IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Fairmount Developments Inc. v. Nova Scotia (Environment and Labour), 2004 NSSC 126

Date: 20040623
Docket: S.H.211363A and S.H.212164A
Registry: Halifax

Between:

Fairmount Developments Inc. and Armstrong Morrell Incorporated

Appellants

and

Nova Scotia (Minister of Environment and Labour)

Respondent

and

IN THE MATTER OF Chapter 1 of the Statutes of Nova Scotia 1994-95, the *Environment Act*

and

IN THE MATTER OF a decision of the Minister of Environment and Labour pursuant to s. 137 of the *Environment Act* and dated November 17, 2003, denying an appeal filed by Fairmount Developments Inc. ("Fairmount") and Armstrong Morrell Incorporated ("AMI") of the refusal by an Administrator of the Department of Environment and Labour ("NSDEL") to approve a Remedial Action Plan ("RAP") and Certificate of Compliance ("CoC") for property known as the Fairmount Ridge Property

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	February 23 and 24, April 16 and 27, 2004 (in Chambers), at Halifax, Nova Scotia
Decision:	June 23, 2004
Counsel:	Dufferin R. Harper and Sean Foreman, for the Appellants Stephen T. McGrath, for the Respondent

Coughlan, J.:

[1] Fairmount Developments Inc. (Fairmount) appeals the decision of the Minister of Environment and Labour (Minister) dated November 17, 2003 denying the appeal by Fairmount of the refusal by an Administrator of the Department of Environment and Labour (Department) to approve a Remedial Action Plan (RAP) and Certificate of Compliance (CoC) for property known as the Fairmount Ridge property. Armstrong Morrell Incorporated (AMI) appeals the decision of the Minister dated November 17, 2003 that AMI was not an "aggrieved person" in the context of s. 137 of the *Environment Act*, S.N.S., 1994-1995, c. 1.

[2] The property in question was owned by Butler Brothers Limited. In the early 1990's large amounts of fill material were brought to the property. The Department of Environment received a complaint about the property and soil samples were taken, which showed the property contained contaminants above the Canadian Council of Ministers of the Environment (CCME) Guidelines for residential/parkland purposes. The Department requested the property be assessed by a professional environmental consultant.

[3] Jacques Whitford Environment Limited prepared a Phase II Environmental Site Assessment dated January 21, 1999 and concluded:

> In summary, the results of the Phase II ESA confirm the presence of lube oil range petroleum hydrocarbons, polycyclic aromatic hydrocarbons and metals

> (arsenic, copper, lead and molybdenum) in concentrations exceeding the applicable regulatory criteria.

[4] Porter Dillon Limited prepared a Phase I and Phase II Environmental Site Assessment dated April, 1999. The property was found to contain various contaminants in concentrations in excess of the Department's Level I Guidelines. In April, 2002, EARTHTech Engineering Limited prepared an Environmental Management Plan for the subject property, recognizing the property contained low levels of metal and Polycyclic Aromatic Hydrocarbons (PAH) impacted soils. A supplement to the report was prepared by EARTHTech dated June, 2002.

[5] In 2000, Longwave Enterprises Limited, a company related to the appellant, Fairmount, entered into an agreement of purchase and sale for the property. Longwave knew the property was contaminated. Glen Clark, President of Fairmount and Vice-president of Longwave, testified he knew the property was considered contaminated before the property was purchased from Butler Brothers Limited. Through its agent, EARTHTech, Longwave submitted various proposals for developing the property, including proposals on November 20, 2000, March 5, 2001, October 22, 2001 and December 19, 2001.

[6] In January, 2002, Longwave presented a proposal to the Department which provided the imported fill be excavated, screened to separate materials greater than two inches in size from smaller material - the greater than two inch material was to be used as fill in the development and the smaller material isolated and incapsulized in an engineered holding cell. In July, 2002 a Remedial Action Plan and Environmental Plan was submitted by EARTHTech. The RAP required a Certificate of Compliance be prepared for each lot. The property was to be developed in two phases, A and B. Remediation work proceeded and extensive communication took place between the Department, EARTHTech, Longwave and Fairmount throughout 2002 and 2003. By fax sent March 3, 2003, Fairmount confirmed it was committed to fully implementing the RAP. Work pursuant to the RAP proceeded.

[7] AMI submitted a proposal dated April 14, 2003 for a wet screening process to reduce the level of contamination on the property. The Department granted AMI a temporary pilot plant project approval for a period of two months effective May 16, 2003.

[8] AMI prepared a report dated August 11, 2003 in which it concluded:

> Based on these results it appears that the original reports of contaminant concentrations at the property overestimated the actual level of contamination at the property. Given the gradation of the soil at the property the laboratory techniques utilized in the original Environmental Site Assessments presented data that was essentially a screening level analysis. When analysed using more detailed sampling techniques that offer a greater degree of confidence in reported levels of contaminants it has been shown that the property in fact meets the applicable residential criteria.

[9] AMI employed a weighted average sampling methodology to determine the concentration of contaminants. The weighted average sampling method had not previously been used in Nova Scotia. AMI issued a CoC dated August 1, 2003 stating, "No exceedances of environmental quality criteria were identified at this site." An amended CoC was issued dated August 12, 2003. Colin Morrell, Vice-president of AMI, testified the words, "based on the data and analysis contained in the above referenced report" were added to the statement "No exceedances of environmental quality criteria were identified at this site" in the amended CoC, as if the methods commonly used in Nova Scotia were employed, the result would show levels of contaminants exceeding environmental quality criteria.

[10] The Department took issue with AMI's conclusion that the property was not contaminated. It did not accept the methodology employed by AMI. The impasse was not resolved. Fairmount and AMI appealed the refusal by the Department to accept the RAP and CoC issued by AMI. By letter dated November 17, 2003, the Minister denied the appeal of Fairmount on the basis "the CCME's Guidelines for Management of Contaminated Sites" had not been met. AMI's appeal was denied on the basis that AMI was not an "aggrieved person" within the context of s. 137(4) of the *Environment Act*.

[11] The issues for the Court are:

- Did the Minister err in not providing adequate reasons for his decision?
- Is AMI "a person who is aggrieved" within the meaning of s. 137 of the *Environment Act*?

- Are the Guidelines for Management of Contaminated Sites in Nova Scotia an administrative directive or a document which has the force of law?

- If the Guidelines have the force of law, what is the appropriate standard of review, and did the Minister meet the standard?

[12] I will first deal with the issue of procedural fairness. The appellants say the Minister erred in not providing adequate reasons for his decision. There is a duty, in certain circumstances, to provide reasons. In *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, L'Heureux-Dubé, J. stated at p. 848:

> In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. ...

[13] In this case, the reasons' requirement was fulfilled. The Minister's statement, "Guidelines for management of contaminated sites have not been met." is sufficient reasons when the earlier correspondence in the file is considered - here the Minister was considering an appeal from the administrator or person delegated authority.

[14] The review of administrative decisions is governed by the pragmatic and functional approach, whether the review is by way of application to the court or statutory right of appeal. Dealing with the standard of review, Bastarache, J. stated in giving the majority judgment in *Pushpanathan v. Canada (Minister of Citizenship and Immigration),* [1998] 1 S.C.R. 982 at p. 1004:

> The central inquiry in determining the standard of review exercisable by a court of law is the legislative intend of the statute creating the tribunal whose decision is being reviewed. More specifically, the reviewing court must ask: "[W]as the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?" (*Pasiechnyk v. Saskatchewan (Workers' Compensation Board),* [1997] 2 S.C.R. 890, at para. 18, *per* Sopinka J.).

[15] The standard of review is determined in relation to four factors: the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provisions in particular; and the nature of the question - law, fact, or mixed law and fact.

[16] Different provisions in a single act may require more deference than others, depending on the four factors.

[17] Dealing with the determination that AMI is not an "aggrieved person" within the context of s. 137 of the *Act*, I will review the factors to determine the appropriate standard of review.

[18] There is no privative clause but rather a statutory right of appeal. The clause permitting appeals suggests a higher standard of review. In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, *supra*, Bastarache, J. stated at p. 1006:

> The absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard. However, the presence of a "full" privative clause is compelling evidence that the court ought to show deference to the tribunal's decision, unless other facts strongly indicate the contrary as regards the particular determination in question. A full privative clause is "one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded" (*Pasiechnyk, supra*, at para. 17, *per* Sopinka J.). Unless there is some contrary indication in the privative clause itself, actually using the words "final and conclusive" is sufficient, but other words might suffice if equally explicit *(United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.,* [1993] 2 S.C.R. 316, at pp. 331 and 333). At the other end of the spectrum is a clause in an Act permitting appeals, which is a factor suggesting a more searching standard of review.

[19] In dealing with the question of expertise, McLachlin, C.J. stated in giving the Court's judgment in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at p. 239:

> ... Yet expertise is a relative concept, not an absolute one. Greater deference will be called for only where the decision-making body is, in some way, more expert than the courts and the question under consideration is one that falls within the

> scope of this greater expertise: See *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at para. 50. Thus, the analysis under this heading "has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise": *Pushpanathan, supra*, at para. 33.

[20] While the Minister has great expertise in the regulation of the environment and in dealing with the technical and administrative issues that arise in that regulation, the specific issue before the Court is the interpretation of the phrase "a person who is aggrieved by a decision or order of an administrator or a person delegated authority pursuant to s. 17 of the *Act*". The Court enjoys a relative expertise to the Minister in dealing with the matter of statutory interpretation which militates in favour of less deference.

[21] The third factor, the purpose of the *Act*, that is, regulating and protecting the environment, involves the balancing of various constituencies and factors to achieve its purpose. This balancing function suggests greater deference to the decision maker. However, the particular provision deals with who may appeal a decision to the Minister and is not a provision which involves the balancing required to carry out the overall purpose of the *Act*; consequently, the purpose of the particular provision does not suggest greater deference to the decision maker.

[22] The final factor is the nature of the problem. In considering this factor, McLachlin, C.J. stated in *Dr. Q. v. College of Physicians and Surgeons of British Columbia, supra*, at p. 241:

> When the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards the tribunal's decision. Conversely, an issue of pure law counsels in favour of a more searching review. This is particularly so where the decision will be one of general importance or great precedential value: *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 23. Finally, with respect to questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive, and less deference if it is law-intensive.

[23] In this case, the question is the interpretation of the term "a person who is aggrieved ..." is a question of law. The term is in a statutory provision and the question is one which may arise in many cases in the future. (See: *Canada*

(Director of Investigation and Research, Competition Act v. Southam, [1997] 1 S.C.R. 748 at pp. 766-768). The issue being a question of law, less deference is to be accorded.

[24] Considering the factors, I find the appropriate standard of review to be one of correctness.

[25] Courts have been more generous in giving standing to individuals to appeal decisions of public authorities in court. The test for standing was set out by Chipman, J.A. in *Ogden Martin Systems of Nova Scotia Ltd. v. Nova Scotia (Minister of the Environment) et al.* (1995), 146 N.S.R. (2d) 372 (C.A.) at p. 378:

> A review of these authorities indicates that the trend of the courts has been to be more generous in according private interest standing to persons to challenge the decisions of the public authorities in the courts. The approach favours granting standing wherever the relationship between the plaintiff and the challenged action is direct, substantial, immediate, real, more intense or having a nexus with such action as opposed to being a contingent or indirect connection. The review of the cases shows, however, that the line between a direct and an indirect connection is not easy to draw.

[26] In dealing with interpreting the phrase "aggrieves or may aggrieve a person" Dickson, J., as he then was, in giving the Court's judgment stated in *Re British Columbia Development Corp. et al. and Friedmann et al.* (1984), 14 D.L.R. (4th) 129 (S.C.C.) at p. 146:

> I would hold that a party is aggrieved or may be aggrieved whenever he genuinely suffers, or is seriously threatened with, any form of harm prejudicial to his interests, whether or not a legal right is called into question. ...

[27] Has AMI genuinely suffered or been seriously threatened with any form of harm prejudicial to its interests, and does it have a direct, substantial, immediate, real connection with the decision appealed to the Minister? The Guidelines for Management of Contaminated Sites in Nova Scotia provide the environmental site professional is responsible for preparation, supervising, implementation and evaluating the performance of the RAP. The site professional is also responsible for preparing the CoC. In this case, AMI prepared the RAP and issued the CoC. The RAP and CoC were prepared on the basis of the "average weighted sampling methodology" which in Nova Scotia is unique to AMI. If the sampling methods

employed by AMI, and remedial action plans and certificates of compliance prepared by AMI are not acceptable to the Department, this affects AMI's business reputation and its ability to conduct business in the environmental field in Nova Scotia. The decision being appealed to the Minister is prejudicial to AMI's interests. AMI is a person who is aggrieved by a decision or order of an administrator or person delegated authority pursuant to s. 17 of the *Act*. The Minister erred in finding AMI was not an "aggrieved person" in the context of s. 137 of the *Act*. AMI has standing to appeal to the Minister.

[28] The appellants are asking the Court to direct the Minister to accept the weighted average sampling method employed by AMI and order the Minister to accept the RAP and CoC by AMI. They say the Guidelines are binding on the Minister, the Guidelines were followed and consequently, the remedies requested should be granted.

[29] The *Environment Act* has as its purpose "to support and promote the protection, enhancement and prudent use of the environment", while recognizing certain specified goals. The protection of the environment is a matter of great importance to society.

[30] The Minister is charged with carrying out the purpose of the *Act* within the framework established by the *Act*. In dealing with sites that contain contaminants, there are distinct ways of proceeding. The Minister may designate the site as a contaminated site and the provisions of Part VIII of the *Act* apply. The property in question was not designated a contaminated site and, therefore, Part VIII does not apply.

[31] Section 8 of the *Act* allows the Minister in administering or enforcing the *Act* to do various things, including:

> **8 (2)** The Minister, for the purposes of the administration and enforcement of this Act, and after engaging in such public review as the Minister considers appropriate, shall
>
> . . . .

> (b) establish and administer policies, programs, standards, guidelines, objectives, codes of practice, directives and approval processes pertaining to the protection and stewardship of the environment;

[32] "Guidelines for Management of Contaminated Sites in Nova Scotia" were adopted. The Guidelines do not apply to sites designed pursuant to Part VIII of the *Act*. In the preamble to the Guidelines, the process is described as follows:

> This guideline describes the process to be followed by owners and government in Nova Scotia to manage (i.e. to identify, assess, remediate or otherwise act at) land that has potential for unacceptable impacts or risks associated with the presence of contaminants. The attached flow chart defines the steps in the overall management process. The guideline identifies the following components:
>
> - objectives of the process at each step
> - required actions and available alternatives
> - responsibilities of the site owner or site operator, the regulator and the site professional
> - definitions, guidelines, other relevant information
>
> The overall purpose of the guideline is to allow site owners to assume responsibility to the maximum extent possible, for appropriate and cost-effective management of contaminated sites, while ensuring that a consistent approach is used for all sites and that the public interest is protected.
>
> . . . .
>
> The ability to use alternate dispute resolution is an integral component of the process.

[33] In Part II of the Guidelines, dealing with notification, the objective of that Part is described:

> **1.1 Objective**

> If the Owner of a site is notified or knows that the site is potentially contaminated, the Owner shall evaluate the potential impacts and risks to determine what action, if any, is required by the Process. The Owner shall then advise the notifying party (if applicable.)

[34] In the same Part, under the heading "Required Actions" the owner shall, among other things:

> **1.2 Required Actions**
>
> a. If a person identifies a site where unacceptable contaminant impacts or risks are suspected, and notifies the Owner or Site Operator in writing, then the owner/operator shall act according to the Process defined in this section.
>
> b. If such notification is made in writing to the Site Operator then the Site Operator shall forward this notification to the Owner within 14 days.
>
> c. The Owner shall then evaluate the site in a reasonably timely manner to determine whether there are:
>
> - off-site impacts
> - unacceptable on-site impacts or risks to human health and safety
> - unacceptable on-site impacts or risks to the environment.
>
> d. If none of the impacts or risks in 1.2(c) are identified, no further action shall be required under the process. The Owner shall advise the notifying party in writing.

[35] The Guidelines set out a procedure to be followed when a site is contaminated or potentially contaminated.

[36] The Minister says the appellants have no statutory right to the remedy they seek. There is no authority to compel the Minister to accept the RAP and CoC. The process established by the Guidelines is voluntary - if the property is not contaminated, the owner can just terminate the process under the Guidelines.

[37] Are the Guidelines a document which has the force of law, rather than an administrative directive?

[38] The difference between an administrative directive and a directive which has the full force of law was dealt with by La Forest, J. in giving the majority judgment in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at p. 35:

> There is little doubt that ordinarily a Minister has an implicit power to issue directives to implement the administration of a statute for which he is responsible; see for example *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2. It is also clear that a violation of such directives will only give rise to administrative rather than judicial sanction because they do not have the full force of law.
>
> Here though we are dealing with a directive that is not merely authorized by statute, but one that is required to be formally enacted by "order", and promulgated under s. 6 of the *Department of the Environment Act*, with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister's authority. To my mind this is a vital distinction. Its effect is thus described by R. Dussault and L. Borgeat in *Administrative Law* (2nd ed. 1985), vol. 1, at pp. 338-39:
>
> When a government considers it necessary to regulate a situation through norms of behaviour, it may have a law passed or make a regulation itself, or act administratively by means of directives. In the first case, it is bound by the formalities surrounding the legislative or regulatory process; conversely, it knows that once these formalities have been observed, the new norms will come within a framework of "law" and that by virtue of the Rule of Law they will be applied by the courts. In the second case, that is, when it chooses to proceed by way of directives, whether or not they are authorized by legislation, it opts instead for a less formalized means based upon hierarchical authority, to which the courts do not have to ensure obedience. To confer upon a directive the force of a regulation is to exceed legislative intent. It is said that the Legislature does not speak without a purpose; its implicit wish to leave a situation outside the strict framework of "law" must be respected.

[39] The Guidelines are administrative in nature. They are designed to deal with situations in which sites have not been designated as a "contaminated site" pursuant to Part VIII of the *Act*. It is a voluntary process in which site owners are

to assume responsibility to the maximum extent possible for appropriate and cost effective management of contaminated sites. If a dispute arises, it is to be resolved by mediation or arbitration. Part II 4.2(e) of the Guidelines provide if any party refuses alternate dispute resolution, then the powers of Part VIII shall prevail. The Guidelines provide for a method of dealing with contaminated sites cooperatively. If the parties are unable to work cooperatively, the process is at an end and Part VIII of the *Act* applies. This is not a situation in which the appellants have a right to the remedies sought.

[40] The Guidelines deal with contaminated sites. AMI says the property is not contaminated. If the property is not contaminated, what need is there for a RAP or CoC? If the owner is of the opinion the site is not contaminated, it can exit the Guideline process. The remedies sought are not available. The appeal is dismissed.

[41] If I erred in determining the Guidelines are not legally enforceable, I will deal with the issue of the applicable standard of review and whether the Minister met the required standard.

[42] To determine the standard of review, I will analyze the issue within the framework of the factors set out by the Supreme Court of Canada. There is no privative clause, but rather a statutory right of appeal. The clause permitting appeals is a factor suggesting a lower level of deference.

[43] The Minister's expertise must be considered. In dealing with this factor, Iacobucci, J. in giving the Court's judgment in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 stated at p. 773:

> Expertise, which in this case overlaps with the purpose of the statute that the tribunal administers, is the most important of the factors that a court must consider in settling on a standard of review. ...

[44] On the issue of the regulation of contaminated sites, the Minister possesses greater expertise than does the Court. The Department has staff which has the scientific and technical knowledge of matters concerning the regulation of the environment. This expertise supports a higher level of deference to the Minister's decision.

[45] The purpose of the *Environment Act* is to support and promote the protection, enhancement and prudent use of the environment, while recognizing certain specified goals. It is a polycentric issue involving a balancing of various constituencies and factors to achieve its purpose. It is more political than legal in nature. Thus, the appropriateness of court supervision diminishes suggesting great deference. The approval or rejection of a RAP or CoC is at the heart of regulation of the environment. It involves a factual consideration of a particular application. This suggests a high level of deference.

[46] Considering the factors, I find the appropriate standard of review to be reasonableness *simpliciter*. Many of the factors suggest a standard of patent unreasonableness; however, the statutory right of appeal militates against the highest level of deference.

[47] The standard of reasonableness *simpliciter* was described by Iacobucci, J. in giving the Court's decision in *Canada (Director of Investigation and Research) v. Southam Inc.*, *supra,* at p. 778:

> Even as a matter of semantics, the closeness of the "clearly wrong" test to the standard of reasonableness *simpliciter* is obvious. It is true that many things are wrong that are not unreasonable; but when "clearly" is added to "wrong", the meaning is brought much nearer to that of "unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not go so far as the standard of patent unreasonableness. For if many things are wrong that are not unreasonable, then many things are clearly wrong that are not patently unreasonable (on the assumption that "clearly" and "patently" are close synonyms). It follows, then, that the clearly wrong test, like the standard of reasonableness *simpliciter* falls on the *continuum* between correctness and the standard of patent unreasonableness. Because the clearly wrong test is familiar to Canadian judges, it may serve as a guide to them in applying the standard of reasonableness *simpliciter*.

[48] In the hearing of this appeal, affidavits were filed exhibiting reports from Dr. Lawrence Keith and Dr. David A. Rae - Dr. Keith supporting the use of weighted average sampling method - Dr. Rae questioning its use. Dr. Rae, in his report, reviewing the soil sampling protocols employed by AMI at the property stated at p. 4:

> ... The inclusion of the coarse rock fraction, as proposed by AMI, is not consistent with CCME guidance or standard industry practice, and is not appropriate for comparison of the results to environmental quality guidelines.

[49] He testified one of his biggest concerns was the risk to health based on the inclusion of larger rock samples as it dilutes the analysis of the amount of contaminants, as the larger rocks do not contain contaminants. In his opinion, it is inappropriate to include larger rocks in the sample and is contrary to standard industry practice.

[50] Was the Minister's decision reasonable? The Minister, who is charged with administering the *Act* to achieve its purpose, faced a situation where three environmental reports dealing with the property over the years concluded the property was contaminated. The owner was developing the property on the basis it contained contaminated material. Then, in 2003, AMI determined the site was not contaminated. That determination was made by using the "weighted average sampling methodology" which had not been previously used in Nova Scotia. AMI's Vice-president, Colin Morrell, testified using methods commonly used in Nova Scotia, this site would show levels of contaminants exceeding environmental quality criteria. The Minister, through the Department, questioned the validity of the test. Dr. Rae also questioned the validity of AMI's testing of the property in his report, albeit prepared subsequent to the Minister's decision.

[51] The appellants say the Minister's decision was unreasonable, as a proper review of the weighted average method was not undertaken before the decision was made. While a review by a third party was not undertaken prior to the Minister's decision, the extensive record sets out the basis for the decision.

[52] Having reviewed the record and affidavits filed, heard the cross-examination of witnesses and submissions of counsel, I am unable to say the Minister's decision was "clearly wrong". The decision was not unreasonable.

[53] If the parties cannot agree on costs, I will receive written submissions from them.

Coughlan, J.