

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Bay of Fundy Inshore Fisherman's Association v. Nova Scotia (Environment)*, 2017 NSSC 96

**Date:** 20170406

**Docket:** Hfx. No. 453771

**Registry:** Halifax

**Between:**

The Bay of Fundy Inshore Fisherman's Association

Applicant

v.

Nova Scotia Minister of Environment, the Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia, Fundy Ocean Research Center for Energy Limited, and Cape Sharp Tidal Venture Ltd.

Respondents

**Judge:** The Honourable Justice M. Heather Robertson

**Heard:** February 1, 2017, in Halifax, Nova Scotia

**Decision:** April 6, 2017

**Counsel:** David G. Coles, Q.C., Allison J. Reid and Edgar Burns,  
Articled Clerk, for the applicant

Sean Foreman and Ryan T. Brothers, for the Nova Scotia  
Minister of Environment and Attorney General of Nova  
Scotia

Scott R. Campbell and Laura Rhodes, for Fundy Ocean  
Research Center for Energy Limited

A. Douglas Tupper, Q.C., and Harvey L. Morrison, Q.C., for  
Cape Sharp Tidal Venture Ltd.

**Robertson, J.:**

## **Introduction**

[1] The Bay of Fundy Inshore Fisherman’s Association (“BFIFA”) has asked for a judicial review in the nature of *certiorari*, seeking to quash the decision made by Nova Scotia Environment (“NSE”), a delegate of the Minister of Environment on June 20, 2016, approving the installation and activation of demonstration tidal turbines in the Bay of Fundy.

## **Facts**

[2] Counsel for NSE has summarized the proposed undertaking and the objections to the undertaking as follows;

The Bay of Fundy has significant potential to provide an abundant supply of renewable energy that will allow the Province of Nova Scotia to meet its strategic public policy goals of reducing reliance on fossil fuels to generate electricity, contributing to lower GHG emissions and greater energy security and long-term price stability.

In 2007, after passage of the *Environmental Goals & Sustainable Prosperity Act*, the Province funded a Strategic Environmental Assessment (“SEA”) to facilitate incremental development of tidal energy projects within the Bay of Fundy. This was the start of a long process of scientific study, assessment and monitoring that is ongoing today and into the future. Although the ultimate goal is to reach commercial development of this critical renewable energy resource, the first phase of development has been to establish a Demonstration Project and test emerging technologies within the specific (and harsh) environment of the Bay of Fundy.

Fundy Ocean Research for Energy (FORCE) is a non-profit corporation supported by the Province of Nova Scotia, among others, with the responsibility to develop and manage the Demonstration Project and its required common infrastructure. Cape Sharp Tidal Venture (CSTV) is a proponent company selected to install two demonstration TISEC (Tidal In-Stream Energy Conversion) devices within the approved area of the Bay of Fundy covered by the Demonstration Project.

In September 2009, the Minister of Environment issued a project-specific Environmental Assessment Approval for the “Fundy Tidal Energy Demonstration Project” pursuant to s.40(1) of the *Environment Act* (“the 2009 EA Approval”), subject to 24 specific terms and conditions that included *inter alia*, a requirement

to develop and submit an Environmental Effects Monitoring Program (“EEMP”) for approval. The 2009 EA Approval is not subject to this judicial review.

Over time as part of an evolving process of scientific study and assessment, FORCE and CSTV developed near and mid-field EEMP’s, based on approved “adaptive management” principles, that were subject to collaborative review between the federal Department of Fisheries & Oceans (“DFO”), Nova Scotia Environment (“NSE”), and the Environmental Monitoring Advisory Committee (“EMAC”) established pursuant to Condition 3.0 of the 2009 EA Approval.

On June 20, 2016, NSE issued a letter confirming its review with the DFO Fisheries Protection Program (“DFO”) of the EEMP’s submitted by FORCE and CSTV was now complete, and NSE was “satisfied” with the adaptive management approach outlined in the latest monitoring programs, subject to further detailed revisions flowing from DFO’s specific recommendations, to be submitted to NSE on or before January 1, 2017 (“the Decision”).

[3] NSE further states:

The Decision is a wholly discretionary, non-adjudicative administrative action taken by NSE within its jurisdiction and expertise as environmental regulator. It confirms acceptance that the EEMP’s submitted by FORCE and CSTV satisfy Condition 3.0 of the EA Approval issued by the Minister in 2009.

What NSE may subsequently accept as satisfying conditions imposed by the 2009 EA Approval is not mandated by statute; such administrative acts are not formal “Approvals” issued subject to a defined statutory process, scope or content, that must be made or delegated by “the Minister” herself pursuant to the *Environment Act* (“Act”) or its *Environmental Assessment Regulations* (“EA Regulations”).

The Applicant, Bay of Fundy Inshore Fisherman’s Association (“BFIFA”) is an established non-profit organization representing designated fishermen in the management and promotion of a sustainable inshore fishery. It disagrees with NSE’s decision to accept the EEMP’s with revisions, pointing to “knowledge gaps” in baseline information outlined in a 2016 DFO Science Review of the proposed EEMP’s.

BFIFA seeks judicial review of the Decision on the sole ground it is unreasonable on its merits. BFIFA argues primarily that insufficient or no consideration was given to the 2016 DFO Science Review, resulting in a lack of “relevant baseline data” being collected prior to deployment of the TISEC devices. BFIFA also argues that various additional information and consultation was not considered by NSE that it says is required by s.12 of the *EA Regulations*.

BFIFA argues that the Decision is also unreasonable because the *Environment Act* requires adherence to the precautionary principle such that

further baseline studies must be undertaken before NSE can accept the EEMP's. BFIFA asks the Court to quash the Decision and remit the matter "to the Minister for reconsideration".

[4] Fundy Ocean Research Centre for Energy Limited ("FORCE") and Cape Sharp Tidal Ventures Ltd. ("CSTV") join NSE as respondents to this application.

[5] The record before the court (five large volumes) demonstrates the very robust scrutiny that the project has received in the environmental assessment approval process and since the 2009 project approval.

### **The Evaluation Process and Relevant Baseline Data**

[6] In June 2009 FORCE submitted an Environmental Assessment Registration Document to NSE, pursuant to s. 33(a) of the *Act* and s. 9 of the *Regulations* (Supplemental Record Volume I Tab 1). The document is 230 pages in length and documents the challenging existing marine environment and plan for environmental effects.

[7] FORCE describes its document as follow:

The main objectives of the demonstration facility as set out in this registration document were:

- To build, own and operate a tidal energy Demonstration Facility in Nova Scotia to test and demonstrate in stream tidal energy devices designed to convert tidal kinetic energy to electrical energy;
- To acquire information and knowledge necessary to assess the performance of tidal energy devices including their effect on the environment and the effect of the environment on the devices; and,
- To develop monitoring techniques and methodologies for TISEC devices in the tidal environment.

Supplementary Record, Volume 1, Tab 1, page 4.

The Registration Document states that an environment management plan ("EMP") would be prepared describing the procedures required to "meet regulatory, recommendations in the SEA, and mitigative measures and commitments" made in the Registration Document. (Registration Document Supplement Record, Tab 1 p. 30). The EMP would "detail the various monitoring of programs to be undertaken before (baseline), during (compliance and environmental effects), and after the Project (ongoing

environmental effects)” (Registration Document, Supplementary Record, Tab 1, p. 31).

The Registration Document noted that “Baseline monitoring in the Project area has begun and the data collected was used in support” of the 2009 environmental assessment. Supplementary Record, Volume 1, Tab 1, page 32. The Registration Document goes on to state:

As indicated in the SEA and in the EA Report, an environmental effects monitoring (EEM) program will be developed to confirm the impact predictions made with respect to the Project as well as to confirm the appropriateness and effectiveness of the mitigation undertaken. The EEM program will be based on adaptive management principles (i.e., monitor, evaluate and learn, and adapt) and will take advantage of ongoing research to assist in refining monitoring technologies and strategies. In the event that that mitigation is insufficient or ineffective, mitigation measures will be modified and or additional mitigation will be developed and implemented. This approach recognizes the unique and severe environment of the Minas Passage, and as well the uncertainty with respect to the potential for environmental effects associated with the new TISEC technologies.

Supplementary Record, Volume 1, Tab1, page 33.

[8] On September 15, 2009, the Minister of the Environment approved the demonstration facility pursuant to s. 34 of the *Act* and under s. 131(b) of the *Environmental Assessment Regulations*.

[9] The Assessment Approval stated:

This Environmental Assessment Approval is based upon the review of the conceptual design, environmental baseline information, impact predictions, and mitigation presented in the Registration Document.

(Record Volume 1, Tab 1, p. 1)

[10] The approval was subject to numerous conditions, one of which was the development and implementation of an environmental effects monitoring programme.

[11] Condition 3 of the Approval states as follows:

3.0 Environmental Effects Monitoring

3.1 The Approval Holder, as part of the project EMP, must develop and implement an environmental effects monitoring program

(EEMP). The EEMP must be developed using relevant baseline data and identify appropriate environmental effects indicators. The plan must be developed and implemented in consultation with the project Environmental Monitoring Advisory Committee and shall consider project effects on, but not limited to, the following:

- fish and lobster
- marine birds
- marine mammals
- acoustics
- physical oceanography
- currents and waves
- benthic environment

- 3.2 Environmental effects monitoring results must be submitted to NSE and DFO at a schedule to be determined by NSE and DFO.
- 3.3 The Approval Holder must form an Environmental Monitoring Advisory Committee to provide advice on monitoring programs and review and advise on monitoring results. The Approval Holder shall seek committee membership from government, the local fishing industry, and the academic community.
- 3.4 The Approval Holder must develop a terms of reference for the Environmental Monitoring Advisory Committee to be reviewed and approved by NSE and DFO.

[12] FORCE outlines environmental effects monitoring activity from September 2009 forward:

The Environmental Effects Monitoring Report September 2009 to January 2011 begins by noting that it fulfills the reporting requirements for a *Fisheries Act* authorization and Condition 3.1 of the Environmental Assessment Approved by “summarizing the key results of the EEMP from the commencement of the program in late September, 2009 to January, 2011.” (Supplementary Record, Volume 1, Tab 3, page 4). The Report goes on to state:

The objective of an EEMP is to test the environmental impact predictions identified in the EA study. Components of the EEMP were proposed in the Project’s Environmental Management Plan (EMP), and approved in principle by DFO and the Nova Scotia Department of the Environment (NSE). The final EEMP was modified based on advice from an independent Environmental Monitoring Advisory Committee (EMAC), established as a requirement of the provincial EA Approval and *Fisheries Act* Authorization. All reports documenting field studies and background

information collection for the EEMP and covered in this report are provided in the Appendices.

Supplementary Record, Volume 1, Tab 3, page 4. (The Appendices to this report have been reproduced and comprise most of the Report as it appears at Tab 3.)

The EEMP collected “useful information” on “determining possible impacts of the tidal turbine as well as on obtaining background environmental data for the Minas Passage”. Some of the main findings of the EEMP with respect to the fish and marine mammals that are of most concern in the Application were as follows:

- (a) Marine Mammals – Passive acoustic monitoring for the harbour porpoise, the predominant marine mammal in the Minas Passage, demonstrated that this technology “is a useful tool for future real-time and long-term monitoring at the site”.
- (b) Fish – “Echo-sounder and mid-water travel surveys demonstrated the presence, relative abundance, and seasonal movements of a wide range of fish species”. Furthermore, movements of “fish species of interest in the Inner Bay of Fundy including striped bass, Atlantic sturgeon and American eel, were demonstrated through the successful use of acoustic tags as part of a monitoring program.”
- (c) Lobster - The lobster catch studies undertaken “provided baseline information on lobster abundance over a broad area and variations in the vicinity of the installed turbine”.

Environmental Effect Monitoring Report September, 2009 to January, 2011  
Supplementary Record, Volume 1, Tab 3, p. 6.

A further overview of studies and projects completed from 2011 to 2013 is presented in the Environmental Effects Monitoring Report 2011-2013 (Supplementary Record, Volume 2, Tab 4). The studies discussed in the Report focused on “collecting background data and investigating monitoring approaches and technologies for use in the high-flow environments that could be employed for future EEM programs at the FORCE site”. What the Report contains is, in essence, “baseline information that will be used with current and future studies to address environmental effects of turbines installed at FORCE.” (Supplementary Record, Volume 2, Tab 4, page 4).

Section 4 of the 2011-2013 Environmental Effects Monitoring Report summarizes the studies and research projects conducted from January, 2011 to December 2012. Interim and final reports with respect to these projects were provided to the EMAC, NSE and DFO (Supplementary Record, Volume 2, Tab 4, page 14). The studies summarized included those dealing with marine mammals,

fish and lobster. The establishment or enhancement of baseline information was central to these studies.

In November 2014, FORCE issued a request for proposal to develop enhances monitoring programs before the deployment of turbines. The request for proposals were prepared in consultation with the Project's EMHC. Following further consultation with EMAC, FORCE accepted the proposal of the team led by SLR Consulting (FORCE Environmental Effects Monitoring Programs March, 2016, Record, Volume 1, Tab 8, page 9).

SLR Consulting produced a report entitled "Proposed Environmental Effects Monitoring Programs 2015-2020". The report begins by noting that with respect to the biophysical studies conducted from 2009 to 2013, they "were designed to document pre-deployment conditions, assess instrumentation and data retrieval techniques, and for a limited time when a functioning turbine was present in 2009, monitoring environmental effects on certain biophysical components." The report continues:

The results of baseline studies reveal the challenges associated with monitoring in this high energy environment and point to monitoring approaches, sampling methods and instrumentation that can be used once TISEC's are again deployed at the site. Over the past 5-7 years, much of the required baseline data have been collected; the focus now turns to monitoring programs that can successfully assess environmental effects post-deployment, once turbines are again installed in late 2015.

The EEMP's presented here are primarily designed to verify the impact predictions made in the EA (AECOM 2009). They are based on the monitoring requirements first described in the Terms and Conditions of Environmental Assessment Approval.

(Supplementary Record, Volume 3, Tab 6, page 1-1.)

Cape Sharp submitted a draft proposed EEMP to NSE and DFO in 2015 (Record, Volume 1, Tab 2). The purpose of the draft EEMP was set out at page 2:

This document outlines a proposed preliminary framework for the CSTV EEMP and is not intended to be finalized version of the Program or to provide details regarding study design. As the Program is still under development this document is meant to provide Fisheries and Oceans Canada (DFO) with a proposed EEMP outline to gain feedback and initiate discussion that will support the development of a final Program. Additionally, this outline will also assist in discussions with the Fundy Ocean Research Center (FORCE) towards the development of an EEMP for the Crown Lease Area (CLA) to ensure that the programs are complimentary [sic] and avoid repetition.

The Cape Sharp draft EEMP notes that DFO provided advice on one of FORCE's earlier EEMP:

Additional advice on the development and modification of the program was provided by the Maritimes Science Branch of DFO on the 1011 FORCE EEMP (June 2012). This feedback, together with EMAC recommendations, has assisted FORCE in planning, developing and augmenting existing or ongoing monitoring studies. A second EEMP (draft) Report was completed in late 2014, and incorporated final data analyses for several studies that were conducted as baseline studies with no turbines in the water.

“Key comments” made by DFO in 2012 with respect to the FORCE EEMP were used in the development of Cape Sharp’s draft EEMP including:

- the need for monitoring studies in the vicinity of the turbine(s) particularly related to fish behavior (e.g. whether fish can avoid the structures);
- concerns around inference to the likelihood of direct encounters of fish with a device since the (2009) test device was not operational for a significant amount of time;
- recognition that monitoring methodologies in the immediate vicinity of the turbine(s) in high flow environments are limited and evolving; and
- the need for more effort. . . directed towards gathering monitoring data directly around the turbine (e.g., either a vessel-mounted system or, preferably, an instrumented monitoring platform mounted on the turbine enclosure).

Record, Volume I, Tab 2, page 4.

Cape Sharp’s proposal to install and operate the turbines was reviewed by the Fisheries Protection Program of DFO to determine:

- (a) Whether it is likely to result in serious harm to fish which is prohibited under s. 35(1) of the *Fisheries Act*, and;
- (b) Whether it will adversely impact listed aquatic species at risk and contravene ss 32, 33 and 58 of the *Species at Risk Act* (SARA).

The Fisheries Protection Program reviewed the draft Cape Sharp EEMP as well as a Request for Review From a Supplemental Information Report submitted by Cape Sharp on May 1, 2015: Record, Volume I, Tab 4, page 1. DFO’s understanding of the EEMP was set out in the letter of advice as follows:

We also understand that CSTV will implement an EEMP, as a component of the Project Environmental Management Plan, to meet conditions as described in the Environmental Approval granted by Nova Scotia Environment on September 15, 2009. The overall purpose of the EEMP will be to monitor potential near-field environmental effects associated with the Project in order to verify the accuracy of environmental effects

predictions made in the joint federal-provincial environmental assessment, test the effectiveness of mitigation measures, ensure compliance with applicable provincial and federal permits and approvals and contribute to a growing body of knowledge on potential environmental effects associated with tidal power development. The CSTV EEMP is also intended to build upon environmental studies that have been underway at the FORCE facility since 2007 and complement the FORCE EEMPs that are being proposed for initial turbine deployments between 2015 and 2020.

Record, Volume 1, Tab 4, page 2.

The letter of advice went on to recommend that the mitigation measures described in the Request for Review Form and the Supplemental Information Report “be fully implemented along with the proposed EEMP.” The mitigation measures referred to are listed in Cape Sharp’s EMP in Appendix B, the final version of which is dated May 2, 2016: Record, Volume 1, Tab 2 page iii, (for date), page 30 et seq. (Appendix B).

The letter of advice also acknowledged that Cape Sharp would adopt an adaptive management approach to allow adjustments and constant improvements to be made to the proposed EEMP as monitoring results became known. See Cape Sharp Draft Proposed EEMP, Record, Volume 1, Tab 2, page 3. The concept of adaptive management was utilized in the development of the EEMPs from the outset. For example in the Registration Document. Supplemental Record, Volume 1, Tab 1, page 33.

In a letter dated March 16, 2016, Mark McLean, Manager of Regulatory Reviews for DFO’s Fisheries Protection Program provided the Fisheries Protection Program’s comments on Cape Sharp’s EEMP. The subject line of the letter refers to “Proposed Environmental Effects Monitoring Program 2015-2020 – Cape Sharp Tidal Venture (CSTV).” The first two paragraphs of the letter state:

This letter outlines Fisheries and Oceans Canada (DFO) Fisheries Protection Program comments on the proposed Environmental Effects Monitoring Program (EEMP) for 2015-2020 for the Fundy Ocean Research Center for Energy (FORCE).

At the request of the Fisheries Protection Program, DFO Science conducted a review of the 2011-2013 Baseline report, the proposed 2015-2020 EEMP and the proposed Cape Sharp Tidal Venture EEMP (see DFO, 2015. Review of Environmental Effects Monitoring Program for the Tidal Energy Project. DFO Can. Sci. Advis. Sec. Sci. Resp. 2015). Comments on the FORCE EEMP have been provided in a separate letter.

(emphasis added)

Record, Volume 2, Tab 10, page 1.

The subject line and the underlined portion of the first paragraph of the letter would suggest that the Mr. McLean's comments were directed to FORCE's proposed Environmental Effects Monitoring Programs 2015-2020 which is the SLR Consulting Report found in the Supplementary Record, Volume 3, Tab 6. When, however, the body of the letter is examined and the letter compared to the letter found at Tab 11 of the Supplementary Record, Volume 3 it is apparent that DFO's comments do, in fact, relate to Cape Sharp's proposed EEMP i.e. the draft proposed E.E.M.P. found in the Record, Volume 1, at Tab 2.

This letter refers to a review by DFO Science of three documents:

- (a) 2011-2013 Baseline report (Supplementary Record, Volume 2, Tab 4);
- (b) the proposed 2015-2020 EEMP (Supplementary Record, Volume 3, Tab 6);
- (c) Proposed Cape Sharp Tidal Venture EEMP (Record, Volume 1, Tab 2).

The review of DFO Science is referenced as "DFO. 2015, Review of Environmental Effects Monitoring Program for the Tidal Energy Project. DFO Can. Sci. Adis. Sec. Sci. Resp. 2015." This document is not found in either the Record or Supplementary Record but it is obviously an earlier version of the DFO Science Report found in the Record, Volume 1, Tab 6. It bears the same title, and the recommendations set out in letters from the Fisheries Protection Program are very similar indeed.

Notwithstanding the fact that DFO Science identified some "knowledge gaps in the baseline information", DFO determined that Cape Sharp's project could proceed.

[13] DFO's Mark McLean stated by letter dated March 16, 2016:

The DFO Science review identified some knowledge gaps in the baseline information collected to date and the need for improvements in the methodology used to collect some of the information. The EEMP acknowledges technological and environmental challenges that will need to be addressed through adaptive management measures to improve the understanding of interactions between aquatic resources and Tidal In-stream Energy Conversion (TISEC) devices. It is the opinion of DFO that this adaptive management approach to environmental monitoring by CTSV will work towards addressing the information gaps raised by the department.

In consideration of specific design features (i.e., the open center; low rotational speed (7-14 rpm); minimal pressure differential for fish that may pass through the device (approximately 3% or 12kPa); minimal contact with the seabed; and CTSV's adaptive approach to environmental monitoring) DFO has determined that the environmental risk is reduced to a level that enables this demonstration

project to proceed under the previously issued letter of advice dated January 7, 2016.

Record, Volume 2, Tab 10, p. 1.

[14] The letter went on to list several issues that required further attention.

[15] Cape Sharp responded to this letter on March 22, 2016. Record, Volume 2, Tab 12.

[16] FORCE also responded to DFO Science, addressing its spring review, made available to the respondents on February 29, 2016. See Record, Volume 2, Tab 15.

[17] There was active engagement between both Cape Sharp and FORCE and DFO, as contemplated by Condition 3 of the Approval in the development of this EEMP 2016-2020. DFO responded by letter Dated June 14, 2016 (Record, Volume 2, Tab 16) and recommended that the turbines could be deployed.

[18] On June 20, 2016, Mr. Sanford of NSE stated:

Following a review of the information provided by Fundy Ocean Research Center for Energy (FORCE), Cape Sharp Tidal Venture (CSTV) and through consultation with Fisheries and Oceans Canada (DFO), Nova Scotia Environment (NSE) is satisfied that an adaptive management approach to environmental effects monitoring will address outstanding knowledge gaps and improve our understanding of interactions between tidal in-stream energy conversion (TISEC) devices and marine resources.

[19] The letter then sets out three specific programs that had to be developed “in consultation with and to the satisfaction of NSE and DFO” and “implemented following deployment” of the Cape Sharp turbines. Mr. Sanford then noted that the EEMP “will be expanded to address information gaps pertaining to environmental effects associated with the deployment of the [Cape Sharp turbines] and reduce uncertainty that may limit regulatory decisions respecting future TISEC deployments” (Record, Volume 2, Tab 17, page 2). The submission of a revised EEMP by January 1, 2017 was then required. Mr. Sanford’s letter set out 17 items which would have to be considered in the preparation of the revised EEMP. (Record, Volume 1, Tab 17, page 2-3.)

[20] The undertaking continues subject to these conditions and rigorous review.

## Issue

[21] The issue in this application for judicial review is whether the applicant and establish that the “decisions” described in the June 20, 2016 letter were unreasonable.

## Analysis

[22] All of the parties agree that the appropriate standard of review of the June 20, 2016 letter is reasonableness.

[23] As Cape Sharp has argued:

The standard of reasonableness applies not only to questions of fact, discretion and policy inherent in the determination described in the letter but also to NSE’s interpretation of its “home” statute, the *Environmental Act*, and the regulations made under that Act. See e.g. *Edmonton (City in Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, at para. 23; *Ghosn v. Halifax (Regional Municipality)*, 2016 NSCA 90, at para. 21. In *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 Moldaver, J., speaking for the Court on this subject, stated at para. 40:

The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to any reasonable interpretation adopted by an administrative decision maker, even if other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with "administer[ing] and apply[ing]" its home statute (Pezim, at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.

[24] If the standard of review is reasonableness, what then is the content of the standard? As Wood, J. noted in *Ellis Don Corporation v. International Union of Operating Engineers, Local 721*, 2017 NSSC 2 this standard “has been the subject of much comment intended to define its scope and application. (at para. 27). As is well known, *Dunsmuir v. New Brunswick*, 2008 SCC 9 transformed the law of judicial review in Canada, by reducing the hitherto three prevailing standards of review to two, namely reasonableness and correctness. *Dunsmuir* remains the seminal case. In *Dunsmuir*, Bastarache and Lebel, J.J. described the reasonableness standard at para. 47.

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[25] When the court “inquires into the qualities that make a decision reasonable it is an “organic exercise.” *Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 14.

[26] Cape Sharp also correctly cited *Egg Films Inc. v. Nova Scotia (Labour Board)*, 2014 NSCA 33, para. 26 in considering the nature of reasonableness review and *Canada (Citizenship and Immigration) v. Khosa* [2009] S.C.R. 339, para 59.

[27] At its heart, I agree this is an administrative decision. The decision-maker was committed to the task of reading all of the reports generated by reason of Condition 3 of the approval. This is the process decided by the legislature in the enactment of the statutes governing this undertaking.

[28] In my view, it is not for the court to descend into this arena and commence scientific fact finding, on the merits of the project already approved. Nor should it be my role to reweigh the comments made by DFO in the Science Report in response to the EEMP and substitute my view of how certain recommendations should be responded to by NSE.

[29] As expressed by Justice Wood in *Specter v. Nova Scotia (Minister of Fisheries and Aquaculture)* 2012 NSSC 40 at para. 77:

It is not the function of this Court, sitting in appeal of the Minister's decision, to review the scientific and technical evidence, and resolve any inconsistencies or ambiguities which might exist. To do so would turn this Court into an "academy of science" as that term has been used in other cases. Such an approach is inappropriate. It is the function of the Minister and his staff to review the scientific information and determine whether it supports the particular application.

It is the role of this Court to assess that decision based on the standard of reasonableness and not to second guess the Minister's interpretation of the evidence.

[30] It is the applicant's burden to establish unreasonableness. Yet they have chosen to adduce no evidence to show that NSE's conclusions and recommendation are unreasonable. Instead they focus on a single 2016 DFO Science Report; and ask the court to find NSE's deliberations unreasonable in light of that document. That is not a successful argument nor is it an expression of the current law.

[31] I agree with Cape Sharp Tidal Venture Ltd. when they say that the fact that NSE's ultimate decision to allow the deployment of Cape Sharp's turbines to proceed coincided with the view of the Fisheries Protection Program of DFO demonstrates convincingly that the June 20 letter fits comfortably within the range of possible reasonable outcomes. In *Malcolm v. Canada (Minister of Fisheries and Oceans)*, 2014 FCA 130, Mainville, J.A. stated at para 58:

The appellant further submits that the Minister did not follow the recommendations of the officials of the DFO in reaching the decision, and that this emphasizes the unreasonableness of that decision. Officials of the DFO did present the Minister with various options prior to the decision, including the option that the Minister finally approved. While DFO officials favoured another option, this does not mean that the Minister's decision is necessarily unreasonable. The final decision properly belonged to the Minister, and in my view, the very fact the option that was finally approved had been tabled by officials of the DFO as a possible alternative tends to show that the approved option was a possible reasonable outcome of the decision making process.

[32] The reasoning in *Malcom* applies with even strong reason here, where the views of the regulators, both NSE and DFO, coincided, notwithstanding the concerns expressed in the DFO Science report. See also *Kolody v. Alberta (Environment and Sustainable Resource Development)*, 2016 ABQB 360.

[33] With respect to the applicant's first argument of lack of relevant baseline data, it is clear to me that environmental baseline information was available and was presented by the proponents of the undertaking.

[34] Neither Mr. Coles or his clients BFIFA nor the courts should be the final arbitrators of what relevant baseline data is sufficient to allow the deployment of the demonstration turbine. Further, the undertaking has always contemplated the

adaptive management approach in assessing environmental risk, which will ensure ongoing assessment and scrutiny as contemplated by s. 3 of the Approval.

[35] It is true that DFO commented on information gaps in the baseline data, however they were of the opinion that the adaptive management approach to environmental monitoring by FORCE will address this. In the DFO Review it is important to note it did not recommend non-deployment of the demonstration turbine, but the continued collection of data as DFO determined that the Cape Sharp Project would proceed.

[36] Having regard to this thorough and dynamic evaluation process, I cannot conclude that the June 20, 2016 decision is unreasonable.

[37] The second objection BFIFA voices to the reasonableness of the June 20, 2016 administrative decision is that NSE failed to “adequately consider and apply all requirements of the EA Regulations in particular Reg. 12.”

[38] I agree with the respondents that the EA Regulations do not apply to NSE’s review of EEMP, submitted by Cape Sharp and FORCE.

[39] This suggestion does not accord with the basic principles of statutory interpretation. In *Canada (Information Commission) v. Canada (Minister of National Defence)*, [2011] 2 S.C.R. 306, Charron, J. stated at para. 27:

The proper approach to statutory interpretation has been articulated repeatedly and is now well entrenched. The goal is to determine the intention of Parliament by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute. . . .

[40] Mr. Coles recommends a purposive analysis. In *Sullivan on the Construction of Statutes*, 6<sup>th</sup> ed. (Markham: LexisNexis, 2014) it is stated at p. 262:

. . . Under the modern principle, an interpreter must always carry out an analysis to determine the relevant purpose or mix of purposes, but the results of this analysis are not necessarily controlling. Purpose is not inherently more important than other contextual factors, and the purpose cannot be relied on to justify adopting an implausible interpretation.

[41] I agree with FORCE that the language of the statute is clear and the application of s. 12 of the EA Regulation specifically set out as applying to s. 34 approvals.

[42] FORCE correctly summarized the legislative schemes as follows:

The environment assessment process begins with registration. Section 22 of the Act states that every “proponent of an undertaking shall (a) register the undertaking with the Minister [of Environment] in the time and manner prescribed by the Regulations. Under s. 9(1A) of the Regulations, in order to register an undertaking, a proponent must submit all prescribed fees and “a registration document in the format provided by the Administrator” that includes all 15 enumerated items set out in s. 9(1A)(b). Among these 15 items is “environmental baseline information” (s. 9(1A)(b)(x)).

After the undertaking is registered the “Minister shall examine or cause to be examined the information that is provided respecting an undertaking”, and then “shall determine that:”

- (a) Additional information is required;
- (b) A focus report is required;
- (c) An environmental assessment report is required;
- (d) All or part of the undertaking may be referred to alternate [sic]dispute resolution;
- (e) A focus report or an environmental-assessment report is not required, and undertaking may proceed; or
- (f) The undertaking is rejected because of the likelihood that it will cause adverse effects that cannot be mitigated.

[43] Section 12 of the Regulations sets out what the Minister must consider “in formulating a decision under subsection 34(1) of the Act.” Section 12 sets out 10 specific pieces of information that the Minister must consider. Clause (da) of s. 17 is in the form of a question:

Whether environmental baseline formation submitted under subclause 9(1A)9B)(x) for the undertaking if *sufficient for predicting* adverse effects or environmental effects relating to the undertaking.

(Emphasis added)

As is evident from the fact that the Minister issued the Environmental Assessment Approval, the Minister’s determination or decision under s. 34(1) was that the “undertaking may proceed”: s.34(1)(e). Under s. 34(2) of the Act the Minister is required to notify the proponent in writing of “the decision pursuant to subsection (1) . . . within the time period prescribed by the regulations”.

(emphasis added) Section 13(1) of the Regulations prescribes the period for notification of the proponent. It states:

No later than 50 days following the date of registration, the Minister shall advise the proponent in writing of the decision under section 34(2) of the Act.

(a) that the registration information is insufficient to allow the Minister to make a decision and additional information is required.

(b) That review of the information indicates that there are no adverse effects or significant environmental effects which may be caused by the undertaking or that such effects are mitigable and the undertaking is approved by subject to specified terms and conditions and any other approvals required by statute or regulations;

(c) That a review of the information indicates that the adverse effects or significant environmental effects which may be caused by the undertakings are limited and that a focus report is required.

(d) That a review of the information indicates that there may be adverse effects or significant environmental effects caused by the undertaking and an environmental-assessment report is required; or

(e) That a review of the information indicates that there is a likelihood that the undertaking will cause adverse effects or significant environmental effects which are unacceptable and the undertaking is rejected.

The Environmental Assessment Approval dated September 15, 2009 begins as follows;

The Fundy Tidal Energy Demonstration Project (the “Undertaking”), proposed by Fundy Ocean Research Centre for Energy (the “Approval Holder”), in the Minas Passage, Nova Scotia is approved pursuant to Section 13(1)(b) of the Environmental Assessment Regulations.

(emphasis added)

Section 34(1) required the Minister to make one decision, namely which of the six outcomes specified in the clauses (a) through (f) applied to the undertaking. Both the Act (s. 34(1) and 34(2)) and the Regulations (s. 12 and s. 13(1)) speak of “the” decision. Once “the” decision is made, the factors specified in s. 12 do not apply by virtue of the very language of s. 12 itself. The “most obvious ordinary meaning” of “the decision” is the decision made by the Minister to issue the Environmental Assessment Approval in 2009. That is the interpretation that accords with the context and purpose of the *Environmental Act: CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14. Section 12 does not contain any language that would allow those considerations to apply to any other approvals to be made by the Minister in the future. If the Legislature of Lieutenant Governor in Council wanted those factors to apply to other future

decisions to be made by the Minister or her department, they could have easily said so. They did not. Any attempt to apply them to such future decisions would involve re-writing both the Act and Regulations. As Charron, J. stated in *Canada (Information Commission) v. Canada (Minister of National Defence)*, [2011] 2 S.C.R. 305 “The Court cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted” (at para. 40).

As s. 12 of the Environmental Assessment Regulation can have no application to the review of the EEMPs and the June 20<sup>th</sup> letter, then the Minister’s alleged failure to consider the factors set out in s. 12 cannot be said to be unreasonable.

[44] I agree.

[45] Thirdly, BFIFA say the June 20<sup>th</sup> letter is unreasonable because the Minister failed to follow the precautionary principle.

Section 2 of the *Environment Act* says that the purpose of the Act is to “support and promote the protection, enhancement and prudent use of the environment.” This support and promotion was to recognize certain stated goals such as “maintaining the principles of sustainable development”, one of which related to the application of the precautionary principle. Section [2(b)(ii)] states:

[T]he 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 . . .

[46] The precautionary principle is concerned with the consideration of and evaluations of risk.

[47] It appears to me that from the EA approval of 2009, extraordinary efforts have been made to evaluate risk. This is the essence of the adaptive management approach and EEMP process.

[48] It is in fact essential that the demonstration turbines actually operate to understand the risk and environmental impacts.

[49] The regime of careful monitoring, study and reporting is in fact consistent with the cautionary principle and reflected in the careful rolling out of this demonstration project. The letter of June 20, 2016 shows no lack of caution or failure to adherence to this principle.

[50] The fact is this is a demonstration project to explore tidal power electrical generation in a climate of significant public interest in diminishing our province's dependence on fossil fuels. The project has not been undertaken lightly and follows rigorous ongoing evaluation. The Minister of the Environment is entitled to the deference of this court, in making these very reasonable decisions.

[51] The application is dismissed.

[52] In the absence of agreement, I will be happy to hear submissions on costs.

Robertson, J.