IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Newfoundland and Labrador (Environment and Climate Change) v. Atlantic Salmon Federation (Canada)*, 2018 NLCA 53
Date: September 14, 2018
Docket Number: 201701H0078

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR, AS REPRESENTED BY THE HONOURABLE PERRY TRIMPER, MINISTER OF ENVIRONMENT AND CLIMATE CHANGE — APPELLANT

AND:

ATLANTIC SALMON FEDERATION (CANADA) — FIRST RESPONDENT

AND:

OWEN MYERS — SECOND RESPONDENT

AND:

GRIEG NL NURSERIES LIMITED — THIRD RESPONDENT

AND:

GRIEG NL SEAFARMS LIMITED — FOURTH RESPONDENT

Coram: Welsh, Harrington and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201601G6118
(2017 NLTD (G) 137)

Appeal Heard: December 14, 2017
Judgment Rendered: September 14, 2018

Reasons for Judgment by: Welsh J.A.
Concurring in the Result with Separate Reasons: O'Brien J.A.
Concurring with O'Brien J.A.: Harrington J.A.

Counsel for the Appellant: Peter E. Ralph Q.C.
Counsel for the First Respondent: Michael J. Crosbie Q.C. and J. Alexander Templeton
Counsel for the Second Respondent: Not present or represented
Counsel for the Third and Fourth Respondents: David G. L. Buffett Q.C. and Deborah L. J. Hutchings Q.C.

Welsh J.A.:

[1] At issue in this appeal is whether an environmental impact statement is required for a salmon hatchery and aquaculture operation proposed for Placentia Bay.

BACKGROUND

[2] Grieg NL Nurseries Limited and Grieg NL Seafarms Limited (together "Grieg") propose to establish a salmon hatchery and nursery in Marystown to produce seven million smolt annually to stock aquaculture operations to be undertaken by Grieg in Placentia Bay.

[3] The project has been registered as provided for by the legislation. Subsequently, the Minister of Environment and Climate Change released the undertaking from the requirement for an environmental impact statement, allowing Grieg to proceed with the project subject to complying with federal, provincial and municipal laws and any terms or conditions established by the Minister.

[4] As provided under section 107 of the *Environmental Protection Act*, SNL 2002, c. E-14.2, the Minister's determination to release the undertaking was appealed, for reconsideration, to the Minister by the Atlantic Salmon Federation (the "Salmon Federation"). After the Minister upheld his original decision, the Salmon Federation sought judicial review.

[5] On review, the applications judge concluded that, under the legislation, the Minister lacked jurisdiction to release the project. That determination is the subject of this appeal. Issues related to registration of the project, addressed by the applications judge, have not been appealed.

ISSUES

[6] At issue is whether the applications judge erred in quashing the Minister's decision to release the project from environmental assessment because that determination was not an option available under the legislation.

ANALYSIS

The Legislative Framework

[7] The purpose of Part X of the *Act*, "Environmental Assessment", is set out in section 46:

> The purpose of this Part is to
>
> (a) protect the environment and quality of life of the people of the province; and
>
> (b) facilitate the wise management of the natural resources of the province,
>
> through the institution of environmental assessment procedures before and after the commencement of an undertaking that may be potentially damaging to the environment.

[8] Section 51(1) of the *Act* addresses options regarding environmental assessments that may apply to an undertaking in the absence of a direction from the Lieutenant-Governor in Council:

> Where, following an examination by the minister under subsection 50(1), the Lieutenant-Governor in Council does not give a direction under subsection 50(2), the minister, using criteria prescribed by regulation, shall determine whether
>
> (a) an environmental preview report is required;
>
> (b) an environmental impact statement is required; or

> (c) the undertaking may be released.

[9] The *Environmental Assessment Regulations, 2003*, NLR 54/03, address screening criteria for these options. Section 23(1) deals with the case when an undertaking is released from environmental assessment:

> Where the minister releases an undertaking because
>
> (a) there are no environmental or public concerns; or
>
> (b) the environmental effects of the undertaking will be mitigated under an Act of the province or of Canada,
>
> he or she, in making a determination under paragraph (a) or (b), may consider
>
> (c) the comprehensiveness of the description of the undertaking;
>
> (d) whether or not there is a demonstrated commitment by the proponent to conduct an environmentally sound undertaking;
>
> (e) the compatibility of the undertaking with other resource use in the area of the undertaking;
>
> (f) whether or not the undertaking occurs in an environmentally or other sensitive area;
>
> (g) the defined boundaries of the undertaking and whether or not the undertaking is contained within that area; and
>
> (h) the technology to be employed for the undertaking and whether or not it is environmentally benign.

"Release" is defined in section 45(i) of the *Act* to mean "the release of an undertaking under section 51, 54, 67 or 72 from the further application of the environmental assessment requirements of this Part."

[10] Section 24(1) of the *Regulations* addresses criteria for requiring an environmental preview report where more information is necessary:

> Where the minister determines that there is insufficient detail to determine the significance of the environmental effects of an undertaking, he or she shall require an environmental preview report for that undertaking.

[11] Section 25(1) of the *Regulations* addresses the requirement for an environmental impact statement:

> Where, the minister determines with respect to an undertaking that there
>
> (a) may be significant negative environmental effects; or
>
> (b) is significant public concern,

> the minister shall require an environmental impact statement.

"Environmental impact statement" is defined in section 45(e) of the *Act* to mean "a report that presents the results of an environmental assessment."

[12] Section 56 of the *Act* applies where a project has been released from environmental assessment:

> Where, under section 51 or 54, the minister notifies a proponent that an undertaking is released, the proponent may proceed with the undertaking subject to
>
> (a) another Act or regulation of the province or of Canada;
>
> (b) a municipal regulation, by-law or requirement; and
>
> (c) the terms and conditions that the minister may, in his or her discretion, establish.

[13] Section 57 of the *Act* describes contents to be included in an environmental impact statement:

> An environmental impact statement shall be prepared in accordance with the guidelines, and shall include,
>
> …
>
> (d) a description of the
>
> (i) present environment that will be affected or that might reasonably be expected to be affected, directly or indirectly, by the undertaking, and
>
> (ii) predicted future condition of the environment that might reasonably be expected to occur within the expected life span of the undertaking, if the undertaking was not approved;
>
> (e) a description of
>
> (i) the effects that would be caused, or that might reasonably be expected to be caused, to the environment by the undertaking with respect to the descriptions provided under paragraph (d), and
>
> (ii) the action necessary, or that may reasonably be expected to be necessary, to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon the environment by the undertaking;

> (f) an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking;
>
> (g) a proposed set of control or remedial measures designed to minimize any or all significant harmful effects identified under paragraph (e);
>
> (h) a proposed program of study designed to monitor all substances and harmful effects that would be produced by the undertaking; and
>
> (i) a proposed program of public information as required under section 58.

[14] Section 107(1) of the *Act* provides for review of the Minister's decision:

> A person to whom subsection 108(1) does not apply, who is aggrieved by a decision or an order made under this Act, may appeal that decision or order to the minister by notice in writing, within 60 days of receipt of that decision or order, stating the reasons for the appeal.

Standard of Review

[15] The applications judge concluded that the Minister's decisions, first, on the registration question, which has not been appealed, and, second, on the release from environmental assessment, were both reviewable on a standard of reasonableness. However, regarding the release from environmental assessment, the judge quashed the Minister's decision on the basis that he "lacked jurisdiction" to make that determination.

[16] Where judicial review engages a question of jurisdiction, the standard set by the Supreme Court of Canada is correctness. This is made clear in the decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, in which Bastarache and LeBel JJ., for the majority, concluded:

> [50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[17] In applying this principle, it must be remembered that the word jurisdiction may be used in more than one context and, unless it is a "true question of jurisdiction" (*Dunsmuir*, at paragraph 59), it will not always engage a standard of review of correctness. In this case, the basis for the applications judge's conclusion is that, on the facts, only section 25 of the *Regulations* could apply. In particular, she explained (2017 NLTD(G) 137):

> [209] The Minister's Release Decision confirmed significant public concern and the potential for significant negative environmental impacts. On these facts, the Minister was constrained by his home statute to order an [environmental impact statement] under section 25 of the *Regulations*. The Project represented an example of an undertaking requiring the highest level of further environmental assessment.
>
> …
>
> [211] I conclude therefore that the Minister lacked jurisdiction to release the Project. The only possible conclusion he could reach from the Record was that the Project had both "significant public concerns" and the potential for "significant negative environmental effects". Read as a whole, the Minister's letter to McInnes Cooper confirmed his acceptance of these factual conclusions for the Project. When these facts apply to a project, section 25 of the *Regulations* constrains the Minister's discretion and he is statutorily required to order an [environmental impact statement]. No other reasonable interpretation of the *Act* and *Regulations* would permit the Minister to release such a project.

[18] The applications judge does not suggest that the Minister did not have the jurisdiction to make a decision under section 51(1) of the *Act*. Rather, the exercise of the Minister's jurisdiction in this case involved interpretation of the *Act* and *Regulations*. This was not a "true" question of jurisdiction as contemplated in *Dunsmuir*, necessarily indicating a correctness standard of review. In the result, the judge undertook a comprehensive analysis applying the *Dunsmuir* criteria in concluding that the reasonableness standard of review would apply.

[19] To summarize, after recognizing that there is no privative clause in the *Act* or *Regulations*, the judge considered the Minister's function, which required him to interpret the legislation "with expert advice from departmental staff assisting with the exercise of his discretion", a factor suggesting a reasonableness standard (applications judge's decision, at paragraph 49). In addition, after reviewing relevant parts of the *Act* and *Regulations*, the judge concluded that the legislative context in which the question arises also supports a reasonableness standard:

> [91] … [I]n the within case, the Minister was required to consider which of the three statutory options was appropriate. For each, the *Regulations* provided him with assistance respecting the various considerations. The Minister had to weigh the significance of the evidence and conclusions drawn from it, (including the significance of the environmental effects of the undertaking) before deciding if he should release, order an [environmental preview report], or order an [environmental impact statement].

[20] On balance, the judge concluded that the reasonableness standard of review properly applied. I agree with her analysis and conclusion. (See decision of the applications judge, at paragraphs 39 to 49 and 80 to 92.)

Release of the Project from an Environmental Impact Statement

[21] In reviewing the Minister's decision, the applications judge concluded that release was not a statutory option available to the Minister because once the criteria set out in section 25(1) of the *Regulations* had been satisfied, the Minister had no option but to require an environmental impact statement. This followed from her interpretation of the language in sections 23 and 25 of the *Regulations*, and her conclusion that there was only one reasonable interpretation of those provisions.

[22] When there is only one reasonable interpretation of a legislative provision, that is the interpretation that must be applied. This does not amount to applying a standard of correctness. The principle is discussed in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, where Moldaver J., for the majority, explained:

> [38] It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation – and the administrative decision maker must adopt it.

[23] A second fundamental principle of statutory interpretation relevant in this case is the presumption of coherence. The presumption is summarized in Sullivan, *Sullivan on the Construction of Statutes*, fifth edition (Markham, ON: LexisNexis, 2008), at page 223:

> **Governing principle**. It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal. … The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other. …

[24] Applying that principle in this case, sections 23 and 25 of the *Regulations* must be read together, giving effect to both. The question is whether the Minister's decision under section 23 of the *Regulations* was reasonable based on an interpretation of that provision together with section 25 of the *Regulations* and section 51(1) of the *Act*. I will deal in turn with sections 23(1)(a) and (b).

Section 25(1)(b) and Section 23 of the Regulations

[25] Section 25(1)(b) of the *Regulations* will be engaged if the Minister determines that there is "significant public concern". In his decision on the appeal under section 107 of the *Act*, the Minister referred to "high public interest", stating, at page 3:

> Public concern was considered in the assessment process and that concern was clearly acknowledged.

Those concerns are summarized in the Minister's decision, at page 3:

> The main concerns identified during the assessment of the undertaking focused around:
>
> - Status of the wild salmon population in Placentia Bay and the South Coast,
> - Escapes and their direct and direct (*sic*) impacts to wild salmon,
> - Disease and disease transfer,
> - Parasites and parasite transfer,
> - Waste products (feed, fecal matter, drifting pesticides (e.g. Salmosan),
> - Site Locations, and
> - Contingency Plan if the project does not work.

[26] It is clear that the Minister recognized that there is "significant public concern" with respect to the undertaking as referenced in section 25 of the *Regulations*. Accordingly, section 23(1)(a), which permits the Minister to

release an undertaking where "there are no environmental or public concerns", could not apply in this case (emphasis added).

[27] The question, then, is whether section 23(1)(b) may apply where section 25(1)(b) would otherwise require an environmental impact statement. There are two possible interpretations in circumstances where the Minister has determined that the undertaking raises significant public concern, the factor that would trigger the requirement for an environmental impact statement under section 25(1)(b).

[28] First, it may be argued that section 23(1)(b) could not be relied upon because that provision speaks to mitigation of environmental effects, with no mention of public concern. Since section 23(1)(a) directly addresses the question of public concern, and applies where there is "no" concern, and paragraph (b) is silent regarding public concern, there would be no provision on which to release the undertaking under section 23 if the Minister determines that the undertaking raises significant public concern. This result would obtain even if section 23(1)(b), regarding the mitigation of environmental effects, may otherwise have been relied upon because section 25(1)(b) would require an environmental impact statement in any event.

[29] An alternate interpretation of section 23 is that the option to release an undertaking would be available if either paragraph (a) or (b) of that section applied without regard to the reason for requiring an environmental impact statement. That is, under this interpretation, section 23 would be read as intending to operate "notwithstanding" section 25. Applying that interpretation, the Minister would have the option of releasing the undertaking from environmental assessment if either paragraph (a) or (b) of section 23 was satisfied, and the reason for requiring an environmental impact statement under section 25 would be irrelevant.

[30] The first interpretation is consistent with a broad reading of section 25 which sets out the general rule that requires an environmental impact statement where there is significant public concern. Section 23, as an exception to the general rule, would be more narrowly construed. That approach is also consistent with the purpose set out in section 46 of Part X of the *Act* to protect the environment of the province through procedures before as well as after the commencement of an undertaking. Finally, the factors that may be considered by the Minister in determining whether to release an undertaking under section 23 do not provide assistance in interpreting the operation of section 25(1)(b).

[31] On the other hand, the second interpretation of section 23 gives substantive effect to the Minister's authority to release an undertaking from environmental assessment if either of the strict conditions is satisfied. As discussed below, section 23(1)(b) can be relied upon only if the environmental effects "will be mitigated under an Act of the province or of Canada". That language circumscribes the extent of the Minister's authority under section 23, subject, of course to the situation covered under paragraph (a), where there are no environmental or public concerns. This interpretation also avoids the likelihood of rendering section 23(1)(b) virtually ineffective if, by virtue of the operation of section 25(1)(b), an environmental impact statement is always required and the project cannot be released since any undertaking requiring a determination under section 51(1) of the *Act* will most likely or almost certainly engage public concern.

[32] Where, as here, the ordinary tools of statutory interpretation may lead to more than a single reasonable interpretation, the principle discussed in *McLean*, where there is a single reasonable interpretation, is not engaged. Rather, the question in this case is whether the Minister's interpretation is reasonable.

[33] The Minister's decision does not reference the alternate interpretations. However, this is an instance in which the reasons may be supplemented on review. The Minister stated his reliance on section 23(1)(b) of the *Regulations* and acknowledged the significant public concern relating to the undertaking. This supports the inference that he adopted the second interpretation of section 23. In my view, it cannot be said that that determination was unreasonable.

[34] It is necessary, then, to consider whether the Minister's decision, relying on section 23(1)(b) of the *Regulations*, to release the undertaking from environmental assessment was reasonable.

Section 25(1)(a) and 23(1)(b) of the Regulations

[35] Where the Minister determines, with respect to an undertaking, that there may be significant negative environmental effects, section 25(1)(a) of the *Regulations* will necessarily apply requiring an environmental impact statement, unless the Minister determines that the environmental effects will be mitigated under federal or provincial legislation, in which case, the undertaking may be released under section 23. That interpretation gives effect to both provisions and avoids conflict.

[36] For example, an environmental assessment of a particular undertaking may be required under both federal and provincial legislation. If the Minister

determines that the environmental effects "will be mitigated" by an environmental assessment under federal legislation, to avoid duplication, it would be open to the Minister to release the project from environmental assessment under the provincial scheme.

[37] In relying on section 23(1)(b), the Minister concluded, at page 4:

> [Section] 23(1)(b) of the Regulations grants the Minister the discretion to release an undertaking where "*the environmental effects of the undertaking will be mitigated under an Act of the province or of Canada*". This was a critical element in the decision to release the project. … The strength of the regulatory and permitting regime of [the federal departments of Fisheries and Oceans and Fisheries and Aquaculture] was thoroughly explored during the assessment of the project. Both [the federal departments of Fisheries and Oceans and Fisheries and Aquaculture] provided substantive information during the assessment regarding the extensive nature of the further permitting and licensing requirements to which this project will be subjected after release of the project from the environmental assessment process.

[38] Further, the Minister relied on "two important differences [from past aquaculture experiences when fish escaped] regarding the project, namely (1) the cage technology to be utilized, and (2) the use of triploid salmon" (page 5 of the Minister's decision). Finally, the Minister's decision states, at pages 5 to 6:

> Throughout the Act and Regulations, language such as "in the opinion of the Minister" or "as determined by the Minister" is used. That language signifies that the Minister has discretion over a certain area of activity. This is important to consider when looking at the language pertaining to environmental assessment. The legislature has granted the Minister the discretion or authority to release an undertaking by use of the language "determines" in s. 25 (*sic*) of the Regulations. <u>The question is whether the Minister is of the opinion that there are environmental effects of significant public concern</u>. This context is often overlooked in the heat of debate. An organization or individual may have come to a different conclusion regarding the release of an undertaking than the Minister. However, the difference of opinion does not mean that the Minister has acted outside his authority or discretion.
>
> The province ensures that projects, which should proceed are released in <u>a manner in which the risks to the environment are satisfactorily addressed through appropriate terms and consideration (*sic*) attached to permits and authorizations issued by the responsible federal and provincial agencies</u>.
>
> <u>The Department is satisfied that the environmental assessment for the Placentia Bay Atlantic Salmon Aquaculture project, carried out in collaboration with numerous departments and agencies, was carried out fully and diligently and considered all the risks that the undertaking raised</u>. It is my conclusion from this review that the decision to release the Project was consistent with the requirements of the

> *Environmental Protection Act* and with my responsibilities as enunciated in the Act. My original decision is upheld.
>
> (Emphasis added.)

[39] If the Minister is exercising his authority under section 23, the proper question is not "whether the Minister is of the opinion that there are environmental effects of significant public concern" (underlining above), but whether the environmental effects will be mitigated under federal or provincial law.

[40] The Minister's reference to releasing an undertaking, in a manner whereby risks to the environment are satisfactorily addressed through appropriate terms and conditions imposed by the Minister and the operation of federal and provincial legislation, does address an issue under section 23. Indeed, it is consistent with the criteria set out in section 56 of the *Act* when an undertaking has been released from environmental assessment.

[41] That said, it should be noted that conditions that may be imposed by the Minister are not part of the analysis to determine whether an undertaking should be released from environmental assessment. Terms and conditions imposed by the Minister become relevant only after the Minister has made the determination to release the undertaking pursuant to section 23 of the *Regulations*, and the proponent has been notified that the undertaking is released. It is then that section 56 of the *Act* is engaged so that the proponent may proceed, subject to compliance with federal, provincial and municipal laws and terms and conditions that the Minister may impose.

[42] Further, it is not the "Department", but the Minister, who must be satisfied that the environmental effects will be mitigated under federal or provincial law. The comment in the Minister's reasons that the "Department is satisfied" that the environmental assessment carried out by numerous departments and agencies "was carried out fully and diligently and considered all the risks that the undertaking raises" indicates only that the risks were "considered", not that the environmental effects will be mitigated. The *Act* and *Regulations* do not make provision for releasing a project from an environmental assessment on the basis that the Minister is of the opinion that a sufficient environmental review has been completed by governmental departments and agencies.

[43] The tenor of the Minister's decision is that, in his opinion, sufficient consideration has been given to environmental concerns, and that issues that

arise in the future will be dealt with by means of federal licencing and regulatory requirements together with conditions that the Minister may impose. That is not what section 23 requires.

[44] The Minister's emphasis on acting according to his opinion and discretion to make determinations under the *Act* and *Regulations* does not free him to make a decision without regard to the legal framework provided by the legislation. In *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 S.C.R. 108, Cromwell J., for the Court, cautioned:

> [55] Discretion conferred by statute must be exercised consistently with the purposes and policies underlying its grant: [authorities omitted].

See also: *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paragraph 33.

[45] Further, I note that the word "opinion" is not found in section 51(1) of the *Act*, which requires the Minister to "determine", "using criteria prescribed by regulation", which of the three options applies. That responsibility arises once the Minister has concluded, applying the definition of "undertaking" (section 2(mm) of the *Act*) that, in his opinion, the undertaking may have a significant environmental effect. Accordingly, the determination of whether an undertaking may be released from an environmental assessment is not a matter of the Minister's opinion. Rather, the Minister is required to determine whether "the environmental effects of the undertaking will be mitigated under an Act of the province or of Canada". In so doing, the factors set out in section 57 of the *Act* would provide a helpful framework.

[46] Finally, section 23 of the *Regulations* may apply where "the environmental effects of the undertaking will be mitigated under an Act of the province or of Canada" (emphasis added). The Minister's decision does not indicate how provincial or federal legislation will mitigate environmental effects or that all the relevant effects will be mitigated. I note that section 23 refers to "the environmental effects" in contrast to "significant negative environmental effects" in section 25. Principles of statutory interpretation require that effect be given to this difference in language, with the result that section 23, without modifying words, would apply to all environmental effects.

[47] Assessments undertaken and conclusions reached pursuant to federal legislation may, where appropriate, be used in preparing an environmental impact statement, but unless the Minister determines that all, not just significant,

environmental effects of the undertaking "will" be "mitigated" under provincial or federal legislation, the Minister will not have authority to release the project under section 23(1) of the *Regulations*. The use of the word "will" establishes a high threshold, though "mitigated" may be contrasted with a word such as "eliminated". Interpretation of such language would fall within the mandate of the Minister whose decision would be entitled to deference applying the *Dunsmuir* reasonableness standard.

[48] In summary, the Minister's decision relying on section 23(1)(b) of the *Regulations* does not address the questions necessary to make a determination, under section 51(1)(c) of the *Act*, that the undertaking may be released from the requirement to provide an environmental impact statement. Accordingly, I would quash the Minister's decision to release the undertaking from environmental assessment, though for reasons different from those of the applications judge.

SUMMARY

[49] In summary, the applications judge erred in her analysis by failing to apply the presumption of coherence in interpreting sections 23 and 25 of the *Regulations*. A determination under section 23 to release an undertaking from an environmental assessment may be made by the Minister even where section 25 would otherwise require an environmental impact statement. However, in his decision, the Minister failed to address the necessary questions in order to release the undertaking pursuant to section 23.

[50] Accordingly, I would dismiss the appeal. I would quash the Minister's decision to release the undertaking from environmental assessment, though for reasons different from those of the applications judge. I would grant costs to the Salmon Federation under column 3 of the scale of costs in the *Court of Appeal Rules*.

B. G. Welsh J.A.

O'Brien J.A.:

INTRODUCTION

[51] I have had the benefit of reading the reasons provided by my colleague, Welsh J.A. in this matter.

[52] First, I agree with my colleague's reasons regarding the standard of review. That is, I agree that the applications judge appropriately identified reasonableness as the applicable standard.

[53] Second, I agree with the ultimate result reached by my colleague. I would also dismiss the appeal, and award costs to the Atlantic Salmon Federation (Canada) (hereafter, the Federation).

[54] However, the reasons for my conclusion to dismiss this appeal differ from those of my colleague.

[55] For the reasons which follow, I would conclude that the applicable provincial environmental legislation mandated the Minister of Environment and Climate Change in this circumstance to require that further environmental assessment procedures be undertaken before any decision could be made regarding the release of the project.

[56] Specifically, the applicable legislation mandated that the Minister require an environmental impact statement in this case, as the Minister determined there was significant public concern regarding the project.

[57] I would further conclude that the Minister's decision to release the project without requiring an environmental impact statement in this circumstance was unreasonable, when considered in light of the criteria set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008]1 S.C.R. 190, and other authorities.

[58] As a result, I would dismiss the appeal.

BACKGROUND

[59] This appeal concerns a proposed aquaculture project, known as the Placentia Bay Atlantic Salmon Aquaculture Project.

[60] The proposed project would involve sea-based salmon farming in the waters of Placentia Bay, NL.

[61] If approved, the project would be substantial in size and scope.

[62] It has been observed that it would represent the largest expansion of salmon aquaculture in Eastern Canada, "if not all of Canada".

[63] The project would also represent many "firsts".

[64] For example, it would be the first time non-native, European-strain triploid salmon would be introduced, for commercial purposes, into local waters.

[65] This would also be the first use in this province of a specific cage technology, which has been proposed to prevent farmed salmon from escaping into the wild.

[66] Mr. Eric Watton, an environmental scientist working with the Government of Newfoundland and Labrador, was the main government scientist involved in the preliminary screening review of this project on behalf of government. In that capacity, he prepared a comprehensive, 49-page background report for the Minister's consideration in this matter (hereafter, the Watton report).

[67] The Watton report considered public and environmental concerns relating to the project and also reviewed, in some detail, the concerns and views of various government agencies in respect of the project.

[68] The Watton report itemized a number of notable, distinctive characteristics of the project, stating the following at page 10:

> Before discussing this project, the following facts should be read. According to DFO [Department of Fisheries and Oceans], this is the:
>
> - largest expansion of salmon aquaculture in Eastern Canada, if not all of Canada,
> - first salmon aquaculture project in Placentia Bay,
> - first commercial use of European-strain triploid salmon in Eastern Canada,
> - first use of this specific cage system in NL,
> - first time production has moved from 1 million fish per farm to 2 million fish per farm - unknown performance and unknown if this production scale is possible in NL.

[69] Perhaps because of the large scale and the numerous “firsts” associated with the proposed project, it has attracted considerable negative attention. The record reveals widespread public concern, in general terms, as well as specific fears relating to the potential negative environmental effects flowing from the project.

[70] The central, but certainly not the exclusive, reason for the unease relates to the potential negative impact of the project on wild salmon in the Placentia Bay area.

The Watton report - chronicling significant public concern

[71] The Watton report documented significant public concern relating to the proposed project. The report is instructive and relevant in this respect, in that it was prepared as a deliberation aid to advise the Minister and to assist in informing the Minister’s decision in this matter.

[72] The report was part of the record and, as such, was considered and referred to extensively by the applications judge in reviewing the Minister’s decision.

[73] At pages 13-14, the report describes various aspects of public concern with the proposed project, especially relating to the potential impact on the local wild salmon population. It states:

> The main concerns focused around, in no particular order:
>
> - Status of the wild salmon population in Placentia Bay,
> - Escapes and their direct and [in]direct impacts to wild salmon,
> - Disease and disease transfer,
> - Parasites and parasite transfer,
> - Waste products (feed, fecal matter, drifting pesticides (e.g. Salmosan)),
> - Site Locations,
> - Contingency Plan if the project does not work, and
> - Why land-based closed containment was not discussed or made compulsory as an alternative.

[74] The Watton report deals with all of the above concerns, citing various scientific studies and presenting the perspectives of various government agencies in relation to the concerns. While it is not possible, or practical, to discuss all the public concerns in detail (including escapes, disease transfer etc.), several examples from the Watton report might provide some useful context for the discussion which will follow.

[75] For example, with regard to the first concern listed above, the "status of the wild salmon in Placentia Bay", the report notes at page 17 that, the "Committee on the Status of Endangered Wildlife in Canada (COSEWIC) has assessed the Atlantic Salmon – SNP [South Newfoundland Population] as *threatened* (COSEWIC, 2015; DFO, 2015; DFO, 2016)." (Emphasis in original.)

[76] The wild salmon population of Placentia Bay is part of this Atlantic Salmon – SNP [South Newfoundland Population]. It is, therefore, part of this "threatened" salmon cohort.

[77] The report goes on to predict that the situation is unlikely to improve, stating at page 18: "With continued decline expected, it is expected that the SNP will be listed under the *Species at Risk Act* (SARA) in the near future (multiple sources)."

[78] With respect to another public concern listed above, "escapes and their direct and [in]direct impacts to wild salmon", Watton noted at page 17:

> According to Thorstad et al. (2008),
>
> - Atlantic Salmon are in decline throughout much of their native distribution,
> - The numbers of farmed salmon escapes are large compared to their wild conspecifics,
> - Escaped farmed salmon are an international issue as they do cross national borders, and
> - The negative effects on wild populations have been scientifically documented including ecological and genetic impacts.

[79] The Watton report also compared the estimated number of wild salmon in Placentia Bay with the proposed number of farmed salmon to be introduced into those waters, if the project is approved.

[80] The report indicates at page 18 that the disparity between the number of wild and farmed salmon would be significant. It states:

> The Wildlife Division has provided an estimate of a total population of less than 27,000 for the South Newfoundland Population of Atlantic salmon of which there may be an estimated 7,000 in Placentia Bay. According to DFO Salmonids Section, actual stock assessment data is not available for Placentia Bay with the only estimates being derived from angling returns which are not reliable and do not reflect actual population size data. For perspective, each cage in each farm in the proposal can hold approximately 160,000 non-native triploid salmon.
>
> (Emphasis added.)

[81] The capacity to hold 160,000 non-native triploid salmon in each cage means that the number of farmed salmon in the waters of Placentia Bay could escalate quickly.

[82] The report states, at page 1, that the proposed project involves "11 marine-based farms" in Placentia Bay, and "each marine-based farm will consist of multiple cages."

[83] Even if each of the proposed 11 marine-based salmon farms had only one cage, this would yield a total capacity exceeding 1.7 million farmed salmon (i.e. 160,000 x 11=1,760,000). Once production began, the number of farmed salmon would quickly dwarf the estimated 7,000 wild salmon presently remaining in Placentia Bay.

[84] This 1.7 million farmed salmon figure could increase dramatically if, as is proposed, each marine-based farm would use "multiple cages". For example, two cages per farm would mean the number of farmed salmon would be more than three million, three cages per farm would yield in excess of five million, and so on.

[85] The exact number of farmed salmon proposed for the waters of Placentia Bay at peak production is, presently, unknown. The Watton report indicates, at page 13, that the number was "not specifically stated" in the documentation filed when the project was registered with government.

[86] However, in terms of calculating the proposed number of salmon to be produced, it is instructive to consider the number of cages proposed.

[87] The Watton report notes at page 12 that "there will be a capacity of 120 cages in the 11 farms…". According to the report, these 120 cages would be

distributed among the 11 proposed marine-based salmon farms, with 9 farms having 12 cages each, and two farms having 6 cages each.

[88] Based on the numbers in the Watton report, and assuming all cages were used, the project could possibly have a total production capacity exceeding 19 million farmed salmon (i.e. 120 salmon cages x 160,000 salmon per cage = 19,200,000). Of course this number would be lower if fewer cages were operational at any given time or if fewer salmon were held in each cage.

[89] The Watton report does give some indication of the possible impact of these numbers when it notes that the project would be the "first time production has moved from 1 million fish per farm to 2 million fish per farm – unknown performance and unknown if this production scale is possible in NL" (page 10).

[90] In terms of the scope of the project, the Watton report also states that, in addition to the 11 marine-based farms (with 120 cages holding up to 160,000 salmon per cage), the project would also include a land-based salmon hatchery, which "will produce up to seven million triploid smolt annually" (page 1).

[91] The Minister, before making a decision in this matter, would have had access to all of the above information as it related to public concern, along with a vast amount of other relevant information contained in the Watton report.

[92] Both the public concern and the environmental effects arising from the proposed project are relevant considerations in the legislation which the Minister had to consider. Both are germane to the decision made by the Minister in this circumstance, and both will be discussed below, in the context of interpreting the relevant legislation.

The Minister's "release" of the project

[93] The applicable provincial environmental legislation mandates that, in certain circumstances, the Minister must require further environmental assessment procedures be undertaken before a project can be approved or "released".

[94] In this case, the Minister released the project without requiring any further environmental assessment procedures. Rather, after a preliminary screening review, the project was permitted to proceed.

[95] This was the Minister's so-called "release" decision. The Minister "released" the project, meaning that it was "released from the further application

of the environmental assessment requirements" set out in provincial environmental legislation.

[96] The record indicates that, in this respect, the Minister's decision to release was contrary to the Watton report's recommendation that the Minister require further environmental assessment be undertaken (page 48). The Minister, of course, was not obligated to accept this recommendation. As discussed below, though, the Minister was obligated to comply with the applicable legislative requirements.

[97] The Federation opposed the Minister's decision to release the project without requiring further environmental assessment. It argued that the Minister's decision to release was contrary to the mandatory requirements in provincial environmental legislation.

[98] The legislation provided that a person who is "aggrieved by a decision or an order" could appeal. It provided that an appeal of the Minister's decision could be made, in writing, to the Minister. The Minister could then allow or dismiss the appeal, or make another decision or order.

[99] On this basis, the Federation appealed the Minister's release decision. The Minister dismissed the appeal. He confirmed his original decision to release the project.

Judicial review of the Minister's decision

[100] The Federation applied for judicial review of the Minister's decision to release the project from the further application of the province's environmental assessment requirements. The application for judicial review was heard in the Supreme Court of Newfoundland and Labrador.

[101] The applications judge determined that the applicable standard of review in considering the Minister's release decision was reasonableness.

[102] Applying a reasonableness standard, the applications judge considered whether the Minister's decision to release the project was, or was not, reasonable.

[103] In this regard, the applications judge referenced the law as set out by the Supreme Court of Canada in *Dunsmuir*, stating at paragraph 128:

> A "reviewing court is concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law", *Dunsmuir* at paragraph 47.

[104] The applications judge also referenced the decision of this Court in *Layman v. Layman Estate*, 2016 NLCA 13, 375 Nfld. & P.E.I.R. 106 regarding the appropriate approach to be taken in judicial review, stating, at paragraphs 155-156:

> In *Layman v. Layman Estate*, 2016 NLCA 13 at paragraph 23, our Court of Appeal confirmed that "the real questions" I must ask myself on judicial review on a reasonableness standard were:
>
> 1. Whether in light of the record before him, the reasons reveal that the (decision maker) chose an interpretation … that its words could bear.
>
> 2. Whether the interpretation chosen … was justifiable in light of the facts and the law, even if there were competing interpretations.
>
> I must therefore review the Record to determine if the outcome is within a range of outcomes justified by the facts and the law.

[105] The applications judge concluded that the Minister's decision to release the project was unreasonable in that, based on a review of the record, the decision was not within a range of outcomes justified by the facts and the law.

[106] As a result, the applications judge set aside the Minister's decision to release the project, and ordered that the Minister require further environmental assessment of the project before a decision could be made with respect to the project's release (2017 NLTD(G) 137).

The Minister's appeal to this Court and the Minister's action before the appeal was heard

[107] The decision of the applications judge was appealed to this Court by the Minister.

[108] Notably, before the hearing of the appeal, the Minister advised that further environmental assessment would be required in this matter before a decision would be made regarding release.

[109] More particularly, the Minister required the proponent to prepare an "environmental impact statement" with respect to this project. The Minister

notified the proponent of this requirement before the appeal was heard and a public announcement was made in this respect.

[110] Notwithstanding this development the appeal proceeded. The Court was not requested to make a determination as to whether the appeal was moot in light of the Minister's decision to order an environmental impact statement. The appeal continued in that it was understood that a decision outlining this Court's views on the interpretation of the applicable legislation and the Minister's authority in this legislative context, while perhaps of only limited consequence or impact in this case (given that the Minister had already ordered further environmental assessment be undertaken), might nonetheless be instructive, relevant or of some general utility in informing future ministerial determinations in this context.

[111] The applications judge's decision required that an environmental impact statement be prepared before release could occur. The Minister, in fact then, complied with this requirement when, before the appeal hearing, he ordered that an environmental impact statement be prepared.

[112] The result in this appeal, then, confirms that the Minister was mandated by the legislation to require an environmental impact statement in this circumstance.

[113] To be clear, then, this appeal did not deal with the Minister's subsequent decision to require an environmental impact statement. Rather, this appeal was brought and argued on the issue of whether the Minister's original decision to release the project, without requiring further environmental assessment, was or was not reasonable in the context of the applicable legislation.

ISSUE

[114] The issue on appeal is whether the applications judge erred in determining that the Minister's decision (to release the project from the further application of the environmental assessment requirements provided for in provincial legislation) was unreasonable, in that the Minister's decision was not within the range of outcomes justified by the facts and the law.

ANALYSIS

The applicable legislation

[115] A decision to release, or not release, a project such as this one from environmental assessment must be made in accordance with the applicable legislation, and the authority provided by that legislation.

[116] The applicable legislation in this context is the *Environmental Protection Act*, SNL 2002, c.E-14.2 (especially Part X, sections 45-77 of the *Act*, entitled "Environmental Assessment") as well as the *Environmental Assessment Regulations, 2003*, NLR 54/03.

[117] Collectively, and as will be discussed in detail below, the legislation prescribes and, notably, also limits the Minister's powers in making a decision to release a project in this context.

[118] Where a Minister's decision to release a project from further environmental assessment is challenged, as in this case, the *Act* and *Regulations* must be considered and interpreted to determine whether the decision is supported by, and consistent with, the legislation.

[119] This matter, therefore, principally entails an exercise in statutory interpretation in the context of the applicable legislation.

Approach to statutory interpretation

[120] This Court in *R v. Pardy*, 2014 NLCA 37, 357 Nfld. & P.E.I.R. 49, sitting as a five member panel, described the proper approach to statutory interpretation as follows:

> [51] As is the case with any statutory provision, its meaning and effect must be gathered by construing the words used in the context of the statute as a whole and harmoniously with the scheme and purpose of the legislation. In giving meaning to the words used in an enactment, the Court must recognize that the inherent plasticity of language requires reference to context and inferred purpose to give them specific meaning. Section 16 of the *Interpretation Act* requires that every provision of an Act shall be considered remedial and be given "the liberal construction and interpretation that best ensures the attainment of the objects of the Act … according to its true meaning."
>
> [52] In *Archean Resources Ltd. v. Newfoundland (Minister of Justice)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124 the process of interpretation of statutes in this province was described this way:

> [22] Instead of mandating some fictionalized search for a collective "legislative intention", s. 16 directs the court to consider every provision "remedial" and to interpret it so that it "best" ensures the attainment of its "objects" according to its "true" meaning. This requires a consideration, as an integral part of the interpretive exercise, of the problem or "mischief" to which the legislature directed its legislative act as a remedy and then the drawing of an inference, based on the language of the whole enactment and the court's general knowledge of the state of the pre-existing law and any information as to the broad social context in which the legislative act occurred, as to what, broadly speaking, the object or objects of the legislative act must have been. The end result is to arrive at a "true" meaning. That inevitably requires an examination of more than the bare words of the legislative enactment that is in issue, no matter how clear or unambiguous they may at first blush appear. The surrounding text, the interrelation of other related statutes, the social and legislative context in which the provision was enacted, and other extrinsic aids are all sources to be consulted in this exercise. … [t]rue meaning is not plain meaning; it is a conclusion arrived at by reconciling all the appropriate indicators of meaning that the court is directed to consider.
>
> [23] In truth, therefore, s. 16 enunciates a principle of harmonization in which the courts are directed, in cases of dispute, to adopt and apply an interpretation that fairly reconciles the language used in the enactment with the broader objectives of the legislation so as to achieve the general goal, or to rectify the mischief, to which the legislative act appears to be directed. That exercise determines the general ambit of impact of the legislative act and provides the basis for the court to conclude whether the particular fact situation before it should fall inside or outside that ambit.

[121] More recently, in *Dwyer v. Bussey*, 2017 NLCA 68, leave to appeal to SCC refused, 37921 (August 9, 2018), Chief Justice Green of this Court summarized the current approach to the interpretation of legislation in this province. This summary, at paragraph 57, encapsulates the thinking on statutory interpretation found in a number of recent decisions from this Court.

[122] Chief Justice Green stated in this regard:

> The approach to interpretation of provincial statutes in this jurisdiction is to ascribe to the words used a meaning that reconciles those words with all other indicators of meaning, including the mischief against which the remedial nature of the statute is directed as well as the context of the surrounding legislative text and related statutes and the social context of the provision, and by inference therefrom, the purpose or object of the provision under consideration: *Interpretation Act*, RSNL 1990, c. I-19 , s. 16; *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124 at paragraphs 22-23; *R. v. Pardy*, 2014 NLCA 37, 357 Nfld. & P.E.I.R. 49 at paragraphs 51-52; *Lynch v. St. John's (City)*, 2016 NLCA 35, 380 Nfld. & P.E.I.R. 13, at paragraphs 75-78, 79.

[123] This Court's approach to statutory interpretation is aligned with the "modern approach" taken by the Supreme Court of Canada.

[124] Justice Brown, writing for the Supreme Court of Canada in *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36 recently offered a succinct synopsis of this approach, at paragraph 17, as follows:

> Statutory interpretation entails discerning legislative intent by examining the words of a statute in their entire context and their grammatical and ordinary sense, in harmony with the statute's scheme and object: *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 21.

[125] The applications judge's approach to statutory interpretation was consistent with the approach of this Court and the Supreme Court of Canada.

[126] The applications judge stated at paragraphs 176 and 178:

> "Today, there is only one principle or approach" (to statutory interpretation), namely the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of Parliament. *Rizzo v. Rizzo Shoes Ltd.(Re),* [1998] 1 S.C.R. 27.
>
> …
>
> In *Lynch v. St. John's (City)*, 2016 NLCA 35, our Court of Appeal confirmed that we must seek an interpretation that "best ensures the attainment of the objects of the *Act*…according to its true meaning" and that discerning the "intention of the legislature" is by "reference to all relevant sources of meaning, including the words used, the statutory context, the court's knowledge of the state of the pre-existing law, social context, the perceived mischief that caused the government …(to introduce the bill)….and the legislative history" (at paragraph 75).

[127] Guided by the approach to statutory interpretation outlined above, the language used in conferring, and also limiting, ministerial authority to release the project in this circumstance shall be considered, both in the "grammatical and ordinary sense", and also in the broader context of the "legislative scheme and object".

[128] Before considering, in further detail, the language which bestows and also constrains the Minister's authority to release a project from environmental assessment, a brief overview of some of the key concepts in the legislation may be helpful, starting with the notion of an "undertaking".

The project is an "undertaking"

[129] The *Act* and the *Regulations* designate certain projects as "undertakings".

[130] The *Act*, in section 2(mm), states that an undertaking "includes an enterprise, activity, project, structure, work or proposal…that may, in the opinion of the minister, have a significant environmental effect".

[131] Also, the *Regulations* specifically designate certain activities/projects/works etc. as undertakings, because of their potential, negative environmental impact. Section 29 of the *Regulations* indicates that an aquaculture project, such as the one proposed, is considered to be an undertaking.

[132] This project, then, meets the statutory definition of an undertaking.

[133] This is significant because the *Act* and *Regulations* set out specific requirements which attach to undertakings, which otherwise would not apply to projects or activities which are not deemed to be undertakings.

[134] First, undertakings must be registered with government, and the undertaking's proponent must notify the Minister of the proposed undertaking in a prescribed manner (section 49 of the *Act*). The project, in this case, has been registered.

[135] Once an undertaking is registered a "screening process" occurs to determine whether further environmental assessment is required. This screening process will be considered more fully, below, when discussing sections 23 and 25 of the *Regulations*.

[136] In this case, following this initial screening review, the Minister decided that no further environmental assessment was necessary. The Minister released the project at this stage.

[137] Second, the legislative provisions dealing specifically with environmental assessments, found in Part X of the *Act*, and in the *Regulations*, apply only to undertakings. These would therefore apply to this project.

[138] Third, an undertaking shall not proceed unless the undertaking has been "exempted or released" as stated in section 48 of the *Act*.

[139] Section 70 of the *Act* permits the Lieutenant-Governor in Council to exempt an undertaking from the environmental assessment process, "where the minister is of the opinion that it is in the public interest …".

[140] In this case, the Lieutenant-Governor in Council has not exempted this project.

[141] Therefore, the project is subject to the *Act* and *Regulations* and cannot proceed until a determination has been made that it can be released from further environmental assessment.

Part X of the *Environmental Protection Act* – Protecting the "environment and quality of life" through environmental assessment procedures

[142] Part X of the *Act* deals solely with environmental assessment.

[143] Section 46 sets out the purpose of Part X as follows:

> The purpose of this Part is to
>
> (a) protect the environment and quality of life of the people of the province; and
>
> (b) facilitate the wise management of the natural resources of the province,
>
> through the institution of environmental assessment procedures before and after the commencement of an undertaking that may be potentially damaging to the environment.

[144] The purpose is concerned with protecting the environment and quality of life of the people of the province and facilitating wise management of natural resources.

[145] This purpose is achieved through "environmental assessment procedures" which contemplate participation by the public so that their concerns may be expressed and considered.

[146] Three environmental assessment procedures are specifically included in Part X of the *Act*. These are the environmental assessment, environmental impact statement and environmental preview report, all of which are defined terms in section 45 of the *Act*.

[147] An environmental assessment is a "process by which the environmental effect of an undertaking is predicted and evaluated before the undertaking has begun or occurred" (section 45(d) of the *Act*).

[148] An environmental impact statement is directly related to an environmental assessment, in that the environmental impact statement is a "report that presents the results of an environmental assessment" (section 45(e) of the *Act*).

[149] As discussed below, an environmental impact statement is required in certain circumstances, including where the Minister determines that there is "significant public concern" relating to an undertaking.

[150] When ordered, an environmental impact statement must be prepared by the proponent of the undertaking, and submitted to the Minister. In this case, the Minister did not require the proponent to prepare an environmental impact statement.

[151] Also, it is significant that, when an environmental impact statement is required, the legislation mandates increased public input and participation in the assessment process. This requirement for enhanced public input and engagement is important in achieving the legislative purpose.

[152] Finally, an environmental preview report is a report "which is necessary to assist the minister in making a determination as to whether or not an environmental impact statement is required" (section 45(f) of the *Act*). The Minister, in this case, did not require or request an environmental preview report.

[153] These three environmental assessment procedures are legislative tools available for the Minister's use, under section 51 of the *Act*, to assist the Minister in achieving the legislative purpose of protecting "the environment and the quality of life" of the people of the province.

[154] Section 51 will be considered next.

Section 51 of the *Environmental Protection Act* – the Minister's three options

[155] Section 51(1) of the *Act* provides that the Minister, using criteria prescribed by regulation, shall make one of three determinations in relation to an undertaking. The Minister shall require an environmental preview report, require an environmental impact statement or release the project.

[156] Section 51(1) states:

> (1) Where, following an examination by the minister under subsection 50(1), the Lieutenant-Governor in Council does not give a direction under subsection 50(2), the minister, using criteria prescribed by regulation, shall determine whether
>
> (a) an environmental preview report is required;
>
> (b) an environmental impact statement is required; or
>
> (c) the undertaking may be released.

[157] The term "released" in section 51(1)(c), above, means the undertaking is released "from the further application of the environmental assessment requirements of [Part X of the *Act*]" (section 45(i)).

[158] In releasing a project, the Minister indicates that neither an environmental preview report nor an environmental impact statement is required.

[159] Once a project is released, no further environmental assessment need be undertaken under the *Act* or *Regulations*, and no environmental impact statement need be produced by the proponent for the Minister's consideration.

[160] This is what occurred in the present case.

The "screening criteria" in the *Regulations* – legislative constraints placed on the Minister's three options

[161] The three options provided to the Minister in section 51 of the *Act* are, in fact, constrained and limited by the criteria prescribed by the *Regulations*, specifically Part II of the *Regulations*, which is entitled "Screening".

[162] The use of the term "Screening" in Part II of the *Regulations* is meaningful.

[163] To screen in this context is to filter. The Minister must screen out those undertakings which require further environmental assessment from those that do not. Certain undertakings can pass through the Minister's screen, and some cannot.

[164] Screening denotes that the Minister's function is to review an undertaking, at a preliminary stage, presumably starting with the information provided by the proponent when the undertaking was initially registered.

[165] Mindful of the stated legislative purpose in section 46, the Minister must consider what level of intensity of environmental assessment is required and

appropriate to "protect the environment and quality of life of the people of the province" and "to facilitate the wise management of the natural resources of the province".

[166] The Minister must consider whether the preliminary screening process is adequate to achieve this legislative purpose or whether something more substantial is required.

[167] The Minister's obligation, in this screening role, involves determining whether there is a legislative requirement for enhanced environmental assessment (beyond the preliminary screening), or whether the project can be discharged, at an early stage, without a more rigorous assessment or examination. Legislative requirements for enhanced assessment are found in the *Regulations*.

[168] The *Regulations* are instructive in this regard. More than instructive, in fact, the *Regulations* explicitly direct the Minister in the discharge of this filtering or screening function.

[169] The Minister's authority to discharge is not unfettered. As my colleague noted at paragraph 45, above, "the determination of whether an undertaking may be released from an environmental assessment is not a matter of the Minister's opinion".

[170] Sections 24 and 25 of the *Regulations* set out specific circumstances where the Minister must require either an environmental preview report or an environmental impact statement. The language in each case is mandatory.

[171] In those circumstances, the Minister's responsibility to screen or filter has been restricted by the legislation. In those circumstances, the undertaking cannot pass through the Minister's screen, and cannot be released without a more robust examination.

[172] The present project is such a circumstance.

[173] The Minister's responsibility is to screen or filter, at a preliminary, review stage. In fact, the legislation indicates that, where an environmental impact statement has been required by the *Regulations*, the Minister (having discharged his screening function) does not have any further authority to release the project. Rather, section 67 of the *Act* states that the Minister's role is, in that circumstance, limited to making a recommendation to the Lieutenant-Governor in Council. It then becomes the Lieutenant-Governor in Council's decision to

release the undertaking or direct that the undertaking not proceed in those circumstances.

[174] Part II contains three specific sections related directly to the Minister's screening responsibility. Section 24 prescribes the screening criteria for an environmental preview report, section 25 prescribes the screening criteria for an environmental impact statement, and section 23 prescribes the screening criteria for release.

Section 24 of the *Regulations* - The Minister "shall require an environmental preview report"

[175] The language in section 24(1) of the *Regulations* is mandatory.

[176] It requires an environmental preview report in one, specific circumstance.

[177] That is, section 24(1) directs that the Minister shall require an environmental preview report for an undertaking where the Minister "determines there is insufficient detail to determine the significance of the environmental effects of an undertaking".

[178] Section 24(2) lists three factors the Minister may consider in making this determination that an environmental preview report is required.

[179] Sections 24(1) and (2) state:

> (1) Where the minister determines that there is insufficient detail to determine the significance of the environmental effects of an undertaking, he or she shall require an environmental preview report for that undertaking.
>
> (2) In making a determination under subsection (1), the minister may consider
>
> (a) the sufficiency of detail with respect to the undertaking to determine interactions of the undertaking with the environment and the environmental effects of the undertaking;
>
> (b) whether or not the proponent has adequately demonstrated to the minister and to the public the ability to conduct the undertaking in an environmentally sound manner; and
>
> (c) unknown or experimental technology intended to be used with respect to the undertaking.

(Emphasis added.)

[180] In this case, the Watton report highlighted numerous instances where there were significant gaps in the science and where there was unknown technology intended to be used. The report stated on many occasions that further research was required or would be recommended in relation to key areas where negative effects might directly result from the project.

[181] For example, the Watton report references a report prepared by the Canadian Science Advisory Secretariat (CSAS). According to Watton, "CSAS coordinates the production of peer-reviewed science advice"…and became involved in this matter "due to the complexity of the project and the public comments…" (page 5).

[182] CSAS produced a report outlining various concerns with the project. The Watton report notes, at page 22, that "the CSAS report (attached) notes many uncertainties, knowledge gaps and makes recommendations for further study."

[183] The Watton report listed some of these uncertainties and unknowns, as highlighted by CSAS. These related to various components of the project, including unknowns arising from the specific type of European strain non-native salmon to be introduced into local waters, the proposed cage technology, the status of the wild salmon, and the impact of escaped farmed salmon on the wild salmon population. Some of the CSAS recommendations called for action or future study before commercial salmon farming operations commenced.

[184] The Watton report stated at pages 22-23:

> The CSAS report highlights many uncertainties, knowledge gaps and recommendations:
>
> 1. **Although all-female triploids are preferred, it is uncertain whether the applicant plans to use all-female or mixed-sex triploid eggs.**
>
> 2. Specific to this proposal, confidence in effective triploidy rates close to 100% will require consultation with the egg-supplying facility and **further analysis to determine appropriate sample size** and statistical power required to ensure acceptable triploid induction levels. Additionally, triploidy rates **should be reassessed prior to fish being transferred to sea cages.**
>
> 3. **Performance of the new proposed cage systems in southern Newfoundland is unknown,** and though it is expected to perform as well if not better than existing systems, **no data exists on its performance**.

4. **Status of wild populations in Placentia Bay is uncertain** as there is only one assessment facility and existing baseline data are limited. Risk is elevated for small depressed populations.

5. Given reduced tolerance to sublethal stressors in triploids and the European-origin of the farmed strain, **the effect of any differences in endemic pathogen susceptibility is unknown**.

6. **The relative performance of European-origin strains** versus the existing available North American-origin strains (i.e., Saint John, Gaspé and Penobscot) in aquaculture in the NL environment **is unknown and should be evaluated** in view of the likely cold environment fish would experience.

7. **There is uncertainty around fitness differences between farm, wild and farm-wild hybrids in the wild;** the extent of the competitive interactions between farm and wild fish in the wild; their effect on the survival of wild fish; and, the impact of local population demographics on interaction outcomes.

8. **The cumulative effects of chronic, low-level escapes are unknown** and difficult to assess because low-level escapes are difficult to identify and monitor at individual sites, but modelling studies have shown that low-level escapes can be more problematic than single, large-scale losses.

9. **There is uncertainty regarding the fate of escaped farm-origin fish in the marine and freshwater environments**, including post-escape dispersal patterns, survival, feeding, and their movements into wild salmon rivers, timing of maturation and maturation success. **It is recommended that the Proponent ensure baseline studies to characterize the genetic structure of existing salmon populations in Placentia Bay are carried out prior to commercial production.**

10. **Potential reproductive success** of wild salmon and diploid European-origin farm escapes (i.e. "failed" triploids) and the strength of selection against hybrids **is unknown**. This will determine the demographic cost to hybridization and the time for farm-origin alleles to be purged from wild populations.

(Emphasis added.)

[185] The Watton report further noted, at page 15, that "in this case the registration document did not provide sufficient information (risk, baseline ecosystem and ecological, contingency–diploid salmon, oceanographic, climatological, etc.) to assist in predicting environmental effects prior to a minister's decision".

[186] Despite the extensive evidence of many "uncertainties, knowledge gaps and recommendations for further study" relating to this project, the Minister did not conclude that there was "insufficient detail to determine the significance of the environmental effects of an undertaking", and did not require an environmental preview report under section 24(1).

[187] In light of the record, and the information available to the Minister, there is a real question as to whether the Minister's failure to require an environmental preview statement, as mandated by section 24, was reasonable in this circumstance.

[188] This issue was not significantly addressed on appeal.

[189] However, in light of the conclusion, below, that an environmental impact statement was required under section 25, it is not necessary for the disposition of this appeal to make any further determination with respect to the requirement for an environmental preview report under section 24.

Section 25 of the *Regulations* –The Minister "shall require an environmental impact statement"

[190] The language of section 25(1) of the *Regulations* is also mandatory.

[191] It directs that the Minister shall require an environmental impact statement in either of two, distinct circumstances.

[192] These circumstances are as follows:

1. Where the Minister determines with respect to an undertaking that there may be significant negative environmental effects; or

2. Where the Minister determines with respect to an undertaking that there is significant public concern.

[193] Section 25(1) states:

> Where, the minister determines with respect to an undertaking that there
>
> (a) may be significant negative environmental effects; or
>
> (b) is significant public concern,
>
> the minister shall require an environmental impact statement.

(Emphasis added.)

[194] Section 25(2) lists seven factors the Minister may consider in making a determination that an environmental impact statement is required on the first basis, in section 25(1)(a); that is, because there may be significant negative environmental effects.

[195] Section 25(2) states:

> In making a determination under paragraph (1)(a), the minister may consider
>
> (a) whether or not the environmental baseline information provided with respect to the undertaking is sufficient for predicting environmental effects;
>
> (b) whether or not original field data collection is required;
>
> (c) whether or not the undertaking would be located in an environmentally sensitive area;
>
> (d) whether or not hazardous or toxic substances in combination with unknown or experimental technology are intended to be used with respect to the undertaking;
>
> (e) whether or not the undertaking emissions, discharges or effluent may exceed limits imposed by law;
>
> (f) the environmental effects of the undertaking upon rare or endangered species; and
>
> (g) the economic importance of a resource to which the undertaking relates.

[196] Section 25(3) lists two factors the Minister may consider in making a determination that an environmental impact statement is required on the second basis, in section 25(1)(b); that is, because there is significant public concern.

[197] These two factors deal, generally, with whether or not there is public acceptability of the undertaking and whether established government policy addresses the public concerns.

[198] Section 25(3) states:

> In making a determination under paragraph (1)(b), the minister may consider whether or not
>
> (a) public acceptability of the undertaking is seriously questioned; and

(b) government policy has been established to address public concerns.

[199] A number of points arise from the language in section 25.

[200] First, section 25(1) clearly distinguishes between these two, distinct circumstances in which an environmental impact statement is required; that is, where the Minister determines there may be significant negative environmental effects as opposed to where the Minister determines there is significant public concern.

[201] These are separate matters. One speaks to environmental effects, and the other to public concern. They address different issues. Public concern is not subsumed under environmental effects, and nor is the reverse true.

[202] Section 25(1) differentiates between these two in subsections (a) and (b), respectively. It does not conflate them.

[203] The language mandates that the Minister shall require an environmental impact statement if the Minister determines that the criteria in either section 25(1)(a) or (b) is met.

[204] Second, the language in sections 25(2) and 25(3) further supports this statutory distinction between significant negative environmental effects and significant public concern.

[205] Section 25(2) provides certain factors that the Minister may consider in making a determination on the issue of whether there may be significant negative environmental effects.

[206] Section 25(3) sets out different factors that the Minister may consider in making a determination on the issue of whether there is significant public concern. For example, the Minister may consider whether public acceptability of the undertaking is seriously questioned or whether government policy has been established to address the public concerns.

[207] The importance of the distinction in the language of sections 25(1)(a) and (b) will be considered further, below.

Section 23 of the *Regulations*– "Where the Minister releases an undertaking"

[208] The language of section 23, which involves the Minister releasing an undertaking, is not mandatory.

[209] Rather, it lists the criteria the Minister may consider when the Minister releases an undertaking in one of two specific circumstances, namely, because:

1. there are no environmental or public concerns; or

2. the environmental effects of the undertaking will be mitigated under an *Act* of the province or of Canada.

[210] Section 23 states:

> (1) Where the minister releases an undertaking because
>
> (a) there are no environmental or public concerns; or
>
> (b) the environmental effects of the undertaking will be mitigated under an Act of the province or of Canada,
>
> he or she, in making a determination under paragraph (a) or (b), may consider
>
> (c) the comprehensiveness of the description of the undertaking;
>
> (d) whether or not there is a demonstrated commitment by the proponent to conduct an environmentally sound undertaking;
>
> (e) the compatibility of the undertaking with other resource use in the area of the undertaking;
>
> (f) whether or not the undertaking occurs in an environmentally or other sensitive area;
>
> (g) the defined boundaries of the undertaking and whether or not the undertaking is contained within that area; and
>
> (h) the technology to be employed for the undertaking and whether or not it is environmentally benign.
>
> (2) In making a determination under paragraph (1)(b), the minister may consider
>
> (a) issues of concern relating to the environmental effects of the undertaking;
>
> (b) whether or not licences, certificates, permits, approvals or other documents of authorization required at law will mitigate the environmental effects referred to in paragraph (a);
>
> (c) whether or not sufficient detail of the undertaking has been provided to determine the level of the known environmental effects of the undertaking;

(d) whether or not the means of determining further information have been identified; and

(e) the environmental effect of the technology to be used and mitigating factors of the technology.

[211] The Minister's decision, then, to release a project or require further environmental assessment, must be made in accordance with section 51 of the *Act* and sections 23, 24, and 25 of the *Regulations*.

[212] Section 51 provides options to the Minister, while the *Regulations* constrain the Minister's options and mandate specific actions (an environmental preview report in section 24 or an environmental impact statement in section 25) in certain circumstances.

Did the Minister determine that there was significant public concern with respect to this project?

[213] The Minister's option to release a project is restrained by the *Regulations* where there is significant public concern.

[214] It is important to consider whether the Minister determined that there was significant public concern regarding this project. If so, section 25(1)(b) of the *Regulations* indicates the Minister shall require an environmental impact statement.

[215] Section 25(1) states: Where the Minister determines with respect to an undertaking that there … (b) is significant public concern, the Minister shall require an environmental impact statement.

[216] A review of the record confirms that the Minister did, in fact, determine that there was significant public concern regarding the project.

[217] As noted above, the Minister's original decision to release the project from further environmental assessment was appealed by the Federation (pursuant to section 107 of the *Act*). The Minister dismissed the appeal.

[218] In his correspondence to the Federation, dismissing the Federation's appeal, the Minister confirmed the significant scope, content and extent of public concern relating to the project.

[219] For example on page 2 of his correspondence to the Federation, the Minister noted the following relating to public concern:

> The complete project was registered on February 19, 2016 including the construction and operation of a land-based Recirculation Aquaculture System (RAS) Hatchery for Atlantic Salmon in the Marystown Marine Industrial Park and 11 marine-based farms in Placentia Bay. The deadline for public comments was March 26, 2016; and the minister's decision was due by April 5, 2016.
>
> Given high public interest and requests for additional time to comment, the department and the proponent agreed to extend the deadline for public comments to April 16, 2016; and the minister's decision to April 26, 2016. …
>
> More than 200 submissions were received from the public (which included submissions from a number of groups and associations) …

[220] Further, on pages 3-4 of his correspondence, the Minister provided further particulars of the public concern, writing:

> Public concern was considered in the assessment process and that concern was clearly acknowledged.
>
> The main concerns identified during the assessment of the undertaking focused around:
>
> • Status of the wild salmon population in Placentia Bay and the South Coast,
>
> • Escapes and their direct and [in]direct impacts to wild salmon,
>
> • Disease and disease transfer,
>
> • Parasites and parasite transfer,
>
> • Waste products (feed, fecal matter, drifting pesticides (e.g. Salmosan)
>
> • Site Locations, and
>
> • Contingency Plan if the project does not work.
>
> The department carefully considered the concerns and evidence presented during the review process regarding these matters. The Department is certainly aware that wild salmon on the south coast of the Province have been determined to be threatened. The health of our wild salmon was an important consideration throughout our review. …
>
> … the greatest concerns expressed by the public related to the potential for escapes and the impact those escapes may have on the wild salmon population.
>
> (Emphasis added.)

[221] The Minister's decision would also have been informed, at least to some extent, by information received from his government officials.

[222] For example, and as discussed above, the Watton Report was prepared for the Minister to advise and inform the Minister before a decision was made. Notably, at page 13 of the report, under the heading of public concern, it states:

> The review resulted in <u>significant public comment opposing the project</u> in the marine environment or calling for full assessment … or consultation. This included comments to the EA [Environmental Assessment] Division and public discussions in the media …The commentary originated from the general public, but also lawyers, researchers, and industry practitioners in other aquaculture industry…
>
> (Emphasis added.)

[223] In this regard, the report noted that "there were more than 200 negative public responses ranging from a few words to more lengthy responses with calls for rejection, a full EIS [environmental impact statement] or further consultation" received from the public relating to the project. It also noted that there "were 10 emails and letters of support for the project" (page 3).

[224] The report, at page 3, indicates that "various individuals and organizations were among these respondents", and it lists some of the respondents. They included the: Atlantic Salmon Federation (Canada), Environment Resources Management Association, Fish Food and Allied Workers-Unifor, Freshwater-Alexander Bays Ecosystem Corporation, Nature Newfoundland and Labrador, Newfoundland and Labrador Outfitters Association, Newfoundland and Labrador Wildlife Federation, Qulipu Mi'kmaq First Nation Band, Salmonid Association of Eastern Newfoundland, Salmonid Council of Newfoundland and Labrador, among others.

[225] Further, and as discussed above, the Watton report listed the main areas of public concern, which included the precarious status of the wild salmon population in Placentia Bay, the risk of escapes of farmed salmon and the resulting impact on wild salmon, disease and disease transfer, parasites and parasite transfer, the physical locations chosen for the marine-based salmon farms, the lack of a contingency plan if the project does not work, and why land-based closed containment of the farmed salmon was not discussed or made mandatory.

[226] Many of the public concerns included in the Minister's correspondence to the Federation were taken directly, and *verbatim*, from the public concerns recorded in the Watton report.

[227] The Minister's decision to release was also informed by a two page memorandum to the Minister, dated July 22, 2016, from the Assistant Deputy Minister, Mr. Martin Goebel. This memorandum was also signed by the Deputy Minister, Ms. Collen Janes.

[228] With respect to public concern, the memorandum states:

> It must be acknowledged that extensive public concerns have been raised over this project. The core aspect of these concerns is what could happen to the native salmon stocks. There are potentially several serious consequences, such as escapes resulting in displacement of native salmon strains, introduction of diseases, and spin-off effects on local recreational fisheries and tourism. In that sense, the exhaustive registration review process for this project has already fulfilled its obligations of advising the Minister on the potential environmental effects prior to allowing the project to proceed.
>
> (Emphasis added.)

[229] The memorandum confirms the extent and content of the public concern regarding the project, of which, again, the Minister would have been aware before making his decision to release the project.

[230] Incidentally, the last sentence in the excerpt from the memorandum, above, appears to overlook section 25(1)(b) of the *Regulations*, which requires an environmental impact statement where there is significant public concern. It is not sufficient to say, as the memorandum suggests, that the registration review process "fulfilled its purpose of advising the Minister" of issues or concerns etc. before allowing the project to proceed. Rather, the essential point is that the Minister is required by the *Regulations* to take certain actions (i.e. order an environmental preview report, order an environmental impact statement etc.) once the Minister, having been advised by departmental officials, determines that significant issues or concerns (in this case, significant public concern) exist. Simply advising the Minister of the concerns, in and of itself, does not displace the legislative requirements.

[231] The record generally, and the Minister's correspondence specifically (by which he dismisses the Federation's appeal under section 107 of the *Act* and upholds his original decision to release the project), confirms that there was

significant public concern respecting the project and, moreover, that the Minister determined that there was significant public concern.

[232] As a result, the starting point in terms of statutory interpretation is the mandatory language of section 25(1)(b) of the *Regulations*, which directs that an environmental impact statement is therefore required. Section 25(1)(b) presumptively obliges the Minister to require an environmental impact statement in these circumstances.

[233] In concluding that there was significant public concern, and that the Minister determined that there was significant public concern, I agree with the applications judge (see paragraphs 200, 203, 208, 209 and 211 of the applications judge's decision) and also with my colleague on this point (see paragraph 26, above).

[234] As an aside, it is also clear from the record, and from the Minister's correspondence dismissing the appeal, that there "may be significant negative environmental effects arising from the project", and that the Minister has, in fact, determined that there may be significant negative environmental effects in this regard.

[235] Again, this would also presumptively indicate the requirement for an environmental impact statement, this time under section 25(1)(a), which states: "Where the minister determines with respect to an undertaking that there … (a) may be significant negative environmental effects, the minister shall require an environmental impact statement."

[236] However, in light of the discussion and conclusion below, with respect to the requirement for an environmental impact statement on the basis of significant public concern, it is unnecessary at this time to further discuss significant negative environmental effects as an additional basis for requiring an environmental impact statement in this case.

In light of the Minister's determination that there was significant public concern with respect to the project, could the Minister release the project from the further application of the environmental assessment requirements in the *Act*?

[237] The Minister's decision, to release the project from the further application of the environmental assessment requirements in the *Act*, was made with reference to section 23(1) of the *Regulations*.

[238] As discussed above, sections 23(1)(a) and (b) state:

> (1) Where the minister releases an undertaking because
>
> (a) there are no environmental or public concerns; or
>
> (b) the environmental effects of the undertaking will be mitigated under an Act of the province or of Canada ,
>
> he or she, in making a determination under paragraph (a) or (b), may consider …

[239] The Minister could not release the project under section 23(1)(a), as this section permits release only where there are no environmental or public concerns.

[240] Section 23(1)(a) is inapplicable in this situation, where the Minister has determined (in the language of section 25) that there is "significant public concern" and there "may be significant negative environmental effects".

[241] Instead, the Minister released the project pursuant to section 23(1)(b), that is, because "the environmental effects of the undertaking will be mitigated under an Act of the province or of Canada."

[242] The question is whether the Minister was authorized to release the project under section 23(1)(b) in this case, where the Minister had determined that there was a significant public concern relating to the project.

[243] Presumptively, in this circumstance, the Minister shall require an environmental impact statement under section 25, and is constrained from directly releasing the project from further environmental assessment requirements.

[244] For the reasons which follow I would conclude that, in this case, where the Minister determined that there is significant public concern regarding the project, section 25(1)(b) compels the Minister to require an environmental impact statement.

[245] Therefore, in this circumstance, the Minister could not release the project under section 23(1)(b).

[246] The interpretations of sections 23 and 25, by which this conclusion is reached, are considered next.

Interpreting the language of sections 23 and section 25 – Were two reasonable interpretations available to the Minister?

[247] The Minister's main argument on appeal is that the language of the *Regulations* was open to two reasonable interpretations.

[248] One of these purported reasonable interpretations would result in the Minister requiring an environmental impact statement, as mandated by section 25(1).

[249] The other purported reasonable interpretation would permit the Minister to release the project from further environmental assessment requirements under the *Act*, on the basis that the environmental effects of the project will be mitigated under an *Act* of the province or of Canada, pursuant to section 23(1)(b).

[250] I agree with the applications judge and my colleague on appeal (see paragraphs 28 and 30 above) that the first interpretation (that is, that an environmental impact statement is required in these circumstances) is a reasonable interpretation of the legislation.

[251] The question is whether this is the only reasonable interpretation in light of the facts and the law in this case.

[252] In order to determine whether the second purported interpretation (that the project can be released without further environmental assessment) is also a reasonable interpretation, requires a closer review of the language of sections 23 and 25, a consideration of how sections 23 and 25 are meant to operate together in the legislative context, and also a consideration of the purpose and intent of the legislation.

Interpreting the language in the *Regulations* in the "ordinary and grammatical sense": The mandatory "rules" in section 25 and the "exceptions" in section 23

[253] Section 25 establishes presumptive, mandatory rules which direct the Minister to require an environmental impact statement in certain circumstances.

Section 23 outlines the exceptions, when the Minister is not required to follow these rules, and may release a project without ordering that an environmental impact statement be prepared.

[254] In this framework, the "rules" in section 25(1) mandate an environmental impact statement before a project is released, in either of two separate circumstances, namely, where the Minister determines:

> (a) there may be significant negative environmental effects; or
>
> (b) there is significant public concern.

[255] The "exceptions" to these rules are found in section 23(1), and allow a project to be released in either of two separate circumstances, namely because:

> (a) there are no environmental or public concerns; or
>
> (b) the environmental effects of the undertaking will be mitigated under an *Act* of the province or of Canada

[256] Section 23(1)(a), then, provides for the first "exception" to the rule requiring an environmental impact statement.

[257] It allows the Minister to greenlight and release an undertaking because there are no environmental or public concerns. Clearly, and as discussed above, this section does not apply to the project, as there are environmental and public concerns.

[258] Section 23(1)(b) provides for the second "exception".

[259] It states that an undertaking may be released because the environmental effects will be mitigated. Presumably this reference to environmental effects relates to the mandatory rule, in section 25(1)(a), that requires an environmental impact statement (and precludes the release of an undertaking) where there may be significant negative environmental effects.

[260] The language chosen by the legislature is important here.

[261] Both the mandatory rule in section 25(1)(a), and the exception to this rule, in section 23(1)(b), refer specifically to environmental effects.

[262] The mandatory language of section 25(1)(a) means that an undertaking cannot be directly released (without an environmental impact statement) where

there may be significant negative environmental effects, whereas the language of section 23(1)(b) provides for release where the environmental effects will be mitigated.

[263] The language used in section 23(1)(b), which allows for release without further environmental assessment, focuses exclusively on the environmental effects.

[264] It does not, however, address public concern.

[265] That is, section 23 does not provide an exception to allow for the release of an undertaking in the other circumstance when an environmental impact statement is required by the legislation; namely, where there is significant public concern under section 25(1)(b).

[266] As discussed above, public concern and environmental effects are separate and distinct bases, in section 25, on which the Minister shall require an environmental impact statement.

[267] Either significant public concern or significant negative environmental effects will trigger this requirement.

[268] There is nothing in the language of section 23(1)(b) to permit an interpretation that displaces the requirement for an environmental impact statement in circumstances where the Minister has determined that there is significant public concern.

[269] To allow a release under section 23(1)(b) would ignore the clear language of section 25(1)(b), which states that a determination that there is significant public concern mandates the Minister to require an environmental impact statement before making a decision on release.

[270] Public concern and environmental effects are separate issues, and are treated distinctly in the *Regulations*. To conflate them, unilaterally, would do violence to the legislative language.

[271] The Minister purported to release the project under section 23(1)(b). However, this section cannot be used to release the project without an environmental impact statement where, as here, the Minister has determined there are significant public concerns.

[272] The language of section 23(1)(b), interpreted in its "grammatical and ordinary sense", does not support the Minister's interpretation in this regard.

Is it appropriate to "read in" words to the *Regulations* in order to make the Minister's interpretation reasonable?

[273] At the appeal hearing it was suggested that, in order to conclude that there is more than one reasonable interpretation (and thereby allow the Minister to release the project under section 23(1)(b) despite significant public concern under section 25), one would be required to read in the words "notwithstanding section 25" into section 23(1)(b).

[274] On this basis the "new" section 23 (with the words proposed to be "read in" highlighted in bold, capitalized and underlined), would read as follows:

> (1) Where the minister releases an undertaking because
>
> (a) there are no environmental or public concerns; or
>
> (b) **NOTWITHSTANDING SECTION 25(1),** the environmental effects of the undertaking will be mitigated under an Act of the province or of Canada,
>
> he or she, in making a determination under paragraph (a) or (b), may consider …

[275] The Federation's submission on this point is that reading in words, in this context, would be wholly inappropriate and would go well beyond interpreting the language of the *Regulations* and, in fact, would amount to a recrafting or rewriting of the *Regulations*.

[276] I agree.

[277] It should not be necessary to read in words into the language of section 23 in order to make the Minister's interpretation of that section become a reasonable interpretation.

[278] Reading in is being used here to create another possible interpretation that otherwise would not exist.

[279] To require language to be "read in" suggests that the language of section 23, as written, does not reasonably support the Minister's interpretation. Further, any decision made by the Minister contingent on the need to read in the words "notwithstanding section 25" into section 23 would constitute an unreasonable decision.

[280] My conclusion on the interpretation of section 23 in this regard differs from that of my colleague, who, at paragraph 29 above, suggests that section 23 could "be read as intending to operate 'notwithstanding' section 25". My colleague states on this point:

> An alternative interpretation of section 23 is that the option to release an undertaking would be available if either paragraph (a) or (b) of that section applied without regard to the reason for requiring an environmental impact statement. That is, under this interpretation, section 23 would be read as intending to operate "notwithstanding" section 25. …

[281] With respect, I would take a different view.

[282] The object of statutory interpretation is to give meaning to legislative language, as written, using the ordinary rules of interpretation. Reading in words, when they are not required in order to give meaning to a legislative provision, (and indeed, where, if included, they would substantially amend the meaning of the provision) would exceed the ordinary rules of interpretation and amount to an "extraordinary", and unreasonable, interpretation.

[283] It would be inappropriate to read words into the language of section 23 in this context in order to permit a conclusion that the Minister's statutory interpretation was reasonable.

[284] To uphold the Minister's decision as reasonable, by "reading in" words, suggests the decision, in the absence of the additional words, would otherwise be unreasonable.

[285] Reading in words, in this context, would do violence to the language of section 23, and also section 25, chosen by the legislature, and as written.

[286] Similarly, another suggested approach raised on appeal was that, in order to conclude that there is more than one reasonable interpretation here, one might alternatively read words into section 25.

[287] On this basis the "new" section 25 (with the words proposed to be "read in" highlighted in bold, capitalized and underlined), would read as follows:

> (1) Where, the minister determines with respect to an undertaking that there
>
> (a) may be significant negative environmental effects; or
>
> (b) is significant public concern,

> **THAT WILL NOT BE MITIGATED UNDER AN ACT OF THE PROVINCE OR OF CANADA,**
>
> the minister shall require an environmental impact statement.

[288] For the reasons provided above, reading in this language to section 25 in the present context would be equally repugnant to the exercise of proper statutory interpretation.

[289] "Reading in" is usually only used when required to allow two patently inconsistent statutory provisions to operate harmoniously or to prevent an absurdity in interpretation. That is not the situation here.

[290] In *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300 the Supreme Court of Canada "cautioned against judicial rewriting of legislation under the guise of interpreting it", in the context of reading in words to legislation "which are simply not there". The Supreme Court of Canada stated at paragraph 27 in *Wilson*:

> Mr. Wilson submits that the officer's belief must be based not only on the ASD result, but also on confirmatory evidence showing that the driver's ability to drive is affected by alcohol. I would reject this interpretation. It is not supported by the text of the provision, and it requires the court to read in words that are simply not there. This Court has cautioned against judicial rewriting of legislation under the guise of interpreting it:
>
> > . . . the contextual approach allows the courts to depart from the common grammatical meaning of words where this is required by a particular context, but it does not generally mandate the courts to read words into a statutory provision. It is only when words are "reasonably capable of bearing" a particular meaning that they may be interpreted contextually. . . .
> >
> > ...
>
> The Crown is asking this Court to read words into s. 34(2) which are simply not there. In my view, to do so would be tantamount to amending s. 34(2), which is a legislative and not a judicial function. [First emphasis in original; second emphasis added.]
>
> (*R. v. McIntosh*, [1995] 1 S.C.R. 686, at p. 701; cited with approval in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 174. See also *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at paras. 8-9 and 36; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 40.)

[291] The Supreme Court of Canada concluded in *Wilson* that reading in words can effectively equate to amending legislation, which is not the function of the judiciary. This statement is wholly applicable to the present case.

[292] Should the legislature decide to amend the *Regulations* in this respect, to indicate that the Minister may release an undertaking notwithstanding the clear and mandatory language of section 25, it of course has the authority to do so.

[293] However, at present, section 25 obliges the Minister to require an environmental impact statement where there is significant public concern arising from the undertaking.

[294] Absent an amendment, the present obligation to interpret the language, as written, is not displaced.

There is only one reasonable interpretation available to the Minister in this legislative context

[295] The conclusion here, then, is that the ordinary language of sections 23 and 25, as written, does not support the purported "second" interpretation (that the project can be released without an environmental impact statement). Such an interpretation is not reasonable in the context of the present language.

[296] That leaves only one reasonable interpretation.

[297] As the Supreme Court of Canada stated in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 in some cases only one interpretation is reasonable. In those cases, a decision maker is compelled to choose that interpretation, or the decision is unreasonable.

[298] The Supreme Court of Canada stated:

> [38] It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it.

[299] On this point, there is also the decision of this Court in *Workplace Health, Safety and Compensation Commission v. Allen*, 2014 NLCA 42, 357 Nfld. & P.E.I.R. 1, leave to appeal to SCC refused, 36265 (July 9, 2015).

[300] In *Workplace Health, Safety and Compensation Commission*, similar to the present case, this Court found that an applications judge was correct in concluding that the legislation in question could not bear the interpretation ascribed to it by an administrative tribunal, stating:

> [5] … For reasons which follow I have concluded the applications judge correctly applied the deferential reasonableness standard of judicial review and correctly considered the appropriate principles of statutory interpretation in deciding that the decisions of the Commission and Review Commission were unreasonable because they adopted an interpretation which the words of the statute in proper context could not properly bear.
>
> …
>
> [37] In the present case the Chief Review Commissioner was interpreting his home statute and had considerable expertise in so doing. If his decision was reasonable, the applications judge had to defer to it even though another reasonable interpretation might have been adopted. But an interpretative decision of a specialized tribunal will not be saved by a deferential approach if the reviewing court correctly concludes the tribunal's interpretation is unreasonable and there is only one reasonable interpretation. …
>
> …
>
> [59] Ultimately, the applications judge concluded that the express wording of subsection 75(1) … in the circumstances permits only a single reasonable interpretation, and the interpretation proposed by the Commission fell outside the range of acceptable outcomes because it was unreasonable (citing *McLean*, at para. 38 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4).

Contextual interpretation of environmental legislation

[301] It is necessary not only to consider the relevant legislative language, in its grammatical and ordinary sense, but also to consider the language in the broader context which informs the text, relating it for example to the legislative scheme, object, and social context of the legislation.

[302] The legislative context in this case involves interpreting environmental legislation. This context is important in informing the statutory interpretation.

[303] The applications judge considered the approach taken by the Supreme Court of Canada, and by this Court, in interpreting environmental legislation. The applications judge stated in this respect:

> [179] The Supreme Court of Canada has recognized that environmental protection has "emerged as a fundamental value in Canadian society". In (*114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)*, 2001 SCC 40, [2001] 2 S.C.R. 241) at paragraph 1 the court stated:
>
> > 1. The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment. In the words of the Superior Court judge: "Twenty years ago there was very little concern over the effect of chemicals such as pesticides on the population. Today, we are more conscious of what type of an environment we wish to live in and what quality of life we wish to expose our children [to]." This Court has recognized that "[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment . . . environmental protection [has] emerged as a fundamental value in Canadian society": *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 55. See also *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 16-17.

[304] Further, the applications judge noted in paragraph 183 that the "*Spray-Tech* decision is often referenced for the court's adoption of the precautionary principle and its application as an element of statutory interpretation. …"

[305] The approach taken by this Court in interpreting environmental legislation was also considered by the applications judge, specifically referencing the decision of this Court in *Labrador Inuit Association v. Newfoundland (Minister of Environment & Labour)* (1997), 155 Nfld. & P.E.I.R. 93 (Nfld. C.A.).

> [181] In *Labrador Inuit*, our Court of Appeal [commented] on the nature of this environmental protection legislation at paragraphs 9 to 12 as follows:
>
> > 9 One of the primary initiatives taken by governments in rationalizing economic activity with environmental imperatives has been the enactment of statutes providing for environmental assessment. These measures have generally been aimed at moving away from correcting environmental problems *ex post facto*, towards preventing them from occurring *ab initio* or, at least, assuring that they are contained at tolerable levels. It is well to point out that this is not only environmentally sound but is economically desirable as well, inasmuch as the costs of rectifying long term effects often eclipse short term burdens. In any event, it appears just plain common sense to require development of resources to await the relatively short time that will be taken to

> allow adverse environment effects to be assessed and mitigated, if not eliminated.
>
> 10 Accordingly, it can be said that the process of environmental assessment is not a frill engrafted on the development process, nor should it be regarded as an administrative hurdle to be gotten over in the march towards economic development. It is, rather, an integral part *of* economic development.
>
> 11 Both the Parliament of Canada and the Newfoundland Legislature have enacted environmental assessment legislation: *Canadian Environmental Assessment Act*, SC 1992, c. 37 (CEAA); *Environmental Assessment Act*, R.S.N. 1990, c. E-14 (NEAA). The regimes created by these statutes represent a public attempt to develop an appropriate response that takes account of the forces which threaten the existence of the environment. If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of the legislation. …

[306] The applications judge also noted that the approach taken by this Court in the *Labrador Inuit* case, has been referenced by the British Columbia Court of Appeal in *Peace Valley Landowner Association v. British Columbia (Minister of Environment)*, 2016 BCCA 377, 87 B.C.L.R. (5th) 44. The applications judge stated:

> [182] The British Columbia Court of Appeal recently committed [*sic*] on the foregoing excerpt from the *Labrador Inuit* decision. In *Peace Valley Landowner Association v. British Columbia (Minister of Environment)*, 2016 BCCA 377, at paragraph 26, it stated:
>
> > 26 The aspirational tone of the quote from *Labrador Inuit Association v. Newfoundland (Minister of Environment & Labour)* (1997), 155 Nfld. & P.E.I.R. 93 (Nfld. C.A.) serves as an important reminder that there is a great deal at stake in environmental law. Environmental legislation is often broadly worded, but there is a real danger that bodies motivated by other agendas (including governments overwhelmed by short-term economic goals) will interpret it narrowly. The courts must not allow environmental legislation to be emasculated through unduly narrow interpretation. That said, Friends of Davie Bay, makes the important point that general rules of statutory interpretation apply to environmental statutes. Provisions are interpreted "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".

[307] Finally, the applications judge properly considered the guiding principles referenced above in interpreting the legislation in question, and used these principles to inform the statutory interpretation analysis, as follows:

> [184] I accept that the *Act*'s focus on environmental protection supports a precautionary approach to its interpretation. Neither the *Act* nor *Regulations* may be interpreted in a manner that allows for the avoidance of precaution or protection of the environment.
>
> …
>
> [186] Consistent with the purpose of Part X, I conclude that the legislature herein approved, similar to other environmental legislation, a range of environmental assessment options depending upon the conclusions reached on the project under scrutiny.
>
> [187] I have concluded that the legislative context gave the Minister some discretion. However, given the wording of sections 23 to 25 of the *Regulations*, if certain conclusions are drawn from the facts, this discretion is constrained so that the purpose of the *Act* can be met and each Project's potential environmental effects are properly considered.

[308] I would agree with the applications judge's approach and conclusions in this regard.

[309] The interpretive principles outlined above are consistent with an approach which supports a liberal interpretation of the *Act*, in order to protect the environment and avoid environmental legislation becoming, to use the language of the British Columbia Court of Appeal in *Peace Valley Landowner Association*, "emasculated through unduly narrow interpretation".

[310] In this case, the contextual interpretive principles outlined above, which are applicable to the interpretation of environmental assessment legislation, support the conclusion that the Minister's decision to release the project in this case, without further environmental assessment, was unreasonable.

Considering public concern in the broader legislative context

[311] As noted above, I would conclude that the Minister was precluded, by section 25 of the *Regulations*, from releasing the project once he determined that there was significant public concern.

[312] As such, it is appropriate to consider "public concern" in the broader context of the legislation, including the legislative "scheme and object".

[313] Section 25 mandates an environmental impact statement where the Minister determines that there is significant public concern. Notably, if an environmental impact statement is mandated by section 25, various sections of

the *Act* and *Regulations* require that there also be significant public input in the assessment process that results.

[314] For example, section 58 of the *Act* requires the proponent of an undertaking to provide an opportunity for interested members of the public to meet with the proponent in order to provide information concerning the undertaking, and to record and respond to the concerns of the local community.

[315] This is only triggered when the Minister determines that an environmental impact statement is required, for example due to significant public concern.

[316] As such, if the public concern about an undertaking is significant in the preliminary, screening stage, the *Act* states that this necessitates greater public involvement and engagement as the undertaking is further assessed.

[317] Further, section 63 of the *Act* states that where the Minister believes there is a strong public interest in an undertaking for which an environmental impact statement is required, the Lieutenant-Governor in Council may, order public hearings and appoint an environmental assessment board for the purpose of conducting public hearings.

[318] Section 64 states that a public hearing ordered under section 63 shall be conducted for the purpose of "examining the contents of the environmental impact statement that has been prepared for an undertaking and exchanging information between the proponent and the public".

[319] The *Act* further provides that the Minister and the proponent shall be represented at a public hearing of the board, and the board shall record comments and questions of persons present regarding the content of the environmental impact statement, and provide, where possible, answers to questions from the persons present.

[320] Further still, pursuant to sections 65 and 66, the chairperson of the board shall submit to the Minister a written report containing the proceedings of the public hearing, and the Minister shall submit copies of this report to the Lieutenant-Governor in Council.

[321] These are examples of the extent of the enhanced level of public involvement provided for in the *Act*. Not surprisingly, once an environmental impact statement is required (for example, due to significant public concern) the amount of direct public engagement in the assessment process substantially increases.

[322] In this respect, public concern is important as a basis to trigger an environmental impact statement, and it must also be addressed through enhanced public participation during the environmental impact statement process.

[323] In this regard, the environmental assessment process is not just about scientists or experts exchanging views on possible negative environmental effects of an undertaking.

[324] The environmental assessment process generally (and the environmental impact statement process specifically) is meant to include a human dynamic, and is concerned with providing the opportunity for the public to learn directly about the undertaking, to question the proponent, and have their concerns addressed in a public forum.

[325] Public concern triggers a statutory right to enhanced public discourse relating to these concerns. Meetings to address public concern can be significant events in the life of a community where a project is proposed, often attracting the media, government officials, and others interested in hearing the public concerns, expressed directly and unfiltered.

[326] The environmental impact statement process, triggered by significant public concern, also provides an opportunity for the public to consider not only whether openness, transparency or even some notion of procedural fairness exists in the assessment process, but also that that these are seen to exist.

[327] The public input and the ability to directly question the project's proponent, before a decision is made regarding release of a project, while not constituting a "hearing", in the adjudicative sense, does provide at least some opportunity to be heard.

[328] The enhanced level of public involvement described above is not required in every undertaking, and likely not in the vast majority of cases where undertakings are registered.

[329] It is only required where an environmental impact statement is mandated by section 25, which includes undertakings where the Minister determines there is significant public concern.

[330] Alternatively government might, in appropriate circumstances, be entitled to bypass completely the enhanced public engagement which attaches to the environmental impact statement process, by invoking section 70 of the *Act*,

thereby exempting a project from all environmental assessment requirements. However, as noted previously, this project was not exempted.

[331] Adopting an interpretation of the language in question which would permit enhanced public participation in the environmental assessment process where public concern is significant, is appropriate in this circumstance.

[332] Enhanced public participation in the assessment process, when public concern has been determined to be significant, is also consistent with the legislative purpose, in section 46 of the *Act*, which is to protect the environment and quality of life of the people of the province and facilitate the wise management of the natural resources of the province "through the institution of environmental assessment procedures…".

[333] In this case, the specific environmental assessment procedure used to facilitate this legislative purpose would be the environmental impact statement.

[334] The proposed alternative interpretation of the *Regulations* (that is, the interpretation which would allow the Minister to release the project despite significant public concern), downgrades the important role public concern plays in this area, and is not consistent with the overall purpose of the legislation, which contemplates an enhanced and meaningful level of public participation in the process where significant public concern has been demonstrated.

The Minister's reasons for releasing the project

[335] The Minister's reasons for releasing the project are found in the Minister's correspondence to the Federation, by which the Minister dismissed the Federation's appeal under section 107 of the *Act*.

[336] Several points are notable about the Minister's reasons.

[337] First, there is no explicit reference to section 51 of the *Act*. The three statutory options available to the Minister under section 51, however, are noted by referring to the Federation's notice of appeal. On page 2 of the reasons, the Minister states:

> The Appellant notes three decision options that are available to the Minister
>
> (a) An environmental preview report is required;
>
> (b) An environmental impact statement is required; or

(c) The undertaking may be released.

[338] Without any meaningful explanation of the analytical process followed to reach his decision, the Minister makes a conclusory statement that "all options were examined… in arriving at the decision taken to release the project with the conditions."

[339] Also, there is nothing in the reasons which would suggest that the Minister was aware of, or understood, the implications of the mandatory language of section 25 of the *Regulations*, which required an environmental impact statement where the Minister determined there is significant public concern.

[340] This is important because, as previously discussed, the record and the Minister's reasons themselves confirm that the Minister had determined that there was significant public concern in respect of this project.

[341] Despite this, there is nothing in the reasons to indicate that the Minister was 'alive to' the fact that his options in section 51 of the *Act* were constrained by the mandatory language of section 25 of the *Regulations*.

[342] There is also no indication that the Minister attempted to interpret his home legislation in a way which might possibly reconcile the requirement for an environmental impact statement in section 25, with his decision to release the project, under section 23, without requiring an environmental impact statement.

[343] The mandatory requirements of section 25 were not factored into the Minister's interpretation, and do not feature in his analysis or reasons. Section 25 was not meaningfully considered, as it should have been, as a legislative constraint on the Minister's ability to release the project.

[344] This lack of any meaningful analysis of section 25 might suggest that the Minister was either not mindful of the requirement contained in the mandatory language of section 25 in this context, or that the requirement was disregarded. In either case, such an interpretation of the language of the legislation cannot, ultimately, be viewed as an appropriate discharge of the Minister's legislative duty.

[345] Again, the Minister's legislative decision-making responsibility is not simply a matter of the Minister's opinion or discretion.

[346] In this case the Minister, as the decision maker and statutory delegate, failed to properly consider a significant statutory provision (section 25) in the home legislation, which required an environmental impact statement before release. Rather, the Minister released the project without a proper consideration or analysis of the mandatory language of section 25.

Was the Minister's decision to release the project reasonable?

[347] I would conclude that the Minister's decision to release the project without requiring an environmental impact statement in this case was precluded by the legislation.

[348] Therefore, in terms of a *Dunsmuir* analysis, the decision was unreasonable.

[349] *Dunsmuir* speaks of a possible choice of reasonable options supported by the legislation. However, in some instances, there may be only one reasonable interpretation of the legislation. Again, see *McLean* and *Workplace Health, Safety and Compensation Commission.*

[350] In this case, to conclude there was an alternative, reasonable interpretation of the legislation would require an incredulous straining of the ordinary meaning of the language used by the legislature or an interpretation whereby words would need to be "read into" the *Regulations* in order the make the Minister's interpretation reasonable.

[351] The decision of the Minister, to choose an interpretation which the legislative language could not bear, was unreasonable.

CONCLUSION

[352] In light of the above, I would conclude that section 25(1)(b) precluded the release of the project without an environmental impact statement in this circumstance, given that the Minister determined that there was significant public concern.

[353] Therefore, the project could not be released under section 23(1)(b).

[354] As noted above, in the particular circumstances of this case, the Minister actually required an environmental impact statement before this appeal was heard.

[355] The Court's determination in this regard, then, confirms that an environmental impact statement was required by the Minister.

[356] The Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, dealing with the proposed expansion of the Trans Mountain pipeline system, recently held that a decision maker may be constrained or precluded, in the exercise of a statutory power, by the language of the legislation. The Court stated on this point at paragraph 217:

> Thus, when a court reviews a decision made in the exercise of a statutory power, reasonableness review requires the decision to have been made in accordance with the terms of the statute: see, for example, *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194, [2011] 3 F.C.R. 344, at paragraphs 29-30. Put another way, an administrative decision-maker is constrained in the outcomes it may reach by the statutory wording (*Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paragraph 21).

[357] As the Minister purported to release the project under section 23(1)(b), and this was not an option available to the Minister under the legislation in this circumstance, the decision to release is unreasonable.

[358] The conclusion above is premised on the fact that the Minister, in this circumstance, actually determined that there was significant public concern.

[359] In other circumstances it is possible that there may not be a ministerial determination that there is significant public concern about an undertaking. However, in circumstances where the record demonstrates that there is significant public concern, the Minister cannot arbitrarily avoid the requirement of an environmental impact statement, under section 25, by simply concluding that there is not significant public concern.

[360] Any such determination by the Minister regarding the existence of significant public concern (or, also, regarding the existence of significant negative environmental effects), under section 25, would need to be made in good faith, based on the record and a proper interpretation of the legislative language, in context. Notably, in respect of other recent undertakings, the Minister has required an environmental impact statement specifically because of the existence of significant public concern.

[361] In light of the conclusion above, is not necessary for the disposition of this appeal to make a determination as to whether the mandatory language of section 25(1)(a), (which states that the Minister shall require an environmental impact statement where the Minister determines that there may be significant negative

environmental effects), also precludes the Minister from releasing the project under section 23(1)(b) in this case.

[362] Having said that, and without making any determination on the issue, should a Minister release a future undertaking using section 23(1)(b), (on the basis that the environmental effects of the undertaking will be mitigated under provincial or federal law), in a circumstance where the Minister has determined that an undertaking may have significant negative environmental effects (per section 25(1)(a)), it would be necessary, if the decision were challenged, to explain why the legislation includes the word "significant" in section 25 but not in section 23, and why the mandatory language used in section 25(1)(a) would not preclude such a release without an environmental impact statement.

[363] In this respect, the applications judge's observations regarding the use of the word 'significant' in section 25 of the *Regulations* and the presumption against tautology, would need to be carefully considered in that context. (See for example paragraphs 188 and 192 of the applications judge's reasons in this regard.)

[364] Finally, in light of the conclusion that an environmental impact statement is required in this case because of significant public concern under section 25(1)(b), it is also unnecessary, for the disposition of this appeal, to further consider the issues raised by my colleague respecting the Minister's approach to the mitigation of environmental effects under section 23(1)(b).

Disposition

[365] In the result, I would dismiss the appeal and award costs to the Federation under Column 3 of the Scale of Costs in the *Court of Appeal Rules*.

_____
F. P. O'Brien J.A.

I concur with the reasons of O'Brien J.A.: _____
M. F. Harrington J.A.