SUPREME COURT OF NOVA SCOTIA

Citation: *Folly Lake-Wentworth Valley v. NS Minister of Environment*, 2024 NSSC 27

Date: 20240124
Docket: 524389
Registry: Halifax

Between:

Folly Lake-Wentworth Valley Environmental Preservation Society

Applicant

v.

Nova Scotia Minister of Environment, Higgins Mountain Wind Farm Limited Partnership, and Sipekne'katik

Respondents

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	January 2, 2024, in Halifax, Nova Scotia
Written Release:	January 24, 2024
Counsel:	Jamie Simpson, for Folly Lake-Wentworth Valley Environmental Preservation Society Myles Thompson, for the Minister of Environment and Climate Change Nancy Rubin, K.C. and Sara Nicholson, for Higgins Mountain Ronald A. Pink, K.C. and Dakota Bernard, for Sipekne'katik

By the Court:

[1] This is an Application for Judicial Review brought by Folly Lake-Wentworth Valley Environmental Preservation Society ("the Applicant") of a decision made by the Respondent Nova Scotia Minister of Environment and Climate Change ("the Minister"). Higgins Mountain Wind Farm Limited Partnership ("HMWF") and Sipekne'katik First Nation ("Sipekne'katik ") also respond in support of the Minister's decision. The latter is one of the partners comprising HMWF in the proposed Wind Farm Project (henceforth "the project") and was added as a Respondent pursuant to a consent order of this Court dated September 7, 2023.

[2] The Society seeks Judicial Review of the Minister's May 4, 2023 decision to approve the environmental assessment of the project in Cumberland and Colchester Counties. I will simply refer to it either as "the decision", or "the Minister's decision".

Preliminary Matter

[3] The Applicant has two affidavits with its Notice for Judicial Review. The first is from Heather Allen-Johnson, on behalf of the Society, dated June 1, 2023. The second is that of Gregor Wilson, also on behalf of the Society, and also dated June 1, 2023. There has been no application made to admit fresh evidence, nor were these affidavits part of the Record before the Minister. The Applicant says that it is simply providing these affidavits to assist the court in its orientation with respect to the various parties, and summarize the process to date. It concedes that any decision which this court must make must be based upon the Record itself, and not upon anything contained in these affidavits. On that basis the Respondents were content to leave the matter.

Background

[4] As noted earlier, Higgins Mountain Wind Farm General Partner Inc. and Sipekne'katik are two of the partners of the Respondent HMWF. The other two are Elemental Energy Renewables Inc. and Stevens Wind Limited.

[5] As the proponents of the project, HMWF filed its Environmental Assessment Regulation Document (otherwise known as the “EARD”) with the Nova Scotia Department of Environmental and Climate Change on March 8, 2023. It had been prepared by Strum Consultants, their environmental consultant. Strum is described as an independent multidisciplinary team of consultants with extensive experience in undertaking environmental assessments throughout Atlantic Canada (*Record* –

part 1, tab 1, p. 19). The Respondent Minister, and his department, were satisfied that the EARD was prepared in accordance with the department's guidance documents. These documents include "A Proponent's Guide to Environmental Assessments" and "Guide to Preparing EA Registration Documents for Wind Power Projects in Nova Scotia" (*Record – part 1 tab 1 page 23; Applicant's book of authorities, tab 9; Respondent Minister's brief, para 12*).

[6] The EARD submitted to the Minister was a 260 page assessment of the project. It is described as possessed of 47 detailed drawings/diagrams and 17 appendices. Among other things, it provided an analysis of the following "Valued Components":

- Atmospheric Environment
- Geophysical Environment
- Aquatic Environment
- Terrestrial Environment
- Socioeconomic Environment
- Archaeological Resources
- Human Health
- Electromagnetic Interference
- Shadow Flicker
- Visual Aesthetics
- Sound

(*Minister's brief, para. 13; Record Part 1, Tab 1, p. 5*)

[7] The study also dealt with the effects of environmental factors on the project, including those wrought by climate change and natural hazards such as wildfires or severe weather. Analysis was also provided with respect to what might happen in the event of accidents and/or malfunctions.

[8] The EARD is, of course, only one of the components of the lengthy Record (consisting of over 2,700 pages) that was before the Minister. For example, the EA process, prescribed by section 10 of the EA Regulations, is provided in detail, as well as the public notice and consultation process. HMWF was required to provide public notice to the public that the EARD had been registered. This was coupled

with an invitation to submit written comments to NSECC over the requisite 30-day period (*Record – part 1, tab 2A, p. 1604*).

[9] Public information centres were set up in Colchester and Cumberland Counties (*Record – part 1, tab 2A pp 1605 – 1606*). Counsel for the Minister has described these venues as "locations where hard copies of the project's EARD could be viewed by members of the public who may not have access to the Internet or the Department's district office" (*Minister's brief, para 16*). Altogether, the Department received 186 comments. Thirteen of the letters expressed support, while 87 were opposed. Twenty-one appeared to be relatively neutral. Eighty-five were received from individuals who submitted multiple comments (*Record – part 1, tab 2B, pages 1623 – 1687 and tab 4B page 2627*).

[10] It is clear that Aboriginal stakeholders in the Province were consulted as well. The Respondent Sipekne'katik has summarized those portions of the Record illustrative of this consultation:

- Section 5.0 of the EARD, which summarizes HMWF's engagement with the Mi'kmaq of Nova Scotia is part of its own consultation process for the Project (see Part 1 of the Record at pp. 39-51);
- Section 5.0 of the EARD, which summarizes HMWF's engagement with the Mi'kmaq of Nova Scotia is part of its own consultation process for the Project (see Part 1 of the Record at pp. 39-51);
- Appendix "B" of the EARD, which contains the March 2023 Mi'kmaq Ecological Knowledge Study conducted by Membertou Geomatics Solutions as part of the Project submissions (see Part 1 of the Record at pp. 310-370);
- Appendix "C" of the EARD, which contains various additional documents pertaining to HMWF's consultation with various Mi'kmaq communities and stakeholder organizations (see Part 1 of the Record at pp. 371-420);
- An April 14, 2023 Memo from the Nova Scotia Office of L'nu Affairs reviewing the materials provided in the EARD to determine "whether the information provided will assist the Province in assessing the potential of the proposed Project to adversely impact established and/or asserted Mi'kmaq Aboriginal and Treaty rights" (see Part 1 of the Record at pp. 1630-1632);

- The April 18, 2023 letter from the Kwilmu'kw Maw-klusuaqn Negotiation Office ("KMKNO") providing feedback on behalf of 10 of the 113 Mi'kmaq communities in Nova Scotia, excluding Sipekne'katik, Millbrook, and Membertou (see Part 1 of the Record at pp. 1688-1690);
- The April 12, 2023 Draft Early Briefing PowerPoint which notes that, at that time, no comments had been received further to the Mi'kmaq review (see Part 1 of the Record at p. 2518 for the email listing the Draft Early Briefing PowerPoint attachment at see page 7 of the Draft Early Briefing PowerPoint which immediately follows); and
- Summaries of the comments provided by KMKNO in the Confidential Advice to the Minister (see Part 1 of the Record at pp. 2610, 2614, 2640, 2665).

(Sipekne'katik brief, para 18)

[11] The EARD (*Tab 1 of the Record*) contains numerous references to the Mainland Moose. Sipekne'katik has described these references as including, but not limited to:

- Mainland Moose is listed as a Valued Component in at Section 4.3 of the EARD (see Part 1 of the Record at p. 36);
- Sipekne'katik raised concerns regarding the Mainland Moose in a September 13, 2022 site visit to Higgins Wind and in a subsequent December 7, 2022 meeting with Higgins Wind (see Part 1 of the Record at p. 43 and pp. 387-388);
- The Mainland Moose is noted at Section 5.3.1 as a "key area of interest" in HMWF's summary of its engagement with the Mi'kmaq generally (see Part 1 of the Record at p. 50);
- HMWF discussed the Mainland Moose with government stakeholders, including the Nova Scotia Department of Environment and Climate Change in January 2022 and November 2022, and the Nova Scotia Department of Natural Resources and Renewables in August 2020, May 2021 and January 2022 (see Part 1 of the Record at pp. 54-56);
- In September 2021, HMWF discussed Mainland Moose mitigation efforts with Dr. Karen Beazley, one of the authors of the 2021 Mainland Moose Recovery Plan: "Dr. Beazley emphasized using existing roads to minimize landscape fragmentation caused by constructing new roads, and

> to utilize (previously) clear-cut areas on site. Higgins Wind noted that the site has existing logging roads and discussed the Project plan to maximize the use of existing roads." (see Part 1 of the Record at p. 60);
>
> - Various other analyses of the Mainland Moose and its habitat at pp. 124, 151-153, 157, 159-162, 164-168, 172, and 273 of the EARD submission in chief; and
> - A November 2022 government engagement presentation which noted that HMWF sought to consult further with the Nova Scotia Department of Natural Resources and Renewables regarding moose management prior to submitting the Environmental Assessment Registration Document" (see Part 1 of the Record at p. 429).
>
> *(Sipekne'katik brief, para 20)*

[12] Equally relevant to the considerations referenced in the Record with respect to the Mainland Moose is the April 14, 2023 memo from the Nova Scotia Office of L'Nu Affairs. It which stresses the importance of the Mainland Moose to the Mi'kmaq of Nova Scotia, and recommends that continued consultation via a Mi'kmaq Communication Plan be required if the EARD is approved (*Record, Part 1, p. 1632*).

[13] The Record contains a second memo dated April 14, 2023, this one from the Department of Natural Resources and Renewables, which contains recommendations for wildlife, not only species at risk, but endangered species generally. In particular, the endangered Mainland Moose is also addressed in this document (*Record - Part 1, pp. 1684 – 1687*).

[14] The record includes a comment from the Tourism Industry Association of Nova Scotia which was brought to the Minister's attention. This is notwithstanding the fact that it was filed outside of the 30 day "public consultation" window (*Record – part 1, tab 4B, page 2663*).

[15] The Minister received a number of briefings on the project during the registration period. These occurred on April 13, 2023, April 28, 2023, and May 3, 2023, respectively. This latter one took place at the outer limit of the statutorily prescribed timeline within which the Minister was required to provide his decision.

[16] The first, occurring as it did prior to the completion of the time allocated for public comment, was an early briefing. On this occasion, the Minister received an overview of the project and was reminded of his decision-making timelines. The

presentation also alerted the Minister to possible emerging issues with respect to ecological considerations involved, including that of the Mainland Moose. The Minister was also advised that there was considerable public interest in the project (*Record - part 1, Tab 4A, pp. 2534 – 2536*).

[17] The second consultation occurred on April 28, 2023, as noted above. During this session, the Minister's staff in his department's Environmental Assessment branch provided him with a copious amount of information, including the comments that had been received from government regulators and the Mi'kmaq, a summary (in draft) of all comments received from the public along with some possible mitigation measures that might address some of these concerns should the project be approved, a comprehensive "Summary of Advice to the Minister and Issues Table", a PowerPoint presentation regarding staff's confidential advice, and two draft decision letters for his review and consideration (*Record - Part 1, Tab 4B, pp. 2544 –2664*).

[18] That briefing also addressed the project's anticipated socioeconomic impacts, as well as its implications for job creation, tax revenue, spinoff economic benefits, and the extent to which the project could contribute to Nova Scotia's legislated goals for producing 80% of its energy from renewable resources by 2030 (*Record – Tab 4B, p. 2645*).

[19] Finally, the Minister's statutory obligations under section 12 of the EA regulations were reviewed with him, including the particular factors which he was required to take into consideration when formulating his decision (*Record - Part 1, Tab 4B, p. 2659*).

[20] The first draft decision with which he was provided consisted of a request for additional information via a socioeconomic impact study. The second consisted of an approval of the project with conditions. Along with these draft “alternatives” he was also briefed on the pros and cons associated with proceeding in either fashion (*Record - tab 4B, p.2661*).

[21] The "approval with conditions" option presented for the Minister's consideration included 56 recommended terms and conditions to be attached in the event that the project were to receive approval. They included eight which were specifically related to wind projects, and 3 more specific to the project itself (*Record – tab C, p. 2687*). Counsel for the Respondent Minister points out that, despite this, he needed more to satisfy his concerns.

[22] As counsel puts it:

29. As part of the continuum of the Minister's decision-making process and before coming to his final decision on May 4, 2023, the Minister initially considered pursuing the option of seeking additional information from the Proponent pursuant to subsection 13(1)(a) of the EA Regulations. As such, on May 1, 2023, the Minister approved and signed an initial letter requesting additional information from the Proponents.

30. However, on May 3, 2023, the Minister's team of technical experts of NSECC provided him with a revised briefing package which included an updated briefing presentation outlining the terms and conditions to be attached to a possible approval letter, a draft decision letter approving the Project with conditions, a draft of the terms and conditions to be attached to the approval along with three project-specific mitigation measures to address specific concerns raised during the EA process.

…

32. As such, the Minister's technical experts within the EA Branch provided him with an additional condition to further mitigate and address the public concerns raised during the 30-day EA public comment period. Condition #9.4 was a new condition that Department had not issued in an EA approval before. The new condition was provided to the Minister on the evening of May 3, 2023, and required the following of the Proponent:

- *The Approval Holder shall present to the CLC ["***Community Liaison Committee***"] a table describing the efforts made to further address concerns raised through the public EA review period. The Approval Holders shall operate the CLC for the duration of the Project or until release in writing by the Department.*

(Minister's brief, para 29-32)

[Emphasis added]

[23] After receipt of this additional information, the Minister issued his decision. It appears at tab 5 of the Record and is reproduced below:

> This letter is to advise that I have approved the project in accordance with section 40 of the Nova Scotia Environment Act, SNS, 1994 – 95 and subsection 13 (1) (b) of the Environmental Assessment Regulations, NS Reg 348/2008, made under the Act. Following a review of the information provided by Higgins Mountain Wind Farm Limited Partnership and the information provided by the Mi'kmaq of Nova Scotia, and the public during the consultation on the environmental assessment, I am satisfied that any adverse effects are significant environmental effects of the undertaking can be adequately mitigated through compliance with the attached terms and conditions.

The Position of the Parties

[24] The Applicant contends that the decision of the Minister to approve the project with the attached terms and conditions was unreasonable. The Court is requested to remit the decision back to the Minister to be remade in accordance with this Court's direction (*Applicant's brief, para 4*). It challenges the reasonableness and/or adequacy of the terms and conditions in the decision which are designed to mitigate the anticipated negative impact of the project upon the Mainland Moose in the region, the socioeconomic issues, and cumulative effects on the region of what they contend are similar proximate ventures.

[25] The descriptors applied by the Applicant to its concerns are important to contextualize its arguments. They are set forth below:

> 2. The Minister erred in law and in fact, and acted unreasonably, in failing to adequately consider factors he was required to consider under s. 12 of the *Environmental Assessment Regulation*, NS Reg 348/2008 when deciding to approve the Project, including:
>
> > a. The concerns expressed by the public in the formal comments submitted during the 30-day public review period of the Project's Environmental Assessment Registration Document and additional correspondence received by the Minister's office regarding the Project, as required by s. 12(c) of the Regulations;
> >
> > b. The Project's adverse effects on the endangered Mainland Moose, a species at risk listed under the *Endangered Species Act*, SNS 1998, c 11, with a Recovery Plan identifying core habitat within the Project area, as required by s. 12(e) of the Environmental Assessment Regulations;
> >
> > c. The area's existing land use for outdoor recreation and eco-tourism, as required by s. 12(g) of the Regulations; and
> >
> > d. The cumulative effects of all wind farm projects in the area, as required by s. 12(h) of the Regulations. The Higgins Mountain Wind Farm will be the second wind farm in the Folly Lake-Wentworth Valley area yet the Decision fails to account for the measurement of cumulative effects of both wind farms.
>
> 3. The Minister erred and acted unreasonably by concluding the terms and conditions attached to the decision to approve the Project would adequately mitigate the project's adverse effects on the endangered Mainland Moose and their habitat:
>
> > a. The Mainland Moose is a species at risk listed as endangered under the *Endangered Species Act*, SNS 1998, c 11 (*ESA*); a purpose of the *ESA* is to provide for habitat protection of species at risk (s. 2(1));

b. The project is within an area as core habitat in the Department of Natural Resources and Renewables' 2021 Mainland Moose Recovery Plan and is pending a designation decision under the *ESA* as core habitat by the Department of Natural Resources and Renewables (DNRR);

c. Core habitat is defined in the *ESA* as "specific areas of habitat essential for the long-term survival and recovery of endangered or threatened species and that are designated as core habitat pursuant to Section 16 or identified in an order pursuant to Section 18" (s. 3(b));

d. The Minister's decision failed to account for the core habitat designation in the Recovery Plan and the pending core habitat decision by DNRR; allowing the project to proceed in advance of the core habitat decision by DNRR unreasonably precludes the potential for the area to be so designated;

e. The only condition of the approval that relates to Mainland Moose is condition 6.6 requiring the proponent to conduct monitoring of Moose in the project area for two years from the time the wind turbines become operational; this condition fails to mitigate activities which may result in the destruction of Mainland Moose core habitat in the project footprint as defined in the 2021 Mainland Moose Recovery Plan; and

f. The approval fails to account for s. 13(1)(c) of the ESA, which prohibits anyone to "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,…".

4. The Minister erred and acted unreasonably by including vague and unclear conditions surrounding the Community Liaison Committee ("CLC") (conditions 9.3 and 9.4), including uncertainty in:

a. whether the Minister intends for the CLC that has been in place for the past four years to remain in place; and

b. when the Minister intends the deliverables under conditions 9.3 and 9.4 to be met.

(Notice for Judicial Review, pp. 2-4)

[Emphasis added]

[26] The Respondents, on the other hand, uniformly contend that there is nothing wrong with the Minister's decision. They argue that it is in accord with the range of possible outcomes with respect to the applicable facts and law, that the Minister took into account all of the factors which he was statutorily obliged to consider, and that his reasons were justifiable, transparent, and intelligible (*see, for example, Minister's brief, para 45)*.

[27] All parties have agreed, in their oral and written submissions, that a "reasonableness" (hence deferential) standard of review is applicable to the decision.

[28] The issues resolve themselves into the following:

A. Is reasonableness the applicable standard of review?;

B. If yes, what is involved in such a standard of review?; and

C. Has the Applicant shown that the Minister's decision was unreasonable?

Discussion and Analysis

A. Is reasonableness the applicable standard of review?

[29] Yes, it is. This follows from the decision of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 and, in particular, the excerpts below:

> [16] In the following sections, we set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged. It starts with a presumption that reasonableness is the applicable standard whenever court reviews administrative decisions.
>
> [17] The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case for the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when the court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review...
>
> [Emphasis added]

[30] In this case, the legislation under consideration is the *Environment Act*, SNS 1994 – 95, c1 ("the Act"). None of the exceptions identified in *Vavilov* are

applicable. All parties have conceded that "reasonableness" is the applicable standard. The concession is appropriate in the circumstances.

B. What is involved in a reasonableness review?

[31] A reasonableness review, as briefly noted earlier, is a deferential one. Deference must be provided to the Minister as having been legislatively entrusted to make the decision in question. This befits the specialized expertise which he and his department wield with respect to their mandate, which is conferred by the Act and the Regulations pursuant thereto.

[32] This is not to say that the review is a "rubberstamp" by any means. The process remains robust. It is not, however, as some authorities have pointed out "a treasure hunt for error".

[33] In *Vavilov*, the court explained what deference means in this context:

> [287] In our view, deference imposes three requirements on courts conducting reasonableness review. It informs the attitude a reviewing court must adopt towards an administrative decision-maker; it affects how a court frames the question it must answer on Judicial Review; and it affects how a reviewing court evaluates challenges to an administrative decision.
>
> [288] First and foremost, deference is an "attitude of the court" conducting reasonableness review (*Dunsmuir*, at para. 48). Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, and for the important role that administrative decision-makers play in upholding and applying the rule of law (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77, at para. 131, per LeBel J., concurring). Deference also requires respect for administrative decision-makers, their specialized expertise and the institutional setting in which they operate (*Dunsmuir*, at paras. 48-49). Reviewing courts must pay "respectful attention" to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction in light of the entire record (*Newfoundland Nurses*, at paras. 11-14 and 17).
>
> [289] Second, deference affects how a court frames the question it must answer when conducting Judicial Review. A reviewing court does not ask how it would have resolved an issue, but rather, whether the answer provided by the administrative decision-maker has been shown to be unreasonable (*Khosa*, at paras. 59 and 61-62; *Dunsmuir*, at para. 47). Framing the inquiry in this way ensures that the administrative decision under review is the focus of the analysis.
>
> [290] This Court has often endorsed this approach to conducting reasonableness review. In *Ryan*, for example, Iacobucci J. explained:

> . . . when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. . . . The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> . . . Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable. [paras. 50-51]
>
> [Authorities omitted]

> [291] Third, deferential review impacts how a reviewing court evaluates challenges to an administrative decision. Deference requires the Applicant seeking Judicial Review to bear the onus of showing that the decision was unreasonable (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (CanLII), [2018] 1 S.C.R. 83, at para. 108; *Mission Institution v. Khela*, 2014 SCC 24 (CanLII), [2014] 1 S.C.R. 502, at para. 64; *May v. Ferndale Institution*, 2005 SCC 82 (CanLII), [2005] 3 S.C.R. 809, at para. 71; *Ryan*, at para. 48; *Southam*, at para. 61; *Northern Telecom Ltd. v. Communications Workers of Canada*, 1979 CanLII 3 (SCC), [1980] 1 S.C.R. 115, at p. 130). Focusing on whether the Applicant has demonstrated that the decision is unreasonable reinforces the central role that administrative decisions play in a properly deferential review process, and confirms that the decision-maker does not have to persuade the court that its decision is reasonable.
>
> [Emphasis added]

[34] Earlier, in *Vavilov*, the Court had noted that a reviewing court should, in such circumstances, ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov, para 99*).

[35] This approach is the polar opposite of a *de novo* analysis. Nor is the Minister's decision to be parsed and/or weighed against an outcome which is perceived to be a "better" or "more correct" one. Rather, the exercise resolves itself into whether the court is able to understand the Minister's decision, whether (in this case) he observed the proper statutory requirements enroute to that decision, and whether it falls within the range of possible outcomes that were available to the Minister, having regard to the constellation of circumstances in this case and the objectives which the legislation seeks to achieve.

[36] If the decision is reasonable, having regard to the above, it will be upheld.

C. Has the Applicant shown that the Minister's decision was unreasonable?

[37] First, it is helpful to examine what the Minister was required to consider when he made his decision. For complete context, s. 34 (1) and (2), as well as s. 40, are reproduced below:

> 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 alter-nate dispute resolution;
>
> (b) a focus report is required;
>
> (c) an environmental-assessment report is required;
>
> (d) all or part of the undertaking may be referred to alter-nate 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.
>
> (2) The Minister shall notify the proponent, in writing, of the decision pursuant to subsection (1), together with reasons for the decision, within the time period prescribed by the regulations.
>
> …
>
> 40 (1) Upon receiving information under Section 34, a focus report under Section 35, an environmental-assessment report under Section 38, a recom-mendation from a review panel under Section 39 or from a referral to alternate dis-pute resolution, the Minister may
>
> (a) approve the undertaking;
>
> (b) approve the undertaking, subject to any conditions the Minister deems appropriate; or
>
> (c) reject the undertaking.
>
> (2) The Minister shall notify the proponent, in writing, of the decision pursuant to subsection (1), together with reasons for the decision, within the time period prescribed by the regulations.

[38] Next, section 12 of the Environmental Assessment Regulations ("the Regulations") uses mandatory language:

> 12 All of the following information shall be considered by the Minister in formulating a decision under subsection 34(1) of the Act:
>
> (a) the location of the proposed undertaking and the nature and sensitivity of the surrounding area;
>
> (b) the size, scope and complexity of the proposed undertaking;
>
> (c) concerns expressed by the public and aboriginal people about the adverse effects or the environmental effects of the proposed undertaking;
>
> (d) steps taken by the proponent to address environmental concerns expressed by the public and aboriginal people;
>
> (da) whether environmental baseline information submitted under subclause 9(1A)(b)(x) for the undertaking is sufficient for predicting adverse effects or environmental effects related to the undertaking;
>
> (e) potential and known adverse effects or environmental effects of the proposed undertaking, including identifying any effects on species at risk, species of conservation concern and their habitats;
>
> (f) project schedules where applicable;
>
> (g) planned or existing land use in the area of the undertaking;
>
> (h) other undertakings in the area;
>
> (ha) whether compliance with licences, certificates, permits, approvals or other documents of authorization required by law will mitigate the environmental effects;
>
> (i) such other information as the Minister may require.
>
> [Emphasis added]

[39] Further obligations are imposed upon the Minister by virtue of section 13 of the Regulations:

13(1) No later than 50 days following the date of registration, the Minister shall advise the proponent in writing of the decision under subsection 34(2) of the Act

(a) that the registration information is insufficient to allow the Minister to make a decision and additional information is required;

(b) that a review of the information indicates that there are no adverse effects or significant environmental effects which may be caused by the undertaking or that such effects are mitigable and the undertaking is approved subject to specified terms and conditions and any other approvals required by statute or regulation;

(c) that a review of the information indicates that the adverse effects or significant environmental effects which may be caused by the undertaking are limited and that a focus report is required;

(d) that a review of the information indicates that there may be adverse effects or significant environmental effects caused by the undertaking and an environmental-assessment report is required; or

(e) that a review of the information indicates that there is a likelihood that the undertaking will cause adverse effects or significant environmental effects which are unacceptable and the undertaking is rejected.

13(2) Where additional information is required pursuant to clause (1)(a), the proponent

(a) shall submit the required information as an addendum to the original registration information and Section 12 applies; and

(b) except as provided in subsection (3), shall submit the required information no later than 1 year after the date the proponent is advised under clause 13(1)(a);

(c) if the Minister considers it necessary to fulfill the notification requirements of clause 33(b) of the Act, may be required by the Minister to publish a notice in the same manner as the original notice under Section 10 announcing the release of the additional information to the public and stating that written comments may be submitted about the additional information to the Department.

13(3) If the Minister considers that the time period prescribed in clause 13(2)(b) is insufficient, the Minister may extend the time for filing of the information and shall advise the proponent in writing.

> 13(4) If additional information is submitted under clause (1)(a), the Minister shall, within 50 days, advise the proponent in writing of the decision under subsection 34(2) of the Act.
>
> [Emphasis added]

[40] Reference to the Notice for Judicial Review, which was earlier reproduced in detail, will show that the Applicant considers the Minister to have erred in law and fact, and to have acted unreasonably, "in failing to adequately consider factors he was required to consider to section 12 of the Environmental Assessment Regulation...". The Applicant singles out "...concerns expressed by the public and the formal comments submitted during the 30 day public review period..."; "[the] project's adverse effects on the endangered Mainland Moose..."; "[the] area's existing land use for outdoor recreation and ecotourism..."; and "the cumulative effects of all windfarm projects in the area... HMWF will be the 2nd windfarm in the Folly Lake – Wentworth Valley area, yet the decision fails to account for the measurement of cumulative effects of both windfarms" (*Notice of Judicial Review, para 2*).

[41] As has also been noted, the Applicant's Notice also takes aim at a number of conditions attached to the Minister's decision approving the project, and says that he acted unreasonably by "... concluding that the terms and conditions... would adequately mitigate the project's adverse effects on the endangered Mainland Moose and their habitat..." (*Notice of Judicial Review, para 3*).

[42] All parties have agreed at the outset that the applicable standard of review is reasonableness. It is a deferential standard. Yet the Applicant has couched its criticism of the Minister's decision in terms which state that he failed to "adequately consider" certain section 12 factors, or that he acted unreasonably when he concluded that the terms and conditions specified in his decision "would adequately mitigate" the project's adverse effects on species at risk, or endangered species, including the Mainland Moose.

[43] First, and with respect, this is nothing more than an attempt to subject the Minister to a "correctness" standard which, as discussed earlier, is inapplicable here. The Minister is not required to do any more than “consider” the factors under section 12. The consideration which he accords to all or any of them is not required to measure up to a standard which the Applicant (or anyone else, for that matter), might consider to be "adequate".

[44] Second, by stating that the Minister was "unreasonable" when he concluded that the terms and conditions appended to his decision "would adequately mitigate" the project's adverse effects upon species at risk, the Applicant is (in effect) saying that the Minister's decision was not the right one. This is a completely different thing than contending that it was "unreasonable".

[45] Third, there is information within the Record that does refer to the existence of another wind farm, one 24 kilometres away from this project. What was noted in the EARD was that this "will not act cumulatively with the project" (*Record, part 1, Tab 1, pp. 283-284*).

[46] In sum, and as earlier discussed, a reasonableness review is not an opportunity for another party (or the Court) to substitute its own view as to what measures they think should have been put in place. The legislation designates the Minister as the person best equipped to make the decision. As long as he complies with the requirements of the statue in arriving at his decision, and the outcome is one of those at which he reasonably could have arrived, it will not be disturbed.

[47] As the Court stated in *Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 in relation to a reasonableness review:

> [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 (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at 12:5330 and 12:5510). <u>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</u>. 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)
>
> [Emphasis added]

[48] So too, as our Court of Appeal (per Fichaud, JA) pointed out in *Canadian Union of Public Employees, Local 3912 v. Nickerson*, 2017 NSCA 70:

> [35] [In a reasonableness review, the] reviewing judge's perspective is wide-angled, not microscopic. The judge appraises the reasonableness of the "outcome", with reference to the tribunal's overall reasoning path in the context of the entire

> record. The judge does not isolate and parse each phrase of the tribunal's reasons, and then overturn because the judge would articulate one extract differently.

[49] Moreover and with specific reference to the legislation under consideration in this case, Arnold, J., in *3076525 Nova Scotia Ltd. v. Nova Scotia (Minister of Environment)*, 2015 NSSC 1372, observed:

> [53] The purpose of this statutory regime is relevant to any consideration of the reasonableness of the Ministerial Order. The purpose of the *EA* impacts on the interpretation of the relevant statutory provisions. The purpose can also affect the overall assessment of whether the Minister created an Order outside the range of possible outcomes. If the Minister has made an Order contrary to the purpose of the statutory regime such Order is more likely to be found outside of the range of possible outcomes.

[50] While it may seem counterintuitive to some, the stated purposes of the Environment Act are not strictly limited to those involving protection of the environment. There is a balancing involved. Section 2 states that the objectives of the legislation are to "support and promote the protection, enhancement and prudent use of the environment" (emphasis added) having regard to a number of goals that are specified in subsections (a)-(j).

[51] These objectives have been referred to as "polycentric" (see for example, *Sorflaten et al v. Nova Scotia Minister of Environment et al*, 2018 NSSC 55, at para 28), and they include "(b) maintaining the principles of sustainable development..." in accordance with a number of specified criteria, some of which include:

> (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, and
>
> (vii) the comprehensive integration of sustainable development principles in public policy making in the Province;

[52] This case involved a non-adjudicative exercise of the Minister's statutorily conferred powers. As such, it is analogous to *Specter v. Nova Scotia (Minister of Fisheries and Aquaculture)*, 2012 NSSC 40, where Wood, J. (as he was then) observed:

> [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.
>
> [Emphasis added]

[53] The Minister considered the material placed before him by his department. This included scientific and other information which had been gathered by experts, a considerable amount of public input, and the results of extensive consultation with Nova Scotia's Mi'kmaq community. Indeed, he considered all of the information contained in the 2700+ page Record. He then added conditions to his approval of the HMWF application, those which he felt were sufficient to mitigate the concerns which the public and his experts had identified. He did all of this within the context of an overarching reality: climate change caused by greenhouse gas emissions.

[54] As the Minister has set out in his brief:

> The development of clean, reliable, and affordable renewable energy through the construction of onshore windfarms is a key component for reaching Nova Scotia's legislative goals set out in the Environmental Goals and Climate Change Reduction Act and further detailed in Nova Scotia's Climate Change Plan for Clean Growth. These goals include, but are not limited to, achieving a 53% reduction in greenhouse gas emissions by 2030, net zero by 2050, having 80% of the electricity in the province applied by renewable energy by 2030, and phasing out the use of coal-fired electricity in the province by 2030. (*Brief, para 4*)

[55] It is clear from a perusal of the record that the Minister relied upon the expertise of his department, the public, the Mi'kmaq and expert/regulator consultation. He received three briefings.

[56] It is true that, as the Applicant has pointed out, as of the night before he was required to render his decision, the Minister had decided to request additional information to address the socioeconomic concerns raised by the public, before approval. He then received a third (and final) briefing by his Department late that day, on May 3, 2023, which provided him with more information. Only then did he decide to approve the project on May 4, 2023, with conditions.

[57] The Applicant contends that this shows that the Minister's decision was an arbitrary one. This is one view. Another, however, would be, to regard it as a

demonstration of his thoroughness, and the considerable attention which he gave to the various factors which he was statutorily obliged to consider.

[58] It has earlier been pointed out that section 13(b) of the Regulations provides that an approval of a project may be rendered in two types of circumstances. The first is where a review of the information indicates “that there are no adverse effects or significant environmental effects which may be caused by the undertaking”. The second arises where such effects exist but are "mitigable and the undertaking is approved subject to specified terms and conditions and any other approvals required by statute or regulation".

[59] One of the conditions upon which the Minister's approval was contingent provided:

> 3.6 Nothing in this Approval relieves the Approval Holder have the responsibility for obtaining and paying for all other licenses, permits, approvals or authorizations necessary for carrying out the project which may be required by municipal bylaws or provincial or federal legislation. The Minister does not warrant that such licenses, permits, approvals or authorizations will be issued.
>
> [Emphasis added]

[60] This is an important point. It must be grasped that the EA process does not exempt HMWF (or any other wind projects that are approved either) from compliance with other existing legislation as it attempts to bring the project to fruition. While the process does help with proper planning by identifying possible adverse effects on the environment before the commencement of a particular project, it does not purport to negate the authority of any other relevant government regulators.

[61] This has countless practical consequences. To cite only one, since the Mainland Moose has been designated as "endangered" or "threatened" under the *Endangered Species Act*, section 13(1)d of that legislation would prevent HMWF from contravening "any regulation made with respect to a core habitat [with respect to the Mainland Moose]", as it implements the project.

[62] The Minister expands upon this point in his brief:

> 76. For example, with respect to endangered species and wildlife concerns, under Term and Condition #6.2, the Proponents are required to develop a Wildlife Management Plan and to submit that plan to various provincial and federal regulators. These regulators will review the Wildlife Management Plan through the

> lens of their respective statutory schemes and mandates, including but not limited to, the provinces *Endangered Species Act* (ESA), the federal *Migratory Birds Convention Act*, and the federal *Species at Risk Act*. Upon review, these regulators will potentially provide the Proponent with additional feedback on their proposed approach to wildlife management and compliance with the relevant statutory regimes.
>
> 77. Likewise, pursuant to subsection 105(3)(a) of the *Environment Act*, the Minister has the authority to authorize, restrict or prohibit the alteration of water courses and wetlands in the province. Based on its review of the EARD, the Department anticipated eleven (11) watercourses and four (4) wetlands to require an alteration approval before the Project can commence. In addition, in their briefing to the Minister, Departmental staff anticipated that the Proponents may need further approvals from the federal Department of Fisheries and Oceans (DFO) under the *Fisheries Act*, RSC, 1985, c. F-14 (FA) and/or *Species at Risk Act*, SC, 2002, c. 29 (SAR) before the Project can commence.

[63] On its own, this one condition requires HMWF to comply with many other pieces of legislation, each of which requires compliance with a myriad of factors before all approvals are granted and the project receives a true “green light”.

[64] There are other such conditions in the decision. By way of another example, point # 6.6 stipulates that:

> the approval Holder must develop a monitoring program for Mainland Moose for not less than 2 years. The program shall be implemented from the time the turbines become operational.

Conclusion

[65] The Minister's decision, when read as an "organic exercise", in conjunction with the Record, without a line by line "treasure hunt for error" is certainly one of the reasonable outcomes at which the Minister could have arrived having regard to the entire corpus of information that was before him. He duly took into consideration all of the information which was required of him before rendering his decision.

[66] The Applicant has not demonstrated that the Minister’s decision, with attached conditions, was an unreasonable one. As a consequence, this application is dismissed. If costs are requested and the parties are unable to agree, I will receive written submissions within 30 days.