Federal Court  Cour fédérale

Date: 20131031

Docket: T-888-10

Citation: 2013 FC 1112

Maniwaki, Québec, October 31, 2013

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SANDY POND ALLIANCE TO PROTECT CANADIAN WATERS INC.

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Respondent

and

VALE INCO LTD., MINING ASSOCIATION OF CANADA AND MINING ASSOCIATION OF BRITISH COLUMBIA

Interveners

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] Sandy Pond Alliance to Protect Canadian Waters Inc. (the "Applicant") commenced this application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and the *Federal Courts Rules*, SOR/98-106 (the "Rules"), seeking a declaration that the regulatory scheme set out in sections 5 and 27.1 and Schedule 2 of the *Metal Mining Effluent Regulations*, SOR/2002-222 (the "2002 MMER" or the "2002 Regulations"), as amended by the *Regulations Amending the Metal Mining Effluent Regulations*, SOR/2006-239 (the "2006 MMER" or "2006 Regulations") are *ultra vires* the regulation-making powers granted to the Governor in Council pursuant to the provisions of the *Fisheries Act*, R.S.C. 1985, c. F-14 (the "Fisheries Act" or the "Act").

[2] In its application for judicial review the Applicant seeks the following relief:

> 3. The applicant makes application for: Declaratory Relief as follows:
>
> (a) A declaration that the following sections of the *Metal Mining Effluent Regulations*, SOR/2002-222 as amended are unlawful as being contrary to the *Fisheries Act* [R.S., c. F-14, s. 1] and *ultra vires* the authority granted to the Governor in Council pursuant to the *Fisheries Act* and subsections 34(2), 36(5) and 38(9) of the *Fisheries Act*, and are hereby declared to be of no force and effect:
>
> i. SCHEDULE 2 of the *Metal Mining Effluent Regulations*
>
> ii. Section 5 of the *Metal Mining Effluent Regulations*
>
> iii. Section 27.1 of the *Metal Mining Effluent Regulations*

> 4. That in the alternative to (a) above, a declaration that the Governor in Council acted beyond its jurisdiction or without jurisdiction in issuing SOR/2006-239, October 3, 2006 and creating SCHEDULE 2, Section 5 and Section 27.1 of the *Metal Mining Effluent Regulations.*

II. THE PARTIES

A) *The Applicant*

[3] The Applicant is a not-for-profit corporation created and existing under the laws of Newfoundland and Labrador. It describes its aims and objectives:

> a. To protect and conserve Canadian waters and their ecosystems; and
> b. To take appropriate actions to assist the Alliance in fulfilling its purpose, including promoting and recommending laws and policies, and informing and engaging the public; and
> c. To join and/or co-operate with other organizations or institutions with similar purposes.

[4] The Applicant is a public interest litigant.

[5] Her Majesty the Queen in Right of Canada as Represented by the Attorney General (the "Respondent") is the Respondent.

[6] Vale Inco Ltd. ("Vale") is a Canadian company with extensive and significant mining operations throughout Canada. Vale Inco Newfoundland and Labrador Limited is a wholly owned subsidiary of Vale, operating a plant at Long Harbour, Placentia Bay, Newfoundland and Labrador. The Long Harbour operations involve a nickel processing plant (the "Project"). That plant will generate residue known as "tailings" which will require a tailings impoundment area ("TIA"). Nineteen TIAs are described in Schedule 2 of the Regulations by their geographic coordinates.

[7] The Mining Association of Canada (the "MAC") is a national organization for the Canadian mining industry. It has existed since 1935 and was initially known as the "Canadian Metal Mining Association". It represents most of the mining operations currently listed in Schedule 2 of the MMER.

[8] The Mining Association of British Columbia (the "MABC") was created in 1901 pursuant to an act of the province of British Columbia. It is the dominant voice of the mining industry in British Columbia. Its members are engaged in metal and coal mining in British Columbia and internationally.

[9] Vale, the MAC and the MABC sought status in this proceeding as either Interveners or Respondents, pursuant to the Rules. By Order issued on February 10, 2011, those three parties were granted status as Interveners, upon certain terms and conditions: see *Sandy Pond Alliance to Protect Canadian Waters Inc. v. Canada (Attorney General)*, 2011 FC 158.

[10] By Notice of Appeal filed on February 18, 2011, the MAC and the MABC appealed against that Order. By Judgment dated April 9, 2011, the appeal was allowed in part, to afford the MAC and the MABC the right to file affidavits from two expert witnesses, in addition to the affidavits previously filed, and the right to participate in cross-examination of the deponents for the Applicant and the Respondent. The Federal Court of Appeal sustained the status of Vale, the MAC and the MABC as Interveners: see *Sandy Pond Alliance to Protect Canadian Waters Inc. v. Canada (Attorney General)* (2011), 418 N.R. 55.

B) *The Evidence*

[11] The evidence of the parties was entered by way of affidavit, the usual manner of submitting evidence in an application for judicial review.

[12] The Applicant submitted the affidavit of Dr. John Gibson, a retired marine biologist and a former employee of the Department of Fisheries and Oceans ("DFO") Canada. This affidavit was sworn to on June 4, 2010.

[13] The Applicant sought leave to file a further affidavit, sworn to on June 23, 2011, as a rebuttal to the affidavits filed by the other parties and in support of his affidavit dated June 4, 2011. By Order of Prothonotary Aronovitch, dated November 11, 2011, leave to file the further affidavit was denied on the basis that the Applicant had failed to meet the criteria applicable to the filing of supplementary evidence.

[14] In disposing of the Applicant's motion to file a further affidavit of Dr. Gibson, Prothonotary Aronovitch remitted the issue of qualifying Dr. Gibson as an expert witness to the judge hearing the case on the merits. That issue will be addressed below.

[15] The Respondent filed the affidavits of Mr. Marvin A. Barnes and Mr. Chris Doiron. Mr. Barnes is employed with DFO and at the time of swearing his affidavit, was the Regional Manager, Environmental Assessment and Major Projects; Ocean, Habitat and Species at Risk Branch. In that

capacity he was involved with and responsible for environmental assessments of major development projects pursuant to the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (the "CEAA"), a statute that was repealed in 2012. The Project at Long Harbour, together with the designation of Sandy Pond as a TIA, was subject to review under the CEAA.

[16] Mr. Barnes described the steps that were taken from March 2006, when DFO received a Project Description from the Canadian Environmental Assessment Agency (the "Agency") until July 2008 when the Agency gave notice of its Decision that the Project was unlikely to cause significant adverse environmental effects.

[17] These steps included a request from the Province of Newfoundland and Labrador to DFO for an opinion on the Project Description; preparation of an Environmental Impact Statement ("EIS") by Vale and its submission to DFO and Transport Canada ("TC") by value; a request to amend the Regulations to include hydrometallurgical ("hydromet") plants such as the proposed Project and the use of Sandy Pond as a residue management and storage site; the submission of the final Fish Habitat Compensation Strategy for Sandy Pond and Notification from DFO that the strategy was acceptable pursuant to section 27.1 of the Regulations; and two public consultation sessions, one in Long Harbour, Newfoundland and Labrador and the second in Gatineau, Québec.

[18] Mr. Chris Doiron is an employee of Her Majesty the Queen in Right of Canada as Chief of the Mining Section, Mining and Processing Division, at Environment Canada. He has held that position since May 2004. In that capacity he was engaged in the evaluation of the proposed waste

disposal facility at Sandy Pond by the Voisey's Bay Nickel Company Limited, as part of the Project.

[19] In his affidavit, dated July 29, 2010, Mr. Doiron described the steps undertaken by the federal regulatory authorities between 2005 and 2008 leading up to the amendments by which Sandy Pond was added to Schedule 2, effective May 28, 2009. DFO and TC were involved in the process leading up to the amendments to the Regulations due to their status as "responsible authorities" within the scope of the CEAA. He deposed that he was integrally involved with Environment Canada's supervision of the regulatory process leading up to the 2009 listing of Sandy Pond as a TIA in Schedule 2 and the expanded scope of the Regulations to include hydromet facilities. This process led to the enactment of the *Regulations Amending the Metal Mining Effluent Regulations*, SOR/2009-156 (the "Voisey's Bay MMER Amendments").

[20] The MAC and the MABC filed the affidavit of Elizabeth J. Gardiner and the reports of Dr. Dirk Jacobus Albertus Van Zyl and Dr. Eric B. Taylor, as expert witnesses.

[21] Ms. Gardiner is the Executive Advisor for the MAC. She was Vice-President, Technical affairs for that organization, from 1996 until 2010. In her affidavit, dated May 6, 2011, she addressed the role of the MAC as the national organization for the Canadian mining industry and its engagement in the pursuit and maintenance of high standards of environmental performances and management. She commented on the evolution of the federal regulatory scheme beginning in the 1990s and leading up to the introduction of the MMER in 2002, including the introduction of Schedule 2. She also addressed the 2006 amendments, notably the addition of section 27.1.

[22] The MAC and the MABC also filed the reports of two expert witnesses, Dr. Van Zyl and Dr. Taylor. Each of these reports was accompanied by a Certificate concerning the "Code of Conduct for Expert Witnesses" pursuant to Rule 52.2 of the Rules.

[23] Dr. Van Zyl is a civil engineer. His report addresses the production and management of tailings, that is residue left after the recovery of metal in a mineral processing facility. His report talks about the options for the management of tailings, either on land surface, below land surface and under water and provides some comparison of the advantages and disadvantages of each option.

[24] The second report, from Dr. Taylor, is entitled "Adaptive radiation and Sandy Pond Brook Trout". Dr. Taylor, currently a professor of zoology at the University of British Columbia, commented on an article written by Dr. Gibson, entitled "The inequity of compensation for destroyed lakes". Dr. Taylor disputed the opinion offered by Dr. Gibson as to the "adaptive evolution" of Sandy Pond Brook Trout.

[25] Vale filed the affidavits of Mr. Don Stevens, Ms. Margarette Livie, Ms. Macijie B. Szymanski and Mr. James H. McCarthy, as well as the transcript of the cross-examination of Dr. Gibson.

[26] Mr. Stevens swore two affidavits, the first on July 13, 2010, and the second on May 6, 2011. Mr. Stevens is the General Manager of the Vale plant in Long Harbour. In his affidavits he stated

that at Vale's request, Schedule 2 of the Regulations was amended to list Sandy Pond as a TIA. He also reviewed the steps that Vale followed leading up to the amendment of the Regulations.

[27] Ms. Livie swore an affidavit on July 27, 2010. At that time, she was a law clerk to Counsel for Vale. She attached certain documents as exhibits to her affidavit, including a transcript of a radio broadcast, a copy of a "background document" about the Applicant, documents relating to the incorporation of the Applicant, and a transcript of a television news story. Her evidence is submitted for the purpose of showing that the Applicant is focusing solely on the Long Harbour facility and Sandy Pond. Vale also relies on the affidavit for the purpose of challenging the status of Dr. Gibson as an expert witness.

[28] Ms. Szymanski, a professional engineer, was retained by Vale to provide an expert report. Her report is accompanied by a certificate pursuant to Rule 52.2 of the Rules.

[29] Ms. Szymanski is employed with AMEC Earth and Environmental Projects, Mining Projects, and experienced in the selection and design of TIAs for mining projects. In her expert report, she commented upon the steps taken by Vale leading up to the selection of Sandy Pond as the desired TIA.

[30] Vale filed a second expert report, that is the report of Mr. James H. McCarthy. He is a senior biologist employed with AMEC Earth and Environmental Projects. He was mandated to provide an opinion about the compensation plan for Sandy Pond, including background information about the

assessment of fish and fish habitat and the plan itself. He provided a certification confirming compliance with the Code of Conduct for Expert Witnesses pursuant to Rule 52.2 of the Rules.

III. SUBMISSIONS

A) *The Applicant*

[31] The Applicant challenges certain provisions of the 2002 Regulations, as amended in 2006, specifically, section 5, section 27.1, and Schedule 2, on the grounds that these provisions are *ultra vires* the authority conferred on the Governor in Council to make regulations pursuant to the Fisheries Act. It submits that these regulatory amendments are not authorized by the Fisheries Act, and in any event that the Regulations contravene the statutory purpose of conserving and protecting Canadian fisheries, including inland fisheries in fresh waters.

[32] The Applicant argues that the regulatory scheme set out in the 2002 version of the Regulations is proper, legal and *vires* the regulation-making powers set out in the Fisheries Act because those Regulations required the treatment of effluent prior to its discharge into water bodies so its ultimate discharge would not harm or destroy fish and other life-forms. In this regard, the Applicant relies on the *Regulatory Impact Analysis Statement* that accompanied the 2002 Regulations.

[33] The Applicant submits that the 2006 amendments to the Regulations, as illustrated by section 5 and section 27.1, eliminated this protection and now allows the discharge of effluent without prior treatment, thereby creating the potential for the destruction of fish, fish habitat and

other life-forms. It submits that this regime is contrary to the conservation purposes anticipated by the Act.

[34] The Applicant submits that the amendments represent a significant change from the prior regulation of the discharge of effluents and that this significant change should be specifically authorized by some provision in the Fisheries Act. It refers to section 7 of the Act that confers full discretion upon the Minister of Fisheries and Oceans (the "Minister") over the granting of licences and submits that a similar legislative authority should be spelled out in the Act to authorize the passage of regulations that can kill off fish and fish habitat.

[35] In the absence of such a specific statutory provision, the Applicant argues that there is no "statutory foundation" to allow the Governor in Council to make the 2006 amendments to the 2002 iteration of the Regulations.

B) *The Respondent*

[36] The Respondent takes the position that the amendments are within the existing powers conferred by the Act. He notes that the amendments in issue specifically refer to subsection 36(5). He submits that the scheme of the Act contemplates the authorization of the deposit of deleterious substances in fish-bearing waters, subject to the Regulations.

[37] The Respondent further submits that the Act contemplates both the deposit of deleterious substances in fish-bearing waters, as well as the preservation of fish spawning grounds and fish

habitat. He relies on the observations of the Federal Court of Appeal in *Georgia Strait Alliance et al. v. Canada (Minister of Fisheries and Oceans) et al.* (2012), 427 N.R. 110 where that Court said the following at paragraph 127:

> Subsection 35(1) of the *Fisheries Act* prohibits any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat. However, subsection 35(2) allows the Minister to authorize the alteration, disruption or destruction of fish habitat under any conditions he deems appropriate. The prohibitions set out in subsection 35(1), when read in conjunction with subsection 35(2), thus constitute a legal means whereby the Minister is enabled to manage and control the alteration, disruption or destruction of fish habitat. In other words, subsection 35(2) allows the Minister to issue a permit to a person to engage in conduct harmful to fish habitat that would otherwise contravene subsection 35(1): *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557 at para. 49.

[38] The Respondent focuses on subsection 36(5) of the Act as being the critical provision of the Act for the purposes of the Applicant's challenge. He says that this provision allows the Governor in Council to make regulations authorizing the deposit of deleterious substances. He highlights the difference between subsection 36(5) and subsection 35(2) which authorizes activities resulting in the destruction of fish habitat, pursuant to certain conditions. Under subsection 35(2), authorization is required from the Minister, a prescribed person or conditions, or another provision in the Act for a work resulting in the destruction of fish habitat. Subsection 36(5) allows such deposit pursuant to regulation rather than by authorization.

[39] In brief, the Respondent submits that management of the fisheries resources has allowed the deposit of deleterious substances. The current Regulations are authorized pursuant to subsection 36(5) and are consistent with the statutory scheme, as confirmed in the decision of *Ecology Action Centre Society v. Canada (Attorney General)* (2004), 262 F.T.R. 160.

[40] The Respondent further submits that prior to the 2002 Regulations, fish-bearing waters could only be used for the deposit of deleterious substances pursuant to an authorization issued under subsection 35(2) of the Act. The current Regulations provide a different mechanism to do the same thing.

[41] The Respondent also highlights that Sandy Pond was added to Schedule 2 in 2009 but Schedule 2 itself was created as a result of the 2002 Regulations. The addition of Sandy Pond to Schedule 2 in 2009 is to be assessed subject to sections 5 and 27.1 which are new; these provisions did not exist under the 2002 Regulations.

[42] The Respondent argues that the only difference between the 2002 Regulations and the 2006 amendments is that "tailings impoundment area" is defined in the definition section of the 2002 Regulations but is incorporated in subsection 5(1) of the 2006 Regulations. Otherwise, the Regulations are the same and since the Applicant has no quarrel with the validity of the 2002 Regulations, its challenge to the 2006 amendments is without merit.

[43] Finally, the Respondent submits that the amendments to the Fisheries Act in 2012, pursuant to Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures,* 1st sess, 38th Parl, 2012, do not affect the 2006 Regulations. The Regulations were amended in 2009 to cover hydromet plants, a new type of metal processing technology which is utilized by the Project at Long Harbour. Details about this technology are reviewed in the affidavits of Mr. Barnes and Mr. Doiron.

C) *The Interveners*

[44] The MAC and the MABC support the position advanced by the Respondent. They emphasize that the Fisheries Act does not contain a purpose provision that is specifically directed to the conservation and protection of fish and submit that in the absence of such a provision the scope of the Act should not be restricted as having only one narrow purpose. They refer to the history of the Act since its inception in 1868 and argue that from the beginning, Parliament exercised a broad discretion over the management of fisheries resources, having regard to the competing demand of industry and the need to manage the resource.

[45] The MAC and the MABC refer to and rely on recent decisions that confirm the broad scope of Parliament's jurisdiction over the fisheries including the decision in *Ward v. Canada (Attorney General)*, [2002] 1 S.C.R. 569.

IV. DISCUSSION AND DISPOSITION

[46] There are two matters that merit comment, as preliminary matters. The first is the status of the Applicant as a public interest litigant and the second is the status of Dr. Gibson as an expert witness.

[47] The Applicant is a not-for-profit corporation that was incorporated solely for the purpose of bringing this application. Although no party has questioned its ability to pursue this litigation, it is appropriate to address its standing.

[48] In *Moresby Explorers Ltd. et al. v. Canada (Attorney General) et al.* (2006), 350 N.R. 101 at paragraph 17 the Federal Court of Appeal commented on public interest standing as follows:

> Standing is a device used by the courts to discourage litigation by officious inter-meddlers. It is not intended to be a pre-emptive determination that a litigant has no valid cause of action. There is a distinction to be drawn between one's entitlement to a remedy and one's right to raise a justiciable issue.

[49] I am satisfied that the Applicant enjoys status as a public interest litigant for the purpose of this proceeding.

[50] Turning now to Dr. Gibson, a marine biologist who was put forward by the Applicant as an expert witness. The evidence of Dr. Gibson, submitted by the Applicant, was the subject of argument during the hearing. Counsel for the Respondent, Vale, the MAC and the MABC vigorously disputed the recognition of Dr. Gibson as an “expert witness”, that is, a person recognized by the Court as being qualified to offer opinion evidence on the matters in issue.

[51] Various objections were raised by these parties including the participation of Dr. Gibson in the incorporation of the Applicant, his status as a Director of the Applicant, his role as a fundraiser on behalf of the Applicant, and his admission upon cross-examination, that he considered himself as an “advocate” for the Applicant.

[52] The role of Dr. Gibson as an "expert witness" was raised when the Applicant sought leave to file his further affidavit. In dismissing the motion in that regard, Prothonotary Aronovitch reserved to the trial judge a determination of his status. This was addressed at the outset of the hearing.

[53] Specifically, exception was taken to paragraphs 7 to 15 of his affidavit, as follow:

> 7. In my opinion this is a serious weakening of the conservation function of the *Fisheries Act.*
>
> 8. Subsequently I wrote an article expressing my concerns about the amended (*sic*) the *Metal Mining Effluent Regulations* entitled: "The Inequity of Compensation for Destroyed Lakes" [The Osprey, 41(3), 2010 (In Press)] and it is attached to this my affidavit as Exhibit "B".
>
> 9. Another article I wrote on the same subject was published in the Canadian Society of Environmental Biologists Newsletter/Bulletin, Volume 67, No. 1, Spring 2010, p 12 and it is attached to this my affidavit as Exhibit "C".
>
> 10. I am concerned about the ecological implications of the amendments to the *Metal Mining Effluent Regulation* (*sic*) in 2006 and in particular the creation of the regulatory scheme that allows natural freshwater ecosystems such as Sandy Pond, Newfoundland and Labrador (located at 47˚25'33" north latitude and 53˚46'52" west longitude, on the Avalon Peninsula, approximately 3 km east southeast of the town of Long Harbour-Mount Arlington Heights, Newfoundland and Labrador) to be classified as tailings impoundment areas for industrial mining effluent waste.
>
> 11. That the proposed discharge of toxic substances permitted by amendments to the *Metal Mining Effluent Regulation* (*sic*) will result in all life in Sandy Pond being extirpated.
>
> 12. That Sandy Pond is a unique ecosystem which once lost can not be recreated.
>
> 13. It is my opinion that the loss of Sandy pond will cause major losses of fish habitats and biological diversity, as well as removing recreational opportunities.
>
> 14. That I am familiar with the compensation scheme contained at section 27.1 of the *Metal Mining Effluent Regulations* and it is my

> opinion that adequate compensation for the destruction of a whole ecosystem, such as Sandy Pond, is in fact impossible.
>
> 15. That traditionally mining companies built their own tailings ponds, and this should be the norm, rather than allowing destruction of waters containing fish pursuant to a Schedule 2 listing in the Metal Mining Effluent Regulations.

[54] After hearing the submissions of Counsel, a ruling was made that Dr. Gibson would not be recognized as an "expert" witness. Although the Respondent and Interveners requested that his affidavit be struck out, the ruling provided that the impugned paragraphs be given no weight, on the basis that they were expressions of a personal opinion rather than of a scientific opinion.

[55] In *Fraser River Pile and Dredge Ltd. v. Empire Tug Boats Ltd. et al.*(1995), 95 F.T.R. 43, Justice Reed reviewed the characteristics of "expert evidence" as evidence from a person who is knowledgeable about the litigation issues and whose evidence may be necessary to allow the trier of fact to understand the evidence. His evidence, as set out in the paragraphs quoted above, does not meet the test for expert opinion and is subject to the criticism levelled by Justice Reed in *Fraser River* at paragraphs 14 and 17.

[56] In the result, the above paragraphs will remain but will be given no weight in the disposition of this application.

[57] At the same time, I acknowledge and endorse the submissions of Counsel for the Respondent and the Interveners that no issue is taken with Dr. Gibson's education, experience, qualifications, and sincerity. His evidence is rejected because it does not meet the legal test for

expert evidence, that is relevance and necessity as discussed in *Fraser River*, at paragraphs 10 and 14.

[58] This application is a challenge to the authority of the Governor in Council to enact sections 5 and 27.1 of the 2006 MMER, as well as a challenge to the creation of Schedule 2 by the 2002 MMER as subsequently amended.

[59] The issue here is whether the 2006 amendments to the Regulations are authorized by statute. This issue is reviewable on the standard of correctness; see *Canadian Council for Refugees v. Canada,* [2009] 3 F.C.R. 136 at para. 63. The issue of law in this application is not the interpretation of sections 5 and 27.1 of the 2006 Regulations but whether those provisions, together with Schedule 2 of the 2002 Regulations, were validly enacted.

[60] The Federal Parliament enjoys exclusive legislative authority over the fisheries in Canada pursuant to subsection 91(12) of the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3 which provides as follows:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that	91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des

(notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,	termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :
[…]	[…]
12. Sea Coast and Inland Fisheries.	12. Les pêcheries des côtes de la mer et de l'intérieur.

[61] As noted in the submissions of the MAC and the MABC, legislation governing the fisheries has existed for nearly as long as the country, the first Fisheries Act having been passed in 1868. Litigation has ensued since the late nineteenth century regarding the interpretation and scope of the federal government's power over the fisheries; see *Reference re: Provincial Fisheries,* [1898] A.C. 700; *British Columbia (Attorney General) v. Canada (Attorney General)*, [1914] 15 D.L.R. 308; and *Quebec Fisheries (Re)*, [1921] 56 D.L.R. 358.

[62] With the exception of the opinion expressed in the affidavit of Dr. Gibson filed by the Applicant, there is no challenge in this proceeding to the manner in which Sandy Pond was chosen by Vale and approved by DFO as a TIA, nor to the elements of the compensation plan that was proposed by Vale and accepted by DFO.

[63] There is little scope for a reviewing Court to comment on such matters since the choice of science is recognized as a matter properly falling within the powers of the governing authority, pursuant to the applicable legislation. In this regard, I refer to the decision in *Inverhuron & District*

Ratepayers' Association v. Canada (Minister of the Environment) et al. (2001), 273 N.R. 62 at paragraph 48. The evidence tendered by the Respondent and the Interveners adequately establishes a factual background relating to the establishment and function of a TIA, the choice of Sandy Pond as a TIA and the compensation plan required under the Act.

[64] The preamble to the 2002 Regulations reads as follows:

Her Excellency the Governor General in Council, on the recommendation of the Minister of Fisheries and Oceans, pursuant to subsections 34(2), 36(5) and 38(9) of the *Fisheries Act*, hereby makes the annexed *Metal Mining Effluent Regulations*.	Sur recommandation du ministre des Pêches et des Océans et en vertu des paragraphes 34(2), 36(5) et 38(9) de la *Loi sur les pêches*, Son Excellence la Gouverneure générale en conseil prend le *Règlement sur les effluents des mines de métaux*, ci-après.

[65] The preamble to the 2006 Regulations reads as follows:

Her Excellency the Governor General in Council, on the recommendation of the Minister of Fisheries and Oceans, pursuant to subsections 36(5) and 38(9) of the Fisheries Act, hereby makes the annexed *Regulations Amending the Metal Mining Effluent Regulations*.	Sur recommandation du ministre des Pêches et des Océans et en vertu des paragraphes 36(5) et 38(9) de la Loi sur les pêches, Son Excellence la Gouverneure générale en conseil prend le *Règlement modifiant le Règlement sur les effluents des mines de metaux*, ci-après.

[66] The Applicant argues that the challenged Regulations are *ultra vires* the power of the Governor in Council because they offend against the conservation purposes of the Act. In this regard, the Applicant relies on section 7 of the Act and the decision of the Supreme Court of Canada in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12. In

that decision the Supreme Court of Canada commented on the breadth of the ministerial discretion over the issuance of licences.

[67] Acknowledging the discretion over the issuance of licenses, the Applicant submits that this broad discretion is subject to the purpose of conservation since no minister has the right to issue licenses that would eliminate a fish habitat. It argues that since the broad discretion granted by section 7 of the Act is subject to the principle of conservation, then the regulation-making authority of subsections 34(2), 36(5) and 38(9) of the Act is likewise to be exercised in a manner that ensures conservation.

[68] Further, it argues that if Parliament intended to authorize the Governor in Council to enact regulations with such extreme effect as the destruction of a fishery then it should have clearly granted a wide power such as the one found in section 7. Since subsections 34(2), 36(5) and 38(9) are narrower than section 7, they cannot authorize the enactment of the challenged regulations.

[69] In my opinion, this argument cannot succeed. In the first place, the Applicant is mistaken when asserting that conservation is the paramount purpose of the Act. The Act contains no "purpose" section. A purpose section that was included in the Act by means of *An Act to amend the Fisheries Act*, R.S., 1985, c. 35 (1st Supp.) as section 2.1 was subsequently repealed; see *An Act to amend the Fisheries Act*, at section 6.

[70] The Supreme Court of Canada in *Ward* recognized the content of the fisheries power as including conservation and protection of that resource, as well as its general management. At

paragraph 41 in *Ward*, the Supreme Court recognized that many interests are engaged in the management of the fisheries, including industrial interests, as follows:

> These cases put beyond doubt that the fisheries power includes not only conservation and protection, but also the general "regulation" of the fisheries, including their management and control. They recognize that "fisheries" under s. 91(12) of the *Constitution Act, 1867* refers to the fisheries as a resource; "a source of national or provincial wealth" (*Robertson, supra*, at p. 121); a "common property resource" to be managed for the good of all Canadians (*Comeau's Sea Foods, supra*, at para. 37). The fisheries resource includes the animals that inhabit the seas. But it also embraces commercial and economic interests, aboriginal rights and interests, and the public interest in sport and recreation.

[71] In my opinion, the presence or absence of a purpose provision does not impact the validity of the Act and in any event, no challenge has been made to the *vires* of any of the provisions of the Act, only to certain Regulations, that is section 5, section 27.1 and Schedule 2 of the Regulations.

[72] The appropriate analysis in considering the *vires* of a regulation is that set out by the Federal Court of Appeal in its decision in *Canada (Wheat Board) v. Canada (Attorney General)*, [2010] 3 F.C.R. 374 at paragraph 46 where the Court said the following:

> The first step in a *vires* analysis is to identify the scope and purpose of the statutory authority pursuant to which the impugned order was made. This requires that subsection 18(1) be considered in the context of the Act read as a whole. The second step is to ask whether the grant of statutory authority permits this particular delegated legislation *(Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595 (C.A.), page 602).

[73] Addressing the first element, the Act contains many provisions that authorize the enactment of regulations. Three provisions are referred to in the preamble to the 2002 Regulations, that is subsections 34(2), 36(5) and 38(9). The preamble to the 2006 Regulations refers only to subsections

36(5) and 38(9). In my opinion, subsection 36(5) is the most relevant to the issues raised in this proceeding and provides as follows:

36(5) The Governor in Council may make regulations for the purpose of paragraph (4)(b) prescribing	36(5) Pour l'application de l'alinéa (4)b), le gouverneur en conseil peut, par règlement, déterminer :
(a) the deleterious substances or classes thereof authorized to be deposited notwithstanding subsection (3);	a) les substances ou catégories de substances nocives dont l'immersion ou le rejet sont autorisés par dérogation au paragraphe (3);
(b) the waters or places or classes thereof where any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;	b) les eaux et les lieux ou leurs catégories où l'immersion ou le rejet des substances ou catégories de substances visées à l'alinéa a) sont autorisés;
(c) the works or undertakings or classes thereof in the course or conduct of which any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;	c) les ouvrages ou entreprises ou catégories d'ouvrages ou d'entreprises pour lesquels l'immersion ou le rejet des substances ou des catégories de substances visées à l'alinéa a) sont autorisés;
(d) the quantities or concentrations of any deleterious substances or classes thereof referred to in paragraph (a) that are authorized to be deposited;	d) les quantités ou les degrés de concentration des substances ou des catégories de substances visées à l'alinéa a) dont l'immersion ou le rejet sont autorisés;
(e) the conditions or circumstances under which and the requirements subject to which any deleterious substances or classes thereof referred to in paragraph (a) or any quantities or concentrations of those deleterious substances or classes thereof are authorized to be deposited in any waters or places	e) les conditions, les quantités, les exigences préalables et les degrés de concentration autorisés pour l'immersion ou le rejet des substances ou catégories de substances visées à l'alinéa a) dans les eaux et les lieux visés à l'alinéa b) ou dans le cadre des ouvrages ou entreprises visés à l'alinéa c);

or classes thereof referred to in paragraph (b) or in the course or conduct of any works or undertakings or classes thereof referred to in paragraph (c); and	
(f) the persons who may authorize the deposit of any deleterious substances or classes thereof in the absence of any other authority, and the conditions or circumstances under which and requirements subject to which those persons may grant the authorization.	f) les personnes habilitées à autoriser l'immersion ou le rejet de substances ou de catégories de substances nocives en l'absence de toute autre autorité et les conditions et exigences attachées à l'exercice de ce pouvoir.

[74] To determine the scope and operation of the statutory authority given by subsection 36(5), it is necessary to read that provision in conjunction with subsection 36(3) and paragraph 36(4)(b) of the Act, as follow:

36(3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.	36(3) Sous réserve du paragraphe (4), il est interdit d'immerger ou de rejeter une substance nocive — ou d'en permettre l'immersion ou le rejet — dans des eaux où vivent des poissons, ou en quelque autre lieu si le risque existe que la substance ou toute autre substance nocive provenant de son immersion ou rejet pénètre dans ces eaux.
36(4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of	36(4) Par dérogation au paragraphe (3), il est permis d'immerger ou de rejeter :
[…]	[…]
(b) a deleterious substance of a class and under conditions —	b) les substances nocives appartenant à une catégorie

which may include conditions with respect to quantity or concentration — authorized under regulations made under subsection (5) applicable to that water or place or to any work or undertaking or class of works or undertakings; or	autorisée sous le régime des règlements applicables aux eaux ou lieux en cause, ou aux ouvrages ou entreprises ou à leurs catégories, pris en vertu du paragraphe (5), et ce selon les conditions — notamment quantités et degrés de concentration — prévues sous leur régime;

[75] Subsection 36(3) of the Act prohibits the deposit of a deleterious substance in fish-bearing waters. Paragraph 36(4)(b) permits the deposit of a deleterious substance in such waters under conditions authorized by regulations enacted pursuant to subsection 36(5). The challenged Regulations in this case were enacted pursuant to subsection 36(5). The effect of the impugned Regulations is to allow the use of Sandy Pond as a TIA, that is as a depository of residue generated by the operation of the Project at Long Harbour.

[76] There is no doubt that the said residue, that is the tailings, contains deleterious substances and that these substances will be deposited in Sandy Pond. While this prospect stirred public opinion and precipitated this litigation, the use of Sandy Pond in this manner is not illegal but expressly authorized by the above-referenced provisions of the Act.

[77] In my opinion, the provisions quoted above are sufficiently broad to authorize the enactment of the challenged Regulations, that is the 2006 version.

[78] The second step, in the *vires* analysis, is to inquire whether the grant of statutory authority permits the delegated legislation in question. In my opinion it is necessary to focus only on

subsection 36(5) in assessing the second aspect of the *vires* test per *Canada (Wheat Board),* because this provision relates to all three aspects of the Applicant's challenge, that is the *vires* of sections 5 and 27.1, as well as Schedule 2.

[79] I will first look at section 5 of the 2006 Regulations which authorizes the deposit of deleterious materials into a TIA. Section 5 provides as follows:

5. (1) Despite section 4, the owner or operator of a mine may deposit or permit the deposit of waste rock or an effluent that contains any concentration of a deleterious substance and that is of any pH into a tailings impoundment area that is either	5. (1) Malgré l'article 4, le propriétaire ou l'exploitant d'une mine peut rejeter — ou permettre que soient rejetés — des stériles ou un effluent, quel que soit le pH de l'effluent ou sa concentration en substances nocives, dans l'un ou l'autre des dépôts de résidus miniers suivants :
(a) a water or place set out in Schedule 2; or	a) les eaux et lieux mentionnés à l'annexe 2;
(b) a disposal area that is confined by anthropogenic or natural structures or by both, other than a disposal area that is, or is part of, a natural water body that is frequented by fish.	b) toute aire de décharge circonscrite par une formation naturelle ou un ouvrage artificiel, ou les deux, à l'exclusion d'une aire de décharge qui est un plan d'eau naturel où vivent des poissons ou qui en fait partie.
(2) The authority in subsection (1) is conditional on the owner or operator complying with sections 7 to 28.	(2) Le propriétaire ou l'exploitant ne peut se prévaloir du droit que lui confère le paragraphe (1) que s'il satisfait aux exigences prévues aux articles 7 à 28.

[80] This conduct is specifically authorized by paragraphs 36(5)(a) to (d) of the Act as follows:

36(5) The Governor in Council may make regulations for the purpose of paragraph (4)(b)	36(5) Pour l'application de l'alinéa (4)b), le gouverneur en conseil peut, par règlement,

prescribing	déterminer :
(a) the deleterious substances or classes thereof authorized to be deposited notwithstanding subsection (3);	a) les substances ou catégories de substances nocives dont l'immersion ou le rejet sont autorisés par dérogation au paragraphe (3);
(b) the waters or places or classes thereof where any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;	b) les eaux et les lieux ou leurs catégories où l'immersion ou le rejet des substances ou catégories de substances visées à l'alinéa a) sont autorisés;
(c) the works or undertakings or classes thereof in the course or conduct of which any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;	c) les ouvrages ou entreprises ou catégories d'ouvrages ou d'entreprises pour lesquels l'immersion ou le rejet des substances ou des catégories de substances visées à l'alinéa a) sont autorisés;
(d) the quantities or concentrations of any deleterious substances or classes thereof referred to in paragraph (a) that are authorized to be deposited;	d) les quantités ou les degrés de concentration des substances ou des catégories de substances visées à l'alinéa a) dont l'immersion ou le rejet sont autorisés;

[81] Section 27.1 of the 2006 Regulations requires that a mine owner or operator submit a compensation plan for approval by the Minister prior to the deposit of deleterious substances. Section 27.1 reads as follows:

27.1 (1) The owner or operator of a mine shall submit to the Minister for approval a compensation plan and obtain the Minister's approval of that plan before depositing a deleterious substance into a tailings impoundment area that is added to Schedule 2 after the	27.1 (1) Le propriétaire ou l'exploitant d'une mine présente au ministre un plan compensatoire pour approbation et doit obtenir celle-ci avant de rejeter des substances nocives dans tout dépôt de résidus miniers qui est ajouté à l'annexe 2 après l'entrée en vigueur du

coming into force of this section.

(2) The purpose of the compensation plan is to offset for the loss of fish habitat resulting from the deposit of a deleterious substance into the tailings impoundment area.

(3) The compensation plan shall contain the following elements:

(a) a description of the location of the tailings impoundment area and the fish habitat affected by the deposit;

(b) a quantitative impact assessment of the deposit on the fish habitat;

(c) a description of the measures to be taken to offset the loss of fish habitat caused by the deposit;

(d) a description of the measures to be taken during the planning and implementation of the compensation plan to mitigate any potential adverse effect on the fish habitat that could result from the plan's implementation;

(e) a description of measures to be taken to monitor the plan's implementation;

(f) a description of the measures to be taken to verify the extent to which the plan's purpose has been achieved;

(g) a description of the time

présent article.

(2) Le plan compensatoire a pour objectif de contrebalancer la perte d'habitat du poisson consécutive au rejet de substances nocives dans le dépôt de résidus miniers.

(3) Le plan compensatoire comporte des dispositions portant sur les éléments suivants :

a) une description de l'emplacement du dépôt de résidus miniers et de l'habitat du poisson atteint par le rejet de substances nocives;

b) l'analyse quantitative de l'incidence du rejet sur l'habitat du poisson;

c) les mesures visant à contrebalancer la perte d'habitat du poisson;

d) les mesures envisagées durant la planification et la mise en oeuvre du plan pour atténuer les effets défavorables sur l'habitat du poisson qui pourraient résulter de la mise en oeuvre du plan;

e) les mesures de surveillance de la mise en oeuvre du plan;

f) les mécanismes visant à établir dans quelle mesure les objectifs du plan ont été atteints;

g) le délai pour la mise en oeuvre

schedule for the plan's implementation, which time schedule shall provide for achievement of the plan's purpose within a reasonable time; and

du plan, lequel délai permet l'atteinte des objectifs prévus dans un délai raisonnable;

(h) an estimate of the cost of implementing each element of the plan.

h) l'estimation du coût de mise en oeuvre de chacun des éléments du plan.

(4) The owner or operator shall submit with the compensation plan an irrevocable letter of credit to cover the plan's implementation costs, which letter of credit shall be payable upon demand on the declining balance of the implementation costs.

(4) Le propriétaire ou l'exploitant présente, avec le plan compensatoire, une lettre de crédit irrévocable couvrant les coûts de mise en oeuvre du plan et payable sur demande à l'égard du coût des éléments du plan qui n'ont pas été mis en oeuvre.

(5) The Minister shall approve the compensation plan if it meets the requirements of subsections (2) and (3) and the owner or operator has complied with subsection (4).

(5) Le ministre approuve le plan compensatoire si les exigences des paragraphes (2) et (3) ont été remplies et si le propriétaire ou l'exploitant s'est conformé aux exigences du paragraphe (4).

(6) The owner or operator shall ensure that the compensation plan approved by the Minister is implemented.

(6) Le propriétaire ou l'exploitant veille à ce que le plan compensatoire soit mis en oeuvre.

(7) If the measures referred to in paragraph (3)(f) reveal that the compensation plan's purpose is not being achieved, the owner or operator shall inform the Minister and, as soon as possible in the circumstances, identify and implement all necessary remedial measures.

(7) Si les mécanismes visés à l'alinéa (3)f) révèlent que les objectifs n'ont pas été atteints, le propriétaire ou l'exploitant en informe le ministre et, le plus tôt possible dans les circonstances, détermine et prend les mesures correctives nécessaires à l'atteinte des objectifs.

[82] The compensation plan in this case is reviewed in the affidavits of Mr. McCarthy, on behalf of the Intervener Vale, and Mr. Barnes on behalf of the Respondent.

[83] Vale developed a compensation plan after undertaking an extensive environmental study of Sandy Pond, following comments from DFO. The plan would relocate the fish from Sandy Pond to a nearby water source with a minimal loss of life, including efforts to replace the fish habitat lost through the use of Sandy Pond as a TIA. The compensation plan was finalized and submitted to DFO in April 2011.

[84] The compensation plan scheme is authorized by paragraph 36(5)(e) of the Act which provides as follows:

36(5) The Governor in Council may make regulations for the purpose of paragraph (4)(b) prescribing	36(5) Pour l'application de l'alinéa (4)b), le gouverneur en conseil peut, par règlement, déterminer :
[…]	[…]
(e) the conditions or circumstances under which and the requirements subject to which any deleterious substances or classes thereof referred to in paragraph (a) or any quantities or concentrations of those deleterious substances or classes thereof are authorized to be deposited in any waters or places or classes thereof referred to in paragraph (b) or in the course or conduct of any works or undertakings or classes thereof referred to in paragraph (c); and	e) les conditions, les quantités, les exigences préalables et les degrés de concentration autorisés pour l'immersion ou le rejet des substances ou catégories de substances visées à l'alinéa a) dans les eaux et les lieux visés à l'alinéa b) ou dans le cadre des ouvrages ou entreprises visés à l'alinéa c);

[85] Finally, there remains the challenge to the creation of Schedule 2 which is a list of TIAs authorized under the Regulations. The basis of the challenge here is the alleged invalidity of section 5 of the 2006 Regulations. However, this argument must fail because section 5 falls within the regulation-making authority of subsection 36(5). The validity of Schedule 2 depends on the validity of section 5 and I have found section 5 to be valid.

[86] In any event, paragraph 36(5)(b) of the Act clearly authorizes the creation of TIAs, as appears from the following:

36(5) The Governor in Council may make regulations for the purpose of paragraph (4)(b) prescribing	36(5) Pour l'application de l'alinéa (4)b), le gouverneur en conseil peut, par règlement, déterminer :
[…]	[…]
(b) the waters or places or classes thereof where any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;	b) les eaux et les lieux ou leurs catégories où l'immersion ou le rejet des substances ou catégories de substances visées à l'alinéa a) sont autorisés;

[87] The Act authorizes activities that may negatively affect fish-bearing waters, as recognized by the Court in *Ecology Action Centre Society*, at paragraph 74 where the Court said the following:

> Furthermore, it is noteworthy that section 35 does not impose a blanket prohibition against HADD [harmful alteration disruption or destruction of fish habitat]. HADD may occur with the authorization of the Minister pursuant to regulations enacted by the Governor-in Council.

[88] The fact that regulations enacted pursuant to the Act may have negative environmental consequences does not, *per se*, render those regulations invalid. Parliament legislated the provisions

allowing the enactment of the Regulations in question here. There is no basis for judicial intervention. The will of the people, with respect to legislation, can be expressed at the ballot box.

[89] The Applicant did not seek injunctive relief to stop any work undertaken in the conversion of Sandy Pond into a TIA. Accordingly, there was no impediment against any steps taken by Vale in pursuit of that aim.

[90] In the result, I am satisfied that the provisions of the 2006 Regulations that are challenged in this application were lawfully enacted by the Governor in Council pursuant to the authority conferred by subsection 36(5) of the Act.

[91] Two residual matters require comment, that is the Intervener's rights to appeal and costs.

[92] The first matter was addressed by the Federal Court of Appeal in its Order of April 8th, 2011 at paragraph 1.(x) as follows:

> the interveners may ask the presiding judge upon the hearing of this application to entertain a motion for the interveners to have the right to appeal from the final judgment disposing of the application for judicial review;

[93] The Interveners did not raise the issue at the hearing of this matter and the matter should be raised before the Federal Court of Appeal if necessary.

[94] The Order granting status to the Interveners addressed costs at paragraph 1.(xi) as follows:

> the interveners shall not be entitled to seek costs against the Applicant or the Respondent nor shall the Applicant or the

> Respondent be entitled to seek costs against the interveners whatsoever for the whole of this proceeding.

[95] In these circumstances, no costs will be awarded for or against the Interveners.

[96] In his submissions the Respondent sought dismissal of this application with costs. The Respondent has succeeded and in the usual course of events, costs are awarded to the successful party.

[97] Accordingly, this application is dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed with costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-888-10
STYLE OF CAUSE:	SANDY POND ALLIANCE TO PROTECT CANADIAN WATERS INC. v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA and VALE INCO LTD., MINING ASSOCIATION OF CANADA AND MINING ASSOCIATION OF BRITISH COLUMBIA
PLACE OF HEARING:	St. John's, Newfoundland and Labrador
DATE OF HEARING:	February 27 and 28, 2013
REASONS FOR ORDER:	HENEGHAN J.
DATED:	October 31, 2013

APPEARANCES:

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Lori Rasmussen	FOR THE RESPONDENT
Douglas Hamilton Christopher Wayland	FOR THE INTERVENOR VALE INCO LTD.
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