

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Lynn v. Nova Scotia (Lands and Forestry)*, 2021 NSSC 184

**Date:** 20210602

**Docket:** HFX499038

**Registry:** Halifax

**Between:**

Maryn Rebecca Lynn, Sandra Catherine Lynn, and Beth Skerrett  
Applicants

v.

Nova Scotia Minister of Lands and Forestry, The Attorney General of Nova Scotia  
Representing Her Majesty the Queen in Right of the Province of Nova Scotia  
Respondents

and

Helen Marjorie Chisholm, Stanley Wayne Chisholm, Jeffrey Wayne Chisholm and  
Janice Darlene Chisholm

Intervenors

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**DECISION**

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**Judge:** The Honourable Justice Ann E. Smith

**Heard:** January 20, 2021, in Halifax, Nova Scotia

**Counsel:** James Simpson, for the Applicants

Myles Thompson, for the Respondents

Marc Dunning, for the Intervenors

**By the Court:**

**Introduction**

[1] Many Nova Scotians find great pleasure in having access to this Province's plentiful and beautiful beaches. Nova Scotians and others who visit the Province enjoy walking along beaches, having picnics and clam bakes on the beaches and swimming in the sea.

[2] Not all of Nova Scotia beaches are "public" beaches in the sense that I will explain later. The beach which is the focus of this judicial review, James Beach, is located in Black Point, Nova Scotia.

[3] The Intervenors, Helen Marjorie Chisholm, Stanley Wayne Chisholm, Jeffrey Wayne Chisholm and Janice Darlene Chisholm (the "Chisholms"), own property which abuts James Beach at 75 Sandpiper Lane (the "Chisholm property").

[4] In the spring of 2017, in late 2019 or early 2020 and again in May 2020, the Chisholms carried out shoreline protection work on their property.

[5] The Applicants Maryn Rebecca Lynn, Sandra Catherine Lynn, and Beth Skerrett and others complained to representatives of the Nova Scotia Department of Natural Resources ("DNR") and the Nova Scotia Department of the Environment

(“NSE”) about what they viewed as illegal construction activity on the part of the Chisholms on James Beach. These complaints will be discussed in greater detail later in this decision. DNR is now the Department of Lands and Forestry (“DLF”).

[6] On June 5, 2020, Mr. Iain Rankin, then Minister of Lands and Forests, (the “Minister”) wrote to the Applicant Beth Skerrett, in response to a complaint she submitted to DNR and NSE concerning the Chisholms’ construction of what Ms. Skerrett referred to as a “rock wall/pier structure” on James Beach.

[7] The Minister advised Ms. Skerrett that Ministry staff had visited the work site on James Beach, reviewed the situation and found no evidence of a violation of the *Crown Lands Act*, R.S., c. 114, s. 1 the *Endangered Species Act*, S.N.S. 1998, c. 11 or the *Beaches Act*, R.S. c. 32, s. 1, essentially dismissing her complaint.

[8] The Applicants say the Minister’s June 5, 2020 decision was unreasonable and seek judicial review by this Court.

### **The Grounds of Judicial Review**

[9] The Applicants’ Notice of Judicial Review raises the following grounds of review:

**Grounds of Review:**

The applicant seeks review on the following grounds:

The Minister's definition of the location of the boundary between Crown land and private land at James Beach was unreasonable. The Minister failed to consider relevant factors in coming to his decision. The Minister's decision that private land extends below the ordinary high water mark at James Beach does not align with the standard and common sense delineation of private and Crown land and is thereby unreasonable.

In the alternative, if the Minister agrees that Crown land and private land at Black Beach is defined by the ordinary high water mark, then the Minister has failed to carry out his statutory duties under the *Beaches Act*, the *Crown Lands Act*, and the *Endangered Species Act*.

[10] On July 28, 2020, The Attorney General of Nova Scotia ("AGNS") filed a Notice of Participation on behalf of the Minister. In the Notice of Participation, the Minister stated that, in the circumstances and given the information before him, the decision of the Department was reasonable and lawful.

[11] In addition, the Minister asserted that, given the information before him, he did not unreasonably err in carrying out any statutory duties pursuant to the *Beaches Act*, the *Crown Lands Act*, or the *Endangered Species Act*.

[12] In a decision of this Court (2020 NSSC 307), I ruled that the Minister's email of June 5, 2020 was a reviewable decision, and the Applicants had filed their Notice of Judicial Review on time. This Court determined that the Applicants had private interest standing in this matter and added Ms. Beth Skerrett as a Co-Applicant, at her request. This Court also granted Intervenor status to the Chisholms.

**Issues:**

[13] The sole issue this Court must address is whether the Minister's June 5, 2020 decision was reasonable.

**The Standard of Review**

[14] The parties agree that the standard of review is reasonableness. That standard was recently confirmed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*).

**Review of the Record**

[15] The first involvement by staff of NSE with respect to work being carried out by the Chisholms was on May 18, 2017.

[16] On that day Forest Technician Scott MacEwan, a forty plus year employee of DLF visited the Chisholm property after being contacted by a contractor from BA Ross Backhoeing & Trucking Ltd. as to proposed shoreline protection work at James Beach by Wayne and Helen Chisholm.

[17] After visiting the Chisholm property, Mr. MacEwan determined that the placement of rocks for shoreline protection would not require the Chisholms to obtain any permits because all of the proposed work would take place from the Chisholms' private property and rock placement would occur above the ordinary high water mark ("OHWM"). The OHWM roughly defines the boundary between privately owned land and Crown land. In addition to carrying out a site visit that day, Mr. MacEwan contacted DLF Regional Biologist Shavonne Myer and Bird Studies Nova Scotia Coordinator Sue Abbott, to determine if there were any issues with the proposed work during Piping Plover nesting season. Piping Plovers are an endangered species and are known to nest on James Beach.

[18] After speaking with Ms. Myer and Ms. Abbott, Mr. MacEwan determined that the proposed work would not have any impact on the nesting activity of Piping Plovers on James Beach.

[19] The Chisholms provided photographs to the DLF after the 2017 shoreline protection work was complete. Included was a photograph dated June 26, 2017 which shows large brown sand-coloured rocks on their property and another photograph dated October 27, 2017 which shows the same rocks which appear to be more tightly placed together.

[20] There were two “newsworthy” rain and windstorms in Nova Scotia in 2018, one on November 4 and another on November 29. The latter storm is reported by CBC Nova Scotia to have resulted in the wash out of the causeway at Big Island, Pictou County. James Beach is approximately 8 km to the west of Big Island. The CBC reported significant storm surge, which is a combination of high winds, high tides and high waves.

[21] On May 17, 2019 Scott MacEwan responded to an email from Patrick Lynch, a Forester with DLF with the re line “Activity below the high water mark – Sand Piper Lane, Chance Harbour”. Mr. MacEwan’s email states that he and other DLF staff visited James Beach that morning at high tide. He states:

Find attached a map of the property of Wayne Chisholm. Shows the extensive washout from the Nov 2018 storm (present washout line is shown in red).

The waves and surge basically washed over and around the pre-existing rock structure. The distance on the ground from the inner bay to the front of the pre-existing rock structure has not changed at approx. 42 meters.

Robert [DLF staff member] had also visited the site a few days previous and has extensive knowledge of that area.

Robert, Matt [DLF staff member] and myself have discussed and determined that the new work being done is all above the OHWM and that no infraction has occurred.

Also that the position of pre-existing rock structure was above the OHWM when put in place.

The washout seems to have possibly minimally altered the situation.

[22] A map attached to Scott MacEwan’s email to Patrick Lynch shows, by way of a red squiggly line, how the shoreline of the Chisholm property was changed by

the washout that Scott MacEwan considered was caused by the November 2018 storm.

[23] The initial inquiry which DLF received from Patrick Lynch is dated May 16, 2019. Patrick Lynch sent this email, with the re line “Activity below the highwater mark-Sand Piper Lane, Chance Harbour”, to NSE Conservation Officers Stephen Fraser and Derrick Sandluck, and to Matthew Reid, DLF Area Manager and Scott McEwan saying that Mark McGarrigle, a Species at Risk Biologist with DLF and some summer students were checking Piping Plover beaches that day and came across activity which they thought was being carried out below the OHWM. Patrick Lynch noted that there were some armour stone and track marks on the beach. He attached pictures he took that day to his email.

[24] One of these photos shows that as of May 16, 2019, the Chisholms had placed armour rock on their property parallel to the shore. It appears that some of the sand-coloured rocks (from the 2017 shoreline protection work) remained in place amongst the armour rock.

[25] Another photo appears to show that the Chisholms’ immediate neighbour along the shore also has armour stone shoreline protection as does another property further along the shoreline.



[26] The Record also discloses photographs of James Beach and the Chisholm property which were taken by Scott MacEwan in October 2019 apparently as a result of a follow-up site visit. The photographs depict that the Chisholms' shoreline protection was increasing, not parallel to the shore, but perpendicular to the shore, i.e., it was starting to come landward.

[27] On January 10, 2020, Maryn Lynn sent an email to Matthew Reid, DLF Area Manager, Pictou County with the subject line "FAO Nova Scotia Department of Natural Resources – Complaint Submission". Attached was a complaint document which Maryn Lynn stated was being filed against Wayne Chisholm.

[28] This complaint states that "Mr. Chisholm's recent construction of three armour rock walls at James Beach" was preventing the public from accessing and enjoying the beach during high tide. Maryn Lynn states that the first rock wall, which she says runs parallel to the water contravened Section 2(2)(b) of the *Beaches Act* "in that it falls below the mean highwater mark, effectively preventing the public from accessing and enjoying the beach during high tide."

[29] Maryn Lynn goes on to state that the two additional rock walls "run perpendicular to the aforementioned barrier, and also block the public from free passage on the beach." She states that "these rock walls - which extend from below

the mean high water mark and into the dune system – ignore 2(2)(b) and 2(2)(c) in that they impair the benefit and enjoyment of land-use activities and will have undesirable impacts on James Beach and its associated dune systems”.

[30] Maryn Lynn also states in this complaint that “Mr. Chisholm’s rock walls – which extend below the mean high water to the dunes - pose a direct threat to Plover habitat and prevents the Province and Birds Canada from monitoring the endangered species.”

[31] This complaint is signed by Maryn and Sandra Lynn and concludes by requesting that DLF take the following actions:

- Order Mr. Chisholm to present his permit(s) for all prior and on going developmental activities;
- Order Mr. Chisholm to remove all rocks and foreign material that violate the *Beaches Act*;
- Order Mr. Chisholm to remove all rocks and foreign material that have been deposited beyond his deeded land, more specifically, which encroach upon the mean highwater mark; and
- Immediately cease ongoing or further development and alterations of the beach and associated dune systems that violate the *Beaches Act*.

[32] Maryn Lynn attached several undated photographs to this complaint. The photographs appear to show winter conditions and some heavy machinery on the Chisholm property (above the rock wall) in certain of the pictures.

[33] Matthew Reid responded to this complaint by email dated January 14, 2020 to Maryn and Sandra Lynn, copied to Scott MacEwan and Robert Sarson, DLF Forest Technician as follows:

Hi Sandra,

I am writing in regards to our conversation that we had last week. I discussed with my Technical staff about the property in question at James Beach, Black Point. The property owner in question had constructed a barrier rock wall above the ordinary high water mark back some years ago. As discussed we have photo imagery that shows his property and the adjacent land/dune. This wall was constructed above the ordinary high water mark and therefore he was within his right to build the rock barrier to protect his property. Since the protection wall was built there have been several if not more significant weather/storm events that have removed sand/dune adjacent to the landowner. Now the property stands out as sand and dunes have been removed by storms and the landowner continues to protect his property that was established back years ago by the barrier that is in place today. I hope this provides some clarification to this situation. If you require any further information please feel free to contact me...

Regards,

Matthew

[34] In May 2020, the Chisholms carried out more work on their property. On May 6, 2020 Sandra Lynn sent another email to Matthew Reid and NSE Inspector Tim Boudreau, DLF Forest Technician Robert Sarson and Forestry Technician Scott MacEwan. Sandra Lynn begins this letter as follows:

Sadly, I am writing in respect to the ongoing illegal dumping of foreign material on James Beach, Black Point by Wayne Chisholm who owns recreational property adjacent to this public beach. This letter is further to my formal complaint filed on January 10, 2020 and your response and explanation of January 14, 2020 which is both unacceptable and incorrect.

Today Mr. Chisholm has converted James Beach, once again, into a heavy construction zone. Images of activity are embedded below for your reference. This on top of his illegal activity late last year (December 2019) which was the genesis

of my original complaint. I attach my letter and images of that activity as well for your review.

[35] Further in this email Sandra Lynn states:

This letter is your notice that we will be writing to the Minister of the Environment and Minister of Lands and Forestry asking both to remedy this situation and to issue an order(s) directing Mr. Chisholm to remove this beach barricade and safety hazard to the public in a way that preserves proper passage and enjoyment of James Beach by all Nova Scotians. This has been their right for many decades, not just Mr. Chisholm. I can assure you and others, we have no intention of letting this go and will be taking all steps necessary in whatever domain necessary to bring this matter to a satisfactory outcome.

[36] Sandra Lynn concludes her May 6, 2020 email by stating:

We have asked Jim Boudreau (cc'd) to visit the property site and related construction activities to assess its impact on the natural environment and habitat, and to have Mr. Chisholm present his permit(s) for ongoing development activities.

[37] Maryn Lynn also sent an email message to Matthew Reid, Scott MacEwan and Jim Boudreau, Inspector Specialist with NSE. She states:

Good morning,

Please see below a photo of ongoing work today (May 6). Mr. Chisholm has started placing more large rocks.

Please note the beach and passage down it is completely blocked.

We would ask someone to visit the property site today before further damage is done.

[38] The photo attached appears to show a backhoe operating landward of the rock protection which runs parallel to the shore.

[39] Mr. Boudreau did visit the property. There had been another complaint from Matthew Lynn, similar in content to Maryn Lynn's complaint. On May 9, 2020, Mr. Boudreau responded to Matthew Lynn as follows:

Hello Matthew:

Thank you for your email and phone conversation on May 5, 2020 regarding Mr. Wayne Chisholm's property at James Beach, Black Point.

I contacted Department of Lands and Forestry (formerly DNR) to discuss the provincial jurisdiction for what department has legislated authority to handle this complaint. DL&F has provincial jurisdiction of beaches. It was discussed that the individual had been protecting his property (at the property boundary) over a few years. Using Google Earth™ history imaging, the land protection work remain in the same location over the last few years and it was observed that it is the beach itself that is receding towards his land. It is my understanding from this conversation that the land-owner is conducting property protection works according to provincial regulations. It is also my understanding that the protected nesting habitat is located farther down (SE) the beach. After reviewing and considering this explanation NS Environment is satisfied that there is no violation and considers this matter closed from our perspective.

I hope this addresses your concerns. Please do not hesitate to contact me should you require additional information. I can be reached at...

[40] Around the same time, i.e., early to mid-May 2020 DLF and NSE staff began to receive email complaints from numerous members of the public, the content of which was similar to Sandra Lynn's May 6, 2020 email. Many attached the same or similar photographs that had been attached to Sandra Lynn's email.

[41] On May 13, 2020, Troy MacKay, NSE Regional Manager Conservation Officer Services, noted in an email to Conservation Officer Orlando Fraser that "the surveyor is going out today to try to establish the mean high water at the time the

rock wall first went in. So I will only be able to say it is under investigation at this time." The results of any such survey or further mention of a survey is not included in the Record.

[42] On May 15, 2020, the Applicant Beth Skerrett sent a lengthy email message to the manager of Biodiversity at NSE wherein she states her concerns about "the ongoing addition and relocation of material on James Beach by Wayne and Helen Chisholm who own recreational property adjacent to this beach." She states her concerns *inter alia*, about the Chisholms having "displaced and covered the natural sand with the extensive use of armour rocks that extend below the mean highwater mark, altered the natural watercourse along the shore, and created a disturbance by knowingly blocking public access to walk the shore at high tide, thereby redirecting foot traffic in a way that threatens the vulnerable Piping Plover nesting habitat down the beach."

[43] The Record contains a NSE Occurrence Report dated May 19, 2020 completed by Conservation Officer Derek Sandluck which confirms that Officer Sandluck reviewed arial photographs of James Beach and the Chisholm property from 2007 and 2018 with Nick Deagle, a Forest Analyst with DLF. They drew lines on these photographs, one of which represents the property sand dune and another

which represents where “the rock (erosion protect) is located”. They conclude “it appears an area of land has been lost due to erosion/s”.

[44] Another note on the Occurrence Report dated May 27, 2020, also written by Conservation Officer Sandluck, states that he discussed the file received from DLF staff “that the retaining wall is above the mean high water mark” and that Conservation Officer Fraser “sent email to Troy MacKay advising no offence had occurred.”

[45] On May 22, 2020 Matthew Reid responded to Ms. Skerrett and other members of the public that the DLF was currently looking into the situation and gathering additional information.

[46] On May 25, 2020 Beth Skerrett sent an email message to Matthew Reid and many other government officials including the Federal Department of Fisheries and Oceans, the Federal Minister of Fisheries and Oceans, the MLA for Pictou County, the leader of the Official Opposition and the Member of Parliament for the area. She states that she is writing on behalf of “our 225 member community group, The Black Point Beach Preservation Group, to present the attached document detailing and supporting our complaint against the construction of a armor rock wall/pier structure on James Beach.”

[47] This was the email which resulted in the Minster's June 5, 2020 email letter that is the decision under review.

[48] Attached to Ms. Skerrett's email was a ten-page document setting out the Preservation Group's research findings including that "a rock wall constructed below high tide mark, extending out into the waters of the Northumberland Strait, and blocking access to the beach at high tide is not in accordance with the various acts and laws of Nova Scotia." The document contained several photographs which were the same or similar to other photographs sent by Maryn and Sandra Lynn and other members of the public to DLF earlier in May 2020. One of the photos (May 6, 2020) contained markings to include the Preservation Group's determination of the location of what they referred to as the "Natural High Water Tide Mark", the "High Tide Water Mark at the time of the Photo" and the "Location of the rock wall/pier blocking public access to the beach."

[49] The document also raises concerns and questions which the Preservation Group purports to answer. These include:

- What is the right of the Property Owners to prevent public access to the nearshore area of the ocean front property?;
- Do property owners with Riparian rights supersede the rights of the public?;
- Can the property owner control public walking on the beach?; and
- What are the prescriptive rights of the community to the unobstructed access to the full length of James Beach?



[50] The Preservation Group requests that actions be taken by the appropriate Minister and government departments in order to provide a clear unencumbered access to James Beach. The actions sought were as follows:

1. Immediate cease and desist order for all armour wall/pier construction and sand movement on the beach and banning all heavy equipment on this beach.
2. Produce and provide this group with copies of all proper permits for the work completed on this property.
3. Remove and or relocate the armour rock wall that currently sits below the ordinary high water mark to allow safe and unobstructed access to the near shore beach by all Nova Scotians.
4. Provide a clear demarcation of the ordinary high water mark on this property, as defined in conjunction with the *Beaches Act*.
5. Provide a clear ruling of the difference between “shoreline protection” and “land reclamation” as it is our understanding that the former is preventing erosion, and encouraged if done properly in conjunction with the regulations and permits, and the others is trying to reclaim land that has already eroded, and is not supported by the Nova Scotia Crown land regulations.

[51] Other individual members of the Preservation Group sent the same ten-page document to the same distribution list.

[52] On May 26, 2020, Troy MacKay, Regional Manager, Conservation Officer Services, NSE, responded to two of the Preservation Group’s individual complainants stating that “conservation officers had been on site several times as have I. They will use a number of resources that they routinely use during an investigation, which will be determined by the officers as they work through their

investigation. The Acts my staff have authority to investigate in this situation would be the Beach, Wildlife and Endangered Species Act....”.

[53] On May 28, 2020 Beth Skerrett sent a follow-up email to many of the same individuals to whom she had sent her May 25, 2020 document, where she acknowledges that “there may be an investigation started”, but questions “how do we stop the construction project and destruction of this beach?” She states, “Today there is a crane on the beach with paving stones and sod. The landowner is planning to pave and sod the beach. How can this continue unchecked?”. She requests a “stop-work order to prevent further damage until the investigation is complete”.

[54] Beth Skerrett attached a photograph to this email which appears to show a flatbed truck with a boom located landward of the shoreline protection running parallel to the water. The picture also shows that the Chisholms had by this time carved out a gap in the rock wall running perpendicular to the water, presumably so that people could pass through the gap if walking along the beach.

[55] The next day, May 29, 2020, Beth Skerrett sent another email message to the Minister and others “to provide an updated complaint document”. Ms. Skerrett states that the Preservation Group had had “some response from NSE”, “who are

conducting their investigation, but “have no visibility into the status of that investigation”.

[56] Ms. Skerrett also stated that:

Several members [of the Group] received a call from Troy MacKay, the regional manager for conservation services, inspection, compliance, and enforcement division for the Department of the Environment. In conversation today, Tim [Troy] stated that the landowner has legal rights and privileges to move the sand with topsoil and grass sod because this is not a protected beach, and therefore does not fall under the Beaches Act.

[57] On June 1, 2020, Troy MacKay, Regional Manager of Conservation Officer Services, NSE sent an email to Ms. Skerrett which contained information on the *Beaches Act*, its application to sand dunes and James Beach. Mr. MacKay stated:

In the Act a beach is defined as land on the coastline lying to the seaward of the mean high watermark, so only applies to land below the high water mark and not to the land above the high water (this includes sand dunes). See definition below from the Beaches Act.

Beaches Act,

“beach means that area of land on the coastline lying to the seaward of the mean high watermark and that area of land to landward immediately adjacent thereto to the distance determined by the Governor in Council, and includes any lakeshore area declared by the Governor in Council to be a beach;

The Act does designate beaches across Nova Scotia that protects the beach and an area of land lying landward from the mean high water mark. This would protect things like sand dunes (this would also apply on private land). The link below will take you to the list of beaches that are designated. (James Beach is not one of them)

[58] The Record shows that DLF Regional Biologist Shavonne Meyer also carried out a site visit on the Chisholm property on June 4, 2020, specifically to address the

concern about the nests of Piping Plovers potentially being impacted by the Chisholms' activities. In an email to Dr. Donna Hurlburt, Manager, Biodiversity and Species at Risk, DLF, dated June 15, 2020 Ms. Meyer recounts the findings of her site visit on June 4, 2020 and opines that the Chisholms' activity on James Beach had no adverse impact on Piping Plover nests. She states:

I visited James Beach on June 4<sup>th</sup>. Birds Canada's, Brenna Martell, showed me the location of this year's active nests. Both are located at the seaward end of the barrier beach, as they normally are, where there is a large area of suitable nesting habitat. The location of nests is approximately 400m from the location of the property in question (eyeballed using scale bar, please let me know if you need a precise measurement). In my opinion, the activities that have occurred at the property have not had adverse effects on PIPL nests or birds while nesting. We assist Birds Canada each year in the monitoring of any nests on Pictou County beaches.

[59] The reference to PIPL is a code used by birders for Piping Plovers.

[60] It appears that following her site visit Ms. Meyer met with DLF Area Manager Matt Reid and Forest Technician Robert Sarson to talk about their knowledge of James Beach and her observations on June 4. In a June 15, 2020 email from Ms. Meyer to DLF biologist Shaunna Morrison, Ms. Meyer states that she "piggy-backed the meeting (of June 4) to first meet with Birds Canada and our students to see where the nests are located this year (we assist each year); followed this with a meeting with Matt Reid, Robert Sarson to talk about the beach stabilization and I also spoke with the landowners that I would be taking some pictures and notes to assist others

in assessing through the lens of the ESA and SARA.” ESA is the acronym for the *Endangered Species Act* and SARA for the Federal *Species At Risk Act*.

[61] On June 5, 2020, the Minister responded to Ms. Skerrett’s email and the attached May 25, 2020 complaint. His letter, in its entirety, is as follows:

Dear Ms. Beth Skerrett:

I am responding to your email of May 25, 2020, concerning your complaint against the construction of an armour rock wall/pier structure on James Beach in Black Point, NS.

Staff from the Department of Lands and Forestry and NS Environment have visited the site at James Beach and reviewed the situation. They found no evidence of a violation of the *Crown Lands Act*, the *Endangered Species Act*, or the *Beaches Act*. There is no legal authority under the *Beaches Act* for the Minister to issue an order in the nature of a “cease and desist”.

In 2017, erosion control work was undertaken on James Beach. No permits were required, as the work was within the boundaries of private land, above the mean highwater mark. In addition, no work was done on submerged crown land.

A number of your questions are legal in nature and request that the law be applied to your individual circumstances. We recommend that you consult with legal counsel in order to determine your individual, or community, rights with regards to this situation.

We know that Nova Scotians have a deep connection to the ocean and public access to the coastline is an ongoing important consideration. I understand that a gap has been put in the wall in question, giving the community safe and unobstructed access to walk along the beach at high tide. This compromise by the landowner to accommodate walkers will enable Black Point residents and other visitors to enjoy the beach.

Sincerely,

Ian Rankin

Minister of Lands and Forestry

[62] On June 22, 2020, the Executive Director of NSE, Adrian Fuller, also replied to the Preservation Group in response to Ms. Skerrett’s May 25, 2020 email:

Dear Black Point Preservation Group:

Thank you for the multiple concerns voiced through the Black Point Beach Preservation Group. I am responding at the request of Minister Wilson as the Executive Director of the Inspection, Compliance and Enforcement Division. Please consider this as the response to all group members.

Your complaints and concerns were thoroughly investigated by the Conservation Officer Service. Officers performed their field investigation which included discussions and necessary evidence collection from various staff from Lands and Forestry. Evidence collected was analyzed and there was no information gathered to support that any violations were committed pursuant to the *Beaches Act* or *Crown Lands Act*. As you are aware, James Beach has no designation as protected landward of the mean high-water mark. As such, current activities occurring at 75 Sandpiper Lane are on private property and are not taking place on Crown lands or in contravention of the *Beaches Act*.

There was also no evidence of violations occurring in relation to the *Endangered Species Act*. Work being undertaken in the area has not impacted the breeding or nesting of the Piping Plover.

I understand that this is a sensitive issue to all involved, however, there has been no contravention of the Acts or regulations that the Conservation Officers can act upon.

Sincerely,

Adrian Fuller

### **The Position of the Parties**

[63] The Applicants say that the Minister's decision was unreasonable because he did not provide the necessary justifications for his June 5, 2020 decision in that he failed to consider the following factors:

- No survey was conducted to determine the location of the high water mark;
- The conclusion that the receding shoreline at James Beach was due to avulsion rather than erosion was not supported by the evidence in the Record.

[64] Therefore, the Applicants say that there was a lack of factual foundation to support the Minister's conclusion.

[65] In their written submissions to this Court, the Applicants state that the Court is not tasked with determining the correct outcome with respect to the question of where the high-water mark ought to fall in this situation.

[66] The Applicants admit that rather, the Court is tasked with determining whether the Minister's decision and the rationale for that decision was reasonable, as per *Vavilov*.

[67] Counsel for the Respondents say that the Minister's decision was reasonable based on the facts before him and after DLF and NSE staff had conducted a thorough investigation and found that the Chisholms' activities on James Beach had not violated the *Beaches Act*, the *Crown Lands Act* or the *Endangered Species Act*.

[68] The Chisholms say that the Minister's decision was reasonable and that the shoreline protection work they carried out in 2017, 2019 and 2020 was on their private property, and above the OHWM.

### **The Reasonableness Standard**

[69] Judicial restraint when reviewing administrative decisions remains an important principle after *Vavilov* (para.13).

[70] However, judges are not to “rubber-stamp” administrative decisions and thereby shield the decision maker from accountability (*Vavilov* at para.13).

[71] This Court, in applying the reasonableness standard, must look at the Minister’s decision as a whole to determine “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law”. (*Dunsmuir v. New Brunswick*, 2008 SCC, at para. 47).

[72] The exercise of public power must be justified, intelligible and transparent “not in the abstract, but to the individuals subject to it.” (*Vavilov* at para. 95).

[73] This Court, per *Vavilov*, must not, however, assess the Minister’s reasons against a standard of perfection (para.91).

[74] To be reasonable, a decision must be based upon “internally coherent reasoning” and be “justified in light of the legal and factual constraints” that were relevant to the matter at issue (*Vavilov*, at para. 105).

[75] In *Vavilov*, the majority said that the matters which will usually be relevant include the governing statutory or common law and the principles of statutory interpretation.



[76] The evidence and facts before the decision maker, the past practices and decisions of the administrative body and the potential impact on the individual to whom the decision applies are all applicable. The majority in *Vavilov* said that these elements are likely to have varying degrees of significance in any review, depending on the context.

[77] Accordingly, here the facts and the relevant statutes that grounded the Minister's decision will be important as will the affect on the Applicants. A reviewing Court should not interfere with the factual findings of a decision maker, unless the decision maker "has fundamentally misapprehended or failed to account for the evidence before it". If the decision maker does so, that will jeopardize the reasonableness of its decision (*Vavilov*, at para. 126).

### **Application of the Reasonableness Standard to this Review**

#### The Legal Constraints

[78] The Applicants raised concerns that the Chisholm activities violated the *Beaches Act*, the *Endangered Species Act* and the *Crown Lands Act*. In his reasons, the Minister states that "staff from the Department of Lands of Forestry and NS Environment have visited the site at James Beach and reviewed the situation". He

states that “they found no evidence of a violation of the *Crown Lands Act*, the *Endangered Species Act*, or the *Beaches Act*”.

(i.) The *Beaches Act*

[79] The *Beaches Act* defines “Beach” as follows:

3 In this Act,

(a) "beach" means that area of land on the coastline lying to the seaward of the mean high watermark and that area of land to landward immediately adjacent thereto to the distance determined by the Governor in Council, and includes any lakeshore area declared by the Governor in Council to be a beach;

[80] This means that beach areas which lay seaward of the mean high water mark are protected under the *Beaches Act*, as are areas of beaches lying landward of the mean high water mark, provided they are so designated by the Governor in Council.

These are deemed “designated beaches”:

**Determination of beach area**

5 (1) The Governor in Council, on the recommendation of the Minister, may determine what area of land to the landward of mean high water mark and immediately adjacent thereto and what lakeshore area is a beach within the meaning of this Act.

[81] James Beach is not a designated beach pursuant to regulations under the *Beaches Act*.

[82] Section 4(1) of the *Beaches Act* provides that the Minister has complete discretion over the administration, management, and control of Nova Scotia beaches.

Pursuant to section 4(3) the Minister has the discretion to utilize “the services of such persons as the Minister considers necessary for the efficient carrying out of the purpose of this *Act* and the regulations”.

[83] The Record discloses that the Applicant Beth Skerrett agreed that the Chisholms’ 2017 erosion control work was carried out about the mean high water mark.

[84] In an email dated June 5, 2020, from Ms. Skerrett to the Minister (copied to Maryn Lynn), Ms. Skerrett requests a meeting with the Minister following her receipt of the decision and states:

According to our records the original placement of the structure in 2017 was well above OHWM, however, this construction in 2020 is substantially different, and extends several meters below OHWM...

(emphasis added)

[85] The Applicant Sandra Lynn also considered James Beach to be a public beach. For example, in an email message dated May 6, 2020 the Applicant Sandra Lynn sent to Matthew Reid, and other DLF and NSE staff she states:

Sadly, I am writing in respect to the ongoing illegal dumping of foreign material on James Beach, Black Point by Wayne Chisholm who owns recreational property adjacent to the public beach...

[86] Later in this same email Ms. Lynn states:

No one owns a public beach no has an unfettered right to alter or block established passage or to on a public beach. That is exactly what is taking place here with your concurrence.

(emphasis added)

[87] Beth Skerrett also suggests that James Beach is a public beach in a May 12, 2020 email she sent to NSE staff when she states, in part, “no one owns a public beach and no one has unfettered right to block established passage to or on a public beach.”

[88] In fact, James Beach is not a public beach above the mean highwater mark. The Respondent produced a list of designated beaches regulated under the *Nova Scotia Beaches Act*. These are the beaches that have been designated by the Governor in Council above the high water mark which attract all the protections under the *Beaches Act*.

[89] There are approximately one hundred such protected beaches in Nova Scotia. James Beach is not such a designated public beach under the *Beaches Act*. This means that the portion of James Beach above the ordinary mean highwater mark is not public space.

[90] The Applicants and certain members of the Preservation Group were notified of this fact by NSE Regional Manager, Conservation Services in telephone calls he made to them in late May 2020.

[91] Section 2(1) of the *Beaches Act* (RSNS 1989, c 32) states that “The beaches of Nova Scotia are dedicated in perpetuity for the benefit, education and enjoyment of present and future generations of Nova Scotians.”

Section 2(2) describes the purpose of the *Beaches Act*:

- (a) provide for the protection of beaches and associated dune systems as significant and sensitive environmental and recreational resources;
- (b) provide for the regulation and enforcement of the full range of land-use activities on beaches, including aggregate removal, so as to leave them unimpaired for the benefit and enjoyment of future generations;
- (c) control recreational and other uses of beaches that may cause undesirable impacts on beach and associated dune systems.

[92] Section 8(1) of the *Beaches Act* does set out prohibited activities on beaches as defined by the *Act*. They include:

**Prohibited activities**

- 8 (1) No person shall, while on a beach,
- (a) be impaired by alcohol or drugs;
  - (b) act in a noisy or disorderly manner;
  - (c) create a disturbance;
  - (d) pursue a course of conduct that is detrimental to the safety of other beach users or their enjoyment of the beach and its facilities;
  - (e) wilfully destroy property and other natural resources found on or adjacent to a beach;

(f) dump or deposit garbage or other material on a beach other than in a receptacle so provided;

(g) engage in any other activity prohibited by regulation.

[93] Section 8(2) of the *Beaches Act* provides that where there are reasonable and probable grounds to believe that a person has violated the *Beaches Act* or regulation the Minister or person authorized to act on the Minister's behalf has the discretion to issue a written order or prohibit that person from entering or being upon a beach for a specific period.

[94] The Minister has no authority under the *Beaches Act* to issue a "stop work order", one of the remedies sought by the Applicants, for activities carried out on privately owned land.

(ii.) The *Crown Lands Act*

[95] The Minister has the general supervision and management of the *Crown Lands Act*:

**Supervision and management of Act**

4 (1) The Minister has the general supervision and management of this Act and the regulations.

(2) The Minister may from time to time designate persons to act on behalf of the Minister.

(3) The Minister shall, in all matters pertaining to Crown lands, have and exercise all the powers, rights, duties, authority and privileges which previous to the nineteenth day of March, 1926, were had or exercised by the Commissioner of Crown Lands and the Commissioner of Forests and Game.

(4) The authority and responsibility of the Minister to administer and control Crown lands exists even though the land may be subject to a lease, licence, easement or encumbrance. *R.S., c. 114, s. 4.*

[96] Section 5 of the *Act* gives the Minister broad statutory powers over the supervision, direction, and control of Crown lands as well as the administration, utilization, protection and management of Crown lands:

#### **Powers of Minister**

5 The Minister has supervision, direction and control of

(a) the acquisition, registration, survey and sale or disposition of Crown lands; and  
(b) the administration, utilization, protection and management of Crown lands, including

- (i) access to and travel on Crown lands,
  - (ii) habitats for the maintenance and protection of wildlife on Crown lands,
  - (iii) harvesting and the renewal of timber resources on Crown lands,
  - (iv) forest recreation on Crown lands, and
  - (v) matters that may be assigned pursuant to this Act and the regulations,
- but not including land owned or claimed by the Province specifically under the jurisdiction of another member of the Executive Council or a department, branch or agency of the Government other than the Department. *R.S., c. 114, s. 4.*

[97] The Minister engages conservation officers who carry out the intent and purpose of the *Crown Lands Act* and regulations:

#### **Personnel**

6 (1) Conservation officers and other persons required for the administration of this Act and the regulations shall be appointed in accordance with the *Civil Service Act*.

(2) Notwithstanding subsection (1), the Minister may engage, upon such terms and conditions as the Minister deems fit, the services of such persons as the Minister deems necessary for the efficient carrying out of the intent and purpose of this *Act* and the regulations.

(3) All conservation officers appointed pursuant to the *Wildlife Act* or the *Forests Act* are conservation officers for the purposes of this *Act*.

...

(5) A conservation officer in carrying out duties pursuant to this *Act* and the regulations has and may exercise in any part of the Province all the powers, authorities and immunities of a peace officer as defined in the Criminal Code (Canada).

...

[98] It is an offence to dump or deposit material on Crown lands without a permit:

#### **Offences**

38 (1) A person who without legal justification or without the permission of the Minister or a person authorized by the Minister, the proof of which rests upon the person asserting justification or permission,

...

(c) dumps or deposits materials on or over Crown lands or causes, suffers or permits material to be dumped or deposited on or over Crown lands,  
is guilty of an offence.

[99] The Minister has the authority to require persons who place a structure on Crown land without a lease or permit to remove that structure, on written notice.

#### **Removal of structure**

39 (1) Where a structure is on Crown lands in respect of which there is not in effect a lease or permit issued pursuant to this Act or a structure is placed on Crown lands by a person who is not the holder of a lease or permit issued pursuant to this Act, the Minister may, by written notice, require the person who erected or occupies or uses the structure to remove it from Crown lands within sixty days after service of the notice upon that person.



(iii.) The *Endangered Species Act*

[100] The purpose of the *Endangered Species Act* is to “provide for the protection, designation, recover and other relevant aspects of conservation of species at risk in the Province, including habitat protection [...]”

[101] Piping Plover was listed as endangered in Nova Scotia in 2000 (Categorized List of Species Act Risk, NS Reg 146/2017), under the *Endangered Species Act*. Piping Plover is also listed as endangered under the Federal *Species at Risk Act*, SC 2002, c.29, Schedule 1, Part 2 (“SARA”).

[102] Where a species like the Piping Plover has been designated as “endangered” or “threatened under the *Act*”, section 13(1) provides a general prohibition against killing or disturbing the species, destroying or disturbing its residence, or destroying or disturbing core habitat:

**Prohibition**

13 (1) No person shall

(a) kill, injure, possess, disturb, take or interfere with or attempt to kill, injure, possess, disturb, take or interfere with an endangered or threatened species or any part or product thereof;

(b) possess for sale, offer for sale, sell, buy, trade or barter an endangered or threatened species or any part or product thereof;

(c) destroy, disturb or interfere with or attempt to destroy, disturb or interfere with the specific dwelling place or area occupied or habitually occupied by one or more individuals or populations of an endangered or threatened species, including the nest, nest shelter, hibernaculum or den of an endangered or threatened species;

(d) contravene any regulation made with respect to a core habitat; or

(e) contravene an order made pursuant to Section 18.

[103] Section 4 of the *Endangered Species Act* provides that the *Act* applies to, and binds all Crown lands, both Federal and Provincial.

[104] Pursuant to section 16 of the *Act*, the Minister has discretion to enter into agreements with private landowners who may have land identified as core habitat. The Minister also has the discretionary power to designate core habitat on private lands, but only where the Minister is satisfied that the core habitat of the endangered or threatened species on public lands is not sufficient to meet the recovery needs of the species. Where the Minister makes such a designation on private lands, it may be considered a form of expropriation to which the provisions of the *Expropriation Act* apply.

[105] To date, core habitat has not been defined for the Piping Plover in Nova Scotia. The Record discloses that DLF Manager of Biodiversity, Dr. Donna Hurlbert, stated in an email to Orlando Fraser, NSE Director, Conservation Enforcement dated May 5, 2020, that “in my mind, its more of a Federal critical habitat matter under *SARA*, and a beach issue, rather than a Provincial *ESA* matter, because there is no nest or bird being impacted at this time (and we have not defined core habitat or the species).”

(iv.) *The Common Law Doctrine of Accretion*

[106] On review, this Court received fulsome submissions from counsel for the Applicants and Respondents on the common law doctrine of accretion. Counsel for the Respondents referred the Court to the decision of Blair J.A. in *Ontario (Attorney General) v. Shanks*, 1981 CarswellOnt 3391 (O.C.A.). The issue on appeal was whether the appellants had lost ownership in land then covered by water in Lake Erie. The appellants had constructed a number of dykes below the high water mark on Lake Erie in an effort to recover their land lost to the lake as a result of floods in 1972 and 1973.

[107] Blair J.A. allowed the appeal and made the following comments about the common law doctrine of accretion:

30 The failure of the learned trial judge to take into account the evidence that there was a well defined shoreline prior to the flood of 1972 led, in my opinion, to the erroneous conclusion that the destruction of the land was “gradual and imperceptible”. In reaching this conclusion, he took into account matters which are irrelevant to the doctrine of accretion. That doctrine deals with the results and not the causes of natural forces acting on the shoreline. It is concerned with the changes in a shoreline resulting from the natural forces of wind and water and not with the nature of the natural forces themselves, in particular whether they erupted suddenly or developed over a long period of time or whether they were cyclical or permanent in their effects. As stated by Lamont J. in *Clarke v. Edmonton*, [1939] S.C.R. 13/ at p.144, “...the doctrine of accretion applies to the result and not to the manner of its production.”

...

33 Fundamental to the doctrine of accretion is the riparian owner’s right to recapture land inundated or destroyed by water. To suggest that this right diminishes in proportion to the amount and permanence of the damage is to distort

the doctrine whose rationale is to provide the riparian owner with the right to repair damage done by the forces of nature.

34 In the *County of York v. Rolls* (1900), 27 O.L.R. 72, this Court held that an owner was entitled to undertake works to reclaim land 20 years after it had been washed away because in the interim no legal rights had accrued to other parties by prescription, acquiescence, estoppel or otherwise. That decision is directly in point in this case because it demonstrates the strength of a riparian owner's right to reclaim land from water, which right can be exercised even years after the damage has occurred.

(emphasis added)

[108] Counsel for the Applicants say that the Minister failed to analyze whether the Crown land boundary on James Beach moved during the years 2017-2020. He asks, “How much of the beach loss was caused by erosion, and how much by a “sudden and violent” avulsion event?” Counsel says that the Minister evidently concluded that all of the land loss was caused by avulsion, but without evidence in the Record demonstrating a logical analysis of this question.

[109] The Minister’s decision stated that the Chisholms’ shoreline protection work was being carried out on their private property. The Minister does not refer to the doctrine of accretion, but rather his reasons reflect the conclusions of staff from DLF and NSE that the May 2020 work was carried out landward from the 2017 shore line protection work and that no work was done on submerged Crown land.

### **Was the Minister's Decision Reasonable?**

[110] Having reviewed the Record and the factual and legal constraints, this Court must decide whether the Minister's decision was reasonable in light of *Vavilov*.

[111] In this case, the Minister relied upon the expertise of the DLF staff to whom he delegated the authority to investigate the matters raised in the May 25, 2020 complaint. His staff thoroughly investigated the complaint.

[112] NSE Conservation Officers and Inspectors investigated the issues relating to alleged violations of the *Beaches Act* in May 2020. This included three visits to the Chisholm property. It is clear that staff concluded that all of the Chisholms' activities were carried out on their private land. The Applicants were advised, in writing of these conclusions by NSE staff.

[113] These conclusions were grounded in the fact that DLF staff had concluded the original 2017 shoreline protection work was carried out above the ordinary highwater mark. As noted earlier in this decision, the Applicant Sandra Lynn acknowledged that that was the case. This conclusion was conveyed to the Applicant Beth Skerrett on June 1, 2020 by Troy MacKay, Regional Manager of Conservation Offices Services, NSE.

[114] This Court is reviewing the Minister's decision on the standard of reasonableness. It is noted that the Record shows that DLF staff utilized GIS mapping to carry out an estimate of the amount of washout behind the pre-existing 2017 shoreline protection in May 2019 and found that although the shoreline had changed, the position of the pre-existing structure (rock wall) had not. In so finding, the Minister's staff concluded that the structure and materials the Chisholms had placed on James Beach were within the boundaries of their own land and were not on Crown land.

[115] The Applicants say that the Minister's decision with respect to the *Endangered Species Act* was unreasonable because "the Minister acted in a manner contrary to the purpose" of that *Act*. The Applicants refer to the decision of the Honourable Justice C. Brothers of this Court in *Bancroft v. Nova Scotia*, 2020 NSSC 175 to suggest that the Minister had relied on the Federal Recovery Strategy for Piping Plover instead of meeting its duties under the *Endangered Species Act*. Yet, the Record does not show that the Minister has adopted the Federal Strategy for the Piping Plover.

[116] What is relevant to the Court's decision is whether the Minister's decision that there were no violations of the *Endangered Species Act* was reasonable.

[117] The Applicants say that the Minister's decision in this regard was unreasonable because "the Minister made his decision before receiving Ms. Meyer's report on the Piping Plover issue." However, it is to be remembered that Ms. Shavonne Meyer, Regional Biologist, met with Matthew Reid on June 4, 2020 to discuss her findings. Also, it would be strange, indeed, to assume that Ms. Meyer would not have notified appropriate staff had she found violations of the *Endangered Species Act*. Rather, her conclusion was that she found nothing of concern during her site visit on June 4.

[118] Even before the start of the Chisholms' shoreline protection work in 2017, staff at the DLF were aware of the possibility of that protection work disrupting the Piping Plover nesting on James Beach. Scott MacEwan contacted Regional Biologist Shavonne Meyer and Bird Studies NS Program Coordinator, Sue Abbott, to see if there were any issues with the work proposed during the Piping Plover nesting season. They both advised Mr. MacEwan that the work would not be detrimental to the nesting activity.

[119] Later, on May 29, 2020, DLF Species at Risk Biologist, Mark McGarrigle advised that he had "surveyed James Beach with Birds Canada staff and our IRM students last year [2019]." He stated that the 2020 work was "likely 200-300m+ away from the nearest nesting site."

[120] The Applicants, through their counsel, now say that the Minister should have engaged a land surveyor to determine the mean high water mark in 2017 and if not at that time, then in May 2020, when it received the May 25, 2020 Lynn complaint.

[121] To accept the Applicant's argument that the Minister should have had a survey conducted on James Beach so as to determine the location of the OHWM and the boundary between Crown and private land would be to impose a standard of correctness on the Minister in the sense that he had only one correct action to take in light of the May 2020 complaint. This Court has no reason not to defer to the expertise of the Minister's staff and their conclusions with respect to whether the Chisholms' activities violated the *Beaches Act* or the *Crown Lands Act*. Rather, this Court has every reason to afford them deference in light of *Vavilov*.

[122] Counsel for the Applicants submit that the Record does not disclose that the Minister's staff considered specific facts concerning the nature of the loss of land at James Beach, beyond references to winter storms in 2018. He states, "If there is specific evidence of a "sudden and violent" loss of land at James Beach, it is not included in the record."



[123] This Court notes, however, that the Record includes an Information Note to the Minister dated May 21, 2020, prepared by Steven Delorey, Regional Director DLF where he stated that:

- Mr. Chisholm did erosion control work in 2017 on his property above the high-water mark (HWM) and did not need permissions from the Crown to complete this work.
- Gradual changes of coastlines due to erosion are natural occurrences, and therefore, Crown versus private boundary lines determined by the HWM will shift over time.
- However, abrupt/sudden changes to the coastline due to large storms do not change boundary lines. Since the coastline was eroded abruptly, due to a significant storm event in 2018, this does not change the boundary line (Crown versus private property) and, therefore, Mr. Chisholm does not need permission from the Crown to repair his previous work.

(emphasis added)

[124] The Applicants' counsel also suggested that this Court should interpret some of the technical evidence, including aerial photographs of James Beach and the Chisholm property, in a manner which differed from that of NSE and DLF senior staff. The Applicants propose that this evidence supports their position that the erosion occurred over a long time rather than suddenly. They argue that if the land was lost over time by erosion, then the common law of accretion means that the lost land had become Crown land.

[125] However, it is not this Court's role, on judicial review, to determine whether such evidence supports the Applicants' position. Nor is this a civil case where a

party generally must prove their case on a balance of probabilities. Rather, it is the Court's role on this judicial review to determine whether the Minister's decision falls within a range of possible, acceptable, and defensible outcomes. It is not this Court's task to second guess the Minister's interpretation of technical evidence. Justice Michael Wood, (as he then was) confirmed this point in *Specter v. Nova Scotia (Fisheries and Aquaculture)*, 2012 NSSC 40:

[77] It is not the function of this Court, sitting in appeal of the Minister's decision, to review the scientific and technical evidence, and resolve any inconsistencies or ambiguities which might exist. To do so would turn this Court into an "academy of science" as that term has been used in other cases. Such an approach is inappropriate. It is the function of the Minister and his staff to review the scientific information and determine whether it supports the particular application. It is the role of this Court to assess that decision based on the standard of reasonableness and not to second guess the Minister's interpretation of the evidence.

[126] I find that the Minister's decision as set forth in his June 5, 2020 email to Beth Skerrett was reasonable in all of the circumstances and based on the information before him. The Minister acknowledged Nova Scotians' deep connection to the ocean and that public access to the coastline was an on-going and important consideration in his decision. The Minister took into consideration the Applicants' wish for coastal access to James Beach. However, the Minister reasonably, in this Court's view, balanced those considerations against the private property rights of the Chisholms, and the relevant statutory provisions in the *Beaches Act*, the *Crown Lands Act* and the *Endangered Species Act*.

[127] This Court recognizes that the Applicants will be disappointed by this decision as it is clear that they have deeply held concerns with the Chisholms' work activities on James Beach.

[128] However, I must weigh their concerns against what I consider to be the reasonable decision of the Minister that none of the Chisholms' activities violated the *Beaches Act*, the *Crown Lands Act* or the *Endangered Species Act*. That decision followed a thorough investigation.

[129] This Court recognizes that climate change is real and will no doubt impact Nova Scotia beaches and coastal areas of the Province both now and in the future. However, it is for the Legislature, and not for this Court on judicial review, to address as the Legislature may see fit, those concerns.

### **Conclusions – A Return to the Grounds of Judicial Review**

[130] The Applicants say that the Minister's "definition of the location of the boundary between Crown lands and private land was unreasonable and that he failed to consider relevant factors in coming to his decision. They say that the Minister's decision that private land extends below the ordinary high water mark at James Beach was unreasonable because it does not align with the standard and common sense delineation of private and Crown land."

[131] This Court does not read the Minister's decision as defining the Chisholm's property boundary but rather determining whether the work carried out in 2020 was above the previously defined mark in 2017. He reasonably concluded that it was.

[132] The Applicants second ground of review is that the Minister failed to carry out his statutory duties under the *Beaches Act*, the *Crown Lands Act*, and the *Endangered Species Act*.

[133] The Record amply demonstrates that the Minister, through his staff, thoroughly investigated whether any of those statutes were violated by the Chisholms' 2020 activities. They concluded that they had not. The Minister reasonably therefore concluded that no violations had occurred.

[134] The Minister's reasons are relatively brief. However, I find that he does address the concerns raised in the May 25, 2020 complaint. Also, the Minister notes that a number of Ms. Skerrett's questions were legal in nature and had requested that the "law be applied to your individual circumstances." He recommended that Ms. Skerrett "consult with legal counsel in order to determine your individual, or community rights with regards to this situation".

[135] This Court finds that there is nothing internally inconsistent in the Minister's reasons, and nothing to indicate that the Minister fundamentally misapprehended or

failed to account for the evidence before him. His reasons have a rational chain of analysis.

[136] The Applicants' Motion for Judicial Review is dismissed, with costs.

[137] If the parties cannot agree on costs, I will receive written submissions within twenty (20) calendar days of this decision.

Smith, J.