Federal Court  Cour fédérale

Date: 20100212

Docket: T-1974-07

Citation: 2010 FC 152

Ottawa, Ontario, February 12, 2010

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

CASSIAR WATCH

Applicant

and

MINISTER OF FISHERIES AND OCEANS
AND SHELL CANADA ENERGY

Respondents

REASONS FOR ORDER AND ORDER

[1] The present Application concerns an opinion called a Letter of Advice (LOA) which was issued on November 9, 2007 by an official of the Department of Fisheries and Oceans (DFO) under the authority of the Respondent Minister of Fisheries and Oceans (Minister). The LOA provided an opinion in response to an inquiry by the Respondent Shell Canada Energy (Shell Canada) as to whether a planned roadway construction near a river in Northern British Columbia would likely result in a harmful alteration, disruption, or destruction of fish habitat (HADD).

[2] The LOA of November 9, 2007 expressed the opinion that no HADD would result from Shell Canada's planned construction. The Applicant, Cassiar Watch, objects to this result.

[3] The Applicant, Cassiar Watch, describes itself as follows:

> The Applicant, Cassiar Watch is a non-profit society incorporated in 1995 under the *Society Act* of British Columbia with a mandate to conserve and protect the rivers, waters, and fish habitat in the trans-boundary river region in Northern British Columbia. Cassiar Watch is a long-standing participant in matters relating to vital headwaters of the Nass River, the Stikine River and the Skeena River. Cassiar Watch has no personal, proprietary or pecuniary interest in the outcome of the litigation.
>
> (Applicant's Notice of Application, paragraph 10).

The Applicant disputes the reasonableness of the opinion but has limited the present Application to a determination to the legal questions arising from the opinion. The preliminary legal questions for determination are: does the Minister have authority to issue an LOA; and is an LOA, in particular the LOA of November 9, 2007, subject to judicial review?

I. <u>What is an LOA?</u>

[4] In order to answer the legal questions it is necessary to first determine this primary question.

A. *The Minister's LOA policy*

[5] The Minister's authority to issue an LOA is not found in any specific statutory or regulatory provision. Rather, the Minister conducts the process of developing and issuing an LOA by a documented policy. With respect to the issuance of the LOA of November 9, 2007 the policy is stated in a document entitled *Practitioners Guide to Writing Letters Used in Fisheries Act and*

Species at Risk Act Reviews for Habitat Management Staff (2007) (Doc. 127, filed September 29, 2009) (*Guide*):

> Purpose of this Guide
> The purpose of this guide is to assist Practitioners in preparing letters commonly used in the review of works or undertakings that are being proposed. Matters concerning the operation of existing facilities; enforcement, monitoring, interdepartmental correspondence, *Canadian Environmental Assessment Act* (CEAA) triggers or scoping are not included in this guide. Template letters have been developed [Footnote 1] to streamline the process of developing correspondence and establish language which is consistent across the country. While it is expected that these templates may require some modification to accommodate unique situations, this discretion should be exercised with input from management staff to ensure changes are consistent with national policy.
>
> Legal and Policy Context
> One of the primary roles of Practitioners is to review development proposals and provide advice to proponents on whether or not they are likely to be in compliance with the habitat protection provisions [Footnote 2] of the *Fisheries Act*, and those prohibitions of the *Species at Risk Act* (SARA) which apply to aquatic species. Letters routinely used to convey this advice often recommend mitigation measures used to offset impacts [Footnote 3] to fish and fish habitat. In those situations where a development proposal is not likely to be in compliance, the Practitioner may ask for more information, request the project be relocated or redesigned, or outline the steps required to obtain a *Fisheries Act* authorization or SARA permit.
>
> It is important that letters providing advice, including letters which request additional information, are clearly distinguished from other types of correspondence that DFO might issue. Table 1 describes the various types of correspondence issued to proponents of DFO.
>
> Footnotes
> [Footnote 1] Please refer to the DFO intranet site at http://oceans.ncr.dfo-mpo.gc.ca/habitat/hmo/guides/letter-templates e:asp or consult the Program Activity Tracking System (PATH) for the most current versions.
> [Footnote 2] The habitat protection provisions of the *Fisheries Act* include many sections (i.e. 20, 21, 22, 26, 27, 28, 30, 32, 34, 35, 37, 40, 43), however, Sections 20, 22, 32 and 35 are the most relevant in terms of reviewing and approving most development proposals submitted to DFO.

[Footnote 3] The *Practitioners Guide to the Risk Management Framework*, uses the term "Effect" to refer to a change to fish and fish habitat which can either be positive or negative, while the term "impact" refers specifically to those effects which are considered adverse or negative.

Table 1 in the *Guide* provides the following description of the various types of correspondence used by DFO:

> Letter of Advice [LOA}
> A letter where information is being conveyed directly to the proponent, which does not amount to a formal Authorization, Order or Permit. Generally speaking, a Letter of Advice accomplishes one or more of the following functions:
> - Concludes that a development proposal poses a low risk of impacting fish and fish habitat,
> - Provides advice to reduce potential impacts to an acceptable level,
> - Informs proponents of the process leading up to the issuance of a *Fisheries Act* authorization or SARA permit, or
> - Requests additional information where proposals could impact fish and fish habitat, but where uncertainty precludes a definitive conclusion.
>
> Authorization
> Where impacts to fish and fish habitat are expected, an authorization is often required to ensure the person causing the impacts is in compliance with the *Fisheries Act* or SARA. Authorizations generally include conditions regarding the application of mitigation, compensation, and monitoring. Where more than one section of the *Fisheries Act* applies to a given proposal, conditions related to each section can be included into a single authorization, which in most cases will be a Section 35(2) *Fisheries Act* authorization. Similarity [sic], conditions pertaining to a SARA permit could be included into a *Fisheries Act* Authorization as well.
>
> Order
> Pursuant to subsection 37(2) of the *Fisheries Act*, an order may be issued requesting modifications or restrictions to plans or when an unauthorized harmful alteration, disruption or destruction of fish habitat (HADD) is imminent or occurring and the proponent is

> uncooperative in protecting fish and fish habitat. Such an order would require approval from the Governor in Council.
>
> [Emphasis added]
>
> (Respondent's Supplemental Crown Book of Authorities, Vol. 2, pp. 590 to 591)

B. *The LOA of November 9, 2007*

[6] Given the conflicting arguments about what an LOA is, the course of conduct in arriving at the LOA of November 9, 2007, and the LOA itself, are useful to consider as contextual information for how the Minister's LOA policy is put into practice:

> The Klappan River in Northern British Columbia is approximately 150 kilometers south of Dease Lake on a branch road off the Cassiar Highway known as Ealue Lake Road. Ealue Lake Road runs parallel to and crosses the Klappan River. The spring runoff in 2007 washed out two separate sections of the Ealue Lake Road ("Site A" and "Site B") and rendered the road impassable. The Ealue Lake Road served as the only overland route between the Cassiar Highway and certain Coal Bed Methane drilling sites to which Shell wanted access. The Klappan River at Sites A and B is spawning habitat for numerous fish species, including bull trout, Dolly Varden char, mountain whitefish, longnose suckers and rainbow trout. The first three species are fall spawners and the latter two are spring spawners. (Applicant's Memorandum of Fact and Law, paras. 3 and 4)
>
> In the early spring of 2007, Shell contacted Paul Christensen, a Senior Habitat Biologist with the Habitat Management Division of DFO to advise that repairs to the Road would likely be required for Shell's planned 2007 exploration program, and that Shell would be seeking his opinion of the planned road repairs. Mr. Giasson wrote to Mr. Christensen on August 9, 2007 requesting that he review information provided by Shell regarding various in-stream and other work requirements along the Road. The purpose of the review was to seek Mr. Christensen's advice as to whether or not the planned work would constitute the harmful alteration, disruption or destruction ("HADD") of fish habitat, and would require an authorization under section 35(2) of the Fisheries Act.
>
> On August 16, 2007, Mr. Christensen issued the August 16 LOA regarding the proposed work, including the in-stream and other work. On August 17, 2007, Mr. Christensen agreed to extend the

August 31, 2007 date for in-stream work to September 15, 2007, depending on certain conditions.

On August 21, 2007, Shell mobilized equipment to commence repairs to the Road, but various individuals had set up a blockade that prevented Shell from accessing the Road and commencing the repairs. On August 23, 2007, Shell commenced an action in the Supreme Court of British Columbia (the "Action") seeking an interlocutory injunction in order to gain access to the Road. On August 31, 2007 the Action was adjourned generally and was never heard.

At this time, it became clear that the in-stream Road repair work was unlikely to be completed prior to the September 15, 2007 date. On September 5, 2007 Shell participated in a teleconference with Mr. Christensen and other DFO representatives to discuss whether there were any conditions under which the in-stream work could extend beyond September 15, 2007. Mr. Christensen advised Shell that, due to changed conditions in the Klappan River, the work could not extend beyond September 15, 2007 without there likely being a HADD.

Following this advice, Shell advised DFO that it was considering undertaking the road repairs "in the dry", i.e.: without the necessity of operating in, or depositing any materials in, the wetted portion of the river. Shell further advised DFO that it would provide additional information regarding this option to DFO for its review. The purpose of providing the information was to seek advice as to whether or not the planned work would constitute the harmful alteration, disruption or destruction ("HADD") of fish habitat, and would require an authorization under section 35(2) of the *Fisheries Act*.

Ultimately, the in-stream work referenced in the August 16 LOA was never carried out. An application for judicial review by Cassiar Watch, in respect of the August 15 LOA, was dismissed as moot in April of 2008.

<u>October 12 LOA</u>

On September 7, 18 and 20, 2007, Shell provided materials to DFO regarding the potential "in the dry" repairs at Sites A and B. To facilitate Shell's preparation and DFO's review of new materials in respect of the "in the dry" Road repairs, Shell had requested that DFO consider the repairs at Site A, Site B and the Big Eddy separately. Shell also arranged for the DFO to inspect the planned road repair locations on September 14, 2007.

Given the interest that a number of groups, including Cassiar Watch, had expressed in Shell's activities, DFO gave a number of groups the opportunity to comment on the proposed repairs. Cassiar Watch did not provide comments on the proposed in-the-dry repairs at Site A, despite being given the opportunity to do so.

On October 12, 2007, DFO provided Shell with a Letter of Advice in respect of the planned "in the dry" repairs at Site A (the "October 12 LOA"). Cassiar Watch has not sought judicial review of the October 12 LOA and the repairs at Site A have been completed.

November 9 LOA

On October 18, 2007, Shell provided DFO with a consolidated package of materials regarding proposed "in the dry" Road repairs to Site B and the Big Eddy site. Replacement materials for part of the package were sent on October 23, 2007. Packages of materials regarding the proposed "in the dry" Road repairs at Site B and the Big Eddy were also provided by Counsel for Shell to Cassiar Watch as well as to a number of other interested organizations.

DFO again provided various groups with an opportunity to comment on the repairs at Site B and the Big Eddy. Again, Cassiar Watch did not provide any comments.

On November 7, 2007, Shell provided DFO with a fisheries report from a consultant which provided an opinion that the potential repairs at Site B and the Big Eddy site would not result in a HADD.

On November 9, 2007, Mr. Gotch sent Shell a Letter of Advice regarding Shell's "in the dry" repairs to Site B and the Big Eddy site (the "November 9 LOA") which stated his opinion that the proposed road repair work was not likely to result in a HADD.
Shell generally undertook the work at Site B and the Big Eddy in the manner described in the plans which it provided to DFO. Ultimately, it decided to install a clear span bridge over the overflow channel rather than a culvert. The work undertaken at Site B and the Big Eddy under the November 9 LOA has been completed.
(Respondent Shell Canada's Memorandum of Fact and Law, March 9, 2009, paras. 11 to 27, as amended)
.
[Emphasis added]

[7] The LOA of November 9, 2007 reads as follows:

> November 9, 2007
>
> Kathy Penney
> Shell Canada Energy
> 400 – 4th Avenue SW
> P.O. Box 100, Station M
> Calgary,
> Alberta
> T2P 2H5
>
> Dear Ms. Penney,
>
> Subject: Shell Canada Energy's Proposed Plans to Conduct Road Repair Work – km 29 (Site "B") and km 64 ("Big Eddy"), Ealue Lake Road.
>
> Fisheries and Oceans Canada has received Shell Canada Energy's proposal, dated October 18, 2007, and amended Appendix 5, sent October 23, 2007 describing plans to conduct road repair work at km 29 and km 64 on the Ealue Lake Road. It is our opinion that the road repair work described in your proposal is not likely to result in the harmful alteration, disruption or destruction of fish habitat and as such does not require an authorization pursuant to section 35(2) of the *Fisheries Act*. This advice applies solely to the works described in your proposal.
>
> Please note that this letter does not constitute approval to allow the deposit of any deleterious substance, for example sediment, into waters frequented by fish nor does it release you from the responsibility to obtain any federal provincial or municipal approvals that may be required.
>
> Should you have any questions regarding our review, I can be reached at (867) 393-6715.
>
> Sincerely,
>
> Steve Gotch
> A/Manager
> Oceans, Habitat and Enhancement Branch
> cc. M. Giasson, Shell Canada Energy
>
> [Emphasis added]
> (Applicant's Record, Vol. 3, p. 628)

[8] Thus, the practice confirms that the LOA policy uses the documented three-stage approach: a development proposal is received and considered; a cooperative due diligence effort is made to find a solution which will allow the proposal to proceed without a HADD; and when, in the opinion of the Minister, such a solution is found an LOA is issued stating this opinion.

C. *Cassiar Watch's legal argument*

[9] Contrary to the Minister's policy that an LOA is an opinion, Cassiar Watch argues that it is something entirely different:

> LOAs are authorizations of "means" and "conditions" on a work or undertaking that limits whether the work or undertaking will contravene s.35(1) of the *Fisheries Act*. LOAs are an exercise of implied powers under s.35(2) of the *Fisheries Act* and an environmental assessment is required under CEAA and the *Law List Regulations* before such power is exercised. […]
>
> In the alternative, LOAs are a purported exercise of powers under s.37(2) of the *Fisheries Act* and, as such, also require an environmental assessment under CEAA and the *Law List Regulations* before such power is exercised. […]; or
>
> In the further alternative, DFO has no jurisdiction to issue LOAs in general […].

The argument continues:

> [A] two part test can be rendered in relation to LOAs and s.35(2) of the Fisheries Act as follows:
>
> Firstly, does the issuance of LOAs involve the satisfaction of a duty, the performance of a function or the exercise of a power conferred by s.35(2) of the Fisheries Act?
>
> Secondly, does the issuance of LOAs involve (a) issuing a permit; (b) issuing a licence; (c) granting an approval; or (d) taking any other action for the purpose of enabling a project to be carried out in whole or in part?
>
> In response to the first question, LOAs involve the exercise of the power under s.35(2) of the *Fisheries Act* to impose mandatory mitigation conditions on a work or undertaking and LOAs involve

> the performance of the function under s.35(2) of the *Fisheries Act* of the function of assessing whether proposed mitigation conditions are sufficient to avoid harm to fish habitat.
>
> In response to the second question, the issuance of LOAs involve granting an approval under s.35(2) of the *Fisheries Act* for a work or undertaking subject to compliance with mitigative measures. The issuance of LOAs also involve action for the purpose of enabling a project to be carried out. The LOA enables a project by removing of the threat of prosecution under s.35(1) of the *Fisheries Act*, subject to the proponent's compliance with the mitigative measures imposed by the LOA.
>
> The issuance of LOAs trigger a requirement that an environmental assessment be performed before the issuance of an LOA because LOAs involve the exercise of power and the granting of an approval of "means" and "conditions" on a work or undertaking under s.35(2) of the *Fisheries Act*. Thus environmental assessments are a legal precondition of the issuance of LOAs.
>
> (Applicant's Amended Memorandum of Fact and Law, dated October 30, 2009, para. 30 and paras. 59 to 62)

[10] Thus, Cassiar Watch's argument is based on an interpretation of key provisions of the *Fisheries Act* R.S., c. F-14, s. 1 (*Fisheries Act*), the *Canadian Environmental Assessment Act*, 1992, c. 37 (*CEAA*), and the *CEAA Law List Regulations*, SOR/94-636. These provisions are cited in the Annex to these reasons.

C. *The Minister's and Shell Canada's response*

[11] The Minister and Shell Canada argue that Cassiar Watch's authorization argument is erroneous; the Minister's Supplemental Crown Submissions dated December 2009 provides the reasons why:

> (At paras. 18 and 19):
> In order for the Court to determine whether the impugned LOA triggers an environmental assessment, the Court must assess whether the LOA represents a statutory approval under either ss. 35(2) or 37(2) of the *Fisheries Act* that was required in order for Shell's

> project to proceed. Examination of these provisions makes it clear that the Applicant's argument that the LOA is a statutory approval under ss. 35(2) or 37(2) is simply untenable.
>
> The statutory obligation to conduct an environmental assessment under CEAA does not arise unless and until a proponent devises a project that is likely to cause a HADD and either applies for an authorization to allow such harm under s. 35(2) or an order is made by the Minister herself (with the approval of the Governor in Council) to prevent harm under s. 37(2) of the *Fisheries Act*. […].
>
> Not all statutory or regulatory decisions that may theoretically have some impact on the environment will trigger an environmental assessment. Parliament has determined an environmental assessment will only be required where the statutory or regulatory power is prescribed in s. 5(1)(d) of CEAA and the *Law List Regulations,* and where the exercise of that power is necessary in order to enable a project to be carried out (in whole or in part).
>
> (At para. 26):
> Section 35(2) of the *Fisheries Act* has but one "function." It empowers the Minister to authorize activity that results in a HADD of fish habitat (i.e. activity that would otherwise contravene the prohibition against causing such harm in section 35(1)). If a proponent wishes to proceed with a project that is likely to cause harm to fish habitat, they can gain some measure of assurance that they will not be prosecuted for doing so by applying for an authorization under s. 35(2) using the form prescribed by regulation and by agreeing to carry out the proposed project in accordance with the precise conditions set out by the Minister in any authorization or face the prospect of prosecution.
>
> (At para. 45):
> The LOA is, as its name suggests, a non-binding opinion as to whether or not the proposed project will cause harm to fish habitat. The advice is non-binding and has no legal effect.
>
> [Emphasis added]

E. *Conclusion*

[12] It is obvious that Cassiar Watch considers an LOA as an impediment in the path towards an environmental assessment under *CEAA*. Thus, to remove the impediment, it is necessary for Cassiar

Watch to obtain a declaration that an LOA is not what it appears to be. In my opinion, a declaration that an LOA constitutes an authorization under s. 35(2) or an order under s. 37(2) of the *Fisheries Act*, as requested by Cassiar Watch, is impossible to achieve. This is so because, as a matter of law, it would require the conversion of a Minister's opinion that a HADD is unlikely to occur if a proposal proceeds, to an opinion that a HADD is likely to occur if a proposal proceeds. There is absolutely no basis for doing so.

[13] As a result, I find an LOA is what the Minister maintains it is: a non-binding opinion which has no legal effect.

II. Does the Minister Have Authority to Issue an LOA?

A. *Cassiar Watch's argument*

[14] Cassiar Watch argues that the Minister lacks statutory authority to issue an LOA:

> In the alternative, if this Honourable Court determines that s.35(2) and s.37(2) of the *Fisheries Act* do not confer by implication the power to issue LOAs, the Applicant takes the position that the Minister entirely lacks jurisdiction to issue LOAs. The law as stated by the Supreme Court of Canada at paragraph 28 of *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII) is as follows:
>
> > By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority.
>
> The Applicant says that the attempt by the Respondent Minister to analogize LOAs to Advance Tax Rulings by Revenue Canada is misconceived. The Minister of Revenue has jurisdiction under s.220 of the Income Tax Act to issue Advance Tax Rulings. Unlike LOAs, Advance Tax Rulings state on the face of the internal CRA policies

> and on the face of the document issued to taxpayers that they are not binding on the Minister's subsequent decisions. The Minister of Fisheries and Oceans has no such express jurisdiction and LOAs do not express to project proponents that they are not binding and of no legal effect.
>
> The Applicant further says that the Respondent Minister cannot rely on so-called "soft law" for jurisdiction for issuing LOAs. The "soft law" examples cited by the Respondent Minister, including policies, administrative rules and guidelines, are primarily examples of internal documents that provide Ministerial guidance and constraint on the exercise of discretion by delegates of an existing Ministerial power. Internal government policy documents, rules to guide discretion of decision-makers, and Ministerial guidelines do not create or confer powers. As noted in *Dunsmuir*, only the Constitution, legislation, and the common and civil law may create and confers powers. The government executive cannot create powers for itself by enacting internal policies.
>
> (Applicant's Memorandum of Fact and Law (Amended) October 30, 2009, paras. 98 to 100)

B. *The Minister's argument*

[15] In response, the Minister makes the following detailed argument:

> The Applicant wrongly asserts that the impugned LOA is *ultra vires* DFO's authority. This erroneous assertion is based on a misinterpretation of the relevant legislative provisions and a failure to recognize that DFO may use appropriate non-statutory means to carry out its mandate.
>
> LOAs are non-statutory administrative tools used by DFO to aid in the effective and efficient conservation and protection of fish and fish habitat (Practitioners Guide For Writing Letters Used in Fisheries Act Reviews for DFO Habitat Management Staff, Applicant's Authorities, Tab 15). The provision of an LOA is but one of the numerous non-statutory instruments (such as policies, administrative rules, guidelines and other non-binding instruments) designed to assist members of the public in avoiding harm to fish habitat and to organize their affairs accordingly. The case law demonstrates that the use of such non-statutory (or "soft law") tools is entirely appropriate and *intra vires* (*Thamotharem, v. Canada (Minister of Citizenship and Immigration)* 2007 (F.C.A.) 198 CanLII, para. 56).

In *Thamotharem v. Canada* (2007) the Federal Court of Appeal articulated the test for determining when the use of a non-statutory instrument will be regarded as *intra vires* despite the lack of any specific statutory authority. Such instruments are permissible where:

> A. There are no contradictory statutory provisions or regulations;
> B. They are not "inconsistent" or "inharmonious" with a statute;
> C. They do not fetter the discretion of the regulator; and
> D. They do not impose mandatory requirements enforceable by sanction (*Ibid*.; *Ainsley Financial Group v. Ontario (Securities Commission)* 1994 CanLII 2621, at page 3).

The application of each of these elements to the case at bar demonstrates that the impugned LOA is *intra vires*.

A. <u>There Are No Contradictory Provisions or Regulations</u>

There is no statutory provision stating that the Minister or any of his delegates/employees in the DFO may <u>not</u> offer non-binding advice to a proponent who has enquired as to whether a proposed project might cause a HADD. […]
[…]

B. <u>The Impugned LOA is Consistent with the *Fisheries Act*</u>

The LOA in the case at bar is entirely consistent and harmonious with the provisions of the *Fisheries Act* as it pursues the very same goal as the statutory scheme as a whole: preventing harm to fish habitat.

That the purpose of ss. 35(2) and 37(2) of the *Fisheries Act* is the avoidance of harm to fish habitat can be inferred from the fact that both provisions threaten prosecution if proponents engage in unauthorized conduct that causes or is likely to cause a HADD.

The purpose of an LOA is also the avoidance of harm to fish habitat. By providing proponents with more and better information about the potential statutory consequences flowing from proposed projects, LOAs encourage proponents to proactively plan with care so that authorizations under s. 35(2) need not be sought and orders under s. 37(2) need not be made. This, in turn, enhances, rather than detracts from the attainment of Parliament's intention in enacting the *Fisheries Act* in general and ss. 35, 37 and 40 in particular.

C. The Impugned LOA Does not Fetter the Minister's Discretion

The issuance of the impugned LOA does not fetter the discretion of the Minister to exercise any of his powers under the *Fisheries Act*. The Minister may still issue a s. 35(2) authorization (if Shell were to apply for one), he may issue an order pursuant to s. 37 if he forms the opinion that a HADD has occurred or is likely to occur and he may initiate a prosecution under s. 40 of the Act if a HADD does in fact occur. The LOA does not constitute an approval and (in its explicit language) does not absolve Shell from meeting its obligations to obtain any federal, provincial or municipal approvals that may be required.

D. The LOA does not Impose Mandatory Requirements Enforceable by Sanction

As discussed above, the LOA does not require Shell to do anything. It makes no directions and imposes no conditions, restrictions or requirements and has no binding legal effect whatsoever. Shell was under no obligation to carry out the project as it had proposed to DFO or otherwise.

As a result of the foregoing, the LOA in the case at bar satisfies all four elements in the test set out by the Court of Appeal in *Thamotharem* and is *intra vires*. It represents an invaluable "soft law" tool in the DFO's toolbox that – like advanced tax rulings discussed by Richard J. in the *Rothmans* case – assist members of the public to predict how the Crown is likely to exercise its statutory discretion and to arrange their affairs accordingly. Were the Court to rule otherwise, the efficient administration of the statutory scheme would be unjustifiably impeded in direct contravention of Parliament's intent in passing ss. 35, 37 and 40 of the *Fisheries Act*.

(Respondent Minister's Memorandum of Fact and Law, dated February 21, 2009, paras. 64 to 78)

[16] The following is a supplement to this argument:

As set out in the [Minister's] original submissions at paras. 64 – 78 the impugned LOA is *intra vires* as a permissible non-statutory tool designed to enhance the efficient administration of the *Fisheries Act*. In this regard, the recent decision of the Federal

Court of Appeal in *Canada v. Arsenault*, 2009 FCA 300 (*Arsenault)* is also of assistance.

In *Arsenault* the Court was assessing the legal effect of a Management Plan issued by the Minister of Fisheries and Oceans that concerned access to certain snow crab areas. In the Management Plan, the Minister announced his plans for the coming year in terms of total allowable catch (TAC) for snow crab and how the catch would be divided as between First Nations fishers, traditional fleets and others. The power of the Minister to issue such a document was not explicitly provided for in the *Fisheries Act* or any other statute or regulation. Yet the Court did not rule that the Management Plan was *ultra vires.* To the contrary, it found as follows (at paras. 39-40):

> In my view, the Minister's powers to issue the Management Plan stem from his general authority to manage the fishery, as exemplified by section 4 of the *Department of Fisheries and Oceans Act*, R.S. 1985, c. F-15, …:
>
> Further, the Management Plan is consistent with the Minister's obligations to manage, conserve and develop the fishery on behalf of Canadians and in the public interest. At paragraph 37 of his Reasons for a unanimous Supreme Court of Canada in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, 1997 CanLII 399 (S.C.C.), [1997] 1 S.C.R. 12, Major J. made the following remarks:
>
> […] Canada's fisheries are a "common property resource", belonging to all the people of Canada. Under the Fisheries Act, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43). […]

The Management Plan issued by the Minister can be readily analogized to the LOA impugned by the Applicant in this case. It is a non-statutory and non-binding instrument, issued by the Minister in order to assist the public in understanding and anticipating how the Minister will interpret and apply the *Fisheries Act* to a particular situation. The Court of Appeal's reasons in *Arsenault* provide another appropriate way of analysing the *vires* of the impugned LOA. Namely, that the LOA represents an entirely valid exercise of the Minister's "general authority to

> manage the fishery, as exemplified by section 4 of the *Department of Fisheries and Oceans Act*."
>
> In other words, in addition to satisfying the test for a permissible non-statutory instrument under the case law canvassed in the Respondent's original submissions, the impugned LOA can also be understood as being a permissible exercise of the Minister's general authority to manage the fishery in the public interest. The Applicant's suggestion that the LOA might be *ultra vires* must thus be rejected by the Court.
>
> (Respondent Minister's Supplemental Crown Submissions, dated December 9, 2009, paras. 70 to 73)

C. *Shell Canada's argument*

[17] As a compliment to the Minister's non-statutory tool and general authority arguments, Shell Canada advances the "doctrine of jurisdiction by necessary implication" as expressed by the Supreme Court in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.R. 140 (*ATCO*). This highly detailed argument is as follows:

> In [*ATCO*] the court set out the "doctrine of jurisdiction by necessary implication", whereby the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature. At paragraph 51, the Court cited the reasoning in *Re Dow Chemical Canada Inc. and Union Gas Ltd.* as an example of the Courts applying the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:
>
> > When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.
> >
> > Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. H.C.J.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.), cited to *ATCO, supra*

Since section 35 sets out a statutory framework by which authorizations are required from the DFO only where a proposed work or undertaking will result in a HADD, Shell submits that by practical necessity and necessary implication the DFO must have the authority to determine whether a proposed work or undertaking will result in a HADD and require an authorization, and to communicate that opinion to a project proponent. This includes the authority to determine and communicate not only that a proposed work or undertaking will result in a HADD and will require an authorization, but also the contrary opinion that a proposed work or undertaking will not result in a HADD and therefore does not require an authorization.

In *ATCO* [at para. 73], the Court enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

a. when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the Board fulfilling its mandate;

b. when the enabling act fails to explicitly grant the power to accomplish the legislative objective;

c. when the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;

d. when the jurisdiction sought is not one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and

e. when the legislature did not address its mind to the issue and decide against conferring the power to the Board. (See also Brown, at p. 2-16.3.)

(a) The jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to DFO fulfilling its mandate

In Shell's submission, the DFO's ability to formulate and communicate to project proponents its opinion of whether or not proposed works or undertakings will result in a HADD is necessary to accomplish the object of s. 35 of the *Fisheries Act* and is essential to DFO fulfilling its mandate under the *Fisheries Act.*

The object of s. 35 is to prohibit persons from carrying on works or undertakings that result in a HADD, except in such circumstances where DFO has specifically allowed such a work or undertaking by

way of an authorization. In order to do so, the DFO must review proposals for works or undertakings in order to determine whether they will or are likely to result in a HADD (and will thus require an authorization), and must be able to communicate that opinion to a project proponent. A project proponent who has been informed that certain proposed work will or is likely to result in a HADD may then either not proceed with a proposed project, revise the project so that it will not result in a HADD, or apply for any required permits or authorizations. This ability on behalf of DFO is necessary to accomplish the object of section 35, and the *Fisheries Act* itself, i.e.: to protect fish habitat and to ensure that proposed works or undertakings that will result in a HADD are first duly authorized by the DFO.

If the *Fisheries Act* is interpreted not to provide DFO this ability, project proponents would be left to formulate their own opinion of whether a proposed work or undertaking will result in a HADD and require an authorization without the benefit of the expertise from the DFO, which could result in proponents unintentionally carrying out works that result in a HADD without an authorization and contrary to section 35, which could result in a failure to protect fish habitat.

Similarly, if the *Fisheries Act* is interpreted not to provide DFO this ability, project proponents might also apply to the DFO for authorizations for projects that would not result in a HADD, and for which authorizations would not in fact be required, leading to an increased administrative burden on the DFO.

(b) The enabling act fails to explicitly grant the power to accomplish the legislative objective

Neither the *Fisheries Act* nor the *Department of Fisheries and Oceans Act* provide the DFO with the explicit authority to provide a Letter of Advice, or to otherwise communicate their opinion to a project proponent of whether or not a proposed work or undertaking will result or is likely to result in a HADD, and thus whether or not it will require an authorization. Accordingly, Shell submits that this factor from *ATCO* is met in this case.

(c) The mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction

In Shell's submission, the mandate of DFO is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction on the DFO to determine whether or not a proposed work or undertaking will or is likely to result in a HADD and to

communicate that opinion to a project proponent. The DFO is responsible for administering all aspects of the *Fisheries Act*, and thus for issuing authorizations pursuant to section 35 of the *Fisheries Act* where the proposed work or undertaking will result in a HADD. In Shell's submission, this strongly suggests a legislative intention to implicitly confer jurisdiction on the DFO to review project plans and determine whether or not an authorization is required, on the basis that a proposed work or undertaking will or will not result in a HADD, and to communicate that opinion to a project proponent. Shell submits that this factor is also satisfied in this case.

(d) The jurisdiction sought is not one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity

The power to formulate an opinion as to whether or not proposed work will or is likely to cause a HADD and requires an authorization, and to communicate that to a project proponent, is not one which the DFO has dealt with through the use of expressly granted powers in the *Fisheries Act* or the *Department of Fisheries and Oceans Act*. Further, the DFO has not relied on any expressly granted powers in the *Fisheries Act* to demonstrate its jurisdiction to provide Letters of Advice and the opinions set out therein.

Although section 37(1) expressly provides the DFO with the ability to determine whether a work or undertaking results or is likely to result in a HADD, there are no express provisions even under that section that provide the DFO with the specific authority to communicate its opinion as to which will be the case.

Accordingly, Shell submits that the implicit power to determine whether or not proposed work will constitute a HADD and thus require an authorization, and to communicate that to a project proponent, has not been dealt with through expressly granted powers, and is therefore necessary.

(e) The legislature did not address its mind to the issue and decide against conferring the power to the Board.

In Shell's submission, there is nothing to suggest that Parliament turned its mind to this issue and decided against conferring the power to the DFO to determine whether a proposed work or undertaking constitutes a HADD and requires an authorization, and to communicate that determination to a project proponent.

To the contrary, the legislature enacted a number of provisions in the *Fisheries Act* that expressly or implicitly require the DFO to make a determination of whether a proposed work or undertaking results or is likely to result in a HADD, which include the following:

a. an authorization under section 35 is required only where a proposed work or undertaking will result in a HADD;

b. under subsection 37, the Minister may request plans, specifications, etc. where a person carries on or proposes to carry on a work or undertaking that results or is likely to result in a HADD;

c. under subsection 37(1) the DFO is provided with the authority to determine whether a work or undertaking results or is likely to result in a HADD that constitutes an offense under subsection 40(1) and what measures, if any would prevent or mitigate that result or the effects thereof; and

d. subsection 37(2) enables the DFO to formulate an opinion that an offense under subsection 40(1) [i.e. a contravention of subsection 35(1)] is being or is likely to be committed, and this determination is a precondition to the DFO exercising any of the powers enumerated under ss. 37(2).

Since the *Fisheries Act* is silent on the DFO's ability to communicate whether or not a proposed work or undertaking is likely to constitute a HADD, there is nothing to suggest that the legislature decided against conferring the power to communicate its opinions to project proponents, and this final factor is met as well.

Conclusion

In *ATCO* [at para. 49], the Court held that: "in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme".

Shell submits that when considering the authority provided to the DFO under the *Fisheries Act*, the court must have regard for the intention of the legislature and purpose of the *Fisheries Act*, which is to protect fish and fish habitat. Section 35 establishes a legislative scheme for the protection of fish habitat, which requires

> proponents to obtain an authorization prior to conducting works or undertakings that result in a HADD. Although the *Fisheries Act* does not provide the DFO with the express authority to formulate and communicate its opinion of whether or not a proposed project will result or is likely to result in a HADD and requires an authorization, Shell submits that the doctrine of jurisdiction by necessary implication applies in this case and confers on the DFO the authority to formulate its opinion and communicate that opinion by Letter of Advice.
>
> In Shell's further submissions, the DFO's authority to review project plans, make a determination of whether the plans will result or are likely to result in a HADD, and communicate that opinion, such as by way of the November 9 LOA, is entirely consistent with the intent of the legislature and the legislative scheme because:
>
> e. it allows the DFO to share its expertise with project proponents in reviewing plans for proposed works and undertakings, and determining whether or not they are likely to result in a HADD (and thus need an authorization), instead of requiring the project proponent to try and formulate such an opinion on their own; and
>
> f. it provides the project proponents and the DFO with the ability to develop measures to avoid harm to fish habitat while projects are still in the planning stages.
>
> (Respondent Shell Canada's Supplemental Memorandum of Fact and Law, dated September 30, 2009, paras. 10 to 27)

D. *Conclusion*

[18] Cassiar Watch does not reply to the *Thamotharem*, and *Arsenault* arguments advanced by the Minister, or the *ATCO* argument advanced by Shell Canada. As a result, I find that they are unchallenged. In my opinion, based on these three arguments the Minister has ample authority to issue an LOA.

III. Is the LOA of November 9, 2007 Subject to Judicial Review?

[19] To support a positive answer to this question, Cassiar Watch relies on certain comments made by Justice Muldoon in reasons provided on an interlocutory motion for production of documents in the judicial review application *Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans)*, [1997] F.C.J. No. 556 (*Friends of the West Country*). The motion requested an order compelling the production of an LOA that had been issued by the Minister, and to establish the relevance of Justice Muldoon's comments to the present Application, they must be read in their full context.

[20] In the following quotation from *Friends of the West Country* the comments relied upon by Cassiar Watch are emphasized (see: Applicant's Memorandum of Fact and Law (Amended) October 30, 2009, para. 105). The comments relied upon are only a selection of what Justice Muldoon actually said at paragraphs 12 to 19:

> The approach of the respondent in refusing the applicant's request raises the issue of whether the letters of advice issued by the DFO to Sunpine are decisions made by a federal board, commission or tribunal within the meaning of section 18.1 of the Federal Court Act.
>
> This a troublesome issue to appear full-fledged before the Court in this motion, since this motion deals with a rule 1612 request. It seems that the respondent is raising an argument for non-disclosure under rule 1613 which attempts to force the resolution of an issue which is in contention between the parties in the proceedings on the applicant's originating motion.
>
> In that proceeding, the applicant seeks a declaration that the letters of advice constitute authorizations under subsections 35(2) and 37(2) of the Fisheries Act, or alternatively, a declaration that the letters were ultra vires the Minister's jurisdiction. The implication of the letters constituting authorizations is that the Minister would be required under paragraph 5(1)(d) of the CEAA to conduct an environmental assessment before issuing the authorizations. Thus, the applicant argues in the end result for the Minister to be responsible for a wider assessment than that conducted with respect to the part of Sunpine's

proposal dealing with the bridges over the Ram River and Prairie Creek triggered by subsection 5(2) of the NWPA.

The respondent Minister and/or his subordinates have gone to some length to attempt to rationalize a distinction between their policy of issuing letters of advice and the applicant's rule 1612 request. In the words of counsel for the respondent at p. 111 of the transcript:

> Now, the Act doesn't expressly provide for this policy nor Letters of Advice, but it doesn't prohibit it either. And in our submission this is pure administrative fact-finding process which the department in its day-to-day exercise of its authority is able to devise in order to assist it with its workload. And where the process that is involved in accordance with this departmental policy does not meet the test of exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament, or by or under an order made pursuant to the prerogative of the Crown, then whoever is doing this fact-finding, it isn't the federal board, commission or other tribunal.

Apparently, it is the respondent's submission that a policy which the DFO has developed internally without any explicit statutory foundation to do so will in some way relieve the Minister of statutory obligations or limit the obligations of the Minister vis a vis subsections 35(2) and 37(2) of the Fisheries Act and, in turn, paragraph 5(1)(d) of the CEAA. It also appears that a further "benefit" which derives from this informal approach to the statutory mandate and obligations placed upon the DFO by the Fisheries Act and the CEAA is that the DFO does not need to disclose materials in relation to a judicial review application related to the letters of advice since, in accordance with the policy, the letters of advice (although they do inform a party that subsection 5(1) of the Fisheries Act will apply to them or not) do not constitute a decision within the meaning of rule 1612. This is a transparent bureaucratic attempt at sheer evasion of binding statutory imperatives. It is neither cute nor smart, and this Court is not duped by it. By making "policy" not contemplated by the statutes, the DFO types simply cannot immunize the Minister and DFO from judicial review, nor circumvent the environment laws which they decline to obey.

Perhaps, if so inclined, the respondent will want to make out their argument once again at the main, substantive judicial review hearing as to the legal merits and effects of their internal policies. It is clear that one legal effect the DFO's internal policy cannot have is to bind this Court with respect to a rule 1612 application, so that this Court must deny the applicant disclosure of the documents it seeks because

> the issue it wants to contend at the main hearing would have already been resolved as a matter of policy by the DFO.
>
> It is this Court's view that the policy of the DFO with respect to letters of advice, and the purported legal effects of the policy i.e. that the letters are not decisions made by a federal board, commission or tribunal, have no bearing on the issue under rule 1612 of whether the respondent should disclose materials relevant to the main action to the applicant. This, however, seems to have been the sole reason for which the respondent has argued for non-disclosure.
>
> Therefore, there exists no valid reason for the respondent's objection [to] the applicant's rule 1612 request. […]
>
> [Emphasis added]

[21] With respect, I find that Justice Muldoon's comments, read in context, do not constitute a precedent on the issue of the legal purpose and effect of an LOA because that judicial review issue was not before him for final decision. While it is true that the Minister argued that production of the LOA concerned was not subject to disclosure because it was not a "decision" subject to judicial review, and while Justice Muldoon certainly expressed his personal views on this issue as *obiter dicta*, his order on the motion was focussed solely on the issue of production which was before him for decision.

[22] Because I have found that an LOA is a non-binding opinion which has no legal effect, I find that a recent decision of the Federal Court of Appeal advanced by the Minister is compelling authority in determining whether the LOA of November 9, 2007 is judicially reviewable.

[23] In *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)* 2009 FCA 15 (*Democracy Watch*) the issue was whether an opinion of the Commissioner that there was insufficient evidence upon which to begin an examination constituted a reviewable decision. Chief

Justice Richard delivered the following reasons at paragraphs 9 to 12 for finding that the opinion was not amenable to judicial review:

> We are all of the view that the Commissioner's letter is not judicially reviewable by this Court, since the Commissioner did not issue a decision or order within the meaning of section 66 of the Act or subsection 18.1(3) of the *Federal Courts Act*.
>
> Where administrative action does not affect an applicant's rights or carry legal consequences, it is not amenable to judicial review (*Pieters v. Canada (Attorney General)*, [2007] F.C.J. No. 746, 2007 FC 556 at paragraph 60; *Rothmans, Benson & Hedges Inc. v. Canada (Minister of National Revenue*) (1998), 148 F.T.R. 3 at paragraph 28; see also *Canadian Institute of Public and Private Real Estate Cos. v. Bell Canada*, [2004] F.C.J. No. 1103, 2004 FCA 243 at paragraphs 5 & 7).
>
> The applicant has no statutory right to have its complaint investigated by the Commissioner and the Commissioner has no statutory duty to act on it. [...]
>
> Furthermore, any statement made by the Commissioner in her letter does not have any binding legal effect. The Commissioner retains the discretion to commence an investigation into the applicant's complaint if, in the future, she has reason to believe that there has been a contravention of the Act.
>
> [Emphasis added]

[24] In my opinion, the LOA of November 9, 2007 is not amenable to judicial review because it is a non-binding opinion which has no legal effect and, given Cassiar Watch's standing as described in paragraph 3 above, it does not affect Cassiar Watch's rights as an Applicant.

[25] An evidentiary argument advanced by Cassiar Watch in the present Application requires determination on the basis of the conclusion just reached. Cassiar Watch argues for findings that the "proposal" upon which the LOA of November 9, 2007 is based incorporates by reference the documentation that supported the August 16, 2007 LOA and, indeed, the content of that LOA is an

important part of the context which must be considered with respect to the issuance of the LOA of November 9, 2007. The purpose of these arguments is to enlarge the factual content of the issuance of the LOA of November 9, 2007 to somehow bolster the legal argument advanced with respect to what an LOA is. I find that to accede to the argument would constitute the making of substantive factual findings which can only be made on a judicial review of the LOA of November 9, 2007. Given the finding that the LOA is not reviewable, I dismiss the argument.

IV. Conclusion on the Present Application

[26] The Application is dismissed.

ORDER

For the reasons provided, the present Application is dismissed.

The issue of costs is reserved for determination following further argument.

"Douglas R. Campbell"
Judge

ANNEX

The *Fisheries Act* provisions are as follows:

35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.	35. (1) Il est interdit d'exploiter des ouvrages ou entreprises entraînant la détérioration, la destruction ou la perturbation de l'habitat du poisson.
(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.	(2) Le paragraphe (1) ne s'applique pas aux personnes qui détériorent, détruisent ou perturbent l'habitat du poisson avec des moyens ou dans des circonstances autorisés par le ministre ou conformes aux règlements pris par le gouverneur en conseil en application de la présente loi.
37. (1) Where a person carries on or proposes to carry on any work or undertaking that results or is likely to result in the alteration, disruption or destruction of fish habitat, or in the deposit of a deleterious substance in water frequented by fish or in any place under any conditions where that deleterious substance or any other deleterious substance that results from the deposit of that deleterious substance may enter any such waters, the person shall, on the request of the Minister or without request in the manner and circumstances prescribed by regulations made under	37. (1) Les personnes qui exploitent ou se proposent d'exploiter des ouvrages ou entreprises de nature à entraîner soit l'immersion de substances nocives dans des eaux où vivent des poissons ou leur rejet en quelque autre lieu si le risque existe que la substance nocive en cause, ou toute autre substance nocive provenant de son rejet, pénètre dans ces eaux, soit la détérioration, la perturbation ou la destruction de l'habitat du poisson, doivent, à la demande du ministre — ou de leur propre initiative, dans les cas et de la manière prévus par les règlements d'application

paragraph (3)(*a*), provide the Minister with such plans, specifications, studies, procedures, schedules, analyses, samples or other information relating to the work or undertaking and with such analyses, samples, evaluations, studies or other information relating to the water, place or fish habitat that is or is likely to be affected by the work or undertaking as will enable the Minister to determine

(*a*) whether the work or undertaking results or is likely to result in any alteration, disruption or destruction of fish habitat that constitutes or would constitute an offence under subsection 40(1) and what measures, if any, would prevent that result or mitigate the effects thereof; or

(*b*) whether there is or is likely to be a deposit of a deleterious substance by reason of the work or undertaking that constitutes or would constitute an offence under subsection 40(2) and what measures, if any, would prevent that deposit or mitigate the effects thereof.

(2) If, after reviewing any material or information provided under subsection (1) and affording the persons who provided it a reasonable opportunity to make representations, the Minister or a person designated by the Minister is of the opinion that an offence under subsection 40(1) or (2) is being or is

pris aux termes de l’alinéa (3)*a*) —, lui fournir les documents — plans, devis, études, pièces, annexes, programmes, analyses, échantillons — et autres renseignements pertinents, concernant l’ouvrage ou l’entreprise ainsi que les eaux, lieux ou habitats du poisson menacés, qui lui permettront de déterminer, selon le cas :

a) si l’ouvrage ou l’entreprise est de nature à faire détériorer, perturber ou détruire l’habitat du poisson en contravention avec le paragraphe 35(1) et quelles sont les mesures éventuelles à prendre pour prévenir ou limiter les dommages;

b) si l’ouvrage ou l’entreprise est ou non susceptible d’entraîner l’immersion ou le rejet d’une substance en contravention avec l’article 36 et quelles sont les mesures éventuelles à prendre pour prévenir ou limiter les dommages.

(2) Si, après examen des documents et des renseignements reçus et après avoir accordé aux personnes qui les lui ont fournis la possibilité de lui présenter leurs observations, il est d’avis qu’il y a infraction ou risque d’infraction au paragraphe 35(1) ou à l’article 36, le ministre ou son délégué peut, par arrêté et sous réserve des règlements d’application de l’alinéa (3)*b*) ou, à défaut, avec l’approbation du gouverneur en conseil :

likely to be committed, the Minister or a person designated by the Minister may, by order, subject to regulations made pursuant to paragraph (3)(*b*), or, if there are no such regulations in force, with the approval of the Governor in Council,
(*a*) require such modifications or additions to the work or undertaking or such modifications to any plans, specifications, procedures or schedules relating thereto as the Minister or a person designated by the Minister considers necessary in the circumstances, or
(*b*) restrict the operation of the work or undertaking,
and, with the approval of the Governor in Council in any case, direct the closing of the work or undertaking for such period as the Minister or a person designated by the Minister considers necessary in the circumstances.

a) soit exiger que soient apportées les modifications et adjonctions aux ouvrages ou entreprises, ou aux documents s'y rapportant, qu'il estime nécessaires dans les circonstances;
b) soit restreindre l'exploitation de l'ouvrage ou de l'entreprise.
Il peut en outre, avec l'approbation du gouverneur en conseil dans tous les cas, ordonner la fermeture de l'ouvrage ou de l'entreprise pour la période qu'il juge nécessaire en l'occurrence.

40. (1) Every person who contravenes subsection 35(1) is guilty of
(*a*) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to

40. (1) Quiconque contrevient au paragraphe 35(1) commet une infraction et encourt, sur déclaration de culpabilité :
a) par procédure sommaire, une amende maximale de trois cent mille dollars lors d'une première infraction ou, en cas de récidive, une amende maximale de trois cent mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines;

both; or (*b*) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.	*b*) par mise en accusation, une amende maximale d'un million de dollars lors d'une première infraction ou, en cas de récidive, une amende maximale d'un million de dollars et un emprisonnement maximal de trois ans, ou l'une de ces peines.

The *CEAA* provisions are as follows:

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority	5. (1) L'évaluation environnementale d'un projet est effectuée avant l'exercice d'une des attributions suivantes : *a*) une autorité fédérale en est le promoteur et le met en oeuvre en tout ou en partie;
[…]	[…]
(*d*) under a provision prescribed pursuant to paragraph 59(*f*), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.	*d*) une autorité fédérale, aux termes d'une disposition prévue par règlement pris en vertu de l'alinéa 59*f*), délivre un permis ou une licence, donne toute autorisation ou prend toute mesure en vue de permettre la mise en oeuvre du projet en tout ou en partie.
59. The Governor in Council may make regulations	59. Le gouverneur en conseil peut, par règlement :
[…]	[…]

(*f*) prescribing, for the purposes of paragraph 5(1)(*d*), the provisions of any Act of Parliament or any instrument made under an Act of Parliament;	*f*) déterminer, pour l'application de l'alinéa 5(1)*d*), des dispositions de toute loi fédérale ou de textes pris sous son régime;

The key elements of the *CEAA Law List Regulations*, SOR/94-636 are as follows:

2. The provisions of an Act set out in Part I of Schedule I and a regulation set out in Part II of that Schedule are prescribed for the purposes of paragraph 5(1)(*d*) of the *Canadian Environmental Assessment Act*.	2. Pour l'application de l'alinéa 5(1)*d*) de la *Loi canadienne sur l'évaluation environnementale*, les dispositions législatives et réglementaires sont celles prévues respectivement aux parties I et II de l'annexe I.

Relevant to the present Application, Part I of Schedule I, prescribes the following sections of the *Fisheries Act*: s. 35(2) and s. 37(2).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1974-07
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APPEARANCES:

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