Federal Court  Cour fédérale

Date: 20110210

Docket: T-888-10

Citation: 2011 FC 158

Toronto, Ontario, February 10, 2011

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

Respondent

REASONS FOR ORDER AND ORDER

[1] Vale Inco Ltd. ("Vale"), the Mining Association of Canada ("MAC") and the Mining Association of British Columbia ("MABC") (collectively, the "Proposed Interveners") seek leave, pursuant to the *Federal Courts Rules*, SOR/98-106 (the "Rules") to intervene in the within proceeding with all rights of a respondent including but not limited to, the right to raise preliminary objections, bring motions, file evidence, make legal submissions, and appeal any and all orders and judgments. Alternatively, they seek status as parties.

[2] Sandy Pond Alliance to Protect Canadian Waters Inc. (the "Applicant") commenced this application for judicial review in order to challenge certain provisions of the *Metal Mining Effluent Regulations*, SOR/2002-222 (the "Regulations") and 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.*

[3] The Applicant is a not-for-profit corporation registered in Newfoundland and Labrador, pursuant to the laws of that province. According to the incorporation documents, the Applicant was incorporated for the following purposes:

> The Corporation is established for the following purposes and shall restrict itself to such activities as in its opinion, directly or indirectly, furthers such purposes:

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 cooperate with other organizations or institutions with similar purposes.

[4] Her Majesty the Queen in Right of Canada as Represented by the Attorney General (the "Respondent") is the Respondent in the application for judicial review. The Regulations were passed pursuant to the *Fisheries Act*, R.S.C. 1985, c. F-14. The Respondent takes no position on the motions by the Proposed Interveners and did not participate in the hearing of the motions brought by Vale, MAC and MABC.

[5] The Applicant is challenging the constitutionality of Schedule 2 of the Regulations, as well as sections 5 and 27.1 of the Regulations as being, among other things, contrary to the protection and conservation of fish habitat which is the purpose of the *Fisheries Act*.

[6] The focus of the Applicant's challenge to the Regulations is the inclusion of a body of water known as Sandy Pond, located in the Long Harbour area on the Avalon Peninsula of the Province of Newfoundland and Labrador. The inclusion of Sandy Pond on Schedule 2 of the Regulations means that that body of water is eligible to be used as a tailings impoundment area in connection with certain operations carried out in Long Harbour by Vale.

[7] The brief statement of facts that appears below is culled from the affidavits filed to date in this proceeding.

[8] The Applicant has filed the affidavit of Dr. John Gibson, a fisheries scientist. The Respondent has filed the affidavits of Mr. Marvin A. Barnes and Mr. Chris Doiron.

[9] Vale has filed the affidavits of Mr. Don Stevens and Ms. Margarette Livie. MAC filed the affidavit of Mr. Gordon Peeling and the MABC filed the affidavit of Mr. Pierre Gratton.

[10] The Applicant filed the affidavit of Dr. John Gibson, a fisheries scientist. Dr. Gibson expressed opinions about the harmful effect on the conservation function of the *Fisheries Act* resulting from the inclusion of Sandy Pond on Schedule 2 of the Regulations.

[11] Vale is a Canadian company with 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 operation is embarking on a proposed nickel processing plant. That plant will generate tailings and require a tailings impoundment area. Currently, eighteen "Tailings impoundment areas" are described in Schedule 2 of the Regulations by their geographic coordinates.

[12] In December 2007, Voisey's Bay Nickel Company Limited ("VBNC"), the former owner of the Long Harbour Processing Plant, submitted a request to the Department of Fisheries and Oceans ("DFO") to amend the Regulations to include hydrometallurgical plants, such as the proposed project, as a regulated operation and to designate Sandy Pond as a management and storage site. On June 10, 2009, Sandy Pond was included on Schedule 2 of the Regulations.

[13] The history of the steps taken to obtain the requested amendment is set out in the affidavit of Mr. Marvin A. Barnes, Regional Manager, Environmental Assessment and Major Projects with DFO. This affidavit was filed by the Respondent in the responding application record, relative to the underlying application for judicial review.

[14] Mr. Chris Doiron is the Chief of the Mining Section of the Mining and Processing Division of Environment Canada in Ottawa. In his affidavit, he states that he played the principal supervisory role within Environment Canada relative to regulatory process leading up to the inclusion of Sandy Pond as a tailings impoundment area on Schedule 2 of the Regulations. His affidavit outlines the key steps that were required in order to have Sandy Pond listed as a tailings impoundment area on Schedule 2 of the Regulations. Those steps included consultations with the public.

[15] Vale filed the affidavits of Mr. Don Stevens and Ms. Margarette Livie in support of its motion to participate as a respondent or as an intervener. Mr. Stevens is the General Manager of the Long Harbour Processing Plant that is operated by Vale Inco Newfoundland and Labrador Limited, a wholly owned subsidiary of Vale.

[16] In his affidavit he stated that he was aware of the circumstances relative to Vale's request to add Sandy Pond to Schedule 2 of the Regulations and that he was aware of the challenge brought by the Applicant against the inclusion of Sandy Pond in Schedule 2 of those Regulations. He further stated he believes that Vale is able to offer a unique perspective about the nature and operations of

tailings impoundment areas, their importance to the mining industry and the extent to which they can be established and operated in an environmentally responsible manner.

[17] Ms. Livie is a law clerk to Counsel for Vale. The purpose of her affidavit is to submit certain exhibits, including a transcript of radio broadcast, a copy of a "backgrounder document" about the Applicant, documents relating to the incorporation of the Applicant, a transcript of a television news story and a copy of a video. All of these documents appear to be available in the public domain and were produced by Vale for the purpose of showing that the Applicant is focusing solely on the Long Harbour operations and Sandy Pond itself, that this application has a local and specific focus.

[18] Mr. Gordon Peeling is the President and CEO of the MAC. The MAC is a national organization for the Canadian Mining Industry and has existed since 1935, initially under the name "the Canadian Metal Mining Association".

[19] MAC represents most of the mining operations currently listed in Schedule 2 of the Regulations. MAC says the Applicant is seeking to have Schedule 2 declared *ultra vires* the authority of the *Fisheries Act*. At paragraph 6 of his affidavit, Mr. Peeling describes the severe effects upon 11 mining projects in Canada if the Applicant is successful in its application for review. If this application for judicial review succeeds, 11 mining projects in Canada would be affected.

[20] Mr. Peeling also deposed that the MAC has been granted intervener status in the several cases described in paragraph 7 of his affidavit.

[21] Mr. Pierre Gratton is the President and Chief Executive Officer of the MABC. The MABC was established in 1901 pursuant to an act of the British Columbia legislature. It is the dominant voice of the mining industry in British Columbia and represents 49 member companies who are engaged in metal and coal mining in British Columbia and throughout the world. The MABC has been granted intervener status in those cases set out in paragraph 6 of his affidavit. Mr. Gratton also comments on the severe consequences for the mining industry should this application for judicial review succeed.

[22] As stated above, Vale, MAC and MABC seek to intervene in this application for judicial review with the full rights of respondents, and alternatively, they request that they be added as parties.

[23] The Applicant, by letter dated August 6, 2010, indicated that it was prepared to consent to the intervention of the Proposed Interveners on a limited basis, as follows:

> (i) That the interveners be restricted to one more affidavit.
>
> (ii) That the interveners would not seek any costs from the Applicant whatsoever for the whole of the full Application.
>
> (iii) That the normal procedures respecting cross examination etc are available to the parties but that no further motions can be brought on by any party without leave of the Court.

[24] This proposal was not accepted by the Proposed Interveners.

[25] I will first address the motion for intervener status. Rule 109 governs intervention and provides as follows:

Leave to intervene	Autorisation d'intervenir
109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	109. (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
Contents of notice of motion	Avis de requête
(2) Notice of a motion under subsection (1) shall	(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :
(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.
Directions	Directives de la Cour
(3) In granting a motion under subsection (1), the Court shall give directions regarding	(3) La Cour assortit l'autorisation d'intervenir de directives concernant :
(a) the service of documents; and	a) la signification de documents;
(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[26] I refer to the decision in *Rothman, Benson & Hedges Inc. v. Attorney General of Canada*, [1990] 1 F.C. 74 (T.D.), where the Court set out the following criteria to be considered when dealing with a motion for intervener status:

> (1) Is the proposed intervenor directly affected by the outcome?
>
> (2) Does there exist a justiciable issue and a veritable public interest?
>
> (3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
>
> (4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?
>
> (5) Are the interests of justice better served by the intervention of the proposed third party?
>
> (6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

[27] The factors are not cumulative and the Proposed Interveners need not meet every one of the factors; see *Boutique Jacob Inc. v. Pantainer Ltd. et al.* (2006), 357 N.R. 384 at paras. 19-21.

[28] It is clear that neither MAC nor MABC are "directly affected" because they have no direct connection with the use of Sandy Pond as a tailings impoundment area. Their interest is a broad one, as representatives of the mining industry in Canada, generally.

[29] Vale also argues that it is not "directly affected" by the subject matter of this application for judicial review. It submits that if this application for judicial review is successful, a declaration that

section 5, section 27.1, and Schedule 2 of the Regulations are unconstitutional and will not have retroactive effect, meaning that its entitlement to operate a tailings impoundment area at Sandy Pond will not be affected.

[30] Having regard to the Supreme Court of Canada's decision in *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, the retroactive effect of a declaration of constitutional invalidity is to be decided on a case-by-case basis. In any event, based on my analysis of the remaining criteria, it is unnecessary to determine if Vale is "directly affected" by this application for judicial review in order to dispose of its motion to intervene.

[31] There is a justiciable issue raised by the application for judicial review and an interest that affects the public interest.

[32] Contrary to the Applicant's submissions on factor number 4, I am satisfied that the interests of the Proposed Interveners may not be adequately defended by either the Applicant or the Respondent. The interests of both the Applicant and the Respondent are not the same as those of the Proposed Interveners. While the Respondent represents the public interest, he does so on a broad plane and without an obligation to address the interests of the Proposed Interveners.

[33] I am satisfied that the interests of justice are better served by the participation of the three Proposed Interveners and that the public interest may suffer if those three parties are denied the right to participate, albeit on a limited basis, in this proceeding.

[34] Finally, having regard to the sixth factor, in my opinion the Court will be assisted in adjudicating the present application for judicial review, by the participation of the three Proposed Interveners. The Proposed Interveners can offer relevant and different perspectives on the underlying application for judicial review. Their interest is not merely jurisprudential, as was the case in *Canada (Prime Minister) v. Khadr*, 2009 FCA 186 (F.C.A.).

[35] As the Proposed Interveners have satisfied a number of the criteria set out in *Rothman, Benson & Hedges Inc.*, this motion to intervene will be granted.

[36] Rule 109(3) provides that in granting a motion to intervene, the Court shall give directions concerning the service of documents and the role of the intervener, including costs, rights of appeal and any other relevant matters concerning the procedure to be followed by the intervener.

[37] The Proposed Interveners seek to participate on a very broad basis, including the right to make motions and to appeal any and all orders that may issue on an interlocutory basis. This degree of participation is more consistent with the role of a party, not as interveners. The Proposed Interveners seek status as a respondent, as an alternative to obtaining status as interveners.

[38] In response to a Direction issued after the hearing of the motions, the Proposed Interveners were asked to make submissions as to the Direction that the Court should issue, as required by Rule 109, if intervener status is granted. To a large degree, the Proposed Interveners responded by again requesting a broad participatory role, echoing what they had set out in their Notices of Motion.

[39] In other words, although they request a role as “interveners”, the Proposed Interveners want to conduct themselves as parties, in this case as respondents.

[40] I am not prepared to issue the Directions as sought by the Proposed Interveners. If the Proposed Interveners had submitted evidence to show that they should be granted party status, a basis would exist for the exercise of discretion to allow them to participate as respondents. No Directions would be required because the Rules guide the manner in which parties can participate in an application for judicial review. I note that according to subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and Rule 303(1) of the Rules, a key characteristic of a “respondent” to an application for judicial review is that such person be “directly affected” by the subject of the application for judicial review.

[41] It is not necessary for me to comment on whether any or all of the Proposed Interveners are “directly affected” by the subject matter of this application for judicial review. I am satisfied that having regard to the evidence submitted and the relevant jurisprudence pertaining to the granting of intervener status, that the three Proposed Interveners should be permitted to participate in that capacity, that is as interveners. The role of an intervener is necessarily more limited than the participation of a respondent who enjoys all rights of a party. The Direction concerning the role of these Proposed Interveners, as interveners, will reflect that more limited role.

[42] As indicated, in response to a request from the Court, the Proposed Interveners made submissions concerning the Directions that should issue in respect of their status as interveners.

[43] The Proposed Interveners have made it clear that they will not be seeking costs in this matter. There is an obvious concern about a right of appeal.

[44] Ordinarily, an intervener has no right of appeal; see *Edmonton Friends of the North Environmental Society v. Canada (Minister of Western Economic Diversification)*, [1991] 1 F.C. 416 (C.A.). In *Chrétien v. Attorney General of Canada* (2005), 273 F.T.R. 219, Prothonotary Aronovitch addressed the issue of a right of appeal for an intervener, at paras. 41 and 42 as follows:

> [41] Ordinarily an intervener is not granted the right to pursue an appeal should the decision in the proceeding in which it is intervening be contrary to its interests.
>
> [42] One of the considerations in determining whether interveners ought to be granted a right of appeal is whether there is an expectation that the respondent would have any vital interest or motivation to prosecute an appeal with the same vigor as the intervening parties would do. Then, the appeal is generally limited to the issues which the intervener was given leave to address below. [references omitted]

[45] In the present case, it seems to me that a right of appeal for the Proposed Interveners will be of concern only in the event that the judicial review application is granted with retroactive effect. That situation would certainly be of great concern to Vale. The potential difficulty in that regard may be addressed by the Proposed Interveners seeking leave to appeal from the hearings judge upon the hearing of the application for judicial review. The Proposed Interveners will address that issue in their respective application records.

[46] Having regard to the submissions made by the parties and the relevant jurisprudence, I am satisfied that Vale, and MAC and MABC jointly, should be granted intervener status in this proceeding and their participation shall proceed on the following basis:

(i) documents will be served upon Counsel for the Applicant and Respondent, respectively, within 60 days after receipt of this Order;

(ii) Vale may file an application record, including supporting affidavits from one more fact witness and one expert witness, in addition to the affidavits filed to date;

(iii) MAC and MABC, jointly, may file an application record, including supporting affidavits from one fact witness and one expert witness, in addition to the affidavits filed to date;

(iv) the interveners shall not have the right to participate in cross examination of the deponents for the Applicant and the Respondent, unless there is consent from both the Applicant and the Respondent in that regard;

(v) Vale will be permitted to bring evidence and make arguments on the following issues:

a. the use of Sandy Pond as a tailings impoundment area is an example of a project that is consistent with the purpose of the *Fisheries Act*;

b. how Sandy Pond came to be chosen as a tailings impoundment area;

c. how it was decided that the Regulations would apply to the use of Sandy Pond as a tailings impoundment area and why it was decided that Vale should seek an amendment to the Regulations;

d. the nature and extent of the environmental assessments and public consultation conducted by Vale in respect of Sandy Pond; and

e. full particulars of the Compensation Plan developed by Vale and why it appropriately compensates for the use of Sandy Pond as a tailings impoundment area;

(vi) MAC and MABC, jointly, will be permitted to bring evidence and make arguments on the following issues:

a. the history of the mining practices with respect to effluent, and the evolution of standards over time;

b. the need for and nature of tailings and the body of research and evolution of best management practice developed through the Mine Environment Neutral Drainage (MEND) program and the MAC Towards Sustainable Mining (TSM) Initiative;

c. the nature of fish populations in water bodies within Canada, and the Applicant's position that individual populations are generally unique in any material respect; and

d. the desirability from a safety and environmental protection perspective of usage of natural water body versus an artificial structure;

(vii) the interveners may present oral argument subject to further Directions from the hearings judge;

(viii) the interveners shall not be entitled to bring interlocutory motions;

(ix) the interveners will have no right to appeal any interlocutory orders made in this proceeding;

(x) 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;

(xi) 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.

[47] There shall be no costs to any party upon the present motions.

ORDER

THIS COURT ORDERS that:

1. The motions are granted, Vale Inco Ltd. ("Vale"), the Mining Association of Canada ("MAC") and the Mining Association of British Columbia ("MBAC") are granted intervener status upon the following basis:

   (i) documents will be served upon Counsel for the Applicant and Respondent, respectively, within 60 days after receipt of this Order;

   (ii) Vale may file an application record, including supporting affidavits from one more fact witness and one expert witness, in addition to the affidavits filed to date;

   (iii) MAC and MABC, jointly, may file an application record, including supporting affidavits from one fact witness and one expert witness, in addition to the affidavits filed to date;

   (iv) the interveners shall not have the right to participate in cross examination of the deponents for the Applicant and the Respondent, unless there is consent from both the Applicant and the Respondent in that regard;

   (v) Vale will be permitted to bring evidence and make arguments on the following issues:

      a. the use of Sandy Pond as a tailings impoundment area is an example of a project that is consistent with the purpose of the *Fisheries Act*;

      b. how Sandy Pond came to be chosen as a tailings impoundment area;

      c. how it was decided that the Regulations would apply to the use of Sandy Pond as a tailings impoundment area and why it was decided that Vale should seek an amendment to the Regulations;

d. the nature and extent of the environmental assessments and public consultation conducted by Vale in respect of Sandy Pond; and

e. full particulars of the Compensation Plan developed by Vale and why it appropriately compensates for the use of Sandy Pond as a tailings impoundment area;

(vi) MAC and MABC, jointly, will be permitted to bring evidence and make arguments on the following issues:

a. the history of the mining practices with respect to effluent, and the evolution of standards over time;

b. the need for and nature of tailings and the body of research and evolution of best management practice developed through the Mine Environment Neutral Drainage (MEND) program and the MAC Towards Sustainable Mining (TSM) Initiative;

c. the nature of fish populations in water bodies within Canada, and the Applicant's position that individual populations are generally unique in any material respect; and

d. the desirability from a safety and environmental protection perspective of usage of natural water body versus an artificial structure;

(vii) the interveners may present oral argument subject to further Directions from the hearings judge;

(viii) the interveners shall not be entitled to bring interlocutory motions;

(ix) the interveners will have no right to appeal any interlocutory orders made in this proceeding;

(x) 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;

(xi) 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.

2. The style of cause is amended as follows:

SANDY POND ALLIANCE TO PROTECT
CANADIAN WATERS INC.

Applicant

and

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

Respondent

and

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

Interveners

3. There shall be no order as to costs for any party or any intervener upon these motions.

"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
PLACE OF HEARING:	St. John's, NL
DATE OF HEARING:	September 10, 2010
REASONS FOR ORDER AND ORDER:	HENEGHAN J.
DATED:	February 10, 2011

APPEARANCES:

Owen Myers	FOR THE APPLICANT
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James Thistle, QC	FOR THE INTERVENER MINING ASSOCIATION OF CANADA AND MINING ASSOCIATION OF BRITISH COLUMBIA

SOLICITORS OF RECORD:

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Myles J. Kirvan Deputy Attorney General of Canada St. John's, NL	FOR THE RESPONDENT