SUPREME COURT OF NOVA SCOTIA

Citation: *Bancroft v. Nova Scotia (Lands and Forestry)*, 2021 NSSC 234

Date: 20210726
Docket: *Hfx*, No. 496023
Registry: Halifax

Between:

Robert Bancroft and Eastern Shore Forest Watch Association

Applicants

v.

Nova Scotia Minister of Lands and Forestry

-and-

Attorney General of Nova Scotia

Respondents

-and-

Lighthouse Links Development Company

Intervenor

Judicial Review Application Decision

Judge:	The Honourable Justice Christa M. Brothers
Heard:	April 1, 2021, in Halifax, Nova Scotia
Final Written Submissions:	June 18, 2021, in Halifax, Nova Scotia
Counsel:	Jamie Simpson and Michael Cofahl, for the Applicant Jack Townsend, for the Respondents Richard Norman and Jacob Che, for the Intervenors

By the Court:

Introduction

[1] For more than four decades, the Province of Nova Scotia (the Province) represented to the public that the Owls Head Crown lands were a provincial park, and openly treated them like one. In 2013, when the government introduced its "Our Parks and Protected Areas" plan (the PAPA) – a policy document intended to guide the government's exercise of its discretion under the *Provincial Parks Act*, R.S.N.S. 1989, c. 367, and other land protection statutes to fulfill its goal to legally protect 12% of Nova Scotia's land mass by 2015 – Owls Head was identified as an existing provincial park. In other words, according to the PAPA, the Owls Head Crown lands were already protected. However, when a developer inquired about purchasing the lands to turn them into golf courses, it became apparent that Owls Head had never been formally designated as a provincial park under the *Provincial Parks Act*.

[2] In March 2019, without informing the public, the Treasury and Policy Board issued a confidential minute letter removing Owls Head from the PAPA. In December 2019, Iain Rankin, then Minister of Lands and Forestry, reached a conditional agreement to sell the developer the Owls Head Crown lands. The public did not learn about the de-listing of Owls Head, or about the conditional sale, until after the agreement was signed. If Owls Head had been formally designated as a provincial park, as was represented to the public, any change to its status as protected land would have required an order-in-council, and would therefore have been public knowledge. Ultimately, the government's own misrepresentation of the status of the lands shielded its actions from scrutiny and allowed purportedly protected lands to be considered for sale, out of the public eye.

[3] Predictably, the Province's conduct did not sit well with some members of the public. An application to this court has ensued. It was clear from the applicants' submissions that they attribute the public's lost opportunity to be heard on the potential de-listing of Owls Head to the government's misrepresentation that the lands were already a provincial park. That said, the applicants did not file a claim in negligent misrepresentation. Instead, they filed an application for judicial review in which they ask the court to be the first in Canada to hold that the government owns property in trust for the public, and that it owes the public a duty of procedural fairness when making decisions about lands that have been identified as having

public value beyond the value of Crown lands generally, including lands with conservation value. Judicial acceptance of this "public trust doctrine" would mean that Owls Head, and any other lands the government has recognized as having such public value, could not be sold without public consultation. The applicants also ask the court to hold that the decision to de-list Owls Head, and the decision to execute the conditional agreement for its sale, were unreasonable and must be struck down.

[4] I conclude that recognition of the public trust doctrine proposed by the applicants would not represent the kind of incremental change to the common law that this court is permitted to make. Nor can the court allow the application on substantive grounds.

[5] Elected officials on occasion make decisions, and use procedures, that leave some constituents feeling betrayed and even incensed. Where those officials exceed their power, judicial review may provide a remedy. But where the decisions are within their lawful authority, as in this case, the court cannot intervene. In such circumstances, if a remedy is sought by the public, the proper recourse in our constitutional democracy is not through the courts, but at the ballot box.

Background

[6] On December 18, 2019, CBC investigative reporter Michael Gorman published an article with the headline, "N.S. won't protect land with 'globally rare' ecosystem that company eyes for golf resort". Mr. Gorman reported that in March 2019, the Treasury and Policy Board had "quietly removed" Owls Head Provincial Park from the list of properties awaiting legal protection under the PAPA. According to the article, the decision to de-list Owls Head was made "after several years of lobbying by and discussions with a private developer who wants to acquire the land as part of a plan to build as many as three golf courses".

[7] The CBC article was the first time that the general public learned of the decision to remove Owls Head from the PAPA, paving the way for its potential sale to Lighthouse Links Development Company. Through a freedom of information request, Robert Bancroft and Eastern Shore Forest Watch Association (the applicants) later discovered that on December 16, 2019, the Minister of Lands and Forestry executed a conditional Letter of Offer (LOO) to sell the Owls Head Crown lands to Lighthouse Links for the development of "a recreational and residential community, which is expected to include one to three world class golf courses, club house, single family homes, and short term accommodations, enhanced seasonal and

recreational activities (including hiking, kayaking, and boating)". Lighthouse Links signed the LOO on December 19, 2019.

[8] The applicants have applied for judicial review of the decisions to remove Owls Head from the PAPA and to execute the LOO to sell the Crown lands to Lighthouse Links. The applicants attribute both decisions to the Minister of Lands and Forestry, and challenge them on procedural and substantive grounds. They say the Minister owed a duty of fairness which required him to inform and consult the public before he made the decision to request that the Treasury and Policy Board remove Owls Head Provincial Park from the PAPA, and before he executed the LOO to sell the lands for private development. According to the applicants, this duty of fairness also required the Minister to provide reasons for both decisions. The applicants further submit that the decisions were unreasonable because the Minister failed to consider relevant factors, including his responsibilities under the *Crown Lands Act*, R.S.N.S. 1989, c. 114, the *Provincial Parks Act*, and the *Endangered Species Act*, S.N.S. 1998, c. 11.

[9] The Minister of Lands and Forestry and the Attorney General of Nova Scotia (the respondents) and Lighthouse Links (the intervenor) oppose the application on multiple grounds. They attribute the decision to remove Owls Head from the PAPA to the Treasury and Policy Board, not the Minister, and say the availability of judicial review of a Cabinet-level decision involving matters of public policy is extremely limited. The respondents and the intervenor submit that the applicants have failed to raise a justiciable issue (and therefore have no standing), that there is no common law duty of fairness owed to the public at large, that the application is premature, and, in the alternative, that the decisions were reasonable.

The applicants and the intervenor

[10] Robert Bancroft is a wildlife biologist who was employed by the Nova Scotia Department of Lands and Forestry from 1967 to 1968, and from 1973 to 1991. He was also an extension biologist for the Province's inland fisheries program from 1991 to 1999. He has worked as an independent forestry and wildlife consultant since 1999, and, since 2009, has been president of the Federation of Nova Scotia Naturalists. Mr. Bancroft promotes the preservation and restoration of important natural habitats throughout the province. He has been involved in various government-initiated public consultations regarding the protection of land in Nova Scotia for conservation purposes.

[11] The Eastern Shore Forest Watch Association was founded in 1998 and is dedicated to promoting sustainable forestry practices and the protection of ecologically important lands on the Eastern Shore of Nova Scotia. Barbara Markovits has been an active member of the Association since 2003, was co-chair of the Association from 2006 to 2016, and, since 2016, has been the Association's membership coordinator and a member at large on its Board. The ESFWA has participated in numerous public consultation processes undertaken by the Province in relation to parks and protected areas.

[12] Lighthouse Links Development Company is a Nova Scotia limited liability company incorporated and registered on September 21, 2016. The company is a wholly-owned subsidiary of Lighthouse Links Holdings, a U.S. subchapter corporation. G.S. Beckwith Gilbert is the sole shareholder of Lighthouse Links Holdings, and the president of Lighthouse Links Development Company. Over the years, Mr. Gilbert and his wife have acquired land along the Eastern Shore and currently own approximately 340 acres adjacent to the Owls Head Crown lands.

The history of Owls Head

[13] The Crown lands at Owls Head consist of 705.2 acres of coastal land near the communities of Little Harbour and Owls Head on Nova Scotia's Eastern Shore. The former Owls Head Provincial Park occupied 703 of the 705.2 acres.

[14] Uncontested affidavit evidence filed by Ms. Markovits shows that Owls Head has been represented as a provincial park by the Nova Scotia government for decades. It was first identified as a park in a 1978 brochure produced by a committee initiated by the Department of Lands and Forests (as it then was known), in which Owls Head is described as part of "The Island & Headlands Natural Environment Parks". A 1980 article in the Department of Lands and Forests' *N.S. Conservation* publication includes a map that identifies Owls Head as a "Natural Area" within the Eastern Shore Seaside Parks System. A 2012 map by the Department of Natural Resources (as it was then known), titled "Owls Head Provincial Park and Park Reserve Series" identifies Owls Head as a "Park Reserve". The map identifies the data source used as "Restricted and Limited Use Lands 2007: NS Department of Natural Resources." This map is no longer available on the Department's website.

[15] An information sheet published in 2013 by the Province of Nova Scotia, titled "Owls Head Provincial Park", notes that the property has "exceptional bedrock-ridged topography", that piping plover (a designated "species at risk" pursuant to s.

12 of the *Endangered Species Act*) has nested on the Owls Head property, and that the land was "assigned to parks program as part of the Province's commitment to develop the Eastern Shore Seaside Park System". This information sheet describes Owls Head Provincial Park's status as "Reserve" and says it is managed as a "Supporting Park". This information sheet is no longer available on the Department's website.

[16] In 2013, the Department of Natural Resources (DNR) and Nova Scotia Environment published the "Our Parks and Protected Areas" plan. The PAPA describes Owls Head Provincial Park as an "existing" provincial park, not a new one, and notes that it was to be managed as a "supporting park".

[17] On June 24, 2015, DNR issued a research permit to researchers Caitlin Porter and Dr. Jeremy Lundholm (St. Mary's University), and to Sean Basquill (DNR-Wildlife Division). The permit states, in part, "Locations of Proposed Research: Provincial Parks", and lists several provincial parks, including Owls Head.

[18] An online, interactive map published by the Province of Nova Scotia titled "Parks and Protected Areas: A System for Nova Scotia" identifies Owls Head as "Owls Head Provincial Park". According to Ms. Markovits, when she accessed the map on February 19, 2020, Owls Head was not depicted in the colour used to identify provincial parks. She said, however, that when she viewed the map on previous occasions, the colour used for Owls Head identified it as a provincial park.

[19] An online map published by the Province of Nova Scotia and visited by Ms. Markovits on March 8, 2020, titled "Nova Scotia Registry of Claims" shows mineral claims in the province and identifies Owls Head as "Owls Head Provincial Park".

The PAPA

[20] In 2007, the Legislature passed the *Environmental Goals and Sustainable Prosperity Act*, S.N.S. 2007, c. 7, (the EGSPA).

[21] Generally, the EGSPA contemplates that the Province will attempt to strike a balance between environmental considerations and economic development. Section 3(2) provides that the statute is based upon the following principles:

> (a) the health of the economy, the health of the environment and the health of the people of the Province are interconnected;

> (b) environmentally sustainable economic development that recognizes the economic value of the Province's environmental assets is essential to the long-term prosperity of the Province;
>
> (c) the environment and the economy of the Province are a shared responsibility of all levels of government, the private sector and all people of the Province;
>
> (ca) to achieve objectives that span both environmental and economic aims, government departments need to collaborate across the Province using a whole systems approach;
>
> (d) the environment and economy must be managed for the benefit of present and future generations, which is in keeping with the Mi'kmaq concept of *Netukulimk,* defined by the Mi'kmaq as the use of the natural bounty provided by the Creator for the self-support and well-being of the individual and the community by achieving adequate standards of community nutrition and economic well-being without jeopardizing the integrity, diversity or productivity of our environment;
>
> (e) innovative solutions are necessary to mutually reinforce the environment and the economy;
>
> (f) a long-term approach to planning and decision-making is necessary to harmonize the Province's goals of economic prosperity and environmental sustainability;
>
> (g) the management of goals for sustainable prosperity, such as emission reduction, energy efficiency programs, climate change adaptation and increasing the amount of legally protected land will preserve and improve the Province's environment and economy for future generations.

[22] The Act defines "sustainable prosperity" at s. 2(h) as "seizing today's opportunities without compromising tomorrow, while working together for a strong, competitive economy, a healthy environment and vibrant, thriving communities."

[23] The need to strike a balance between environmental considerations and economic development is further underscored by s. 4(1), which provides as follows regarding the Province's long-term objectives:

> The long-term environmental and economic objective of the Province is to achieve sustainable prosperity and to this end to
>
> > (a) establish clear goals that foster an integrated approach to environmental sustainability and economic well-being; and
> >
> > (b) work towards continuous improvement in measures of social, environmental and economic indicators of prosperity.

[24] In turn, s. 4(2) sets out a number of environmental and economic goals for the Province to pursue in order to achieve these long-term objectives, including the following:

> (v) at least 12 per cent of the total land mass of the Province is legally protected by 2015…

[25] The EGSPA leaves it to the Province to determine how to achieve these goals and objectives and, ultimately, strike an appropriate balance between environmental considerations and economic development. The legislation does not identify specific lands to protect, nor does it specify a process for the Province to follow in determining whether a particular parcel should receive legal protection so that it counts toward the goal in s. 4(2)(v).

[26] In 2013, DNR and Nova Scotia Environment published the PAPA. One of the PAPA's purposes was to help the Province achieve the land mass protection goal set out in s. 4(2)(v) of the EGSPA. The PAPA states at p. 7:

> Our natural landscape and cultural heritage are protected by both legislation and policy in numerous ways, but Nova Scotians have expressed a desire for a more comprehensive plan to address long-term viability. Two documents in particular reflect that desire:
>
> 1. *Environmental Goals and Sustainable Prosperity Act*, which requires
>
> > a. the creation of a sustainable parks system
> >
> > b. the legal protection of at least 12 per cent of the total land mass of the province by 2015
>
> 2. *The Path We Share: A Natural Resources Strategy for Nova Scotia 2011–2020*, which lays out five goals for provincial parks: shared stewardship, far-sighted planning, protection, education, and recreation.
>
> This plan responds to both these documents; it exceeds the protected lands goal of at least 12 per cent and takes specific actions to address the goals of the natural resources strategy. This plan also commits government to deliver an integrated, coordinated parks and protected areas program.

[27] The Province's decisions as to which lands should be protected were based in part on extensive public consultation:

> A key recommendation of the natural resources strategy (2011) is to engage Nova Scotians in "a focused dialogue about provincial parks." The strategy outlines the need to inform people about the park system, ask what they value most, and involve them in setting priorities. In 2012, the province held public meetings in 20

> communities and conducted nearly 1500 interviews with both park users and non-users to examine their perceptions and preferences. This plan reflects the extensive input received through the natural resources strategy.
>
> Specific properties proposed for protection are also based on extensive consultation with the public and Nova Scotia Mi'kmaq around land selection and use. This consultation was informed by the 2009 Colin Stewart Forest Forum report and the 12 percent lands review process (2011), which included numerous stakeholder meetings and more than 700 written submissions.
>
> (p. 7)

[28] The PAPA identifies approximately 206,000 hectares of lands to be added to the existing parks and protected areas system. These new lands were planned to be legally protected by 2015. There were also delayed designation lands that were planned to be protected by 2020. Those lands proposed for protection were to be managed under interim guidelines until final decisions were made respecting their protection.

[29] Appendix "A" to the PAPA sets out "a complete list of new protected areas, as well as provincial park properties." Owls Head is listed as site #694 in Appendix "A" where it is described as "Owls Head Provincial Park".

[30] At the time the PAPA was drafted, it was believed that Owls Head had already been formally designated as a provincial park under the *Provincial Parks Act*. To the surprise of both the public and government, that understanding turned out to be incorrect. In fact, as the applicants point out, more than 100 of the "existing" provincial parks identified in the PAPA, including Pomquet Beach Provincial Park and Herring Cove Provincial Park, are not legally designated as parks. Due to the lack of formal designation under the *Provincial Parks Act*, management of Owls Head falls under the *Crown Lands Act*.

The proposal from Lighthouse Links

[31] The application to purchase the Owls Head Crown lands was initiated by Sean Glover, a lawyer at Cox & Palmer and the secretary and registered agent of Lighthouse Links. On September 23, 2016, Mr. Glover submitted an application to purchase Crown lands to DNR, on behalf of the company. In his email attaching the application, he requested that "reasonable steps be undertaken to keep the application confidential".

[32] In the correspondence accompanying the application, G. S. Beckwith Gilbert explained that his company wishes to acquire the Owls Head Crown lands "to construct two or more world-class 18 hole oceanfront links golf courses – Lighthouse Links – in Little Harbour, at the heart of Nova Scotia's Eastern Shore, to bring major economic benefits to the area by enhancing tourism and increasing employment." Mr. Gilbert continued:

> Fifteen years ago, my wife, Kitty, and I fell in love with Little Harbour. We initially acquired 255 acres in two parcels in Little Harbour, approximately 3 miles of ocean shoreline with many beautiful white, sandy beaches, and have since added another 19 properties, almost all vacant land, as part of our program to preserve the area's unspoiled beauty and protect the environment, bringing our total holdings to approximately 340 acres. We built a home about nine years ago and bought several other houses in the area to use for guests.
>
> We value the friendships we have made in the area and are sad that a number of our favorite restaurants, stores, and our gas station have closed.
>
> Kitty and I would like to do something for the area which has brought us to much pleasure. One of our guests who had played at Bandon Dunes in Oregon said our property was very similar to Bandon Dunes and suggested we construct a golf course.
>
> After the great success of Cabot Links and Cabot Cliffs, the idea of world-class links golf courses on Little Harbour's magnificent seaside seemed more and more feasible. Cabot Links and Cabot Cliffs have oceanfront sites very similar to Little Harbour. Little Harbour has the additional benefit of being easy to access, within a little more than an hour's drive from Halifax and its international airport.
>
> …
>
> Multiple diverse oceanfront courses with unique holes could make Little Harbour and Lighthouse Links a major golf destination and, together with other great courses nearby in Nova Scotia, benefiting employment and the economy of the Eastern Shore.
>
> Our objective is to build one of the world's finest golf complexes with other facilities, preserving and enhancing the natural beauty of the area, while making it accessible to the public, to Canadians and tourists from around the world. Currently, there is no public road access to the spectacular sandy beaches, dramatic ocean coastline, and spectacular vistas in Little Harbour. The only access is over private lands, or by kayak or boat.
>
> Given the economic benefits of Cabot Links and Cabot Cliffs to Nova Scotia, another world-class golf course complex in Nova Scotia – this time on the spectacularly beautiful Eastern Shore ocean coastline – would build on the success of the Cabot Links model, further enhance Nova Scotia as a world-class golf destination, and boost employment on the Eastern Shore.

> The acquisition of the Provincial lands is essential to the feasibility of the project by providing enough land to make the Lighthouse Links golf complex possible. As shown in the attached map, after a careful review, no other comparable, suitable, or reasonable property alternative exists.

[33] Staff subsequently prepared briefing notes for the Minister and Deputy Minister. In the briefing note to the Deputy Minister, the author wrote that "[t]o remove the lands from the PAPA a Memorandum to Executive Council (MEC) would be required."

[34] In September 2017, Lighthouse Links delivered a presentation to the Province regarding its proposal. Later that month, the then-Minister of Natural Resources, Margaret Miller, wrote to Mr. Gilbert "to provide a summary of the various steps that are required to proceed with your proposal to acquire Crown lands for your Lighthouse Links project at Owls Head". The Minister noted that:

> As discussed at the September meeting, the first step that must be taken before the transaction can proceed is DNR obtaining authorization from Cabinet to remove the Crown lands from the Parks and Protected Areas Plan (PAPA). The PAPA was issued by the Minister of Environment and the Minister of Natural Resources in 2013 and lays out the commitment by the Province to work towards protecting lands identified in the Plan. All other processes are subject to this step being successfully completed.

[35] The Minister then stated that "(i)f approval is received from Cabinet to remove the Crown lands from the PAPA, staff advise that these are next steps that will be required for your proposal". She noted that an environmental assessment (or EA) might be required before any conveyance of Owls Head could be completed:

> A development project such as yours, must be screened to determine if it requires an environmental assessment (EA), which falls under the jurisdiction of the Department of Environment (NSE). The types of projects that require an EA are listed in the Environmental Assessment Regulations. For example, if there are significant wetland impacts, the Lighthouse Links golf course could trigger an EA…
>
> Due to the nature of an EA, it is initiated at the beginning of a project and it includes other steps such as public consultation and aboriginal consultation.
>
> We recommend that you speak directly with NSE regarding potential EA requirements…
>
> Please note that steps required by DNR can be ongoing while an EA and other authorities are in process, but the conveyance of Crown lands would not be finalized until an EA is complete.

[36] The Minister went on to note that Lighthouse Links might also have to obtain a number of other approvals from other agencies and levels of government:

> Typically for a project of this nature, various authorizations/approvals will be required from various sources other than DNR. The following are additional authorizations/approvals that appear likely based on information received to date (the list may change as more project details become available):
>
> - Approvals from Transportation Infrastructure and Renewal (*sic*) depending on increases in traffic volume, required road work and public road access;
> - Municipal approvals including: development approvals (sewer, subdivision, condominium or facilities development);
> - Additional approvals would be required from Transport Canada and other approvals related to aircraft operations and safety if the project includes the development of a helipad or facilities to access the site by air; and
> - Approvals from NSE pursuant to the Environment Act (e.g. watercourse/wetlands alterations)

[37] The Minister proceeded to set out several additional steps that "will be required as part of the DNR process before a request for approval to convey the requested Crown lands can be presented to Cabinet", including an Integrated Resource Management report:

> A preliminary records research report was conducted prior to the initial meeting in 2016 to identify encumbrances on the land, but a full report is required, which will take approximately 2 weeks.
>
> While that research is being conducted, the Integrated Resource Management report (IRM) can be conducted. The IRM is a planning and decision making tool used by DNR to ensure a mix of land use activities, minimize conflict and balance social, economic, and environmental benefits from activities on Crown lands. Within the Regional Services Branch of DNR there are three Regional IRM Teams comprised of resource sector professionals including Crown forest planners, wildlife biologists, GIS specialists and other specialties.
>
> IRM is used to provide input into decisions regarding proposed activities on Crown lands and resource use, including legal authorities issued by the Land Services Branch and authorizations issued by other DNR Branches. This step will take approximately 30 days.

[38] The Minister then said the following about aboriginal consultation:

> The Government of Nova Scotia is committed to making decisions in a manner that is consistent with the recognition and affirmation of existing and asserted

> Aboriginal and treaty rights. Consultation with the Mi'kmaq of Nova Scotia and accommodation where required, and appropriate, occurs when contemplating conduct that has the potential to adversely impact established and/or asserted Mi'kmaw Aboriginal rights. If an Environmental Assessment is not required for the project, then DNR will lead consultation with the Mi'kmaq of Nova Scotia. In that case, the consultation would be initiated at the same time the IRM is started. The timing to complete consultation will depend on the potential impacts identified and options for addressing those impacts.

[39] The Minister closed by noting that additional approvals would be required if Lighthouse Links intended to develop a marina, build wharves, or install shoreline protection measures:

> If there is an intention to develop a marina, build wharves or put in place shoreline protection measures (e.g. armourstone), approvals would be required from DNR for work on any submerged Crown lands as well as possibly from NSE (e.g. if depositing any dredged materials and for any watercourse alteration). It could also require permits from the Federal Department of Fisheries and Oceans, Navigation Protection and Transport Canada. For DNR, the permit process can up (*sic*) to 6 months, but it would depend on the scope of the project (wharf vs. marina).

[40] On October 23, 2017, Leslie Hickman at DNR emailed Mr. Gilbert to inform him that "a more detailed project/business plan is being requested in order to fully assess your plans for the Crown lands being requested." On November 27, Sean Glover emailed Ms. Hickman, stating in part:

> I know we'd had some discussion on your understanding that a business plan would be required before we could go any further, but such a plan would be difficult to prepare in the absence of property specific knowledge that we can only gain by accessing the property.

[41] Ms. Hickman replied to Mr. Glover on November 28 as follows:

> Hi Sean, I spoke with the Deputy today and she confirmed that an updated business plan is still required as the next step. Please feel free to contact me if you want to discuss options to allow access to the site to gather information required for the plan development or any other matters related to the request.

This updated business plan was apparently never provided to the Province.

[42] In July 2018, Lighthouse Links delivered a "Proposal for Exchange or Purchase of Lands" regarding Owls Head. The proposal explained that Lighthouse Links wished to use land from the Provincial Crown, the Federal Crown (40 acres,

including the Owls Head automated lighthouse), and parties affiliated with the company to construct a series of golf courses and "to develop a destination residential or resort community, with the intent of encouraging more tourists, visitors, and others to visit and live in the Eastern Shore". Lighthouse Links noted that it had engaged a well-known golf course architect who had developed preliminary plans for three courses, set out in a series of exhibits attached to the proposal.

[43] Lighthouse Links went on to note:

> This development should encourage more native Nova Scotians, along with tourists, visitors, and others, to come to the Eastern Shore, in expectation of creating a bedroom community for families working in the Halifax/Dartmouth area, could attract industry, and provide additional jobs for up to 150-200 people for the golf courses alone on an ongoing basis. Spin-off businesses should provide other economic benefits to the Eastern Shore. This project would tie in well to the current housing and tourism boom being experienced in and around Halifax and elsewhere in Nova Scotia.
>
> Additional jobs would be created to construct the residential and commercial buildings. We estimate that it would take approximately three (3) years from breaking ground to complete the first course…

[44] Lighthouse Links also provided details of the cost estimates it had received for the development. The company estimated the cost to construct the first course at $12.6 million, excluding the cost of building the infrastructure – the club house, lodging, a maintenance shed, parking, etc. Lighthouse Links explained that the costs would be much higher than the typical golf course because "it would have to be built on ledge and sand is not easily available." The company noted that it would not be able to refine its cost estimates without an onsite evaluation of the terrain:

> Refining our cost estimates requires an onsite evaluation of the terrain over which the courses would be built – which currently can't be accessed by construction because there are no roads. We anticipate finding additional savings as well after an onsite evaluation.
>
> In order to refine the cost estimates, two roads capable of handling construction vehicles from the existing road in Southwest Cove, would be required, one on either side of Long Cove. We estimate that about 2.5 miles of roads will be needed at a cost of approximately $370,000.

[45] In September 2018, Lighthouse Links provided DNR with an appraisal report from Turner Drake & Partners, which attributed a market value of $250,000 to the

Owls Head lands. Turner Drake explained that its appraisal was premised upon the basis that the property would be used for its highest and best use, which it defined as "that use which will produce the greatest net return for the foreseeable future." Turner Drake's opinion on the highest and best use is set out at p. 12 of the report:

> The majority of the property is zoned as regional parkland which precludes most development. Any development would require alteration of the municipal planning strategy and zoning. The majority of the property is identified as part of an existing Regional Park, it is similarly recognized as a park in the recently adopted (August 2018) Green Network Plan. The use of the Subject Property for anything other than what it is currently enabled under its zoning would require significant policy changes at the highest levels of municipal planning authority. Requests for amendments to policy at this level carry no guarantee that they will even be considered by Council, and no opportunity for appeal to the UARB if denied. Such changes would be highly unlikely.
>
> Having regard to the foregoing, we are of the opinion that the Highest and Best Use of the subject property is for recreational or conservation purposes.

[46] In December 2018, representatives of Nova Scotia Environment and the Department of Lands and Forestry (as it is now called) met with representatives of Lighthouse Links. Notes from the meeting suggest that the Province reiterated the need for Cabinet approval to remove Owls Head from the PAPA, and raised other outstanding issues including municipal approvals, an IRM, aboriginal consultation, and, if necessary, an environmental assessment.

The Treasury and Policy Board Decision

[47] In February 2019, the Minister of Environment and the Minister of Lands and Forestry submitted a Memorandum to Executive Council (MEC), entitled "Decision on whether to withdraw Crown lands at Owls Head identified for protection in the Parks and Protected Areas Plan", along with a Communications Plan. Both the MEC and the Communications Plan in the record have been substantially redacted. The MEC indicates that it was prepared by Matt Parker, Director, Parks, Outreach and Service Delivery, and was reviewed by several other staff at the Department of Lands and Forestry and Nova Scotia Environment.

[48] The MEC summary indicates that "[a] decision is being sought whether to withdraw Crown lands identified for potential protection as 'Owls Head Provincial Park' under the 2013 Parks and Protected Areas Plan." It goes on to note that if Executive Council decides to remove Owls Head from the PAPA, "the required

review processes would be conducted to assess the request, including consultation with the Mi'kmaq of Nova Scotia, and a subsequent approval to sell the Crown lands would need to be submitted to Cabinet" (p. 1).

[49] The MEC outlines the proposal from Lighthouse Links at p. 2:

> The Company is proposing to build two or three world-class oceanfront links public golf courses, a clubhouse, inn and other related facilities. The balance of the land will be used to develop a destination residential or resort community and provide public access to environmental/recreational features on the lands, with the intent of encouraging more tourists to visit and people to live in the Eastern Shore.
>
> …
>
> The Company states that the proposal would have economic benefits for the area by enhancing tourism and increasing employment on the Eastern Shore. The Company projects that the golf courses could attract industry and provide additional jobs for 150-200 people on an ongoing basis. The Company anticipates spin-off businesses and the development of a bedroom community to result in the creation of additional jobs to construct the residential and commercial buildings, and further economic benefits for the area.

[50] The MEC then provides information about the PAPA and its relationship to the EGSPA and other government policy:

> Prepared jointly by NSE and L&F and approved by Executive Council in 2013, the PAPA Plan was developed to support government in meeting and maintaining the EGSPA goal to legally protect at least 12% of the total land mass of the province by 2015. The PAPA Plan includes enough lands to also achieve government's more recent mandate to move towards 13% protected land across the province while ensuring a balance so there are no negative recreational or economic effects. …
>
> The development of the PAPA Plan took into account scientific research, consultations involving members of the public and Nova Scotia's Mi'kmaq, and work with key stakeholders. NSE and L&F sought feedback on a proposed PAPA Plan (February 2013) to determine how well the plan reflected what was heard in the past and to find out what changes various groups and individuals wanted for a final parks and protected areas plan for Nova Scotia.
>
> The PAPA Plan is being implemented in a phased approach working towards the Province's protected lands commitment. Government indicated to the public that all provincially owned lands included in the PAPA Plan will be managed under interim guidelines until they are legally protected or released from further protection consideration. As sites come forward for designation, NSE and L&F undertake additional planning, legal, and survey work prior to the final legal designation of the lands under protection legislation. The Provincial Parks Act sets

> out the process required to obtain legal status as a "park reserve" through Governor in Council approval. (p. 2)

[51] The protection and broader ecological values of the Owls Head lands are detailed at pp. 2-3:

> In the approved PAPA Plan, Owls Head was proposed for designation as a provincial park. The protection values for Owls Head identified in the PAPA Plan include a variety of coastal barrens and wetlands; exceptional bedrock-ridged topography; coastal access; and, occurrences of nesting Piping Plovers. L&F biologists have identified two occurrences of Species at Risk – the Piping Plover (listed endangered provincially and nationally) and the Barn Swallow (listed as provincially endangered; nationally threatened). Part of Owls Head was confirmed as significant habitat for nesting Piping Plovers. Occurrences of other species of conservation include Ruby-crowned Kinglet and Common Eider. Owls Head includes one of nine sites in the province for the globally rare *Coastal Broom Crowberry Heathland Ecosystem*. Broader ecological values of the area are similar to other coastal areas of Nova Scotia, offering foraging, breeding and migratory habitat for birds and other faunal species, as well as unique borsal and temperate plants and lichens.
>
> There are local interests in land and conservation and community-based economic development associated with the natural and cultural assets along the Eastern Shore, including those of the Wild Islands Tourism Advancement Partnership (WITAP).

The remaining four pages of the MEC are redacted.

[52] The Communications Plan, prepared by Steven Stewart, Communications Officer at the Department of Lands and Forestry, is heavily redacted but includes the following information under "Background/Context":

> While Owls Head has been managed by Lands and Forestry as a park reserve, it is not legally designated as a provincial park or reserve. Lands and Forestry has not prioritized designation of these lands and has no plans to develop parks infrastructure at this site.
>
> Protection values associated with the Owls Head lands include both typical and unique coastal habitat, and several species of conservation concern. The potential park has also been highlighted as supporting the goals of the community based Wild Islands Tourism Advancement Partnership (WITAP) that is focused on expanding regional economic opportunities through experiential tourism development associated with the natural and cultural assets of the coastal islands, headlands, and related tourist offerings. (p. 1)

[53] It was against this factual and informational backdrop that the Treasury and Policy Board decided, by way of a minute letter, to remove Owls Head from the PAPA in March 2019.

The Letter of Offer

[54] After the Treasury and Policy board made its decision, Turner Drake provided Lighthouse Links with a revised appraisal report in which the Owls Head property's market value was assessed at $216,000 ($306 per acre).

[55] As in the first report, the effective date of the valuation and the date of inspection is August 21, 2018. An examination of the two reports indicates that the first report assessed the value of 744.12 acres of land, while the second assessed only 705.21 acres. This suggests the first appraisal report included the lands owned by the Federal Crown.

[56] In December 2019, the Minister of Lands and Forestry and Lighthouse Links signed the LOO. The LOO is subject to a variety of terms and conditions, including the following:

> 1. This Offer is subject to the approval of Cabinet and/or the Minister of the Department.
>
> …
>
> 4. The sale of the Property is subject to the Department completing an Integrated Resource Management Review.
>
> …
>
> 6. The Property will be sold for $306 per acre, as determined by the report prepared by an Accredited Appraiser Canada Institute (AACI) qualified appraiser, dated August 26, 2019. The final purchase price to be determined when the approved survey plan has been completed.
>
> 7. It is the Purchaser's responsibility to obtain all applicable permits, authorizations or approvals required from the applicable level of government required for the Purchaser's intended use of the Property… The Department does not, by the act of issuing this offer, covenant or provide any assurance that any other required permits, authorizations or approvals will be issued by the Province of Nova Scotia, any other level of government or any other body.
>
> …
>
> 10. The Purchaser represents and warrants to the Department that the Purchaser's intentions for future use of the Property including with respect to the Project

> have been fully disclosed to the Department, including any information it has or obtains including any project report detailing the Project that could affect the Province's approval to proceed with the proposed sale of the Property as all such information is needed in order to complete the Department's reviews and consultations and before cabinet approval can be sought.
>
> …
>
> 17. The sale of the Property is subject to the Province being satisfied that it has fulfilled its duty to consult with the Nova Scotia Mi'kmaq Chiefs under the August 31, 2010 Mi'kmaq-Nova Scotia-Canada Consultation Terms of Reference (TOR) regarding the proposed sale of Crown lands…
>
> 18. The sale of the Property is subject to public engagement being concluded to the satisfaction of the Department.
>
> …
>
> 20. In the event the sale does not receive approval of Cabinet or the Minister, the Purchaser will be notified by the Department that the sale of the Property cannot proceed, and the Offer shall immediately terminate…

[57] It was around this time that the general public learned of the removal of Owls Head from PAPA by way of Mr. Gorman's article. On January 1, 2020, Ms. Markovits wrote to the Premier to voice her concerns. The then-Minister of Lands and Forestry, Iain Rankin, replied on the Premier's behalf, and stated:

> When the Department receives an application to sell Crown lands, it is reviewed following relevant processes. The transaction under review to sell the Crown lands referred to as Owls Head will undergo the usual due diligence reviews and assessments, including seeking approval by Cabinet before it would be sold.
>
> …
>
> If the Crown lands are sold, any proposed development would be subject to all applicable Municipal, Provincial and Federal legislation, approvals and authorizations required for the proposed development. In addition, lands are screened for any records of species-at-risk known to occur on site; and destroying or disturbing endangered or threatened species or their nesting and denning habitats is prohibited by federal and provincial law.
>
> It is government's role to balance the need to protect land with the need to allow economic activity in an area. We continue to examine areas both inside and outside the Parks and Protected Areas plan for designation.
>
> Government remains committed to protecting the province's most valuable biodiversity and habitats. That is why we recently designated 17 more sites as protected areas. We are also working to finalize another group of sites. All together,

> these sites will protect more than 14,000 hectares and bring our total land protected to about 12.75%. That brings us closer to our goal of 13%.

[58] The applicants subsequently brought this application for judicial review.

Issues

[59] This application raises a host of issues including justiciability, standing, prematurity, procedural fairness, the public trust doctrine, and substantive review. Some of the issues apply to both impugned decisions, while the issue of prematurity relates only to the applicant's challenge to the LOO. In addition, some of the issues are interrelated. For example, whether the applicants have raised a justiciable issue is also relevant to whether they can establish public interest standing.

[60] This decision will consider the following issues:

1. Was the decision to remove Owls Head from the PAPA made by the Minister of Lands and Forestry, or by the Treasury and Policy Board?
2. Are the decisions justiciable?
3. Does the Treasury and Policy Board's decision raise a jurisdictional issue?
4. Do the applicants have standing to bring this application?
5. Were the applicants owed procedural fairness in relation to the decisions under review?
6. Were the decisions under review reasonable?

Who made the decision to de-list Owls Head?

[61] In their pre-hearing brief, the applicants argue that, for the purposes of judicial review, the decision to remove Owls Head from the PAPA should be attributed to the Minister of Lands and Forestry, not the Treasury and Policy Board. Essentially, they submit that although the Treasury and Policy Board issued the minute letter, the decision was made at the request of the Minister. The applicants note that it is the Minister, not the Board, who is responsible for the management and control of Crown lands and provincial parks. The applicants write at p. 23 of their brief:

> The Applicants question whether the Minister needed approval from the T&PB to remove Owls Head Provincial Park from the Parks and Protected Areas Plan. There is no indication that the TP&B approved the creation of the Parks and Protected Areas Plan before the Plan was released to the public, so why did the Minister seek approval from the T&PB to remove Owls Head from the PAPA? The Applicants submit that seeking approval from the T&PB was an attempt by the Minister to insulate himself from public accountability and possibly from legal review.

[62] The respondents and the intervenor say the Treasury and Policy Board is the policy-making committee of the Executive Council, and the decision whether to remove Owls Head from the PAPA was within its mandate. The respondents further note that, according to p. 2 of the MEC, the PAPA was put before and approved by Executive Council in 2013.

[63] In my view, the record clearly demonstrates that the decision to remove Owls Head from PAPA was made by the Treasury and Policy Board. If the Board acted without jurisdiction, its decision would be a nullity. It is not open to the court to simply deem the decision to have been made by the Minister when the record indicates otherwise.

[64] Before moving on, I note that my decision on this point is consistent with Justice Chipman's finding on a preliminary evidentiary motion in this matter. In dismissing the applicants' motion to supplement the record, Chipman J. rejected the applicants' position that both decisions were made by the Minister:

> [6] In the main the Applicants argue that the Record is incomplete. They submit that it must be expanded to have all of the documents they say were before the Minister when he decided to request de-listing of Owls Head from PAPA and to enter into a LOO with the Intervenor, Lighthouse Links Development Company. At this juncture, I pause to again point out that the Applicants have characterized the decision as one of the Minister; however, based on the totality of the material before me, I have concluded differently. That is to say, I am of the firm view that the material establishes that there were two decisions; one made by the T&PB on March 13, 2019 and the other by the Minister on December 16, 2019.
>
> (*Bancroft v. Nova Scotia (Minister of Lands and Forestry),* 2020 NSSC 370)

The applicants did not appeal Justice Chipman's decision.

Are the decisions justiciable?

[65] The parties disagree on whether the decisions raised by the applicants are justiciable – that is, whether they are reviewable by the court. If the decisions cannot be reviewed, that obviously ends the matter.

[66] The Federal Court of Appeal explained the concept of justiciability in *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4:

> [62] Justiciability, sometimes called the "political questions objection," concerns the appropriateness and ability of a court to deal with an issue before it. Some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government.
>
> [63] Whether the question before the Court is justiciable bears no relation to the source of the government power. …

[67] In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, Rowe J., for the court, described it this way:

> [32] … Justiciability relates to the subject matter of a dispute. The general question is this: Is the issue one that is appropriate for a court to decide?
>
> [33] Lorne M. Sossin defines justiciability as
>
> > a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.
>
> (*Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 7)
>
> Put more simply, "[j]usticiability is about deciding whether to decide a matter in the courts": ibid., at p. 1.
>
> [34] There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. **The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter**: see Sossin, at p. 294. In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and

> that no other administrative or political body has been given prior jurisdiction of the matter by statute" (ibid.).
>
> [Emphasis added]

[68] The Nova Scotia Court of Appeal recently applied *Highwood Congregation* in *Sorenson v. Swinemar*, 2020 NSCA 62, where it concluded that the court had neither the institutional capacity nor the legitimacy to review MAID assessments:

> [62] I will now consider the two factors underlying justiciability—legitimacy and the institutional capacity of the courts.
>
> [63] A court's legitimacy to adjudicate a matter includes a consideration of whether the subject matter advanced for judicial scrutiny has been placed with another decision maker. As I will explain below, it is clear Parliament fully intended, provided it is undertaken in a manner consistent with the law, the determination of MAID eligibility should rest with authorized medical and nursing professionals not with judges. The Province of Nova Scotia has not enacted legislation that contemplates judicial intervention in assessing MAID eligibility. I am also satisfied the institutional capacity of the courts is not well-suited to respond to the time-sensitive nature of challenges advanced in relation to MAID eligibility assessments.

[69] The respondents argue that the court's authority to review Cabinet-level decisions involving matters of public policy is extremely limited, and does not include assessing the reasonableness of those decisions. They say the applicants are asking the court to examine the internal policy-making process of the legislature and to scrutinize the adequacy of its policy decisions regarding the designation of provincial parks or park reserves. The respondents rely on *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, *Dixon v. Canada (Governor in Council)*, [1997] F.C.J. No. 985 (C.A.), and *David Suzuki Foundation v. British Columbia (Attorney General)*, 2004 BCSC 620.

[70] In *Thorne's Hardware*, the appellants sought judicial review of a federal order in council that extended the limits of the Port of Saint John. As a result of the extension, the appellants' water lot was brought within the port limits and their vessels were subjected to substantial harbour tolls. Dickson J. (as he then was), writing for a unanimous court, cautioned that the courts' ability to review a decision of this nature is limited:

> The mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond judicial review... I have no doubt as to the right of the courts to act in the event that statutorily prescribed conditions have not been met and

> where there is therefore fatal jurisdictional defect. Law and jurisdiction are within the ambit of judicial control and the courts are entitled to see that statutory procedures have been properly complied with… Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although, as I have indicated, the possibility of striking down an order in council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action. This is not such a case. (p. 111)

[71] The appellants asked the court to examine and weigh the evidence of the Governor in Council's motives in passing the order in council, and argued that it was passed for an improper purpose (namely, to increase the National Harbour Board's revenues). Justice Dickson declined this invitation, noting that "[i]t is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council": p. 112. He also noted that "governments may be moved by any number of political, economic, social or partisan considerations", and that although there were no reasons for the decision, the evidence indicated that there were other motivating factors, such as the rationalization of maritime activity in the region: pp. 112-113. Justice Dickson ultimately concluded that:

> …the issue of harbour extension was one of economic policy and politics; and not one of jurisdiction or jurisprudence. The Governor in Council quite obviously believed that he had reasonable grounds for passing Order in Council P.C. 1977-2115 extending the boundaries of Saint John Harbour and we cannot enquire into the validity of those beliefs in order to determine the validity of the Order in Council. (p. 115)

[72] The Federal Court of Appeal in *Dixon* relied upon Justice Dickson's reasoning in *Thorne's Hardware*. In *Dixon*, a federal commission investigating certain aspects of a peacekeeping mission to Somalia requested several extensions to the deadline to complete its report. The first two requests were approved by the Governor in Council, who issued orders in council moving the deadline from December 22, 1995, to March 31, 1997. When the commission requested to further extend the deadline to September 30, 1997, however, the Governor in Council issued an order in council pushing the deadline back only until June 30, 1997. The respondent was a former special advisor to the Minister of National Defence who sought standing to participate in the inquiry. The commission refused the respondent's request, citing the truncated deadline as a reason for the denial. The respondent then brought judicial review proceedings to quash the order in council. Although he was successful in the Trial Division, the Court of Appeal set aside that decision, and restored the order in council. In doing so, the Court of Appeal noted:

> 17 It may well be that the refusal of the Governor in Council to extend the life of the Commission for the entire period requested by the Commissioners was motivated by political expediency, but that is simply not the business of the Court. **It is a well-established principle of law and a fundamental tenet of our system of government, in which Parliament and not the Judiciary is supreme, that the courts have no power to review the policy considerations which motivate Cabinet decisions.** Absent a jurisdictional error or a challenge under the Canadian *Charter of Rights and Freedoms*, **where Cabinet acts pursuant to a valid delegation of authority from Parliament, it is accountable only to Parliament and, through Parliament, to the Canadian public, for its decisions.** In other words, the validity of an Order in Council is measured against the statutory conditions precedent to its issuance, and not by its content. Dickson J. (as he then was) made this point clear in *Thorne's Hardware v. The Queen*…
>
> [Emphasis added]

[73] The reasoning in *Thorne's Hardware* was also cited by Justice Hood of the British Columbia Supreme Court in *David Suzuki Foundation*. In that case, the petitioners applied for judicial review of a provincial order in council exempting timber from northwestern British Columbia from an export prohibition. In determining the degree to which the order in-council could be judicially reviewed, Justice Hood reviewed the leading cases and summarized their essential points as follows:

> [119] …in the exercise of a legislative power given to it by statute, the LGIC must stay within the boundary of the enabling statute, both as to empowerment and purpose. It is otherwise free to exercise its statutory power without interference by the Court, except in an egregious case or where there is proof of an absence of *bona fides*. The Court has a jurisdictional supervisory role to determine whether the LGIC acted within its boundary.
>
> [120] Additionally, *Thorne's Hardware*, supra, reminds us that decisions made by the Lieutenant Governor in Council in matters of pure public convenience and general policy, which are not matters of law or jurisdiction, are final and not reviewable by the Court. In order to strike down such an Order in Council there must be remarkable or shocking reasons for doing so. I would suggest that *Roncarelli*, supra, might be an example of this perhaps rare occasion.
>
> [121] The important factor is the subject matter of the decision. Where it involves the consideration of political, economic, social, and other matters so vital to the legislators, but which the Courts are ill-equipped to weigh or consider, the Court must defer to legislators where no error in law or jurisdiction is found…

[74] Justice Hood went on to state, in relation to the leading cases:

> [138] … **None of these cases say that "legislative" orders of the Governor in Council under a statute are immune from review. They do say that if the enabling provision and the purpose of the statute entitles the Governor in Council to do what it did, there is no jurisdictional or other error of law and there is an end to the matter.**
>
> [139] In my view, and with respect, in a sense it was not necessary for Dickson J. to go on to say, at 111 in *Thorne's Hardware*, that "decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings." I say this because he had already set the parameters of the Court's review, being law and jurisdiction. If no legal or jurisdictional error was found that ended the matter. At 115, when he speaks of his purpose in referring to the "several pieces of evidence", what he is saying is that he confirmed that the issue before the Court was not one of jurisdiction or jurisprudence and that ended the matter; although he went on to say what it actually was, matters of economic policy and politics which were not reviewable by the Court.
>
> [140] I think that this interpretation explains what Estey J. was saying in *Inuit*, supra at 758. **While acknowledging that the questions before him were legislative in nature, he did not find it necessary to reiterate the well-known principle that economic policy, politics, and the like are matters solely for consideration by the legislature, not the Courts. He simply focussed on the narrow issue, which was determinative that the Court's only role was to see that the executive did not act outside the terms of the enabling statute.** This principle also brings home the significance of his advice that the Courts should not continue to search for words that will clearly and invariably differentiate between administrative and legislative decisions, because the characterization of the decisions does not really matter when the issue to be decided is whether the Council performed its function within the boundary of the legislative grant and mandate.
>
> [Emphasis added]

[75] After reviewing these authorities, the respondents note at p. 34 of their brief:

> 113. At this juncture, it bears emphasizing that the Minister is a member of Executive Council. Accordingly, the principles governing review of a Cabinet-level decision are also persuasive in the context of a policy-laden exercise of Ministerial discretion. See, for example, the following comments by Sara Blake at page 223 of *Administrative Law in Canada*, 5th ed.:
>
> > Query whether the standard of review analysis should apply at all to the merits of discretionary decisions by elected officials, such as Cabinet or a Minister. Elected officials are accountable to the legislature and, ultimately, to the ballot box. Historically their decisions were reviewable only if they acted outside the terms of the enabling statute or abused their powers. Their motives are not justiciable.

> 114. To summarize, discretionary decisions of policy at the Cabinet or Ministerial level should not be judicially reviewed unless the applicant can point to proof of bad faith or other shocking circumstances (e.g., intentional misfeasance in public office), or unless the decision-maker committed a jurisdictional error by exceeding the bounds of (or failing to comply with) their enabling legislation. The court cannot review the wisdom, merits, or motives of the decision, and must instead defer to the executive branch on these issues.

[76] The applicants say the respondents' authorities are distinguishable because the decisions in those cases were specifically authorized under legislation. For example, in *Thorne's Hardware*, the *National Harbours Board Act,* R.S.C. 1970, c. N-8, authorized the Governor in Council to set the boundaries of the Port of Saint John by way of an order. In *David Suzuki Foundation*, the *Forest Act,* R.S.B.C. 1996, c. 157, authorized the Lieutenant Governor in Council to make an order in council regarding "blanket standing timber exceptions". The applicants say there is no such similar legislative direction to the Executive Council concerning the management of Nova Scotia's Crown lands.

[77] The intervenor, for its part, suggests the decisions are not reviewable at all. It cites *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, where the Ontario Court of Appeal considered an application brought by four individuals and an organization devoted to human rights and equality rights in housing, alleging that actions and inaction on the part of Canada and Ontario have resulted in homelessness and inadequate housing. They argued that the governments had taken an approach that violated their s. 7 and s. 15 rights under the *Charter*. The appellants did not challenge any particular legislation or policy. Instead, they alleged that the social conditions created by the overall approach of the federal and provincial governments violated their rights to adequate housing. The motion judge struck the application on the basis that it disclosed no reasonable cause of action and was not justiciable. The majority of the Court of Appeal, affirming the motion judge, defined justiciability as follows:

> [19] I would uphold the motion judge's conclusion that this application is not justiciable. In essence, the application asserts that Canada and Ontario have given insufficient priority to issues of homelessness and inadequate housing.
>
> [20] As indicated in *Canada (Auditor-General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 at 90-91, "[a]n inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring to other decision making institutions of the polity."

[21] Having analysed the jurisprudence relating to justiciability in Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Carswell, 2012), the author identified several relevant factors, at p. 162:

> Political questions, therefore, must demonstrably be unsuitable for adjudication. These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process. Justiciable questions and political questions lie at opposing ends of a jurisdiction spectrum.
>
> ...
>
> [T]he political nature of a matter raises two related dilemmas for courts. The first is the dilemma of institutional capacity. Courts are designed to make pronouncements of law. Arguably, they accomplish this goal more effectively and efficiently than any other institution could. Where the heart of a dispute is political rather than legal, however, courts may have no particular advantage over other institutions in their expertise, and may well be less effective and efficient than other branches of government in resolving such controversies, as the judiciary is neither representative of the political spectrum, nor democratically accountable.

[78] The majority went on to note:

> [33] Finally, there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. **This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review.** Here the court is not asked to engage in a "court-like" function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy.
>
> [34] Were the court to confine its remedy to a bare declaration that a government was required to develop a housing policy, that would be so devoid of content as to be effectively meaningless. To embark, as asked, on judicial supervision of the adequacy of housing policy developed by Canada and Ontario takes the court well beyond the limits of its institutional capacity. All agree that housing policy is enormously complex. It is influenced by matters as diverse as zoning bylaws, interest rates, procedures governing landlord and tenant matters, income tax treatment of rental housing, not to mention the involvement of the private sector and the state of the economy generally. Nor can housing policy be treated monolithically. The needs of aboriginal communities, northern regions, and urban centres are all different, across the country.
>
> [35] I add that complexity alone, sensitivity of political issues, the potential for significant ramifications flowing from a court decision and a preference that

> legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability: see, for example, *Chaoulli*, at para. 107. Again, the issue is one of institutional competence. **The question is whether there is a sufficient legal component to anchor the analysis.**
>
> [Emphasis added]

[79] I will start with *Tanudjaja*, which is clearly distinguishable from the present case. In *Tanudjaja*, the appellants did not challenge any specific legislation or policy. Instead, they asserted that the federal and provincial governments had given insufficient priority to issues of homelessness and inadequate housing. The matters raised were not capable of resolution through the application of law. In the present case, the applicants have challenged two specific decisions. They say that both decisions were procedurally unfair and substantively unreasonable. In addition, in *Hupacasath First Nation*, the Federal Court of Appeal noted that truly non-justiciable cases are very rare:

> [67] These cases show that the category of non-justiciable cases is very small. **Even in judicial reviews of subordinate legislation motivated by economic considerations and other difficult public interest concerns, courts will still assess the acceptability and defensibility of government decision-making, often granting the decision-maker a very large margin of appreciation.** For that reason, it is often said that in such cases an applicant must establish an "egregious" case: see, e.g., ***Thorne's Hardware v. Canada***, [1983] 1 S.C.R. 106 at page 111, 143 D.L.R. (3d) 577; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 at paragraph 28. **But the matter is still justiciable.**
>
> [Emphasis added]

[80] The cases referred to by the respondents, *Thorne's Hardware*, *Dixon*, and *David Suzuki Foundation*, held that the court has no power to review the policy considerations which motivate Cabinet decisions. The court's review is limited to issues of law and jurisdiction. Again, in *Thorne's Hardware*, Dickson J. wrote at p. 111:

> I have no doubt as to the right of the courts to act in the event that statutorily prescribed conditions have not been met and where there is therefore fatal jurisdictional defect. Law and jurisdiction are within the ambit of judicial control and the courts are entitled to see that statutory procedures have been properly complied with…

[81] Likewise, in *Suzuki*, Justice Hood noted at para. 119:

> [119] …in the exercise of a legislative power given to it by statute, **the LGIC must stay within the boundary of the enabling statute, both as to empowerment and purpose.** It is otherwise free to exercise its statutory power without interference by the Court, except in an egregious case or where there is proof of an absence of *bona fides*. **The Court has a jurisdictional supervisory role to determine whether the LGIC acted within its boundary.**
>
> [Emphasis added]

[82] In my view, the scope of review prescribed by these decisions is consistent with more recent case law on judicial review and the reasonableness standard. The rule of law dictates that "all exercises of public authority must find their source in law", and that "[a]ll decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution": *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 28. Judicial review is the means by which the courts ensure that statutory decision-makers act within the boundaries of their legal authority, which includes exercising that authority reasonably.

[83] In *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, McLachlin C.J., for the court, rejected the distinction drawn in *Thorne's Hardware* between policy and legality and held that delegated legislation is in fact subject to review for reasonableness:

> [14] Against this general background, I come to the issue before us -- the substantive judicial review of municipal taxation bylaws. **In *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at p. 115, the Court, referring to delegated legislation, drew a distinction between policy and legality, with the former being unreviewable by the courts:**
>
> > The Governor in Council quite obviously believed that he had reasonable grounds for passing Order in Council P.C. 1977-2115 extending the boundaries of Saint John Harbour and we cannot enquire into the validity of those beliefs in order to determine the validity of the Order in Council.
>
> (See also pp. 111-13) **However, this attempt to maintain a clear distinction between policy and legality has not prevailed. In passing delegated legislation, a municipality must make policy choices that fall reasonably within the scope of the authority the legislature has granted it.** Indeed, the parties now agree that the tax bylaw at issue is not exempt from substantive review in this sense.
>
> [Emphasis added]

[84] Chief Justice McLachlin continued:

[15] Unlike Parliament and provincial legislatures which possess inherent legislative power, regulatory bodies can exercise only those legislative powers that were delegated to them by the legislature. Their discretion is not unfettered. **The rule of law insists on judicial review to ensure that delegated legislation complies with the rationale and purview of the statutory scheme under which it is adopted. The delegating legislator is presumed to intend that the authority be exercised in a reasonable manner.** Numerous cases have accepted that courts can review the substance of bylaws to ensure the lawful exercise of the power conferred on municipal councils and other regulatory bodies …

[16] This brings us to the standard of review to be applied. The parties agree that the reasonableness standard applies in this case. The question is whether the bylaw at issue is reasonable having regard to process and whether it falls within a range of possible reasonable outcomes (*Dunsmuir*, at para. 47).

[17] Where the parties differ is on what the standard of reasonableness requires in the context of this case. This is the nub of the dispute before us.

…

[18] **The answer lies in *Dunsmuir*'s recognition that reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry** (*Dunsmuir*, at para. 64). As stated in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59, per Binnie J., "[r]easonableness is a single standard that takes its colour from the context." **The fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation. The scope of a body's decision-making power is determined by the type of case at hand.** For this reason, it is useful to look at how courts have approached this type of decision in the past (*Dunsmuir*, at paras. 54 and 57). To put it in terms of this case, we should ask how courts reviewing municipal bylaws pre-*Dunsmuir* have proceeded. This approach does not contradict the fact that the ultimate question is whether the decision falls within a range of reasonable outcomes. It simply recognizes that reasonableness depends on the context.

[19] The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. **Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature.** Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. "Municipal governments are democratic institutions", per LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 33. **In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.**

> [20] **The decided cases support the view of the trial judge that, historically, courts have refused to overturn municipal bylaws unless they were found to be "aberrant", "overwhelming", or if "no reasonable body" could have adopted them (para. 80, per Voith J.).** …
>
> [21] This deferential approach to judicial review of municipal bylaws has been in place for over a century. …
>
> [Emphasis added]

[85] The Chief Justice rejected the appellant's position that *Dunsmuir* changed the law, displacing the traditional deference owed by the court when reviewing municipal by laws:

> [22] **Catalyst argues that *Dunsmuir* has changed the law and that the traditional deferential approach to the review of municipal bylaws no longer holds.** The bylaw, it argues, must be demonstrably reasonable, having regard to objective criteria relating to taxation. The reasonableness standard in *Dunsmuir*, it says, means that all municipal decisions, including bylaws, must meet the test of demonstrable rationality in terms of process and outcome. …
>
> [23] This argument misreads *Dunsmuir*. As discussed above, *Dunsmuir* described reasonableness as a flexible deferential standard that varies with the context and the nature of the impugned administrative act. In doing so, *Dunsmuir* expressly stated that **the approaches to review developed in particular contexts in previous cases continue to be relevant** (*Dunsmuir*, at paras. 54 and 57). Here the context is the adoption of municipal bylaws. The cases dealing with review of such bylaws relied on by the trial judge and discussed above continue to be relevant and applicable. **To put it succinctly, they point the way to what is reasonable in the particular context of bylaws passed by democratically elected municipal councils.**
>
> [24] **It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.**
>
> [25] Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw.
>
> [Emphasis added]

[86] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court of Canada reiterated that the context and nature of the act or decision will establish what will be reasonable for the decision maker to decide. Chief Justice Wagner, for the majority, wrote:

> [82] Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law …
>
> …
>
> [88] In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. **Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of "high policy" on the one hand and "pure law" on the other.** Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.
>
> [89] Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. **Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case**. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context" …
>
> [90] The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that **what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt.** The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.
>
> [Emphasis added]

[87] In my view, the authorities relied on by the respondents do not prohibit the court from reviewing the reasonableness of the Treasury and Policy Board's decision. Instead, these cases, like the authorities dealing with municipal by-laws

discussed in *Catalyst*, point the way to what is reasonable in the context of a decision by a Cabinet committee given wide discretion to make and implement government policies. I find that the reasonableness of the Treasury and Policy Board's decision is a justiciable issue.

[88] With respect to the Minister's decision to enter into the LOO, however, I find that it is not justiciable for another reason – it is not a final decision to sell the Owls Head Crown lands. In other words, the matter is not "ripe" for judicial determination:

> Ripeness is a doctrine of justiciability concerned with the timing and presentation of a dispute. Absent exceptional circumstances, courts will assume jurisdiction of a matter only when it becomes "ripe" for judicial determination, in the sense that there is a live controversy, with a sufficient factual foundation, and no other prior, procedural avenues to exhaust. While Canadian courts have sometimes used this term in the context of premature appeals, its most common usage refers to the prematurity or hypothetical nature of an action, application or matter.
>
> *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2012) at p. 32.

[89] In *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 2020), Donald M. Brown and John M. Evans state at pp. 3-59 and 3-60:

> …the court has a discretion as to whether to undertake review before the administrative process has been completed. In those circumstances, the pivotal consideration for a court is the need to avoid fragmenting the administrative process and encouraging piecemeal resort to the courts. Furthermore, if the court declines to grant relief until the final administrative decision has been rendered, there may be no dispute left to resolve.
>
> And third, courts not generally defer a determination of an allegation that an administrative decision-maker has no jurisdiction over a matter or has breached the duty of fairness until the administrative process is complete. Not only does this avoid fragmentation of the issues and possibly unnecessary litigation, but it also permits the reviewing court to have the benefit of a complete record and, through the tribunal's reasons for decision, its expertise….

[90] To similar effect, in *C.B. Powell Ltd. v. Canada (Border Services Agency)*, [2010] F.C.J. No. 274 (C.A.), Stratas J.A., for the court, wrote:

> 30 The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted…
>
> 31 Administrative law judgements and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the

> doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. **All of these express the same concept: absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court.** Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> 32 This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway… Further, **only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience**… Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge…
>
> 33 Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception… Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high… Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. **Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted**… …the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to the courts.
>
> [Emphasis added]

[91] The LOO is subject to numerous conditions, including the completion of an Integrated Resource Management Review by the Department of Lands and Forestry, the completion of public engagement by the proponent to the satisfaction of the Department, and approval of the sale by Executive Council. At this point, whether Owls Head is ultimately sold to Lighthouse Links depends on future events. It is a

matter of speculation. For this reason, the Minister's decision to enter into the LOO is not reviewable on either substantive *or* procedural grounds.

[92] The applicants' procedural challenge to the Treasury and Policy Board's decision, however, does raise a justiciable issue. The applicants acknowledge that their success on procedural fairness grounds depends on this court being the first in Canada to recognize the existence of the "public trust doctrine" at common law. The public trust doctrine, an established legal principle in American environmental law, posits that the state holds certain "public trust resources" in trust for the benefit of the public and for the public use.

[93] In *La Rose v. Canada*, 2020 FC 1008, Manson J. of the Federal Court held that the existence of the public trust doctrine at common law or as an unwritten constitutional principle is a justiciable issue:

> [58] The existence of the public trust doctrine at common law or as an unwritten constitutional principle is clearly a legal question, which the Courts can resolve. This question does not engage the same considerations in relation to the constitutional demarcation of powers and there is no policy or political context or component to the claim. The novelty of the doctrine is not a bar to its justiciability. The real question in relation to this particular claim is whether such a doctrine discloses a reasonable cause of action or has a reasonable prospect of success.

[94] Accordingly, I find that the applicants have raised the following justiciable issues:

- Did the Treasury and Policy Board owe a duty of fairness to the applicants by virtue of the public trust doctrine?
- Was the Treasury and Policy Board's decision to remove the Owls Head Crown lands from the PAPA reasonable?

Before I consider whether the applicants have standing to brings these issues before the court, I will address whether the Treasury and Policy Board decision raises a jurisdictional issue.

Jurisdiction

[95] In their efforts to establish that the respondents' authorities on justiciability were distinguishable, the applicants relied on *Greenisle Environmental Inc. v. Prince*

Edward Island, 2005 PESCTD 33, which they said is analogous to the present case. In *Greenisle Environmental*, the applicant sought judicial review of a decision of the Executive Council to impose a one-year moratorium on the approval of construction and demolition (C&D) debris disposal sites. In February 2003, the applicant applied to the Department of Fisheries, Aquaculture and Environment for a permit to develop and operate a C&D site. The applicant and the Department worked through the application process, which the court described at para. 5 as "a very substantial endeavour", for the next year, with the applicant responding to all of the Department's concerns.

[96] In January 2004, local residents expressed concerns about the site at an open house held by the applicant at the Department's request. On March 2, 2004, the Department provided the applicant with a letter outlining the issues and comments of the residents for the applicant's response. The next day, Executive Council imposed a moratorium on the approval of additional C&D debris disposal sites for up to one year, effectively immediately. The Minister of Environment and Energy announced the moratorium in a news release.

[97] In its application for judicial review, the applicant argued, among other things, that the decision made by Executive Council imposing the moratorium was made without statutory authority. The government argued that that both the Lieutenant Governor in Council and the Minister had the authority to implement the moratorium pursuant to the *Environmental Protection Act*, R.S.P.E.I. 1998, c. E-9 (EPA), and the *Executive Council Act*, R.S.P.E.I. 1988, Cap. E-12. The EPA authorized the Lieutenant Governor in Council to compose and appoint an Environmental Advisory Council; and to enact regulations under the Act, for the Minister to administer. In 2002, the Lieutenant Governor in Council, on advice of the Minister, enacted the *Waste Resource Management Regulations*, EC691/00. The regulations governing the operation and construction of C&D disposal sites came into effect on January 1, 2002. Those regulations outline the application process for approval to construct or operate a C&D disposal site. The Minister is responsible for all aspects of the approval process.

[98] The *Executive Council Act* provides for the creation of an Executive Council, and makes the Executive Council responsible for the executive government of the province and the departments of government. Its provisions state:

> 1. There shall be an Executive Council of the province consisting of the Composition of Premier, who may be President of the Executive Council, and

> not less than seven or more than ten other persons appointed by the Lieutenant Governor on the advice of the Premier. 1980, c. 1, s. 1; 1986, c. 1, s. 1.
>
> …
>
> 3. The Executive Council is responsible for the executive government of the province and the several departments thereof as set out in the *Public Departments Act* R.S.P.E.I. 1988, Cap. P-29. 1980, c. 1, s. 3.

[99] After reviewing the legislation, the court held that the Executive Council had no authority to impose the moratorium:

> [31] The Decision is stated on its face to be a decision of Executive Council. It states: "Cabinet imposed a moratorium of up to one year, effective immediately ... The Department of Environment and Energy is requested to announce the moratorium ..." **Upon consideration of the Decision, in context of the applicable legislation, and the respective roles and relationship of Executive Council and the Minister in the executive function of the Government, I conclude that the Decision is an act that is not an act pursuant to authority conferred by an enactment, and as a matter of law, the Decision is a nullity.**
>
> [32] The Decision imposes a moratorium on operation of the Waste Resource Management Regulations, in particular, on the approval and approval process for C&D construction sites. **The decision directly affects the administration of the EPA; it overrides and precludes administration of the EPA regarding C&D site approvals.** The enabling statute, the EPA, was created by the Legislature. The Legislature conferred upon the Minister a broad mandate of administration. By Section 3 the Legislature authorized the Minister to take such action as he considers necessary in order to manage, protect or enhance the environment, and conferred upon the Minister exclusive control over the preservation of the environment within the jurisdiction of the Province. The Legislature did not overlook the Lieutenant Governor in Council - it conferred upon Executive Council specific and limited authority (i) executive authority to appoint and constitute an environmental advisory council; and (ii) legislative authority to make regulations, including the Regulations. That enumerates the extent of the authority conferred by the Legislature on Executive Council by the Act.
>
> [33] Executive Council Decision D-2004-108 is not a regulation, and it does not purport to be a regulation. There is no provision in the EPA that confers authority on the Lieutenant Governor in Council to enact a moratorium, or to take executive action to override and suspend operation of the Regulations by stopping the Minister and the Minister's Delegate from performing their due administration of the Act.
>
> [34] **The moratorium purports to impose a suspension on the operation of an application and approval process that validly operated pursuant to legislative authority. The Decision infringes upon the jurisdiction of the Minister and the**

> **Minister's Delegate that was duly conferred upon them by legislation and authorized appointment. It contradicts the express grant of authority made by the Legislature. It is clearly outside the limited power intended by the Legislature to be conferred upon the Lieutenant Governor in Council.**
>
> [Emphasis added]

[100] Justice Jenkins continued at para. 38:

> All citizens are subject to the law, and no statutory delegate can exercise state power without legislative authorization. In my respectful opinion, the Government's submission does not respect the fact that it is the Minister, not Executive Council, upon whom the Legislature has delegated the exclusive power to administer the Act. When Executive Council made the Decision, it was acting in an executive capacity. Although it has responsibility for the executive government of the Province, Executive Council has no legislative authority to carry out the particular executive act represented by the Decision.

[101] The applicants' reliance on *Greenisle Environmental* is puzzling. They have not pleaded nor argued that the Treasury and Policy Board's decision was made without jurisdiction. Even if they had so pleaded, *Greenisle Environmental* is clearly distinguishable. In that case, statutory authority over the approval process for C&D disposal sites rested exclusively with the Minister. The moratorium enacted by Executive Council intruded upon the Minister's jurisdiction, effectively precluding him from administering the Act and the regulations with respect to C&D disposal sites. The statutes that govern the present case, however, give no such exclusive authority to the Minister to either sell Crown lands or to determine which Crown lands should be designated as provincial parks or park reserves.

[102] The *Crown Lands Act* gives the Minister the following powers:

> 5 The Minister has supervision, direction and control of
>
> (a) the acquisition, registration, survey and sale or disposition of Crown lands; and
>
> (b) the administration, utilization, protection and management of Crown lands, including
>
> (i) access to and travel on Crown lands,
>
> (ii) habitats for the maintenance and protection of wildlife on Crown lands,
>
> (iii) harvesting and the renewal of timber resources on Crown lands,
>
> (iv) forest recreation on Crown lands, and

> (v) matters that may be assigned pursuant to this Act and the regulations,
>
> but not including land owned or claimed by the Province specifically under the jurisdiction of another member of the Executive Council or a department, branch or agency of the Government other than the Department.

[103] Section 16(1)(a) clarifies, however, that the Minister may not dispose of Crown lands or any interest in Crown lands without approval of the Governor in Council (that is, the Lieutenant Governor acting by and with the advice of the Executive Council):

> 16 (1) With the approval of the Governor in Council, the Minister may
>
> (a) issue a grant, deed, lease, licence or other conveyance for the disposition of Crown lands or any interest in Crown lands; …

[104] Nor are the Minister's powers in relation to the designation of Crown lands as parks or park reserves as far-reaching as the applicants suggest. The Minister's powers under the *Provincial Parks Act* are set out at s. 5 and s. 13:

> 5 The Minister, **with the approval of the Governor in Council,** may
>
> (a) acquire by purchase or gift, expropriate or otherwise acquire title to land, whether or not covered by water, or an interest in land for the purpose of a provincial park;
>
> (b) exchange Crown land for privately owned land for the purpose of a provincial park;
>
> (c) acquire an easement or right of way across privately owned land to gain access to or provide an exit from a provincial park; or
>
> (d) accept the transfer of the administration and control of land from the Government of Canada or an agency thereof.
>
> …
>
> 13 The Minister, or any person designated to act on behalf of the Minister in respect of a provincial park, may
>
> (a) co-ordinate and implement provincial park policies and programs in co-operation with federal, provincial or municipal governments or agencies thereof or other persons;
>
> (b) construct and operate buildings and facilities for the convenience of the public and necessary for the purposes of a provincial park;
>
> (c) construct and operate food concessions and other facilities for the convenience of the public;

> (d) construct and operate buildings, compounds and other facilities for the public display of exhibits;
>
> (e) construct, renovate, restore, repair and improve any building, structure or site in order to preserve its historical significance;
>
> (f) construct and operate recreation facilities that the Minister considers necessary for the convenience or benefit of the public;
>
> (g) prescribe the use to be made of a provincial park by erecting, posting or otherwise displaying notices and signs;
>
> (h) initiate conferences and meetings respecting provincial parks;
>
> (i) declare the dates in any year when a provincial park is opened and closed to the public;
>
> (j) dispose of flora or fauna in a provincial park;
>
> (k) issue permits for scientific, historic and educational research within a provincial park;
>
> (l) take such measures as the Minister deems necessary to protect flora and fauna within a provincial park;
>
> (m) prepare a management plan to guide the long-term development and operation of a provincial park;
>
> (n) prohibit or regulate the cutting and removal of forest products in a provincial park;
>
> (o) undertake matters that may be assigned to the Minister pursuant to this Act and the regulations.
>
> [Emphasis added]

[105] It is the Governor in Council, not the Minister, which has the power to set aside and reserve Crown land as a park reserve:

> 6 (1) The Governor in Council may set aside and reserve Crown land as park reserve for the purpose of protecting those lands that have the potential to be a provincial park.

[106] Once lands are set aside and reserved by the Governor in Council, the Minister "may develop programs and policies deemed necessary to control and develop a park reserve": 6(2).

[107] Likewise, it is the Governor in Council which has the power to designate Crown land as a provincial park or terminate the status of a provincial park:

> 8 The Governor in Council may

> (a) designate land owned, leased or otherwise acquired by Her Majesty in right of the Province as a provincial park and make such regulations as may be necessary for the control thereof;
>
> (b) increase or decrease the size of a provincial park;
>
> (c) terminate the status of a provincial park or any part thereof;
>
> (d) declare the name by which a provincial park is to be known.

[108] The Governor in Council also has the power to terminate the status of park reserves. The *Provincial Parks Regulations*, N.S. Reg. 69/89, state at s. 4(2):

> (a) Pursuant to Section 6 of the Act, a "park reserve" is an area of Crown land set aside and reserved by the Governor in Council for the purpose of protecting those lands which have potential as a park.
>
> (b) The provisions of the Act and these regulations shall be applicable to a park reserve as if it were a park.

The effect of s. 4(2)(b) is that although s. 8(c) of the Act refers only to the Governor in Council's power to terminate the status of a provincial park, the provision applies equally to park reserves.

[109] Accordingly, under the *Crown Lands Act*, control over the sale of Crown lands is shared by the Minister and the Lieutenant Governor acting by and with the advice of the Executive Council. Under the *Provincial Parks Act*, control over the designation of Crown lands as provincial parks and park reserves rests exclusively with the Governor in Council. As such, the Minister's jurisdiction was unaffected by the Treasury and Policy Board's decision.

[110] But what about the Governor in Council's jurisdiction? Although the applicants did not challenge the Treasury and Policy Board's decision on jurisdictional grounds, the purpose of an application for judicial review is to determine whether a statutory decision-maker has acted within the boundaries of its legal authority. As the Supreme Court of Canada noted in *Vavilov*, in administrative law, the concept of jurisdiction is "inherently 'slippery' … because in theory, any challenge to an administrative decision can be characterized as 'jurisdictional' in the sense that it calls into question whether the decision maker had the authority to act as it did": para. 66. The Supreme Court acknowledged that "there are no 'clear markers' to distinguish questions of jurisdiction from other questions related to the interpretation of an administrative decision maker's enabling statute": para. 66. With this in mind, I raised the issue with the parties after the hearing and asked for their

supplemental submissions. After considering their responses, I am satisfied that there is no jurisdictional issue for the following reasons.

[111] The Treasury and Policy Board is a committee of the Executive Council that was established on December 12, 2013, as part of a series of amendments to the *Public Service Act*, R.S.N.S. 1989, c. 376. Prior to these amendments, ss. 9-12 of the PSA established three committees: the Treasury Board, charged with ensuring that plans and policies for the operation of government were implemented in a coordinated and fiscally responsible manner; the Policies and Priorities Committee, charged with establishing such plans and policies and ensuring that they were developed in a coordinated manner; and the Economic Investment Committee, charged with ensuring that decisions respecting any provincial investment aligned with the government's economic development strategies and priorities.

[112] On December 12, 2013, the Lieutenant Governor gave royal assent to *An Act to Amend Chapter 155 of the Revised Statutes, 1989, the Executive Council Act, and Chapter 376 of the Revised Statutes, 1989, the Public Service Act*, S.N.S. 2013, c. 37. The effect of this statute was to merge the functions and powers of the Treasury Board, the Policy and Priorities Committee, and the Economic Investment Committee into a single committee of Executive Council, known as the Treasury and Policy Board.

[113] The Treasury and Policy Board is composed of a chair and not fewer than four other members of the Executive Council (s. 9(2)). Section 10(2) grants broad authority to the Board to develop and implement government policy, as a committee (or delegate) of Executive Council:

> 10(2) The Treasury and Policy Board is charged to establish plans and policies for the operation of the Government of the Province, ensuring that the plans and policies are developed and implemented in a co-ordinated and fiscally responsible manner, and, without limiting the generality of the foregoing, is charged with all matters relating to
>
> > (a) the development and implementation of policies, plans and strategies for the effective administration and operation of government;
> >
> > (aa) the identification and prioritization of policy issues, selection of policy initiatives and direction of action on policy issues and initiatives;
> >
> > …
> >
> > (ad) ensuring that decisions respecting any Provincial investment align with the economic development strategies and priorities of the Government of the Province;

> (ae) ensuring alignment between the fiscal and policy agendas of the Government of the Province; …

[114] The PAPA is a policy document prepared by the Minister of Lands and Forestry and the Minister of Environment. Although it was approved by Executive Council, there was no associated order in council. The PAPA is, in effect, a roadmap or plan for how the Province intends to exercise its discretion under the *Provincial Parks Act* and other land protection statutes to fulfill its goal under the EGSPA to protect 12% of Nova Scotia's land mass. The PAPA is not a regulation, and it has no binding legal status or effect. The applicants could not, for example, rely on the PAPA to obtain an order for *mandamus* to compel the government to legally protect any of the lands it said it would designate as provincial parks or park reserves by 2015 or 2020, but which have not yet been protected. If such a remedy was available, the applicants would surely have filed an application to obtain it. To sum up, the PAPA is a statement of policy to help guide (but not fetter) the Province's decision making in respect of land protection.

[115] The issue before the Treasury and Policy Board in the MEC was not whether to sell the Owls Head Crown lands, nor was it whether to remove Owls Head's status as a provincial park or park reserve – because, as everyone now realizes, it had never been designated as either. The narrow issue put before the Board in the MEC was "whether to withdraw Crown lands identified for potential protection under the PAPA". While not an entirely accurate description of the situation – Owls Head was identified as an existing provincial park and therefore already protected – the Treasury and Policy Board appears to have considered the issue as framed in the MEC.

[116] Unlike the decision in *Greenisle Environmental*, the Treasury and Policy Board's decision to amend a statement of government policy did not intrude upon the Governor in Council's jurisdiction under either the *Crown Lands Act* or the *Provincial Parks Act*. While removal of Owls Head from the PAPA was deemed by the Province to be a necessary precondition to further consideration of a potential sale to Lighthouse Links under the *Crown Lands Act*, the Board's decision did not determine whether the sale would proceed. That decision will eventually be made by the Governor in Council. Nor did the Board make a decision on whether Owls Head would ever be designated as a provincial park or a park reserve. Satisfaction of the terms and conditions in the LOO does not, in and of itself, require the Province to sell Owls Head to Lighthouse Links. If the Governor in Council decides not to approve a sale, it retains the authority under the *Provincial Parks Act* to formally

designate Owls Head as a provincial park or a park reserve, if it so chooses. Whether that is likely to occur is not the question. The fact remains that the range of options available to the Governor in Council was not fettered or limited by the Treasury and Policy Board's decision.

[117] I will now consider the issue of standing.

Standing

[118] In *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2012), at p. 257, Lorne Sossin explains the distinction between justiciability and standing:

> Standing addresses the question of who is entitled to bring proceedings to a court. Those parties directly affected by an impugned action or law are generally entitled to standing. Canadian courts have also expanded the availability of discretionary public interest standing. Part of the test which public interest litigants must satisfy is that the claim they seek to advance is a justiciable one. Thus, once a party is granted public interest standing, the subject matter of its claim must also have been held to be justiciable.

[119] The applicants concede that they are not directly affected by the Treasury and Policy Board's decision to remove Owls Head from the PAPA, but say they are entitled to public interest standing.

[120] Public interest standing is concerned with "maintaining the rule of law", as Bryson J.A. wrote for the court in *Canadian Elevator Industry Education Program (Trustees of) v Nova Scotia (Elevators and Lifts Act)*, 2016 NSCA 80, at para. 13. He cited *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138, where the majority said, at 145, that "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."

[121] In *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, Cromwell J., for the court, provided a concise statement of the law of public interest standing:

> [1] This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had

> in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.
>
> [2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court*: Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

[122] Justice Cromwell said the three factors should not be assessed like a checklist, but rather seen as “interrelated considerations to be weighed cumulatively... in light of their purposes”: para 36. The factors should be “applied purposively and flexibly”: para 37.

[123] The first factor is whether the case raises a “serious justiciable issue”. Justice Cromwell described a serious issue as follows:

> [42] To constitute a “serious issue”, the question raised must be a “substantial constitutional issue” … or an “important one” … . The claim must be “far from frivolous” … , although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel’s*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a “foregone conclusion” (p. 690). Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question.

[124] In *Galati v. Canada (Governor General)*, 2015 FC 91, the Federal Court, after quoting the above paragraph from *Downtown Eastside*, wrote:

> 25 Thus, on a preliminary examination of the merits of the case, the claim must be so unlikely to succeed that its outcome is a "'foregone conclusion'". Reservations

> as to the merits, or the existence of countervailing authority, is not determinative.
> …

[125] In *Judicial Review of Administrative Action in Canada*, Vol. 2, the authors discuss the "serious issue" requirement at 4:3550:

> Because of the limits to judicial and other public resources, where private rights are not at stake, courts have required that the issue in dispute not only be justiciable, but also that it be "serious." This concept has two aspects to it. First, the judicial review proceeding must have some prospect of succeeding on the merits, a requirement that is typically readily met, and not be premature. Second, the issue must also be "serious" in the sense that it must be of some public importance.

[126] The applicants say they have met the serious issue requirement, writing at p. 18 of their brief:

> Furthermore, the Applicants submit that the clandestine delisting of a Provincial Park, known to contain endangered and other species of interest as well as globally rare plant communities, in order to execute a Letter of Offer to sell the Park to a private resort and golf course developer, is an inherently serious issue.

[127] As noted earlier, the respondents and the intervenor say the applicants have failed to raise any justiciable issues, serious or otherwise. The intervenor goes on, however, to argue that even if the issues are justiciable, they are not serious. The intervenor cites *Lynn v. Nova Scotia (Lands and Forestry)*, 2020 NSSC 307, where Smith J. held that a challenge to the reasonableness of a Minister's decision made within the Minister's home statute did not raise the kind of serious issues required for public interest standing:

> [104] The issue before the Court is justiciable. But is it also serious? The Supreme Court has said that to be serious, the question raised must be a "substantial constitutional issue" or "important."
>
> [105] The challenge here is to a Minister's decision. The decision was made within the Minister's home statutes and any challenge to that decision would be based on whether the decision was made within a range of reasonable outcomes.
>
> [106] The question(s) raised by the Applicants on judicial review do not rise to a level of seriousness as described by the Supreme Court in *Downtown Eastside*.
>
> [107] In this case, the challenge arises solely over the Minister's decision to not require the Chisholms to obtain a permit or comply with any applicable regulations to undergo the rock wall work they had carried out in the Spring of 2020. This is

> not a public interest challenge and the Applicants and Ms. Skerrett do not meet the test.

[128] *Lynn* involved a Ministerial decision about permit requirements for work being done on private land. Justice Smith held that it was not a matter of public interest. That is not the situation here. This case involves a decision to remove Crown lands that are home to several endangered species and a globally rare plant ecosystem, and that have been managed as a park more than 40 years, from the PAPA, for the purpose of a potential sale to a developer. By contrast to the situation in *Lynn*, this is a decision that, to one degree or another, affects all residents of the province to some degree. As the PAPA itself acknowledges, "[p]arks and protected areas play an important role in conserving Nova Scotia's biodiversity and protecting our access to clean air and water": p. 3. In my view, whether the Province owes the public a duty of fairness when it makes decisions about lands that it has previously identified as having conservation value is an important issue that does not appear to have been previously judicially considered. Whether the Treasury and Policy Board's decision was reasonable is also an important issue. Although the merits of the applicants' positions might not survive a more fulsome review, the claims are far from frivolous.

[129] Moving on to the "genuine interest" factor, the authors of *Judicial Review of Administrative Action in Canada*, Vol. 2, state at §4:324:

> The requirement that an applicant for standing have a "genuine interest" is less stringent than the requirement that an individual be a "person aggrieved" or have a "personal interest" in the matter. In a negative sense, this requirement screens out so-called "busybodies" who persist notwithstanding the cost of litigation and the potential risk of being responsible for costs if an application is dismissed. However, on the positive side, **the test may "screen in" those whose "interest" takes the form of an ideological commitment to the subject matter of the litigation, for example, the welfare of refugees, civil liberties, the issuance of export permits for controlled goods, or the protection of the environment.**
>
> **In other words, the "genuine interest" requirement serves to identify individuals and groups who are likely to have something of value to contribute to the judicial decision-making process as a result of their personal experience, or the fact that they, along with others, may be affected by the decision, or out of their record of active concern and expertise.** Of course, a person who satisfies the "genuine interest" test may nevertheless be denied standing on the ground that one of the other requirements is not met.
>
> [Emphasis added]

[130] I find that the applicants clearly have a genuine interest in the outcome of the proceeding. Both applicants have demonstrated an ongoing dedication to the protection and preservation of ecologically important lands and have participated in public consultation processes regarding the selection and designation of parks and protected areas in Nova Scotia. They are not the "busybody" litigants intended to be weeded out by the genuine interest requirement.

[131] The third factor requires the court to consider whether the proposed suit is a reasonable and effective means to bring the case to court. It is not necessary that it be the *only* reasonable and effective means for the case to be heard. In *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, McLachlin C.J. and Karakatsanis J., writing for the majority, stated:

> [43] The courts below did not have the benefit of this Court's decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524. **In that case, the Court rejected a strict approach to the third requirement for standing. The presence of other claimants does not necessarily preclude public interest standing; the question is whether this litigation is a reasonable and effective means to bring a challenge to court.** The requirements for public interest standing should be addressed in a flexible and generous manner, and considered in light of the underlying purposes of setting limits on who has standing to bring an action before a court. **Even if there are other plaintiffs with a direct interest in the issue, a court may consider whether the public interest plaintiff will bring any particularly useful or distinct perspective to the resolution of the issue at hand.**
>
> [Emphasis added]

[132] There is no evidence of any individuals or groups who have been directly affected by the decision and who could potentially seek judicial review. As such, the matter could only be heard if it was brought forward by public interest litigants like the applicants.

[133] Applying the three factors purposively and flexibly, I would grant public interest standing to the applicants.

Procedural fairness and the public trust doctrine

[134] The applicants concede that Canadian law does not yet recognize any duty of procedural fairness owed by the government to the public in relation to decisions about Crown lands with recognized conservation values. They submit, however, that

the Supreme Court of Canada, opened the door to a Canadian public trust doctrine in *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38 (*Canfor*). The public trust doctrine, once recognized, would entitle the public, as beneficiaries of the trust, to procedural fairness with respect to decisions about the status of those Crown lands.

[135] In *Canfor*, Canadian Forest Products Limited negligently caused a forest fire which resulted in environmental damage to Crown lands. The Crown sued in its capacity as the property owner of the forest and a representative of the people of British Columbia:

> 9 The Crown in right of British Columbia says it sues not only in its capacity as property owner but as the representative of the people of British Columbia, for whom the Crown seeks to maintain an unspoiled environment. Thus the claim for an environmental premium is made "in recognition of the fact that it [the Crown], and the public on whose behalf it owned the Protected Trees, valued them more highly as part of a protected ecosystem". The Crown frames the issue on appeal as the valuation of tort damages for a "publicly owned resource", and makes reference to the "worth to society" of the trees in their protected state. The Crown states that "[f]air compensation also requires that wrongdoers pay the public for damaging their ecosystems." In thus framing its claims, the Crown invokes its role as *parens patriae*.

[136] In considering whether the Crown could sue as a representative of the public to enforce the public interest in an unspoiled environment, Binnie J., writing for the majority, traced the history of the public trust doctrine at common law:

> 74 The notion that there are public rights in the environment that reside in the Crown has deep roots in the common law: see, e.g., J. C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized" (1997), 7 J.E.L.P. 1. Indeed, the notion of "public rights" existed in Roman law:
>
> > By the law of nature these things are common to mankind — the air, running water, the sea . . . .
> >
> > (T. C. Sandars, *The Institutes of Justinian* (1876), Book II, Title I, at p. 158)
>
> 75 A similar notion persisted in European legal systems. According to the French *Civil Code*, art. 538, there was common property in navigable rivers and streams, beaches, ports, and harbours. A similar set of ideas was put forward by H. de Bracton in his treatise on English law in the mid-13th century (*Bracton on the Laws and Customs of England* (1968), vol. 2, at pp. 39-40):

> By natural law these are common to all: running water, air, the sea and the shores of the sea . . . . No one therefore is forbidden access to the seashore . . . .
>
> All rivers and ports are public, so that the right to fish therein is common to all persons. The use of river banks, as of the river itself, is also public by the *jus gentium* . . . .

76 By legal convention, ownership of such public rights was vested in the Crown, as too did authority to enforce public rights of use. According to de Bracton, *supra*, at pp. 166-67:

> (It is the lord king) himself who has ordinary jurisdiction and power over all who are within his realm. . . . He also has, in preference to all others in his realm, privileges by virtue of the *jus gentium*. (By the *jus gentium*) things are his . . . which by natural law ought to be common to all . . . . Those concerned with jurisdiction and the peace . . . belong to no one save the crown alone and the royal dignity, nor can they be separated from the crown, since they constitute the crown.

Since the time of de Bracton it has been the case that public rights and jurisdiction over these cannot be separated from the Crown. This notion of the Crown as holder of inalienable "public rights" in the environment and certain common resources was accompanied by the procedural right of the Attorney General to sue for their protection representing the Crown as *parens patriae*. This is an important jurisdiction that should not be attenuated by a narrow judicial construction.

77 As stated, in the United States the *CERCLA* statute provides legislative authority for government actions in relation to the "public interest", including environmental damage, but this is not the only basis upon which claims in relation to the environment can be advanced by governments at the state and federal levels.

78 Under the common law in that country, it has long been accepted that the state has a common law *parens patriae* jurisdiction to represent the collective interests of the public. This jurisdiction has historically been successfully exercised in relation to environmental claims involving injunctive relief against interstate public nuisances …

79 **The American law has also developed the notion that the states hold a "public trust".** Thus, in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), the Supreme Court of the United States upheld Illinois' claim to have a land grant declared invalid. The State had granted to the railroad in fee simple all land extending out one mile from Lake Michigan's shoreline, including one mile of shoreline through Chicago's central business district. **It was held that this land was impressed with a public trust. The State's title to this land was**

> **different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them,**

> **and have liberty of fishing therein freed from the obstruction or interference of private parties. [p. 452]**

The deed to the railway was therefore set aside.

80 The *parens patriae* and "public trust" doctrines have led in the United States to successful claims for monetary compensation. Thus in *New Jersey, Department of Environmental Protection v. Jersey Central Power and Light Co.*, 336 A.2d 750 (N.J. Super. Ct. App. Div. 1975), the State sued a power plant operator for a fish kill in tidal waters caused by negligent pumping that caused a temperature variation in the fish habitat. The State sought compensatory damages for the harm to public resources. The court concluded that the State had the "right and the fiduciary duty to seek damages for the destruction of wildlife which are part of the public trust" in "compensation for any diminution in that [public] trust corpus" (p. 759), noting that:

> It seems to us that absent some special interest in some private citizen, it is questionable whether anyone but the State can be considered the proper party to sue for recovery of damages to the environment.

…

[Emphasis added]

[137] Justice Binnie proceeded to make the following *obiter* comments:

81 **It seems to me there is no legal barrier to the Crown suing for compensation as well as injunctive relief in a proper case on account of public nuisance, or negligence causing environmental damage to public lands, and perhaps other torts such as trespass, but there are clearly important and novel policy questions raised by such actions. These include the Crown's potential liability for inactivity in the face of threats to the environment**, the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard, the limits to the role and function and remedies available to governments taking action on account of activity harmful to public enjoyment of public resources, and the spectre of imposing on private interests an indeterminate liability for an indeterminate amount of money for ecological or environmental damage.

82 **This is not a proper appeal for the Court to embark on a consideration of these difficult issues.** The Crown's own expert evidence treated the Crown as owner of Crown forests seeking compensation on the same basis as any other landowner for stumpage and "diminution of the value of the timber". … Of course it is perfectly open to the Crown to assert its private law rights as a property owner … The groundwork for a claim on some broader "public" basis was not fully argued in the courts below. The Crown now suggests that it claimed "commercial value as a proxy" for environmental damage but, with respect, the pleadings suggest

> otherwise. It would be unfair to the other parties to inject such far-reaching issues into the proceedings at this late date.
>
> [Emphasis added]

[138] The applicants say the *Canfor* decision provides sufficient authority for this court to adopt a public trust doctrine that would apply to Crown lands previously identified as having "public values" beyond ordinary public lands, including lands like Owls Head with recognized conservation value.

[139] The respondents and the intervenor submit that Justice Binnie's comments suggest, at most, that there could be some public rights in the environment in the context of a tort claim by the Crown on behalf of the public. They rely on the recent decision in *La Rose v. Canada*, 2020 FC 1008, for their position that the public trust doctrine does not exist in Canada. In *La Rose*, the plaintiffs, fifteen children and youth from across Canada, alleged that acts or omissions by the federal government contributed to climate change and unjustifiably infringed their rights, and the rights of all children and youth in Canada, under ss. 7 and 15 of the *Charter*. The plaintiffs further alleged that the government failed to discharge its public trust obligations with respect to "public trust resources", including navigable waters, the foreshores and the territorial sea, the air including the atmosphere, and the permafrost. The relief sought included (para 12):

> e. an order requiring the Defendants to prepare an accurate and complete accounting of Canada's GHG emissions, including the GHG emissions released in Canada, the emissions caused by the consumption of fossil fuels extracted in Canada and consumed out of the country, and emissions embedded in the consumption of goods and services within Canada;
>
> f. an order requiring the Defendants to develop and implement an enforceable climate recovery plan that is consistent with Canada's fair share of the global carbon budget plan to achieve GHG emissions reductions compatible with the maintenance of a Stable Climate System, the protection of Public Trust Resources subject to federal jurisdiction and the Plaintiffs' constitutional rights;

[140] Justice Manson granted the government's motion to strike the claimants' pleadings, concluding that the claim based on the public trust doctrine had no reasonable prospect of success:

> [87] I find that there is no legal foundation to suggest that the public trust doctrine, as described by the Plaintiffs, discloses a reasonable cause of action. For the reasons that follow, this claim has no reasonable prospect of success.

> [88] **The breadth of the claim under the alleged public trust doctrine and the lack of material facts to support any legal basis suggests this claim is reflective of an "outcome" in search of a "cause of action".** The scope of the obligations proposed by the Plaintiffs are both extensive and without definable limits. The Plaintiffs rely on *obiter* in *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 [Canfor] for the proposition that the door has been opened for the public trust doctrine to be considered in Canada, whereby public rights are vested in the Crown …
>
> [89] *Canfor* concerned the Attorney General's ability to recover damages for environmental loss (*Canfor* at para 8). In this case, the Crown in right of British Columbia claimed it sued not only in its capacity as a property owner, but as the representative of the people of British Columbia. In this context, *obiter* comments in relation to the public trust doctrine cannot be taken to suggest a basis for the extensive scope of rights as suggested by the Plaintiffs, where the Plaintiffs have an actionable right against the Crown (Plaintiffs' Statement of Claim at para 242). **The Supreme Court's *obiter* comments in *Canfor* were made in the context of whether the Crown was limited to suing in its capacity as an ordinary landowner. As such, if any door was opened, it is in relation to the entitlement of the Crown in the context of a tort action.**
>
> [Emphasis added]

[141] Justice Manson held that the public trust doctrine has been consistently rejected by Canadian courts and does not exist in Canada:

> [90] The American public trust doctrine and secondary sources relied on by the Plaintiffs to this effect are also not applicable in my view. Specifically, the Plaintiffs rely on *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) [*Waters*], which surveys the doctrine under American law. This text discusses the American public trust doctrine, before clarifying that "[t]he public trust doctrine has not been adopted in Canada" …
>
> [91] In *Burns Bog Conservation Society v Canada*, 2014 FCA 170 [*Burns Bog* (FCA)], the Federal Court of Appeal agreed with a decision of the Federal Court, recognizing that the public trust doctrine has not been recognized in Canadian law (*Burns Bog* (FCA) at paras 43-47; *Burns Bog* (FC) at para 107). The Federal Court of Appeal specified at paragraph 44:
>
> > 44 It is clear that in reaching his conclusion, the Judge carefully considered *Canfor*. He found that at best *Canfor* opens the door to the application of the public trust doctrine developed in the United States in respect of land owned by the Crown (see *Canfor* at paragraphs 74-81). Here, as mentioned, the respondent does not own Burns Bog.

> [92] While it is clear the determining issue in *Burns Bog* was that of ownership**, I do not find these cited cases have "opened the door" to an expansive public trust doctrine, as described by the Plaintiffs, that could be crystalized in a different factual context.** I have reviewed the reasons in *Canfor* and *Burns Bog* (*Canfor* at paras 72-83; *Burns Bog* (FC) at paras 74-81) and **while there is a "notion" that public rights in the environment reside in the Crown, these authorities do not approach the breadth of the rights and actionable interests that the Plaintiffs claim could exist at common law.**
>
> [93] I remain unconvinced that a claim for the public trust doctrine should proceed to trial on the basis that it is a novel claim and that I must err on the side of caution. Rather, **the public trust doctrine is a concept that Canadian Courts have consistently failed to recognize. It does not exist in Canadian law.** In this respect, I do not agree with the Plaintiffs' attempt at distinguishing an unrecognized from non-existent cause of action.
>
> [Emphasis added]

[142] Justice Manson further noted that recognition of the public trust doctrine "is not consistent with the Courts' approach to the development of the common law, namely that these evolutions are incremental, unlike the developments in the law that may be taken by the legislature": para 95. In his view, adoption of the public trust doctrine "is not reflective of such an incremental step": para. 95.

[143] The respondents further submit that applying the public trust doctrine to impress the Owls Head Crown lands with a trust would be inconsistent with Canadian trust law generally. In Canada, for a trust to come into existence, it must have three essential characteristics:

> (1) The language of the alleged settlor must be imperative, in the sense that he must employ language which clearly shows his intention that the recipient should hold the property in trust.
>
> (2) The subject-matter or trust property must be certain, in that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained.
>
> (3) The objects of the trust must be certain, in that they must be equally and clearly delineated, and there must be no uncertainty as to whether someone is a beneficiary.

(See *Moore v. Catholic Episcopal Corporation.*, 2015 NSSC 308, at para. 28)

[144] The respondents also cite *Green v. Ontario*, 1972 CarswellOnt 438 (H.C.J.), where the plaintiff argued that the Province of Ontario had committed a breach of a statutory trust by allowing property adjacent to a provincial park to be used for sand excavation. The plaintiff relied on s. 2 of the *Provincial Parks Act*, R.S.O. 1970, c. 371, which provided:

> 2. All provincial parks are dedicated to the people of the Province of Ontario and others who may use them for their healthful enjoyment and education, and the provincial parks shall be maintained for the benefit of future generations in accordance with this Act and the regulations.

The defendants brought a motion to strike out the statement of claim and dismiss the action.

[145] Justice Lerner concluded that a declaration for a breach of a statutory trust was not open to the plaintiff unless he had a special interest above that of the general public: para. 24. The court went on to find that there could be no trust because the subject matter of the alleged trust was not certain:

> 26 A reading of s. 2 together with s. 3(2) makes it clear that the subject-matter of the trust is not certain. Section 3(2) empowers the Province to increase, decrease or even put an end to or "close down" any park. There cannot be a trust as is alleged by the plaintiff herein unless the subject-matter of the trust is of certainty.
>
> 27 The significance of the powers in s. 3(2):
>
> > 3(2) ... decrease the area of any provincial park and may delimit any provincial park.
>
> defeats any comfort that one can obtain in the words of the learned authority, Keeton in *Law of Trusts*, 9th ed. (1968), p. 5, where it is stated:
>
> > All that can be said of a trust, therefore, is that it is the relationship which arises wherever a person called the trustee is *compelled* in Equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed *cestui que trust*) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust.
>
> (The emphasis is mine.)

> 28 This statement when considered in the light of s. 3(2) and when coupled with s. 2 should make it clear that the Province of Ontario cannot be held to be a trustee. Section 3(2) cannot be construed as *compelling* the Province to hold these lands or for that matter any park lands, for any certain period of time or forever for the purposes that are alleged by the respondent to be read into s. 2 of the *Provincial Parks Act*.

[146] As the respondents point out, the Nova Scotia *Provincial Parks Act* contains similar legislative provisions.

[147] The applicants say in reply that *La Rose* and the other cases where the public trust doctrine has been rejected are distinguishable because the doctrine was relied on in those cases in an effort to achieve substantive outcomes. Here, by contrast, the applicants are relying on the public trust doctrine to achieve procedural outcomes, which is primarily how the doctrine has been applied by U.S. courts. American courts typically only consider the merits of a decision in cases of flagrant misfeasance, which has not been alleged here. The applicants say they do not challenge the Province's right to sell Crown lands with recognized conservation or other public values, but they say the decision must be made by a sufficiently representative, accountable and open body, and that adequate consideration must be given to the public trust interests at stake and any less-harmful alternatives.

[148] With respect to the alleged conflict between Canadian trust law and the public trust doctrine, the applicants submit that they are not seeking to establish a traditional trust relationship between the public and the Crown. They cite *Canadian Approaches to America's Public Trust Doctrine: Classic Trusts, Fiduciary Duties & Substantive Review* (2011) 23 J. Env. L. & Prac. 135, where Anna Lund said the following about the *Green* decision:

> Classical trust law is only loosely applied to the public trust doctrine in the United States. Its incorporation into Canadian law marks a significant break from the American approach. The American doctrine recognizes a government's ability to expand and restrict the scope of the doctrine and divest itself of trust resources, which stands in stark contrast to Lerner J.'s position that the government's ability to decrease or close down a park was fatal to the plaintiff's public trust claim. The difference in approach may help to explain why public trust litigation has not been more successful in Canada. From the standpoint of a litigant who wishes to have a public trust claim recognized, strict adherence to classical trust law may pose a significant obstacle. As evidenced by the outcome in *Green*, it can be exceedingly difficult to establish that the necessary elements are present when alleging a public trust duty. (p. 158)

[149] The applicants say this court's recognition of a public trust doctrine that applies to Crown lands that have been previously identified as having public values distinct from ordinary Crown lands would be a permissible "incremental change" to the common law. The intervenor, on the other hand, says that recognizing a public trust doctrine in Canada would be tantamount to a "legal earthquake". The intervenor points out that the American case law does not establish a duty of procedural fairness with respect to property previously designated for public benefit. Instead, the cases go much further, suggesting that the government holds "public trust resources" for the public. The intervenor writes at pp. 28-29 of its brief:

> 73. The government manages many public resources. It would be impractical in the extreme to suggest that the members of the Legislature elected to oversee these public resources must now undergo public consultation for each and every decision made regarding public resources. Ultimately the public consultation for legislative decisions comes from the many ways that legislators reach out to constituents to gauge their views on any given issue, and, in accordance with our constitutional framework, the ballot box.
>
> 74. With respect this application for judicial review is not the case (if there ever was one) to recognize the public trust doctrine and interpret it as a mechanism whereby the general public is owed procedural fairness whenever the doctrine is triggered.
>
> 75. Furthermore, it is impractical to suggest that any and every decision concerning "public trust resources" triggers a duty to consult the public. It is clearly within the confines of the legislative branch's authority to pragmatically determine how to deal with public resources. There is an almost unlimited range of items which might be described as public trust resources including public revenue, minerals, and various forms of infrastructure. All of these items may be caught in the Applicants' net. If their doctrine was recognized, every time a bridge was repaired or revenue re-directed to a new purpose would be an occasion for mandatory public consultation and, in its absence, judicial review.

[150] In *Watkins v. Olafson*, [1989] 2 S.C.R. 750, McLachlin J. (as she then was) considered the limits on the court's power to change the common law at pp. 760-61:

> The respondents do not deny that the jurisprudence suggests that the courts cannot award damages on a periodic basis. They argue, however, that the time has come to change the law. The common law, they assert, evolves to meet the realities of contemporary society. Those realities, they submit, cry out for a rule permitting judges to award periodic damages in appropriate cases.
>
> This branch of the case, viewed thus, raises starkly the question of the limits on the power of the judiciary to change the law. Generally speaking, the judiciary is

> bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.
>
> **There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make.** Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. **Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.**
>
> **Considerations such as these suggest that major revisions of the law are best left to the legislature. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution.**
>
> [Emphasis added]

[151] In *R. v. Salituro*, [1991] 3 S.C.R. 654, Iacobucci J., for the court, reviewed several authorities, including *Watkins*, and stated at p. 670:

> Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins*, *supra*, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which

> are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

[152] In *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, McLachlin J. described the test for judicial reform at para. 93:

> The question is whether the proposed change falls within the test for judicial reform of the law which has been developed by this Court. **Courts may change the law by extending existing principles to new areas of the law where the change is clearly necessary to keep the law in step with the "dynamic and evolving fabric of our society" and the ramifications of the change are not incapable of assessment.** Conversely, courts will not intervene where the proposed changes will have complex and far-reaching effects, setting the law on an unknown course whose ramifications cannot be accurately gauged …
>
> [Emphasis added]

[153] Regardless of whether judicial recognition of the public trust doctrine proposed by the applicants is desirable, I find that it would not amount to the kind of "small extension of existing rules to meet the exigencies of a new case" with "readily assessable" consequences contemplated in *Watkins*. It would require a substantial recasting of the current law, the ramifications of which this court is not in a position to accurately predict.

[154] Currently, a common law duty of procedural fairness is owed when "a public body …. makes an administrative decision affecting individual rights, privileges or interests": *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, at para. 3. The duty of procedural fairness is flexible and variable, and its content depends on the specific circumstances of each case: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 21-22. "There is no recognized duty of fairness owed to the public at large": *League for Human Rights of B'nai Brith Canada v. Canada*, 2009 FC 647 at para. 42, aff'd 2010 FCA 307.

[155] To adopt the public trust doctrine would be to accept that the rights, privileges, or interests of all Nova Scotians, as beneficiaries of the trust, are affected by the removal of Owls Head from the PAPA. But decisions that affect the rights, privileges, and interests of the public at large are typically considered "legislative" and do not attract a duty of procedural fairness, for reasons explained in Halsbury's Laws of Canada (online), *Administrative Law* (2018 Reissue) at HAD-73:

> There are two reasons why "legislative" decisions have been held exempt from the duty to provide procedural protection. First, where the decision is taken by a Minister or other elected official, they are accountable to Parliament and the electorate rather than the courts. The second reason is practical: bodies may be exempt from the duty of fairness where many diverse interests are potentially affected. Legislative decisions are often based on technical evidence and require several contending interests to be balanced. While individuals affected by specific policy-based decisions benefit from the application of the rules of procedural fairness, diffuse populations affected by general decisions will not. If broad-based policy decision-making were subject to the rules of procedural fairness, the legislative process might grind to a halt.

[156] In saying this, I acknowledge the applicants' argument that decisions about the protection of Crown lands are administrative, not legislative, because they relate to a specific property. In *Potter v. Halifax Regional School Board*, 2002 NSCA 88, Oland J.A., for the court, explained the distinction between legislative and administrative decisions:

> [40] The classification of an act as legislative or administrative is not always easily done. There is a great diversity of administrative decision-making with decision-makers ranging from those primarily adjudicative in function to those that deal with purely legislative and policy matters: see *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, [1992] S.C.J. No. 21 at ¶ 27. Where a particular decision-making power falls on this continuum is a consideration in determining the application and extent of any duty of fairness. In *Martineau (No. 2) (supra)*, Dickson, J. indicated at p. 628 that a "purely ministerial decision, on broad grounds of public policy" would typically afford no procedural protection and spoke at p. 629 of "myriad decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum." In *Knight (supra)*, L'Heureux-Dubé, J. made a distinction at ¶ 26 between acts of a "legislative and general nature" which generally do not attract a duty of fairness and acts of a "more administrative and specific nature." While it is not possible to define such decisions in generally applicable terms, I agree with Brown and Evans that those decisions closer to the "legislative and general" end of the spectrum usually have two characteristics: generality (the power is of "general application and when exercised will not be directed at a particular person") and a broad policy orientation in that the decision creates norms rather than decides on their application to particular situations: see D. Brown & J. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 1998) vol. 2 at ¶ 7:2330. In my view, when the Board decides to close a specific school or specific schools, it is applying, among other things, policy and general considerations but to particular situations. Such decisions are not, in my view, so close to the legislative and general end of the spectrum as to foreclose entirely any duty to act fairly.

> [41] In determining that a decision to close a particular school or schools is an administrative decision rather than a legislative one exempt from the application of the duty of procedural fairness, I agree with and adopt the reasoning in *Elliott (supra)*. In that decision involving a school closure, Green J.A. (as he then was) for the Newfoundland Court of Appeal quoted the passage from De Smith, *Judicial Review of Administrative Action* set out above in ¶ 20 of his decision. At ¶ 19 and 21 he wrote:
>
> > 19 The closer a decision comes to being plenary in nature, both in terms of its general impact on the totality of persons affected by it and in terms of the application of policy considerations that transcend the individual interests of those persons, the closer it approaches a legislative act that should not attract a general duty of procedural fairness or at the very least, the greater will be the necessity for flexibility in the formulation of the duty as it affects the particular decision in issue.
> >
> > . . .
> >
> > 21 … **notwithstanding the generalized impact of the decision on parents and others and the necessity for the board to consider broad policy questions, there is a qualitative difference between the impact on parents of children in the closed school and those other parents who live in the district.** Furthermore, once a question becomes refined to whether a particular school should be closed, such a decision is not, in de Smith's words, "the creation and promulgation of a general rule of conduct without reference to particular cases" but, rather "the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice." As the decision in Newfoundland Telephone indicates, different standards of fairness may apply at different stages of a decision-making process. **Once the process begins to approach a situation where a decision may be made affecting a particular case it moves away from the truly legislative, towards a situation where it is appropriate to accord the persons particularly affected with at least a modicum of procedural protection.** (Emphasis by Oland J.A.)

[157] The decision to remove specific Crown lands from the PAPA, unlike a decision to close a specific school, does not affect any particular person and is not targeted at any one group. The applicants have not identified any person or group that will be more affected by the decision than the rest of the general public. As such, the decision falls much closer to the legislative and general end of the spectrum than a decision to close a specific school.

[158] In addition to that significant hurdle, I am not satisfied that, were this court to adopt the public trust doctrine, the limited scope proposed by the applicants could

be easily maintained in future cases. According to the secondary materials relied on by the applicants, the content and scope of the American public trust doctrine varies from state to state. In *Canadian Approaches to America's Public Trust Doctrine*, Anna Lund notes that "[i]n each state, the scope and content of the doctrine has been modified by state court rulings, state statutes, and state constitutional amendments": p. 138. Ms. Lund attempts, however, to describe some essential features of the doctrine:

> The public trust is analogous to a public easement over some types of land, where the legal title of the land can be owned publicly or privately. Public trust law recognizes two estates in trust resources: the *jus privatum* and the *jus publicum*. The *jus privatum* refers to the bare legal interest in the resource, whereas the *jus publicum* "protects public access to and right to use" trust resources. In the language of easements, the *jus publicum* is the dominant tenement or estate and the *jus privatum* is the subservient tenement or estate.
>
> As its name suggests, the public trust doctrine also incorporates trust language: each state holds the *jus publicum* on behalf of the public.
>
> [p. 140]

[159] She continues:

> The scope of the public trust doctrine has two dimensions: the resources to which it attaches and the uses it protects. *Illinois Central* can be understood as setting out the traditional scope of the public trust doctrine, which can then be modified by each state.
>
> …
>
> The traditional scope of the doctrine as articulated in *Illinois Central* attaches to two well-defined sets of resources: (i) navigable waters, the land submerged thereunder, and the resources located therein and (ii) tidal waters, the lands submerged thereunder, and the resources located therein.
>
> …
>
> The traditional public trust doctrine found in *Illinois Central* is most often associated with the protection of three types of uses: navigation, commerce and fishing.
>
> …
>
> **One of the key developments in American public trust litigation is the expansion of the scope of the doctrine**. Through case law and statute, states have broadened the applicability of the doctrine, by increasing the number of resources subject to and uses protected by the doctrine.

> In some jurisdictions, public trust protection now extends to wilderness preserves, state parks, marshlands, "all waters usable for recreation purposes," usufructuary water rights, beaches and wildlife. States have also been able to expand the scope of the public trust doctrine by adopting a less-demanding test for determining what makes a body of water navigable.
>
> Likewise, some states have broadened the scope of the doctrine to recognize and protect new uses including scientific study, conservation, tourism, aesthetics and scenic views, "bathing, swimming [...] hunting, boating and general recreation."
>
> [pp. 141-43]

[160] The applicants say the only lands that would be captured by the public trust doctrine would be those identified in government reports, policy statements, or legislation as having public values that distinguish them from Crown lands generally. However, this narrowing of the doctrine's scope, likely intended to make its adoption more palatable to the court, has no apparent legal foundation. As such, if the court introduces the applicants' proposed public trust doctrine into the common law, there is no principled basis upon which to reject future attempts to broaden its scope and content to include the kinds of resources and uses protected in some U.S. states. In other words, the court would be "setting the law on an unknown course whose ramifications cannot be accurately gauged": *Bow Valley*, at para. 93.

[161] I would add that even if the doctrine could be limited to Crown lands with previously recognized conservation and other public values, it would capture every one of the hundreds of properties listed in the PAPA as existing parks or areas identified for protection. As a result, notwithstanding that extensive public consultation was a key component in the process used to select the lands included in the PAPA, further public consultation would be required before the Province could remove any of those lands from consideration for protection. Such an outcome could be a disincentive for government to consult the public in preparing policy documents like the PAPA, or from drafting and releasing such policy documents at all.

[162] In conclusion, I find that the applicants were not owed a duty of procedural fairness in relation to the Treasury and Policy Board's decision to remove Owls Head from the PAPA. If the public trust doctrine is to become part of the law in Nova Scotia, that kind of substantial change must be introduced through legislation, not the common law.

Was the Treasury and Policy Board's decision reasonable?

[163] The standard of review applicable to the Treasury and Policy Board's decision is reasonableness. The applicants say the Treasury and Policy Board's decision was unreasonable for the following reasons:

- the Board failed to consider relevant factors. Specifically, the Board made its decision without obtaining the more detailed project/business plan previously requested by DNR, without undertaking an analysis of the feasibility of the project or its claimed benefits, and without obtaining and reviewing an "on-the-ground ecological or environmental assessment" of the Owls Head Crown lands;

- The Board "failed to justify [its decision] in light of established practices"; and

- The Board "fettered itself to a single outcome: the removal of Owls Head Provincial Park from the PAPA Plan so that the Minister could negotiate its bargain sale to private interests".

[164] In *Vavilov*, the Supreme Court of Canada described the reasonableness standard at paras. 12-15:

> [12] ... Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir*'s promise to protect "the legality, the reasonableness and the fairness of the administrative process and its outcomes", reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.
>
> [13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.
>
> [14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public

> power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 C.J.A.L.P. 171, at p. 174 …
>
> [15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

[165] As noted earlier in this decision, the Supreme Court in *Vavilov* explained that "the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case": para. 89. The constraints imposed by the legal and factual context of the decision under review "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt": para. 90.

[166] The Court addressed decisions made, as here, without reasons at paras. 136-138:

> [136] Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g., *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. **In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all: *Baker*, at para. 43.**
>
> [137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. **It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision**: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements

> of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.
>
> [138] There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.
>
> [Emphasis added]

[167] Before addressing each of these grounds, I will review the legal and factual context of the decision. The legal context includes the *Public Services Act*, which sets out the Treasury and Policy Board's broad mandate (see para. 113 of these reasons). As the policy-making committee of Executive Council, the Treasury and Policy Board is charged with developing and implementing policies, plans and strategies; identifying and prioritizing policy issues; directing action on policy issues and initiatives, ensuring that plans and policies are developed and implemented in a fiscally responsible manner; and ensuring that the fiscal and policy agendas of government are in alignment. In this case, the Treasury and Policy Board's decision involved issues of policy regarding environmental protection and economic development in a rural area of the province. As the case law reviewed earlier in this decision illustrates, Cabinet-level decisions involving matters of public policy are entitled to a very high level of deference. In my view, McLachlin C.J.'s comments in *Catalyst* with respect to municipal bylaws apply equally to Cabinet committee policy decisions (para 19):

> In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.

[168] The EGSPA is also a key part of the legal context. The PAPA was implemented to assist the Province in achieving its goals under the EGSPA. For this reason, the respondents submit that the relevant factors in a decision on whether to remove a property from PAPA can be drawn from the pertinent provisions and overarching purpose of the EGSPA. I agree. The overarching purpose of the EGSPA

is to attempt to strike a balance between economic development and environmental protection. One of the Province's goals set out in the EGSPA is to ensure that 12% of Nova Scotia's land mass is legally protected. That goal was subsequently increased to 13%.

[169] Accordingly, the relevant factors for the Treasury and Policy Board to consider in reaching its decision were:

1. Would removing Owls Head from the PAPA impede the Province's ability to meet its land protection goal?

2. How would removing Owls Head from the PAPA affect the economy on the one hand, and the environment on the other?

[170] Because Owls Head is home to several "species at risk", the *Endangered Species Act* is relevant to the second factor. The purpose of that Act is set out at s. 2:

> 2 (1) The purpose of this Act is to provide for the protection, designation, recovery and other relevant aspects of conservation of species at risk in the Province, including habitat protection, while recognizing the following:
>
> > (a) the goal of preventing any species in the Province from becoming extirpated or extinct as a consequence of human activities;
> >
> > (b) the conservation of species at risk is a key component of a broader strategy to maintain biodiversity and to use biological resources in a sustainable manner;
> >
> > (c) the commitment of Government to a national co-operative approach for the conservation of species at risk, as agreed to in the National Accord for the Protection of Species at Risk;
> >
> > (d) all Nova Scotians share responsibility for the conservation of species at risk and governments have a leadership role to play in this regard;
> >
> > (e) Nova Scotians be provided with the opportunity for meaningful participation in relation to conservation of species at risk;
> >
> > (f) the aboriginal peoples of the Province have an important role in conserving species at risk;
> >
> > (g) the importance of promoting the purposes of this Act primarily through non-regulatory means such as co-operation, stewardship, education and partnerships instead of punitive measures, including such preventative actions as education, incentives, sustainable management practices and integrated resource management; and

> (h) the precautionary principle that a lack of full scientific certainty must not be used as a reason for postponing measures to avoid or minimize the threat of a species at risk in the Province.

[171] Pursuant to s. 13 of the Act, it is an offence for anyone to harm or interfere with an endangered or threatened species, or to destroy, disturb or interfere with the dwelling place or area occupied by an endangered or threatened species.

[172] The factual context for the decision is set out in the MEC. The following facts are contained in that document:

- The Crown lands at Owls Head have never been legally designated as a "park reserve" or a "provincial park";
- The lands were thought to be legally designated as a park reserve when they were included in the PAPA;
- There are no plans to develop park infrastructure at the site given the proximity of other parks, the current underutilization of the area, and the operational constraints involved in running a new park;
- The Department of Lands and Forestry received an application to sell the Crown lands from Lighthouse Links, a private developer proposing to build two or three oceanfront links public golf courses, a clubhouse, inn and other related facilities.
- The balance of the land would be used to develop a destination residential or resort community and provide public access to environmental/recreational features on the lands, with the intent to encourage more tourists to visit and people to live in the Eastern Shore;
- Lighthouse Links claims that acquisition of the Crown lands is essential for the project to be economically feasible, and a successful real estate development project is expected to be necessary to offset the high costs of the golf course construction;
- Lighthouse Links states that the proposal would have economic benefits for the area by enhancing tourism and increasing employment on the Eastern Shore. It projects that the golf courses could attract industry and provide additional jobs for 150-200 people on an ongoing business;

- Lighthouse Links anticipates spin-off businesses and the development of a bedroom community to result in the creation of additional jobs to construct the residential and commercial buildings, and further economic benefits for the area;

- The Department of Lands and Forestry has not assessed the high-level development proposal by Lighthouse Links. An evaluation of the proposal would be conducted as a next step;

- Any sale of the lands would follow the usual processes for the disposal, sale and/or acquisition of Crown lands under the *Crown Lands Act*, including consultation with the Mi'kmaq, and would be submitted as separate submissions to Executive Council;

- The protection values for Owls Head identified in the PAPA include a variety of coastal barrens and wetlands; exceptional bedrock-ridged topography; coastal access; and occurrences of nesting Piping Plovers. L&F biologists have identified two occurrences of Species at Risk – the Piping Plover (listed endangered provincially and nationally) and the Barn Swallow (listed as provincially endangered; nationally threatened);

- Part of Owls Head was confirmed as significant habitat for nesting Piping Plovers. Occurrences of other species of conservation concern include Ruby-crowned Kinglet and Common Eider;

- Owls Head includes one of nine sites in the province for the globally rare Coastal Broom Crowberry Heathland Ecosystem;

- Broader ecological values of the area are similar to other coastal areas of Nova Scotia, offering foraging, breeding and migratory habitat for birds and other faunal species, as well as unique boreal and temperate plants and lichens;

- There are local interests in land conservation and community-based economic development associated with the natural and cultural assets along the Eastern Shore, including those of the Wild Islands Tourism Advancement Partnership;

- Withdrawal of Owls Head for consideration for protection does not inhibit government from maintaining its land protection goals under the EGSPA or its commitment to move toward 13% protected land; and,

- Any sale of the Owls Head Crown lands will require Cabinet approval.

[173] Consequently, the Treasury and Policy Board had information before it concerning the potential economic benefits associated with Lighthouse Links' proposal, along with information about the Owls Head conservation values. The Board clearly concluded that, notwithstanding the potential harm to the environment, the potential economic benefits warranted removing Owls Head from the PAPA so that further consideration of the development proposal could be undertaken.

[174] The applicants say the Treasury and Board failed to consider relevant factors because it did not have the more detailed project/business plan previously requested by DNR, it did not undertake an analysis of the feasibility of the project or its claimed benefits, and it did not obtain and review an "on-the-ground ecological or environmental assessment" of the Owls Head Crown lands. In my view, the applicants argument, at its core, is not that the Board failed to consider the relevant factors (ie: the environmental concerns and the potential economic benefits associated with the proposed development), or that it weighed those factors incorrectly, but that it lacked sufficient evidence to reach any conclusions about them at all. Put another way, the applicants say the Board should have required more fulsome evidence on both the feasibility of the development proposal and its potential impact on the environment, including the endangered species that are known to inhabit the area, before deciding to withdraw Owls Head from the PAPA.

[175] The reasonableness of the Treasury and Policy Board's decision must be assessed in its proper context. Despite the Province's representations to the contrary for more than four decades, the Owls Head Crown lands were never designated for protection as a provincial park or a park reserve. They did not become a provincial park or a park reserve through their inclusion in the PAPA, nor did such inclusion guarantee that they would be protected in the future. The government's misrepresentations that Owls Head was a provincial park, while troubling, are legally irrelevant to this court's substantive review of the Treasury and Policy Board's decision. The same is true of the choice by the Ministers of Land and Forestry and Environment to seek removal of Owls Head from the PAPA without first informing the public. The wisdom of the government's conduct in this regard is not a matter for judicial review. In our constitutional democracy, the merits of such exercises of discretion by elected representatives are reviewable only by the public who elected them.

[176] The applicants' position that the Treasury and Policy Board should have required further evidence would be much more compelling if the Board had been making a final decision about whether to sell the Owls Head Crown lands. It wasn't. Instead, it was deciding whether to take the preliminary step of removing Owls Head from the PAPA so that further in-depth consideration of the development proposal, including its impact on the economy and the environment, could be undertaken. The Treasury and Policy Board's decision did not seal the fate of the Owls Head lands. They currently remain Crown lands, and the endangered species inhabiting the lands are still protected under the *Endangered Species Act*. If the sale to Lighthouse Links does not proceed, the Governor-in-Council can, if it so chooses, reconsider whether the Owls Head Crown lands should be protected as a park reserve.

[177] In making its decision, the Treasury and Policy Board was entitled to presume that further investigation of the environmental impacts of the potential sale would be undertaken by the government as part of its assessment of the proposed development, and, indeed, completion of an Integrated Resource Management report is a condition of the LOO. That said, the sufficiency of the government's efforts in this regard can only be assessed once Cabinet makes a decision about whether to approve the sale. If, for example, Cabinet were to approve a sale of Owls Head without adequate information to determine whether the proposed development is likely to disturb or destroy the habitat of a species-at-risk, an offence under the *Endangered Species Act*, the respondents and the intervenor may find themselves right back here. As the government is aware, there is no exception under the *Endangered Species Act* for golf courses, regardless of the economic benefits associated with them.

[178] Policy decisions made by a Cabinet committee like the Treasury and Policy Board are entitled to substantial deference. In deciding to remove Owls Head from the PAPA – a document which did not bind the government to legally protect Owls Head – the Board was aware that the Department of Lands and Forestry had not yet performed a detailed assessment of the development proposal. Such an assessment would be the next step. The Board knew that Owls Head has important conservation values and is home to several endangered species. Finally, it was aware that removing Owls Head from the PAPA would not impact the Province's ability to meet its land protection goal. The Board concluded, based on the information before it, that the potential economic benefits warranted removal of Owls Head from the PAPA so that further review of the development and its effects could be conducted. I find that the Treasury and Policy Board considered the relevant factors and its

decision was reasonable. The Board's decision, while unpopular with some constituents, was lawfully made.

[179] The applicants further allege that the Treasury and Policy Board's decision was unreasonable because it failed to justify its decision in light of established practices. The applicants write at p. 36 of their pre-hearing brief:

> The PAPA Plan represented the decision of the Minister of Lands and Forestry with respect to the suite of Nova Scotia's identified Provincial Parks (both existing and new). As well, the Minister had a long history of informing and consulting the public with respects [*sic*] to decisions about parks. The Minister's (and T&PB's) decisions to remove Owls Head Provincial Park represented a break with established practice and a reversal of the decision to protect the Park. *Vavilov, supra*, notes that when a decision maker departs from "longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons" (at para. 131), which the Minister (and T&PB) failed to do.

[180] This ground is without merit. The decision-maker in this case was the Treasury and Policy Board. It has never made a previous decision to legally protect Owls Head, nor does it have the jurisdiction to do so. Moreover, there is no evidence before the court that the Board has made previous decisions about whether to remove a property from the PAPA which show that the Board departed from any longstanding practice or internal authority.

[181] The applicants' final ground is that the Treasury and Policy Board's decision was unreasonable because the Board "fettered itself to a single outcome: the removal of Owls Head Provincial Park from the PAPA Plan so that the Minister could negotiate its bargain sale to private interests." In their brief, the applicants cite *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326, where Hinkson C.J., at para 114, described fettering of discretion as:

> when a decision-maker does not genuinely exercise independent judgment in a matter. This can occur, for example, if the decision-maker binds itself to a particular policy or another person's opinion. … Similarly, it is an abuse of discretion for a decision-maker to permit others to dictate its judgment.

[182] The applicants' arguments on this ground are confusing and disjointed. They write at pp. 37-38 of their brief:

> Finally, not only did the Minister and the T&PB fail to seek and consider public input concerning their decisions, but they purposely kept the decisions and the

> decision-making process hidden from public view. There was no public knowledge of the decisions until an investigative journalist broke the story of the removal of Owls Head Provincial Park from the PAPA Plan (on December 18, 2019), and there was no public knowledge of the content of the Letter of Offer until one of the Applicants received a redacted version of the executed offer on April 17, 2020, by way of a FOIPOP request.
>
> …
>
> That the Minister listened exclusively to the proponents, that the Minister agreed to sell the public lands at an unjustified low price, that the Minister sought no assessment of the ecological values of the Park, that the Minister did not insist on receiving a detailed business plan, that the Minister insisted on keeping the entire process secret, leads to the inevitable inference that the Minister and the T&PB had fettered themselves to a single outcome: the removal of Owls Head Provincial Park's protected status and the execution of an offer for its sale to private interests.

[183] As the respondents point out at p. 36 of their brief, the *Trinity Western* decision is of no assistance to the applicants. The issue regarding fettering in that case was whether the Law Society's benchers had impermissibly fettered their discretion to approve a new law school by binding themselves to the results of a plebiscite of the Society's membership. That issue does not arise on the facts of the case at hand.

[184] I agree with the respondents that the applicants are conflating procedural and substantive review. In fact, the comments by Chief Justice Hinkson relied on by the applicants appear under the heading "Procedural Fairness". The concept of "fettering" typically refers to situations where a non-binding guideline or policy, a promise, or a contract is relied upon to dictate a particular substantive result in a discretionary matter. The applicants' submissions, on the other hand, appear to revolve around the lack of public consultation and an allegation that the Minister and the Treasury and Policy Board did not maintain an "open mind". Whether a decision-maker maintained an open mind typically goes to whether there is an issue of bias, as opposed to a fettering of discretion. Bias, like fettering, is a procedural fairness issue. I would dismiss this ground of review.

Conclusion

[185] The applicants' application for judicial review must be dismissed.

[186] The applicants say it is unfair for the Province, having represented the Owls Head Crown lands as a provincial park for decades, and having previously consulted

with the public with respect to the designation of provincial parks and other protected lands, to have quietly removed Owls Head from the PAPA and entered into a conditional LOO to sell the lands to Lighthouse Links. The fundamental defect in the applicants' position, however, is that there is no recognized common law duty of procedural fairness owed by the Crown to the public at large, and the adoption by this court of the "public trust doctrine" would not amount to a permissible incremental change to the common law. Neither the Province's previous misrepresentations about Owls Head, nor its history of public consultation in relation to parks and protected areas, entitles the applicants to be consulted before decisions are made about the protection or sale of Owls Head Crown lands.

[187] The applicants' substantive challenges to the Treasury and Policy Board decision are also without merit. The court's role on an application for judicial review is to ensure that those who exercise statutory powers do not overstep their legal authority. The court will not second guess policy decisions about what is best for the province as a whole. The Board's decision to remove Owls Head from the PAPA was reasonable based on the information before it, including that further assessment of the proposed development and its effects would occur prior to any sale of the lands.

[188] Finally, the applicants' application for review of the Minister of Lands and Forestry's decision to enter into the LOO is premature, and therefore does not raise a justiciable issue.

[189] I would encourage the parties to reach agreement on costs. If these efforts are unsuccessful, I will accept written submissions within 30 days of the release of this decision.

Brothers, J.