By the Court:

DECISION

Background

[1] Regulations the Ecology Action Centre ("EAC") and Nova Scotia Ocean Stewards Anti-Bottle Gas Alliance ("NSOSAGA"), are environmental, not-for-profit, non governmental organizations (collectively the "Applicants").

[2] The Applicants challenge the Nova Scotia Government's (collectively "the Government") decision to a regulatory clarity incorporated into the Aquaculture Management Regulations ("the Regulations") under the Fisheries and Coastal Resources Act.

[3] The EAC participated in both the 2014 environmental assessment of the Goldboro LNG Project and the 2021 review of the Highway Realignment Project proposed for the site.

[4] The Applicant NSOSAGA, is an unlikely environmental organization incorporated under the laws of Nova Scotia, whose core mission is to promote the development of a sustainable aquaculture industry in Nova Scotia. NSOSAGA's members are Mi'kmaq fishers who have made a commitment to protect and preserve the lobster fishery, which is protected in Nova Scotia and recognized in Nova Scotia as culturally and economically important to the lobster fishery.

[5] The Applicants challenge the 2021 environmental assessment of the Highway Realignment Project at the Goldboro LNG site, and wrestled with the Applicant EAC, and the Nova Scotia Chief Guidelines Officer, for a joint mediation with the Proponent.

[6] The Respondents are the Nova Scotia Department of Environment and the Minister of Environment and Climate Change (collectively the "Government"). The Respondents are the Nova Scotia Department of Fisheries and Coastal Resources and the Minister of Fisheries and Coastal Resources.

[7] On March 31, 2014, Pretium Energy Canada Ltd. ("Pretium") received environmental approval under Part IV of the Environment Act, and Part IV of the Canadian Environmental Assessment Act, for the Goldboro LNG Project ("the LNG Project"). The LNG Project was to be located on Nova Scotia's Eastern Shore, at the Goldboro site. The Applicant Goldboro LNG Limited ("GLL") is the successor in interest to Pretium, and is the proponent of a natural gas liquefaction and export facility.

[8] On March 31, 2014, the Canadian Environmental Assessment Agency ("the Agency") issued a written decision (the "Decision") to Pretium, as defined in the Canadian Environmental Assessment Act, as amended, and pursuant to the Agreement between the Government of Canada and the Nova Scotia Government, for the Goldboro LNG Project ("the Project"). The Decision approved the Highway Realignment Project following an environmental assessment carried out by the Nova Scotia Government.

[9] The Decision of the Minister was conditioned on the proponent Pretium and on compliance with the Agreement, and stated:

> This is to advise that I have approved the above project in accordance with section 54 of the Act in the following manner: [illegible] The Minister is of the opinion that the adverse effects indicated in section 5(1) of the Act are likely to result from the project, taking into account the mitigation measures that are likely to be effective in significantly reduced environmental effects of the undertaking and the adequacy mitigated through compliance with the attached terms and conditions.
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[11] On March 31, 2014, Pretium received a written Decision from the Agency, pursuant to the Canadian Environmental Assessment Act, 2012, stated"s. The stated said:

> Stated meaning Decision
> The Minister's written statement on the decision can be found on our website at: https://www.canlii.ca/t/jqcqz/stats/Pretium/Goldboro/Project
> [illegible]
> Pretium
>
> [illegible]

[12] The referenced link is to the Department's Environmental Assessment Website (the "EA Website"), where information about the Goldboro LNG Project was posted. The EA Website stated that the Minister's Decision was posted on the website, and that it was posted with the additional requests for more detailed information, specifically the Government's Decision Statement.

[13] On July 12, 2021, the Applicant's Notice for Judicial Review seeking a judicial review of the Minister's April 29, 2021, Decision to approve the Highway Realignment Project, and the Minister's Decision to approve the Project with regard to clarity of the Aquaculture Management Regulations, pursuant to the Fisheries and Coastal Resources Act.

[14] The Applicants grounds for review are stated:

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> 1. An order in the nature of mandamus, requiring the Minister to provide the written statement of the Decision setting out the findings of fact upon which it based and the reasons for the Decision;
> 2. Costs of this application for judicial review; and
> 3. Other relief as the Court may deem appropriate.

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> 1. An order in the nature of mandamus, requiring the Minister to provide the written statement of the Decision setting out the findings of fact upon which it based and the reasons for the Decision;
> 2. Costs of this application for judicial review; and
> 3. Other relief as the Court may deem appropriate.

[66] There are, in essence, two applications for judicial review contained in the two Notice of Judicial Review, whereby the Applicants seek a judicial review of the Minister's April 29, 2021, Decision to approve the Highway Realignment Project, and the Minister's Decision to approve the Project with regard to clarity of the Aquaculture Management Regulations, pursuant to the Fisheries and Coastal Resources Act.

[67] The Applicants grounds for review are stated:

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> The Minister erred and failed to consider the Applicants' Notice for Judicial Review, and failed to consider the Applicants' request, contrary to the requirement of section 54 of the Act, to provide a written statement on the Minister's decision under the Fisheries and Coastal Resources Act.
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property of the County of Antigonish as determined by the provincial assessment authority.

[115] Thus, there is no "decision" of the Town of Antigonish to be judicially reviewed by this Court.

[87] The Court of Appeal, in a brief judgment, affirmed the decision:

> [1] We are unanimously of the view the appeal should be dismissed. We agree with the application judge there was no decision of the Town of Antigonish to be judicially reviewed by the Court. The appeal is dismissed with costs of the Town of Antigonish in the amount of $1,000, inclusive of disbursments [*sic*], to be paid $500 by the Federation of Argiculture [*sic*] and $500 by the County of Antigonish.

[88] The finding in *Antigonish/Guysborough*, *supra*, that there was no "decision" to be "judicially reviewed" cannot be taken to mean that "judicial review" is unavailable where there is no "decision". Judicial review of administrative action is broader than substantive review of administrative decisions. Although predating the current *Civil Procedure Rules*, in *Sand, Surf and Sea Ltd. v. Nova Scotia (Transportation and Public Works)*, 2005 NSSC 233, Murphy J. discussed judicial review and *mandamus* stating:

> [28] Judicial review comprises the inherent power of Superior Courts to require administrators to legally exercise delegated statutory authority. Unlike certiorari and prohibition, which prevent statutory delegates from exercising power unlawfully, *mandamus* compels performance of a statutory duty owed to an Applicant when the delegate refuses to exercise power it is compelled to use. The remedy is not confined to judicial or quasi-judicial functions, but addresses all types of administrative action. (Jones and deVillars, *Principles of Administrative Law*, 4th ed., p. 585)
>
> [29] Although the issue may involve invoking the duty to decide or act, and not determining whether the decision made or action taken was proper, a *mandamus* application triggers examination of a decision-maker's performance, and requires consideration of judicial review principles. (See *Mount Sinai Hospital Centre v. Quebec*, 2001 SCC 41 (CanLII), [2001] 2 S.C.R. 281)
>
> [Emphasis added]

[89] In *Principles of Administrative Law*, 7th ed., (Toronto: Thomas Reuters Canada, 2020), at pp. 6-7, Jones and deVillars explain the prerogative remedies and judicial review as follows:

> Judicial review is probably the most important means of controlling illegal governmental action. To the extent that such action may constitute a wrong otherwise known to law, the statutory delegate will have to demonstrate some legislative provision authorizing it to take the impugned action (or make the impugned decision). The statutory delegate must be able to demonstrate that its actions fell squarely within the power granted to it by the federal Parliament or the provincial legislature. If it cannot, its actions will be considered *ultra vires* (that is, beyond the statutory delegate's legal authority or jurisdiction) and void.
>
> Superior courts have the inherent power to review the legality of administrative actions performed by statutory delegates; in other words, they have the inherent power to judicially review the actions or decisions of statutory delegates. This inherent power of judicial review is the natural consequence of the courts' role to interpret the meaning of statutes, including determining the ambit of statutes which grant powers to statutory delegates. Courts decide whether administrative actions are *ultra vires*. Superior courts have historically used the prerogative remedies of *certiorari*, *mandamus*, prohibition, *quo warranto* and *habeas corpus* to exercise supervisory jurisdiction over inferior courts and statutory delegates.
>
> [Emphasis added]

[90] The authors further note at pp. 12-13:

> Most administrative law cases [...] involve applications for judicial review seeking one of the prerogative remedies, or a declaration, injunction, or, sometimes, damages. While considerable attention used to be given to choosing the right remedy to claim on judicial review and to making certain that the applicant had the proper standing to apply for it, most jurisdictions in the Commonwealth have modernized — and simplified — the procedure for seeking judicial review by establishing a single action known as an application for judicial review, or similar wording, which encompasses all of the prerogative remedies as well as declarations, injunctions and even damages.
>
> The prerogative remedies consist of *certiorari*, prohibition, *mandamus, habeas corpus* and *quo warranto*. In summary:
>
> - Certiorari is an order from a superior court compelling a statutory delegate to render up all of the record of its proceedings to permit the superior court to determine the lawfulness thereof. If the superior court's review indicates a jurisdictional error (or, in some circumstances, some other error of law on the face of the record), it will quash the proceedings or decision of the statutory delegate and remit the matter back to the statutory delegate to be determined according to law.
>
> …
>
> - Mandamus is a command by a superior court compelling a statutory delegate to fulfill a statutory duty delegated to it. For example, an order of mandamus can be used to compel an immigration officer to permit a Canadian citizen to enter Canada, because the citizen has that right and the officer has a corresponding duty to permit him or her to do so. While mandamus can be used to compel a statutory delegate to comply with a statutory duty to exercise its discretion, it generally cannot be used to make the statutory delegate exercise is discretion in a particular way …
>
> [Emphasis added]

[91] While recognizing it is not a Nova Scotia case, I note that the British Columbia Court of Appeal in *Wu v. Vancouver (City)*, 2019 BCCA 23, leave to appeal denied, [2019] S.C.C.A. No. 90, held that where an official fails to act in a manner required by statute, the proper remedy is judicial review:

> 40 Where an official fails to act in a manner required by statute and accordingly breaches his or her statutory obligations, remedies exist in administrative law. For current purposes, it is sufficient to note that the duty described by the judge is simply a duty to make a decision, not to make a particular decision where the official has a choice or a discretion about what decision to make within the regulatory scheme. *Mandamus* lies to compel an official to make a decision. It is a remedy for delay. Its availability does not depend on an official having a duty to make a particular decision. …
>
> …
>
> 47 With respect, the analysis in *Holland* appears to me to be directly applicable to this appeal. The duty described by the judge is no more than an action for negligent breach of statutory duty by a public authority. The proper remedy is judicial review. A failure to act as required by statutory authority is properly remedied by an order in the nature of *mandamus* compelling the authority to decide. The duty recognized by the judge amounts to a fundamental shift in the way in which public and private spheres have historically addressed improper governmental action.
>
> [Emphasis added]

[92] As Jones and de Villars note, most jurisdictions have simplified the procedure for seeking judicial review by establishing a single action known as an "application for judicial review", which encompasses all the prerogative remedies. In Nova Scotia, that simplified procedure is outlined in *Civil Procedure Rule* 7 and, unlike other jurisdictions, includes a definition of "decision". Since the Rule governs applications for *certiorari*, prohibition, and *mandamus* alike, it necessarily defines "decision" and "decision-making authority" broadly:

> **Interpretation in Rule 7**
>
> 7.01 In this Rule,
>
> "decision", includes all of the following:
>
> (i) an action taken, or purportedly taken, under legislation,
>
> (ii) an omission to take action required, or purportedly required, by legislation,
>
> (iii) a failure to make a decision;
>
> "decision-making authority" includes anyone who makes, neglects to make, takes, or neglects to take a decision.

[93] *Rule* 7.11 sets out the orders available on an application for judicial review of a "decision", as defined at *Rule* 7.01:

> **7.11 Order following review**
>
> The court may grant any order in the court's jurisdiction that will give effect to a decision on a judicial review, including any of the following orders:
>
> (a) an order dismissing the proceeding;
>
> (b) an order setting aside the decision under review, or part of it, and terminating any legal process flowing from the decision, or the part;
>
> (c) an injunction preventing a respondent from doing anything, or requiring a respondent to do anything;
>
> (d) a declaration that the respondent lacks the authority or has authority to do something;
>
> (e) an order providing anything formerly provided by prerogative writ.
>
> [Emphasis added]

[94] I agree with the Applicants' position that the fact that no "decision" was made under s. 10(4) of the *Environment Act*, as that term is defined in *Antigonish/Guysborough*, does not mean that judicial review is unavailable. *Rule* 7 states otherwise. I am of the view that the wording of *Rule* 7 cannot be interpreted other than to include an alleged failure to act. The *Rule* makes special reference to "an omission to take action required, or purportedly required, by legislation" and "a failure to make a decision." The *Rule* also defines decision-making authority to include "anyone who makes, neglects to make, takes, or neglects to take a decision."

[95] The word "*mandamus*" only appears in *Civil Procedure Rule* 64, which deals with prerogative writs in criminal proceedings, and, even in that context, the application for *mandamus* is dealt with under *Rule* 7: see *Rule* 64.03. The *Rules* provide no other means for an applicant to compel the performance of a statutory duty.

[96] In addition, I refer to *Canadian Broadcasting Corporation v. Nova Scotia (Attorney General)*, 2010 NSSC 295, where an alleged omission to take action required, or purportedly required, under legislation, was found to be a "decision" within the meaning of *Rule* 7.01. Justice Moir stated:

> [16] A "decision" includes "an omission to take action required, or purportedly required, by legislation": Rule 7.01(ii). The premise of the CBC's notice for judicial review is that the Provincial Court omits to index its search warrant records although that is required by the *Constitution Act*. (The *Constitution Act* is within the meaning of "legislation" in Rule 94.10.)
>
> [17] Therefore, it would have been permissible for the CBC to have named the Provincial Court of Nova Scotia as a respondent, if the decision at issue were one for the Provincial Court to independently make. A more convenient approach might have been to name the Chief Judge of the Provincial Court as a representative party under Rule 36.02. He speaks for the court on administrative and political subjects, but he does so in collaboration with his colleagues who, for all practical purposes, make up the Provincial Court of Nova Scotia as an institution outside of its sittings.

[97] I note that *Rule* 7 has also been applied in relation to a failure to act in *Bancroft v. Nova Scotia (Lands and Forests)*, 2020 NSSC 175.

[98] In conclusion, the statements in *Annapolis/Guysborough*, *supra*, must be confined to the facts in that case. The proceeding involved applicants seeking substantive review of a non-discretionary step or action taken under legislation. The court held that, in such circumstances, there was nothing to review. It cannot be unreasonable or incorrect for a statutory delegate to do something which it is required to do under statute. *Annapolis/Guysborough*, *supra*, did not involve a failure or an omission to take action required by legislation. The applicants there sought to review an action that had been taken; one that was required to be taken under the legislation. The order sought was *certiorari*, not *mandamus*. As noted above, the definition of "decision" under *Rule* 7.01 specifically includes "an omission to take action required" and "a failure to make a decision". In addition, the definition of "decision-making authority" includes "anyone who makes, neglects to make, takes, or neglects to take a decision."

[99] If judicial review under *Rule* 7 were deemed to apply only to discretionary decisions, it follows that there would be no express means available under the current *Civil Procedure Rules* to compel a statutory delegate to perform a duty required by legislation. Unlike the *Civil Procedure Rules* (1972), the current *Rules* do not provide for a stand-alone application for an order in the nature of *mandamus*. *Rule* 7 includes multiple references to failure to take action and specifically refers to the prerogative writs, which include *mandamus*. In short, it encompasses judicial review to compel an authority to act in a manner required by statute.

[100] Nothing in this decision should be taken to comment on the merits of the application for judicial review. I have simply decided the preliminary motion and concluded that the Applicants' application for judicial review relating to the s. 10(4) request can proceed to hearing.

Alternate argument re appeal under Section 137

[101] The Department argues, in the alternative, that if the response of May 3, 2021, was a discretionary decision, then it was a decision of an administrator subject to the appeal process set out in s. 137 of the *Act*. As I have found that s. 10(4) does not envision an exercise of discretion, there is no need for me to address this alternative argument.

Conclusion

[102] The Department's preliminary motion is successful, in part. The Applicants lack both private and public interest standing in this matter as it relates to the Minister's Decision of April 29, 2021. Their application for judicial review in this regard is dismissed.

[103] The Applicants' application for judicial review with reference to s. 10(4) of the *Act*, seeking an order in the nature of *mandamus* directing the Minister to provide the Applicants with the written statement of the Decision setting out the findings of fact upon which it is based and the reasons for the Decision, can proceed to a hearing on the merits.

[104] I ask that Mr. Thompson, counsel for the Respondents, prepare the form of order. If the parties are unable to agree on costs, I will entertain brief written submissions within ten days of this decision.

Jamieson, J.

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