirm this condition, and SML identified the changes to the application on its website (November 2016).
>
> From this information, members of the public were notified that operating below the water table is a possibility, and a hydrogeological study will be carried out. Although the public consultation process had concluded, NSE continued to accept information and this information was taken into consideration during the review of the application.

[49] Likewise, in the decision letter to Ms. Rudderham and Mr. Isenor, the Minister wrote at p. 2:

> Preliminary information did indicate the quarry will be operating above the water table and identified the possibility that they will be extracting rock below the water table.
>
> During the review of the submission, dewatering or operating below the water table was identified. NSE worked with the applicant to obtain further information to confirm this condition. The public was notified in November 2016 that operating below the water table is a possibility, and a hydrogeological study will be carried out.
>
> Since 2003, Gateway Materials is currently authorized to excavate below the water table. This demonstrates the department has experience in issuing approvals after considering the quarry location and whether an adverse effect can be mitigated.

[50] The record demonstrates that the appellants made extensive submissions to the Administrator at NSE, in person and in writing, and to the Minister on appeal, in relation to Scotian's intention to quarry below the water table. While they are not satisfied with the response they received, it cannot be said that there has been manifest unfairness or actual prejudice to the appellants' right to be heard. I would dismiss this ground of appeal. I will now deal with the substantive grounds.

Blasting within 800 metres of the highway

[51] Everyone agrees that the active area of the quarry is located within 800 metres of Highway 102. The appellants argue, however, that the approval issued by the Minister does not actually permit blasting within 800 metres of a public highway, and that, as a result, Scotian currently has no right to do any blasting.

[52] The *Pit and Quarry Guidelines* address separation distances for quarries. They provide, in part:

> IV. SEPARATION DISTANCE FOR QUARRY OPERATIONS
>
> (1) No person responsible for the operation of a quarry shall locate the associated works within:
>
> (a) **30 m of the boundary of a public or common highway** unless the person has written consent from the Department of Transportation and Public Works to operate closer;
>
> …
>
> (2) No person responsible for the operation of a quarry shall blast within:
>
> (a) **30 m of the boundary of the public or common highway** unless the person has written consent from the Department of Transportation and Public Works;
>
> (b) 30 m of the bank of any watercourse or the ordinary high water mark;
>
> (c) **800 m of the foundation or base of a structure located off site.** Structure includes but is not limited to a private home, a cottage, an apartment building, a school, a church, a commercial building , a treatment facility associated with the treatment of municipal sewage, industrial or landfill effluent, an industrial building or structure, a hospital, nursing home etc.*
>
> (d) 15 m of the property boundary when a structure on the abutting property is not involved.
>
> * NOTE: The separation distance is measured from the working face and point of blast to the foundation or base of the structure. This distance can be reduced with written consent from all individuals owning structures within 800 m.
>
> [*Emphasis added*]

[53] The appellants point out that the *Pit and Quarry Guidelines* only establish minimum standards, and the Minister may impose more stringent terms and conditions where appropriate: *Environment Act*, ss. 56(2)-(4).

[54] The appellants say the standards set out in the *Guidelines* were revised in the approval to remove any reference to specific separation distances between blasting and public highways or watercourses. The approval reads as follows:

> **4. Separation Distances**
>
> a. The Approval Holder(s) shall not locate the Active Area of the Site within the following separation distances unless otherwise exempted or varied by conditions of this approval:

> i. 30 m of the boundary of a public or common highway;
>
> …
>
> b. The Approval Holder(s) shall not blast within the following separation distances unless the Approval Holder(s) has obtained written letters of permission from the property owner of the structure on or before the date of Approval:
>
> i. **800 m from the foundation or base of a structure** located off site. This shall not apply to structures which are placed within the 800 metre separation distance following the date of which an application for approval is received from the Approval Holder(s).
>
> [*Emphasis added*]

[55] The approval also contains a definition of "structure" at subsection 1(o), which the appellants say is "more expansive" than the one in the *Pit and Quarry Guidelines*:

> **1. Definitions**
>
> …
>
> o. Structure includes but is not limited to a private home, a cottage, an apartment building, a school, a church, a commercial building or a treatment facility associated with the treatment of municipal sewage, industrial or landfill effluent, an industrial building, **infrastructure** or construction, a hospital, and a nursing home, etc.
>
> [*Emphasis added*]

[56] The appellants contrast the Scotian approval with two other approvals included in the record. The first, Approval No. 2006-051587-R01, granted to Sovereign Resources Inc., contains the same definition of "structure" as the Scotian approval, but more closely tracks the wording of the *Pit and Quarry Guidelines* with respect to separation distances. In particular, there is a specific separation distance between blasts and public highways. The same is true of Approval No. 2003-032431-A03, issued to Gateway Materials Limited. The appellants submit that, in relation to the Sovereign and Gateway approvals, it can be argued that "structure" does not include a highway because there are specific separation distances outlined for highways and structures. The Scotian approval, on the other hand, has no specific separation distance for highways, and therefore fails to make the same distinction. It follows, they submit, that the court must determine whether the definition of "structure" in the Scotian approval includes a 100-series highway.

[57] According to the appellants, the inclusion of the word "infrastructure" in the approval definition of "structure" shows that it was meant to capture a public highway. They cite the following three dictionary definitions of "infrastructure" which they say demonstrate that the term is generally defined to include public roads:

> 64. The online version of the Oxford English Dictionary defines "infrastructure" as:
>
> > The basic physical and organizational structures and facilities (e.g. buildings, roads, power supplies) needed for the operation of a society or enterprise.
>
> 65. The online version of *Merriam-Webster* defines it as:
>
> > 1: the underlying foundation or basic framework (as of a system or organization)
> >
> > 2: the permanent installations required for military purposes
> >
> > 3: the system of public works of a country, state, or region; also: the resources (such as personnel, buildings, or equipment) required for an activity
>
> 66. The online version of the *Cambridge Dictionary* defines it as:
>
> > The basic systems and services, such as transport and power supplies, that a country or organization uses in order to work effectively
>
> [Appellants' brief, p. 16]

[58] The appellants summarize their position at pp. 16-17 of their brief:

> 69. [T]he Minister may impose restrictions that are stricter than the [*Pit and Quarry*] *Guidelines*. Here, it appears that has happened by virtue of the more expansive definition of "structure". By including "infrastructure and construction" in the definition, a "structure" should include a 100-series highway, being one of the most vital pieces of infrastructure in the province.
>
> 70. The quarry footprint, by Scotian's own admission, is only about 315 metres from Highway 102 … Subsection 4(b) of the Approval permits blasting within 800 metres of a structure provided that Scotian has obtained written letters of permission from the owner of the structure on or before the date of the Approval, which was June 19, 2017. No such letter of permission from the Department of Transportation and Infrastructure Renewal appears in the Record, and it is too late for a new letter of permission to be sought.
>
> 71. As such, Scotian's blasting plans are not inline with the requirements of their own Approval, and Scotian has no right to blast at the Site within 800 metres of Highway 102.

> 72. In the alternative, this discrepancy has rendered the Approval void for vagueness. The Approval should therefore be set aside.

[59] Although Scotian notes that this argument was not raised before the Minister in any of the s. 137 appeals, neither respondent asked the court not to consider it. The general rule is that a new issue may not be raised on appeal. In *Administrative Law in Canada*, 6th ed., Sara Blake writes:

> 6.26 If the appeal is to a court, a new issue may not be raised that was not raised before the tribunal unless the interests of justice require it and the court has a sufficient evidentiary record and findings of fact to decide it.

[60] The court's role in this appeal is to determine whether the Minister's decisions dismissing the appellants' appeals under s. 137 of the *Environment Act* were reasonable. Since this issue was not put before the Minister in any of those appeals, there is no decision by him on this point to review. While I recognize that neither respondent asked the court not to consider this ground, that does not end the matter. The appellants have not explained why the issue was not raised earlier, or shown that the interests of justice require the court to decide it now. I would therefore decline to consider it.

[61] Even if I am wrong, however, I would dismiss this ground of appeal for three reasons. First, I agree with the Province's submission that the appellants are misconstruing the definition of "structure" in the approval. In the definition, the various categories of nouns are separated grammatically by the indefinite article "a" or "an". The one exception to this, on plain reading, is "…a treatment facility". The definition can be broken down as follows:

> "Structure includes but is not limited to:
>
> - a private home,
> - a cottage,
> - an apartment building,
> - a school,
> - a church,
> - a commercial building or a treatment facility associated with the treatment of municipal sewage, industrial or landfill effluent,

- an industrial building, infrastructure or construction,
- a hospital, and
- a nursing home, etc."

[62] Reading the definition as a whole, it is clear that the infrastructure mentioned in the definition of "structure" is associated with an industrial building or construction. In addition to the separation of examples by "a" or "an", the "or" contained within "…an industrial building, infrastructure or construction" supports this interpretation. It parallels the clause directly preceding it ("…a commercial building or a treatment facility associated with the treatment of municipal sewage, industrial or landfill effluent…"). It is clear in that clause that the commercial building or treatment facility following the "a" is for treating municipal sewage, or industrial or landfill effluent. Likewise, the infrastructure mentioned in the definition is associated with an industrial building or construction.

[63] Even if the definition could be read as the appellants suggest, the Sovereign and Gateway approvals demonstrate that a public or common highway is not intended to fall within the definition of "structure". Those approvals use the same definition of "structure" as the Scotian approval, but still contain a specific separation distance for "a public or common highway".

[64] Finally, it would be nonsensical to allow the active area of a 3.99 hectare quarry to be located within thirty metres of the public highway, but to restrict blasting to 800 metres, 26 times further away. The approval demonstrates no intention to depart from the requirement in the *Pit and Quarry Guidelines* of a thirty metre buffer between any blasting and the boundary of a public or common highway. Accordingly, even if the interests of justice required me to consider this ground of appeal, I would dismiss it.

Blasting within 800 metres of the weigh scales and the pipeline

[65] The appellants say the TIR weigh scales are located within 800 metres of the quarry, and there is no written letter of permission from TIR in the record. They rely again on the diagram of the "new" footprint for the quarry attached to Mr. Miller's letter to Katherine MacLeod, P.Eng, dated March 16, 2016. As discussed earlier, this diagram includes a notation that the property lines on the plan are for reference only, and "are not survey accurate in any way". According to the diagram, the separation distance between the weigh scales and the quarry is 777

metres. The appellants also say that Scotian did not obtain proper consent from Maritimes and Northeast Pipeline to blast within 800 metres of the natural gas pipeline. For these reasons, they say, it was unreasonable for the Minister to issue the approval.

[66] As I indicated earlier, the evidence relied on by the appellants falls short of establishing that Scotian changed the footprint of the quarry in March 2016. In addition, it is not clear from the diagram relied on by the appellants whether the 777 metres from the weigh scales is to a property line, rather than to the active area of the quarry, or to a blasting site.

[67] The respondents say the survey plan filed by Scotian in February 2016 proves that the weigh scales are not within 800 metres of the quarry. Although it is difficult to make out the numbers on the copy filed with the court, the plan appears to show a distance of 911 metres between the "scalehouse" and the quarry. A similar figure also appears in other places in the record. In a report dated May 29, 2017, Katherine MacLeod, P.Eng, at NSE stated that the "NSTIR Scalehouse" is 912 metres from the proposed quarry site. In the Rudderham and Isenor appeal decision letter, the Minister wrote that "the survey plan submitted indicates a separation distance of 911m from the weigh scale, therefore, consent is not required." In my view, it was reasonable for the Minister to conclude, based on the information before him, that Scotian did not need written permission from TIR.

[68] With respect to the pipeline, the appellants argue that Scotian sought, but did not clearly receive, consent from M&NP. On February 26, 2016, Robert MacPherson, President of Scotian, sent the following e-mail to Sean MacLean, the Lands, Public Awareness and Emergency Response Coordinator at M&NP:

> Hi Sean
>
> We will be submitting our supplemental information in support of our quarry application before the end of next week. I would appreciate receiving some comment from you regarding our initial direct stakeholder consultation letter and subsequent blasting details provided
>
> Sincerely
>
> Rob

[69] Mr. MacLean replied on February 29, 2016:

> Good Morning Robert,

> After reviewing the blasting plans and associated materials provided by **Scotian – re: Fall River Quarry Proposal -** , Maritimes & Northeast Pipeline (M&NP) have come to the conclusion there is technically no justifiable reason for us to reject your blasting proposal as it currently exists. M & NP are committed to continue working with Scotian Materials to exchange any new information regarding their blasting plans to determine their ongoing compliance with our safety requirements and standard operating procedures. Please feel free to contact us anytime in the future to discuss any changes to your currently approved scope of wrok [*sic*]
>
> Thanks for your continued cooperation with Maritimes & Northeast Pipeline on advance notice for any proposed work to our operating facilities.
>
> Respectfully,
>
> Sean MacLean
>
> [*Emphasis in original*]

[70] The issue of consent from M&NP was put to the Minister in the Rudderham and Isenor appeal. In his decision letter, the Minister stated that "[t]he pipeline is within 800 m, and a letter of permission was received from Maritimes and Northeast Pipeline".

[71] The appellants emphasize that Mr. MacLean, on behalf of M&NP, only gave consent to Scotian for its "blasting proposal *as it currently exists*", and that there is no evidence that Scotian consulted M&NP again after it changed the blasting direction to face the pipeline. As such, they say, the Minister erred by relying on Mr. MacLean's e-mail to find that M&NP had granted consent to blast. The appellants also submit that it is questionable whether an e-mail is sufficient to meet the requirement in the approval for a "written letter of permission" from the property owner of a structure.

[72] Scotian argues that there was evidence before the Minister from which he could find that M&NP's consent was sufficient, notwithstanding the subsequent change in blasting direction. In the "Summary of Issues and Concerns Raised and Proponent's Responses, 2016" included in the Consultation Report, Scotian wrote that M&NP had been consulted in relation to the minimum setback from the pipeline for quarrying activity, and that "M&NP responded indicating that the minimum setback would be 30 m". Appendix "G" to the same report contains a letter dated January 14, 2016, from Robert MacPherson to Sean MacLean at M&NP. In it, Mr. MacPherson stated:

> We are submitting as part of our consultation copies of our proposed work in relation to your pipeline, the blast design and blast simulation for your review. **As**

> **previously discussed with you there is no planned ground disturbance within 30 metres of the pipeline in relation to the quarry operation.**
>
> [*Emphasis added*]

The Minister would also have been aware that M&NP did not appeal the decision to issue the approval.

[73] It might have been prudent for Scotian to obtain new letters of permission following any noteworthy change to the blasting proposal. I find, however, that it was not unreasonable for the Minister to conclude that M&NP had granted consent to blast. According to the evidence in the record, M&NP advised Scotian that the minimum setback for quarrying activity is thirty metres. The quarry site is 199 metres from the pipeline, well beyond this thirty-metre setback. Changing the blasting direction does not change that fact. I further find that it was reasonable for the Minister to conclude that an e-mail was sufficient to meet the requirement for a written letter of permission. I would dismiss this ground of appeal.

Failure to order environmental assessment

[74] The appellants say the Minister erred by failing to order an environmental assessment pursuant to the *Environmental Assessment Regulations*, or in failing to find that he had the authority to make such an order. The *Environment Act* defines an "environmental assessment" at s. 3(s):

> (s) "environmental assessment" means a process by which the environmental effects of an undertaking are predicted and evaluated and a subsequent decision is made on the acceptability of the undertaking…

[75] The environmental assessment process is dealt with in Part IV of the Act. Section 31 states:

> 31(1) Subject to subsection (2), the environmental-assessment process under this Part applies with respect to an undertaking as determined by the Minister or as prescribed in the regulations.
>
> (2) This Part does not apply to class environmental assessments as prescribed in the regulations.

[76] Section 3 of the *Environmental Assessment Regulations* establishes that the environmental assessment process will apply to an undertaking set out in Schedule "A":

> 3(1) Undertakings and classes of undertakings listed in Schedule "A" to these regulations are designated as undertakings or classes of undertakings, as the case may be, to which Part IV of the Act applies.
>
> (2) The Act and these regulations may apply to a modification, extension, abandonment, demolition or rehabilitation of an undertaking listed in Schedule "A" which was established either before or after March 17, 1995.

[77] The following is listed as a Class I Undertaking in subclause B(2) of Schedule "A":

> 2. A pit or quarry, other than a pit or quarry exempted under Section 4 of the regulations for the Department of Transportation and Infrastructure Renewal, that is larger than 4 ha in area for extracting one of the following:
>
> (a) ordinary stone;
>
> (b) building or construction stone;
>
> (c) sand;
>
> (d) gravel;
>
> (e) ordinary soil.

[78] The appellants say the effect of these provisions is that an environmental assessment is a necessity for a quarry larger than four hectares, and it remains a discretionary option for the Minister for a smaller quarry. They submit that it is open to the Minister to declare a quarry less than four hectares in size to be an "undertaking" to which Part IV of the Act and the *Environmental Assessment Regulations* apply. Their argument can be summarized as follows.

[79] Section 31 of the *Environment Act* provides that the environmental assessment process shall apply to "undertakings as determined by the Minister and as prescribed in the regulations". Part V, the approval process that was followed in this proceeding, applies to "activities". "Undertaking" and "activity" are both defined in s. 3:

> (aa) "activity" means an activity or part of an activity prescribed by the regulations;
>
> …
>
> (az) "undertaking" means an enterprise, activity, project, structure, work or proposal that, in the opinion of the Minister, causes or may cause an adverse

> effect or an environmental effect, and may include, in the opinion of the Minister, a policy, plan or program or a modification, extension, abandonment, demolition or rehabilitation, as the case may be, of an undertaking;

[80] The definition of "activity" is closed. The *Activities Designation Regulations* list in detail what will constitute an "activity" under the *Environment Act*. The construction, operation, or reclamation of a quarry is an activity by virtue of s. 13(f) of those regulations.

[81] Conversely, the definition of "undertaking" is open. Certain types of activities are automatically undertakings by virtue of Schedule "A" of the *Environmental Assessment Regulations*. However, the appellants say, any activity "that in the opinion of the Minister, causes or may cause an adverse effect or an environmental effect" may be considered an "undertaking".

[82] The appellants submit that the Minister's discretion is written directly into the *Environmental Assessment Regulations*. Section 11 states:

> **Class I and Class II undertakings**
>
> 11(1) With respect to a Class I undertaking listed in Schedule "A" or an undertaking which the Minister determines to be a Class I undertaking, the environmental assessment process
>
> (a) shall include registration;
>
> (b) may include a focus report, terms of reference, and an environmental-assessment report;
>
> (c) may include alternate dispute resolution; and
>
> (d) may include referral to a review panel where an environmental-assessment report is required.
>
> (2) With respect to a Class II undertaking listed in Schedule "A" or an undertaking which the Minister determines to be a Class II undertaking, the environmental assessment process
>
> (a) shall include registration, terms of reference, and an environmental-assessment report;
>
> (b) may include alternate dispute resolution; and

> (c) shall include referral to a review panel.
>
> (3) If the Minister is of the opinion that any of the following is an undertaking, the Minister must classify the undertaking as either Class I or Class II and must advise the proponent in writing of the classification and, if not already registered, the requirement to register the undertaking in accordance with the Act and regulations:
>
> (a) a policy, plan or program;
>
> (b) a modification, extension, abandonment, demolition or rehabilitation of an undertaking.
>
> [*Emphasis by the appellants*]

[83] According to the appellants, these provisions clearly indicate that the Minister has discretion to declare projects to be undertakings that are subject to the environmental assessment process on a case-by-case basis, even if they are not designated as such by Schedule "A". Therefore, where the Minister determines that a quarry of less than four hectares "causes or may cause an adverse effect or an environmental effect", the Minister has the discretion under s. 11 of the *Environmental Assessment Regulations* to declare that quarry a Class I or Class II undertaking. The appellants submit that if this court determines that the Minister has such discretion, his failure to recognize it means his decisions must be set aside. They rely on Donald J.M. Brown, Q.C. and the Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (loose-leaf, updated December 2017), (Toronto: Thomson Reuters, 2013) ("Brown & Evans") at 14:5443:

> By definition, a discretionary power need not be exercised. In some circumstances, however, an adjudicative decision-maker may be found to have failed *unlawfully* to exercise a statutory discretion. For example, where an agency had a discretion to hold a hearing, but mistakenly believed it was *obliged* to do so, its decision was set aside on the ground that it had failed to exercise its statutory discretion.
>
> [*Emphasis in original*]

[84] Brown & Evans cite *Wood v. British Columbia (Attorney General)*, 1985 CarswellBC 355 (B.C.S.C.). In *Wood*, the petitioner was a police officer seeking to overturn an order for an open public inquiry into his conduct. The Attorney General took the position that the relevant legislation required an open public inquiry in the circumstances, and that therefore the judicial review must fail. In response, Mackoff J. noted:

> 18 If, in fact, the respondents had no discretion in making the order, then, of course, counsel are quite right in the position they take. If, however, the respondents did have a discretion, then in failing or refusing to exercise that discretion, they have declined jurisdiction and the order may be quashed. It is therefore necessary to examine the poorly drafted relevant portions of s. 40 to determine whether they did or did not have a discretion.

[85] In the end, it was determined that the legislation was in fact discretionary, and the order for the public inquiry was quashed.

[86] The Province, in its brief, submits that the appellants' position is based on a misunderstanding of s. 31 of the Act. Again, that section provides:

> 31(1) Subject to subsection (2), the environmental-assessment process under this Part applies with respect to an undertaking as determined by the Minister or as prescribed in the regulations.
>
> (2) This Part does not apply to class environmental assessments as prescribed in the regulations.

[87] The Province's argument is as follows. The appellants interpret "undertaking as determined by the Minister" to mean that the Minister can order that an activity is an undertaking subject to the environmental assessment process under Part IV. On the contrary, the Province submits, the section says the Minister determines or the regulations prescribe the way in which the environmental assessment process under Part IV applies to an undertaking. Numerous provisions of Part IV demonstrate that the Minister determines how the process will apply to an undertaking on a case-by-case basis. For example, s. 34(1) states:

> 34 (1) After an undertaking is registered pursuant to Section 33, the Minister shall examine or cause to be examined the information that is provided respecting an undertaking and shall determine that
>
> (a) additional information is required;
>
> (b) a focus report is required;
>
> (c) an environmental-assessment report is required;
>
> (d) all or part of the undertaking may be referred to alternate dispute resolution;
>
> (e) a focus report or an environmental-assessment report is not required, and the undertaking may proceed; or
>
> (f) the undertaking is rejected because of the likelihood that it will cause adverse effects or environmental effects that cannot be mitigated.

[88] Section 35 provides:

> 35 (1) Where the Minister decides that a focus report is necessary pursuant to Section 34, an administrator shall provide the proponent with terms of reference for the preparation of the focus report.
>
> (2) The proponent shall undertake the necessary study for the preparation of the focus report and submit the report to the Minister.
>
> (3) Upon receiving the focus report, the Minister shall examine the report or cause it to be examined and shall determine that
>
> > (a) an environmental-assessment report is required;
> >
> > (b) all or part of the undertaking may be referred to alternate dispute resolution;
> >
> > (c) an environmental-assessment report is not required and the undertaking may proceed; or
> >
> > (d) the undertaking is rejected because of the likelihood that it will cause adverse effects or environmental effects that cannot be mitigated.
>
> …

[89] And section 36 states:

> 36 Where the Minister decides that an environmental-assessment report is required, the Minister shall
>
> > (a) prepare proposed terms of reference for the environmental assessment;
> >
> > (b) give the public and the proponent an opportunity to comment on the proposed terms of reference in the prescribed manner;
> >
> > (c) modify the terms of reference as the Minister considers appropriate; and
> >
> > (d) provide the proponent with the terms of reference.

[90] According to the Province, reading the words of the Act in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature, the proper interpretation of s. 31 is that the Minister determines or the regulations prescribe the way in which the environmental assessment process applies to an undertaking.

[91] That was the Province's position in its brief. At the hearing, however, its stance was more muddled. Apparently retreating from the claim that the Minister lacked the discretion to classify the proposed quarry as an undertaking, the Province argued that the Minister had determined that the quarry, subject to the

terms and conditions of the approval, would not cause an adverse effect or an environmental effect and, as such, his decision not to classify the proposed quarry as an undertaking was reasonable.

[92] For its part, Scotian took the position that the Minister does have the discretion to classify a quarry of less than four hectares as an undertaking. It argued, however, that while the Minister did not explicitly refer to that discretion in his decisions, it cannot be presumed that he did not consider it. Scotian says it is implicit in the decision to not order an environmental assessment that the Minister declined to exercise his discretion in that regard. Scotian wrote in its brief at para. 66:

> As *Newfoundland Nurses*, supra, notes at paragraph 12, deference to the Minister requires that the Court must first seek to supplement the Minister's reasons before it seeks to subvert them. It is trite to say that the Minister has considerable discretion under the Act and he need not be explicit in every instance that he declines to exercise his discretion. The determination by the Minister that an environmental assessment would not be required in respect of this project is reasonable and should not be interfered with by the Court.

[93] In my view, the disposition of this ground of appeal does not turn on whether the Minister has the discretion to classify a quarry of under four hectares as an undertaking. I reach that conclusion on the basis of the appellants' submissions to the Minister on the need for an environmental assessment, and the Minister's comments in response. In their appeal to the Minister, Ms. Rudderham and Mr. Isenor raised the issue of an environmental assessment in grounds nine and twelve:

> 9. To the appellants' knowledge, this is the only quarry permit ever issued in Nova Scotia that permits blasting below the water table at a site under 4 hectares in area. A full environmental assessment must be required before permission is given to blast below the water table.
>
> …
>
> 12. … Further, the proposed quarry and access road are in excess of four hectares, and the quarry application must be rejected until there has been a full environmental assessment as a Class 1 undertaking under the *Environmental Assessment Regulations* along with all other requirements of Part IV of the Act.

[94] In his decision letter, the Minister responded as follows:

> The Approval has a trigger that requires SML undergo an environmental assessment if the quarry footprint exceeds 3.99 hectares. A pre-existing access

> road is not considered a new feature for the quarry and is not taken into consideration when the footprint of the quarry is determined. Consequently, NSE determined from the SML quarry application, the size of the quarry as proposed to be 3.99 hectares.
>
> …
>
> Since 2003, Gateway Materials is currently authorized to excavate below the water table. This demonstrates the department has experience in issuing approvals after considering the quarry location and whether an adverse effect can be mitigated.
>
> …
>
> Respecting Ground 9, quarrying below the water table is not a stand-alone trigger for an environmental assessment under the regulations. The disturbed area will be 3.99 hectares (9.86 acres) on a 248-acre lot, as confirmed on a surveyed drawing. Quarries less than 4 hectares are not subject to the *Environmental Assessment Regulations* regardless of water-table influence.
>
> …
>
> Respecting Ground 12, regarding the contravention of the *Environmental Assessment Regulations*, only quarries larger than 4 ha in area for extracting stone are subject to the regulation.

[95] Mr. Isenor and Ms. Rudderham, then, argued that an environmental assessment was required for two reasons. First, because the quarry was actually larger than four hectares in size, and second, that Scotian intended to quarry below the water table. The Minister explained that, contrary to the appellants' submission, the quarry was not larger than four hectares in size because access roads are not included in the quarry footprint. He added that only quarries larger than four hectares are subject to the *Environmental Assessment Regulations*. On the water table issue, he noted that NSE had experience granting approvals to quarry below the water table, and that quarrying below the water table was not a stand-alone trigger for an environmental assessment. The rest of the decision letter made clear that, in the Minister's opinion, any potential adverse effects resulting from quarrying below the water table could be mitigated. The Minister did not suggest that he could not order an environmental assessment if he felt otherwise.

[96] In Mr. Horne's appeal, he referred to an environmental assessment in ground four:

> 4. The Approval is not in accordance with the *Environmental Assessment Regulations* in that the public consultation was deficient in the following respects:

> a. The location of the footprint of the quarry shown at the public consultation was incorrect as the footprint had been moved as a result of wetland encroachment.
>
> b. The proponent had confirmed both orally and in writing that it would not quarry below the water table, whereas, unbeknownst to the public at the time, it had amended its application to quarry below the water table.

[97] The Minister responded:

> Respecting Ground 4, the *Environmental Assessment Regulations* state that quarries less than 4 hectares in size are not an undertaking identified at Schedule "A". Therefore, the SML quarry with an area of 3.99 hectares is not subject to Part IV of the *Environment Act* or the *Environmental Assessment Regulations*.

[98] In his appeal, Mr. Horne incorrectly assumed that the proposed quarry was already subject to the *Environmental Assessment Regulations*. The Minister responded that quarries less than four hectares in size are not designated as undertakings under Schedule "A" and are therefore not subject to Part IV of the Act or the regulations. There was no suggestion by Mr. Horne that the Minister had the discretion to classify the quarry as an undertaking subject to the *Environmental Assessment Regulations*, and that he should exercise that discretion.

[99] Unlike the previous two appeals, the SWEPS appeal directly referred to the Minister having discretion in relation to quarries smaller than four hectares in size. Ground three of the SWEPS appeal stated:

> (3) This quarry is an example of an individual use adding to a growing negative impact on the Soldier/Miller Lake watershed which is a headwater to drinking water sources for 1,000s of Nova Scotians. We request that the Minister revoke this approval until a full Environmental Assessment for the quarry and any associated (asphalt/concrete plant) uses is completed and demonstrates no adverse effect on downstream water quality. We again point out that the ordering of an Environmental Assessment for quarries of 3.9 hectares or less is at the discretion of the Minister.

[100] In dismissing the appeal, the Minister wrote:

> Respecting Ground 3, no information was provided to support the position that the Soldier/Miller Lake watershed is a source of drinking water.
>
> As noted in Ground 1, the current approval to operate a quarry does not include an asphalt or concrete plant.
>
> In review of the hydrological information, groundwater flowage from the SML quarry site is to the south and southwest away from residential areas. Soldier and

> Miller Lakes are not protected water areas; however, the adjacent Lake Major Watershed is and does provide potable water to thousands of residents. This watershed however is outside of the drainage basin for SML, therefore an impact on the surface water of this watershed is not possible.
>
> The *Environmental Assessment Regulations* state quarries of 4 hectares or more are subject to an environmental assessment. The SML quarry is 3.9 hectares. Therefore, an Environmental Assessment is not required.

[101] SWEPS' request for an environmental assessment was grounded in its concern that the proposed quarrying activities would adversely impact the Soldier/Miller Lake watershed. The Minister addressed that concern, explaining why no adverse effects on the Soldier/Miller Lake watershed or the Lake Major watershed were anticipated. He then noted that quarries of four hectares or more are subject to an environmental assessment, and that an environmental assessment was not required because the proposed quarry was 3.9 hectares. He did not comment on whether he could order an environmental assessment if he was of the opinion that the quarry was likely to cause an adverse effect.

[102] Even if we accept that the Minister has the discretion to classify a quarry of under 3.99 hectares as an undertaking requiring an environmental assessment, that discretion could only be exercised where the Minister was of the opinion that the proposed quarry causes or may cause an adverse or environmental effect. The Administrator's decision to issue the approval and the Minister's decisions dismissing all three appeals reflect their shared opinion that any adverse or environmental effect caused by the quarry could be mitigated. To put it differently, the Minister was clearly satisfied, first, that the information obtained in the approval process, which included hydrogeological studies, was sufficient to identify any potential adverse or environmental effect, and second, that those effects could be mitigated by the many terms and conditions attached to the approval. Unlike the appellants, the Minister did not see this as a particularly unique or "borderline case" justifying extraordinary scrutiny. As such, even if the Minister had the discretion proposed by the appellants, there was no need for him to refer to it in these circumstances. I would dismiss this ground of appeal.

Failure to consider HRM municipal planning documents

[103] The appellants argue that the Minister erred in failing to consider the planning documents of Halifax Regional Municipality as required by s. 213 of the *Halifax Regional Municipality Charter*. According to the appellants, the quarry is clearly inconsistent with the Municipal Planning Strategy ("MPS") and the Land

Use By-law ("LUB") for Districts 14 & 17 (Shubenacadie Lakes) and, in particular, the policies in relation to the Aerotech Business Park. Section 213 of the *HRM Charter* provides:

> 213 A department of the Government of the Province, before carrying out or authorizing any development in the Municipality, shall consider the planning documents of the Municipality.

[104] Section 213 was raised in Mr. Horne's appeal, and in the appeal by Ms. Rudderham and Mr. Isenor. The appellants' submissions in both appeals were substantially similar. Mr. Horne wrote at ground seven of his appeal:

> The Approval is inconsistent with s. 213 of the Halifax Regional Municipality Charter whereas this provision requires the Minister (or his delegate) to take into account the planning documents of the municipality before authorizing any development. The quarry is clearly inconsistent with the Municipality Planning Strategy (MPS) for Districts 14 & 17 (now District 2) and the Aero Tech Business Park policies set out in the said MPS. It should be noted that while the Nova Scotia Court of Appeal ruled that certain sections of the Land Use By-Law were *ultra vires* the municipality, it did not address or in any way void any sections set out in the MPS, particularly those dealing with the Aero-Tech Business Park.

[105] In a letter prepared by Mr. Miller on Mr. Horne's behalf, considered as part of the appeal, Mr. Miller wrote:

> Mr. Horne's last ground of appeal, number 7, deals with the requirement of s. 213 of the Halifax Regional Municipality Charter which requires that the Minister consider the planning documents of the Municipality prior to authorizing any development. Had NSE reviewed the Municipal Planning Strategy and Land Use Bylaw for Districts 14 and 17, it would have seen that a quarry is inconsistent with the intent of the MPS for the Aero Tech Business Park, which focuses on high technology industries and supports a campus like development. The Zoning By-Law for the AE-4 zone, in which this quarry is located, implements the policies set out in the Municipal Planning Strategy. It is submitted that a heavy industrial use, such as a quarry, is inconsistent with this MPS and LUB.

[106] In his decision letter to Mr. Horne, the Minister responded to ground seven as follows:

> Respecting Ground 7, the Nova Scotia Court of Appeal in *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, 2015 NSCA 44 concluded that the Province of Nova Scotia has the right to control the location of quarries and that all quarrying activities fall exclusively within provincial authority. Notwithstanding, as noted above, the Administrator upon receipt of an application

> does take into consideration the suitability of the site and whether the effects of the proposed activity are acceptable.

The Minister's response in the Rudderham and Isenor appeal was virtually identical.

[107] The appellants acknowledge that the Court of Appeal in *Northern Construction* held that certain sections of the LUB purporting to regulate the siting of quarries were *ultra vires*, and that the Province has sole decision-making authority regarding the location of quarries. They submit, however, that *Northern Construction* does not affect the application of s. 213 which, according to the appellants, "imports the municipality's planning documents into the provincial decision-making process". The Province is therefore still required under the *HRM Charter* to consider the municipal planning documents when deciding whether to approve a quarry operation. According to the appellants, these documents emphasize land uses that are complimentary to the Aerotech Business Park, which was envisioned as a high-tech campus environment. The appellants submit that there is no reference in the record to NSE's statutory obligation under s. 213, and that the only reference to "suitability" is unrelated to planning considerations. They say this failure by the Minister to take account of a relevant consideration is an error that warrants quashing the Minister's decisions.

[108] The Province argues that s. 213 does not "import the municipality's planning documents into the provincial decision-making process", as claimed by the appellants. Nor, it says, does s. 213 require the Minister to sit down and read every page of the lengthy MPS and LUB. Instead, the Province submits, all that s. 213 requires from the Minister is a consideration of the planning documents, and the Minister met that obligation in this case. The Province notes that there are references to zoning and the planning documents in the record. For example, in its application, Scotian wrote:

> The adjacent and surrounding lands, also owned by Scotian, include an existing clay pit and a former rock quarry which were operated periodically over the past few decades to support provincial transportation and infrastructure projects. Other land uses in the vicinity of the Project include a variety of business and industrial operations north and east of the site in the Aerotech Industrial Park, such as Maritime Fence, Irving Oil CNG, Clean Earth Technologies Inc., and L3 Electronics Systems, as well as the Halifax Stanfield International Airport. Located just west of the proposed quarry is the north bound Highway 102 weigh station, operated by the NSTIR. Further west, across Highway 102, are a number of residential subdivisions, approximately 3 km from the Project, in Fall River.

> Approximately 1.5 km southwest of the Project is a residential community known as the Miller Lake West subdivision. (Figure 1)

Various maps of the area were included in the application.

[109] Scotian also included consultation materials at Appendix "G" to its application. In a letter dated January 22, 2016, to the Native Council of Nova Scotia, Robert MacPherson wrote at page 2: "…It should be noted that the land on which the Project is proposed is designated by the Halifax Regional Municipality for industrial/commercial development in its land use zoning by-laws."

[110] The application also contained a table summarizing the issues raised during public consultation in relation to its previous application in 2011/2012, and Scotian's updated responses to those concerns. In response to the concern that the quarry was an "inconsistent use as per Municipal Planning Strategy and By-law", Scotian stated:

> Quarry activities are consistent with adjacent industrial land uses (e.g., Envirosoil). The latest decision by the Supreme Court of Nova Scotia [*sic*] on May 12th, 2015 indicated that the by-law in question is invalid.

[111] Scotian also included materials regarding zoning on its informational website, which were before the decision-maker. That information included the following:

> Scotian Materials owns over 743 acres in the Goffs area, which is zoned a combination of AE-4 and R1-B. A map of the lands and their zoning is shown below.

The map appears in the record.

[112] The Province says there is also evidence in the record that NSE considered aspects of the municipal planning documents. Under the heading "Variations from Quarry Approval Template", Katherine MacLeod, P.Eng, wrote in her "Application for Approval Report":

> Added 2(c): "It is the Approval Holder's responsibility to ensure applicable legislation, approvals, and codes of practice are met for all other aspects of the operation of the Facility." This is in other templates. **Added due to land use by-law.**
>
> [*Emphasis added*]

[113] More importantly, the Province adds, NSE and the Minister would have been aware from the *Northern Construction* proceedings that an aggregate quarry was inconsistent with HRM's vision for the AE-4 zone. According to the Province, HRM's hostility toward an aggregate quarry was well known to the Minister and would have been considered by him, which is all that s. 213 requires. The Minister decided, notwithstanding that hostility, that the site was suitable for the proposed quarry activity. That decision, the Province says, was reasonable.

[114] Scotian's position is that it follows from *Northern Construction* that any HRM by-law that purports to interfere with the Province's exclusive jurisdiction to regulate the location of quarries is invalid. As such, if the municipal planning documents contain policies or by-laws that are inconsistent with a decision by the Minister to approve a quarry – as the appellants argue – those policies or by-laws are *ultra vires*, and s. 213 cannot require the Minister to consider *ultra vires* planning documents. Furthermore, and contrary to the appellants' submissions, Scotian says the quarry was only inconsistent with the municipal planning documents to the extent that the LUB prohibited "extractive facilities". That inconsistency was resolved when those provisions were declared *ultra vires*. According to Scotian, the focus on high-tech industries described in the MPS and relied on by the appellants does not apply to the AE-4 zone where the quarry is located. In fact, Scotian says, there was evidence before the Minister that HRM has already permitted other heavy industrial activity in the AE-4 zone, including a concrete and asphalt plant on the same parcel of land as the proposed quarry site, a large facility for remediation of contaminated soil, and an Irving Oil CNG facility.

[115] Finally, like the Province, Scotian says the Minister was aware from the *Northern Construction* proceeding that HRM was against allowing a quarry operation at the proposed location, and the Minister would have considered that information. That consideration, it says, is sufficient to meet any obligation on the Minister under s. 213.

[116] Looking at the record, the Administrator reviewing Scotian's application had evidence that the proposed quarry site was in the AE-4 zone, that it was in the vicinity of a variety of business and industrial operations in the Aerotech Industrial park, and that it was 1.5 kilometres from the nearest residential subdivision. The Administrator also had evidence that HRM had permitted other heavy industrial activity in the AE-4 zone. She would have known from the *Northern Construction* proceedings that an aggregate quarry was inconsistent with HRM's vision for the area as set out in its planning documents. Based on the totality of the information gathered during the approval process, however, she concluded that

the site was suitable for an aggregate quarry, and issued the approval. The Minister, on appeal, would also have been aware that an aggregate quarry was inconsistent with HRM's planning documents. In addition to the information that was before the Administrator, he had the benefit of the appellants' submissions as to the specific aspects of the planning documents that they claimed were inconsistent with an aggregate quarry. The Minister was nevertheless satisfied that the approval was in the public interest having regard to the purposes of the Act.

[117] According to the appellants, the Minister's consideration of all of the above information is not sufficient to discharge his obligation under s. 213. I disagree. In my view, s. 213 obliges the Minister (or his delegate), as part of the larger determination of whether an approval is in the public interest, to consider whether the proposed development is consistent with municipal planning documents. In some cases, the decision-maker will need to review portions of the planning documents to obtain that information. In the circumstances of this case, however, there was no need to read the planning documents themselves to know that an aggregate quarry was inconsistent with them.

[118] While s. 213 requires the Minister to consider municipal planning documents before authorizing any development in the municipality, the *Northern Construction* decision makes clear that the Province ultimately retains control over the location of quarries. It is open to the Minister to conclude that approval of a quarry is in the public interest even if such approval is inconsistent with municipal planning documents. That is the situation here.

[119] I am satisfied that the Minister complied with s. 213 of the *HRM Charter*, and I would dismiss this ground of appeal.

Failure to adequately consider economic impact

[120] The appellants submit that when a project has the potential to cause adverse effects to other businesses in the area, the Minister has jurisdiction to consider those effects when deciding whether to issue or reject an approval. They note that the purpose of the *Environment Act*, as set out at s. 2, is to support and promote the protection, enhancement and prudent use of the environment while recognizing numerous goals, including:

> (a) maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society;
>
> (b) maintaining the principles of sustainable development, including

> …
>
> (iv) the principle of shared responsibility of all Nova Scotians to sustain the environment and the economy, both locally and globally, through individual and government actions, …
>
> …
>
> (vi) the linkage between economic and environmental issues, recognizing that long-term economic prosperity depends upon sound environmental management and that effective environmental protection depends on a strong economy, …

[121] In 2015, Paul B. Miller Law Inc. retained Group ATN Consulting Inc. to prepare a report assessing the economic impact of the proposed quarry on the Aerotech Business Park and its tenants. This report was included with Mr. Horne's appeal and the appeal by Ms. Rudderham and Mr. Isenor. Those appeals also included a letter dated November 14, 2016, from PAL Aerospace to Katherine MacLeod, P.Eng, expressing concerns about the risks and incompatibility of the quarry in a "high tech" business park. The appellants say the Minister failed to adequately consider this information, and, as a result, his decisions upholding the approval were unreasonable.

[122] According to the respondents, the record shows that information on economic impact, including the Group ATN report, was before the Minister, and, therefore, that the Minister considered economic impact. The respondents note that the Reviewer, in his Appeal Review Reports, identified a series of deficiencies in the Group ATN report. These deficiencies led the Minister to find that the report's conclusions could not be given weight. They say the Minister gave adequate consideration to economic impacts and his decisions were reasonable.

[123] In the Appeal Review Report on the Horne appeal, the Reviewer identified the weaknesses of the Group ATN report at pp. 5-6:

> The Approval, noted in Mr. Miller's September 18th letter refers to authorization 2016-095664, the subject of this appeal, issued to SML a year and eight months after the Group ATN's report. This is significant because information concerning the current quarry design was not made public until December 2015, during the proponent's consultation period. In fact, the approval the ATN report refers to is the previous authorization issued to SML in 2015, and it is surmised this report had been prepared in preparation for an appeal of that approval.
>
> In respect of the ATN report, it t [*sic*] is an assessment of the 2015 quarry using a google map with the 2015 quarry site plan overlain existing features and developments respective of the business park (Park) and surrounding areas. The

> author applied a property valuation – Diane Hite's Estimated Property Value Impact of Operational Gravel Pit (Delaware County, Ohio) that estimates reductions in property values based on distance to the quarry – to demonstrate property and tax losses. The report extrapolates from the valuation table the loss in property values for existing residences and business within a 2-4 km radius. A questionnaire was undertaken with several Park residents for feedback and views on the possibility of the Park being home to a quarry, a cement plant and an asphalt plant. The result is an economic impact analysis of the potential impact of a quarry on the growth potential of the Park .
>
> Aside from this report using or referring to information that predates the current approval, their assessment of the quarry impact does not take into consideration the stakeholder implications from the public consultation that followed the release of the report. Arrangements with Transport Canada to allow the quarry to operate in proximity to the airport and permission from other significant infrastructure owners were put in place. In addition, the questionnaire hypothesized the commencement of asphalt and cement plants as part of the quarry activity. These two activities did not materialize and their absence from the questionnaire could have resulted in a different view of the overall quarry project.
>
> The ATN report did not consider an assessment of the Pit & Quarry Guidelines (NSE 2003) relating to setback distances from all environmental receptors and structures. These considerations are critical in determining the impact and the prevention of an adverse effect on the environment, and are [*sic*] framework for the approval's terms and conditions.
>
> Assessing the negative economic impact or linkages between the economy and the environment, as being contrary to the long-term economic prosperity of the Aerotech Business Park, would be impossible without knowing the terms and conditions that would be in the Approval to mitigate and prevent an adverse effect. As noted above, the Group ATN report, dated October 13, 2015, predates the public consultation period and the issuance of the Approval in June 2017.
>
> [*Emphasis in original*]

[124] With respect to the PAL Aerospace letter, the Reviewer noted that the letter was not signed, was addressed incorrectly, and was never received by NSE. For these reasons, the Reviewer concluded at p. 6 that "it cannot be confirmed that the company's concerns were intended to reach NSE."

[125] In his decision letter to Mr. Horne, the Minister addressed the Group ATN report as follows:

> Respecting Ground 1, there is reference to an October 2015 Group ATN Consulting Inc. (ATN) report, submitted by the Appellant. It is noted this report was authored more than a year prior to the Approval being issued.

> The report is an assessment of the 2015 quarry design using a Google map with the 2015 quarry site plan and existing features of the Aerotech Business Park (Park). Feedback was sought from businesses in the Park about the possibility that it would become home to a quarry, a cement plant and an asphalt plant. However, the cement plant and the asphalt plant does not form part of the Approval that was issued SML.
>
> The ATN report did not consider the Pit and Quarry Guidelines (NSE 2003) relating to setback distances. The Guidelines are used by the Administrator to assist in determining the impact of the activity, prevention of adverse effects, as well as the framework for the approval's terms and conditions.

[126] In the letter to Ms. Rudderham and Mr. Isenor, the Minister wrote:

> The Appellants also submitted the Group ATN Consulting Inc. report. It did not consider all the criteria set out in the Pit and Quarry Guidelines. These considerations are critical in determining the impact and the prevention of an adverse effect on the environment, and provides [*sic*] framework for the approval's terms and conditions.
>
> These reports were taken into consideration during the drafting of the Approval, including information provided after the formal consultation period had concluded in December 2015.
>
> …
>
> Respecting Ground 10, the current approval was issued to SML more than a year after the Group ATN Consulting Inc. report. The report is an assessment of the 2015 quarry design and assesses feedback and views on the possibility of the Park being home to a quarry, a cement plant and an asphalt plant. The result is an economic impact analysis of the potential impact of a quarry on the growth potential of the Park.
>
> This report predates the current Approval and does not take into consideration public consultation that followed the release of the report. Transport Canada has given consent for the quarry to operate in proximity to the airport and permission for other significant infrastructures was received. In addition, the questionnaire given to business owners suggested that asphalt and cement plants would be a part of the quarry activity. However, these two activities are not captured by the approval issued to SML. Concerns were [not] brought directly to NSE from industries at the Aerotech Business Park during the processing of this application.

[127] This court has recognized that the Minister, in deciding whether to issue an approval under the *Environment Act*, is charged with balancing a number of interests identified in the purposes of the Act. The Minister of one political party might balance those interests very differently than another. I agree with and adopt Justice Chipman's observation in *Sorflaten* that "it is for the Minister tasked with

making the decision to consider the various policy choices": para. 28. In this case, the Minister had information before him on economic impacts, including the Group ATN report, and the following information from Scotian's application:

> The proposed Project is expected to employ at least 10 to 12 direct employees throughout the year, with five to six additional secondary workers being employed by the blasting contractor for at least one week, four times a year. Additional secondary employment through hauling / trucking contractors is estimated to result in the employment of another 20 to 30 workers.

[128] In his decision letters, the Minister specifically referred to the Group ATN report and gave his reasons for why the report did not support a conclusion that the project would have a negative impact on the Aerotech Business Park. After balancing the economic and environmental considerations, the Minister decided in favour of granting the approval. That conclusion is entitled to deference. In my view, the Minister's determination with respect to the economic impacts of the quarry was reasonable. I would dismiss this ground of appeal.

Failure to adequately consider concerns raised by Dr. R. F. Favreau

[129] The appellants argue that the Minister's decisions are unreasonable because he failed to adequately consider concerns raised by Dr. R. F. Favreau, a blasting expert retained by the appellants. Dr. Favreau is a professor emeritus at the Royal Military College in Kingston, Ontario. On January 20, 2016, he produced a report entitled "Analysis of the Consequences of Blasting at a Quarry Proposed by Scotian Materials Limited at Goffs, Halifax Regional Municipality, Nova Scotia". He produced a second report on April 27, 2016, after receiving more detailed technical information about the quarry. Dr. Favreau identified several serious concerns with Scotian's blasting plan, including the potential for dangerous flyrock. He summarized this concern at pp. 13-14 of his second report:

> The writer does not propose that all the blasts from the proposed quarry would necessarily send dangerous flyrock every time. But the results of the simulations above do show that for the variations of the values of the blast parameters that the writer has encountered in quarries, the type of blasts intended for the proposed Scotian Materials quarry will without any doubt send dangerous fly rock regularly, and this is an unacceptable situation for the nearby inhabitants and the traveling public on Highway 102.

[130] Dr. Favreau concluded at p. 56 of his second report:

> As a final conclusion, the writer is of the opinion that the authorities must not under any circumstances give approval to the proposed quarry, because blasting in the location of the proposed quarry is unacceptably dangerous. New quarries should be located far from inhabited regions and pipelines. Quarry operators should accept this, even if it raises their costs of transportation of the excavated stones.

[131] The appellants state at p. 31 of their brief that the Minister's decisions "appear to suggest that the reports were largely ignored." They say the Minister's refusal to consider Dr. Favreau's concerns in any more than a surface manner is a reviewable error, both on the basis of ignoring relevant evidence and failing to recognize the Minister's discretionary power under s. 52(2) to refuse an approval where the location is unacceptable or an adverse effect would be unacceptable. The appellants emphasize that the Minister's duty is more than a mechanical application of the *Pit and Quarry Guidelines*; it involves examining proposals in light of the purposes of the *Environment Act* and the discretion to refuse an approval under s. 52.

[132] The respondents argue that Dr. Favreau's reports were clearly considered by the Administrator in issuing the approval, and by the Minister on appeal. They say the reports were based on outdated blasting plans and that Dr. Favreau's concerns were considered throughout the process and addressed in the approval. The Minister, like the Administrator before him, decided that the terms and conditions of the approval adequately addressed any blasting concerns. The respondents submit that the appellants are attempting to apply a correctness standard to the Minister's decision when the standard is reasonableness. They say the Minister's consideration of Dr. Favreau's reports was reasonable.

[133] The approval for the quarry was issued on June 19, 2017. Katherine MacLeod, P.Eng, commented on blasting concerns in her "Application for Approval Report" dated May 29, 2017. She wrote at p. 5:

> **Blasting**: The blast plan, in the reference documents, indicate that the limits set out in the Pit and Quarry Guidelines for ground vibration and air concussion can be met. The pipeline is being shown to experience a maximum peak particle velocity of 7.4 mm/s (12.5 mm/s limit) under worst case conditions. The NSTIR camera tower, the closest above ground structure, is greater than 500 m for the initial blasts. The supporting documentation does indicate that "blast sizes are approximate in this plan and may need adjustments as terrain conditions are exposed."
>
> As per the reference documents, "Drilling and blasting will be conducted by an independent, licensed contractor who will be responsible for blast designs and

> methods in accordance with the General Blasting Regulations pursuant to the Nova Scotia Occupational Health and Safety Act." Flyrock is not included under the mandate of the Environment Act, however the supporting documentation indicates that "the blasts should ultimately all be directed toward the SE, which will create multiple free faces that will always be directing blasts away from the 4 lane highway as well from the critical receptors located in the surrounding communities."

[134] In their appeal to the Minister, Ms. Rudderham and Mr. Isenor relied on Dr. Favreau's reports to support several of their grounds. Their second ground of appeal was as follows:

> 2. The Administrator erred in granting the Approval in that the proposed quarry does not comply with the "Pit and Quarry Guidelines", specifically:
>
> …
>
> b) The blasting profile as set out by the proponent in its application exceeds the maximum concussion and ground vibrations as set out in the "Guidelines".
>
> c) The sound levels of the proposed quarry will exceed the maximum levels as set out in the "Guidelines".

[135] On September 20, 2017, Mr. Miller submitted as follows on behalf of the appellants:

> Further, and with reference to this point, we rely upon the report of April 27th, 2016 of Dr. R.F. Favreau … which models the blasting, based on Dyno Nobel's submission, and shows without any doubt that the modelled blasts proposed by the Applicant will exceed the Pit & Quarry Guidelines.
>
> …
>
> We rely on Dr. Favreau's report of April 27th, 2016 in support of the likelihood that the sound levels of the quarry blasts will exceed the maximum sound levels set out in the Pit & Quarry Guidelines …

[136] The Reviewer responded to this ground of appeal at p. 9 of his report:

> For sub-ground #2b, Mr. Miller has not identified the blast design the Appellants' believe are not in compliance with the P&QG except for the designs reviewed by Dr. Favreau in his preliminary report of January 20, 2016 and supplementary report dated April 27, 2016. It's noted the application for the Approval under Appeal is dated January 26, 2016. The original Favreau assessment appears to be the blast design involving the previous approval issued to Northern Construction Limited. The blast design or blasting profile accepted by NSE as part of the application submission for the current Approval is dated November 24, 2016, for

> air concussion, and December 16, 2016, for ground vibration, both conform to the P&QG as follows:
>
> > Air Concussion: Initial submission, January 22, 2016, Appendix D: at 400m, 144.3 dB@280 kg. exceeds 128 dB in P&Q Guidelines. Final submission, November 24, 2016, at 400m, approx. 128 dB@75 kg – nearest structure above ground at 480m (camera tower).
> >
> > Ground Vibration: Initial submission, January 22, 2016, Appendix D: Blast Design #2, Peak Particle Velocity of 13.3 mm/s exceeding P&Q guidelines (12.5mm/s). Final submission, December 16, 2016, PPV at pipeline – nearest structure below ground at 199m (pipeline) – at 7.4 mm/s.
>
> Condition 12(d)(i) states:
>
> > The Approval Holder(s) shall have a technical blast design prepared by a qualified person which ensures the ground vibration and air concussion limits in this Approval can be achieved.
>
> All blasts are monitored and an exceedance is to be reported to NSE within 48hrs. This allows the Administrator the option to suspend the Approval pending a review of the blast design.
>
> At subground #2c, Mr. Miller has not provided evidence to support this claim. The application for this Approval contains baseline noise sampling conducted by SML to determine ambient conditions (from highway and airport traffic). Noise modelling was conducted and estimated to be within the Guidelines at 250m from the operation (daytime limit), and 500m (night time limit).

[137] Ms. Rudderham and Mr. Isenor also relied on Dr. Favreau's reports in ground four, referring to his conclusions that flyrock would regularly reach Highway 102; that the level of ground vibrations would likely exceed the *Pit and Quarry Guidelines* and create the risk of damage to homes, businesses, and the M&NP pipeline; that ground vibrations would cause a settling or rupture of the M&NP pipeline; and that flyrock, turbulence from blasting, and dust created by blasting would result in unnecessary risk to aircraft using Runway 5 of the Stanfield International Airport.

[138] The Reviewer, at p. 15 of his report, reiterated that the Favreau reports pre-dated the blast profile Scotian submitted in November 2016. He reproduced his response to the blasting concerns raised in ground two, and added at p. 16:

> **In addition, the final design plan submitted (December 16, 2016) shows blasting to be directed away from Highway 102 to minimize risk.** Mr. Miller has not submitted evidence to show the likelihood of pipeline effects due to vibration. **Dr. Favreau indicated that there is little, if any, study of the long**

> **term effects of continuous large scale blasting on pipelines or other structures. (page 5 of his January 20, 2016 report).**
>
> Relating to potential impacts at the Stanfield International Airport, an agreement between Nav Canada and Scotian Materials is included in the file. Conditions of the agreement include 10-day notification prior to blasting and approval from HIAA prior to each blast. A signed agreement between HIAA and Scotian materials were [*sic*] developed to mitigate aircraft risks. The approval holder will be required to meet the dust emission requirements in the P&Q Guidelines. Sampling can be required by the NSE as part of the conditions of the Approval.
>
> **Once again, the reports provided by Mr. Miller on behalf of the Appellants, were taken into consideration by engineer MacLeod during the drafting of the Approval.**
>
> [*Emphasis added*]

[139] In his decision letter to Ms. Rudderham and Mr. Isenor, the Minister wrote at p. 2:

> The Appellants submitted a report from Dr. R. F. Favreau. Dr. Favreau's assessment and supplementary report do not consider the current blast designs for air concussion and ground vibration. The current designs meet the criteria of the Pit and Quarry Guidelines. All blasts are monitored and an exceedance is to be reported to Nova Scotia Environment (NSE) within 48 hours. This allows the Administrator the option to suspend the Approval pending a review of the blast design.
>
> …
>
> These reports were taken into consideration during the drafting of the Approval, including information provided after the formal consultation period had concluded in December 2015.
>
> …
>
> Respecting Ground 4, there is reference to two Dr. Favreau reports. These pre-date the blast profile SML submitted in November/December 2016. Concerns regarding this ground are covered above. In addition, the final design plan shows blasting to be directed away from Highway 102.
>
> Relating to potential impacts at the Stanfield International Airport, an agreement between Nav Canada and SML was reached. Further, SML will be required to meet the dust emission requirements in the Pit and Quarry Guidelines.

[140] At p. 4, the Minister also commented as follows in relation to a flyrock incident at another quarry raised by the appellants:

> Respecting Ground 7, the Pit and Quarry Guideline [*sic*] are applied consistently to all applications and to the quarry approval when given. NSE is not aware that

> the blasting technique or method causing the alleged flyrock incident and resulting prohibition, is the same blast method to be used at SML quarry. **SML will not be permitted to blast unless the blast design conforms to the Pit and Quarry Guidelines.**
>
> [*Emphasis added*]

[141] The appellants argue, in effect, that the Minister's decision is unreasonable because he did not accept Dr. Favreau's opinion that blasting in the location of the proposed quarry is unacceptably dangerous, primarily due to a high potential for flyrock to reach Highway 102. They say that Scotian's subsequent changes to the blasting plan, including the change in blasting direction away from Highway 102, would have little impact on Dr. Favreau's concerns. The Minister and his staff, on the other hand, were satisfied that the revised blasting plan, unlike the previous plan, met the criteria of the *Pit and Quarry Guidelines*, and that this fact, together with the change in blasting direction and the requirement to report any exceedance of the *Guidelines*, was sufficient to prevent any adverse effects.

[142] In my view, NSE staff gave adequate consideration to Dr. Favreau's concerns. In a letter dated November 18, 2016, the Stop the Fall River Quarry group wrote to Administrator Lori Skaine at p. 2:

> We are pleased to hear you have incorporated other members of the public service with appropriate expertise to review Dr. Favreau's report. We cannot understand why you would not have done this earlier. …

[143] The reports, and the appellants' concerns about NSE's response to them, were clearly before the Administrator, and, according to this letter, Ms. Skaine indicated that she intended to consult other experts within the public service on the issue. Blasting concerns were also reviewed by Katherine MacLeod, P.Eng, and she ultimately recommended issuing the approval, subject to certain terms and conditions.

[144] The Minister also gave adequate consideration to Dr. Favreau's concerns. In the Minister's opinion, Dr. Favreau's failure to consider the actual blasting plan connected to the approval significantly undermined the reports' usefulness. The Minister's decision to rely on the expertise of his staff over that of Dr. Favreau in these circumstances was reasonable. I would dismiss this ground of appeal.

Failure to adequately consider the impact on groundwater and wells

[145] The appellants' final ground of appeal is that the Minister's decisions were unreasonable because he failed to give adequate consideration to the impact that the quarry might have on groundwater and wells in the area.

[146] The appellants acknowledge that Golder Associates, Scotian's consultant, prepared a hydrogeological assessment in July 2016 and a proposed water handling plan in August 2016, and that NSE's Regional Hydrogeologist, Lynsey Crowell, prepared a hydrogeologist report on January 5, 2017. They say, however, that NSE requested a well survey in February 2016, but that Golder merely searched the Nova Scotia Water Well Database for wells within two kilometres of the quarry site. The appellants submit that the comprehensiveness of the well database is questionable. In its November 2016 letter to the Administrator, the Stop the Fall River Quarry group identified a number of homes in the Miller Lake West subdivision that, according to the group, had wells that did not appear in the database. The appellants submit that once it became clear that Scotian would be quarrying below the water table, NSE should not have issued an approval without requiring Scotian to complete the promised well survey.

[147] According to the appellants, Ms. Crowell's report acknowledges that groundwater at and near the site naturally exceeds some drinking water parameters, but the report does not contemplate the potential results of further contamination of a well in the area as a result of the quarry. They say the Golder hydrogeological assessment and its proposed water handling plan, upon which Ms. Crowell relies, acknowledge that the quarry poses significant risks to both water quality and quantity. The appellants rely on p. 32 of the hydrogeological assessment report, and pp. 10-11 of the proposed water handling plan for this point.

[148] The appellants acknowledge that the Minister has ordered a variety of water testing measures to detect changes in local water quality and quantity but, they say, these tests are cold comfort to residents in the area who stand to suffer damages as a result of the quarrying activities. They say the Minister should have insisted on requiring Scotian to perform the full well survey, and that allowing the approval to proceed without doing so was unreasonable and constitutes a reviewable error.

[149] The respondents say the Minister gave adequate consideration to the potential impact of the quarry on groundwater and wells. They submit that the Minister's decision to require regular water testing and to include extensive references to water in the terms and conditions of the approval shows that he gave adequate consideration to the impact of the quarry on groundwater and wells.

[150] In addition, the Province disagrees that the pages of the Golder reports cited by the appellants "acknowledge that the quarry poses significant risks to both water quantity and quality." For example, p. 32 of the hydrogeological assessment report states:

> 9.1 Impact on Local Private Wells
>
> It is our current understanding that the location of the nearest well is approximately 1 km away. The 2D groundwater model predicts that the groundwater radius of influence is approximately 211 m from the proposed quarry boundary (Section 8.0). Therefore, water well interference for nearby water wells related to dewatering of the quarry is not anticipated since these are beyond the radius of influence of groundwater level drawdown.

[151] With respect to the proposed water handling plan, p. 10 states:

> As indicated in the Hydrogeological Assessment (Golder, 2016), well interference for nearby wells is not anticipated since these are beyond the radius of influence of groundwater level drawdown. If not correctly handled, dewatering due to quarrying activities has the potential to effect the stream baseflow, wetland habitat and functionality, fish habitat and water quality.

[152] On the same page, the Province notes, Golder acknowledges that quarrying activities will result in a change in catchment and groundwater seepage resulting in a decrease in surplus, but that "the water assessment showed that the quarry would intercept a significant amount of groundwater flow resulting from the aforementioned catchment changes, and therefore, there would be enough water available to mitigate the potential effects in case the total available water within the water features is reduced to below the habitat and functionality requirements." The Province says these statements do not support the appellants' claim that the reports acknowledge significant risks to both water quantity and quality.

[153] Water issues were raised in all three appeals to the Minister. In the Minister's decision letter to Mr. Horne, he wrote at pp. 1-2:

> Respecting Ground 2, groundwater monitoring is included as terms and conditions of the Approval. Baseline sampling had been conducted. The Approval includes a condition allowing NSE to require additional monitoring of chemicals and frequency of monitoring should impacts from the quarry operation be identified.
>
> If impacts occur and additional mitigation measures are insufficient, the Administrator has the option to suspend the Approval. Groundwater monitoring will be quarterly as a condition of the Approval, just as Shubenacadie Watershed

> Environmental Protective Society (SWEPS) had requested in their February 10th letter.
>
> To detect potential groundwater influence due to quarrying, comparisons will be made between upgradient and down-gradient wells. A 48-hour notification to Nova Scotia Environment (NSE) is required for increases in chemicals above background.
>
> …
>
> Concern was expressed that this site is the first to operate below the water table. The SML Approval is not the first quarry approval to operate below the water table, and NSE has experience in issuing approvals after considering the quarry location and whether an adverse effect can be mitigated.
>
> …
>
> It was determined during the review of SML's application that dewatering or operating below the water table would occur. NSE worked with SML to obtain further information to confirm this condition, and SML identified the changes to the application on its website (November 2016).
>
> From this information, members of the public were notified that operating below the water table is a possibility, and a hydrogeological study will be carried out. Although the public consultation process had concluded, NSE continued to accept information and this information was taken into consideration during the review of the application.
>
> Respecting Ground 5 reference is made to Soldiers and Miller Lakes providing water for the City of Dartmouth, however, these two lakes form part of the Shubenacadie River Watershed and are not part of the water supply for the City. The Lake Major Watershed provides water to the Halifax Regional Municipality, including Dartmouth.
>
> Hydrogeological assessment and water handling plans were prepared and submitted to NSE as part of the application requirements. Monitoring measures to predict/identify an impact are captured in the Approval and include monitoring for quantity and quality.

[154] In the decision letter to Mr. Rudderham and Ms. Isenor, the Minister wrote at pp. 2-3:

> Respecting Ground 3, layout of the area for the proposed quarry is consistent with the site plans submitted with the January 2016 application. Preliminary information did indicate the quarry will be operating above the water table and identified the possibility that they will be extracting rock below the water table.
>
> During the review of the submission, dewatering or operating below the water table was identified. NSE worked with the applicant to obtain further information to confirm this condition. The public was notified in November 2016 that

> operating below the water table is a possibility, and a hydrogeological study will be carried out.
>
> Since 2003, Gateway materials is currently authorized to excavate below the water table. This demonstrates the department has experience in issuing approvals after considering the quarry location and whether an adverse effect can be mitigated.
>
> …
>
> A well survey was completed, and it was determined that the closest well is approximately 1.2km away. Groundwater flow has been determined to be away from the subdivisions and modeling has shown that impacts are not probable. Groundwater monitoring is included as terms and conditions of the Approval. Baseline sampling had been conducted.
>
> Respecting Ground 6, the Approval requires surface water runoff from the quarry operation to be restricted to the limits in the Pit and Quarry Guidelines.
>
> With respect to the position that Soldiers and Miller Lakes provide water for the City of Dartmouth, these two lakes form part of the Shubenacadie River Watershed and are not part of the water supply for the city.

[155] Finally, in the SWEPS decision letter, the Minister wrote at pp. 1-2:

> Respecting Ground 3, no information was provided to support the position that the Soldier/Miller Lake watershed is a source of drinking water.
>
> …
>
> In review of the hydrological information, groundwater flowage from the SML quarry site is to the south and southwest away from residential areas. Soldier and Miller Lakes are not protected water areas; however, the adjacent Lake Major Watershed is and does provide potable water to thousands of residents. This watershed however is outside of the drainage basin for SML, therefore an impact on the surface water of this watershed is not possible.

[156] In my view, NSE and the Minister gave adequate consideration to the impact of the quarrying activities on groundwater and wells in the area. In response to a request from NSE in May 2016, Scotian retained Golder Associates to prepare a report assessing the hydrogeological conditions at the site and evaluating the potential impacts within the radius of influence of the proposed quarry. The assessment included 2D groundwater modelling and the installation of sixteen monitoring wells in five locations surrounding the proposed active area and in one location in the middle of the active area. At p. 6 of the July 2016 hydrogeological assessment report, Golder wrote as follows under the heading “Local Groundwater Use”:

> To understand the number and type of groundwater uses in the area, the Nova Scotia Water Well Database was searched for wells located within 2 km of the Project footprint (Figure 1). Most of the wells within this radius are located in the closest subdivision, Miller Lake West, which is located approximately 1.5 km to the southwest of the Project. Note that not all wells in the Nova Scotia Water Well Database are entered with an address and therefore the list of wells contained in Table 1 may not include all wells in the area of interest.

[157] Later, at p. 32, Golder wrote:

> 9.1 Impact on Local Private Wells
>
> It is our current understanding that the location of the nearest well is approximately 1 km away. The 2D groundwater model predicts that the groundwater radius of influence is approximately 211 m from the proposed quarry boundary (Section 8.0). Therefore, water well interference for nearby water wells related to dewatering of the quarry is not anticipated since these are beyond the radius of influence of groundwater level drawdown.

[158] Golder recommended that the sixteen monitoring wells should continue to be monitored for water levels and groundwater quality annually during the quarry activities, and that monitoring of streams and wetlands should be conducted to confirm the results of the impact assessment.

[159] Based on the findings of the hydrogeological assessment, it was determined that approval would be required to operate below the water table. Nova Scotia Environment requested additional studies regarding on-site water handling. Golder prepared a proposed water handling plan, which contained observations similar to those in the hydrogeological assessment report respecting groundwater and wells.

[160] In January 2017, NSE Regional Hydrogeologist Lynsey Crowell prepared a report providing a hydrogeologist recommendation on Scotian's application for an industrial approval. She wrote at p. 2 of her report:

> A well survey was requested due to the geology in the area. There are no water wells located within 800m of the proposed active area. The closest well was determined to be approximately 1.2km away. There are two watercourses between the active area and the nearest subdivision, it is commonly assumed that watercourses serve as a groundwater divide. **Also, groundwater flow has been determined to be away from the subdivisions, and modeling has shown that impacts are not probable.** Therefore, based on information provided, it is not anticipated that any well interference effects will be observed on nearby water wells.
>
> [*Emphasis added*]

[161] Ms. Crowell ultimately recommended issuing the approval, subject to certain terms and conditions.

[162] The approval issued to Scotian contains numerous terms and conditions relating to groundwater and surface water monitoring. For example, Scotian was required to install two additional monitoring wells and to obtain baseline water level and water quality from those wells. These new monitoring wells were to be regularly monitored for significant drops in water level, with the requirement that any instances of significant water level drops were to be reported to NSE within 48 hours. The approval also states at s. 10(j):

> The Approval Holder(s) shall compare results from the groundwater monitoring sampling program to the baseline monitoring results. If significant increase in the level of any of the analyzed constituents has occurred, the Department shall be notified within 48 hours of receipt of results. An explanation and/or corrective action shall be provided, within 7 days of the notification, to the satisfaction of the Department. The groundwater sampling results shall also be compared to the Guidelines for Canadian Drinking Water Quality.

[163] The Minister had all of this information before him. He concluded, based on that information, that the quarrying activities were unlikely to have an adverse impact on groundwater and private wells, and that the regular monitoring required by the approval would be sufficient to identify and immediately address any such impacts if they did occur. That decision was reasonable.

[164] I recognize that the appellants believe that the Minister should have forced Scotian to perform a full well survey, but I am not satisfied that it was unreasonable for the Minister to allow the approval to proceed without one. Even if the appellants are correct and there are wells in the Miller Lake West subdivision that do not appear in the Nova Scotia Water Well Database, the hydrogeological assessment determined, first, that groundwater flow was away from the subdivision, and second, that the groundwater radius of influence was only 211 metres from the proposed quarry boundary. The Miller Lake West subdivision is approximately 1.5 kilometres from the proposed quarry boundary. I would dismiss this ground of appeal.

Conclusion

[165] The *Environment Act* gives the Minister substantial discretion to decide matters of environmental regulation. He is assisted by NSE staff who have the scientific and technical knowledge to oversee and regulate the environment. The

court, on an appeal under the Act, does not have the benefit of similar expertise. It must assess the Minister's decisions unaided by witness testimony and cross-examination. Accordingly, where the duty of procedural fairness has been met, the court will only interfere where it is satisfied that the Minister has exercised his discretion unreasonably. That is not easy to establish, and the appellants have not established it here.

[166] The appeal is dismissed. I leave it to the parties to attempt to reach agreement on costs, failing which they may make further written submissions with 60 days of the date of release of this decision.

McDougall, J.