

2020

Hfx No. 496023

Supreme Court of Nova Scotia

Between:

ROBERT BANCROFT and EASTERN SHORE FOREST WATCH ASSOCIATION

Applicants

and

NOVA SCOTIA MINISTER OF LANDS AND FORESTRY, and THE ATTORNEY
GENERAL OF NOVA SCOTIA REPRESENTING HER MAJESTY THE QUEEN IN
RIGHT OF THE PROVINCE OF NOVA SCOTIA

Respondents

and

LIGHTHOUSE LINKS DEVELOPMENT COMPANY

Intervenor

**PRE-HEARING BRIEF SUBMITTED ON BEHALF OF THE APPLICANTS WITH RESPECT TO THEIR
APPLICATION FOR JUDICIAL REVIEW**

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PART ONE: OVERVIEW

1. I am counsel for the Applicants, Robert Bancroft and Eastern Shore Forest Watch Association. Both of the Applicants submit that they are public interest litigants for the purpose of these proceedings.
2. The Applicants in this judicial review challenge the following decisions:
 - a. the Minister of Lands and Forestry and Treasury and Policy Board's March 13, 2019 decision to remove Owls Head Provincial Park from the Parks and Protected Areas Plan of 2013; and
 - b. the Minister of Lands and Forestry's December 16, 2019 decision to execute a Letter of Offer with Lighthouse Links Development Corporation in order to sell the Owls Head Crown land for private development into resort residences and two or three golf-courses.
3. If the decision to remove Owls Head Provincial Park from the Parks and Protected Areas Plan is held to have been made solely by the Treasury and Planning Board, then, in the alternative, the Applicants challenge the Treasury and Planning Board's decision to remove Owls Head Provincial Park from the Parks and Protected Areas Plan.
4. In brief, the Applicants submit that the Minister erred in these decisions as follows:
 - a. The Minister had a duty of procedural fairness to inform and consult the public before he made the decision to request removal of Owls Head Provincial Park from the Parks and Protected Areas Plan, and before he executed the Letter of Offer to sell these public lands for private development; this duty is grounded in part in the trust-like nature of the Crown's ownership of public lands with identified public values;
 - b. The Minister also breached this procedural fairness duty by failing to provide justification for these decisions; and
 - c. The Minister's decisions were unreasonable because he failed to consider relevant factors and fettered himself, contrary to the implied relevant factors in the *Crown Lands Act* and *Endangered Species Act*, to a single outcome, that is, delisting Owls Head Provincial Park and negotiating its sale to a private developer.
5. The Applicants submit that the Record and other evidence before this Court will demonstrate that the Owls Head Crown lands have been recognized by the public and identified by government (provincial and municipal) as a Park, and that these lands have been represented to the public as a Park for several decades. The evidence will also show that the Province's selection of Crown lands to be managed as Parks and other protected areas flows, in part, from public consultation.

6. Owls Head Provincial Park, notwithstanding its representation to the public as a Park, did not receive formal designation as a Park under the *Provincial Parks Act*. Some 100 other Provincial Parks (approximately half of Nova Scotia's Provincial Parks), represented to the public as provincial parks, fall into this category. In other words, approximately half of Nova Scotia Provincial Parks, absent designation under the *Provincial Parks Act*, are similarly vulnerable to secret negotiations for their sale to private interests.
7. On this basis, the Minister's involvement with Lighthouse Links over some three years concerning the Owls Head Crown lands, culminating in an executed Letter of Offer with Lighthouse Links Development Company, was fundamentally unjust because the relationship, negotiations, and outcomes were cloaked in secrecy. The public was not informed of the request to remove Owls Head Provincial Park from the Parks and Protected Areas Plan, nor of the Treasury and Planning Board's decision to grant the Minister's request, nor of the proposal to turn the Park into several private golf courses and a resort community, and nor of the Minister's negotiation and execution of the Letter of Offer for the sale of these public lands.
8. The Applicants acknowledge that they are relying, in part, on a novel ground of judicial review – that is, a duty of procedural fairness extended to the public concerning public lands with identified public purpose, specifically, conservation value.

PART TWO: BACKGROUND

9. The facts relevant to this application are set out in the Record as provided by the Respondents, as well as the following portions of affidavits of Robert Bancroft and Barbara Markovits:
 - a. Robert Bancroft's January 28, 2020 affidavit, save for para. 12 and the words "negative" and "specifically, the negative impact on some of Nova Scotia's most valuable natural history" in para. 18;
 - b. Barbara Markovits' January 30, 2020 affidavit, save for para. 14 and the words "negative" and "specifically, the negative impact on one of Nova Scotia's most important ecological areas" in para. 15;
 - c. Barbara Markovits' March 25, 2020 affidavit, save for paras. 10, 11, 14, 15 (and Exhibit "Q"), 16, 17 and 18; and
 - d. Robert Bancroft's May 20, 2020 affidavit, save for Exhibits "A" and "C" (that is, only Exhibit "B").

A. The Applicants

Robert Bancroft (Bancroft January 28, 2020 affidavit)

10. Applicant Robert Bancroft is a wildlife biologist with degrees in Biology from Acadia University, and was employed by the Nova Scotia Department of Lands and Forests from 1967 to 1968, and from 1973 to 1991. Mr. Bancroft was also an extension biologist for the Province's Inland Fisheries program from 1991 to 1999. Mr. Bancroft has been sworn as a wildlife expert in the

Nova Scotia Provincial Court while employed as a conservation officer for the Province. Mr. Bancroft has worked as an independent forestry and wildlife consultant since 1999, and has no pecuniary interest in the outcome of this application.

11. Since 2009, Mr. Bancroft has been president of the Federation of Nova Scotia Naturalists, a non-profit, charitable organization of natural history enthusiasts; through this organization Mr. Bancroft promotes the preservation and restoration of important natural habitats throughout Nova Scotia.
12. Mr. Bancroft has been involved in various government-initiated public consultations regarding protecting land in Nova Scotia for conservation purposes. He participated in Voluntary Planning's 2008-2009 Phase 1 Citizen Engagement process that resulted in *The Future of Nova Scotia's Natural Resources* report (March 2009). Mr. Bancroft also participated in a multi-stakeholder consultation process that led to the listing of various lands as Provincial Parks, including Owls Head Provincial Park, in the *Parks and Protected Areas Plan* of 2013.

Eastern Shore Forest Watch Association (Markovits January 30, 2020 affidavit)

13. Eastern Shore Forest Watch Association (the 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. Ms. Barbara Markovits believes that the Association was instrumental in the province's designation of the Ship Harbour – Long Lake Wilderness Area.
14. 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 a member at large on the Association's Board as well as the Association's membership coordinator.
15. During Ms. Markovits' involvement with the Association, she has represented the Association in all public consultations conducted by the Provincial Government concerning the selection and designation of parks and protected areas in Nova Scotia, including the consultations leading to the designation of Owls Head Provincial Park, as described in the Province's *Parks and Protected Areas Plan* of 2013. Ms. Markovits and the Association both have a long-standing commitment to, and interest in, the protection of Nova Scotia's most important ecosystems.
16. Neither Ms. Markovits nor the Association have any pecuniary interest in the outcome of this application.

B. Owls Head Provincial Park

17. The Crown lands at Owls Head comprise of approximately 285.3 hectares (705.2 acres) of coastal land near the communities of Little Harbour and Owls Head on Nova Scotia's Eastern Shore (Record, PG 8 of Tab 19). The vast majority of these Crown lands, approximately 703 acres, comprised the former Owls Head Provincial Park (Record, PG 1 of Tab 15), and includes a freshwater lake (Murphy's Lake).

18. These Crown lands, depicted in photographs included in the Record (PG 14-19 of Tab 4), include 24,920 feet, approximately 7.6 kilometres, of public shoreline (Record, PG 17 of Valuation Report, Tab 18).
19. Before it was removed from the Parks and Protected Areas Plan (PAPA), Owls Head Provincial Park was identified as a Provincial Park and managed as a “supporting park” under the Department of Lands and Forestry’s parks program (Record, PG 1 of Tab 2). Owls Head Provincial Park was identified as site number 694 in the PAPA. The PAPA distinguishes “new” additions to its protected areas list from areas already protected or “existing”; the PAPA lists Owls Head as “existing,” rather than “new” (Markovits March 25, 2020 affidavit, last page of Exhibit “L”).
20. The February 26, 2019 Memorandum to Executive Council (MEC) describes features of the Owls Head Crown lands as follows (Record, PG 2 and 3 of Tab 15). The statement below incorrectly states that Owls Head was “proposed” for designation as a provincial park in the PAPA; as mentioned above, the PAPA identified Owls Head as an “existing” park.

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 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 habitats for birds and other faunal species, as well as unique boreal and temperate plants and lichens.

C. Proposed Resort Community and Golf Course development project

21. In a July 22, 2018 proposal, Lighthouse Links describes its project as two or three golf courses, with the rest of the land used “to develop a destination residential or resort community [...]”
22. The proposal notes that a “successful real estate development program is expected to be necessary to help offset the high costs of the golf course construction. We are currently evaluating whether the land used for the proposed third course would be better utilized for residential construction” (Record, PG 7 of Proposal, Tab 9).
23. The proposal includes a map showing the location of the proposed real estate development and golf course areas (Record, PG 3 and 11 of Tab 9). The proposal also notes that the Company is prepared to “work with the Province and related stakeholders to ensure that the interests of Nova Scotians are considered throughout the development of the project,” and that the project

will provide jobs for “up to 150-200 people for the golf courses alone [...]” (Record, PG 3 and 5 of Tab 9).

24. The cost estimate for the project is \$12.6 million. The proposal notes (Record, PG 7 of Tab 9) that this cost is

much higher than the typical course because it would have to be built on ledge and sand is not easily available. The largest component consists of \$5,000,000 for earth moving/ledge removal and covering the area with sand, which must be trucked onto the site. We believe that significant savings [...] can be achieved by building a sand plant to convert the ledge that is removed during golf course construction to sand.”

25. Lighthouse Links also estimated that it would take approximately three years from breaking ground to complete the first golf course (Record, PG 5 of Tab 9).

26. Finally, the proposal notes that a refined cost estimate requires access to the property by construction equipment, which would require 2.5 miles of roads to be built on the property at a cost of approximately \$370,000 (Record, PG 7 of Tab 9).

27. An Updated Draft Proposal for the project, dated October 29, 2019, is included at Tab 19 of the Record. The Updated Proposal largely repeats the July 22, 2018 version, and adds additional statements including the following (PG 3 of the Proposal, Tab 19):

Lighthouse Links presents a rare opportunity to enjoy and showcase some of the most scenic coastline in the Province with its pristine, rugged natural beauty [...]

This project will make friendly use of the relatively undiscovered topography, vistas, and terrain [...]

Every effort will be made to enhance the site’s natural beauty and we look forward to working with environmentally friendly groups to ensure that objective. The golf industry has a history of being an environmentally friendly business, often enabling remote, often largely unseen, and untouched areas to be exposed sensitively to more people who will enjoy them, treat them respectfully, and work to maintain their natural beauty.

28. The Updated Proposal also notes (PG 4-5 of Proposal, Tab 19) that

Parts of the property include high granite outcroppings which are not ideal for golf, but would be great for residential construction, including condominiums and single-family homes. The views from these high outcroppings are spectacular. [...]

Murphey’s Lake, a large deep, freshwater lake, [...] could be developed for other water sports, including boating and fishing.

The coastline has many unique natural features, including beautiful beaches and wonderful kayaking, which are now difficult to access because of the lack of public access/facilities which we propose to provide. [...]

A definitive, detailed construction, financial, and business plan will have to be prepared, but it is expected that the project will provide on-going employment for at least 150-200 people for the construction and operation of the golf courses and residential housing, some of which would be seasonal.

D. Owls Head Crown lands valuation

29. On September 13, 2018, the Honourable Michel Samson (lobbyist and former NS Liberal MLA, 1998 – 2017) submitted a Valuation Report for the Owls Head Crown lands, dated August 21, 2018, to the Department of Lands and Forestry and copied the Minister’s executive assistant Mr. Peter Bragg (Record, PG 1 of Tab 10).
30. The August 21, 2018 Valuation Report concluded that the market value of the 744.12 acres of interest at Owls Head was \$250,000 (\$336/acre) (PG ii and 7 of Valuation Report). The value was based on the land’s current zoning, which the report identified as “Regional Park”, noting that “the Subject Property has long been identified and regulated as park and open space uses.”
31. The Report also noted that the \$250,000 value is based on current zoning, which precludes most development (Record, PG 12 of Valuation Report, Tab 10):

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 is currently enabled under its zoning would require significant policy changes at the highest levels of municipal planning authority.

32. On August 26, 2019, Mr. Glover submitted an updated property valuation report to Lands and Forestry (Record, Tab 17). By this date, Owls Head Provincial Park had been removed from the PAPA Plan; nonetheless, the property valuation report continued to value the property as of August 21, 2018 (that is, as essentially undevelopable). The updated market value of the property was \$216,000 for 705.21 acres (\$306/acre) (Record, PG ii and 7 of the Report at Tab 18).

E. Communications and negotiations between Lands and Forestry, and Lighthouse Links

33. The application to purchase the Owls Head Crown lands was formally initiated by Mr. Sean Glover (Cox & Palmer) on behalf of Mr. Beck Gilbert and his company Lighthouse Links Development Company, on September 23, 2016, by way of correspondence to Department of Natural Resources (as it was then known) staff and an attached “Application for the Use of Crown Land.” Mr. Glover requested that the application be kept confidential (Record, PG 1 of Tab 1).

34. On September 26, 2017, the Honourable Margaret Miller, Minister of Natural Resources at the time, wrote to Mr. Gilbert and described the authorizations and approvals required in order to proceed with Lighthouse Link's proposal to acquire the Crown lands at Owls Head. Ms. Miller noted that the first step is "DNR obtaining authorization from Cabinet to remove the Crown lands from the Parks and Protected Areas Plan (PAPA)" (Record, PG 1 of Tab 5).
35. Ms. Miller also noted that "[i]f approval is received from Cabinet to remove the Crown lands from the PAPA..." then an environmental assessment may be required. Ms. Miller noted that an environmental assessment, if required, would include public and aboriginal consultation (Record, PG 2 of Tab 5).
36. On October 23, 2017, Leslie Hickman informed Mr. Gilbert that "a more detailed project/business plan is being requested in order to fully assess your plans for the Crown lands being requested" (Record, Tab 6). On November 28, 2017, Ms. Hickman wrote to Sean Glover, representative of Lighthouse Links, indicating the need for an updated business plan "as the next step" (Record, Tab 7). On February 20, 2018, Ms. Hickman noted that the requested detailed business plan had not yet been received by DNR (Record, PG 5 of Tab 8).
37. The Honourable Sean Fraser, MP, replied to Ms. Hickman on February 20, 2018, noting "The proposed development would require [Mr. Gilbert] purchase of two pieces of land – one owned by the federal government, the other owned by the province. [...] I believe it would be helpful to connect to bring you up to speed and to see if I can assist on moving the provincial side of things along" (Record, PG 5 of Tab 8).
38. On November 26, 2018, Hon. Michel Samson wrote to Lands and Forestry Deputy Minister Julie Towers about the potential sale of the Owls Head Crown lands, noting: "we talked about convening a meeting with senior officials from Lands & Forestry and Environment to work on a game plan and make sure we are all on the same page. [...]" (PG 2 and 3 of Tab 11).
39. An assistant to Lands and Forestry Deputy Minister Julie Towers initiated the requested meeting on November 27, 2018. Participants were to include the L&F Executive Director of Land Services, the L&F Manager of Acquisitions and Disposals, the L&F Executive Director of Regional Services, the L&F Director of Parks, Outreach & Service Delivery; the L&F Executive Director of Renewable Resources; and Minister Rankin's Executive Assistant, among other government staff (PG 1 and 2 of Tab 11).
40. Mr. Samson proposed the following agenda for the December 5, 2018 meeting (Tab 12):
 - a. *Owls Head Lighthouse*
 - b. *Has the Crown land in question been removed from the list of proposed protected properties*
 - c. *Appraisal – what is the status?*
 - d. *Purchase of Crown lands – procedure and timeframe – is an MOU required?*

- e. *Authority to construct roads to access property for engineers and golf course designers*
- f. *Establish a government working group in light of the significance of this project*

41. Notes taken during the December 5, 2018 meeting are included in the Record at Tab 14. The attendees were Michel Samson (Cox & Palmer), Sean Glover (Cox & Palmer), Francis Martin (NSE), Matt Parker (L&F), Andrew Murphy (NSE), Julie [Towers] (DM, L&F), Leslie [Hickman] (L&F), Jon Porter (L&F), Peter Bragg (EA to Min. Rankin), and Kevin Musgrave (Premier's Office). The notes were approximately, in part, as follows:

**Michel Samson – Registered Company lobbyist?*

[...]

1. Owl's Head Lighthouse

- Major element of the project Beck wants to acquire

- Is it possible for this to happen?

Julie – We notified feds we may be interested. [...]

2. PAPA

- Would have to be removed from PAPA.

- Approval / Decision from Executive Council needed

Kevin M – Doesn't expect it to linger. [...]

After the withdrawal from PAPA [underneath list in original]

LH - EA required?

- Transfer

- Watercourse / watercourse alteration

- Mun approvals

- CLR

- IRM

- Aboriginal Consultation → Arch Work / Benefits Agreement

→ Public Consultation →

Would like an MOU type agreement → Some assurances

Open to an Optional Revisionary clause or Milestone

→ LH Must be removed from PAPA first

LH - Development Plan also need for decision making by EC to remove from PAPA

- Not full meal deal approvals

Joint Discussion - Better if once removed from PAPA go straight to sale. versus Agreement

No Public Consultation until after decision re PAPA

MS. Access for investigations (engineers etc) – Roads

LH. Yes... LOAs with conditions

– Disturbance would require consultation Encourage non disturbance research

[...]

F. Memorandum to Executive Council: removing Owls Head from Parks and Protected Areas Plan

42. On February 26, 2019, the Minister of Lands and Forestry and the Minister of Environment submitted a Memorandum to Executive Council (MEC) titled “Decision on whether to withdraw Crown lands at Owls Head identified for protection in the Parks and Protected Areas Plan,” to the Treasury and Policy Board, along with a communications plan (Record, Tab 15; communications plan is largely redacted).

43. The MEC (Record, Tab 15) noted that the Crown lands at Owls Head were thought by the Department of Lands and Forestry to be legally designated as a “park reserve” and was managed as such under the Department’s parks program:

[The Owls Head Crown lands] were thought to be legally designated as a “park reserve” when they were included in the PAPA Plan. Although not formally designated, the Crown lands are managed as a park reserve under the provincial parks program. Owls Head has not been identified as a priority site for designation as a “provincial park” through the PAPA Plan implementation process and there are no plans to develop park infrastructure at this site given the proximity of other parks, that the area is currently underutilized, and due to operational constraints to run a new park. [...] L&F has not assessed the high-level development proposal provided by the Company. [...] In addition, any Crown lands transactions related to the Company’s development proposal and the Federal surplus lands will 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. This request is solely focused on seeking direction on whether to withdraw Crown lands at Owls Head from consideration for protection as outlined in the PAPA Plan.

44. The MEC (Record, Tab 15) also notes that the PAPA Plan was created with input from the public and other key stakeholders, and that all provincial Crown lands included in the PAPA Plan would be managed under interim protection guidelines:

[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. [...] 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.

G. Letter of Offer to sell the Owls Head Crown lands

45. The Letter of Offer to sell the Owls Head Crown lands was executed by Minister Rankin on December 16, 2019 and by Lighthouse Links on December 18, 2019. This letter was attached to an email from Sean Glover to Lands & Forestry [date omitted or redacted], which also includes an outline of steps required to be taken between execution of the offer and conveyance of the lands, including “First Nationals [sic] Consultation” and “Public Engagement” (Record, Tab 19).
46. The Letter of Offer includes a number of Terms and Conditions, including the following (Record, Tab 19):

#1. This Offer is subject to the approval of Cabinet and/or the Minister of the Department.

#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 16, 2019. [...]

#8. Prior to closing, the Purchaser must apply to the Department and obtain authorization before entering the Property including, but not limited to, accessing the Property to conduct any investigations, inspections, tests or building roads.

#9. The Property shall be conveyed subject to an option to repurchase the Property (the Option) in favour of the Department, whereby the Department shall have the right, exercisable by giving thirty (30) days’ notice in writing, following an event of default by the Purchaser under the Option, [...] subject to the other terms and conditions within the Option. This Offer is conditional upon the parties entering into an option agreement on or before closing date on terms satisfactory to both parties.

#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, 2020 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.

47. The Applicants, and the general public, learned of the decision to delist Owls Head Provincial Park and sell this Crown land to a private resort and golf-course developer by way of an article published by CBC investigative reporter Mr. Michael Gorman on December 18, 2019 (some three years and three months after Mr. Gilbert submitted his initial proposal to acquire the Owls Head Crown lands). The decision was purportedly made on March 13, 2019 (Exhibit “B”, Bancroft May 20, 2020 affidavit).

48. The Applicants obtained the executed Letter of Offer by way of a Freedom of Information request, submitted February 18, 2020 and received April 17, 2020.

H. Representation of Owls Head as a Provincial Park

49. Owls Head Provincial Park has been represented to the public as a Provincial Park by the Department for several decades, as indicated in Barbara Markovits' March 25, 2020 affidavit. The following paragraphs detail this representation; all references are to Markovits' March 25, 2020 affidavit.
50. Owls Head was first identified as a park in a 1978 brochure produced by a committee initiated by the Department of Lands and Forests (as it was then known), in which Owls Head is identified as part of "The Island & Headlands Natural Environment Parks" (Exhibit "C").
51. A 1980 article in the Department of Lands and Forests' *N.S. Conservation* publication included a map that identifies Owls Head as a "Natural Area" within the Eastern Shore Seaside Parks System (Exhibit "D").
52. 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." This map distinguishes non-Park Crown land from Crown land that is a Park by way of different colouring. This 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 (Exhibit "E").
53. 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 (an endangered species) has nested on the Owls Head property, and that the property was "assigned to parks program as part of the Province's commitment to develop the Eastern Shore Seaside Park System." This information sheet describes the Park's status as "Reserve" and notes that the Park is managed as a "Supporting Park." This information sheet is no longer available on the Department's website (Exhibit "F").
54. A 2013 map published by Nova Scotia Environment titled *Our Parks and Protected Areas* identifies Owls Head as a "Provincial Park" (#694). The reverse side of the map includes an "Index to Provincial Parks," which includes the entry "694, Owls Head Provincial Park, 267.62 ha (existing)." Other entries of Provincial Parks are denoted as "new" rather than "existing" (Exhibit "G").
55. A Research Permit titled "Application to Conduct Research in a Provincial Park, Park Reserve, or Protected Beach" was issued by the Department of Natural Resources on June 24, 2015, to researchers Caitlin Porter and Dr. Jeremy Lundholm (of St. Mary's University), and to Sean Basquill (Department of Lands and Forestry). The permit states, in part, "Locations of Proposed Research: Provincial Parks" and lists a number of Provincial Parks including Owls Head, Pomquet Beach, and Herring Cove, among others (Exhibit "H").

56. A report published by the Halifax Regional Municipality in 2018 titled *Halifax Green Plan* includes a map of the Municipality that identifies locations of “Parks, Protected Areas and Proposed Protected Areas.” Owls Head is identified by the map’s colour scheme as a “Park” (Exhibit “I”).
57. An on-line, 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.” On February 19, 2020, the colour scheme used for Owls Head indicated that it is not a Park; however, when Ms. Markovits had previously used this map, the colour used for Owls Head had identified it as a Provincial Park (Markovits March 25, 2020 affidavit para. 8(h) and Exhibit “J”).
58. An on-line 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” (Exhibit “K”).

The Parks and Protected Areas Plan

59. The *Our Parks and Protected Areas: A Plan for Nova Scotia* (PAPA Plan) is a planning document produced by the Departments of Natural Resources (as it was then known) and Environment, and published in 2013. The PAPA Plan was created to support recreation, tourism, research and education, and conservation of land, water and biodiversity.
60. A 2013 report published by Department of Natural Resources and Nova Scotia Environment titled *Our Parks and Protected Areas: A Plan for Nova Scotia* (PAPA) lists Owls Head as one of the Province’s 205 Provincial Parks. The Plan notes that Owls Head was an “existing” Provincial Park at the time the report was published (that is, not among the slate of “new” provincial parks added to the suite of provincial parks), and that it was to be managed as a supporting park (Exhibit “L”, pg 54).
61. The 2013 PAPA Plan acknowledges that the Department of Natural Resources is “grateful for the input from the public [...]” (PG 2 of Exhibit “L”). The Ministers of Natural Resources and Environment also note that the

plan’s success has been authored by you: Nova Scotians committed to protecting and conserving our beautiful province for future generations. It builds on extensive consultations over the last several years involving members of the public and Nova Scotia’s Mi’kmaq community [...] (PG 3 of Exhibit “L”).
62. The 2013 PAPA Plan notes that if all of the lands included in the plan were legally protected, it would result in four new provincial parks, and that “with these changes” Nova Scotia would have 205 provincial parks. Owls Head Provincial Park was not identified in the PAPA Plan as one of the “new” provincial Parks (PG 4-5 of Exhibit “L”).
63. The 2013 PAPA Plan describes why the Province protects some of Nova Scotia’s Crown lands, noting that

for many Nova Scotians, protecting wild spaces is instinctive; these spaces are special places where we can enjoy, learn about, and care for our natural heritage. Protecting our wild spaces is also necessary. Parks and protected areas play an important role in conserving Nova Scotia's biodiversity and protecting our access to clean air and water. [...] This plan also commits government to deliver an integrated, coordinated parks and protected areas program (PG 6 of Exhibit "L").

64. The PAPA Plan emphasizes the public engagement that the Province undertook during the development of the Plan, stating, for example (PG 6-7 of Exhibit "L"):

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 1,500 interviews with park users and non-users to examine their perceptions and preferences. This plan reflects the extensive input received through that process.

Specific properties in the plan are also based on comprehensive 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 per cent lands review process (2011), which included numerous stakeholder meetings and more than 700 written submissions. The final plan also reflects what we heard following release of the proposed plan early in 2013. This included more than 2,000 written submissions, and input from more than 1,300 people at 17 public open house sessions held across the province.

65. The PAPA Plan also notes that Nova Scotia's Provincial Parks both protect nature and support a wide range of heritage values and opportunities for outdoor recreation. The Plan points out that "Parks represent a special case; only those whose main intent is to protect nature count toward our legal protection goal [...]" (PG 8 of Exhibit "L").

66. The PAPA Plan states that all of the provincially owned lands included in the Plan will be managed under "interim guidelines" until legally protected, and that these interim guidelines

will be consistently applied by the Department of Natural Resources and Nova Scotia Environment to ensure that the areas included in the plan are managed in a manner consistent with their intended protection. [...] This plan shows government decisions for this new system of protected areas. Additional time is needed to complete the planning, legal, and survey work that will result in the final legal designation of the lands under protection legislation (PG 9-10 of Exhibit "L").

67. The PAPA Plan describes the selection process for parks and protected areas as focused on remote and large areas with few human impacts, representative of the full spectrum of Nova Scotia's natural landscape, and with rare or unique landscapes, plants or animals, among others (PG 12 of Exhibit "L").

68. The PAPA Plan acknowledges that “parks cannot be all things to all people [and] this plan identifies which properties are most important to maintain as parks, and which should be managed as part of the general Crown land program [...]. In all cases, the land remains in public ownership” (PG 13 of Exhibit “L”). Owls Head, evidently, was among the “most important” lands to be maintained as a park.
69. The PAPA Plan asserts that parks and protected areas help build healthy communities by, among others, “invigorating human spirits; giving hope for the future; providing settings of breathtaking beauty; and enhancing our quality of life” and contributes to our economy by, among others, “helping us brand Nova Scotia as a clean, green place in which to live, work and do business; [and] employing people, directly and indirectly, especially in rural areas” (PG 14 of Exhibit “L”). The Plan also notes that “Updating our Parks and Protected Areas is about leaving a legacy” (PG 15 of Exhibit “L”).

I. Applicants’ history of public consultation concerning parks

70. Markovits’ March 25, 2020 affidavit also details a history of engagement and consultation conducted by the Province concerning protected areas, as described in the following paragraphs. All references are to Markovits’ March 25, 2020 affidavit.
71. In 2016, Eastern Shore Forest Watch Association (ESFW) was invited to participate (and did participate) in a stakeholder meeting to discuss protected areas issues on the Eastern Shore. During this meeting, the Province showed a map of protected areas on the Eastern Shore, which included Owls Head Provincial Park (Exhibit “O” and para. 12(c)).
72. In 2013, ESFW participated in (and submitted written comments for) consultations undertaken by the Department of Natural Resources concerning parks and protected areas. Their written submission, *Public Consultation for Our Parks and Protected Areas* (April 30, 2013; Exhibit “P”), did not discuss Owls Head Provincial Park because the Department had represented to the public that Owls Head was already a Provincial Park. As noted above, the PAPA Plan (published following these public consultations) identified Owls Head as an already existing Provincial Park (para. 12(f)).
73. In 2013, ESFW also participated in public consultation conducted by the Province regarding the commitment to achieve 12% protected areas by 2015 (para. 12(g)).
74. In 2008, ESFW participated in and made written submissions for meetings organized by Voluntary Planning (an arm’s length government body at the time) to discuss parks and protected areas on the Eastern Shore (para. 12(l)).
75. The 1980 edition of *N.S. Conservation*, mentioned above, includes an article by Gordon Hammond, chair of the Citizens’ Representation Committee, in which he noted that the Committee was formed in 1975 by the Province and consists of residents from 17 Eastern Shore communities, including Owls Head and Little Harbour. He also noted that the Committee’s

mandate was to work with provincial park planners in an effort to create the Eastern Shore Provincial Park System, and that one of the group's purposes was to "make sure that the representatives carried to the Department of Lands & Forests the concerns of the people in their community" (Exhibit "I", Markovits' March 25, 2020 affidavit).

J. Nova Scotia's parks designated by regulation and not so designated

76. The PAPA Plan (Markovits March 25 affidavit, Exhibit "L") identifies 205 Provincial Parks in Nova Scotia. However, only 102 of these 'Provincial Parks' are designated by regulation as Provincial Parks under the *Provincial Parks Act*. [The Applicants respectfully request judicial notice of the 102 provincial parks regulations under the *Provincial Parks Act*].

77. Owls Head Provincial Park is among the more than one-hundred Nova Scotia Provincial Parks not designated under the *Provincial Parks Act*, including Pomquet Beach Provincial Park and Herring Cove Provincial Park. As with the former Owls Head Provincial Park, neither Pomquet Beach Provincial Park nor Herring Cove Provincial Park are legally designated as Parks under the *Provincial Parks Act*, yet are presented to the public as Provincial Parks.

PART THREE: ISSUES

78. The issues in this matter are as follows:

- a. The Applicants have public interest standing;
- b. The application for judicial review is not premature;
- c. The standard of review is correctness (procedural fairness) and reasonableness (remainder);
- d. The Applicants were owed a duty of procedural fairness; and
- e. The decisions by the Minister and the Treasury and Policy Board were unreasonable.

PART FOUR: LAW AND ARGUMENT

A: The Applicants have public interest standing

79. Justice Brothers summarized the test for public interest standing in *Bancroft v Minister of Lands and Forestry* (2020 NSSC 175, paras. 143 - 144), as follows (with reference to *Canadian Council of Churches v R* [1992] 1 SCR 236):

In summary, there must be a serious issue to be tried; the Applicant must show a "genuine interest" in the subject matter; and there must be no other reasonable and effective manner for the case to come before the Courts. [...]

80. Justice Brothers also referenced (*Bancroft, supra*, para. 144) Cromwell J.'s comments in *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)* (2021 SCC 45), that "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), and should be 'applied purposively and flexibly' (para 37)."

Genuine interest:

81. The Applicants' affidavits demonstrate the Applicants' interest in Nova Scotia's natural history, with particular interest in conserving ecologically important lands. Both of the Applicants have participated in various government-led public consultation processes concerning protected areas and parks in Nova Scotia, and the Eastern Shore Forest Watch Association in particular has been involved with parks and protected areas on the Eastern Shore in the vicinity of Owls Head Provincial Park. For these reasons, the Applicants have demonstrated a genuine interest in the subject of the matter at bar.

Reasonable and effective means for the case to be heard:

82. The Applicants initiated this matter to request the Court to exercise its supervisory role concerning the administrative decisions of government, with respect to both the procedural fairness and the reasonableness of the Minister and the T&PB's decisions. The Applicants submit that there are no private rights or interests engaged in this matter, and thus this judicial review is the only means to engage the court's supervisory role.

83. Furthermore, the Applicants are, in a sense, speaking not only on behalf of public interests, but also on behalf of Owls Head Provincial Park itself – the land, the public shoreline, the endangered species that live there, the globally rare ecosystem. As Justice Brothers noted in *Bancroft v Minister of Lands and Forestry*, "[species at risk] need people like Mr. Bancroft and organizations like the other Applicants... to take such action and speak for them. [...]" (*supra*, para. 152).

Serious and Justiciable Issue:

84. In *Bancroft (supra*, at para. 150), Justice Brothers described the serious and justiciable issue aspect of the test for public interest standing as "not a high bar," and noted that Cromwell J. in *Downtown Eastside* described a serious issue as "far from frivolous."

85. The serious and justiciable nature of the issues at stake in this judicial review are illustrated in detail below. However, the Applicants note that although Justice Manson held that the public trust doctrine did not disclose a reasonable cause of action in *La Rose v Canada* (2020 FC 1008, at para. 102), his Lordship did note that the public trust doctrine is a justiciable issue.

86. 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.

B. Application for Judicial Review is not premature

87. The removal of Owls Head Provincial Park from the PAPA Plan is a radical change in the conservation status of this Park. The public lands at Owls Head were considered to be protected as a Provincial Park since the late 1970s. Scientists, including Lands and Forestry researchers, were required to obtain permits to carry out research in Owls Head Provincial Park. The Parks and Protected Areas Plan describes Owls Head Provincial Park as “established” and managed as a “supporting park.” The secret delisting of Owls Head, rendering it ordinary Crown land that could be sold off for private development, is a final decision worthy of judicial review.
88. Furthermore, the decision to execute the Letter of Offer to sell the former Owls Head Provincial Park for private resort and golf course development is, again, a final decision worthy of judicial review. The Letter of Offer sets the terms and conditions of the sale of the Owls Head Crown lands to Lighthouse Links. The Minister has bound himself to the sale of the former Park, at a set price, subject to the conditions specified in the contract.
89. The Applicants in this matter were not engaged in a formal administrative process (or *any* consultation process) concerning the status of Owls Head Provincial Park or its sale. The decision to remove Owls Head Provincial Park from the PAPA Plan, and the decision to execute the Letter of Offer for its sale, are substantive decisions, not procedural. This is not a situation where the Applicants are challenging an interim step in an adjudicative process, or where there are additional levels of a tribunal proceeding to pursue.
90. Justice Smith in *Oxford Frozen Foods Ltd. v Nova Scotia (Workers’ Compensation Board)*, 2017 NSSC 136, para. 60, quoted Bateman JA in *Sydney Engineering Inc. v Irving Oil Ltd.*, 1996 NSCA 5 (para. 12), as follows:
- It emerges from the cases that the distinction between interlocutory and final orders is not strictly parallel to the distinction between substance and procedure. Pleadings and joinder of claims and parties, for example, are generally regarded as matters of procedure, but orders in such matters can have drastic effects on what and against whom a party can claim. Where such orders have a terminating effect on an issue or on the exposure of a party, they plainly ‘dispose of the rights of the parties’ and are appropriately treated as final. Where such orders set the state for a determination on the merits, they do not ‘dispose of the rights of the parties’, and are appropriately treated as interlocutory.*
91. With the matter at bar, the delisting of Owls Head Provincial Park has a “terminating effect on an issue,” given that the decision removes protection and opens the Park to disposal to private interests. Similarly, the Letter of Offer is a finalization of the terms for the disposal of the Park to private interests and as such disposes of any right of the public to provide input on whether the Minister should execute the Letter of Offer.
92. Alternatively, should this Court find that the decision is an interim or interlocutory decision and that the actual sale of the land would be the final decision, the applicants submit that this

matter involves exceptional circumstances that justify this Court's intervention at this stage. Justice Smith in *Oxford, supra*, at para. 66, referenced with approval the following passage from *McIntosh v College of Physicians & Surgeons*:

38 In the case of Gage v Ontario (Attorney General) (1992), 90 D.L.R. (4th) 357 (Ont. Div. Ct.) the Ontario Divisional Court stated in part at p. 553:

If there is a prospect of real unfairness through denial of natural justice or otherwise, a superior court may always exercise its inherent supervisory jurisdiction to put an end to the injustice before all the alternative remedies are exhausted...

93. The notion that the Applicants ought to wait until after the land is sold to a private developer to launch a judicial review is concerning. Once the Crown land is sold, the environmental attributes of the land are at imminent risk. The Applicants would have to bring a successful injunction motion to halt the developer's actions on the land. The developer may have obtained financing for the development projects by this point and could be significantly inconvenienced by an injunction and on-going court proceedings. The stakes – and tensions – would be exponentially higher for both the public and the private developer.
94. Furthermore, the window of time to challenge the decision to strip Owls Head Provincial Park of its park status had already passed by the time the Applicants learned of the decision; the Applicants required judicial leave to file their application. Delaying their application until Owls Head was actually sold would create a heightened risk that a court may not grant the Applicants permission to challenge the decision.
95. In short, the Respondents' assertion that a judicial review be launched only after the land is sold risks shifting focus away from the government's responsibilities for its actions in this matter, and heightening animosity between the public and the developer. In a sense, the government would, thereby, scapegoat its responsibilities onto the private developer.
96. Challenging the decisions to delist Owls Head Provincial Park and to execute the Letter of Offer to sell the public lands, on the other hand, helps to ensure that the focus is on the government's actions. The Applicants' 'fight,' after all, is not with Lighthouse Links but rather with the Department of Lands and Forestry and its decision-making process.

C. Legislative Context: *Crown Lands Act*, *Provincial Parks Act*, and *Endangered Species Act*

Crown Lands Act

97. The purpose of the *Crown Lands Act* (RSNS 1989, c 114, s. 2) is

to provide for the most effective utilization of Crown lands by
[...]

(c) the integration of wildlife and outdoor recreation considerations in the forest management planning process on Crown lands; and

(d) the more effective administration and management of all Crown lands

98. The Legislature has assigned the authority and responsibility to manage Nova Scotia's Crown lands to the Minister of Lands and Forestry (s. 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, [...]

99. The Legislature has also empowered the Minister of Lands and Forestry to sell Crown land, subject to approval of the Executive Council (*Crown Lands Act*, s. 16(1)(a)):

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;

100. Furthermore, the Legislature assigned the authority to execute documents of title conveyance to the Minister of Lands and Forestry (*Crown Lands Act*, s. 19(1)):

19(1) Where the Minister, with the approval of the Governor in Council, conveys title to Crown lands, the Minister shall sign the instrument or document and affix the seal of the office of the Minister.

101. The Legislature also empower the Minister of Lands and Forestry to set aside "special areas" on Crown lands (*Crown lands Act*, s. 24) for

[...] (b) the conduct of forest research;

(c) the protection and regulation of the flow of water within the lands so reserved and set apart;

[...]

(e) the protection, management and conservation of wildlife and wildlife habitat;

(f) such purposes as the Minister deems expedient.

102. Further, the *Crown Lands Act* requires that "[t]he Minister shall manage wildlife and wildlife habitats on Crown lands and provide for the maintenance of long-term productivity, diversity and stability of the forest ecosystem" (s. 25(1)).

Provincial Parks Act

103. The Nova Scotia Legislature enacted the *Provincial Parks Act* (RSNS, c 367), in part, to “preserve unique, rare, representative or otherwise significant elements of the natural environment and historic resources of Nova Scotia [...]” (s. 2(1)(b)).
104. Furthermore, the Legislature dedicated “all provincial parks [...] in perpetuity for the benefit of present and future generations of Nova Scotians” (s. 2(2)).
105. The Legislature assigned the Minister of Lands and Forestry to the “general supervision, administration and management of [the *Provincial Parks Act*] and the regulations” (s. 4(1)).
106. The Legislature empowered the Minister of Lands and Forestry to supervise, manage and control activities within provincial parks, including, among others, issuing permits for scientific research (s. 13(f)) and protecting flora and fauna within provincial parks (s. 13 (l)).

Endangered Species Act

107. The Minister of Lands and Forestry is responsible for the “general supervision and management” of the Endangered Species Act (s. 6(1)).
108. The Legislature enacted the *Endangered Species Act* to “provide for the protection, designation, recovery and other relevant aspects of conservation of species at risk in the Province, including habitat protection [...]” (s.2(1)), and noted that “governments have a leadership role to play” with respect to the conservation of species at risk (s.2(1)(d)).
109. The Legislature also directed that “Nova Scotians be provided with the opportunity for meaningful participation in relation to conservation of species at risk” (s. 2(1)(e)).
110. The Act requires the identification of potential “core habitat” for endangered and threatened species in recovery plans for such species (s. 15(4)(h); designation of core habitat as such is considered to be “regulations” (s. 16(6)).
111. The Act stipulates that before the Minister can designate any core habitat of a species on private land, the Minister must first be satisfied that the core habitat of the species on public lands is insufficient to meet the recovery needs of the species (s. 16(4)).

D. Minister of Lands and Forestry is the Administrative Decision Maker

112. The Treasury and Policy Board (T&PB – a committee of the Executive Council) issued the minute letter that removed Owls Head Provincial Park from the Parks and Protected Areas Plan. Nonetheless, the role of the T&PB was perfunctory in that the minute letter was not issued ‘out of thin air’ but rather at the request of the Minister who is responsible for the management and control of Crown lands and provincial parks. But for the Memorandum to Executive Council (MEC) requesting the removal of Owls Head Provincial Park, such a minute letter would not be issued by the T&PB.

113. 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 T&PB 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.
114. With respect to a decision to sell Crown land, the Minister of Lands and Forestry must obtain approval from the Executive Council to convey a parcel of Crown land; however, the *Crown Lands Act* assigns the Minister responsibility over the decision-making process for the conveyance of any parcel of Nova Scotia Crown land. It is the Minister who is responsible for the “supervision, direction and control of the ... sale or disposition of Crown lands” (s. 5) and who must “sign the instrument or document [of conveyance] and affix the seal of the office of the Minister” (s. 19(1)).
115. With respect to provincial parks, it is again the Minister of Lands and Forestry that is empowered by the Legislature for the “general supervision, administration and management of [the *Provincial Parks Act*]” (s. 4(1)). Likewise with species at risk and the *Endangered Species Act*.
116. Finally, it was the Department of Lands and Forestry that engaged with Lighthouse Links for over three years concerning Lighthouse Links’ proposal to acquire the Owls Head Crown lands. The Record shows a history of Department staff meeting with the proponent, requesting information from the proponent, and negotiating the terms and conditions of the Letter of Offer to sell Owls Head Crown lands to the proponent. But for the minute letter from the T&PB granting permission to remove Owls Head Provincial Park from the PAPA – the necessity of which is not established – the Department of Lands and Forestry was solely responsible for the delisting of Owls Head Provincial Park and executing the Letter of Offer for its sale to private interests.

E. Decision to remove Owls Head from the PAPA is an administrative decision

117. Should this court find that the T&PB is the sole administrative decision maker concerning the removal of Owls Head Provincial Park from the PAPA, the Applicants submit that the decision is nonetheless an administrative decision rather than a legislative decision. The decision to remove Owls Head Provincial Park from the PAPA involved one park. The decision did not involve Crown lands generally or even provincial parks generally; it cannot be described as a matter of general policy.
118. Justice Southcott, in *Barry Group Inc. v Canada*, 2017 FC 1144, para. 21, referenced with approval the test for whether an act is legislative or administrative in nature, as set out by the Federal Court in *Ecology Action Centre v Canada (Attorney General)*, 2004 FC 1087:

[50] ... A legislative act differs from an administrative act and that difference is discussed in De Smith *Judicial Review of Administrative Action* (S.A. De Smith & J.M. Evans, 4th ed. (London England: Stevens, 1980)) at page 71 as follows:

A distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.

119. In *Bridgewater (Town) v South Shore Regional School Board*, 2017 NSSC 25, Justice Lynch at para. 17 references Justice Oland in *Potter v Halifax Regional School Board*, who also references De Smith's *Judicial Review of Administrative Action* (albeit the third rather than fourth edition):

[17] Justice Oland in *Potter v. Halifax Regional School Board*, 2002 NSCA 88, provides a help explanation of the distinction:

[39] ... I have found the following passage from S.A. De Smith's text, *Judicial Review of Administrative Action*, [3rd ed] ... on the distinction between administrative and legislative acts helpful for my analysis:

The distinction between legislative and administrative acts is usually expressed as being a distinction between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases...

[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.... I agree with Brown and Evans that those decisions closer to the "legislative and general" end of the spectrum usually have two characteristics: generality ... and a broad policy orientation in that the decision create norms rather than decides on their application to particular situations.... 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. [Emphasis in original]*

120. The decision to remove Owls Head Provincial Park from the PAPA Plan falls squarely into the "particular" category. The decision did not involve the "creation and promulgation of a general rule of conduct without reference to particular cases..." but rather the delisting of one

provincial park to facilitate its sale to a private interest. As such, the 'closure' of one Provincial Park to facilitate the sale of that land is analogous to the closure of a school.

F. Standard of Review: Correctness (procedural fairness) and Reasonableness (remainder)

121. No standard of review analysis is conducted for questions of procedural fairness; determining whether a duty of procedural fairness is owed and the nature of that duty is squarely in the wheelhouse of the judiciary. The substantive aspect of an administrative decision, however, is presumed to be reviewed on the standard of reasonableness. As noted in *Canada (Minister of Citizenship and Immigration) v Vavilov* [Vavilov] (2019 SCC 65, at para. 23),

Where a court reviews the merits of an administrative decision (i.e. judicial review of an administrative decision other than a review related to a breach of natural justice and/or the duty of procedural fairness), [...] the starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

None of the exceptions that rebut this presumption applies in the matter at bar.

G. Applicants were owed a duty of procedural fairness

122. Procedural fairness is “a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. [...]” (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para. 79). The majority in *Dunsmuir* went on to quote Le Dain J. (at para. 87):

This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the right, privileges or interests of an individual... (Cardinal v Director of Kent Institution, [1985] 2 SCR 643, at p 653)

123. Procedural fairness is not owed in respect of every government or tribunal decision. Only decisions that are administrative in nature and that affect the rights, privileges or interests of an individual attract a duty of procedural fairness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [Baker], at para. 20, in reference to the above quote from *Cardinal*).

124. The extent of the duty, when it is owed, varies according to the circumstances of the matter, and is evaluated through the lens of the following (non-exhaustive) factors: (1) the nature of the decision to be made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself (*Vavilov, supra*, at para. 77, referencing *Baker* at para. 23-27).

125. The Courts have not yet acknowledged nor denied that an administrative decision-maker may owe a duty of procedural fairness to a public interest litigant. Suspending this evident hurdle for a moment, the applicants otherwise cross the procedural fairness threshold.

The decisions to remove Owls Head Provincial Park from its protected status and to execute a letter of offer for its sale are administrative decisions, as described previously. As representatives of citizens concerned for the state of Nova Scotia's environment, and for the conservation of Owls Head specifically, the applicants are deeply impacted by the potential loss of a globally-rare ecosystem, endangered species habitat, and public access to this coastal land.

126. L'Heureux-Dubé J. emphasized that underlying the procedural fairness factors is the need to ensure that administrative decisions are made using a "fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker" (*Baker, supra*, at para. 22). There is an inherent sense of injustice that the matter at bar would attract a duty of fairness only if the decisions had affected private interests, given that this matter can only affect the public interests of those who care about Nova Scotia's natural history and public parks.
127. Lifting the public/private interest barrier for a moment, the *Baker* factors suggest that the Applicants were owed a moderate level of fairness. The decisions were not adjudicative in nature and the *Crown Lands Act* gives the Minister discretion in managing Crown lands, militating in favour of a relaxed duty of fairness. However, the loss of a Provincial Park and 7.5 kilometres of public coastland to private ownership and the evident risk to the park's ecological values elevates the duty of fairness. Furthermore, the Department's long history of consulting the public when making decisions to create parks also elevates the duty of fairness. As well, the Act offers no appeal procedure for such decisions.
128. The Applicants' legitimate expectations that they would be informed and consulted before a park would be removed from the PAPA Plan and sold for private development further elevates the duty of fairness owed. The Applicants' legitimate expectation is based on the following facts.
129. First, the Applicants (and the Department itself) believed that Owls Head Provincial Park was a park, as evidenced by the following:
 - a. The Department has produced numerous maps and other publications that represent the Owls Head as a Provincial Park. The PAPA Plan identifies Owls Head Provincial Park as an already existing provincial park.
 - b. The Halifax Regional Municipality produced a map that identifies Owls Head as a Provincial Park.
 - c. The Department of Lands and Forestry issued a permit enabling scientific research to take place on land, wherein the land was referred to as Owls Head Provincial Park. Such permits are not required for Crown land that is not protected in some manner.

- d. Of the 206 Provincial Parks in Nova Scotia, approximately half of these are not designated as provincial parks by regulation, yet are presented to the public and are managed by the Department as Provincial Parks. For example, Herring Cove Provincial Park is identified as a Provincial Park, yet is not designated by regulation. Pomquet Beach Provincial Park is identified as a Provincial Park, yet is not designed by regulation.
- e. There is no practical difference discernible to the public between the Department's representation and management of Provincial Parks designated by regulation and Provincial Parks that are parks in name, management, and use only.

130. Second, the Applicants have a long history of participating in public consultation concerning the creation of parks, and the Minister explicitly emphasized in the PAPA Plan the role that public consultation plays in selecting Crown lands to be conserved. The PAPA Plan states, for example,

- a. *[The] plan's success has been authored by you: Nova Scotian committed to protecting and conserving our beautiful province for future generations. It builds on extensive consultation over the last several years involving members of the public and Nova Scotia's Mi'kmaq community [...] (PG 3 of Exhibit "L", Markovits' March 25, 2020 affidavit).*
- b. *This plan also commits government to deliver an integrated, coordinated parks and protected areas program (PG 6 of Exhibit "L").*
- c. *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 1,500 interviews with park users and non-users to examine their perceptions and preferences. This plan reflects the extensive input received through that process.

Specific properties in the plan are also based on comprehensive 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 per cent lands review process (2011), which included numerous stakeholder meetings and more than 700 written submissions. The final plan also reflects what we heard following release of the proposed plan early in 2013. This included more than 2,000 written submissions, and input from more than 1,300 people at 17 public open house sessions held across the province. (PG 6-7 of Exhibit "L")

131. Third, the Minister assured Nova Scotians that the properties listed in the plan will be managed under "interim guidelines" until legally protected:

[These guidelines] will be consistently applied by the Department of Natural Resources [...] to ensure that the areas included in the plan are managed in a manner consistent with their intended protection. [...] This plan shows government decisions for this new system of protected area. Additional time is needed to complete the planning, legal, and survey work that will result in the final legal designation of the lands under protection legislation (PG 9-10 of Exhibit "L").

132. In other words, the Minister promised Nova Scotians that the lands identified in the Plan would be managed in a manner consistent with the Minister's decision to conserve these lands, until the necessary work was completed to formally designate the lands under legislation. Ironically, Owls Head Provincial Park was identified in the Plan, represented to the public, and thought by the Department of Lands and Forestry, to be *already* formally designated under legislation.

133. The Minister also explicitly promised that Crown land generally as well as those Crown lands identified in the Plan for protection will remain in "public ownership" (PG 13 of Exhibit "L").

134. For these reasons, it is clear that the Applicants had a reasonable belief that Owls Head Provincial Park was a park, and that the Applicants had a legitimate expectation that the Minister would not remove its status as a park and negotiate its sale to a private resort and golf-course developer, absent public notice and consultation.

135. It is apparent, then, that should this court find that a duty was owed, the nature of that duty should include notice and an opportunity to comment. Further, the 'moderate' nature of this duty suggests that any decision regarding the delisting and entering into an offer of sale requires a written rationale. Divestment of public lands with known high ecological value, especially lands identified as a provincial park for decades, is a drastic and highly significant decision and as such warrants a written rationale (*Baker, supra*, at paras. 38, 39 and 43).

136. As well, the majority in *Vavilov, supra*, reiterated the importance of reasons, noting that reasons "shield against arbitrariness as well as the perception of arbitrariness" (at para. 78); encourage administrative decision makers to "more carefully examine their own thinking" (at para. 80); and help to demonstrate the "justification, transparency and intelligibility" of the reasoning process and outcome (at para. 81). All of these points speak to the rationale for why the Minister ought to explain his analysis and decision with respect to Owls Head Provincial Park.

Lifting the private/public interest barrier

137. The Minister's (and the T&PB's) duty of fairness to the Applicants flows from the Crown's duty to act in the broad interests of Nova Scotians. In *Alberta v Elder Advocates of Alberta Society* (2011 SCC 24) the Supreme Court of Canada referenced the Crown's "duty to act in the best interests of society as a whole" and the Crown's "broad responsibility to act in the

public interest” (at para. 44). Acting in the public’s interest necessarily implies a duty to inform and consult Nova Scotians before making a decision to dispose of public lands with identified conservation values.

138. While the common law has not yet recognized nor denied that administrative decision makers owe a duty of fairness to public interest litigants, the facts of this matter suggest that the Minister of Lands and Forestry (or the T&PB) committed a fundamental breach of fairness by secretly removing Owls Head Provincial Park from the PAPA Plan to facilitate its sale to a private developer. Deciding what is fair and what is not fair with respect to the decision-making processes of administrative decision makers is squarely within the wheelhouse of the judiciary. Recognizing a basic duty of procedural fairness in these circumstances is an incremental expansion of the common law, whereby an existing duty is extended to a new beneficiary. Such a shift is harmonious with the expansion of procedural fairness over recent decades.

H. The Doctrine of Public Trust gives rise to a duty of procedural fairness

139. The Supreme Court of Canada has recognized the possible application of the public trust doctrine, as developed in various States in the United States, in respect of public lands (*British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 [*Canfor*]). In laying the foundation for the possible application of this doctrine, Justice Binnie quoted (at para. 73) an Ontario Court of Appeal case (*Scarborough v R.E.F. Homes Ltd.* (1979), 9 MPLR 255, at p. 257):

In our judgment, the municipality is, in a broad general sense, a trustee of the environment for the benefit of the residents in the area [...] and, indeed, for the citizens of the community at large. [Emphasis by Justice Binnie]

140. Binnie J also commented that the notion that there are public rights in the environment residing in the Crown has “deep roots” in the common law, dating from Roman law (at para. 74) and flowing through French civil law and English common law (at para. 75). The rights were applied to running water, banks of rivers, air, the sea and the shores of the sea.
141. Binnie J referenced the seminal public trust case in the United States, *Illinois Central Railroad Co. v Illinois* (146 US 387 (1892)), wherein the court distinguished between public lands held “in trust for the people of the state” and those lands intended for sale, noting that the former lands were impressed with a public trust (at para. 79).
142. Binnie J also referenced *New Jersey, Department of Environmental Protection v Jersey Central Power and Light Co.*, 336 A.2d 750 (NJ Super. Ct. App. Div. 1975), wherein the court held 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” (at para. 80).
143. Binnie J recognized that “the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown” would raise “important and novel policy questions” (at para. 81). Binnie did not delve deeper into these questions because these grounds had not been pleaded or otherwise raised by any of the parties to the proceedings. Justice Binnie’s

exploration of these grounds, notwithstanding that these grounds had not been raised by the parties, suggests that the Court is not fundamentally opposed to considering their application in suitable circumstances.

144. In the United States, the public trust doctrine has developed on a state-by-state basis. While the breadth of the doctrine varies according to the state, the doctrine generally has been applied to questions of procedural fairness rather than to the outcome of a decision. In *Canadian Approaches to America's Public Trust Doctrine*, Anna Lund notes the courts' reluctance to weigh competing interests involved in public interest claims and that, rather,

*the judicial branch will scrutinize a decision of the legislative or executive branch to ensure that the decision is made by a sufficiently representative, accountable and open body and that adequate consideration is given to the public trust interests at stake and any less-harmful alternatives.*¹

145. Lund recognizes that the public may not have access to any administrative mechanism to hold administrative decision-makers directly accountable for their decisions that impact public trust resources. Lund notes that these decision-makers may be "subject to behind-the-scenes pressure coming from interested purchasers, who would prefer that public trust dispositions be completed quietly, without raising the ire or awareness of the public." For this reason, among others, USA courts may scrutinize the procedure adopted by the decision-maker in respect of decisions that impact public trust resources, and may require written evidence that the decision-maker evaluated the public trust values and less harmful alternatives (Lund, at p. 153-154).

146. Such a scenario played out in the matter at bar. The Minister was petitioned by a private developer, which included lobbying by a former Nova Scotia Liberal cabinet minister, to sell a Provincial Park for private resort and golf course development, without letting the public know of the removal of the public land's status as a park and without letting the public know of the Letter of Offer for its sale.

147. Lund references *Kootenai Environmental Alliance v Panhandle Yacht Club Inc.*, 671 P.2d 1085 (Idaho, 1983), a case concerning a lease granted by the State Department of Lands to a yacht club for the construction of private docking facilities. The Idaho Supreme Court held that the public trust resource at issue (public coastal land) could only be "alienated or impaired through open and visible actions, where the public is in fact informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made" (at pg. 149).

148. In the matter at bar, the Minister (or the T&PB) acted in a manifestly unfair manner by removing Owls Head Provincial Park from the PAPA Plan and entering into an agreement to sell the public land, in absence of any "open and visible actions, where the public is informed of the

¹ Anna Lund, *Canadian Approaches to America's Public Trust Doctrine*. 23 J Env L & P 135, April 2012, at p. 153.

proposed action and has substantial opportunity to respond to the proposed action before a final decision is made.”

149. Lund also references an administrator’s duty to account for the public trust when making decisions affecting the public trust resource or use. In *Water Use Permit Applications*, 9 P.3d 409 (Hawai’i, 2000), the court noted that the public trust is a “dual concept of sovereign right and responsibility” and in *National Audubon Society v Superior Court of Alpine County*, 189 Cal. Rptr. 346, 658 P.2d at 719 (California, 1983; aka the Mono Lake case), the court held that the administrative decision-maker had to account for the broader ecological ramifications of its decision. In both of these cases, the courts held that the administrative decision-makers had the following duties with respect to decisions that may impact a public trust resource (at p. 146-148):

- a. *To consider the effect of the decision on public trust uses,*
- b. *To consider, and (where feasible) implement less harmful alternative and mitigation measures, and*
- c. *To carry out ongoing supervision of the public trust resource and, if deemed necessary to protect public trust values, revisit its earlier decision to impair or dispose of the resource.*

150. In Canada, courts have held that certain public lands are held under a form of public trust. In *Highways, Parks and the Public Trust Doctrine*, Andrew Gage notes that since the 1859 case of *Sarnia (Township) v Great Western Railway*, (1859), 21 UCQB 59 (QB), courts have held that governments hold highways subject to a “fiduciary or trust-like obligation to the public.” In *Sarnia*, the court held that

The [highway] property vested in the municipality is a qualified property, to be held and exercised for the benefit of the whole body of a corporation ... [The municipality] may be said to hold the freehold, but then it is only as trustees for the public, and not by virtue of any title which confers a right of exclusive possession.²

151. The 1886 case *Octave Chavigny de la Chevrotiere v Montreal (Ville)* ((1886), (1887) LR 12 App. Cas. 149 (Quebec PC) at 159) extended this public trust-like obligation to a public market place (Gage, at p. 33).

152. In *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, at 154, Lamer J also commented on the “special nature” of government property:

In my opinion, this analytical approach [which equates government ownership of land with private ownership] contains inherent dangers. First, it ignores the special nature of

² Andrew Gage. *Highways, Parks and the Public Trust Doctrine*. 18 J Env L & P, 1 October 2007, at p. 32.

government property. The very nature of the relationship existing between citizens and the elected government provides that the latter will own places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns. The "quasi-fiduciary" nature of the government's right of ownership was indeed clearly set out by the U.S. Supreme Court in Hague v. Committee for Industrial Organization [...] (Gage, p. 33-34).

153. A theme connecting these cases is an indication by government that the property in question is designated for public benefit. Such an indication resonates with the doctrine of dedication and acceptance, traditionally applied to public rights of passage. Absent legislation to the contrary, the common law maxim 'once a public highway, always a public highway' applies.
154. In the 1995 Ontario Court of Appeal's *Gibbs v Grand Bend (Village)*, the court rejected the trial judge's suggestion that dedication and acceptance is limited to public rights of passage, stating "[p]erhaps such a proposition was tenable in other days, but today's attitude favouring playgrounds, greenbelts, parks, [...] is because facilitating public recreation is a matter of public necessity" (Gage, at p. 15).
155. With the matter at hand, the Owls Head public lands had been identified and designated as a park since the late 1970s, and the Minister of Lands and Forestry formally recognized this designation in the PAPA Plan. The Minister stated in the Plan that Nova Scotia's parks (as identified in the Plan) "play an important role in conserving Nova Scotia's biodiversity and protecting our access to clean air and water" and that parks help build healthy communities by "invigorating human spirits; giving hope for the future; providing settings of breathtaking beauty; and enhancing our quality of life."
156. With respect to Owls Head public lands specifically, the province articulated that the lands were designated as a park because of their "variety of coastal barrens and wetlands; exceptional bedrock-ridged topography; coastal access; and occurrences of nesting Piping Plovers [an endangered species]" among other values.
157. The public arguably accepted this designation by way of the extensive public consultation conducted by the province as previously illustrated. This dedication and acceptance of the Owls Head public lands as a park and as lands conserved for their ecological and geological significance further elevates the 'trust-like,' 'quasi-fiduciary' obligation on part of the Minister (and the T&PB to the extent that they authorized the Minister's actions) to Nova Scotians.
158. The trust-like and quasi-fiduciary nature of the Crown's ownership of public lands, especially those that are identified for their public values, suggests that the Crown has an implied duty to ensure that any decisions concerning the fate of public-trust resources are made in an open and fair manner, with opportunity for the public to participate in the decision-making process.

Extending the Common Law

159. In *R v Salituro* ([1991] 3 SCR 654, pg. 678) the Supreme Court of Canada noted that “[t]he courts are the custodians of the common law, and it is their duty to see that the common law reflects the emerging needs and values of our society.” The specific circumstances of the present matter are an opportunity to take first, tentative steps towards its application in Canada by recognizing that the Minister and the T&PB failed to meet their duty of fairness in the decision-making process concerning the fate of Owls Head Provincial Park.

160. Writing for the court, Iacobucci J described the balance that courts must find when considering a change in the common law:

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. (Salituro, supra, at pg. 670):

161. Iacobucci J referenced the factors described by McLachlin J (as she was at the time) in (in *Watkins v Olafson*, [1989] 2 SCR 750) for considering whether it is appropriate for a court to change the common law: (1) the jurisprudence is recent and unsettled; (2) there are strong policy reasons (fairness) for the change; and (3) there would not be a great difficulty to incorporate the change (*Salituro, supra*, at pg. 669). Iacobucci J also referenced McLachlin J’s decision in *R v Seaboyer*, noting “[Justice McLachlin] recognized that judges may broaden rules of evidence to conform to their sense of justice [...]” (*Salituro, supra*, at pg. 670).

162. Justice Binnie noted in *Canfor, supra*, that while Canadian courts have not yet recognized a trust-like or quasi-fiduciary duty on part of the Crown with respect to public-trust resources, there is no inherent bar to such a finding. No Canadian court has ruled, before or since *Canfor*, that such a duty does not exist. Thus, the law is arguably unsettled: the public-trust door has been opened, and this court may determine whether it is time to take a tentative step through that door.

163. With respect to policy, it is clear that the conservation of nature is a growing part of the “evolving fabric of our society.” As the Minister (at the time) pointed out, the PAPA Plan was created in part by Nova Scotians who are “committed to protecting and conserving our beautiful province for future generations.” The Minister noted that “protecting our wild spaces is ... necessary. Parks and protected areas play an important role in conserving Nova Scotia’s biodiversity and protecting our access to clean air and water.” The Minister also recognized that parks help build healthy communities by “invigorating human spirits; giving hope for the future; providing settings of breathtaking beauty; and enhancing our quality of life” as well as by

contributing to our economy by helping brand Nova Scotia as a “clean, green place in which to live, work and do business.” The Minister described the PAPA plan as “leaving a legacy.”

164. Illuminating the Crown’s trust-like duty with respect to public lands identified for their public values dovetails with the growing understanding of the importance of our natural environment.

165. Finally, there is no great difficulty to incorporate an expanded duty of procedural fairness into our common law. The legal foundation of the duty and its application are established. The proposed change would see this already established doctrine extended to include public interests where public-trust resources or uses are at stake. Such an expansion would further the public’s sense of justice and fairness in our legal system by supplying a remedy for this fundamental breach of fairness.

I. Decisions to delist Owls Head Provincial Park and execute the Letter of Offer were unreasonable

166. The reasonableness review as contemplated in *Dunsmuir* and further elaborated in *Vavilov* examines both the reasoning process leading to the decision, wherein the court looks for evidence of an “internally coherent and rational chain of analysis that is justified in relation to the facts and the law that constrain the decision maker” (*Vavilov*, at para. 85) as well as a decision that “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Vavilov* at para. 86).

167. Here, there were no written reasons provided so we must look to the record as a whole to discern the chain of analysis leading to the decisions to remove Owls Head Provincial Park from the PAPA Plan and execute the agreement to sell the park (*Vavilov, supra*, at para. 137).

The Minister and T&PB failed to consider relevant factors:

168. The decision-making process was initiated in September 2016 when the proponent submitted an application to acquire the Owls Head Crown lands, which are in the vicinity of lands he already owns, in order to build a resort community and two or three golf courses.

169. The Department of Lands and Forestry requested a “more detailed project/business plan” from the proponent (now incorporated as Lighthouse Links Development Company) on October 23, 2017, then again on November 28, 2017, and once again on February 20, 2018 (Record, Tab 6; Tab 7, and PG 5 of Tab 8). Given that a “detailed project/business plan” is not included in the Record, it is apparent that the Department did not receive the requested plan. Indeed, Lighthouse Links noted in its July 22, 2018 proposal that it could not supply a refined cost estimate for the project until 2.5 miles of roads were built through the property.

170. It seems that the Department believed that a “detailed project/business plan” was important to its decision-making process. Department staff told Lighthouse Links that the plan was needed in order to “fully assess your plans for the Crown lands being requested” (Record, PG 2 of Tab 5). And yet, the Minister went ahead with his request to the T&PB to remove Owls Head from the PAPA Plan and executed the Letter of Offer, absent this apparently important

information. Indeed, Lighthouse Links noted that the cost of the project would be “much higher than the typical course because it would have to be built on ledge and sand is not easily available” (Record, PG 7 of Tab 9). And yet, the Minister failed to obtain a detailed project/business plan and thereby failed to account for this relevant information, even in light of the proponent’s own assertion about the “much higher” than normal costs of the project.

171. Furthermore, there is no evidence in the Record that the Department of Lands and Forestry, or any other Department, undertook any analysis whatsoever of the project’s feasibility or claimed benefits to the Province. The Record indicates that the Minister (and the T&PB) relied exclusively on the “high level” assertions of the proponent to conclude that Owls Head Provincial Park should be removed from the PAPA Plan and that the Minister should execute an offer of sale of the public lands. That the Minister (and the T&PB) failed to consider any analysis of the proposed project is a failure to consider relevant information.
172. The Department of Lands and Forestry decision-making process regarding the sale of Crown lands is intended to be guided by the Real Property Disposal Policy, which is section 3.8 of the Corporate Administrative Policies and Procedures Manuals of the Government of Nova Scotia, as approved by the Treasury and Policy Board on January 9, 2003. This policy was not included in the Record, and was held by Justice Chipman to be inadmissible as evidence beyond the record (*Bancroft v Nova Scotia (Minister of Lands and Forestry)*, 2020 NSSC 370). Given that this Policy was not included in the Record, and given that the Respondents opposed its inclusion in the Record, it is evident that the Minister failed to consider this relevant factor in his decision-making process.
173. The Minister executed the Letter of Offer on the premise that Lighthouse Links would develop a resort community and two or three golf courses on the land. And yet, the Minister accepted a price per acre for the Owls Head public lands that was based on the land being undevelopable. The Record provides no indication or justification for why the Minister would sell public lands valued as ‘undevelopable’ for a development project. The inference is that the Minister wished to give Lighthouse Links an exceptionally ‘good deal’ on the lands, but nowhere in the Record is this low-price deal rationalized, justified, or even recognized. As such, there is a gap in the Minister’s reasoning process. If these public lands were intended to be sold for the public good, where is the justification for the bizarrely-low sale price? The Minister’s reasoning process for offering to sell the Owls Head public lands at such a low price cannot be described as justifiable and transparent.
174. The Department noted in its MEC to the T&PB that the PAPA Plan identified various “protection values” for Owls Head Provincial Park, as follows:

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 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.

175. Despite these identified protection values, nowhere does the Record indicate that the Department of Lands and Forestry, or Nova Scotia Environment, ever visited Owls Head Provincial Park to assess the current status of ecological values of the land before removing the Park from the PAPA Plan and before executing the Letter of Offer. Given the environmental values that justified the protection of the Park, the Minister failed to consider relevant information by failing to obtain and review any current on-the-ground ecological or environmental assessment of the Park. This failure is despite the evidence that a Department of Lands and Forestry biologist (along with biologists from St. Mary's University) had applied for permits to carry out research within the Park in 2015. The Minister (and by extension the T&PB) had access to specialized, expert knowledge, yet made no effort to avail himself of this expertise.

176. Given that the Minister "shall manage wildlife and wildlife habitat on Crown lands" (*Crown Lands Act* s.25(1)) and given that the purpose of the *Endangered Species 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" (s.2(1)), it is apparent that the Legislature intended the Minister to evaluate and consider the potential impacts of removing Owls Head Provincial Park's protected status on the species at risk reported for the property.

177. As well, the *Endangered Species Act* stipulates that before the Minister can designate core habitat of a threatened or endangered species on private land, he must first be satisfied that the core habitat of the species on public lands is insufficient to meet the recovery needs of the species (s. 16(4)). The record discloses no analysis or consideration of whether the loss of the Owls Head Crown lands may affect the sufficiency of Crown land core habitat for these species, and thereby whether the loss of these lands would shift the 'burden' to private lands where these species occur.

178. On the whole, given the failures to seek and consider information that is implicitly relevant to the Minister's responsibilities under the *Crown Lands Act*, the *Provincial Parks Act*, and the *Endangered Species Act*, there is no logical justification, transparency or intelligibility that can be drawn from the decision-making process evident in the Record.

The Minister and T&PB failed to justify their decisions in light of established practices

179. 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 to decisions about parks. The Minister's (and T&PB's) decisions to remove Owls Head Provincial Park represented a break with this established practice and a reversal of the decision to protect the Park. *Vavilov, surpa*, 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.

The Minister and T&PB were fettered to a single outcome:

180. The Record creates a strong inference that the Minister and the T&PB had fettered themselves 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.
181. In *Trinity Western University v The Law Society of British Columbia* (2015 BCSC 2326, at para. 114), Hinkson, CJ described fettered 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 only people that the Department of Lands and Forestry communicated with outside of government during the decision-making process were (a) the proponent Lighthouse Links, (b) a former Liberal cabinet minister (Hon. Michel Samson) lobbying on behalf of the proponent, and (c) a federal Member of Parliament (Hon. Sean Fraser) who was also intervening on behalf of the proponent.
183. Mr. Glover requested that the proposal be kept confidential as far as possible (Record, PG 1 of Tab 1). MP Sean Fraser, on February 20, 2018, requested a meeting with Lands and Forestry to “see if I can assist on moving the provincial side of things of things along” (Record, PG 5 of Tab 8). Hon. Michel Samson, on November 26, 2018, requested a meeting with Lands and Forestry “to work on a game plan and make sure we are all on the same page” (Record, PG 2 and 3 of Tab 11).
184. Furthermore, as described above, the Minister failed to seek a feasibility or business analysis of the project, an ecological assessment of the lands, or an assessment of any species at risk core habitat in the Park, and offered to sell the lands for an unjustified low price. No inference from the Record can be drawn that the Minister maintained an open mind during the decision-making process.
185. 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.
186. At the December 5, 2018 meeting requested by Michel Samson, notes taken during the meeting indicate that those at the meeting determined that there would be “No Public Consultation until after decision re PAPA,” and that “Aboriginal Consultation,” likewise, would not be initiated until “after the withdrawal from PAPA.” Even after the Park was removed from

the PAPA Plan, the Minister failed to release the communications plan included with the MEC (and remains redacted).

187. 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.

PART FIVE: REMEDY

188. For the reasons above, the Applicants respectfully request this court to set aside the decisions at issue, and remit the matter to the Minister (and the T&PB) to be reconsidered in light of the reasons of this court.

189. The Applicants suggest that no costs be awarded in this matter given the public interest nature of the review; alternatively, the Applicants requests costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st of MARCH, 2021

Jamie Simpson

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