SUPREME COURT OF NOVA SCOTIA

Citation: *3076525 Nova Scotia Limited v. Nova Scotia (Environment)*, 2017 NSSC 67

Date: 20170309
Docket: Hfx. No. 449947
Registry: Halifax

Between:

3076525 Nova Scotia Limited

Appellant

v.

Minister of the Environment representing Her Majesty the Queen in Right of the Province of Nova Scotia

Respondent

v.

Marlene Brown, Melissa King and Angela Zwicker

Intervenors

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	November 24, 2016, in Halifax, Nova Scotia
Counsel:	Robert G. Grant, Q.C. and Sara Nicholson, for the Appellant Sheldon Choo, for the Respondent Kaitlyn Mitchell and Julia Croome, for the Intervenors

By the Court:

[1] The appellant, 3076525 Nova Scotia Limited, appeals a Ministerial Order ("the 2016 MO") of the respondent made pursuant to s. 125 of the *Environment Act*, SNS 1994 – 1995, c. 1 ("The *Act*"). The order was made on February 24, 2016 against the appellant, 3076525 Nova Scotia Limited (hereafter "307 NSL"). It found that the appellant had contravened s. 67 of the *Act*, and required it to undertake some remedial and monitoring measures.

[2] The intervenors are all land owners of properties either adjacent to or in the vicinity of the site of the appellant's operations.

Background

[3] Central to this appeal is a very polluted property located at 1275 Old Sambro Road in Halifax Regional Municipality. Almost two decades ago the Province began to hear from people in the area detailing concerns with respect to the deteriorating quality of the drinking water in their wells.

[4] This rough time-line coincides with the arrival on the scene of a company, 3012334 Nova Scotia Limited ("301 NSL"), who were then operating under the name of RDM Recycling. They ran a construction and debris (C&D) recycling business at the location from 1997 until 2005. Much occurred during that interval, but for present purposes it all culminated with the 2005 purchase of almost all of the assets of 301 NSL by 307 NSL, the current appellant. 301 NSL adopted its current appellation at that time, while 307 NSL took over the operation of the business, assuming the name "RDM Recycling".

[5] The only asset which 301 NSL did not sell to the appellant was the land, (which is to say, 1275 Old Sambro Road, hereinafter referred to as "the property"). This property was leased by the appellant, who went into occupation in 2005.

[6] To repeat, much transpired, both before and after the 2005 transaction. This history has been discussed extensively in a bevy of earlier court decisions which were rendered in the wake of the ongoing efforts of the Province to come to grips with, and compel those whom it felt were responsible, to remediate (or at least vitiate) the effect of the released contaminants upon the local environment, and upon the local ground water in particular. The most fulsome review of this history is contained in *3076525 Nova Scotia Ltd. v. Nova Scotia (Environment)*, 2015 NSSC 137 (hereinafter referred to as "307 NSL No. 1"), a decision of Justice

Arnold. In that case, 307 NSL appealed an earlier order of the Minister which had been issued in 2010. I will discuss this more extensively in due course.

[7] Other related decisions consist of *3076525 Nova Scotia Ltd. v. Nova Scotia (Minister of the Environment)*, 2016 NSSC 138, (a motion to add intervenors in the present appeal), *3076525 Nova Scotia Ltd. v. Nova Scotia (Minister of the Environment)*, 2014 NSSC 85 (a preliminary motion to adduce fresh evidence in the matter that was ultimately decided by Justice Arnold in 307 NSL No. 1) and, most recently, *Brown v. Nova Scotia (Environment)*, 2016 NSSC 319 (which dealt with an appeal of two of the principals of 301 NSL of a "companion" Ministerial Order issued simultaneous to the 2016 MO in the case at bar, requiring them to also undertake remedial measures in relation to 1275 Old Sambro Road and environs).

[8] I do not intend to recapitulate this history in anything even approaching an exhaustive manner. The record prepared by the respondents in this matter comprises four volumes, consisting of over 1600 pages. This material has been reviewed by me and portions of it were referenced by the parties, both in their briefs and in their oral submissions before this court on November 24, 2016.

[9] Although I have considered all of this material, I will only refer to such portions of it as are necessary to explain the conclusion that I have reached.

[10] It is convenient at this juncture to refer to Justice Boudreau's synopsis in *Brown, supra,* paras. 6 – 13 thereof, where she notes:

> 6 From very early on, concerns arose in respect of non-recyclable materials that were being stored on the property, in particular, the effect of these materials on water quality on the property, as well as adjoining properties. Those materials included gyproc, asphalt, and carpet. Rainwater flowing through those materials and into the ground (called "leachate") was found to be contributing to elevated levels of chemicals in the groundwater, both on-site and off-site. Following many discussions between the respondent and 301 NSL, in 2003 a Remedial Action Plan (the "Plan") was developed to address some of these concerns.
>
> 7 One aspect of the Plan was the construction of a containment cell on the property, for storage of the materials I have mentioned. That containment cell was constructed in 2003 - 2004, and was filled with approximately 120,000 tons of material. In its design, and as built, the cell included a holding tank for the large volumes of leachate which would, it was anticipated, accumulate. It was further anticipated that this holding tank would periodically be drained, and the contents discarded, as required by the respondent.

> 8 It would appear that various questions have been raised since that time, and continue to be raised, as to whether that containment cell was/is doing the job it was meant to do. From the limited information before me, it does not appear that the cell holding tank is capturing much leachate. In December 2004, for example, the appellant Mr. Brown checked the holding tank and noted that there was not enough leachate to pump. It is difficult to know, however, what this means; it may not necessarily mean that the cell is not working properly.
>
> 9 In any event, in 2005, 301 NSL sold its business assets to a new company, 3076525 NSL Limited ("307 NSL"). 301 NSL retained ownership of the land, and leased portions of it to 307 NSL, which then commenced operating the facility under the business name "RDM Recycling". 307 NSL took over the periodic water monitoring that was required by the Plan with the respondent. The containment cell would appear to have remained the responsibility of 301 NSL.
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> 10 In 2006, 301 NSL's status with the Registry of Joint Stock Companies was revoked for nonpayment of registration fees. That has remained the case until the time of the hearing before me.
>
> 11 In 2009, 307 NSL contacted the respondent, seeking a reduction in the frequency of water monitoring (required by the 2003 plan). Discussions were held between the parties, without the involvement of 301 NSL or the appellants.
>
> 12 In November 2010, the respondent issued an Order pursuant to ss. 125 of the Act (the "2010 Order") requiring that certain remedial actions be undertaken by a number of named parties. This 2010 Order named 307 NSL, 301 NSL, a third company named Ernest A. Nicholson Limited, as well as both appellants.
>
> 13 307 NSL was the only party that appealed the 2010 Order, to this Court. The main thrust of their objection related to the containment cell; they argued that much of the contamination on the property resulted from the cell, which was not their responsibility. By decision dated May 6, 2015 (3076525 Nova Scotia Ltd. v. Nova Scotia (Minister of Environment) [2015] NSSC 137), the Court held that the 2010 Order was reasonable with the exception of the clause referring to the containment cell. The Court found that the respondent had not been aware of the full circumstances between 307 NSL and the containment cell, which rendered the Order unreasonable in relation to that one issue.

[11] In the aftermath of Justice Arnold’s decision in 307 NSL No. 1, the Minister engaged in further discussions with the affected parties. She revoked the 2010 Ministerial Order (“the 2010 MO”) and replaced it with two new ones. The first named 301 NSL and its directors, Brown and Lawrence, and imposed certain remedial obligations upon them in relation to the property. Brown and Lawrence appealed it and that appeal (as previously discussed) was the subject of the decision in *Brown, supra,* by Justice Boudreau.

[12] The second named only 307 NSL, and it is this particular 2016 MO which I address herein.

The first and second orders

[13] All parties agree that the contents of the 2010 MO and the 2016 MO are substantially the same.

[14] With respect to the former, Justice Arnold noted at para. 58 of 307 NSL No.1:

> 58 The most significant issue raised by the appellant relates to Clause 7 of the Order, requiring it to develop a leachate management plan. All parties to this appeal agree that Clause 7 would require the parties named in the Order to develop a comprehensive leachate management plan for the entire Property, including the containment cell…

[15] This containment cell was built by 301 NSL in response to the need to contain material that this company had stockpiled on the property in anticipation of receipt and approval from Nova Scotia Department of the Environment ("NSE") to dispose of C&D waste on the property. Not only was 301 NSL refused the necessary approval to dispose of the material on site, NSE also required it to develop a remedial action plan (RAP) to deal with concerns in relation to ground water testing results that had been conducted in the area.

[16] After submission of its RAP, 301 NSL was advised (on November 27, 2003) that NSE had approved the proposed plan. NSE also advised that it had changed its position (in part) with respect to the disposal of waste on the property. The department's decision was to allow 301 NSL (one time only) to dispose of the materials that had accumulated on the property into a containment cell. A suitable strategy for the collected leachate, and the cell construction and capping design, were to be completed by 301 NSL and provided to NSE. It was also stipulated that the collected leachate and capping work "must be completed by a geotechnical engineer".

[17] Although the containment cell was completed by September 2004, and the cell was capped by October of that year, there is no available evidence to suggest that a geotechnical engineer was ever involved in the project.

[18] Concerns have been expressed with respect to the cell and whether it is functioning properly ever since. For example, as has been seen, Justice Boudreau mentioned in *Brown, supra*, at para. 8:

> 8 ... From the limited information before me, it does not appear that the cell holding tank is capturing much leachate. In December 2004, for example, the appellant Mr. Brown checked the holding tank and noted that there was not enough leachate to pump. It is difficult to know, however, what this means; it may not necessarily mean that the cell is not working properly.

[19] After concluding, on the basis of the available evidence, that the containment cell was not likely the only source of contamination emanating from the property, Justice Arnold, in 307 NSL No. 1, analyzed a number of different factors and concluded that the Minister had not been provided with sufficient information by her department as to the relationship of the appellant with the containment cell. In particular, it did not appear to have been sufficiently clear to the Minister prior to her decision to issue the 2010 MO, that 301 NSL was responsible for the design and construction of the cell. It also did not appear to have been made sufficiently clear to her that 301 NSL had (apparently) retained responsibility for the cell when all of the assets (except the land, which the appellant leased) were sold to 307 NSL in 2005. This implicated Clause 7.

[20] Accordingly, after concluding that Clause 7 of the 2010 MO was not reasonable insofar as it pertained to 307 NSL, Justice Arnold concluded that the balance of the 2010 MO was within the range of reasonable outcomes or measures which could be taken by the Minister and, therefore, approved the balance of the order. Justice Arnold had this to say at para. 103 of his decision:

> 103 In relation to the majority of the Order, there is no evidence to indicate that the containment cell is the sole cause of the contamination in question. In fact, the body of evidence presented on this appeal suggests otherwise. Just because some of the contamination pre-dates the appellant's use of the Property does not lead to the inescapable conclusion that the factors in s. 129(1)(a) and s. 129(1)(b)(l) of EA have been met. For at least five years, the appellant stored gyproc and other potentially hazardous materials on its site exposed to the elements for thirty days at a time. The leachate created by the appellant's operations could have contributed to some of the cumulative harm being considered on this appeal.

[21] The 2010 MO was remitted back to the Minister for reconsideration solely in relation to Clause 7. Essentially, the 2016 MO (as it relates to the appellant in the present context) reiterates the terms of the 2010 MO, with the exception that Clause 7 has been excised. In addition, the appellant has also been required to

undertake mitigation measures in relation to the wells of the three intervenors with respect to the impact of lead, uranium and some other substances. The 2016 MO also includes the requirement for quarterly sampling of eight off-site residential wells for content, including dissolved metals, as well as for the annual monitoring of a number of domestic wells.

[22] Those requirements of the 2016 MO that are virtually identical to the 2010 MO require the appellant to:

a. mitigate impacts of uranium, lead and other substances in ground water that may impact domestic wells at the homes of other residents in the area (including intervenors);

b. conduct a phased site assessment and ground water plume delineation and submit a report of the results;

c. conduct a phased site assessment and ground water monitoring program regarding the same onsite wells, and offsite downgradient domestic wells;

d. continue surface water monitoring of Shea's Lake;

e. submit quarterly reports on water quality to NSE and to well owners; and

f. prepare and submit a Remedial Action Plan to NSE.

[23] Before issuing the 2016 MO, NSE personnel met with the appellant's representatives on July 29, 2015 and September 1, 2015 in attempts to fairly address what amounted to continuing non-compliance with the 2010 order. NSE also reviewed evidence from the appellant's expert (Mr. Blackmer), as well as a full legal opinion from the appellant's counsel. Also available to NSE was the results of its own investigation and analysis conducted during that interval, which, among other things, concluded that the appellant's operational area "has a distinct ground water impact signature which is different from the containment cell and includes the association between elevated alkalinity, elevated calcium, and elevated uranium…".

[24] NSE's investigation also yielded two further conclusions. The first was that it was not possible to segregate the individual impact of 307 NSL's operation from those of the containment cell in the area downgradient of the cell. The second was that since the appellant had discontinued operation in 2013, wells downgradient

from its operational area had observed downward trends with respect to a number of contaminants.

Statutory Framework

[25] The Minister's authority to make orders such as the one at issue in this proceeding is strictly statute based. The *Environment Act* (hereinafter the *Act)* declares in s. 2 that its purpose is to "support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals…". These goals are then set out in sub-paragraphs (a) to (j) thereof. They include the principles of sustainable development (including the prevention of loss of bio-diversity), and also "the precautionary principle", which is to be used:

> 2b(ii) …in decision making so that there where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation.

[26] Also referenced in the legislation is the principle of the shared responsibility of all Nova Scotians to sustain the environment and the economy (2(b)iv) and the "polluter pay" principle which confirms "the responsibility of anyone who creates an adverse effect on the environment that is not *de minimus* to take remedial action and pay for the cost of this action". Also noted, *inter alia,* is the intent of the legislation to provide for "a responsive, effective, fair, timely and efficient administrative and regulatory system (2(i)), as well as the promotion of the *Act* "through non-regulatory means such as cooperation, communication, education incentives and partnerships".

[27] The Minister has extensive powers under the *Act.* They are set forth in s. 125. Due to their importance, I reproduce them below:

> 125 (1) Where the Minister believes on reasonable and probable grounds that a person has contravened or will contravene this Act, the Minister may, whether or not the person has been charged or convicted in respect of the contravention, issue an order requiring a person, at that person's own expense, to
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> (a) cease the specified activity;
>
> (b) stop, limit, alter or control the release of any substance into the environment or part thereof in accordance with the directions set out in the order, either permanently or for a specified period;
>
> (c) alter the procedures to be followed in the control, reduction or elimination of the release of any substance into the environment or part thereof;

(d) install, replace or alter any equipment or thing designed to control, reduce or eliminate the release of any substance into the environment or part thereof;

(e) take interim measures to control, eliminate or manage the adverse effect, including the provision of potable water to affected parties;

(f) undertake remedial action to control, reduce, eliminate or mitigate an adverse effect;

(g) install, replace or alter a facility in order to control, reduce, eliminate or mitigate the release of any substance into or on the environment or part thereof;

(h) carry out clean-up, site rehabilitation or management, site security and protection or other remedial actions in accordance with directions set out in the order;

(i) comply with directions set out in the order respecting the withdrawal of water from a watercourse, including directions to stop the withdrawal;

(j) refrain from altering a watercourse or comply with directions set out in the order respecting altering a watercourse;

(k) where a person has altered a watercourse, or has unlawfully released a contaminant into a watercourse, or where a contaminant may reach a watercourse, take immediate action to remedy the damage that person has caused;

(l) where a person is handling, storing or transporting dangerous goods, waste dangerous goods or pest-control products, take such action as is deemed necessary to avoid contamination by the good or product;

(m) cause a crop, feed, food, animal, plant, water, produce, product or other matter contaminated by a pest-control product to be destroyed or rendered harmless;

(n) restrict the sale, handling, use or distribution of a crop, feed, food, animal, plant, water, produce, product or other matter permanently or for such period of time as deemed necessary;

(o) take specified precautions with respect to the treatment or decontamination of an area affected by dangerous goods, waste dangerous goods or a pest-control product;

(p) take specified precautions with respect to the future use of an area affected by dangerous goods, waste dangerous goods or a pest-control product;

(q) restrict or prohibit the use of a contaminated site, or the use of any product that comes from a contaminated site;

(r) provide security in an amount and form specified by the Department during a clean-up and afterwards for monitoring or other purposes;

(s) do all things and take all steps necessary to comply with this Act, or to repair any injury or damage, or to control, eliminate or manage an adverse effect.

(2) In environmentally sensitive areas, an order under subsection (1) may impose terms and conditions in excess of requirements provided in regulations, policies, guidelines or standards prescribed or adopted by the Department.

(3) In addition to any other requirements that may be included in an order issued pursuant to this Part, the order may contain provisions

(a) requiring a person, at that person's own expense, to

(i) maintain records on any relevant matter, and report periodically to the Minister or person appointed by the Minister,

(ii) hire an expert to prepare a report for submission to the Minister or person appointed by the Minister,

(iii) submit to the Minister or person appointed by the Minister any information, proposal or plan specified by the Minister setting out any action to be taken by the person with respect to the subject-matter of the order,

(iv) prepare and submit a contingency plan,

(v) undertake tests, investigations, surveys and

other action and report results to the Minister,

(vi) take any other measure that the Minister considers necessary to facilitate compliance with the order or to protect or restore the environment;

(b) fixing the manner or method of, or the procedures to be used in, carrying out the measures required by the order;

(c) fixing the time within which any measure required by the order is to be commenced and the time within which the order or any portion of the order is to be complied with.

[28] “Person” is defined in s. 3(aj):

(aj) "person" includes an individual and a partnership and, for greater certainty, a corporation, municipality and any other entity, and, without restricting the generality of the foregoing, the Government, a Government agency, and Her Majesty in right of Canada and a person acting on behalf of Her Majesty;

[29] As in *Brown*, *supra*, the 2016 MO references the Minister's belief that the appellant had breached the provisions of s. 67(2) of the *Act*, which reads as follows:

> 67(2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause an adverse effect, unless authorized by an approval or the regulations.

[30] Prior to considering the reports and recommendations of her department, the Minister is to be provided with what is sometimes referred to as a "Section 129 Checklist". She was provided with such a checklist prior to the 2010 MO, and it was considered in detail in Justice Arnold's decision in 307 NSL No. 1.

[31] The Minister was also provided with one prior to the 2016 MO. It is reproduced below:

	Section No	**Question**	**Answer**	**Comments**
1	s. 1.25 s. 126 s. 127 s. 128	Who is/are the persons to be named in the Ministerial Order? Are they present day owners/occupiers/operators or past owners/occupiers/operators? Are they directors/officers, employees of the corporation?	3012334 Nova Scotia Limited (formerly RDM Recycling Limited) – Revoked for non-payment Michael Lawrence Roy Brown	Current Property Owner and past Operator Director of 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) and Ernest A. Nicholson Limited Director of 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) and Ernest A. Nicholson
2	s. 129(1)(a)	When did the substance become present on site?	Unknown – NSE determined in 2010 review of data from ground water monitoring program that an offsite impact to domestic wells is occurring from the property at 1275 Old Sambro Road, Harrietsfield	Suspected of initially becoming present when 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) Roy Brown and Michael Lawrence – Directors 301 NSL started processing operations prior to 2003; and continuing to increase through 2010 or later. In 2002 301NSL was found by NSE to be stockpiling

				material in anticipation of an approval to dispose of construction and demolition debris. This was not approved and a further appeal was denied by Nova Scotia Environment. A Remedial Action Plan allowed for an engineered cell to be constructed and debris to be disposed. In December 2005 Halifax allowed for a C and D recycling operation to be licenced on the site for processing and transfer only.
FOR OWNER, OCCUPIER OR OPERATOR ASK (PRESENT/PREVIOUS):				
3	s. 129(1)(b)(i)	Was the substance present when the person became an owner, occupier or operator?	Unknown	The owner, 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) are believed to have caused the initial release during their operations on the site.
4	s. 29(1)(b)(ii)	Did the person know, or should the person have reasonably known, that the substance was present? (Subjective test)	YES	Water quality monitoring has been done quarterly on the site since 2003; samples going back to 2003 indicated some impacts and concerns in the groundwater on the site in 2004/2005 and 301 NSL was aware of this. Results of continued monitoring after 2005 by lessees/subsequent (2005 – 2012) operators 3076525 NS Limited were delivered to Nova Scotia Environment in 2010. Additional monitoring by lessees occurred in 2010 – 2015 and shows additional impacts.
5	S. 9(1)(b)(iii)	Would the substance have been discovered if the person had exercised due diligence in ascertaining the presence of the substance before taking ownership, occupation or operation? (objective test)	Unknown	

6	S. 9(1)(b)(iii)	Did the person exercise due diligence in ascertaining the presence of the substance before taking ownership, occupation or operation?	Unknown	
7	S. 29(1)(b)(iv)	Was the presence of the substance caused solely by an independent party?	NO	The named parties (owners) caused the initial release. However the site has also been used by lessee 3076525 NS Limited between 2005 and 2012 under lease with the owners; impacts additional to those created previously by 301NSL have likely occurred.
8	s. 29(1)(b)(v)	Would the person have received an economic benefit based on the relationship between the price paid and the fair market value if the substances had not been present on the site?	UNKNOWN	RDM recycling was in a lease agreement with RDM Recycling Ltd with an expiry of October 31st, 2015. At that time, there was an option that the contract can either be renewed or the property can be purchased. Under the lease, the rent was applied by 3076525 NSL to the "environmental liabilities" of the owner.
FOR PREVIOUS OWNERS, OCCUPIERS, AND OPERATORS ASK:				
9	s. 129(1)(c)	Did the previous owner dispose of the site without disclosing the presence of the substance?		Not Applicable
FOR ALL PERSONS RESPONSIBLE ASK:				
10	s. 129(1)(d)	Did the person take reasonable care to prevent the presence of the substance? Address the "due diligence" defence.	NO	The owner when operating on the site prior to 2004 illegally stored C and D waste on the site and initiated contamination; constructed a containment cell under a Remedial Action Plan but failed to adhere to that plan; did not ensure poor results of follow up groundwater monitoring were acted upon or provided to NSE while their site was under lease to a new operator.
11	s 129(1)(e)	Did the person ignore industry standards in effect at the time? Are there industry standards?	YES	The construction of the engineered cell was not completed with the

				appropriate engineering oversight to demonstrate it was constructed as designed and the owner did not pump leachate from it as designed. Owner then did not follow up on evidence of increased groundwater impairment.
12	s. 129(1)(e)	Did the person comply with the requirements of applicable enactments in effect at this time?	NO	301NSL stored C and D waste on site without an approval as required for disposal; C and D Recycling is not regulated by the Province of NS. HRM Bylaw 101 regulates this activity and it was not adhered to in all respects.
13	s. 129(1(f)	Did the person contribute to further accumulation or continued release of the substance after becoming aware of it?	Unknown	The impacts observed in the groundwater increase over the time period that the operators leasing the property from 301NSL continued the previous operations of the owners. Can not separate a time where contamination stopped or decreased.
14	s. 129(1)(g)	Did the person take steps to deal with the substances after becoming aware of it?	Yes	NSE authorized 3016525 to construct an engineered disposal cell on the property, to disposes of 120,000 tonnes of C&D material however 3016525 NSL did not pump leachate from the cell as required or ensure follow up on evidence of worsening groundwater impairment being collected by their lessee.
15	➢ Are there any other factors that are relevant? No If yes explain? s. 129(1)(h) ➢ Could the pollution be coming from adjacent lots? NO			
16	Enclosed find copies of deeds to the property. YES			
17	➢ If corporation/partnerships/businesses are named, enclosed find a print out from the Registry of Joint Stocks (424-7770) YES ➢ Who is the recognized agent? ➢ Recognized Agent for 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) is Dawn Lawrence			
18	A briefing note needs to be prepared for the Minister. Address items set out in Section 125 of the *Environment Act* (what are the reasonable and probable grounds). The note should address measures taken to achieve compliance before the Order is prepared.			
19	A draft of the Ministerial Order including Schedule "A" terms and conditions to be forwarded.			

	Note: s. 125 and s. 129(2).

Issues

[32] The parties have focused upon the following issues***:***

A. Was procedural fairness extended to the appellant by the Minister prior to issuance of the 2016 MO?

B. Does issue estoppel apply to prevent the appellant from once again arguing that the clauses that were originally contained in the 2010 MO, were found to be reasonable in 307 NSL No. 1, and were repeated in the 2016 MO, are unreasonable?

C. Are the terms of the 2016 MO reasonable?

Analysis

A. Was procedural fairness extended to the appellant by the Minister prior to issuance of the 2016 MO?

i. Background

[33] The appellant argues (first), that it was not accorded procedural fairness by the Minister. It has two broad complaints in particular:

a. that it could not have known of the contamination with the exercise of due diligence; and

b. that it did not receive an economic benefit when it purchased 301 NSL's assets and took over its recycling business in 2005. In particular, they argue, there was not any offset between the price paid and the fair market value representing the costs that the appellant would incur to clean up or remediate the site.

[34] The appellant says that the Minister would have been left (at least) with the opposite impression, with respect to both of the above points, because of what was put to her by her staff when the Section 129 Checklist was provided.

[35] The appellant's counsel says, to the same effect, in para. 71 of his brief:

> The Section 129 Factors submitted to the Respondent contained numerous prejudicial statements against the Appellant. The Section 129 factors depict the Appellant as irresponsible and having assumed and not fulfilled environmental responsibilities of [301 NSL] for which it was financially remunerated by [301 NSL].

[36] 307 NSL argues (first) that it actually continued the quarterly water monitoring program voluntarily at its own expense, submitted the results all along to NSE, and never received any feedback from the Minister or her department until 2010 when they themselves approached the Minister to request a decrease in the frequency of the monitoring required. It will be recalled that the need for this monitoring came about originally as a result of the RAP to which 301 NSL (307 NSL's predecessor at the site) and the Minister had agreed in 2003.

[37] Second, the appellant says the following at paras. 79 and 80 of its brief:

> 79. In the checklist [as submitted to the Minister] …it is asserted that the Appellant had received an economic benefit because:
>
> > *Under the lease [between RDM as Landlord and the Appellant as tenant], the rent [was to be] applied by 3076525 NSL [the Appellant] to the "environmental liabilities" of the owner*
> >
> > Section 129 Checklist, Record, Vol. 1, Tab 30, p. 509.
>
> 80. The apparent basis for this statement is the following passage from the December 9, 2015 Review of Evidence prepared by Melanie Haggart, NSE Regional Hydrogeologist:
>
> > *Roy Brown, a director of 301 NSL, verbally advised NSE staff during site visits that he did not receive any rent from 307 NSL for use of the site and stated that they were 'looking after' his obligations pursuant to the 2003 RAP in exchange for use of the land;…*
> >
> > Record, Vol. 1, Tab 25, p. 249.

[38] The appellant says these statements are untrue, and indicates that it was never approached or asked about their veracity prior to the 2016 MO being handed down by the Minister. If asked, it says that 307 NSL representatives would have clearly explained the fallacy of these contentions to the Minister and/or her department. In fact (the appellant continues):

> It [the Appellant] paid RDM [301 NSL] rent in full in the amount specified under the lease agreement. It did not deduct from its rent payments to RDM any of the costs it incurred in having water sampling conducted. There was no agreement,

> informal or otherwise, whereby the appellant agreed to look after the obligations of the owners under the 2003 RAP.
>
> [Appellant's brief, para. 81]

ii. Procedural Fairness – Standard of Review

[39] In any consideration of this issue, it is important to bear in mind that the procedure followed by the Minister does not attract deference. Either her process was fair to all parties, or it was not. In *Bowater Mersey Paper Co. v. Communications, Energy and Paperworkers Union, Local 141*, 2010 NSCA 19, at para. 30, the Court of Appeal referred to the current state of the law in this regard:

> 30 The judge [para. 8] gave no deference to the arbitrator in the judge's assessment of procedural fairness. With that, I agree. I note parenthetically that deference is not withheld because of any standard of review analysis. 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…

[40] This harkens back to the Supreme Court Canada decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, in which the Supreme Court of Canada provided five non-exhaustive criteria to assist the reviewing court in determining whether an appropriate level of procedural fairness was observed at first instance:

a. the nature of the decision and the nature of the decision maker,

b. the nature of the statutory scheme,

c. the importance of a decision to affected individuals,

d. the legitimate expectations, if any, of the person challenging the decision and

e. the process chosen by the decision-maker.

[41] It is true that, in *Brown, supra*, Justice Boudreau adverts to recent developments in this area, particularly with respect to a reviewing court's approach to procedural fairness. As she mentions at paras. 25 and 26 of her decision:

> 25 Having said that, the intervenors have directed me to a recent article written by Justice David Stratas of the Federal Court of Appeal, who notes that this area

of law is unsettled, and advocates flexibility in a reviewing court's approach to procedural fairness:

> The time has come to recognize that procedural decisions come in all shapes and sizes.
>
> Courts are particularly vigilant in reviewing procedural fairness where the interests at stake are high. Thus, administrative decision-makers who make procedural decisions affecting those facing the expropriation of their home or the loss of their license to practice the profession are often subject to exacting review. In many cases, the review is described as correctness review.
>
> However, some cases are different. Suppose a labor arbitrator has been managing a case for years, observing the inter-party dynamics and understanding the litigation complexities in it. At the last minute, a party seeks an adjournment of a long-scheduled hearing. The arbitrator decides not to adjourn the case. On judicial review, the reviewing court will recognize the fact-based nature of the decision, the arbitrator's knowledge of the management -- labor dynamic and the arbitrator's privileged position to appreciate what has been going on in this particular matter. In such a case, reviewing courts are deferential, sometimes highly so.
>
> In short, just as the intensity of review of substantive decisions should vary according to the circumstances, procedural decisions should also be subject to the same flexible approach. The approach discussed above -- arriving at a sense of what the margin of appreciation should be in a particular case -- is apposite to procedural decisions as well. Decisions are decisions and they should be reviewed using the same methodology.
>
> ...
>
> As the conflicting Supreme Court decisions recognize, some "procedural" decisions deserve deference, some less so, others not at all. It all depends on the animating concept behind judicial review and the factors in circumstances that affect its application in an individual case.

26 I conclude from my review of this issue that when considering the issue of procedural fairness, I do not approach it strictly from a "reasonableness" or "correctness" lens, but from a perspective individual to this case.

[42] As earlier noted, *Baker, supra*, posits an approach whereby its five individual non-exhaustive criteria are analyzed when the reasonableness of the procedure followed is under consideration. On the other hand, Justice Stratas argues that the correct vantage from which to view the topic of procedural fairness should be from a perspective individual to the case under consideration. Accordingly, (he continues) the process followed in an individual case should be reviewed according to the same standard by which the reasonableness of the result

is assessed. This would include, in some cases, the extension of deference to the decision-makers' process.

[43] In *Brown, supra,* Justice Boudreau analyzed the Minister's process according to both Justice Stratas' criteria and those of *Baker,* and concluded that the procedure followed by the Minister was appropriate and fair whether viewed through either lens.

[44] She concluded that, under the Stratas analysis, the Minister was entitled to deference with respect to the process followed, and that, if the *Baker, supra,* analysis was employed, the process was not unfair (to 301 NSL). I have come to the same conclusion in this case for reasons which I will briefly outline.

[45] After the 2010 MO came into effect on November 5, 2010, the appellant was the only one of the parties named to appeal it. The appeal was ultimately heard in October 2014, and as previously noted, the appeal resulted in Justice Arnold's decision in 307 NSL No. 1, which was not released until June of 2015.

[46] Between November 5, 2010 and October of 2014, the Minister made some concessions (in the form of time extensions) in an effort to work with the appellant to obtain compliance. NSE also engaged in a number of consultations with the appellant and its experts to further that compliance objective. In some cases, this included furnishing further information to the appellant upon its request.

[47] The submissions of counsel for the intervenors as contained in their brief at para. 44 are correct:

> 44. Despite this lengthy process, none of the persons named on the 2010 Order, including the Appellant, fully complied. The following items are outstanding or incomplete: (a) investigating or addressing leachate issues on the site from the Appellant's own operational area; (b) providing an adequate surface water management plan; (c) conducting or proposing adequate site assessment so as to delineate the impacts of contamination to groundwater; (d) submitting a remedial action plan; (e) submitting an environmental management plan; and (f) meeting all requirements of the water monitoring program in the Order.

[48] In the face of continued non-compliance, the parties' focus returned to the appeal, which was reactivated, and heard ultimately in October of 2014. As noted, that decision essentially concluded that all but Clause 7 of the 2010 MO was reasonable. As for Clause 7 itself, which related to the containment cell built by the appellant's predecessor, Justice Arnold concluded that the Minister's staff did

not provide her with an adequate factual underpinning upon which to base the inclusion of that clause as it pertained to the appellant. Justice Arnold himself, did not decide what a proper course of action on the Minister's part would be once sufficient evidence was presented to her so as to facilitate a properly informed decision (with respect to the containment cell).

[49] Some of the steps taken by the Minister in the aftermath of Justice Arnold's decision included meetings between her representatives and those of the appellant on July 29, 2015 and September 1, 2015 to discuss what amounted to continuing non-compliance with the remedial measures that had been spelled out (by that time) five years earlier in the 2010 MO.

[50] The Minister also afforded to the appellant a process whereby the latter could (and did) provide further expert evidence for consideration by the Minister and her department. The appellant was also permitted, as noted earlier, to submit a full legal opinion from its counsel. This material was considered by the Minister and her department before the 2016 MO, which forms the subject of this appeal, was issued. The Minister ultimately did not follow the recommendations of, or agree with, the consultants hired by the appellants. Instead, she chose to accept and rely upon the findings of her staff, which included the following:

i. that material stored and processed by the appellant were consistent with analyses obtained in relation to contaminants found in monitoring wells in the direction (south west) of the site, which is the direction in which water flowed from the processing area;

ii. that the monitoring well installed by the appellant itself following the 2010 MO was clearly impacted by the appellant's processing operations;

iii. that, as previously noted, the effluent from the appellant's site carried its own impact signature, one which is distinct from that of the containment cell, one which is notable for its elevated levels of alkalinity (calcium) and uranium; and

iv. that since the appellant ceased operations in 2013 (it was required to - the Minister would not renew its license at the time in the face of continued non-compliance with the 2010 MO) decreases in a number of the parameters were noted in wells downgradient of the appellant's operational area.

[51] Against this backdrop, the appellant argues that it was not accorded due process or natural justice in that the Minister was provided with a Section 129

Checklist which contained misleading or false information. It says that this information (in section 8) suggested that the appellant derived an economic benefit by being entitled to divert rent that it would otherwise have paid to 301 NSL for the land, which funds were supposed to have been used to address some of the obligations of the latter with respect to the 2003 RAP and, by extension, the 2010 MO.

[52] The appellant submits that:

> …it was unfair the Minister in the circumstances of this case to rely upon unsubstantiated hearsay and surmise concerning matters within the knowledge of the appellant without canvassing the appellant for its position.

[53] The appellant argues that a person must be informed of a case against him and be afforded a fair opportunity to respond, and cites *Kane v. University of British Columbia,* [1980] 1 S.C.R. 1105 in support of that proposition. In particular, para. 4 is referenced:

> 4. The tribunal must listen fairly to both sides giving the parties to the controversy a fair opportunity for correcting or contradicting any relevant statement prejudicial to their views.

[54] The appellant also cites *Baker, supra,* and in particular, the views of Justice L'Heureux-Dube at para. 22 to the effect that the decision-maker must provide "…an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."

[55] This argument overlooks the fact that results from cases involving tribunal appeals do not often translate well into the present context, which requires the Court to scrutinize a Ministerial Order made under the auspices of the Minister's home legislation. Importantly, there is nothing in the *Act* which requires the Minister to provide an opportunity at all to those affected to make representations beforehand. In *Pracz v. Nova Scotia (Minister of Environment and Labour),* 2004 NSSC 61 this point is made explicitly:

> 52 There is nothing…which requires a Minister to receive submissions prior to issuing a Ministerial Order. Staff of the Department did discuss with the Praczes the particulars surrounding the spill on several occasions. In his Affidavit, Paul Currie, an Inspector Specialist II with Environment listed occasions when he spoke with the Praczes:
>
> (1) On April 11, 2003 he met with the Praczes in the Bedford offices of Environment where he received, "further particulars regarding

> their contractor and the insurance adjusters representing the sub-contractor who installed the tank";
>
> (2) On April 11, 2003 he met and spoke with Mr. and Mrs. Pracz at the spill site;
>
> (3) On April 11, 2003 he spoke with the Praczes' adjuster and contractor;
>
> (4) On April 16, 2003 along with another inspector Mr. Currie met and spoke with the Praczes.

[56] In para. 53, Justice Pickup reiterated that "…there is no procedural right for the Praczes to make submissions prior to the issuance of the Ministerial Orders."

[57] In *Brown*, *supra*, Justice Boudreau came to the same conclusion at para. 38 when she pointed out:

> I agree that there is nothing in the *Act* which requires a Minister to receive submissions, on any issue, prior to issuing a s. 125 Order. I have been provided with no caselaw suggesting such a duty.

[58] Even though she was under no statutory obligation to do so, it is an uncontradicted fact that the Minister did engage in some meaningful consultation with the appellant. This consultation included, as noted, permitting the appellant to file reports from its own experts and a full legal opinion from its counsel, all of which was considered by the Minister before her 2016 MO was issued.

[59] While the Minister did not call for further submissions after her receipt of the Section 129 Checklist from her department, this was merely the culminating document in what had been (essentially) a six year process. During that time the parties and their representatives had met and discussed the issues involved on many occasions.

[60] Moreover, those representations contained in the Checklist (to which the appellant objects) had no discernable impact upon the Minister's decision in any event: the 2016 MO, insofar as it pertains to the appellant, is (in all material respects) the same as the 2010 MO, with Clause 7 of the former order having been removed.

[61] For these reasons, I cannot agree with the appellant's suggestion (at p. 70 of its brief), that " a party must be provided an opportunity to contradict any prejudicial statement."

[62] With respect, by the time that the 2016 MO was issued, six years had elapsed after the 2010 MO. During this extensive period, significant consultation had ensued. To require yet more consultation, in relation to every statement which could possibly be construed as prejudicial to the appellant, would prolong the process to a point where the problem sought to be remediated may have become so aggravated as to have become virtually insoluble or irreparable. This would have been contrary to almost all of the *Act's* stated goals. In particular, I am mindful of the "precautionary principle", set out in s. 2bii , in this context.

[63] This was an administrative, rather than *quasi judicial* order made by the Minister. The appellant was familiar with the process, having gone through it in the leadup to the 2010 MO. 307 NSL was provided with, if anything, more consultation prior to the 2016 MO than it had any right to expect based upon such a precedent. To impose an obligation on the Minister to consult further would have been inimical to the process of attempting to arrest and remediate the degradation of the ground water downgradient of the appellant's operational site.

[63] Consideration of the appellant's position with respect to its other bone of contention yields a similar result. 307 NSL takes issue with the Section129 Checklist information in relation to s. 129(1)(b)ii, which was presented to the Minister in the Section 129 Checklist in the following fashion:

> Continued monitoring after 2005 was collected by consultants for 307 NSL but were not delivered to NSE until 2010…

[64] The Minister was well aware that the appellant took the position that it had delivered the water monitoring results to her office, without any feedback, from 2005 to 2010, and the fact that her staff took the position that they had not received this information until 2010. In 2010, it will be recalled that the appellant applied for an order decreasing the frequency of the water monitoring, and at that time, the DOE requested provision of the results.

[65] The record of all of this was in the possession of the Minister and her department. The record was voluminous and painstakingly thorough, the result of what amounted to, in effect, a six year investigation. Throughout the process of investigation and consultation which was followed by the Minister and her department, procedural fairness in the sense intended by the Supreme Court of Canada in *Baker, supra*, has been achieved.

[66] In any event, this conclusion would only be strengthened if I were to adopt the viewpoint put forward by Justice Stratas , which (as Justice Boudreau had considered in *Brown*, *supra*) would involve the extension of considerable deference to the Minister's process in this particular context.

B. Does issue estoppel apply to prevent the appellant from once again arguing that the clauses that were originally contained in the 2010 MO, and were found to be reasonable in 307 NSL No. 1 (and were repeated in the 2016 MO) are unreasonable?

(i) Positions of the Parties

[67] The respondent Minister and the intervenors have raised the issue of estoppel. They concede that the appellant was entitled to ask this court to scrutinize the process that lead to the decision to issue the 2016 MO. That issue has just been considered. However, (they argue), the appellant ought not to be permitted to re-argue the reasonableness of the clauses, repeated in the 2016 MO, that were originally found in the 2010 MO, and have already been found to be reasonable by Justice Arnold in 307 NSL No. 1.

[68] They say that the 2016 MO, in all material respects, differs little from its 2010 predecessor. Clause 7 has now been removed, and that had been the only difficulty that Justice Arnold identified with respect to the 2010 MO. As a result, the appellant is no longer required to engage in surface water and leachate management activities relating to the containment cell.

[69] The respondent and intervenors, therefore, argue that the doctrine of issue estoppel denies the appellant further opportunity to relitigate those portions of the Ministerial Order that were already found to be reasonable as per Justice Arnold. Put differently, those portions of the 2010 MO that are repeated in the 2016 MO (and that is all of them, except for Clause 7 as previously discussed) have been decided. The appellants are accordingly (so the submission goes) estopped from arguing, once again, that they constitute an unreasonable exercise of the Minister's discretion.

[70] From the appellant's perspective, it is argued that the Minister chose to revoke the 2010 MO and issue two separate 2016 MO's, one of which applies to it. Accordingly, s. 138 of the *Act* operates to provide the appellant with a fresh statutory basis of appeal and this applies to the entire contents of the 2016 MO to which it is subject. Moreover, the appellant goes on to say, the form which

accompanied the 2016 MO, when it was provided to the appellant, explicitly reiterated that 307 NSL has a right of appeal with respect to the contents of the MO.

ii. Analysis

[71] In *Danyluk v. Ainsworth Technologies Inc.* 2001 SCC 44, the Supreme Court traces the origin of issue estoppel within context of administrative law and concludes at para. 25:

> 25 The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle, supra*, at p. 254:
>
> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[72] The Supreme Court goes on to conclude that even if the three criteria noted above are met, it is still a matter for the court to decide whether "…as a matter of discretion, issue estoppel ought to be applied…". These principles were reiterated by the Supreme Court of Canada in the later decision of *BC (WCB) v. BC (Human Rights Tribunal)* 2011 SCC 52, a decision cited by the respondent in its brief.

[73] The statutory scheme envisioned in the *Act* has been earlier reviewed and I will not repeat it at further length. It is appropriate to observe, however, that one of its objectives is to equip the Minister with the wherewithal to make orders against a "person" who has "contravened or will contravene this *Act*" (s. 125).

[74] The *Act* contemplates, among other things, the ability of the Minister to act with dispatch to remediate contravention(s) of the *Act* and to "promote the protection, enhancement, and prudent use of the environment", in accordance with a number of stated principles set out in s. 2 of the legislation.

[75] As Saunders, JA observed in *R. v. Hicks* 2013 NSCA 89, at para. 45:

> 45 …Even a cursory review of the statute reveals its vast scope and the broad powers accorded the Minister and government inspectors to enforce its terms. The statute effectively proclaims the stewardship of the environment as being the responsibility of both citizens and government. It establishes a mandate to find

> and hold accountable polluters and other offenders. It affirms an explicit goal of remediating adverse consequences. It expressly states that the Act is intended to provide a regulatory regime that is quick, effective and fair. The breadth of the legislation is reflected in the broad definitions of such terms as "air", "environment" and "water course". The statute targets the use or handling of waste, pollutants, and other contaminants, giving broad powers to inspectors in the investigation and enforcement of standards, as well as the prosecution of violators whose actions would negatively impact upon human health. The Act expressly provides that owners or occupiers have an obligation to co-operate and assist the inspectors in their work.

[76] The nature of a decision rendered in review of a Ministerial Order pursuant to s. 125 of the EA is indisputably judicial. Moreover, Justice Arnold's decision in 307 NSL No. 1 was obviously a "final" one and s. 138(6) of the *Act* makes this explicit.

[77] All of that having been said, I am of the respectful view that issue estoppel is inapplicable to this case. The decision to be rendered in the present appeal is not identical to that with which Justice Arnold was confronted in 307 NSL No. 1, despite the overwhelming correspondence between the 2010 MO and the 2016 MO, which is under review in the case at bar.

[78] Justice Arnold clearly decided that the terms of the 2010 MO (except Clause 7) were reasonable based upon the information available to the Minister and her department in 2010. However, the Minister decided, after Justice Arnold's decision, that the appropriate course of action was to cancel that order, and issue two new ones, one of which applies to the appellant and does not contain Clause 7. Although the resulting 2016 MO is almost identical to the 2010 MO, and contains virtually all of the clauses which Justice Arnold found to be reasonable in 2010 (again, except Clause 7) it remains (in my view) to assess the reasonableness of the 2016 MO on the basis of <u>all information available to the Minister</u>, including that which she did not have available to her prior to her decision to issue the 2010 MO.

[79] The appellant ought not to be deprived of the opportunity to argue that the terms of the 2010 MO, ruled reasonable by Justice Arnold, are no longer reasonable when reiterated in the 2016 order, because there was, in effect, more information available to the Minister when the 2016 MO was issued. Accordingly, the reasonableness of the 2016 MO must be measured against the entire corpus of information available to the Minster beforehand.

C. Are the terms of the 2016 MO reasonable?

i. What is the Standard of Review?

[80] "Reasonableness" within the context of a judicial review was discussed at length in *IMP Group International Inc. v. Nova Scotia (Attorney General)* 2014 NSSC 191. Justice Murphy summarized the state of the law in paras. 19 – 20 as follows:

> 19 …the test to be applied on this appeal is whether the Minister acted reasonably in issuing the Order… that is, to the terms of the Order and to the naming of parties. I am going to make some general comments on the standard, not detailed because the principle is not disputed, and then I will weigh each issue in the context of that standard.
>
> 20 *Dunsmuir v. New Brunswick*, 2008 S.C.C. 9 ("*Dunsmuir*") significantly updated the law on judicial review and held that a minister's decision must fall within a range of possible acceptable outcomes which are defensible in respect of the facts and the law. The parties agree that the onus is on IMP as the appellant to establish that the Order was outside the scope of the Minister's reasonable options. It is also acknowledged by the parties and not in dispute that a statutory appeal of a discretionary Ministerial decision is a form of judicial review which attracts the reasonableness standard; that was noted in *Dunsmuir*, and also in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 ("*Khosa*").

[81] It is trite to observe that I am not to substitute my decision for that of the Minister in this case. Put differently, I am to grant deference to the Minister's decision by recognizing that in any given set of facts there may be more than one reasonable conclusion. Provided that the Minister's decision is one such reasonable outcome based upon the evidence that was before her, I must not choose another simply because I might prefer it. It is the Minister upon whom the statute confers the discretion in this context, not the court.

ii. Analysis

[82] The situation, as it stood in 2010, prior to the first MO, included evidence that the residents of Harrietsfield, Nova Scotia had been voicing concerns to the Province since the turn of the 21st Century about ground water contamination downgradient from the appellant's site, as well as its impact upon the potability of their well water. There was also evidence that of all these voiced concerns began before the appellant began occupying the site (301 NSL was operating there until

2005). These concerns continued after 2005. In particular, it was noted that contamination in many areas downgradient had not abated and, in some instances, was increasing in the aftermath of 307 NSL's assumption of operations in 2005.

[83] Some of the information available to the Minister before her 2010 MO was issued, included data which indicated that:

i. uranium levels for 1321 Old Sambro Road were "much higher" than the current guidelines for Canadian drinking water quality would permit. The guidelines were also exceeded at 1311 and 1300 Old Sambro Road as well;

ii. arsenic levels at 12194 and 1300 Old Sambro Road were found to "significantly higher" than the guidelines were permit;

iii. lead levels (lead is a cumulative poison) giving rise to health concerns were noted at 1300 Old Sambro Road and 1316 Old Sambro Road;

iv. zinc, although long term ingestion has not resulted in adverse health effects, lends adverse aesthetic characteristics to drinking water at levels over 5.0 mg/l, leading to undesirable taste and smell, among other things. There was concern noted that residents of 1300 Old Sambro Road may experience these factors due to level exceedances;

v. cadmium is extremely unlikely to occur as a component of drinking water, in anything more than a very negligible amount. However, cadmium compounds are sometimes found in electroplating wastes, and can, in some cases, result in drinking water contamination;

vi. cadmium levels beyond the guideline amounts were located in the wells at 1311 Old Sambro Road, and the substance was detected in the water at 1300 Old Sambro Road as well;

vii. in early 2010, all seven wells downgradient of the appellant's site were noted to be "very likely or likely influenced by the groundwater plume sourced from this site, such that the wells' chemistry has been changed". The need at that time was identified to take steps involving "mitigation" and management due to potential health risks, "with respect to 4 of them, and an additional one, belonging to the Intervenor Marlene Brown, required continued monitoring."; and

viii. as a consequence, the Minister's staff determined that 1300, 1321, 1305 and 1316 Old Sambro Road, and 75 Whitehead Road were either "very likely" or, at least, "likely" to have been impacted by the leachate emanating from the appellant's operations site at 1275 Old Sambro Road.

[84] The conclusions drawn as a result of the NSE investigations were spelled out in a letter from Andrew Teal (NSE) to Roy Brown (director of 301 NSL) in a letter dated June 24, 2010:

> Conclusions:
>
> 1) All seven domestic wells located downgradient of the site are considered "very likely" or 'likely' influenced by a groundwater plume sourced from the site. This means that water in the wells has probably been influenced by water which has passed through the materials and soils on the site, and has changed in chemistry in the wells as a result.
>
> 2) Three of these domestic wells will require some form of mitigation or management action to be taken, as well as continued monitoring, because there are upward trends present in certain parameters of the water which may pose a health risk. It appears that the trends in these three wells have arisen due to impacts from a groundwater plume sourced from the site.
>
> 3) Four of the domestic wells required continued monitoring, but not immediate management action. While there are trends present in the groundwater chemistry that show an impact from the groundwater plume source from the site, there are not health concerns arising from these trends at this time.
>
> 4) There are upward trends in various parameters in monitoring wells located on the site. The site owner and operator will also need to take steps to understand better the extent of the impacts from the groundwater plume on the site.

[85] Evidence made available to the Minister after the 2010 MO, but before the 2016 MO was decided upon, included a memo from Melanie Haggart, Regional Hydro Geologist, dated December 21, 2015 which contained, *inter alia* :

> …NSE has evidence that drywall and plaster were on the site and were stored for extended periods during NSE's inspections. This material was present in both bulk sheets and also in smaller pieces attached to wood materials which were being stock piled in preparation for grinding 'matrix' for use as a daily cover at Otter Lake Landfill, operated by Mirror Group, which is the sister company of 307 NSL.
>
> Gyproc, drywall is made with gypsum, which breaks down into calcium and sulphite ions in contact with water. These dissolved ions can enter ground water or, in the case of sulphate ions, in low oxygen conditions (eg. within a pile of ground wood) be transformed into hydrogen sulphite gas (which smells like

> sulphur or rotten eggs). Plaster is a version of interior wall covering applied to narrow wooden 'lathes' and would dissolve into calcium and carbonate ions on exposure to water, causing increased alkalinity.

[86] Ms. Haggart goes on to reference the potential for biodegradation of organic carbon (the ground wood component of matrix left on site) to result in an increase in alkalinity of any surface water and/or "leachate entering ground water". In a further memo dated January 6, 2016 to Scott Robertson, inspector specialist, (within the context of a review of monitoring data through September 2015) Ms. Haggart continued on a related theme:

> This pattern clearly shows that operational area of the site has a distinct groundwater impact signature which is different from the containment cell and includes the association between elevated alkalinity, elevated calcium, and elevated uranium without high boron.
>
> This calcium – alkalinity – uranium relationship has been previously noted as showing a cause – effect relationship between high calcium and alkalinity in groundwater, and the consequent mobilization of naturally occurring uranium in bedrock into solution. This relationship has been inferred by both NSE and by CRA (307 NSL's site professionals) in the Initial Phase 2 Site Assessments submitted in 2011.
>
> [Emphasis in original]

[87] Ms. Haggart continued her analysis as follows:

> 3) The pattern observed in the MW8 pair for boron at only low levels, versus elevated calcium, alkalinity, and uranium, appears to be repeated for wells in the MW2 triplet (MW2 – S, 2-M, 2-D) as well as in 1321 Old Sambro Road, which is the most significantly impacted domestic well. Particularly, boron is low to absent in these wells; but calcium and alkalinity have been significantly elevated in these well groups, along with the uranium increases. On the other hand, boron is significantly elevated in the deep bedrock wells south and southwest of the containment cell, as well as in the containment cell leachate, suggesting these wells are impacted by leachate from the cell and that flow from the cell appears to the be the south and southwest.
>
> 4) I conclude that based on the currently available information, the pattern of ground water chemistry changes and uranium impacts to 1321 Old Sambro Road area are more analogous to the impacts in wells downgradient of the operational area than they are to impacts from the containment cell. However, the increasing and/or elevated calcium, alkalinity and uranium down gradient of the operational portion of the site also occur in ground water down gradient of the cell, which is also down gradient of the operational portion of the site. Therefore, it is not currently possible to separate the operational impacts to ground water from the containment cells impacts to ground water in the area down gradient of the cell.

> …these observations cast significant doubt on the conclusion made by 307 NSL and Mr. Blackmer, [307 NSL's advisor] that leakage from the containment cell is responsible for the impacts of the domestic wells.
>
> (Records of the Respondent, Volume 1, Tab 25, Pages 263-264)

[88] This obviously does not contain a complete summary of the voluminous material available to the Minister and her department at the time of issuance of the 2016 MO, but it does review the most significant aspects of it.

[89] Reference has been made to the extensive efforts of the Minister, after the 2010 MO, to reach a resolution and, ultimately, to obtain the co-operation of both 307 NSL and 301 NSL with respect to the terms of that first MO. As noted, the appellant, in particular, was given the opportunity to submit both a legal opinion, and a report from its own specialist Mr. Blackmer, in an attempt to advance the proposition that the containment cell (which Justice Arnold had concluded was not the responsibility of the appellants) was responsible for the contamination downgradient of the operational site. As has just been noted, Regional Hydro Geologist, Melanie Haggart disagreed and, in effect, concluded that there was evidence of contamination both from the operations of the appellants and by virtue of outflow from the containment cell. Although the "plume" or impact signature of the appellant's operational site differs from that of the containment cell, the conclusion reached by the Minister's personnel upon analysis of the existing data indicated that it was not currently possible to "separate the operational impact (of the appellant's activities) to ground water from the containment cell's impacts to ground water in the area downgradient of the cell".

[90] It was open to the Minister to accept the analysis of the evidence offered on behalf of the appellant by Mr. Blackmer and conclude that all of the contamination downgradient from the operational site was caused by the containment cell, for which the appellants ought not to be held responsible. She did not do so.

[91] The extensive body of evidence that was before the Minister included what was available at the time of the issuance of the earlier 2010 MO, and was augmented by the evidence summarized by Melanie Haggart in her reports as noted above, prior to the issuance of the 2016 MO. The Minister obviously attached significant weight to Ms. Haggart's findings and those of her own department. It will be recalled that these findings included the fact that there had been a decrease observed in the prevalence of some contaminants downgradient from the property after the appellant had ceased operations in 2013. These findings

were preferred to those of Mr. Blackmer, which were submitted on behalf of the appellant.

Conclusion

[92] The 2016 MO references the Minister's belief that the appellant has contravened s. 67(2) of the *Act*. As previously mentioned, this section reads as follows:

> 67(2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause an adverse effect, unless authorized by an approval or the regulations.

[93] Although the appellant is a corporation, it is clearly encompassed within the definition of the word "person" in s. 3(a)(j) of the *Act*. This is considered and juxtaposed with the stated purposes and underlying principles of the *Act* as set out in para. 2, to which previous reference has been made, and in particular:

> 2(b)(v) the stewardship principle, which recognizes the responsibility of a producer for a product from the point of manufacturing to the point of final disposal,
>
> 2(c) the polluter-pay principle confirming the responsibility of anyone who creates an adverse effect on the environment that is not *de minimis* to take remedial action and pay for the costs of that action;
>
> [Emphasis added]

[94] And, as well:

> 2(b)(ii) the precautionary principle will be used in decision-making so that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation,
>
> [Emphasis added]

[95] The "cocktail" or "recipe" of factors noted in Section 129 of the *Act* were clearly weighed by the Minister. Her conclusion that the appellant was a "person" who had created an adverse effect on the environment beyond the *de minimus* range was certainly well within the range of reasonable outcomes available to the Minister on the basis of all of the information that was before her. If anything, the information which became available to her after the 2010 MO only reinforced the reasonableness of the Minister's decision to issue the 2016 MO. As such, an order

containing the terms of the latter was a reasonable exercise of the Minister's authority as conferred by the *Act.*

[96] The appeal is accordingly dismissed. If the parties wish to be heard on the issue of costs, I would require short written submissions within 30 days.

Gabriel, J.