NOVA SCOTIA COURT OF APPEAL

Citation: *Ecology Action Centre v. Nova Scotia (Environment and Climate Change)*, 2023 NSCA 12

Date: 20230222
Docket: CA 515123
Registry: Halifax

Between:

Ecology Action Centre and New Brunswick Anti-Shale Alliance

Appellants

v.

Nova Scotia Department of the Environment and Climate Change and the Minister of Environment and Climate Change

Respondents

Judge:	The Honourable Justice Joel Fichaud
Appeal Heard:	December 6, 2022, in Halifax, Nova Scotia
Subject:	Public interest standing
Summary:	On April 29, 2021, under Part IV of the *Environment Act*, S.N.S. 1994-95, c. 1, the Minister of the Environment and Climate Change gave conditional environmental assessment approval to a highway re-alignment. The highway re-alignment would facilitate a liquid natural gas project in Goldboro, Guysborough County. The Ecology Action Centre and New Brunswick Anti-Shale Gas Alliance ("Appellants") sought judicial review by *certiorari* of the Minister's Decision to approve. On the Minister's motion, a judge of the Supreme Court of Nova Scotia held the Appellants would not be granted public interest standing. The judge held the Appellants' contentions did not raise a sufficiently "serious issue" for standing. Absent standing, the judge dismissed their application for judicial review.

The Appellants appeal from the dismissal of their application for judicial review.

Issues: Did the judge err by ruling the Appellants would not be granted public interest standing?

Result: The Court of Appeal allowed the appeal and ordered that the Appellants be granted public interest standing to seek judicial review of the Minister's Decision of April 29, 2021.

Public interest standing will be granted when three factors, weighed cumulatively and analyzed purposively, justify standing. The factors are: (1) there is a "serious justiciable issue", (2) the applicant has a "real stake or genuine interest" in the issue, and (3) the proposed litigation "is a reasonable and effective way to bring the issue before the courts". Here, the second and third factors favored standing, as the motions judge acknowledged. On the first factor, the motions judge erred in principle in her analysis and ruling that there was no "serious issue". Under the criteria for whether there is a "serious issue": the Appellants' proposed contentions were "far from frivolous" and not "marginal", their failure was not a "foregone conclusion", and their substance was sufficiently "important" to justify a merits hearing.

Having determined the motions judge erred in principle, the Court of Appeal re-assessed the factors and held the cumulative weight supported public interest standing.

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Appellants

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Respondents

Judges:	Wood C.J.N.S., Fichaud and Van den Eynden, JJ.A.
Appeal Heard:	December 6, 2022, in Halifax, Nova Scotia
Decision released:	February 22, 2023
H**eld:**	Appeal allowed with costs, per reasons for judgment of Fichaud J.A., Wood C.J.N.S. and Van den Eynden J.A. concurring
Counsel:	James Gunvaldsen Klaassen and Danielle Gallant for the Appellants Myles H. Thompson for the Respondents

Reasons for judgment:

[1] The Ecology Action Centre was incorporated as a society in Nova Scotia in 1973 and operates as a charity with over 4,000 members. The New Brunswick Anti-Shale Gas Alliance Inc. ("NB Alliance") was incorporated in New Brunswick and has members across that Province. Both promote environmental goals which include conversion to sources of energy other than fossil fuels.

[2] Pieridae Energy (Canada) Ltd. develops energy infrastructure and focuses on liquified natural gas. In early 2013, Pieridae proposed to develop a facility at an industrial park in Goldboro, Guysborough County to export liquefied natural gas ("LNG Project"). The LNG Project initially envisaged a pipeline, liquefaction trains, storage tanks, a power supply from a natural gas-fired power plant, and a marine terminal for ocean carriers. It aimed to produce 10 million tonnes of liquified natural gas annually.

[3] Under the *Environment Act*, S.N.S. 1994-95, c. 1 ("*Act*") the Minister of Environment and Climate Change ("Minister") decides whether to approve an undertaking with a significant adverse environmental impact, such as the LNG Project. The statutory process has two stages. The first, termed an "Environmental Assessment Approval", culminates in approval of the environmental impact, subject to any conditions required to mitigate the significant adverse effect. This is followed, at the second stage, by industrial approval of the overall undertaking.

[4] At the first stage, in 2013 and 2014, Nova Scotia's Department of the Environment and Climate Change ("Department") conducted an environmental assessment of the LNG Project. The Ecology Action Centre participated. In March 2014, the Minister issued a conditional Environmental Assessment Approval for the LNG Project. Work was to start by 2016. The conditions required Pieridae to prepare and submit for further approval plans to mitigate various environmental concerns. The required plans were to include a Greenhouse Gas Management Plan.

[5] To date, Pieridae has not submitted the Greenhouse Gas Management Plan.

[6] In March 2021, Pieridae requested the Minister's environmental approval for a highway re-alignment that was necessary for the LNG Project. The Ecology Action Centre and NB Alliance objected. Their brief to the Minister cited two concerns: (1) Pieridae should not construct the LNG Project's infrastructure

without the approved Greenhouse Gas Management Plan that was required by the March 2014 conditions, and (2) the excavation for the highway re-alignment would expose toxic chemicals, contaminants and tailings from the abandoned gold mines in the area. On April 29, 2021, the Minister issued a conditional Environmental Assessment Approval of the highway re-alignment.

[7] The Ecology Action Centre and NB Alliance applied to the Supreme Court of Nova Scotia for judicial review of the Minister's Decision of April 29, 2021.

[8] On the Minister's preliminary motion, a judge of the Supreme Court of Nova Scotia ruled the Ecology Action Centre and NB Alliance lacked public interest standing. The test for public interest standing includes whether there is a "serious issue" to be litigated. The motions judge said the issues raised by the Ecology Action Centre and NB Alliance were not "serious" and this deficiency outweighed the other factors that favoured standing. As they lacked standing, the judge dismissed their application for judicial review.

[9] The Ecology Action Centre and NB Alliance appeal. The question is – did the motions judge commit an appealable error by denying public interest standing to the Ecology Action Centre and NB Alliance to apply for judicial review by *certiorari* of the Minister's Environmental Assessment Approval of the highway re-alignment dated April 29, 2021?

The Approval Process under the Environment Act

[10] The proponent of an undertaking with a significant adverse environmental effect must obtain the Minister's approval under Part IV of the *Act*. Under Regulation 3 and Schedule A of the *Environmental Assessment Regulations*, N.S. Reg. 26/1995 as amended, under the *Act*, such projects are designated as either Class I or Class II undertakings.

[11] First, the proponent registers the undertaking with the Department (*Act*, s. 33). The Minister may request an environmental assessment report (s. 34). The Minister releases the report to interested persons and the public for comment and may refer the matter to a review panel (ss. 38-39). Then the Minister decides whether to give environmental approval and whether to impose conditions:

> Powers of the Minister
>
> 40(1) Upon receiving information under Section 34, a focus report under Section 35, an environmental-assessment report under Section 38, a recommendation

> from a review panel under Section 39 or from a referral to alternate dispute 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.

[12] A conditional environmental assessment approval means, but for the mitigative conditions, the undertaking would cause a significant adverse environmental effect. The *Environmental Assessment Regulations* say:

> 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
>
> …
>
> (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;

Regulation 2(1) defines a "significant" effect as an "adverse" environmental effect.

[13] Regulation 27 says, unless the Minister grants a written extension, the proponent "shall within 2 years of the approval [under s. 40 of the *Act*] commence work on the undertaking".

[14] After an environmental assessment approval, the next stage is approval of the industrial undertaking under Part V:

- Without the Minister's approval the activity is prohibited, subject to specified exceptions (*Act*, ss. 50-51).
- The proponent applies for approval (s. 53).
- The Minister may deny approval if, in the Minister's opinion, "it is not in the public interest having regard to the purpose of this Act", the activity "contravenes a policy of the Government or the Department,

whether the location of the proposed activity is unacceptable or adverse effects from the proposed activity are unacceptable" (s. 52).

- The Minister has 60 days to decide unless the Minister notifies the applicant otherwise (s. 54).

- The Minister "may issue or refuse to issue an approval" and "may issue an approval subject to any terms and conditions the Minister considers appropriate to prevent an adverse effect" (s. 56).

[15] The *Act* permits the Minister to delegate the Minister's powers of approval, under Parts IV or V, to an administrator:

> 7 Such administrators and employees as are necessary for the administration of this Act shall be appointed in accordance with the *Civil Service Act*.
>
> …
>
> 17 The Minister may, in writing, delegate to
>
> (a) any employee of the Government or a Government agency …
>
> who has the qualifications and experience, any power or duty conferred or imposed on the Minister pursuant to this Act.
>
> …
>
> 21(1) The Minister may appoint as an administrator a person who has the qualifications and experience to be an administrator for the purpose of all or part of this Act.

[16] The *Act* permits anyone, not just the proponent, to obtain the reasons for a decision by the Minister or administrator under ss. 40 (environmental assessment approval) and ss. 54 and 56 (industrial approval):

> 10(4) Where the Minister, administrator or delegated agent makes a decision under Section 34, 35, 40, 52, 54 or 56, any person who asks for a reason for the decision shall, within thirty days, and subject to the *Freedom of Information and Protection of Privacy Act*, be furnished with a written statement of the decision, setting out the findings of fact upon which it is based and the reasons for the decision.

[17] Section 141 says "nothing in this Act shall be construed so as to repeal, remove or reduce any remedy available to any person under any enactment, at common law or under any Act of Parliament or of a provincial legislature". Hence, the applications in the nature of *certiorari* and *mandamus* in this case.

2014 Approval of the LNG Project Under Part IV

[18] On February 18, 2013, under s. 33 of the *Act*, Pieridae registered the LNG Project as a Class II undertaking. The Department appointed an environmental assessment review panel which performed a Class II assessment. The Department invited public consultation and received comments which included input from the Ecology Action Centre.

[19] Under s. 40(1)(b) of the *Act* and Regulation 13(1)(b), the Minister issued a conditional environmental assessment approval for the LNG Project. The Minister's letter of March 21, 2014, to Pieridae said:

> Following a review of the information provided by Pieridae Energy (Canada) Ltd., and from comments received from agencies and persons that participated in this environmental assessment review, including recommendations provided by the Environmental Assessment Panel, **I have approved the above project with conditions** in accordance with Section 40 of the *Environment Act*, S.N.S. 1994-95 and subsection 26(1) of the Environmental Assessment Regulations, N.S. Reg. 348/2008, made under the *Act*.
>
> This approval is subject to any other approvals required by statute or regulation, including but not limited to, approvals under Part V of the Nova Scotia *Environment Act* (Approvals and Certificates section).
>
> [bolding added]

[20] The Minister's letter attached a list of conditions that included:

> **This approval is subject to the following conditions** and obtaining all other necessary approvals, permits or authorizations required by municipal, provincial and federal acts, regulations and by-laws before commencing work on the Undertaking. It is the responsibility of the Approval Holder to ensure that all such approvals, permits or authorizations are obtained before commencing work on the Undertaking.
>
> …
>
> 2.0 Phase I – Studies, Inventory, Analysis
>
> Prior to application for Part V approval under the *Environment Act* **the Approval Holder must provide for review and approval:**
>
> …
>
> 2.2 **A Greenhouse Gas (GHG) Management Plan.** The plan will include a full accounting of all anticipated GHG emissions based on detailed facility design, explanation of how major technology choices in

> the facility design are best-available technology for GHG mitigation, and demonstration of how the facility achieves an overall carbon intensity in line with best-in-class. The plan will also include details on GHG emissions monitoring and reporting, and ongoing GHG management and abatement practices. The GHG Management Plan must include an independent technical review of GHG analysis and estimates. Following the approval of the initial plan, the Approval Holder will then be required to submit an updated GHG Management Plan on or before March 31 of each year to NSE [Nova Scotia Environment] for approval.
>
> [bolding added]

[21] Article 2 of the conditions also required Pieridae to prepare and submit for approval the following mitigative plans: (1) an Air Emissions Management Plan, (2) modelling to predict the assimilative capacity of all receiving environments for all chemical parameters that would enter the environment as a result of the project activities, (3) a Wetland Management Plan, (4) a plan to mitigate the human health and environmental impacts of abandoned mine openings, contaminated mine tailings and/or soils and sediments on the Project site, (5) an Environmental Monitoring Plan for the Project and (6) a Contingency Plan to address discharges, emissions, escapes, leaks or spills of dangerous waste.

[22] Article 1.3 of the conditions said Pieridae "must, within two years of the date of issuance of this Approval, commence work on the Undertaking unless granted a written extension by the Minister". This reiterated Regulation 27, quoted earlier.

[23] The Minister's Decision of March 21, 2014 was made public. The Ecology Action Centre did not apply for judicial review.

[24] The *Act* permits the Minister to delegate approval powers to an administrator employed by the Department. The Minister appointed Mr. Jeremy Higgins, an Environmental Assessment Officer with the Department, as the administrator for the LNG Project.

[25] The Minister's 2014 conditions left the content of the mitigative plans to Pieridae, subject to approval by the administrator.

[26] Pieridae has not submitted the Greenhouse Gas Management Plan that was required by article 2.2. Any mitigative plans that have been submitted by Pieridae and the terms of any approvals by the administrator are not in evidence. In oral submissions to this Court, the Minister's counsel advised that the information

would be made public with the eventual industrial approval of the LNG Project under Part V of the *Act*.

[27] There has been no approval of the LNG Project under Part V.

2021 Approval of the Highway Re-alignment Under Part IV

[28] On March 10, 2021, under s. 33 of the *Act*, Pieridae registered (*i.e.* submitted to the Department) the highway re-alignment proposal. Pieridae's registration submission said, in the Executive Summary:

> Pieridae Energy (Canada) Limited (Pieridae) is the Proponent of the realignment of approximately 3.5 km of the existing Marine Drive (Highway 316) in Goldboro, Nova Scotia (the Realignment; the Project). The Realignment will convey traffic along an approximately 5.6 km new road segment around the site for the planned Goldboro LNG facility.

[29] The highway re-alignment would disrupt significant wetland and excavate an area formerly used for gold mining. The disruption meant the project was designated as a Class I undertaking under Schedule A, item F -2, of the *Environmental Assessment Regulations*. This designation triggered the requirement for an environmental assessment under Part IV of the *Act*.

[30] The body of Pieridae's submission explained how the highway re-alignment would serve the LNG Project:

> Pieridae is the Proponent of the Goldboro LNG Project, which entails the development and operation of a natural gas liquification plant, an LNG tanker terminal, marine facilities, a power plant, and a freshwater supply pipeline. During construction, the LNG development also requires extensive temporary laydown areas, as well as a temporary work camp for up to 5,000 workers. The proposed development is the reason behind the planned Realignment to provide the LNG facility with unobstructed access to its marine infrastructure and a safe public transport route around the LNG site (Figure 1.3-1). …

[31] Pieridae's registration of the proposal was followed by a public notice and comments from government sources, members of the public and Mi'kmaq representatives.

[32] The texts of the public comments are in evidence. Most were short missives that either objected to the environmental impact or supported the economic impact of the LNG Project.

[33] The Ecology Action Centre and the NB Alliance, with the Sierra Club Canada Foundation, submitted to the Department a detailed "Submission on Environmental Assessment of Realignment of Marine Drive (Highway 316)", dated April 9, 2021. Their submission advanced two distinct contentions that: (1) infrastructure dedicated to the LNG Project should not move forward without the Greenhouse Gas Management Plan, to mitigate adverse climate impact, that was required by the 2014 conditions, and (2) the highway re-alignment posed a direct risk to the environment from toxic contaminants left by historic gold mining in the area.

[34] On this appeal, the question is whether the Ecology Action Centre and NB Alliance would raise a "serious issue". As a resource for the answer, I will quote at length from their submission to the Minister of April 9, 2021.

[35] Their first contention to the Minister was:

> **2.0 Climate Impacts**
>
> Nova Scotia has committed to follow a pathway to net-zero by 2050, which includes interlinking economics and environmental policies. …
>
> The Environmental Assessment conducted for the Pieridae Goldboro project in 2013 estimated that the overall project would increase Nova Scotia's emissions of CO2 by 15% and increase Canada's emissions by 0.5%, based on 2010 emission estimates. The Ecology Action Centre did its own calculations and estimated that the project would increase Nova Scotia's emissions by 18% based on 2010 emission estimates. This is considered a significant adverse effect which cannot be mitigated effectively, and will cancel emission reductions achieved thus far by the Province of Nova Scotia. …
>
> The provincial Environmental Assessment conducted in 2014 left virtually all analysis of climate impacts and associated adverse environmental effects up to the proponent within the requirement to produce a Greenhouse Gas (GHG) Management Plan. Neither the public, nor the Minister, has seen or approved this plan, creating an unacceptable and grossly inadequate response to the climate crisis. Without a concrete and realistic plan, or any determination as to how the plan will enable full compliance with the GHG emission caps, this project simply cannot be permitted to move forward.
>
> Understandably, the larger Goldboro LNG project is not directly within the scope of the current Environmental Assessment regarding highway realignment. However, approval of this related highway project is essential to enable the larger project as currently designed. Each successive component furthers the pathway for the larger project, which combined with incomplete information on the latest

trends of GHG emissions would effectively set emission achievements in Nova Scotia back by half a decade and deepen the climate crisis.

[36] Then the second contention to the Minister:

3.0 Abandoned Gold Mines and Risk to Project, Community and Environment

As noted by the Proponent the Goldboro area is the site of extensive gold mining activity. See Figure 5.1-4. Disruption of these abandoned gold mines, because of old mine openings and toxic mine wastes, poses significant risks to the project, project personnel, adjacent residences and the environment, and is likely to create significant adverse impacts for which no effective mitigation is proposed.

3.1 Inadequate Consideration of Literature and Expertise on Gold Mining in Nova Scotia

University and government experts have compiled an extensive body of work identifying abandoned gold mine shafts and historical gold mining wastes in Nova Scotia, as well as researching the effects of both.

As a result of this research, we have the benefit of knowing the care that needs to be taken when contemplating the disturbance of this historical legacy, and the risk of harm that could ensue if proper care is not taken. [A footnote cites Appendix A to the Submission which attaches excerpts and detailed summary of the research from 14 historical gold mining districts in Nova Scotia.]

This knowledge base has been utilized since 2006 for the purpose of examining potential industrial development in Goldboro; a major centre of this historical gold mining. The expertise of federal and provincial government civil servants played a crucial role in the environmental assessment of the proposed Keltic Petrochemical complex, and then for Goldboro LNG, proposed for the same industrial site.

Nowhere in the current documents for the Road Re-Alignment Environmental Assessment Registration is there any evidence that the same government experts were consulted about how road construction would be impacted by these previously well identified concerns. …

In both the documents and the associated review processes of the earlier Keltic Petrochemical (2007) and Goldboro LNG (2014) Environmental Assessments, safety and contamination transmission risks posed by heavy construction through areas with abandoned gold mining shafts were noted at many points in the processes. Equal attention was paid to assessing the risks of disturbing prolific and dispersed deposits of mining wastes, both known and unknown. …

It is essential that a proponent contemplating the building of a Nova Scotia Department of Transportation and Infrastructure approved road through an area of

historical gold mining wastes and abandoned shafts should base their assessments on the province's digital database, *Nova Scotia Mine Tailings Data Base*. …

If the proponent has not demonstrated in detail how they have used the database to scope out their own investigation of potential hazards, the Minister can have no assurance that the impacts of the project approval have been properly and comprehensively assessed, and is unable to approve the project. And the public has a right to and a need to see this information to enable meaningful, informed comment on the proposal.

3.2 Inadequate Consideration of Safety and Contamination Risks Posed by Mine Shafts and Mine Wastes

The Environmental Assessment Registration materials contain many instances where information is omitted, and is not fully assessed.

There are highly elevated arsenic levels in sediment shown in SED 5 and SED 7 (right of way locations on shown an Figure 5.1-8), especially near Sable Road. … But since there is no evidence that experts in the field were consulted, it is impossible to assess the adequacy and comprehensiveness of soil sampling and whether any reliable conclusions can be drawn from the data that was gathered.

For a comparison of a minimum baseline of assessment required in these conditions, we refer to the consulting field work of Dr. Mike Parsons, Natural Resources Canada, and others for the Keltic Petrochemical Environmental Assessment. They identify and list areas of mine waste tailings, with a table of tailings sample results for arsenic and mercury contamination. …

…

The proponent in the current environmental assessment provided a map of Abandoned Mine Openings (Figure 5.1-4). This map includes AMOs identified on the two earlier plant site environmental assessments, with the addition of "Golder identified" locations. We conclude this to be Golder Associates …

As the Golder analysis is not provided, the Minister and the public were not provided with crucial information that would permit an informed determination as to the environmental effects and risks associated with abandoned mine openings on site. The geotechnical analysis may have included ground penetrating radar. These would be a crucial part of assessing risk, but have not made available such that a decision can be made in respect of this environmental assessment registration. If the work was performed and conclusions drawn, it must be included.

…

We also include pictures of the extensive mine waste rock field where the road right of way crosses Crusher Brook, and which correspond with one of the "Golder Identified" clusters of AMOs. …

At this Crusher Brook ROW crossing there are extensive underground abandoned mine shafts. The mine shafts are flooded and are connected with the watercourse and extensive wetland above. So as well as the already noted construction safety hazard of collapsing tunnels, there is the risk of contaminant transmission through the flooded mine shafts. A risk from both contaminants introduced during construction, and the construction mobilizing mine waste contaminants that presumably have not yet been mapped for this area. The proponent has not noted assessments of these risks or of the searches for evidence of significant deposits of mine wastes.

…

North of that cluster location, encompassing a road right of way length of about 200 metres, three footprints of historical mine buildings are shown on the same map sheet. Tailings deposits with high concentrations of arsenic and mercury are typically found in the immediate vicinity of these buildings.

As noted in the Keltic Petrochemical EA:

> *"Recent investigations by Parsons et al. (2005) just outside the proposed Keltic Site boundaries and at other sites in Nova Scotia have documented high concentrations of mercury (up to 350 mg/kg) and arsenic (up to 31% by weight) in mine wastes."* [Keltic Petrochemical Provincial Environmental Assessment p 8-143, *with the finding of the tailings by field researchers described pp 8 143-145*]

The north tail of the road right of way we refer to immediately above had the same historical gold mining use as the area just off the Goldboro LNG/Keltic site identified by Parsons et al.

The proponent did not note the presence of the old mine structures. Their presence would indicate that soil samples should have been taken for these locations due to the high likelihood of contaminants associated with the workings. …

Given these gaps and lack of analysis, there may well be other locations in the road right of way that also need further investigation. Having no proponent references, we have no way of knowing what protocol, if any, the proponent used to scope out locations in the right of way that might require investigation for AMO and/or mine wastes. …

The proponent has not shown that there is a formal assessment of soil and rock structure stability in the road right of way. This would appear to be an essential safety issue, both during construction and during years of road use, given the known extensive lacing of mine shaft cavities, and the uncertainty of where they are located. …

…

Finally, we see no protocol for identifying locations in the road right of way that might contain toxic gold mining tailing deposits. Nor do we see a protocol for when tailings are found, how to contain them and prevent them from mobilizing

> into the environment; and/or determining if re-locating them is the best course of action.
>
> Given the many unassessed risks and information gaps, the Minister is not in a position to make a decision based on the proponent's materials. Likewise, the public is prevented from making informed comments on what amounts to a partial environmental assessment. The missing and crucial information presents serious environmental risks and other hazards and makes it impossible to assess the adverse impacts of this project.

[37] As support for their second contention, the Ecology Action Centre's and NB Alliance's submission appended a Geological Survey prepared in 2012 by Natural Resources Canada titled "Environmental geochemistry of tailings, sediments and surface waters collected from 14 historical gold mining districts in Nova Scotia".

[38] Mr. Higgins' affidavit attaches the Department's written "Advice to Minister". That document summarized the comments from the public and the suggestions from government sources. It synopsized the Ecology Action Centre/NB Alliance's submissions as follows:

> Comments from the Ecology Action Centre, in a joint submission with Sierra Club of Canada and the New Brunswick Anti-Shale Alliance expressed concerns relating to the Goldboro LNG project in general, as well as the historic mining activity (AMOs) and potential for water quality impacts.

[39] On April 29, 2021, the Minister issued a written Decision giving conditional environmental assessment approval, under Part IV of the *Act*, to the highway realignment. The Decision, addressed to Pieridae, said:

> This is to advise that I have approved the above project in accordance with Section 40 of the Nova Scotia *Environment Act*, S.N.S. 1994-95 and subsection 13(1)(b) of the Environmental Assessment Regulations, N.S. Reg. 348/2008, made under the Act. Following a review of the information provided by Pieridae Energy (Canada) Ltd., and the information provided during the government and public consultation of the environmental assessment, I am satisfied that **any adverse effects or significant environmental effects of the undertaking can be** adequately **mitigated through compliance with the attached terms and conditions**.
>
> This approval is subject to other approvals required by statute or regulation, including but not limited to, approval under Part V of the *Environment Act* (Approvals and Certificates section).
>
> [bolding added]

[40] The Minister's approval attached the conditions. They required Pieridae to prepare and submit to the Department, for review and acceptance, mitigative plans respecting: (1) sulphide bearing material, for areas with potential acid rock drainage concerns; (2) erosion and sedimentation control and surface water management; (3) wetland management and monitoring; (4) groundwater resources, monitoring and management; (5) blasting; (6) saltwater management; (7) wildlife management; (8) dust suppression and air quality management; (9) noise management; (10) archeological and heritage resources; (11) complaint resolution and community liaison; (12) Mi'kmaq communication and (13) contingencies for accidental occurrences.

[41] As with the 2014 conditions, the 2021 conditions left the content of mitigative measures to Pieridae, subject to approval by the administrator.

[42] Neither Pieridae's mitigative plans, if any have been submitted, nor the administrator's terms of approval are in evidence. As noted earlier, according to the Minister's counsel, that information would be made public with the eventual industrial approval of the LNG Project under Part V of the *Act*.

[43] On April 30, 2021, the Ecology Action Centre and NB Alliance wrote to the Minister and requested full reasons as per s. 10(4) of the *Act*:

> Pursuant to subsection 10(4) of the Environment Act, we request that the Minister provide us with a written statement of the Minister's April 29, 2021 decision in the above-captioned matter, setting out the findings of fact upon which it is based and the reasons for the decision.

[44] On May 3, 2021, the Department emailed its response:

> The Minister's written statement of the decision can be found on our website at: https://www.nova scotia.ca/nse/ea/Realignment-of-Marine-Drive-Project/

The linked website displayed the Minister's Decision of April 29, 2021, quoted above, and its conditions that are extracted above.

The Litigation

[45] On July 12, 2021, the Ecology Action Centre and NB Alliance filed a Notice for Judicial Review in the Supreme Court of Nova Scotia. The Notice sought: (1) an order in the nature of *certiorari* to set aside the Minister's Decision of April 29,

2021, and (2) an order in the nature of *mandamus* to direct the Minister to provide fuller reasons further to s. 10(4) of the *Act*.

[46] Pieridae was notified of the Notice of Judicial Review, but did not participate.

[47] On July 21, 2021, the Minister filed a Notice of Participation.

[48] On January 10, 2022, the Minister filed a Notice of Motion for an order that the Ecology Action Centre and NB Alliance lacked standing for the *certiorari* claim. The Notice also sought a ruling that the sufficiency of the Minister's reasons was not justiciable.

[49] On March 2, 2022, Supreme Court Justice Darlene Jamieson heard the Minister's motions. The judge issued a Decision dated April 13, 2022 (2022 NSSC 104). She held the Ecology Action Centre and NB Alliance lacked public interest standing to seek *certiorari* review of the Minister's Decision of April 29, 2021.

[50] Justice Jamieson's Decision (paras. 51-53) referred to *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 45, per Cromwell J. for the Court. Justice Cromwell said someone seeking public interest standing must show that three factors, weighed cumulatively, favour standing. These are that: (1) "there is a serious justiciable issue raised", (2) the plaintiff has a "real stake or genuine interest in it", and (3) the proposed litigation "is a reasonable and effective way to bring the issue before the courts". Justice Cromwell said the court should exercise its discretion "purposively and flexibly" in a "liberal and generous manner". *Downtown Eastside*, paras. 2-3 and 37.

[51] Justice Jamieson applied the *Downtown Eastside* approach as follows:

- **First factor – serious and justiciable issue:** In the motions judge's view, the issue was justiciable, but not "serious":

> [56] The Department concedes that the issue of whether the Minister's Decision was reasonable is capable of being adjudicated and is, therefore, justiciable. … Clearly, there is a justiciable issue; the question is whether it is also serious. I, therefore, turn to the "serious issue" considerations.
>
> [57] As was noted by Brothers J. in *Bancroft v. Nova Scotia (Lands and Forestry)*, 2021 NSSC 234, at para. 125, this serious issue concept has two aspects to it: (1) the judicial review application must have some prospect

of succeeding on the merits, a requirement that is typically readily met, and it must not be premature; and (2) the issue must also be "serious" in the sense that it is of some public importance. …

[58] While the grounds of review raised by the Applicants in relation to the Decision of April 29, 2021, are not frivolous, I have considerable reservations as to whether they constitute a serious issue. First of all, **the application before the court relates to a decision to allow a highway realignment and not a decision to approve the overall LNG Project**. There are no significant constitutional or *Charter* issues at stake in this matter. The validity of the legislation under which the Decision was made is not challenged. This is a challenge to a discretionary decision, alleging:

> failure to provide internally coherent rationale within the context of the legal and factual constraints on the Minister when making his Decision under section 40

and

> failing to properly consider the comments received from the Applicants and other participants during the public consultation process, including comments received from the Applicants concerning greenhouse gas emissions and the risks of carrying out the project in an area already significantly impacted by historical gold-mining activity and contaminated by toxic gold mine tailing deposits.

[59] As the Department points out, **the Minister's Decision was a discretionary one**, made within the terms of his own statute, following an expert review of the submissions from the Project proponents, Federal and Provincial government reviewers, aboriginal groups, and the public at large. While cases involving discretionary decisions of a Minister, reviewable on a reasonableness standard, have been found to raise important issues grounding the granting of public interest standing, this is not such a case. **The reasonableness of the Minister's Decision in the context of this matter is not an issue of sufficient importance**. **Nor are there any broad or significant impacts to the challenged decision.**

…

[62] I am of the view, based on the record before me, that **the Applicants'** actual **primary concern is with the greenhouse gases that will be emitted by the LNG Project**. **The environmental impacts associated with the road realignment itself are of secondary concern**. While, as pointed out by the Applicants, the road realignment is necessary to enable the LNG Project to go forward, it must not be forgotten that **the decision to approve the LNG Project, notwithstanding the associated greenhouse gas emissions, was made in March 2014**. At that time, the Department of Transportation and Infrastructure Renewal planned to

> undertake the necessary road realignment (Higgins affidavit, para. 10). Although the EAC participated in the environmental assessment process, it did not seek judicial review of the Minister's 2014 decision to approve the LNG Project. **Attempting to attack the 2014 decision now**, **seven years later,** via judicial review of the Highway Realignment Project approval, **does not assist these Applicants with the serious issue question**.
>
> …
>
> [67] I am unable to conclude definitively, based on the Record before the court, that the proposed LNG Project will not be moving forward as originally envisioned. However, the evidence before me is **sufficient to raise a question**, and, while certainly not determinative of the serious issue analysis, **it is none the less a consideration**, along with the other items I have listed above.
>
> [68] In conclusion, in assessing all of the above considerations together, **I am not satisfied that the Applicants have raised a serious issue**. …
>
> [bolding added]

- **Second factor - genuine interest:** The Ecology Action Centre has participated in a number of federal and provincial environmental assessments. Justice Jamieson cited the background of the Ecology Action Centre and NB Alliance on environmental issues, and said (paras. 69-76) they have a "genuine interest" in the issue and "are certainly not mere busy bodies".

- **Third Factor – reasonable and effective manner to litigate:** Justice Jamieson held the considerations for this criterion "appear to favour" public interest standing. After citing the items pertaining to this factor, as set out in *Downtown Eastside* (paras. 50-51), she continued:

> [76] In relation to the above criteria for consideration, it would seem that the Applicants have sufficient resources and capacity to undertake this judicial review, as demonstrated through their involvement in other litigation, and they are represented by counsel who have experience with these issues. There are no realistic alternatives to the Applicants bringing the case via judicial review, as was acknowledged by the Department. The Department concedes that pursuant to s. 138(2) of the *Act*, a decision of the Minister to approve or reject an undertaking registered under Part IV of the *Act* may not be appealed to the Supreme Court of Nova Scotia. Therefore, judicial review appears to be the only mechanism for the Applicants to challenge the Minister's Decision.

> [77] The Applicants bring a perspective to the issues which is distinct from those more directly affected, and such perspective is likely to be only brought forward by public interest applicants. There is no indication that any other individuals or groups were interested in, or deliberately refrained from, bringing a similar challenge. The case is of some public interest given the noted submissions during the public comment period of the environmental assessment from the Applicants and other interest groups and individuals.
>
> [78] A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. While these considerations appear to favour granting public interest standing, I will return to them when the factors are weighed cumulatively.

- **Cumulative analysis:** Justice Jamieson held that the absence of a "serious issue" outweighed the positive aspects of the other two factors. Consequently, she ruled the Ecology Action Centre and NB Alliance would not be granted public interest standing. Absent standing, the judge dismissed their application for *certiorari*:

> [79] When assessing all three factors cumulatively and purposively, I cannot conclude that they support granting public interest standing to the Applicants. I accept that climate change and the environmental impacts from natural gas production are important issues, but **this Decision is not about the approval of the LNG Project; it is about a highway realignment.** While the decision to approve the LNG Project arguably has broad or significant impacts, the same cannot be said of the decision to approve the Highway Realignment Project.
>
> [80] Although it is true that this case is of some public interest and the Applicants bring a distinct perspective to the issues which is likely only to be brought forward by public interest litigants, these considerations do not justify the use of court resources to adjudicate **issues that are not sufficiently serious.** While I make no comment on whether public interest standing will ever be granted where the serious issue requirement is clearly not met, I decline to grant it in the specific circumstances of this case. As the Court of Appeal said in *Canadian Elevator Industry Education Program v. Nova Scotia (Elevators and Lifts)*, 2016 NSCA 80:
>
> > In the broadest sense, this is an access to justice issue. Entertaining **marginal cases** plainly compromises access to justice for more meritorious claims. (para. 65)
>
> [bolding added]

[52] On the separate issue of entitlement to reasons, Justice Jamieson held the request was justiciable and, under s. 10(4) of the *Act*, the Ecology Action Centre and NB Alliance had private interest standing to seek fuller reasons. She directed their *mandamus* application would proceed to a merits hearing.

[53] On May 27, 2022, the Ecology Action Centre and NB Alliance filed a Notice of Application for Leave to Appeal and Notice of Appeal to the Court of Appeal. They challenge the judge's ruling that they lacked public interest standing for the application in the nature of *certiorari*. The Department and Minister have not filed a Notice of Cross-Appeal or Notice of Contention. The issues of justiciability and standing for the *mandamus* application are not appealed.

[54] Pieridae has not participated in the appeal though its counsel attended the hearing in this Court as an observer with a watching brief.

Leave to Appeal

[55] Civil Procedure Rule 90.09 requires leave for an interlocutory appeal. The Ecology Action Centre and NB Alliance applied for leave to appeal.

[56] The motions judge dismissed the Ecology Action Centre's and NB Alliance's application for judicial review by *certiorari*. An appeal from a final order that dismisses a claim does not require leave, despite that the notice of motion was interlocutory. See: *Raymond v. Brauer*, 2015 NSCA 37, paras. 17-18, per Beveridge J.A.; *Van de Wiel v. Blaikie*, 2005 NSCA 14, paras. 12-13, per Cromwell J.A.; *Irving Oil Ltd. v. Sydney Engineering Inc.* (1996), 150 N.S.R. (2d) 29 (S.C.A.D.), at paras. 11-12, per Bateman J.A.

[57] Leave to appeal is unnecessary.

Fresh Evidence

[58] At the hearing before the motions judge, Mr. Higgins' affidavit attached a press statement from Pieridae which said: Pieridae has "made the decision to move Goldboro LNG in a new direction"; "[t]he Project's fundamentals remain strong"; but "cost pressures and time constraints due to COVID-19 have made building the current version of the LNG Project impractical"; and Pieridae will "assess our options and analyze strategic alternatives that could make an LNG Project more compatible with the current environment".

[59] Based on this evidence, Justice Jamieson (para. 67) said the possibility the project would not proceed was "a consideration" that assisted her to conclude there was no "serious issue" to be litigated.

[60] In the Court of Appeal, the Ecology Action Centre and NB Alliance tendered an affidavit dated September 27, 2022, by Genevieve Rondeau, a legal assistant with the Appellants' counsel. Ms. Rondeau's affidavit attached five reports from the media to the effect that the LNG project would proceed, though with some alteration to the original format. The Ecology Action Centre and NB Alliance move for the acceptance of this material as fresh evidence.

[61] The Minister opposes the admission of the tendered fresh evidence as hearsay, among other points. Alternatively, if the Ecology Action Centre's and NB Alliance's fresh evidence is admitted, the Minister moves to add a rebuttal affidavit dated October 31, 2022, by Mr. Higgins. Mr. Higgins' affidavit attaches media reports that reflect a pessimistic outlook for the progress of the LNG Project.

[62] Rule 90.47(1) permits the Court of Appeal to admit fresh evidence on "special grounds". The test for special grounds derives from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Admission is governed by: (1) whether there was due diligence to offer the evidence at the initial hearing, (2) relevance of the fresh evidence, (3) credibility of the fresh evidence and (4) whether the fresh evidence could reasonably have affected the outcome. Further, the fresh evidence must be in admissible form. The last point is a subset of the fourth – *i.e.* inadmissible evidence cannot affect the outcome. *Armoyan v. Armoyan*, 2013 NSCA 99, para. 131, leave to appeal denied February 6, 2014 (S.C.C.).

[63] Subject to one exception, I would dismiss both the Ecology Action Centre's and NB Alliance's' motion and the Minister's counter-motion, for two reasons:

- The fresh evidence is irrelevant under *Palmer*'s second test. Mootness is not an issue. Pieridae's applications for the highway re-alignment and for the LNG Project are not withdrawn, remain intact, and have unrevoked ministerial approval under Part IV of the *Act*. If mootness is to be an issue, then the Minister should plead it, and the parties and judge should address the tests for mootness. The Minister's factum (para. 70) acknowledges "mootness was not before the motions judge". Neither the parties nor the judge cited the tests for mootness from *Borowski v. Canada (Attorney*

General), [1989] 1 S.C.R. 342, at 353 or later authorities. I will re-visit this point later (paras. 98-100).

- The motion and cross-motion would submit the media statements for truth of their contents. Unless it is admitted for an exceptional reason, hearsay on a disputed fact is not in admissible form. Inadmissible evidence cannot affect the outcome under *Palmer*'s fourth test. Here, there is no exceptional reason to receive hearsay on this contested fact. Pieridae's evidence is accessible: Pieridae filed the application to the Minister, received the Minister's decision, had notice of the judicial proceedings to challenge it, and its counsel attended the Court of Appeal hearing. Either party could submit an affidavit from a Pieridae deponent or subpoena a Pieridae witness to speak of Pieridae's intention from personal knowledge and respond to cross-examination.

[64] The exception is this. Paragraph 19 of Mr. Higgins' affidavit of October 31, 2022 lists the plans that Pieridae was required to submit by the conditions of the Minister's 2014 and 2021 Decisions, states whether or not each plan has been submitted and, if submitted, whether or not the plan has been approved. Neither the contents of any plan nor the terms of any approval are set out in the Affidavit. Nonetheless, the information in para. 19 is useful for the analysis of the issues on appeal, as I will discuss. I would admit Mr. Higgins' para. 19 as fresh evidence.

Issue

[65] Did the judge err, under the standard of review, by ruling that the Ecology Action Centre and NB Alliance lacked public interest standing to seek judicial review, in the nature of *certiorari*, of the Minister's Decision of April 29, 2021?

Standard of Review

[66] Whether a judge should grant public interest standing is discretionary and attracts deference on appeal: *Downtown Eastside*, para. 20; *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27, para. 79. However, the mischaracterization of the legal tests, in their definition or application, is an extractable legal error that is reviewable for correctness: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paras. 26-28, 30-34, 36.

[67] The Supreme Court of Canada has held that an initial denial of public interest standing by a judge or tribunal may be overturned on appeal if, in the application of the tests, the judge or tribunal mischaracterized the legal principles:

- The judge at first instance must assess and cumulatively weigh the factors "in light of the underlying purposes of limiting standing" and "in a flexible and generous manner that best serves those underlying purposes". As the chambers judge in *Downtown Eastside* did not do so, "these three concerns identified by the chambers judge were not entitled to the decisive weight which he gave them". *Downtown Eastside*, paras. 20 and 72. See also paras. 21, 23, 26-30, 42, 52-53, 56, 60, 67 and 76 for the application of that standard.

- The denial of public interest standing by the tribunal at first instance was overturned because the tribunal did not apply the required "flexible, discretionary approach", which Chief Justice McLachlin, for the majority, described as follows:

> The whole point is for the court to use its discretion, where appropriate, to allow more plaintiffs through the door.

Delta Air Lines Inc. v. Lukacs, [2018] 1 S.C.R. 6, paras. 16 and 18.

- The judge at first instance must weigh the factors "in light of the underlying purposes of limiting standing … applied in a flexible and generous manner that best serves those underlying purposes" [following *Downtown Eastside*], and also in light of "the purposes that justify *granting* standing" [Chief Justice Wagner's italics]. As the chambers judge had not done so, "it was not open to the chambers judge to afford these concerns the decisive weight he did." *Council of Canadians with Disabilities*, paras. 28-30 and 87. See also paras. 37-40, 48-50, 59, 79, 82-83, 85, 88-94 and 96-97 for the application of that standard.

Public Interest Standing – Legal Principles

[68] In *Downtown Eastside*, Justice Cromwell set out the test:

> [1] … The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out

> the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government. *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.
>
> [2] In exercising their discretion with respect to standing, the **courts weigh three factors in light of these underlying purposes and of the particular circumstances.** The courts consider whether the case raises a **serious justiciable issue**, whether the party bringing the action has a **real stake or a genuine interest** in its outcome and whether, having regard to a number of factors, the proposed suit is **a reasonable and effective means to bring the case to court:** *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 253. **The courts exercise this discretion** to grant or refuse standing **in a "liberal and generous manner"** (p. 253).
>
> [3] … The appeal raises one main question: whether the three factors which courts are to consider in deciding the standing issue are to be treated as a rigid checklist or as considerations to be taken into account and **weighed in exercising judicial discretion in a way that serves the underlying purposes of the law of standing**. In my view, **the latter approach is the right one**. ….
>
> [bolding added]

[69] Ten years later, in *Council of Canadians with Disabilities*, Chief Justice Wagner for the Court reiterated and expanded on the purposes and principles that inform *Downtown Eastside*'s three factors:

> [29] In *Downtown Eastside*, this Court explained that each factor is to be "weighed … in light of the underlying purposes of limiting standing and applied in a **flexible and generous manner that best serves those underlying purposes"** (para. 20). **These purposes are threefold**: (i) efficiently allocating scarce judicial resources and screening out "busybody" litigants; (ii) ensuring that courts have the benefit of the contending points of view of those most directly affected by the issues; and (iii) ensuring that courts play their proper role within our democratic system of government (para. 1).
>
> [30] **Courts must also consider the purposes that justify *granting*** [Chief Justice Wagner's italics] **standing** in their analyses (*Downtown Eastside*, at paras. 20, 23, 36, 39-43, 49-50 and 76). **These purposes are twofold**: (i) giving effect to the principle of legality and (ii) ensuring access to the courts, or more broadly, access to justice (paras. 20, 39-43 and 49). The goal, in every case, is to strike a

meaningful balance between the purposes that favour granting standing and those that favour limiting it (para. 23).

[31] *Downtown Eastside* remains the governing authority. Courts should strive to balance *all* [Chief Justice Wagner's italics] of the purposes in light of the circumstances and the "wise application of judicial discretion" (para. 21). It follows **that they should not, as a general rule, attach "particular weight" to any one purpose,** including legality and access to justice. Legality and access to justice are important – indeed they played a pivotal role in the development of public interest standing – but they are two of many concerns that inform the *Downtown Eastside* analysis.

[32] To demonstrate this, I will define legality and access to justice, review their role in the development of public interest standing, and situate them in the *Downtown Eastside* framework. …

(1) Defining the Legality Principle and Access to Justice

[33] The legality principle encompasses two ideas: (i) state action must conform to the law and (ii) there must be practical and effective ways to challenge the legality of state action (*Downtown Eastside*, at para. 31). Legality derives from the rule of law: "[i]f people cannot challenge government actions in court, individuals cannot hold the state to account – the government will be, or be seen to be, above the law" (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 40.

[34] Access to justice, like legality, is "fundamental to the rule of law" (*Trial Lawyers*, at para. 39). As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230).

[bolding added]

[70] This appeal focuses on whether there is a "serious issue" under the first factor.

[71] In *Downtown Eastside*, Justice Cromwell elaborated on the meaning of "serious issue":

(a) Serious Justiciable Issue

[39] This factor relates to two concerns underlying the traditional restrictions on standing. In *Finlay*, Le Dain J. linked the justiciability of an issue to the "concern about the proper role of the courts and their constitutional relationship to the other branches of government" and the "seriousness of the issue to the concern about allocation of scarce judicial resources [citation omitted].

…

> [41] This factor also reflects the concern about overburdening the courts with the "**unnecessary proliferation of marginal or redundant suits" and the need to screen out the mere busybody**: *Canadian Council of Churches*, at p. 252; *Finlay*, at pp. 631-33. As discussed earlier, **these concerns can be overplayed and must be assessed practically in light of the particular circumstances** rather than abstractly and hypothetically. Other possible means of guarding against these dangers should also be considered.
>
> [42] To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil* [*Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265], at p. 268) or **an "important one**" (*Borowski*, at p. 589). The claim must be **"far from frivolous"** (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel's* [*Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 365], Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a **"foregone conclusion"** (p. 690). He reached this position in spite of the fact that the Court had seven years earlier decided that the same Act was constitutional: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Major J. held that he was "prepared to assume that the numerous amendments have sufficiently altered the Act in the seven years since *Edwards Books* so that the Act's validity is no longer a foregone conclusion" (*Hy and Zel's*, at p. 690). In *Canadian Council of Churches*, the Court had many reservations about the nature of the purported action, but in the end accepted that "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation" (p. 254). **Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing issue.**
>
> [bolding added]

[72] Later, Justice Cromwell illustrated how the "serious issue" factor weighed in the cumulative analysis:

> (6) Weighing the Three Factors
>
> …
>
> (a) *Serious Justiciable issue*
>
> [54] As noted, with one exception, there is no dispute that the respondents' action raises serious and justiciable issues. …
>
> [55] The appellant submits, however, that the respondents' action does not disclose a serious issue with respect to the constitutionality of s. 213(1)(c) (formerly s. 195.1(1)(c)) because the Court has upheld that provision in

> *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, and *R. v. Skinner*, [1990] 1 S.C.R. 1235.
>
> [56] On this point, I completely agree with the learned chambers judge. He held that, in the circumstances of this broad and multi-faceted challenge, it is not necessary for the purposes of deciding the standing issue to resolve whether the principles of *stare decisis* permit the respondents to raise this particular aspect of their much broader claim. A more pragmatic approach is to say, as did Cory J. in *Canadian Council of Churches* and the chambers judge in this case, that some aspects of the statement of claim raise serious issues as to the invalidity of the legislation. **Where there are aspects of the claim that clearly raise serious justiciable issues, it is better for the purposes of the standing analysis not to get into a detailed screening of the merits of discrete and particular aspects of the claim. They can be assessed using other appropriate procedural vehicles.**
>
> [bolding added]

[73] In *Council of Canadians with Disabilities*, Chief Justice Wagner summarized "seriousness":

> (b) *Serious Justiciable Issue*
>
> [48] … Seriousness, by contrast, addresses the concern about the allocation of scarce judicial resources and **the need to screen out the "mere busybody".** This factor also broadly promotes access to justice by ensuring that judicial resources remain available to those who need them most (see, e.g., *Trial Lawyers*, at para. 47.).
>
> [49] A serious issue will arise when the question raised is **"far from frivolous"** (*Downtown Eastside*, at para. 42, citing *Finlay*, at p. 633). Courts should assess a claim in a "preliminary manner" to determine whether "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation" (*Downtown Eastside*, at para. 42, citing *Canadian Council of Churches*, at p. 254). **Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually be unnecessary to minutely examine every pleaded claim to assess standing** (*Downtown Eastside*, at para. 42).
>
> [bolding added]

[74] In *Canadian Elevator Industry Education Program v. Nova Scotia (Elevators and Lifts)*, 2016 NSCA 80, at para. 65, Justice Bryson said "marginal cases" were insufficiently serious for public interest standing. Justice Jamieson's Decision, para. 80, adopted this passage.

Application of the Principles

[75] The Ecology Action Centre's and NB Alliance's submission to the Minister made two contentions respecting (1) climate impact and (2) risk to the environment from former gold mining contaminants. These are quoted above (paras. 35-36). The motions judge said neither was "serious" and denied public interest standing. In my respectful view, the analysis of the judge for each contention demonstrates an error in principle, for the following reasons.

First Contention – Climate Impact

[76] Justice Jamieson said (para. 62) "the decision to approve the LNG Project, notwithstanding the greenhouse gas emissions, was made in March 2014" and "[a]ttempting to attack the 2014 decision now, seven years later, via judicial review of the Highway Realignment Project approval, does not assist these Applicants with the serious issue question". The judge did not cite issue estoppel or its criteria. Nor was issue estoppel cited to the judge in argument. Nonetheless, she effectively treated the Ecology Action Centre's and NB Alliance's 2021 submission as subject to issue estoppel by the Minister's 2014 Decision.

[77] Issue estoppel involves a two-step analysis. It applies when:

> (1) the "same question" has been "distinctly put in issue and directly determined" by an earlier final "judicial" decision between the same parties or their privies (a "judicial" decision may include a decision by an administrative decision-maker who is required to act judicially); and
>
> (2) the court declines to exercise its residual discretion to consider the issue in the interests of justice.

Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, at paras. 24-25, 33, 35-42, 54-60, 62-67, per Binnie J. for the Court.

[78] I will leave aside the questions of whether the Minister's 2014 Decision is "judicial" and whether there is a basis to exercise the residual discretion. Issue estoppel does not apply because the Ecology Action Centre's and NB Alliance's 2021 submission did not raise the "same question" that was determined in 2014.

[79] The contention in the Ecology Action Centre's and NB Alliance's 2021 submission to the Minister was: (1) the 2014 Approval "left virtually all analysis of

climate impacts … up to the proponent within the requirement to produce a Greenhouse Gas (GHG) Management Plan", (2) "[n]either the public, nor the Minister, has seen or approved this plan", and (3) "[w]ithout a concrete and realistic plan, or any determination as to how the plan will enable full compliance with the GHG emission caps, this project simply cannot be permitted to move forward" (full passage quoted above, para. 35). The Ecology Action Centre's and NB Alliance's brief to the motions judge (paras. 15 and 46) cited their submission to the Minister as a platform for the proposed judicial review.

[80] The 2021 contention did not "attack" the 2014 Decision, as the motions judge characterized it. Rather, it relied on the 2014 Decision. The point was that one of the 2014 Decision's mandatory conditions had not been met and, absent the fulfillment of that condition, the construction of permanent capital infrastructure dedicated to the LNG Project would be inconsistent with the 2014 Decision. That contention does not generate an issue estoppel by the 2014 Decision. It suggests an interpretation of the 2014 Decision, and the main question will be whether that interpretation is correct.

[81] Is the contention frivolous or marginal, and is its failure a foregone conclusion? Pertaining to this contention are the following:

- The 2014 Decision said the Approval was "subject to" the conditions, including, in article 2.0, that Pieridae "must provide for review and approval … A Greenhouse Gas (GHG) Management Plan" with a "full accounting of all anticipated GHG emissions … and demonstration of how the facility achieves an overall carbon intensity in line with best-in-class" and "an independent technical review" (article 2.2).

- Article 2.0 says the Greenhouse Gas Management Plan must be submitted "[p]rior to application for Part V approval". Part V approval would precede construction of the permanent infrastructure for the LNG Project.

- Further to article 1.3 of the 2014 conditions and Regulation 27 of the *Environmental Assessment Regulations*, work on the undertaking was to commence within two years of the approval, *i.e.* by March 21, 2016, unless the Minister approved an extension in writing. There is no evidence of a ministerial written extension.

- Stringing this together, the Ecology Action Centre and NB Alliance would contend the 2014 Decision and conditions reasonably showed an

> intent that the Greenhouse Gas Management Plan was to be submitted and approved by March 21, 2016, as a basis for later activity on the LNG Project.
>
> - However, by 2021, there was no Greenhouse Gas Management Plan, either submitted by Pieridae or approved by the Minister or administrator.
>
> - Yet, in 2021, the Minister gave environmental approval to permanent infrastructure (the highway re-alignment) dedicated to the LNG Project.

[82] On the judicial review, the Ecology Action Centre and NB Alliance would contend that the Minister's 2021 Decision was inconsistent with the 2014 Decision, and would offend the reasonableness standard, as explained in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653.

[83] I am merely reciting the proposition to assess its "seriousness". Nothing in my reasons should be taken as commenting on ultimate merit, which is for the reviewing judge. All that need be said now is that, under the formulations of the "serious issue" test for public interest standing, the contention is "far from frivolous", not "marginal" and its failure is not a "foregone conclusion". Further, the concern about climate change is sufficiently "important" for public interest standing. On the latter point see *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, paras. 2, 7 and 12.

[84] As the motions judge's reasons mistook the matter of issue estoppel, her analysis did not address the Ecology Action Centre's and NB Alliance's submission to the Minister. This was an error of legal principle.

Second Contention – Contaminants

[85] The Ecology Action Centre's and NB Alliance's submission to the Minister on this point is quoted earlier (para. 36). The motions judge held it was not "serious" for several reasons. I will address each.

[86] **First – "Highway re-alignment":** Justice Jamieson said:

> [58] While the grounds of review raised by the Applicants in relation to the Decision of April 29, 2021, are not frivolous, I have considerable reservations as to whether they constitute a serious issue. First of all, the application before the court **relates to a decision to allow a highway realignment** and not a decision to approve the overall LNG project.

> [59] As the Department points out, the Minister's Decision was a discretionary one, made within the terms of his own statute, following an expert review of the submissions from Project proponents, Federal and Provincial government reviewers, aboriginal groups, and the public at large. While cases involving discretionary decisions of a Minister, reviewable on a reasonableness standard, have been found to raise important issues grounding the granting of public interest standing, **this is not such a case**. The reasonableness of the Minster's Decision in the context of this matter is **not an issue of sufficient importance.**
>
> …
>
> [79] … I accept that climate change and the environmental impacts from natural gas production are important issues, but the Decision is not about the approval of the LNG project; **it is about a highway realignment.** …
>
> [bolding added]

[87] The judge held the issue was not serious because it involved only a highway re-alignment, not climate change.

[88] With respect, the 2021 Decision involves a highway re-alignment just as the 2014 Decision involved construction work in an industrial park. In neither case is the location or architecture the relevant target of analysis. We are dealing with the *Environment Act*. The focus should be on the environmental effect.

[89] **Second – "Secondary concern":** Addressing the environmental effect, the motions judge said:

> …
>
> 62 … the Applicants primary concern is with the greenhouse gases that will be emitted by the LNG Project. The environmental impacts associated with the road realignment itself are of **secondary concern**.
>
> [bolding added]

[90] Whether a submission may be triaged as subjectively primary or secondary to the applicant is irrelevant to the applicant's standing. The applicant is entitled to advance more than one submission and have each analyzed before standing is denied. The question, for either submission, is whether the potential environmental effect is "serious", as that term was explained in *Downtown Eastside* and *Council of Canadians with Disabilities*.

[91] **Third – Assessment of the actual submission:** In *Downtown Eastside*, para. 41, Justice Cromwell cautioned that the concern about "marginal or

redundant suits … can be overplayed" and "must be assessed practically in light of the particular circumstances rather than abstractly and hypothetically".

[92] The Ecology Action Centre's and NB Alliance's submission to the Minister explained in detail, with supporting material, that disturbance of soils in this area of abandoned gold mines posed significant risks from toxic mine wastes and tailings and elevated arsenic and mercury levels (above, para. 36). The Department's "Advice to Minister" compressed the submission into one generic sentence (above, para. 38). The Ecology Action Centre's and NB Alliance's brief to the motions judge (para. 46) cited their submissions to the Minister and said the judicial review would consider whether the Minister, as decision maker, sufficiently addressed their submissions under *Vavilov*'s criteria. *Vavilov*, paras. 127-28, explained how reasons are to address the submissions.

[93] The motions judge's analysis did not address the Ecology Action Centre's and NB Alliance's submission to the Minister, except to say it related to a highway re-alignment and was secondary to climate change.

[94] The denial of public interest standing because the standing-applicant's proposed contentions are not "serious" requires a practical assessment of the contentions. A peremptory disposition does not suffice. With respect, that assessment is absent from the motions judge's reasons.

[95] **Fourth – Statutory benchmarks:** The judicial review would apply the reasonableness standard. *Vavilov* discussed the factors that may assist the determination of whether an administrative decision is, or is not reasonable. The majority's ruling said the "most salient" factor is "the governing statutory scheme":

> [106] … However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely: the governing statutory scheme; …
>
> …
>
> (a) *Governing Statutory Scheme*
>
> [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. …
>
> …

> [110] … What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. …

[96] In our case, the scheme of the *Environment Act* offers a qualitative appraisal of "seriousness":

- Section 2 states the *Act*'s purposes as including "maintaining environmental protection as essential to the integrity of ecosystems, human health and socio-economic well-being of society" among other broad objectives. Clearly the statute's purposive ambit extends beyond neighbourhood nuisances. The *Environmental Assessment Regulations* implement those purposes.

- According to Regulations 3 and 11 and Schedule A (Class I - item F 2), the highway re-alignment, if unmitigated, would cause what Reg. 13(1)(b) terms as "adverse" and "significant environmental effects". Regulation 2(1) defines "significant" as an "adverse" effect resulting from the effect's magnitude, geographic extent, duration, frequency, degree of reversibility or possibility of occurrence.

- The Minister's Decision of April 29, 2021 prescribed conditions to mitigate those significant adverse effects. Of course, the Minister's statutory discretion affects the application of reasonableness. But, as the majority noted in *Vavilov* (para. 108), "there is no such thing as absolute and untrammelled 'discretion' ", and "any exercise of discretion must accord with the purposes for which it was given". The judicial review would consider whether the mitigative measures were reasonably consistent, under *Vavilov*'s approach to reasonableness, with the *Environment Act*'s purpose to mitigate significant adverse environmental effects.

[97] The designation of the highway re-alignment as having a "significant" and "adverse" environmental effect informs the assessment of "seriousness". The motions judge's analysis does not mention the statutory benchmark.

Potential Mootness as a "Consideration"

[98] At the hearing in the Supreme Court, Mr. Higgins' affidavit attached a press statement of July 2, 2021 from Pieridae. The statement included:

> While Pieridae has made tremendous progress in advancing the Goldboro LNG Project, as of June 30, 2021, we have not been able to meet all the key conditions necessary to make a final investment decision. Following consultation with our Board, we have made the decision to move Goldboro LNG in a new direction. The Project's fundamentals remain strong; robust LNG demand from Europe and high global LNG prices, Indigenous participation, a net-zero emissions pathway forward, and support from jurisdictions across Canada. This speaks to our ongoing efforts to find a partner to take advantage of these opportunities.
>
> That said, it became apparent that cost pressures and time constraints due to COVID-19 have made building the current version of the LNG Project impractical.
>
> We will now assess our options and analyze strategic alternatives that could make an LNG Project more compatible with the current environment. …

[99] Justice Jamieson (para. 64) cited the Minister's proposition that the matter was "potentially … moot". As referenced earlier, the judge said Pieridae's press statement was "sufficient to raise a question", which was "a consideration" in her ruling that there was no "serious issue". For convenience, I restate her finding:

> [67] I am unable to conclude definitively, based on the Record before the court, that the proposed LNG Project will not be moving forward as originally envisioned. However, the evidence before me is sufficient to raise a question, and, while certainly not determinative of the serious issue analysis**, it is none the less a consideration**, along with the other items I have listed above.
>
> [68] In conclusion, **in assessing all of the above considerations** together, I am not satisfied that the Applicants have raised a serious issue. …
>
> [bolding added]

[100] With respect, to treat this as a negative consideration was an error in principle, for the following reasons:

- In April 2021, on Pieidae's application, the Minister gave environmental assessment approval of the highway re-alignment. Pieridae has not withdrawn its application and the Minister has not revoked the approval. For judicial purposes, the issue is alive. There is no doctrine of "potential mootness".

- Mootness was not before the motions judge. The Minister's factum to this Court (para. 70) acknowledges:

  > The issue of mootness was also not before the Motions Judge and therefore the Respondents submit that she was never asked or required to

> carry out a mootness analysis pursuant to the decision in *Borowski v. Canada (Attorney General)*, [1989] S.C.R. 342. …

- If mootness is to be an issue, the Minster should plead it. The "blunt instrument of standing denial" should not replace other well-established litigation strategies: *Downtown Eastside*, para. 64; *Council of Canadians with Disabilities*, para. 73.

- Then the Minister should support this pleading with admissible evidence. That means an affidavit or oral testimony, by subpoena if necessary, from a Pieridae witness who could speak from personal knowledge and be cross-examined. It does not mean unsworn evidence from Pieridae, exhibited as untestable hearsay to the affidavit of the Department's Mr. Higgins, immunizing it from meaningful cross-examination.

- Finally, if mootness is to be a consideration, the judge's reasons should apply the tests for mootness. The judge's reasons did not cite the layered tests from *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at 353, *Doucet-Boudreau v. Nova Scotia (Department of Education)*, [2003] 3 S.C.R. 3, paras. 17-23, or any other authority on mootness.

Sufficiency of Reasons as a "Serious" issue

[101] Section 10(4) of the *Environment Act* says:

> 10(4) Where the Minister, administrator or delegated agent makes a decision under Section 34, 35, 40, 52, 54 or 56, any person who asks for a reason for the decision shall, within thirty days, and subject to the *Freedom of Information and Protection of Privacy Act*, be furnished with a written statement of the decision, setting out the findings of fact upon which it is based and the reasons for the decision.

[102] Literally, this requirement applies to a decision by the Minister or by an administrator as the Minister's delegate. It applies to decisions under s. 40, including an approval of Pieridae's mitigative plans according to the conditions of the Minister's 2014 Decision or 2021 Decision, both issued under s. 40. The words "any person" include the Ecology Action Centre and NB Alliance.

[103] The broad scope of section 10(4) affirms that the environment is a matter of general public interest. This follows also from s. 2, stating the *Act*'s purpose as including "maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society".

[104] The Minister's 2014 and 2021 Decisions left the terms of any mitigative measures to Pieridae, subject to approval by the administrator. The terms or contents of those plans and approvals are not in evidence. As I have mentioned, the Minister's counsel informed the Court that the information would become publicly available with the Minister's eventual industrial approval under Part V of the *Act*. However, by then, the LNG Project would have moved past Part IV's environmental assessment, which generated the requirement for the mitigative plans, to be overtaken by the Minister's industrial approval.

[105] The Ecology Action Centre and NB Alliance submit that the Minister's reasons are inadequate and that itself is a serious issue worthy of public interest standing. They cite *Vavilov*, where the majority explained how the decision maker's reasons are instrumental to the application of reasonableness standard (*Vavilov*, paras. 79-81, 84-86, 95, 102 and 127). They say it makes no sense to send their motion for fuller reasons to a merits hearing while dismissing their underlying application for judicial review, to which the fuller reasons would pertain.

[106] Citing s. 10(4), the Ecology Action Centre and NB Alliance applied for fuller reasons. The Department declined. The adequacy of the Minister's reasons will be litigated in the upcoming *mandamus* hearing. I prefer not to make a comment that might influence the merits judge on that application.

[107] For this appeal, it is unnecessary to address the adequacy of the Minister's reasons. As I have discussed, the Ecology Action Centre's and NB Alliance's two contentions, on climate change and contaminants, are each "serious". As I will discuss next, that suffices for public interest standing. An application for standing is not a motion to strike pleadings or for summary judgment. It need not assess every pleaded argument. Nor does it pre-empt other procedural mechanisms to screen discrete issues or the merits judge's function to rule on each argument raised. See *Downtown Eastside,* paras. 42 and 56 and *Council of Canadians with Disabilities*, para. 49.

Re-assessment of Public Interest Standing

[108] Once an appeal court determines that the motions judge erred in principle, that appeal court should re-assess and cumulatively weigh the three factors purposively and determine whether the error was material or overriding: *Council of Canadians with Disabilities*, paras. 95-97; *Downtown Eastside*, para. 53.

[109] Under the first factor, the issues on judicial review are justiciable. The exercise of a Minister's statutory discretion is reviewable for reasonableness as explained in *Vavilov*, paras. 88-90 and 108-110.

[110] Still with the first factor, the two issues raised by the Ecology Action Centre and NB Alliance are "serious". For the reasons I have expressed, the Ecology Action Centre's and NB Alliance's contentions on climate change and contaminants are far from frivolous, not marginal, their failure is not a foregone conclusion and their importance is worthy of a merits analysis.

[111] The motions judge held *Downtown Eastside*'s second and third factors favoured standing. I adopt her views:

- The Ecology Action Centre and NB Alliance are not "busybodies". Their affidavits show a significant track record and a genuine interest, on behalf of their thousands of members, in the environmental issues at play.

- This judicial review is a reasonable and effective way to litigate the matter. The Ecology Action Centre and NB Alliance have the resources and capacity, with experienced counsel, to assist the court. The court will hear an opposing view. As Justice Jamieson said (para. 76), "there are no realistic alternatives to the Applicants bringing the case via judicial review, as was acknowledged by the Department".

[112] Each of *Downtown Eastside*'s three factors, analyzed in tandem with the underlying purposes for and against standing as explained by Justice Cromwell and Chief Justice Wagner, supports public interest standing. Consequently, so does the cumulative weighing.

[113] It follows that the motions judge's treatment of the "serious issue" criterion as a decisive negative factor was an overriding or material error (*Council of Canadians with Disabilities*, para. 96).

Conclusion

[114] I would admit Mr. Higgins' para. 19, but otherwise dismiss the motion and counter-motion to admit fresh evidence.

[115] I would allow the appeal and order that the Ecology Action Centre and New Brunswick Anti-Shale Gas Alliance Inc. have public interest standing to seek judicial review, in the nature of *certiorari*, of the Minister of Environment and

Climate Change's environmental assessment approval of the highway re-alignment, dated April 29, 2021, under Part IV of the *Environment Act*.

[116] Justice Jamieson's Order recites that the parties agreed they would bear their own costs of the proceeding in the Supreme Court of Nova Scotia. I would not disturb that outcome. In this Court, the parties sought costs from each other. I would order the Respondents to pay a single amount of $2,500 for both Appellants jointly, all inclusive, as costs of the appeal.

Fichaud, J.A.

Concurred: Wood, C.J.N.S.

Van den Eynden, J.A.