SUPREME COURT OF NOVA SCOTIA

Citation: *3266304 Nova Scotia Ltd. v. Nova Scotia (Environment)*, 2016 NSSC 353

Date: 20161230
Docket: Hfx No. 445759
Registry: Halifax

Between:

3266304 Nova Scotia Limited

Appellant

v.

Minister of the Environment Representing
Her Majesty the Queen in Right of Nova Scotia

Respondent

DECISION

Judge: The Honourable Justice Glen G. McDougall

Heard: June 9, 2016, in Halifax, Nova Scotia

Written Decision: December 30, 2016

Counsel: Richard John Melanson, for the Appellant (Justin E. Adams, for the Appellant by Notice of New Counsel dated August 26, 2016 and filed on September 15, 2016)
Alison Winona Campbell, for the Respondent

By the Court (McDougall, J.):

Introduction

[1] On May 7, 2013, the appellant applied for an industrial approval to operate a quarry in Brooklyn, Nova Scotia. After reviewing the application, Nova Scotia Environment ("the Department") directed the appellant to complete a public consultation process.

[2] During the consultation process, members of the public expressed concern about the potential effect of the quarry on the water supply and quality of water. The Department requested additional information from the appellant to address these concerns and set a deadline of October 15, 2013. The appellant requested an extension to the deadline, which was granted. When the information was provided and reviewed, the Department determined that further information was required.

[3] This back and forth between the parties continued – with the appellant requesting and receiving several more extensions of time to provide additional information – until August 6, 2015. At that time, the Department advised the appellant that its latest request for an extension was denied, and, as a result, the approval application was rejected on the grounds that it was incomplete.

[4] The appellant appealed the Department's decision to the Minister of Environment, pursuant to s. 137 of the *Environment Act*, S.N.S. 1995 c. 1, without success. The appellant now appeals the Minister's decision to dismiss the s. 137 appeal to this court.

Background

[5] The government of Nova Scotia regulates industrial operations in the province. In order to operate an industrial activity, like a quarry, the proponent must first obtain an industrial approval from Nova Scotia Environment. Quarries that are four hectares or more in size must undergo an environmental assessment. For the purposes of the *Environmental Assessment Regulations*, the active area of a quarry includes roadways constructed solely for the operation of the quarry.

[6] Gerard Pothier is the sole director and officer of the appellant. Michael Lowe is the majority shareholder. On May 7, 2013, the appellant applied for an approval to operate a quarry in Annapolis County. The proposed size of the quarry was 3.9 hectares. Department staff conducted an initial review of the application and notified the appellant that a public consultation was required.

[7] On June 5 and June 20, 2013, Kathryn MacLeod, an Engineer with the Department, visited the proposed quarry site. The survey plan accompanying the application showed an existing road leading up to the location of the quarry. Ms. MacLeod observed that this road started as a shared driveway, then disappeared into pasture land. There were indications that parts of the road had been used by all-terrain vehicles. It was determined that the road was originally put in to facilitate the installation of piping for two spring-fed wells. According to the survey, the driveway for the quarry would extend off of this road.

[8] On August 6, 2013, Ms. MacLeod e-mailed Steve Sanford, a colleague, about her concern that the quarry site may require an environmental assessment. She explained that the Department's initial review suggested that the road would not be included in the quarry footprint because it was previously existing and would also be used for the purpose of accessing the wells. She noted, however, that work would need to be done in order to make the road accessible for quarry traffic. Her concerns arose when Department staff met with residents of the area and were advised that the entrance off of the highway had been relocated and would not be connected to the existing road. Ms. MacLeod asked Mr. Sanford for comment from an environmental assessment standpoint in light of this new information.

[9] In his response, Mr. Sanford stated that he was not certain from Ms. MacLeod's e-mail whether a new or existing road was being proposed but if a new road was being constructed solely for the quarry he would consider the road part of the quarry size.

[10] On August 9, 2013, the appellant submitted the results of the public consultation to the Department. The consultation revealed that members of the community were concerned about the effect the potential quarry would have on water sources and the quality of the water. They also raised concerns about the effects of dust, or contaminated particulate matter, that may result from blasting, crushing, or truck traffic.

[11] On August 26, 2013, the Department sent a letter to the appellant requesting the following additional information:

a) Identification of any contaminants of concern;

b) Details of local geologic and hydrogeological conditions;

c) Identification of groundwater users;

d) Surface water investigation;

e) A groundwater and surface water monitoring plan;

f) Surface drainage and erosion sedimentation control plan; and

g) Updated survey plan showing proposed new road location.

The deadline for the additional information was October 15, 2013.

[12] On September 4, 2013, the Department requested that the appellant submit a plan for additional public consultation by September 20, 2013. The appellant complied with this deadline.

[13] On October 11, 2013, the appellant requested a one-week extension of the October 15 deadline. The request for an extension was approved by the Department in an e-mail of the same date. On October 18, 2013, three days after the original deadline, the appellant provided the Department with a hydrogeological assessment prepared by Stantec Consulting Ltd. and a proposed erosion and sedimentation plan. According to the appellant's covering letter, the road survey issue had been resolved in earlier correspondence.

[14] On October 30, 2013, after reviewing the Stantec hydrogeological assessment, the Department advised the appellant that it must confirm whether any of the springs in the area were being used for human consumption. The deadline for providing this information was November 29, 2013. On November 22, 2013, the appellant requested an extension of time to respond to this request. The deadline was extended to December 23, 2013. On December 11, 2013, the appellant requested a further extension. The deadline was extended to January 31, 2014.

[15] Also on December 11, Kathryn MacLeod advised the appellant that the documentation submitted by the appellant on October 18 indicated that access to the quarry would be from a newly constructed culvert location on Brooklyn Road instead of from the shared driveway originally indicated as the access point on the initial survey plan. The more recent plan showed a new section of road from the culvert location joining into the existing road. Ms. MacLeod informed the appellant of the Department's conclusion that "[t]he construction of a new portion of road to eliminate the requirement for the historic shared driveway with the adjacent property owner, along with the upgrading of the remainder of the road to accommodate conventional vehicles indicates that this upgraded road's primary purpose is for truck travel to a quarry."

[16] The appellant was given two options: (1) proceed with the footprint presented in the most recent plan, which would require an environmental assessment, or (2) limit the quarry size to less than four hectares, which would require amending the active area to include the road and associated environmental controls. The deadline for the appellant's response was January 31, 2014.

[17] On January 20, 2014, the Department again granted an extension to provide the information about whether water from the springs was being used for human consumption. The deadline was extended from January 31, 2014, to February 28, 2014. The deadline for the quarry footprint information was also extended to February 28, 2014.

[18] On February 14, 2014, the Department hydrogeologist reviewed a report submitted by concerned local residents. The Department requested that the appellant provide additional information regarding the location of the water table, including a more detailed explanation as to how the location was determined, and assurances that the water table would not be impacted by quarry operations. The deadline for this information was March 31, 2014.

[19] On February 27, 2014, one day before the information regarding the water consumption and the quarry footprint was due, the appellant wrote to the Department explaining that Stantec had encountered difficulty obtaining access to neighbouring properties in order to confirm whether any of the springs in the area were being used for human consumption. Access was eventually granted, but the delay meant that more time was needed to complete the study. An extension was also requested for the quarry footprint information. Both deadlines were extended to March 21, 2014.

[20] The information concerning the footprint of the site, which had an original deadline of January 31, 2014, was provided to the Department on March 20, 2014. It was later determined, however, that important pieces of information had been omitted from the documents. A follow up letter was sent to the appellant requesting the missing information on May 6, 2014, with a deadline of June 6, 2014. The appellant met this deadline.

[21] The water consumption information was not provided by the deadline of March 21, 2014. On that date, the appellant contacted the Department to request another extension on the basis that the report was not yet complete and Stantec had advised the appellant that Maylia Parker, the project manager for the study, was out of town and would not be returning until April 6. The deadline was extended to April 11, 2014. The information, which was originally due on November 29, 2013, was provided on April 10, 2014.

[22] After reviewing the second Stantec report, the Department notified the appellant that if an approval was issued, additional water monitoring would be required beyond what was suggested in the report as a term and condition of the approval. An inspection report outlining the Department's findings was mailed to the appellant on July 2, 2014.

[23] On July 29, 2014, the Department informed the appellant that the final step in the public consultation process required the appellant to submit a proposed plan to inform the public of the results of the Stantec report and the mitigation measures that would be undertaken to reduce the risk to the water resource.

[24] On September 9, 2014, the appellant sent a letter to the Department recapping the information requests made by the Department since the initial public consultation. After pointing out that "the department has been very thorough in its evaluation of this application," the appellant suggested limiting the additional consultation to those individuals who had previously expressed concerns with the proposal.

[25] The Department responded to the appellant on October 21, 2014, thanking the appellant for its letter "outlining your concerns with the application process" and proposing a plan for the final step of the consultation process. The Department advised that an open house/public meeting was required under the *Approval and Notification Procedures Regulations*. The appellant was required to submit a proposed plan for the open house/public meeting by November 14, 2014. A public consultation summary report was due on January 31, 2015. Once the summary

report was reviewed and accepted by the Department, the public consultation process would be considered complete.

[26] The appellant provided the public consultation plan on November 14, 2014. The public meeting took place on January 15, and the consultation report summary was submitted on January 30, 2015.

[27] On February 9, 2015, Department staff changed the status of the application to "complete" following an information review and internal discussion. A briefing note and draft approval were prepared. The briefing note recommended that the quarry approval be issued. The draft approval contained the following "site specific condition":

> a) Hydrogeological Assessment
>
> (i) The Approval Holder shall conduct a Hydrogeological Assessment to determine the groundwater and surface water monitoring requirements at the Facility. The Assessment shall, at a minimum, provide the following information: location and well logs of monitoring wells, frequency of sampling, parameters to be sampled, depth to the water table at the facility, and a proposed groundwater and surface water monitoring plan. The Assessment shall be completed by or under the supervision of a qualified Professional Geoscientist or Professional Engineer licensed to practice in Nova Scotia.
>
> (ii) The Hydrogeological Assessment shall be submitted to the Department for review by September 1, 2015 or 45 days prior to blasting and/or excavation within the active area, whichever comes first.

[28] In other words, the draft contemplated that the approval would be issued, but with a condition that a hydrogeological assessment would be submitted by September 1, 2015.

[29] On March 6, 2015, Department staff briefed the Minister. According to a note-to-file prepared following the briefing, "the Minister had questions about the site specific term and condition requiring the hydrogeological assessment." The nature of these questions is unclear. However, on March 12, Lori Skaine, Western Regional Director with the Department, e-mailed several colleagues to ask whether they were aware of any quarry applications in the region where the Department had required the applicant to conduct a hydrogeological assessment *prior* to issuing an approval. Barry Gillis, a District Engineer with the Bridgewater District Office of

the Department, responded that, "None of that is standard for a quarry approval, but, I expect, the EA guys may be able to help as they are the ones who tend to put those requirements on quarries." Ms. Skaine replied that she was aware of examples in other regions, but those usually involved a specific issue with groundwater.

[30] On March 24, 2015, the Department informed the appellant that it was reviewing information in relation to the application and requested the hydrogeological assessment referenced in the draft approval, along with details of the appellant's corporate structure. The deadline for this information was July 31, 2015.

[31] The corporate structure information was provided on April 10, 2015. Nothing appears to have been done in relation to the hydrogeological assessment until June 10, 2015, when Gerard Pothier called Jennifer Lonergan at the Department and told her that he had been speaking with Stantec and they were not sure what the Department was looking for with respect to the detailed hydrogeological assessment. Ms. Lonergan indicated that she did not have any information other than what was included in the letter but advised Mr. Pothier that he could either send questions in writing or arrange to have a conference call to discuss the matter.

[32] Mr. Pothier also asked Ms. Lonergan if other quarries were required to undergo this type of assessment prior to obtaining an approval. She told him that the Department had required that type of assessment in other cases. Mr. Pothier asked what the decision to require the hydrogeological assessment was based on, pointing out that he had an inspection report stating that the Department hydrogeologist accepted the initial Stantec assessment. He expressed his view that he had the right to know how the Department made the decision and whether it was based on any report submitted by local residents. Ms. Lonergan told him that the Department had received correspondence, including reports, from concerned citizens, which Mr. Pothier was free to review by filing a request under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5. Mr. Pothier indicated that he considered it his right as a proponent to view the reports and have his consultants counter any opinions stated therein. Ms. Lonergan told him, "that is why our professional reviews the reports from an unbiased opinion."

[33] Mr. Pothier asked whether the Department had required the assessment for any other quarries on the North Mountain. Ms. Lonergan said no, and explained

that the appellant's quarry site had specific issues that those sites did not, such as the perched water table and proximity to wells and wetlands. Mr. Pothier said he would get back to her with his questions.

[34] On June 16, 2015, Stantec submitted a work plan for the hydrogeological assessment and surface water monitoring plan on behalf of the appellant. The work plan concluded with the following:

> Stantec understands that NSE requires the work to be completed and a report submitted by July 31, 2015. Field work is currently scheduled to begin the week of June 22, 2015. Therefore, we appreciate your timely response to the proposed work plan. …

[35] On June 19, 2015, Department staff sent an offsite inspection report by e-mail to Stantec and the appellant. The Department, in its summary of the facts, described this report as confirming that the appellant could proceed with the work plan. The appellant, on the other hand, stated that it was not clear from the report whether the plan was acceptable. The report provided, in part:

> The work plan is not a hydrogeological assessment and only outlines what work is scheduled to be completed. NSE would also expect the hydrogeological report to include an assessment of any interaction between groundwater, surface water, and wetlands with recommendations and appropriate mitigation measures (if required).

[36] On June 29, 2015, Jennifer Lonergan received another call from Gerard Pothier. He asked Ms. Lonergan to confirm whether the Department would require any additional information if he took on the expense of the hydrogeological assessment. Ms. Lonergan told him that she could not tell him definitively one way or the other, as it would depend on the results of the information contained in the assessment. She explained that the report could determine that the quarry would impact nearby wetlands, in which case an approval to alter a wetland may be necessary. If the report determined that more than two hectares of wetland would be altered, an environmental assessment would be required. She further noted that the Department could refuse to issue the approval if there were impacts that could not be mitigated, or an approval might be issued with terms and conditions requiring additional information.

[37] Mr. Pothier reiterated his concerns about the Department making decisions based on information that he, as the proponent, did not have, and indicated that this may have legal implications. Ms. Lonergan reiterated that he could apply to

receive the reports through *FOIPOP* and that the Department had a professional hydrogeologist that reviews all reports received and has an unbiased view.

[38] On July 9, 2015, Department staff visited the quarry site and found the driveways overgrown with vegetation. It appeared that no trucks or equipment had been at the site for "quite some time." There was no activity at the proposed quarry active area.

[39] Jennifer Lonergan called Gerard Pothier on Friday, July 10, 2015. He returned her call on July 13. Ms. Lonergan told Mr. Pothier that an inspector had been to the site and had not witnessed any activity there. She expressed her surprise as Mr. Pothier and Stantec had indicated that they would be starting the field work component of the hydrogeological assessment in early July. Mr. Pothier said the plan had only been completed the previous week and they were going to get started the following week. Ms. Lonergan asked how the drill rig was going to get to the site with no road constructed. Mr. Pothier said there was an existing road. Ms. Lonergan replied that she did not think a rig would get up the existing road. Mr. Pothier told her that "that would be up to them to figure out."

[40] Mr. Pothier also indicated that he had not wanted to start the work until he knew what the Department was looking for and they had not done anything to the road because they did not know if they were going to get an approval.

[41] Ms. Lonergan asked if Mr. Pothier intended to submit a request to extend the deadline and he confirmed that he did. She asked what information would be submitted along with the request and he said he would get the Stantec project manager to put something together that week.

[42] The pair spoke again on July 15, when Mr. Pothier called to ask whether the Department would consider granting an approval prior to the appellant conducting the hydrogeological assessment. He said the assessment was a considerable investment for the company. Ms. Lonergan reminded Mr. Pothier that the request for the assessment had been made on March 24, and, ideally, his current request would have been made prior to July 15. He responded that they had not been wasting any time and Stantec had been working on developing the plan since March. He explained that he did not think they could meet the July 31 deadline because they may have to blast in order to get the drill rig to the location where a monitoring well needed to be constructed. Mr. Pothier was aware that he did not need an approval for blasting to construct a road. Ms. Lonergan told him that the regulations state that the information must be supplied within ninety days or a

written request for an extension must be made. She advised him that the Department needed a written request and a rationale to support the request.

[43] On July 17, Jennifer Lonergan prepared an updated briefing note that outlined the background to the file and stated under the heading "Current Situation":

> As part of the application process, NSE requested the proponent to submit a comprehensive Hydrogeological Assessment by July 31, 2015. NSE has not received a request to extend the deadline. NSE anticipates that the proponent will request an extension.
>
> The proponent has indicated they may blast prior to conducting the Hydrogeological Assessment.

[44] Under the heading, "Government Action", Ms. Lonergan wrote:

> NSE has requested to be notified prior to blasting and to submit a written request for an extension with rationale to support the request, if required.

[45] Finally, under the heading, "Advice to Minister", the note indicated:

> The Nova Scotia Pit and Quarry Guidelines state an approval is not required in relation to land being cut for road or highway construction.
>
> If an extension is requested, NSE will evaluate.

[46] The extension request came from Maylia Parker at Stantec via e-mail on July 24, 2015. In the letter, Ms. Parker stated that she was writing the letter on behalf of the appellant "to present an alternative approach and timeline for completing the requested hydrogeological assessment."

[47] The letter referenced the Department's instruction in the inspection report of June 19, 2015, that the hydrogeological report should include "an assessment of any interaction between groundwater, surface water and wetlands." Ms. Parker explained that in order to address potential concerns related to wetlands, "we have added wetlands assessment to our scope of work." Ms. Parker outlined a plan for what she called the "more robust wetlands assessment."

[48] Ms. Parker also stated that although they recognized that installation of monitoring wells would require improvement of the existing roadway and construction of an additional accessway to an elevation above the springs, they

"recently discovered that construction of an appropriate accessway would require blasting."

[49] Stantec, on behalf of the appellant, took the position that blasting at that time would not be prudent because the wetlands assessment might provide additional information that either did not support the proposed quarry development and/or provide for controls around how blasting and development should be conducted. Furthermore, blasting would disturb the project area without confirmation that the roadway would be used in the future, and might cause concern to local residents in the absence of an approval for the quarry development. Accordingly, Stantec proposed that the appellant conduct and provide the wetlands assessment and submit the report to the Department for review. If the findings of the report were acceptable and supported development of the quarry, the Department could issue the approval to construct the quarry with a condition that the hydrogeological assessment be provided prior to the quarry becoming active.

[50] As for a timeline, Ms. Parker stated that since they had not yet been able to begin the field program, they would be unable to meet the July 31, 2015 deadline. She proposed that the wetlands assessment field program be conducted from July 27 to July 31, 2015 with the report being submitted on August 31, 2015. As for the hydrogeological assessment field program and reporting, the timeline would be "dependent on issuance of NSE Approval." Ms. Parker noted that they had a drill rig booked for August 10 to 14, 2015 but they would cancel the driller if the Department approved the proposed approach.

[51] On August 6, 2015, Lori Skaine, Western Regional Director for the Department, wrote to the appellant advising that its request for an extension had been denied, and, as a result, its application for an approval was being rejected:

> Nova Scotia Environment (NSE) requested additional information in order to process your application (Application 2013-085685). A hydrogeological assessment was to be submitted on July 31st, 2015, and we recently received a request for an extension to this deadline from Stantec Consulting Ltd. on your behalf. The request did not specify a date for when the completed assessment would be submitted to NSE.
>
> As you are aware, on March 24th, 2015, NSE sent a letter requesting the hydrogeological assessment and clearly indicated that your application would be considered incomplete until the information was received. On June 16th, 2015 NSE received a proposed work plan and confirmed via email on June 19th, 2015 that the work could proceed as specified. NSE only received notification that the July 31st, 2015, deadline could not be met on July 24th, 2015. There has been no

> reasonable explanation provided as to why the July 31st deadline could not be met, nor did we receive any confirmation that there were concerns with the original deadline within a reasonable timeframe.
>
> Please be advised that NSE is not granting an extension to the July 31st, 2015 deadline and your application is being rejected in accordance with Section 7 of our *Approval & Notification Procedures Regulations* as it has been deemed incomplete and adequate time has been provided to obtain the requested information.

[52] The letter closed by advising the appellant that an appeal to the Minister of Environment could be made under s. 137 of the *Environment Act*. The appeal form was provided with the letter.

The Section 137 Appeal

[53] The appellant filed an appeal to the Minister under s. 137 of the *Act* on September 4, 2015. The appellant identified two grounds of appeal. The first ground was that the denial of the extension request and rejection of the application was unreasonable and contrary to the duty of fairness owed to the appellant. This ground was broken down into the following six submissions:

> (i) The Appellant's request for an extension, the reasons therefore and the timing thereof were reasonable;
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> (ii) The length of the requested extension was reasonable generating no adverse consequences;
>
> (iii) The granting of the extension would achieve its intended purpose;
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> (iv) The approval of the extension request would cause no prejudice to Nova Scotia Environment while the rejection causes extreme prejudice to the Appellant;
>
> (v) The history of the proceedings supports the granting of an extension; and
>
> (vi) The Appellant's suggested method of proceeding as set out in the extension request was reasonable and would provide the best available evidence in an efficient manner.

[54] The second ground was that the denial of the extension request after the deadline had passed effectively precluded the appellant from making any attempts to meet the deadline.

[55] The form of appeal prescribed by the Minister for a s. 137 appeal provides that "other information may be submitted with this notice or presented to the person(s) conducting the review on or before the hearing date." Along with written submissions, the appellant attached two pages of Stantec telephone conversation records. These handwritten records, prepared by Maylia Parker at Stantec, pertained to conversations she had with Jennifer Lonergan at the Department on June 26, 2015, and July 22, 2015.

[56] The first phone call on June 26, 2015 took place ten days after Stantec submitted its work plan and one week after the Department had issued the inspection report containing the reference to wetlands. It was three days prior to Gerard Pothier calling Jennifer Lonergan to ask whether she could confirm that the appellant would receive an approval if it took on the expense of performing the hydrogeological assessment.

[57] According to the notes, Maylia Parker asked Jennifer Lonergan if Lynsey Barnes, the Department's Regional Hydrogeologist, was out of the office until July 2. Ms. Lonergan confirmed that Ms. Barnes was indeed out. Ms. Parker asked, "is scope ok?" Ms. Lonergan confirmed the scope was fine and that Ms. Barnes was providing guidance to make sure the appellant looked at "sw/wetlands." Ms. Parker indicated that Stantec had included some time for a wetlands scientist, although it was not spelled out in their written scope, and they would "take another look."

[58] Ms. Parker noted that it was a "pretty hefty scope of work," and asked whether, if the work supported it, the next step was an approval. Ms. Lonergan responded that if the report supported it, the Department would begin drafting "Ts & Cs" (presumably the "terms and conditions.") Ms. Parker informed Ms. Lonergan that they were looking at likely delay, and they would "need to be drilling now to meet deadline." They were still working out access for drilling and only wanted to request an extension once so they would wait to send. Ms. Lonergan was fine with waiting to send the official extension request if needed until Ms. Parker could confirm the field schedule. Ms. Lonergan told Ms. Parker that the request needed to be made in writing.

[59] The second phone call on July 22, 2015 took place two days prior to Maylia Parker submitting the official extension request on the appellant's behalf. According to the notes, Ms. Parker advised Ms. Lonergan that they had not yet been able to drill because they may need to blast the road. She stated her concerns about the public's reaction to blasting without an approval and raised the

possibility of doing the wetlands work first and having the approval issued with the condition of completing the hydrogeological assessment. Ms. Lonergan said she had the same concerns about the public and the two women discussed that the wetlands work could help guide whether blasting was appropriate and how to blast/build the road. Ms. Lonergan told Ms. Parker that she could not approve the request over the phone and advised Ms. Parker to put the request in writing "with as much backup as possible" and submit it for review. This advice also applied to the extension request.

[60] Following receipt of the appeal, Derek DeGrass, Compliance and Inspection Coordinator with the Department, was designated as Reviewer. Mr. DeGrass retrieved and reviewed the complete file materials, including the appeal submissions. He then prepared an interim decision report for the Minister.

[61] In his report, Mr. DeGrass commented on each of the grounds of appeal. With respect to the appellant's argument that the history of the proceedings supported the granting of an extension, Mr. DeGrass stated:

> Again, as stated above, the Appellant makes assumptions that because so much time had passed, there should be no concern with granting further time and extension. The Department, at a broader level, must consider the time and resources involved in administering the review process. Resources cannot be constantly committed to one application over a lengthy period of time. The Department processes over 4000 applications every year for various activities it regulates. It is for this fundamental reason that the review and processing process is regulated by statute and allows for decisions to be made by administrators, even if the applicants disagree.

[62] With respect to the ground of appeal concerning the timing of the denial of the extension request, the report indicated:

> The final ground of appeal again makes reference to the numerous extensions given throughout the review period. They state in their submission that "Historically, extension requests have been reviewed and favourable decisions given in very short order."
>
> The decision to reject this application was made because requested information was not provided within the 3 months, in accordance with Section 7(3) of the Approval and Notifications Procedures Regulations. The Appellant was advised there was a possibility of the application being rejected if the requested information was not provided. It was within the authority of the Administrator to make this decision.

[63] The report concluded with a recommendation that the Minister dismiss the appeal:

> This application for approval was submitted to the Department May 7, 2013. The decision to reject the application was made on August 6, 2015 – over two years later. This is not the normal time period to submit, review and make a decision on most applications received by the Department. Yes, during the review, it is noted that many time extensions were given, which is within the authority of staff to do. But, in the end, an Administrator made the decision that information was not forthcoming as required and a decision was made to reject. While it is recognized that this is not the outcome the appellant wished for and many assumptions were made that extensions would continue to be given, a decision to reject was made, and the Administrator, Lori Skaine, was authorized to do so.
>
> **Based on the Reviewer's findings identified in this report, the Reviewer recommends that this Appeal be <u>Dismissed</u>.**
>
> [*Emphasis in original*]

[64] On October 29, 2015, the Minister issued his decision dismissing the appeal:

> After careful review of the "grounds of appeal", the information you submitted in support of your appeal, and the applicable statutory provisions, your appeal has been:
>
> Dismissed.
>
> The reason for the decision is that:
>
> - In accordance with Section 7(3) of the Approval & Notification Procedures Regulations, the application was deemed incomplete. The additional information requested was not submitted within 3 months of the request.
>
> It is recognized that you believe the request for additional time was reasonable. I have reviewed the file and note there have been previous extensions granted and therefore it is my finding that your application was processed in accordance with regulations.

[65] The appellant exercised its right under s. 138 of the *Act* to appeal the Minister's decision to this court on November 26, 2015. It was heard on June 9, 2016.

Legislative Overview

[66] This is a statutory appeal pursuant to s. 138 of the *Environment Act*. The three pieces of applicable legislation are the *Act*, the *Activities Designation Regulations* and the *Approval and Notification Procedures Regulations*.

[67] The purpose of the *Environment Act*, set out at s. 2, is to "promote the protection, enhancement and prudent use of the environment" while recognizing certain goals further outlined in the *Act*, including, "providing a responsive, effective, fair, timely and efficient administrative and regulatory system."

[68] Part V of the *Act* deals with approvals. Section 50 prohibits any person from commencing or continuing any activity designated by the regulations as requiring an approval, unless that person holds the appropriate class of approval required for that activity. Section 56 provides:

> 56 (1) The Minister may issue or refuse to issue an approval.
>
> …
>
> (2) The Minister may issue an approval subject to any terms and conditions the Minister considers appropriate to prevent an adverse effect.

[69] Division V of the *Activities Designation Regulations* deals with industrial approvals. Section 13(f) provides that the construction, operation or reclamation of "a quarry where a ground disturbance or excavation is made for the purpose of removing aggregate with the use of explosives" is a designated activity that requires an approval.

[70] The *Approval and Notification Procedures Regulations* set out procedures for the completion, review and processing of applications for approval. Sections 7 and 8 address requests for additional information by the Department:

> 7 (1) If an application is not complete, the Department must notify the applicant in writing and request the information necessary to make the application complete.
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> (2) An applicant who disputes a decision that their application is incomplete may appeal the decision to the Minister.
>
> (3) If information is not supplied by an applicant within 3 months of a request under subsection (1), the Minister may reject the application and must immediately advise the applicant in writing that the application has been rejected.
>
> (4) An applicant may request from the Minister an extension of the 3-month time limit prescribed in subsection (3).

> 8 (1) During the review of an application, the Minister may request oral information or additional written information from any of the following:
>
> (a) an applicant or an agent of the applicant;
>
> (b) a person who is directly affected by the application;
>
> (c) a local authority, the Government, a Government agency or the Government of Canada or any agency or department of the Government of Canada;
>
> (d) any other source that the Minister considers appropriate.
>
> (2) An applicant must be given an opportunity to respond to information received from a source referred to in clause (1)(b), (c) or (d).

[71] Pursuant to s. 137 of the *Act*, a proponent may appeal a decision made by the Department under ss. 7(3) or (4) to the Minister:

> 137 (1) A person who is aggrieved by a decision or order of an administrator or person delegated authority pursuant to Section 17 may, within thirty days of the decision or order, appeal by notice in writing, stating concisely the reasons for the appeal, to the Minister.
>
> (2) The notice of appeal may be in a form prescribed by the Minister.
>
> (3) The Minister shall notify the appellant, in writing, of the decision within sixty days of receipt of the notice of appeal.
>
> (4) The Minister may dismiss the appeal, allow the appeal or make any decision or order the administrator could have made.
>
> (5) The administrator and the appellant shall take such action as is necessary to implement the decision of the Minister disposing of the appeal.
>
> (6) The initiation of an appeal pursuant to this Section does not suspend the operation of any decision or order appealed from, including the requirement to comply with an order under Part XIII, pending the disposition of the appeal.

[72] Section 138 permits an appeal of a Ministerial decision made under s. 137 to the Supreme Court of Nova Scotia:

> 138 (1) Subject to subsection (2), a person aggrieved by
>
> …
>
> (b) a decision of the Minister pursuant to Section 137;
>
> …
>
> may, within thirty days of the decision or order, appeal on a question of law or on a question of fact, or on a question of law and fact, to a judge of the Supreme

> Court, and the decision of that court is final and binding on the Minister and the appellant, and the Minister and the appellant shall take such action as may be necessary to implement the decision.

[73] The Supreme Court's decision is final.

Positions of the Parties

[74] The appellant raises two grounds of appeal. First, it is argued that the Minister failed to provide an independent assessment of the appellant's extension request. Relying on the decision of the Honourable Justice Gerald R.P. Moir in *Millett v. Nova Scotia (Minister of Agriculture)*, 2015 NSSC 21, [2015] N.S.J. No. 29 ("*Millett*"), the appellant says an appeal under s. 137 is a "hybrid appeal" which requires the Minister to perform an independent assessment as to whether the extension should have been granted. Put another way, rather than limiting his review to whether the administrator's decision was reasonable, the Minister should have taken a fresh look at the issue based upon all of the information available to him. Under this approach, the administrator's decision would be only one factor in the analysis.

[75] The second ground of appeal is that the Minister's decision to uphold the administrator's decision was unreasonable. The appellant says the Minister considered only the fact that previous extensions were given and denied the request on this basis alone, which was allegedly unreasonable. It says the Minister, in deciding whether an extension should have been granted, should have considered: (1) the appellant's explanation for the requested extension; (2) the length and purpose of the extension; (3) the respective prejudice to the parties; and (4) the history of the matter, including the reasonableness of previous extensions. An independent assessment of these factors shows that the only reasonable outcome open to the Minister was to allow the extension.

[76] The respondent denies that the Minister misunderstood his role on appeal. According to the respondent, the Minister's role in a hybrid appeal is not always the same, and, more often than not, the appropriate standard of review to be applied by an appellate tribunal to a lower tribunal is reasonableness. While the standard for a statutory review in *Millett* may have been correctness, that is not the applicable standard for a Ministerial appeal under the *Environment Act*.

[77] As to the reasonableness of the Minister's decision, the respondent concedes that the Minister's decision is sparse. However, it says the court may look to the record, along with the reasons, in order to assess the reasonableness of the outcome. The record demonstrates that the Minister had information before him in relation to each of the factors suggested by the appellant and this information shows that the Minister's decision was reasonable.

Law and Analysis

[78] A statutory appeal begins with a determination of the applicable standards of review for each of the issues. The first issue is whether the Minister erred in his interpretation of his role on a statutory appeal of an administrator's decision to deny the extension request and, as a consequence, reject the approval application. The jurisprudence has not yet satisfactorily determined the standard of review for a Ministerial decision of this nature under the *Environment Act*.

[79] In *Millett*, this court considered the applicable standard of review for a Minister's interpretation of his role on statutory review of an inspector's decision under the *Animal Protection Act*, 2008 S.N.S. c.33. Due to the appellant's reliance on this decision, it is necessary to review it in some detail.

[80] During the harsh winter of 2015, inspectors from the provincial Department of Agriculture received a complaint concerning the welfare of cattle being kept on leased lands in New Ross. The cattle belonged to Nelson Millett, the owner and operator of Rocky Top Farm.

[81] When the investigators arrived, they found thin or emaciated cattle with no hay or water. While the inspectors seized the herd, the lead inspector gave notice to Mr. Millett that she had decided not to return the animals. She informed him that, if he wished, he could request a review of that decision. Subsection 26(7)(b) of the legislation permits the owner of seized animals to request a review by the Minister of the decision of "the Provincial Inspector, another inspector or another person" deciding that "an animal will not be returned." If a review is requested, the Minister retains custody of the animals until a review decision is made: s. 26(9).

[82] Mr. Millett requested a review. The Minister instructed the Acting Provincial Inspector to provide a response to the request. This official concluded that the inspectors acted appropriately and followed the procedures under the

statute. Mr. Millett, through counsel, filed a brief and an affidavit in response to the Acting Provincial Inspector's report. The affidavit set out Mr. Millett's side of the story and provided detailed evidence about past care for the herd along with an explanation of what could be done to feed, water, and shelter the herd if the animals were returned to Rocky Top Farm.

[83] The Minister delegated the statutory review to the Deputy Minister. The Deputy Minister considered the summary by the Acting Provincial Inspector, which attached the lead inspector's report, reports by veterinarians, the notice to Mr. Millet given by the lead inspector, photographs and videos. He also considered Mr. Millett's brief, which attached his evidence, including photographs and videos.

[84] In his decision, the Deputy Minister framed the issue before him as "whether the decision" by the inspectors to take custody of the animals "was a reasonable one." The Deputy Minister preferred the lead inspector's version of events over that of Mr. Millett but did not comment on Mr. Millett's evidence on subjects not known to the inspector. He concluded that the lead inspector acted reasonably and in the best interest of the animals. Justice Moir observed that "[t]he decision says nothing about Mr. Millett's evidence about care of the herd in future. It focuses entirely on the reasonableness of the decision to keep the herd as made at the time of seizure": para 35.

[85] Mr. Millett sought judicial review of the Deputy Minister's decision. He argued, among other things, that the Deputy Minister applied a reasonableness standard to the inspector's decision and should have considered the matter *de novo*. He further argued that the correctness standard applied to the Deputy Minister's interpretation of his role on review. The province argued that the reasonableness standard applied on this issue.

[86] Justice Moir began by conducting a comprehensive review of recent Supreme Court of Canada decisions concerning standard of review. He noted that the Court has reiterated that the full standard of review analysis is not necessary in certain categories of cases. In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] S.C.J. No. 61, Justice Rothstein, for the majority, established a presumption in favour of the reasonableness standard for all cases in which a decision maker interprets its home statute. However, as Justice Moir noted, subsequent cases clarified that the presumption has its limits:

> **52** The majority decision in *Alberta Teachers' Association* could be understood to apply the presumption about interpretation of the home statute to provisions in the statute defining the extent of, and limits on, the essential powers given by the legislature to the decision maker. Later decisions of the Supreme Court of Canada, and of the Nova Scotia Court of Appeal, show that there is still room for a full standard of review analysis when a decision maker interprets a provision in a home statute about the essential power, or task, given by the legislature to the decision maker.

[87] In Justice Moir's view, a decision maker's interpretation of its role on review is a decision about the core of its statutory powers:

> **67** There are many kinds of appeal or review mandated by legislation. Some are restricted to a record, and the decision under appeal is reviewed on its own at a standard expressly or impliedly prescribed. Others are *de novo*, and the initial decision is usually ignored. Some give weight to both the initial decision and new evidence. In those reviews, the status of the initial decision and the role of the reviewing court or tribunal is found, expressly or impliedly, in the statute.
>
> **68** Respectfully, when the appellate tribunal decides what kind of review the legislature set for it, it does much more than to decide a question "of process under the statute" (para. 35). It decides on the core of the powers given to it by the statute.
>
> **69** The question of deference to the Deputy Minister's interpretation of his "review" power forces us to ask about the strength or weakness of the presumption when a decision maker interprets the home statute and about the relationship between the presumption and the second step under *Dunsmuir*.

[88] According to Justice Moir, the question of what kind of review or appeal a decision maker is required to conduct "comes close to what we usually consider jurisdictional": para 75. He observed that it "seemed inconsistent" with the principles of democracy and the rule of law "to hold that a person who has been given statutory power can expand or restrict the power by reasonable misinterpretation": para 76.

[89] Justice Moir concluded that a full standard of review analysis was necessary:

> 78 In my opinion, the presumption favouring the reasonableness standard for interpretation of the home statute does not necessarily prevail when a decision maker interprets a provision defining the core power given to the decision maker. The standard remains to be set on the second step in *Dunsmuir*, the standard of review analysis.

[90] Beginning with the nature of the question under review, the court held that the question of the Minister's role was one of law:

> 89 As in *Midtown Tavern & Grill Ltd.*, the question of the Minister's role is one of law. The *Animal Protection Act* does not expressly prescribe the relationship between the inspector's first instance decision and the Minister's review. Whether the Minister pays any attention to the inspector's decision, whether he owes deference to her reasons, or whether he is in one of the various middle grounds that may constitute an appeal or a review, is to be resolved on the statute and the principles of statutory interpretation. This tends towards a correctness standard.

[91] Although the legislation contains no privative clause and no right to appeal, it does recognize judicial review on certain issues. This suggested a correctness standard:

> 94 A right of appeal would tend towards a correctness standard for judicial review on a question of law. Although this statute does not go that far, its express recognition of judicial review and its providing aids to such a review also tends towards a correctness standard.

[92] The expertise of the board also suggested correctness:

> 96 It may well be that the Minister has expertise in questions of animal welfare, but determining his role on review of the inspector's decision does not require much of that kind of expertise. As in *Midtown Tavern & Grill Ltd.*, questions involving standards of review are regular for this court. This tends towards the correctness standard.

[93] Finally, Justice Moir considered the purposes of the statute under which the decision to be reviewed was made:

> 101 In conclusion, the statute has two general purposes: prevention of cruelty to animals and relief of distress. Within the latter is another purpose: to balance the interests of the owner with the relief of distress.
>
> 102 The prevention of cruelty and alleviation of distress purposes tend towards a reasonableness standard of review. Let the legislated system freely run its course so that animals do not suffer. However, the apparent purposes of also protecting the owner's interests and of balancing the two may tend towards correctness.
>
> 103 In my opinion, the four considerations lead to a correctness standard for the Minister's determination of what may be called the standard for the Minister's review of the inspector's decision, but what I would prefer to call the Minister's role on statutory review of the inspector's decision.

[94] Having decided on the correctness standard, Justice Moir reviewed the Deputy Minister's conclusion as to his role under the statute:

> 106 The Deputy Minister explicitly determined that the legislation required him to decide whether the inspector's decision was reasonable. Implicitly but clearly, he decided that he was to make that decision based on the inspector's reasons, information available to the inspector at the time, but also information produced after that time. However, he implicitly decided he was not to provide an independent, fresh assessment of whether to keep the seized animals. For example, he gives reasons for accepting the inspector's evidence of events at the time of seizure but pays no attention to Mr. Millett's evidence of the farm's ability to care for the herd, of which the inspector knew nothing.

[95] Justice Moir examined the legislation and held that the Deputy Minister had misconstrued his statutory role:

> 107 The principle in *Rizzo v. Rizzo Shoes Ltd.*, [1998] S.C.J. 2 applies. This is a situation where the person reading the statute has to find the content of the role on review by considering the immediate text in light of the surrounding text, the legislative scheme, and the legislative purposes to which it relates.
>
> 108 The owner's right to a review is provided by s. 26(7). The subject of the review is "the decision that an animal will not be returned". That decision is made under s. 26(5) after seizure. It can only be made when the inspector "is of the opinion, due to the animal's state or situation or previous actions of the owner, that the owner is not a fit person to care for the animal". Subsection 26(9) requires the Minister to "retain custody of the animal until a review decision has been made".
>
> 109 The initial decision is made quickly. The subject, distress of an animal, demands this. And, the legislation recognizes it. It allows for immediate seizure when the owner "does not immediately take appropriate steps to relieve [the] distress" or when the owner "cannot be found promptly": s. 23(1)(a) and (b).
>
> 110 The review decision is less hurried. Reasonable steps must be taken to find the owner: s. 26(5). If found, the owner must be notified of the inspector's decision and of the right to a review: s. 26(5)(a). The right of review may be exercised by the owner within three days of the notice. The statute sets no time limit for conducting or determining the review.
>
> 111 The legislative review allows for timely reflection, after a decision necessarily made in haste.
>
> 112 I have written of the statutory purposes in connection with the standard of review analysis. The purpose of balancing the need to relieve distress with the owner's interest, suggests a review in which the owner would have a better

> opportunity to make its case and in which the owner's present ability to provide an alternative to continued seizure would receive consideration.
>
> 113 The first, in light of the scheme and purpose, calls for the kind of review actually undertaken in British Columbia SPCA. The British Columbia Supreme Court held, alternatively, that the Farm Industry Review Board had correctly interpreted the Prevention of Cruelty to Animals Act when it decided that the appeal provisions allowed for a hybrid between pure appeal and de novo.
>
> 114 I conclude that the Deputy Minster was required by the legislature to consider the inspector's decision, the information before the inspector, and new information given to the Deputy Minister. His obligation was to decide, on old and new evidence, whether Rocky Top Farm is a fit person to care for the cattle.
>
> 115 The Deputy Minister decided only that the inspector's decision was reasonable. He was entitled to take that into consideration, but limiting his review to that subject misinterpreted what the legislation required him to do. Rocky Top Farm was entitled to the Minister's independent judgment about whether it was fit to care for the cattle. Instead, it only got the Deputy Minister's appraisal of the lead inspector's judgment.

[96] Following *Millett*, I must conduct a full standard of review analysis to determine the standard applicable to the Minister's determination of his role on a s. 137 appeal of an administrator's decision under the *Approval and Notification Procedures Regulations* to deny an extension request.

[97] The nature of the question under review has been described as "arguably the most crucial aspect of the standard of review analysis."[1] As in *Millett*, the nature of the question in this case is one of law. Like the *Animal Protection Act*, the *Environment Act* is silent as to the relationship between the administrator's decision and the Minister's decision on appeal. The degree of deference, if any, that the Minister owes the administrator is not spelled out in s. 137. This militates in favour of a correctness standard.

[98] The *Environment Act* contains a right of appeal to the Supreme Court of Nova Scotia on questions of law, fact, or mixed fact and law. This supports a correctness standard.

[99] The next factor is the expertise of the Minister in relation to the specific question under consideration. Questions involving standard of review do not fall within the scope of the Minister's specialized area of expertise. The court

[1]Guy Régimbald, *Canadian Administrative Law*, 2d ed (Markham: LexisNexis Canada Inc., 2015) at p 465.

possesses greater expertise than the Minister on these issues. This factor favours a correctness standard.

[100] Finally, I must consider the purposes of the statute under which the decision to be reviewed was made. Justice Coughlan observed in *Fairmount Developments Inc. v. Nova Scotia (Minister of Environment and Labour)*, 2004 NSSC 126, [2004] N.S.J. No. 251:

> **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. …

[101] Unlike the purposes of the *Animal Protection Act* considered in *Millett*, the purposes of the *Environment Act* tend toward a reasonableness standard of review.

[102] In my view, although the purposes of the statute suggest a reasonableness standard, this factor cannot overcome the others in this case. I find that the standard of correctness applies to the Minister's interpretation of his role on an appeal under s. 137 of the *Environment Act*.

[103] What, then, did the Minister actually decide about the scope of his role on a statutory appeal? Unlike the Deputy Minister in *Millett*, the Minister did not explicitly frame the issue before him as whether the administrator's decision was a reasonable one. This is an important distinction. The Minister's decision states:

> After careful review of the "grounds for appeal", the information you submitted in support of your appeal, and the applicable statutory provisions, your appeal has been:
>
> Dismissed.

[104] He went on to hold that the extension request and approval application had been processed in accordance with the regulations. Nothing in this language, scant as it is, suggests that the Minister believed his role was limited to assessing the reasonableness of the administrator's decision.

[105] That said, I will now consider the Minister's role on an appeal of this nature in view of the legislative text, scheme and purposes. Section 137 provides a right of appeal to "[a] person who is aggrieved by a decision or order of an

administrator" under the *Act*. This would include a proponent who is denied an extension of time to provide additional information in support of an application for an industrial approval.

[106] Unlike an inspector's decision to seize and keep an animal under the *Animal Protection Act*, a decision by an administrator under the *Environment Act* to deny an extension request is not made in haste. Nor does the legislation contemplate a decision being made without input from the aggrieved person. A proponent seeking an extension of a deadline to provide additional information is expected to make the request in writing and explain why the deadline cannot be met. An extension may be requested at any time following imposition of the deadline and there is no prescribed time limit for the Department to make its decision. The proponent has ample opportunity to put its best foot forward.

[107] Another important difference between an appeal under s. 137 of a decision to deny an extension request and a review under the *Animal Protection Act* of a decision to seize and keep an animal is that the former is unlikely to involve considerable fresh evidence. Section 7(3) of the *Approval and Notification Procedures Regulations* authorizes the Minister to reject an approval application where a proponent has failed to provide additional information within three months of the Department's request. A proponent who makes a request under s. 7(4) for an extension of time is expected to explain why the extension is necessary and it is in the proponent's best interests to submit all relevant evidence to support the request at that time. An appeal to the Minister under s. 137 must be made within thirty days of the decision to deny the extension. As a result, there is unlikely to be important information before the Minister on appeal that was not also before the administrator. A decision to seize and keep an animal under the *Animal Protection Act*, on the other hand, may be made with very little input from the owner of the animal, or, if the owner cannot be located, no input at all. As a consequence, the review provides the owner an opportunity to state its case which, as seen in *Millett*, may involve filing substantial new evidence that was not before the inspector.

[108] In my view, on an appeal under s. 137 of a decision to deny an extension request, the Minister is required to consider the administrator's decision, the evidence before the administrator, the appellant's written submissions and any new evidence or information. If an internal report has been prepared, he may consider that as well. That being said, the decision of the administrator is entitled to far greater deference by the Minister than the decision of an inspector to seize and keep an animal under the *Animal Protection Act*. The inspector's decision is made

in haste, potentially with very little information. The Minister, armed with additional evidence and the benefit of time for reflection, is in a better position to determine whether an animal should be returned to its owner. An administrator under the *Environment Act*, on the other hand, will often be more qualified than the Minister to decide whether an extension should be granted. As Sara Blake notes at page 173 of *Administrative Law in Canada*, 5th ed (Markham: LexisNexis Canada Inc., 2011):

> Regardless of how broad the scope of appeal appears to be from the wording of the appeal provision, the extent of deference shown by the appellate body to the decision of the lower tribunal may depend on a number of other factors, including the extent to which the issue under appeal is within the special expertise of the lower tribunal. … In appeals from lower tribunals to appellate tribunals, the greater expertise is often possessed by the lower tribunal because of its practical experience gained in its daily regulation in the field. For that reason, its exercise of discretion should be given deference by the appellate tribunal.

[109] Even on an appeal *de novo*, "the appellate body may consider the record of evidence that was before the tribunal, because it is not expected to start from scratch, and it may accord considerable weight to the reasons": *Blake*, p. 172.

[110] In the appellant's case, the administrator is a Department official who routinely deals with processing applications for approvals. She has experience requesting additional information from proponents and analyzing the responses provided. This on-the-ground experience enables her to assess whether a proponent's request for an extension is reasonable in the circumstances. Although the Minister oversees the regime as a whole, he is not on the front lines processing applications. For this reason, when deciding whether an extension should have been granted, the Minister is entitled to accord substantial weight to the administrator's decision.

[111] Had the Minister framed the issue before him as whether the administrator's decision was reasonable, as in *Millett*, or otherwise demonstrated that he had limited the scope of his review in this manner, I would have allowed this ground of appeal. The appellant has not satisfied me, however, that the Minister failed to perform the kind of review required under the *Environment Act*. This ground of appeal is dismissed.

Was the Minister's Decision Reasonable?

[112] Both parties agree that the standard of reasonableness applies to the Minister's decision under s. 137 to dismiss the appeal. I agree.

[113] In *Egg Films Inc. v. Nova Scotia (Labour Relations Board)*, 2014 NSCA 33, leave to appeal denied September 25, 2014 (SCC), Justice Fichaud, for the majority, explained reasonableness:

> 26 Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't -- What does the judge think is correct or preferable? The question is -- Was the tribunal's conclusion reasonable? If there are several reasonably permissible outcomes the tribunal, not the court, chooses among them. If there is only one and the tribunal's conclusion isn't it, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise discretion, or invites the tribunal to weigh policy. [citations omitted]
>
> …
>
> 30 Next, the judge's "treasure hunting", "zooming in", or "tracking" of the Board's reasons. Reasonableness isn't the judge's quest for truth with a margin of tolerable error around the judge's ideal outcome. Instead, the judge follows the tribunal's analytical path and decides whether the tribunal's outcome is reasonable. *Law Society v. Ryan*, *supra*, at paras 50-51. That itinerary requires a "respectful attention" to the tribunal's reasons, as Justice Abella explained in the well-known passages from *Newfoundland and Labrador Nurses' Union*, paras 11-17.

[114] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] S.C.J. No. 62, Justice Abella, for a unanimous Court, emphasized that reasons must be considered together with the outcome:

> 12 It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
>
> > "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that

> among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added.] …
>
> 13 This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. …
>
> 14 Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses -- one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at s. 12:5330 and 12:5510). It is a more organic exercise -- the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. …
>
> 15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[115] Justice Abella, for the majority, reiterated this point in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] S.C.J. No. 34:

> 54 The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. …

[116] Similarly, in *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] S.C.J. No. 65, the Court described the issue for reviewing courts as "whether the decision, viewed as a whole in the context of the record, is reasonable": para 3.

[117] In his decision, the Minister stated that the application for an approval had been rejected in accordance with s. 7(3) of the *Approval and Notification*

Procedures Regulations. Under this section, the Minister may reject an application where the proponent has failed to submit additional information within three months of the request. He acknowledged the appellant's belief that the request for additional time was reasonable, but concluded:

> I have reviewed the file and note there have been previous extensions granted and therefore it is my finding that your application was processed in accordance with regulations.

[118] The brevity of the Minister's reasons means I must look to the record to assess whether the outcome was reasonable. The record in this case consists of the application file, the appellant's written submissions (including two pages of additional evidence) and the Reviewer's report. The parties are generally in agreement as to the factors the Minister should have considered when reviewing the materials. The respondent disagrees, however, with the appellant's contention that consideration of these factors yields only one reasonable outcome.

[119] The first factor is the appellant's explanation for the extension. According to the appellant, the extension was necessary for several reasons. First, it took longer than anticipated to determine the scope of the work. Second, the appellant had not anticipated the "more robust" wetlands component of the hydrogeological assessment. Finally, it took time to organize a drilling program, and the appellant only realized in mid-July that blasting would be necessary to get the drilling apparatus to the site. The appellant says that since the request was reasonable, the only reasonable decision was for the Department to approve it.

[120] The request for the hydrogeological assessment was made on March 24, 2015, with a deadline of July 31, 2015. It was not until June 10, 2015, that Gerard Pothier contacted Jennifer Lonergan at the Department and told her that Stantec was uncertain as to the scope of the assessment. During the hearing, the appellant attempted to excuse this delay by attributing it to the unusually harsh winter of 2015. While the harsh winter conditions may have prevented Stantec from commencing field work in late March or April, nothing prevented the appellant from taking immediate steps to obtain clarification as to what the Department was looking for in the report. The appellant's failure to take these steps until June 10 was not reasonable.

[121] The phone call of June 10 from Mr. Pothier to Ms. Lonergan offered some insight as to why the appellant had not begun work on the hydrogeological assessment at an earlier time. Mr. Pothier wanted to know if the request was based

on any third party reports and whether the Department had made the same request of other quarries on the North Mountain. He clearly believed the Department was acting unfairly when it requested the hydrogeological assessment and he did not want to take on the additional expense it required.

[122] Mr. Pothier's reluctance to undertake the assessment persisted even after the Department approved Stantec's work plan on June 19, 2015. On June 29, Mr. Pothier called Ms. Lonergan again and asked for confirmation that the Department would issue an approval if he assumed the expense of the assessment.

[123] Notwithstanding Stantec's proposal in the work plan submitted on June 16, 2015 that field work would begin on June 22, 2015, Mr. Pothier informed Ms. Lonergan on July 13 that "they just got the plan finished last week" and would begin work the following week. It is unclear why the work did not begin after the appellant received approval of the presumably completed work plan on June 19 or even immediately after the phone call of June 29, 2015.

[124] The appellant's claim in the extension request that it "recently discovered that construction of an appropriate accessway would require blasting" is dubious. During the phone call on July 13, Ms. Lonergan asked Mr. Pothier how Stantec would get the drill rig to the site with no road constructed. Mr. Pothier told her there was an existing road. She said she did not think a rig would get up the existing road. Mr. Pothier's response was, "that would be up to them to figure out." It was obvious to Ms. Lonergan, having visited the site, that the drill rig was not getting to the site without upgrades to the roadway. Mr. Pothier told Ms. Lonergan that "they haven't done anything on the road because they didn't know if they are going to get an approval." It was unreasonable for the appellant to have ignored this issue until July.

[125] It would be open to a decision maker to conclude, on the basis of the record, that the extension was necessary because the appellant was determined to avoid the expense of the hydrogeological assessment until after an approval was granted, not because there was confusion as to the scope of the assessment or that the appellant had not realized until the eleventh hour that blasting would be required. In other words, the record could support a finding that the appellant failed to move the process forward with the diligence required under the legislation.

[126] The next factor is the length and purpose of the extension. The appellant says it requested a one month extension for a wetlands assessment and proposed that the hydrogeological assessment be made a condition of the approval. The

appellant points out that, even with the extension, the wetlands information would be submitted before September 1, 2015 – the deadline contemplated by the draft approval. The purpose of the extension was to ensure that the most accurate and reliable scientific information was presented to the Department without any undue delay.

[127] Lori Skaine's decision of August 6, 2015 was before the Minister. In it, she noted that the appellant's request "did not specify a date for when the completed assessment would be submitted to NSE." As such, the length of the extension was unknown. The appellant argues that the letter did specify that field work would commence on August 10 and the appellant "should have been able to meet the same deadline as with the wetlands assessment." The fact remains that the request failed to indicate when the Department could expect the report in the event that the appellant's proposal was rejected.

[128] Moreover, it is questionable whether Stantec could have completed the report within the same time frame as the wetlands assessment. In the June 16 work plan, Maylia Parker recognized that the Department required the report by July 31, 2015 and said field work was scheduled to begin June 22, 2015. She therefore requested a timely response from the Department. On June 26, 2015, Ms. Parker told Ms. Lonergan that they would "need to be drilling now" to meet the July 31 deadline. If Stantec initially allocated four to five weeks to complete field work for the hydrogeological assessment and prepare the report, it is unlikely that it could have completed the field work and prepared the report, in addition to the wetlands report, by September 1, 2015.

[129] The next factor is the respective prejudice to the parties. The appellant relies heavily on this factor. It says the Department would suffer no prejudice if the extension was granted, while the appellant has invested significant time and money to obtain the approval necessary to get its quarry business off the ground. As a result of the Department's decision to deny the extension request, the appellant is left with a piece of land with no quarry and no determination on the applicant's merits, despite Department staff's internal conclusion in March 2015 that the application should be approved.

[130] Reviewer Derek DeGrass addressed prejudice to the Department in his report to the Minister. Mr. DeGrass highlighted that two years had passed since the application was submitted, which was in excess of the normal processing time for most applications. He noted that the Department receives more than four

thousand applications every year and must consider the time and resources involved in administering the review process. Mr. DeGrass acknowledged that the appellant was given many extensions, but "in the end, an Administrator made the decision that information was not forthcoming as required."

[131] Evaluating the respective prejudice in this situation is challenging. Although the appellant has invested time and money in the application process, with little to show for it, an approval was never guaranteed. The wetlands assessment or the hydrogeological assessment might have revealed environmental impacts that could not be mitigated. We can only speculate. There is a level of risk inherent to any application for an approval to operate a quarry. The Department says the appellant can simply apply again, but there is obviously a cost associated with filing a new application. The extent of that cost is unclear. Common sense suggests that aspects of the process would not need to be repeated, but counsel for the respondent was unable to confirm which steps, if any, would have to be done again.

[132] The final factor is the history of the matter. There is no question that the appellant requested and received numerous extensions of time during the application process. The appellant argues that these extensions were all reasonable and, as a consequence, they should have had no impact on the Minister's assessment of the most recent request. It also suggests that by granting the previous extensions, the Department created an expectation that further requests would be granted in short order. In my view, the Minister was entitled to consider the total processing time without revisiting each extension request and assessing its reasonableness. Furthermore, I do not accept that previous accommodation by the Department creates an obligation to grant further extensions, particularly where the degree of diligence shown by the proponent has diminished.

[133] The court's role on this appeal is to consider the reasons together with the record to determine whether the result falls within a range of possible outcomes. As noted by Professor Dyzenhaus and endorsed by the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union*, "even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them."

[134] The Minister noted in his decision that previous extensions had been given, "and therefore it is my finding that your application was processed in accordance with regulations." Ideally, the Minister would have provided a more detailed

analysis. However, the reasons, while scant, demonstrate that the Minister considered the numerous extensions given to the appellant by the Department and decided "enough is enough." The record contains evidence upon which he could conclude that the appellant failed to act diligently to provide the information requested by the Department. This evidence, coupled with the Reviewer's conclusion that there is prejudice to the Department in granting further extensions, leads me to find that the Minister's decision falls within the range of reasonable outcomes. This ground of appeal is dismissed.

Conclusion

[135] The appeal is dismissed. I will leave it to the parties to attempt to arrive at an agreement on costs. If an agreement is not forthcoming, I will accept their written submissions within 45 days of the date of release of my decision.

McDougall, J.