SUPREME COURT OF NOVA SCOTIA
Citation: *Sipekne'katik v. Nova Scotia (Environment)*, 2017 NSSC 23

Date: 20170127
Docket: Hfx No. 450765
Registry: Halifax

Between:

Sipekne'katik

Appellant

v.

Nova Scotia (Minister of Environment) and Alton Natural Gas Storage LP

Respondents

DECISION

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	November 14 and 15, 2016 in Halifax, Nova Scotia
Final Written Submissions:	December 20, 2016
Counsel:	Raymond F. Larkin, Q.C., and Balraj Dosanjh, for the Appellant Alex M. Cameron and Edward A. Gores, Q.C., for the Respondent Nova Scotia (Minister of Environment) Robert G. Grant, Q.C., and Daniela Bassan, for the Respondent Alton Natural Gas Storage LP

By the Court:

Introduction

[1] Sipekne'katik, one of 13 First Nations in Nova Scotia, appeals the decision of the Minister of Environment made pursuant to s. 137 of the *Environment Act*.

Issues

1. Procedural fairness.

2. Adequacy of consultation.

Overview of the Project

[2] To provide an overview, I quote from Justice Wood's decision on Sipekne'katik's motion for an order staying the Industrial Approval granted pending final resolution of the appeal. He said in paras. 5 through 8 of his decision (2016 NSSC 178) as follows:

> [5] The brining pond which is the subject of the Industrial Approval is part of a larger project involving the construction and operation of an underground storage facility for natural gas. The development of the overall project has been underway for many years. This initial registration for environmental assessment took place in July 2007.
>
> [6] The construction involves the creation of underground caverns where natural gas can be stored. This will allow natural gas to be purchased when prices

> are low and stored until required. This buffer provides a security of supply and a stabilization of prices for consumers.
>
> [7] The underground facility will be built in a salt formation using a technique known as solution mining. This involves pumping water into the structure where it will dissolve the salt thereby creating a cavern. For the Alton project the water to be used in the mining process will come from the Shubenacadie River which is approximately 12 kilometers away. Once the water is removed from the underground excavation it will contain a significant level of dissolved salt. This brine will be returned to the Shubenacadie River where it is diluted and ultimately returned to the river.
>
> [8] The brine storage pond, which is the subject of the Industrial Approval, is the location where the salt solution is kept until it is diluted and returned to the river.

Section 138 Appeal

[3] The Industrial Approval was issued on January 20, 2016, to Alton Natural Gas Storage LP ("Alton") (attached to Notice of Appeal at Record Vol. 1 Tab 1). It grants approval for "operation of a Brine Storage Pond, and associated works, at or near Fort Ellis, Colchester County in the Province of Nova Scotia". It is subject to a number of Terms and Conditions, which are attached to it, containing nine pages. Sipekne'katik appealed the issuance of the Industrial Approval to the Minister of Environment pursuant to s. 137 of the *Environment Act* (Record Vol. 1 Tab 1). The Minister dismissed the appeal on April 18, 2016 (Record Vol.1, Tab 4). Sipekne'katik appeals that decision.

[4] In a decision dated July 13, 2016, Sipekne'katik's motion for a stay of the Industrial Approval, pending the hearing of the s. 138 appeal by this Court, was denied by Justice Wood after a hearing on June 22, 2016.

[5] The s. 138 appeal was set to be heard on August 17 and 18, 2016, but an issue arose about the admissibility of the affidavits filed for the appeal. That matter was argued on August 17, 2016, before Justice Arnold who issued a decision on the subject on October 5, 2016 (2016 NSSC 260).

[6] Justice Arnold concluded the affidavits were generally admissible. He said in para. 54 of his decision:

> [54] I agree that all affidavits currently tendered that are relevant to the Crown's duty to consult can be admitted in this case. The amount of weight to be attributed, if any, to each piece of evidence is an exercise to be dealt with later in the proceedings. The issue of weight differs from the issue of admissibility.

He did exclude some paragraphs of the affidavits of Tim Church and Charles Lyons (filed by the respondent Alton) and some paragraphs of the affidavit of Justin Huston (filed by the respondent Nova Scotia (Minister of Environment), (hereinafter "Nova Scotia"). The matter was heard on November 14 and 15, 2016.

[7] I quote again from the decision of Wood, J. where in para. 13 he summarizes the arguments made in Sipekne'katik's Notice of Appeal:

> [13] The notice of appeal filed by Sipekne'katik request that the Minister's decision be reversed and the Industrial Approval be set aside. There are 16 grounds of appeal however the primary argument is that the province has failed to comply with the duty of the Crown to consult with Sipekne'katik and accommodate its interests. Such a duty is said to arise because of the project's potential adverse impact on aboriginal and treaty rights. In addition, Sipekne'katik argues that the Minister breached a duty of procedural fairness and denied them natural justice by considering information as part of her assessment of their appeal which had not been disclosed to them.

[8] The Notice of Appeal also referred to the failure of the Minister to consider affidavit evidence filed by Sipekne'katik for the appeal.

Procedural Fairness

[9] Section 138 of the *Environment Act* provides for an appeal to the Nova Scotia Supreme Court. Section 138 provides as follows:

> **Appeal to Supreme Court**
>
> **138 (1)** Subject to subsection (2), a person aggrieved by
>
> (a) a regulation;
>
> (b) a decision of the Minister pursuant to Section 137;
>
> (c) a decision of the Minister respecting the granting or refusal of a certificate or an approval;
>
> (d) a decision of the Minister respecting the terms or conditions of a certificate or an approval;
>
> (e) a decision of the Minister respecting the amendment, addition or deletion of terms and conditions of a certificate or an approval;
>
> (f) a decision of the Minister respecting the cancellation or suspension of a certificate or an approval; or
>
> (g) an order,

> 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.
>
> **(2)** For greater certainty, a decision of the Minister to approve or reject an undertaking registered under Part IV may not be appealed pursuant to subsection (1).
>
> **(3)** *repealed 2011, c. 61, s. 49.*
>
> **(4)** An appeal pursuant to this Part shall be commenced within thirty days of the date of the decision or the date of the order referred to in subsection (1).
>
> **(5)** The initiation of an appeal pursuant to this Part does not suspend the operation of any act or omission appealed from, including the requirement to comply with an order under Part XIII, pending the disposition of the appeal.
>
> **(6)** The decision of the court under subsection (1) is final and there is no further appeal to the Nova Scotia Court of Appeal. 1994-95, c. 1, s. 138; 2011, c. 61, s. 49.

[10] There are two competing arguments made with respect to procedural fairness as follows:

1. Sipekne'katik says the procedure was unfair and the matter should be remitted back to the Minister of Environment to conduct a fair hearing; Nova Scotia and Alton say the procedure was fair;

2. Nova Scotia says the procedure was not unfair but, in any event, since the matter before the Nova Scotia Supreme Court is an appeal, not a

judicial review, the Court can cure any defects when it hears the s. 138 appeal.

Appeal or judicial review

[11] I do not agree with Nova Scotia's submission about the nature of the s. 138 appeal.

[12] If I were to accede to Nova Scotia's submission, I would be conducting a new hearing which would cure any procedural defects in the Minister's decision. In effect, I would be hearing the matter *de novo* and substituting my decision for that of the Minister rather than reviewing the Minister's decision for reasonableness. I cannot agree that is the process to be followed.

[13] Hearings *de novo* have not been the practice followed to date in *Environment Act* appeals. They have been dealt with as judicial reviews. Sipekne'katik has provided a bound volume of authorities where the reasonableness standard has been applied to decisions pursuant to the *Environment Act*. (I note that several of these decisions pre-date *Dunsmuir v. New Brunswick*, 2008 SCC 9, where the Supreme Court of Canada concluded there were only two standards of review: reasonableness and correctness.)

[14] In *Pracz et al. v. Minister of Environment et al.*, 2004 NSSC 61, Pickup, J. concluded the standard of review was patent unreasonableness (para. 47). In *Fairmount Developments Inc. et al. v. Nova Scotia (Minister of Environment and Labour)*, 2004 NSSC 126, Coughlan, J. dealt (in the alternative) with the issue of the standard of review. He said in para. 46:

> [46] Considering the factors, I find the appropriate standard of review to be reasonableness *simpliciter*.

[15] In *Truro Sanitation Limited v. Nova Scotia (Minister of Environment and Labour)*, 2004 NSSC 146, Scanlan, J. (as he then was) said in paras. 18 and 19:

> [18] Section 138(6) provides:
>
> > The decision of the Court under subsection (1) is final and there is no further appeal to the Nova Scotia Court of Appeal.
>
> In a sense the Supreme Court on this appeal is in a position which is close to the original trier of fact in that it can consider issues of fact. The court must however resist the temptation to simply substitute its decision for that of the Minister. In spite of the very broad discretion on this appeal the fact is this is still a review of an administration decision. …
>
> [19] In determining the standard of review I am satisfied the standard of review is that of reasonable simpliciter.

[16] In *Pinsonnault-Flinn v. The Minister of Environment and Labour for the Province of Nova Scotia*, 2004 NSSC 206, Edwards, J. cited *Pracz* (*supra*) in concluding the standard of review was patent unreasonableness (para. 63). Similarly, in *DRL Environmental Service v. AGNS*, 2004 NSSC 245, Haliburton, J. concluded in para. 23 that the standard of review was one of patent

unreasonableness. Stewart, J. came to the same conclusion in *Acheson & DeWolfe v. Minister of Environment*, 2006 NSSC 211, when she referred to *Pracz* and *DRL* before concluding that patent unreasonableness was the appropriate standard of review (para. 55).

[17] In *Elmsdale Landscaping Limited v. Nova Scotia (Environment)*, 2009 NSSC 358, Duncan, J. concluded the appropriate standard of review to be reasonableness (para.42). In *IMP Group International Inc. v. Nova Scotia (Attorney General)*, 2014 NSSC 191, Murphy, J. said in para. 19:

> The parties agree, and so do I, that the test to be applied on this appeal is whether the Minister acted reasonably in issuing the Order. That standard of review applies to both issues; that is, to the terms of the Order and to the naming of parties.

[18] He referred to *Dunsmuir* and then said with respect to statutory appeals in para. 20:

> It is also acknowledged by the parties and not in dispute that the statutory appeal of a discretionary Ministerial decision is a form of judicial review which attracts the reasonableness standard: …

[19] He then went on in para. 25 to quote from *Egg Films Inc. v. Nova Scotia (Labour Board)*, 2014 NSCA 33 where Fichaud, J. said at para. 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.

[20] In addition, I have been provided with the decisions in *Parker Mountain Aggregates Ltd. v. Nova Scotia (Minister of Environment)*, 2011 NSSC 134, *Margaree Environmental Association v. Nova Scotia (Environment)*, 2012 NSSC 296, and *3076525 Nova Scotia Limited v. Nova Scotia (Environment)*, 2015 NSSC 137. The first two of these decisions were s. 138 appeals and the third was an appeal pursuant to s. 128 of the *Environment Act*.

[21] Nova Scotia says that any lack of procedural fairness (which it does not admit) can be cured on this appeal. It relies on the following authorities for its submission: *King v. University of Saskatchewan*, [1969] S.C.J. No. 38; *Harelkin v. University of Regina*, [1979] S.C.J. No. 58; *McNamara v. Ontario (Racing Commission)*, [1998] O.J. No. 3238 (Ontario Court of Appeal); *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541; and *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97.

[22] None of these decisions were appeals pursuant to the Nova Scotia *Environment Act*. In *King* and in *Harelkin*, the Supreme Court of Canada did not state that the courts had the authority to hear matters *de novo* and cure procedural defects. The Supreme Court of Canada in each of those cases was reviewing the decision of a university senate committee. In *King*, it was the committee which heard the matter *de novo* and was found to have cured procedural defects in earlier proceedings. In *Harelkin*, the court agreed with that principle but concluded the student had an adequate alternative remedy other than resorting to the courts.

[23] Similarly in *McNamara* the tribunal established under the *Racing Commission Act* had heard the matter *de novo* and given the appellant a "full, open and fair hearing" (para.27).

[24] In *Volochay* the issue was whether the appellant had an adequate alternate remedy and could prove there were no exceptional circumstances for resort to the court instead of having the decision reviewed by the Health Professions Appeal and Review Board (HPARB). Laskin, JA, said in para. 76:

> 76 What the HPARB could not have done was give Volochay the remedy he sought, and that was granted, in the Divisional Court: an order quashing the decision of the complaints Committee and the later decision appointing an investigator. However, in my opinion, a reconsideration of the investigation after giving Volochay notice of the compliant and the opportunity to make submissions would be an adequate alternative remedy. We must assume that the ICRC [Inquiries, Complaints and Report Committee] would conduct the reconsideration

> fairly and with an open mind. The HPARB would, therefore, be capable of curing the initial failure of the Complaints committee to treat Volochay fairly.

[25] In all these cases, the body which the court said had the ability to cure procedural defects was a tribunal or an individual which or who was an integral part of the legislative scheme. These included senate committees, the Ontario Racing Commission, the HPARB, and tribunals established pursuant to the *Employment Standards Act*. In my view, none of these decisions stand for the proposition that courts have such inherent authority on a statutory appeal. It is to be noted that all of the decision-making authorities to which these cases refer are statutory bodies, established by acts of various legislatures and have only a single purpose in dealing with appeals pursuant to those statutes. For a court to hear a matter *de novo* would, in my view, require specific language in the *Environment Act*. There is none.

[26] If what Nova Scotia submits is the case, the court would be deciding the matter on a standard of correctness and substituting its own view. The courts of Nova Scotia in the decisions to which I have referred have consistently dealt with *Environment Act* appeals using the standard of reasonableness.

[27] In *Taiga Works*, Tysoe, J.A. referred to *King*, *Harelkin*, and *McNamara*. He set out in para. 1 the issue on the appeal:

> At issue in this appeal is whether an appellate body has the ability to cure breaches of the rules of natural justice or procedural fairness committed by the tribunal whose decision is under appeal and, if so, whether the breaches in this case were cured.

[28] In that case, a delegate of the Director of Employment Standards allowed a complaint by employees which the employer appealed to the Employment Standards Tribunal. The first member of that tribunal concluded there had been procedural unfairness to the employer which he could cure on appeal. The employer appealed to a second tribunal and that member referred the matter back to the first tribunal for a further hearing. The employer sought judicial review of the decision of the second tribunal.

[29] Tysoe, J.A. quoted from *Cardinal v. Director Kent Institution*, [1985] 2 S.C.R. 643. He said the employer's submission was that an appeal can only cure breaches of procedural fairness where there is a *de novo* hearing. He said in para. 15:

> The employer initially took the same position before this Court as it did before the chambers judge. Based on *Cardinal*, it said an appellate tribunal has no power to cure breaches of the rules of natural justice and procedural fairness. It pointed out that *Cardinal* was not mentioned in *International Union of Operating Engineers*, which it said was incorrectly decided because it conflicted with *Cardinal*. At the hearing of the appeal, the employer submitted in the alternative that if breaches of the rules of natural justice and procedural fairness can be cured by an appellate tribunal, a breach can only be cured if a *de novo* hearing or a hearing resembling a *de novo* hearing has taken place after the occurrence of the breach.

[30] He then said in para. 17 that *Cardinal* could not stand for the proposition asserted:

> I note *Cardinal* did not involve an appeal from the person who breached the duty of procedural fairness. The application was for judicial review of the director's decision, with relief requested in the form of *habeas corpus*. Hence, as the case did not involve a tribunal sitting on appeal from a decision of another tribunal, it would appear doubtful that *Cardinal* could stand for the broad proposition asserted by the employer that an appellate tribunal cannot cure a breach of the rules of natural justice or procedural fairness.

[31] He then referred to *King* and *Harelkin*, which pre-dated *Cardinal*, and several authorities which came thereafter. He concluded that the three named authorities "can stand side by side" (para. 36). He continued in that paragraph and in para. 37:

> 36 … The fact that the Supreme Court of Canada mentioned both *Harelkin* and *Cardinal* with approval means that *Cardinal* cannot be taken to have overruled the proposition established by *Harelkin* (and *King*) that a breach of the rules of natural justice or procedural fairness can be cured by an appellate tribunal in appropriate circumstances.
>
> 37 I think it is fair to say that *Cardinal* stands for the proposition that a breach of the rules of natural justice or procedural fairness cannot be overlooked on the basis that the reviewing court or appellate tribunal is of the view the result would have been the same had no breach occurred. As demonstrated by the post-*Cardinal* authorities to which I have referred, *Harelkin* and *King* continue to stand for the proposition that appellate tribunals can, in appropriate circumstances, cure breaches of natural justice or procedural fairness by an underlying tribunal.

[32] The question then is what are "the appropriate circumstances" in which, on appeal, failures to provide procedural fairness can be cured. The answer in this case, in my view, lies in the nature of the legislative scheme. Where the Legislature

has enacted a scheme for making administrative decisions and providing for an appeal of those decisions to a person or tribunal which has expertise in the subject matter in issue, a failure to provide procedural fairness can be cured by the appellant tribunal. In my view, the Nova Scotia Supreme Court should not conduct a *de novo* hearing and substitute its decision for that of the Minister, thereby curing any procedural defects which may have occurred in the making of the Minister's decision. To do so would result in the court speculating about what the Minister's decision would have been had there been no procedural defects. The courts are not experts or parts of the administrative machinery pursuant to the *Environment Act*.

[33] In its reply, Sipekne'katik provided to the court and other counsel a copy of a recent (November 4, 2016) Supreme Court of Canada decision, *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47. Sipekne'katik relied on it as further support for its argument on procedural fairness.

[34] Because the decision was recent and only provided to opposing counsel at the end of the two-day hearing, I gave both of those counsel an opportunity to make submissions about it. The last of these was received on December 20.

[35] Both Alton and Nova Scotia say the decision is not helpful to Sipekne'katik's submission on procedural fairness. Alton says the issue only arose tangentially in paras. 36-40 and 57. Nova Scotia says it was not addressed.

[36] I agree in para. 2, Karakatsanis, J., writing for the majority set out the issues before the court:

> This appeal raises two issues: (1) What is the appropriate standard of review for the Board's implicit decision that it could increase the assessment? (2) Does the decision withstand scrutiny on that standard?

[37] The issues were the standard of review and the reasonableness of the decision. There was no argument that there had been procedural unfairness. There is no issue here that the standard of review of the Minister's decision is reasonableness, that is, the reasonableness of the decision that there was adequate consultation. The issue here about procedural fairness is to determine if the means by which the Minister arrived at her decision was fair.

[38] I will therefore consider the content of procedural fairness owed to the appellant and whether that level of fairness has been met.

Procedural Fairness

[39] Sipekne'katik alleges procedural unfairness in the decision of the Minister of Environment made pursuant to s. 137 of the *Environment Act*.

[40] The authorities are clear that the issue of procedural fairness is not subject to a standard of review analysis. It is a two-step process: first to determine the content of the duty of procedural fairness and then to determine if the procedure was fair. I am to consider whether the means by which the Minister arrived at her decision was fair in the context of the level of procedural fairness called for.

[41] MacAdam, J. in *Margaree* at para.11 referred to *Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.*, 2010 NSCA 19. In that decision, the court said at para. 30:

> The judge is not reviewing the tribunal's ultimate decision, to which a "standard of review" is accorded. Rather, the judge assesses the tribunal's process, a topic outside the typical standard of review analysis.

[42] The Court of Appeal also referred to *Nova Scotia (Provincial Dental Board) v. Creager*, 2005 NSCA 9, where it said in para. 24:

> Issues of procedural fairness do not involve any deferential standard of review: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74 per Arbour, J.; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paras. 100-103 per Binnie, J. for the majority and at para. 5, per Bastarache, J. dissenting. As stated by Justice Binnie in *C.U.P.E.*, at para. 102:
>
> > The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.

[43] Reference was also made to *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 where L'Heureux-Dubé, J. at para. 43 "considered procedural fairness without analyzing the standard of review".

[44] No deference is owed to the way in which the Minister made her decision. If the decision was procedurally unfair to the appellant, it is an invalid decision. As LeDain, J. said at p. 661 of *Cardinal*:

> … the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

[45] There have been a number of decisions on appeals pursuant to the *Environment Act*. With the exception of *Margaree*, none have involved First Nations. In that case, the only reference to First Nations is in para. 4 where MacAdam, J. said:

> The meeting of February 10, 2011, was conducted at the Wycobah First Nation. The Kwilmu'kw Maw'klusuaqn Negotiation Office, on behalf of the Assembly of Nova Scotia Mi'kmaq Chiefs (KMK) retained exp Services Inc. to carry out an independent hydrogeological, hydrological, and biological analysis of the proposed project.

[46] The appellants were a group called the Margaree Environmental Association. In para. 6 the appellant in that case was described as follows:

> [6] The appellant is a non-profit society whose purposes include "promoting the interests of all people and owners of real property in the preservation of the natural environment and their landholdings." Most of the appellant's members live in the Lake Ainslie-Margaree watershed, and some are landowners adjacent to the MacDonald property.

[47] The role of the KMNKO was to arrange for an independent scientific analysis of the project. It is not referred to again in the decision.

[48] In previous *Environment Act* appeal decisions, pursuant to s. 138, the following principles were applied. These include:

1. no specific form of procedure is set out in the *Act* (*Margaree*);
2. there is no need for a formal hearing or trial-like process (*Margaree, Acheson* and *Parker Mountain*);
3. there must be an opportunity for the appellant to make written submissions to the Minister and otherwise have ample opportunity to present its position (*Margaree, Parker Mountain* and *Pracz*);
4. there is no requirement that a staff report be provided to the appellant before the Minister makes his or her decision (*Parker Mountain*);
5. the Minister must provide written reasons (*Fairmount*);
6. there is conflicting authority about whether the Minister's decision is an administrative or judicial-like decision. In *Margaree*, in 2012, MacAdam, J. referred in para.52 to the "adjudicative role of the Minister". In 2011, in para. 56 of *Parker Mountain*, Robertson, J. said the decision was administrative. In my view the characterization of

> the decision as adjudicative is preferable. The appeal to the Minister is an appeal from the decision of a staff person. The s. 137 appeal is more in the nature of a judicial decision.

[49] In *Baker*, L'Heureux-Dubé, J. discussed the content of the duty of procedural fairness. She referred to *Cardinal* where LeDain, J. said at page 653:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. …

[50] In *Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd.*, 2016 NSCA 40, the court quoted Cromwell, J.A. (as he then was) in *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27. The focus is on the way in which the decision was made, not on the end result of the decision (para. 20). Cromwell, J. A. discussed the two-step process in para. 21:

> [21] The first step – determining the content of the tribunal's duty of fairness – must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step – assessing whether the Board lived up to its duty -- assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness.

a) <u>Determining the content of the duty of fairness</u>

[51] Turning to the first step of the analysis, what is the content of the Minister's duty of fairness?

[52] L'Heureux-Dubé, J. in *Baker* considered the factors which would affect the duty of procedural fairness. She referred back to her decision in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 where she said:

> [21] The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal, supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J.

[53] She went on in para. 22 to refer to the context of the statute and the rights affected saying:

> [22] Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[54] She then enumerated five non-exhaustive factors relevant to the determination of the level of procedural fairness required in given circumstances. These non-exhaustive factors have since been summarized, including in para. 13 of *Margaree*, as:

> 1. The nature of the decision and the nature of the decision-maker;
> 2. The nature of the statutory scheme;
> 3. The importance of the decision to affected individuals;
> 4. The legitimate expectations, if any, of the person challenging the decision; and
> 5. The process chosen by the decision-maker.

1. The nature of the decision and the nature of the decision-maker

[55] In *Baker*, L'Heureux-Dubé said in para. 23:

> 23 … One important consideration is the nature of the decision being made and the process followed in making it. In *Knight*, *supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making".

[56] The process followed under s. 137 of the *Environment Act*, to which I have referred above, makes the decision one which is closer to being judicial than merely administrative. The Minister is dealing with an appeal from a staff decision. In this case, she received lengthy submissions from Sipekne'katik and a report from Glen Warner which dealt in detail with the grounds of appeal raised by Sipekne'katik's solicitor, James Michael. In addition it is apparent that Darlene

Willcott, a solicitor with the province, had a role to play in the process. The involvement of lawyers for the government and the appellant make it appear more like a judicial process. This leads to a conclusion that a higher level of procedural fairness is called for.

2. The nature of the statutory scheme

[57] L'Heureux-Dubé, J. said in para. 24:

> 24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface, supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statue help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

[58] Under the *Environment Act* there is an appeal to the Nova Scotia Supreme Court. Because of this a lower level of procedural fairness is indicated.

3. The importance of the decision to the affected individuals

[59] In para. 25 of *Baker*, L'Heureux-Dubé said:

> A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.

This is an important factor in this case. A higher level of procedural fairness is therefore called for.

[60] Sipekne'katik's Notice of Appeal to the Minister, pursuant to s. 137, from the decision of Brad Skinner to grant the Industrial Approval consists of the Notice of Appeal Form and 74 paragraphs of explanation from the band's solicitor James Michael (Vol. 1, Tab 1 of the Record). In para. 2 Mr. Michael succinctly sets out the basis for the appeal:

> 2. The Province failed to fulfill its legal obligations of consultation and accommodation before granting the necessary approval for the operation of the Alton Gas Brine Storage Pond Project ("project") in Sipekne'katik traditional territory.

He then in detail set out Sipekne'katik's view of what led to the granting of the Industrial Approval and the deficiencies in the process (paras. 3 to 39).

[61] He stated Sipekne'katik's position on the issue that was before the Minister. He said in para. 40:

> 40. The issue to be determined in this appeal is as follows:
>
> a. Whether the Province granted the approval to operate the brine storage pond pursuant to section 56(1) of the *Environment Act* contrary to section 35(1) of the *Constitution Act*, by failing to consult with and accommodate Sipekne'katik prior to granting the approval to Alton Gas.

[62] In the following paragraphs, he referred to Sipekne'katik's aboriginal rights and the duty to consult and accommodate. He referred to Supreme Court of Canada

decisions on the subject of the duty to consult and the extent of the required duty. In his conclusion he said in paras. 69 and 70:

> 69. Sipekne'katik submits that the Province failed to fulfill its legal obligations of consultation and accommodation before granting any necessary approval for the operation of the Alton Gas brine storage pond project ("project") in Sipekne'katik traditional territory.
>
> 70. Sipekne'katik respectfully requests that the Minister set aside the approval decision of Brad Skinner dated January 20, 2016, and engage in the appropriate consultation and accommodation of the Sipekne'katik interests and concerns relating to the Alton Gas project.

[63] In *Kelly*, Cromwell, J.A. referred to the need for the court to pay careful attention to the context of the proceeding. In *Baker* L'Heureux-Dubé, J. commented on the nature of the issue.

[64] S. 35(1) of the *Canada Act 1982* ("the Constitution") provides:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[65] In the context of s. 35(1) of the Constitution, aboriginal rights and the issue of the duty to consult and its extent, I conclude there is an elevated importance of the Minister's decision which indicates a higher level of procedural fairness.

4. Legitimate expectations, if any, of the person challenging the decision

[66] L'Heureux-Dubé, J. said in para. 26:

> Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. … As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: … This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers.

[67] In this case Sipekne'katik requested, on several occasions, an opportunity to respond to the staff review provided to the Minister. As Robertson, J. said in *Parker Mountain*, there is a "well established departmental practice" for the Minister to receive staff advice and recommendations.

[68] Sipekne'katik had no reason to believe that practice would not be followed on this s. 137 appeal. It is the usual practice and no one in the Nova Scotia Department of Environment is alleged to have promised otherwise.

[69] Sipekne'katik bases its submissions on the unique social and statutory context, to which I have referred above with respect to the third factor.

[70] An argument was made in *Baker* that the rights of the child set out in the Convention on the Rights of the Child ((Can) T.S. 1992 No. 3 (Articles 3, 9 and 12)) created an expectation that the appellant would have greater procedural rights beyond those normally accorded in similar appeals. In para. 29, L'Heureux-Dubé, J. concluded this was not the case. She said:

> 29 I turn now to an application of these principles to the circumstances of this case to determine whether the procedures followed respected the duty of procedural fairness. I will first determine whether the duty of procedural fairness that would otherwise be applicable is affected, as the appellant argues, by the existence of a legitimate expectation based upon the text of the articles of the Convention and the fact that Canada has ratified it. In my view, however, the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms. Baker that when the decision on her H & C [Humanitarian and Compassionate] application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. This Convention is not, in my view, the equivalent of a government representation about how H & C [Humanitarian and Compassionate] applications will be decided, nor does it suggest that any rights beyond the participatory rights discussed below will be accorded. Therefore, in this case there is no legitimate expectation affecting the content of the duty of fairness, and the fourth factor outlined above therefore does not affect the analysis.

[71] Sipekne'katik submits that the Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia (Record Vol 1, 2nd Tab numbered 5) gives it a legitimate expectation that there would be transparency in the s. 137 appeal. The Consultation Policy provides, as one of its Guiding Principles, the following with respect to Transparency:

> Information that supports or contributes to the decision or action that is the subject of consultation is generally shared with the Mi'kmaq of Nova Scotia.

There are specific exceptions which are not relevant in this situation.

[72] Sipekne'katik says because of this policy it anticipated the information provided to the Minister would be shared with it. However, the "subject of consultation", insofar as the s. 137 appeal was concerned, was the operation of the brine storage pond and associated works. Information about the project was

provided and the sufficiency of the consultation is a the heart of the second issue on this appeal.

[73] I refer to the words of L'Heureux-Dubé, J. in *Baker* (in para. 29 quoted above) and apply them to this situation. The fact that Nova Scotia signed the Consultation Policy does not mean that procedural rights on appeal from granting the Industrial Approval would be greater than what would normally be required. The Consultation Policy is not a representation that s. 137 appeals, as opposed to the granting of an Industrial Approval, will give Sipekne'katik greater participatory rights. A kind of consultation process is not required for the Minister's decision on the s. 137 appeal.

[74] Sipekne'katik had no legitimate expectation there would be an opportunity to see the Warner report. In fact, Darlene Willcott had told Mr. Michael, the Band's solicitor, that it would not be provided. Sipekne'katik wanted to have the opportunity, but it was given no such assurance.

[75] Because there was no promised additional opportunity for submissions, this factor does not lead to a conclusion that a greater level of procedural fairness is required.

5. The process chosen by the decision-maker

[76] L'Heureux-Dubé, J. said in para. 27 of *Baker*:

> Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the stature leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, *per* Gonthier J.

[77] She said the procedure chosen should be "respected". Also, Cromwell, J.A. in *Kelly* said "appropriate deference" should be shown to the choice of procedure.

[78] The *Environment Act* does not set out any specific procedures to be followed on a s. 137 appeal. The usual practices have been referred to above. The "institutional constraints" include the short time limits for the Minister's decision. As well the Minister has the authority to appoint "any person … to advise the Minister with respect to … (d) any other matter referred by the Minister to the person …" (s.9(1) *Act*).

[79] In my view this factor too calls for a lower level of procedural fairness.

Conclusion on content of procedural fairness

[80] Weighing these factors I conclude the most important are the nature of the decision (more judicial than administrative) and the importance of the decision to this appellant, in the context of the Canadian constitution, the rights affected and the expectation of fair treatment of First Nations by government. These factors outweigh those that call for a lower level of procedural fairness. Overall I conclude a higher level of procedural fairness is called for as is appropriate for a decision of this nature in these circumstances.

[81] The next step is to determine whether the higher level of procedural fairness required in this case was met.

b) Was the procedure fair

[82] In *Parker Mountain*, Robertson, J. said in para. 57 that the appellant knew the case it had to meet. She said in para. 55 that the Nova Scotia Department of Environment "in its letter of October 30th, 2009, was clear in stating their reason for suspension…".

[83] In this case, although it was the appellant, Sipekne'katik did not have the information that the Office of Aboriginal Affairs provided to Glen Warner which

contradicted Sipekne'katik's position on consultation and criticized its conduct. The information from the Office of Aboriginal Affairs found its way into the Warner report to the Minister, often verbatim.

[84] Also in *Parker Mountain*, Robertson, J. said at para. 31:

> 31 PMAL says further that in the review conducted by Glen Warner of the PMAL appeal of November 23, 2009, Mr. Warner did not meet with PMAL although it is clear their legal counsel Kevin Latimer had been invited to make further representation to Mr. Warner and chose not to do so.

[85] Accordingly it appears that it is not the invariable practice of the Department of Environment that no further submissions can be made. They were invited in *Parker Mountain*. In *Margaree* MacAdam, J. seems to leave open the argument that if there was a request and a refusal it could affect procedural fairness (para. 26).

[86] In the specific circumstances of this case, bearing in mind the "statutory, institutional and social context" (*Baker* para. 22), I conclude Sipekne'katik should have been given the opportunity it sought to "respond to any information that [the Minister] will be considering concerning the adequacy of consultation by the Crown with Sipekne'katik concerning the Alton project". (Exhibit D to the affidavit of James Michael sworn June 3rd, 2016).

[87] That request was made several times: see Exhibits B, C, D and E of the affidavit of James Michael. The request was refused by Darlene Willcott, a solicitor in the Legal Services Division of the Department of Justice. She said in her letter of April 15, 2016 (Exhibit G to the Michael affidavit):

> The statutory scheme does not obligate the Minister to solicit input from the appellant before making her decision. The Minister is committed to preserving the integrity of the appeal process. Therefore, in accordance with the principles of natural justice, she will review your client's appeal, along with the supporting documentation, and she will render her decision within the timeframe set out in s. 137 of the *Environment Act*.

[88] The Minister's decision is brief: two pages. She refers to the consultation process which she says has occurred and the requirement in the Industrial Approval for continuing consultation. She does not refer to the Warner report, a 30 page report entitled "Interim Decision Report" dated April 18, 2016, which is the same date as the Minister's decision. Nor does she refer to material the Office of Aboriginal Affairs sent to Glen Warner. It was in three parts and dated March 23, 2016. The first was entitled "Summary of concerns raised in Sipekne'katik First Nation's appeal of the Alton Gas Storage Project Industrial Approval and related media reports", a four page document. The second was entitled "OAA Consultation Record of Meetings and Correspondence with Sipekne'katik First Nation on the Alton Gas Project". It was eight pages in length and listed 107 items. Justin Hustin, the Executive Director of the OAA says in his letter of March 23,

2016: "A binder of the documentation that we have on record associated with this chronology will be provided later this week." The third document was entitled "OAA Chronology of Sipekne'katik First Nation Consultation Funding/Process Development". It was a four-page document listing 48 items.

[89] It is this material that Sipekne'katik did not have as well as the Warner report.

[90] As a result, I conclude the decision of the Minister should be quashed. It was not procedurally fair in the circumstances of this case, in that there was a refusal to allow Sipekne'katik to have a copy of, and respond to, the Warner report. The matter is therefore remitted back to the Minister to allow Sipekne'katik an opportunity to respond to the Warner report and the material from the Office of Aboriginal Affairs on which Warner relied.

Stay request

[91] Sipekne'katik asks that, if the matter is remitted back to the Minister, I grant a stay of the Industrial Approval. Sipekne'katik says that any such stay would not be a stay in the nature of the one denied by Justice Wood.

[92] Section 138(5) of the *Environment Act* provides that a stay is not automatic upon the filing of a s. 138 appeal. Since this decision concludes the s. 138 appeal, that subsection has no further application.

[93] Pursuant to s. 137(6) of the *Act*, a stay is not automatic on the filing of a Notice of Appeal to the Minister. As a result of my conclusion that the Minister's decision be quashed and remitted back to her for further decision, it is s. 137 which applies.

[94] I conclude I do not have the authority to deal with a stay while the matter is subject to appeal to the Minister pursuant to s. 137. I am supported in this view by *Civil Procedure Rule* 7.28. It provides in subsection (1) that a judge may grant a stay of a decision under appeal. As I have said, with the rendering of this decision, the appeal to this court has been decided. There is no appeal to the court pending to which *Rule* 7.28 could apply. I therefore do not grant a stay.

Conclusion

[95] Since I have concluded the matter must be remitted back to the Minister of the Environment, it is unnecessary for me to deal with the issue of consultation.

Costs

[96] Sipekne'katik has been successful on this appeal. If the parties cannot agree on costs, I will accept written submissions to be made by March 31.

Hood, J.