Federal Court of Appeal | Cour d'appel fédérale

Date: 20110408

Docket: A-93-11
A-81-11

Citation: 2011 FCA 129

CORAM: **EVANS J.A.**
DAWSON J.A.
TRUDEL J.A.

A-93-11

BETWEEN:

VALE CANADA LIMITED

Appellant

and

SANDY POND ALLIANCE TO PROTECT CANADIAN WATERS INC. and HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL

Respondents

and

MINING ASSOCIATION OF CANADA and MINING ASSOCIATION OF BRITISH COLUMBIA

Interveners

A-81-11

BETWEEN:

MINING ASSOCIATION OF CANADA AND MINING ASSOCIATION OF BRITISH COLUMBIA

Appellants

and

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

Respondent

and

SANDY POND ALLIANCE TO PROTECT CANADIAN WATERS

Respondent

and

VALE INCO LTD.

Intervener

Heard at Toronto, Ontario, on March 31, 2011.

Judgment delivered at Ottawa, Ontario, on April 8, 2011.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: EVANS J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] These are two appeals from an Order of the Federal Court (2011 FC 158, Heneghan J. (the Motions Judge), 10 February 2011) allowing in part the appellants' motions for leave to intervene in

the judicial review application by Sandy Pond Alliance to Protect Canadian Waters Inc. (SP Alliance). Her Majesty the Queen in Right of Canada as represented by the Attorney General is the sole named respondent (Attorney General). The Attorney General took no position on the motions, nor on these appeals.

[2] The appellants mainly contest the limitations imposed by the Motions Judge on their participation in the proceedings as interveners. More particularly, they object to the limit of one expert witness per intervener, and the exclusion of the rights to cross-examine witnesses and to appeal the final decision.

[3] The only issue to be determined in this appeal is whether the interveners should have been granted broader participatory rights in the judicial review proceedings. This Court will not disturb the Federal Court's discretionary order unless persuaded that the Motions Judge misapprehended the facts or committed an error of principle in the conditions that she imposed on the appellants' rights as interveners granting the interventions (*Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, [2010] 1 F.C.R. 226 (F.C.A.) at paragraph 6).

[4] I propose to allow, in part, both appeals in a single set of reasons as the appellants have taken similar positions, albeit based on their respective circumstances, which I shall discuss below.

The parties

[5] Vale Canada Limited (then Vale Inco Limited) (Vale) is a Canadian mining company with significant activities throughout Canada. Of particular interest to this appeal is its nickel processing plant in Long Harbour, Newfoundland and Labrador, near Sandy Pond, which Vale intends to use as a tailings impoundment area.

[6] In order to do so, Vale sought the necessary governmental approvals, as required by sections 5 and 27.1 of the *Metal Mining Effluent Regulations*, SOR/2002-222 (the Regulations) made pursuant to the *Fisheries Act*, R.S.C. 1985, c. F-14 (*Fisheries Act*).

[7] Vale has been successful in having Sandy Pond included in Schedule 2 of the Regulations, which allows it to "deposit or permit the deposit of waste rock or an effluent that contains any concentration of a deleterious substance and that is of any pH into" Sandy Pond (Regulations at subsection 5(1)).

[8] Sandy Pond has not yet been converted into or used as a tailing impoundment area. Vale still needs to submit for ministerial approval a compensation plan, the purpose of which is "to offset for the loss of fish habitat resulting from the deposit of a deleterious substance" into Sandy Pond (Regulations at subsection 27.1(2)).

[9] The Mining Association of Canada (MAC) represents most of the mining operations currently listed in Schedule 2 of the Regulations, as well as mining corporations seeking, as Vale did, the addition of "a water or place" in Schedule 2 (Regulations at paragraph 5(1)(a)).

[10] The Mining Association of British Columbia (MABC) represents many mining corporations operating in that province and around the world (reasons at paragraph 21).

[11] SP Alliance is a not-for-profit corporation registered under the laws of Newfoundland and Labrador for the purposes, amongst others, of protecting and conserving Canadian waters and their ecosystems (reasons at paragraph 3).

[12] SP Alliance supports the Order below, arguing that the appellants are "missing the point" of its application for judicial review, which is to obtain a declaration that Schedule 2 and sections 5 and 27.1 of the Regulations are unlawful, *ultra vires* the authority of the Governor in Council and, therefore, of no force and effect for being contrary to subsections 34(2), 36(5) and 38(9) of the *Fisheries Act*. The application thus raises questions of law; if granted, a declaration of invalidity would be of general application. Accordingly, the factual circumstances of Sandy Pond are of limited, if any, relevance. The application is not, it adds, "to spend time reviewing the speeches of citizens who are opposed to Vale's project" at Long Harbour (SP Alliance's memorandum at paragraph 4). As a result, SP Alliance contends that the participatory rights granted by the Federal Court are fair and more than adequate to allow the interveners to make their cases. I disagree.

Analysis

[13] At paragraph 26 of her reasons, the Motions Judge set out the six factors for consideration in a motion for intervener status, as listed in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 (at paragraph 12):

a. Is the proposed intervener directly affected by the outcome?

b. Does there exist a justiciable issue and a veritable public interest?

c. Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

d. Is the position of the proposed intervener adequately defended by one of the parties to the case?

e. Are the interests of justice better served by the intervention of the proposed third party?

f. Can the Court hear and decide the cause on its merits without the proposed intervener?

[14] Having considered the application of these factors to the proposed interveners, and having found that the focus of SP Alliance's challenge to the Regulations was the inclusion of Sandy Pond in Schedule 2, the Motions Judge granted leave to intervene but went on to limit the interveners' participatory rights. Never in her reasons, however, did she fully address the first factor, i.e., whether the proposed interveners were directly affected by the outcome. On the contrary, the Motions Judge twice decided not to deal with this issue. At paragraph 29 of her reasons, she held that it was unnecessary to determine whether Vale was "directly affected" by the application for judicial review to dispose of its motion to intervene. Then, at paragraph 41, she applied the same reasoning to all the interveners.

[15] Reading the reasons as a whole, I am of the view that the Motions Judge's decision not to address the first factor stems from her mischaracterization of the relief sought by SP Alliance. As I explain below, framing the issues raised by the application as a constitutional challenge of Schedule 2, as well as of sections 5 and 27.1 of the Regulations, seems to have sent the Motions Judge down the wrong path (reasons at paragraph 5). The misinterpretation of Vale's submissions ensued.

[16] At paragraphs 29 and 30 of her reasons, the Motions Judge summarized Vale's position as follows:

> [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 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.

[17] But Vale had made the concession that it was not directly affected by the application as part of a twofold argument: (1) if the relief sought has no retroactive effect, Vale is not directly affected by the outcome because any Order issued will be of no effect on approvals already received by it; (2) however, if, contrary to Vales' principal submission, the relief sought has a retroactive effect,

Vale is directly affected by the outcome (Vale's written submissions, appeal book, volume 1, tab 1 at page 39).

[18] At the hearing of these appeals, SP Alliance confirmed that its application raises a question of statutory *vires*. Had the Motions Judge examined the matter in that light, I am convinced that she would have concluded that Vale and the various mining corporations represented by MAC and MABC could potentially be directly affected by the outcome as any order granting the application for judicial review on the basis that the Regulations are *ultra vires* would almost certainly have a retroactive effect on Vale's mining operations and those of MAC and MABC's members. Broader intervening rights would have ensued.

[19] The interveners have persuaded me of their need for two expert witnesses. An expert qualified in the general area of engineering or geochemistry is needed by Vale to respond to the SP Alliance's assertion that the construction of an artificial tailings impoundment area is preferable to the use of a natural water body. As well, Vale requires the assistance of an expert qualified in the general area of fisheries biology or fisheries ecology to respond to SP Alliance's arguments regarding the impact of Vale's mining operations on the ecosystem and its compensation plan.

[20] MAC and MABC's interests reach far beyond Sandy Pond. One expert witness will address mining practices with respect to effluent treatment while another expert will address SP Alliance's submission that individual ecosystems are generally unique and, once lost, cannot be recreated (affidavit of R.J. Gibson, Vale's appeal book, volume 1, tab 5 at page 79).

[21] It is safe to foresee that the Applications Judge will have to weigh contradictory evidence. I agree with the appellants that they should be granted the right to cross-examine the deponents for the Applicant and the Respondent.

[22] Vale also intends to argue that the application for judicial review is untimely. This issue is not listed in the Federal Court's Order. I propose to grant Vale's request.

[23] Finally, the interveners are asking this Court to grant them a right of appeal of the final decision to issue. The Motions Judge has decided that this question was better left to the Applications Judge. I see no reason to intervene.

[24] This being said, I propose to allow the appeals in part, each party assuming its own costs. A copy of these reasons will be filed in both appeals.

[25] The Federal Court's Order, in its relevant parts, would now read as follows (I have underlined the changes and omitted the part of the Order that concerns the style of cause).

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 30 days after receipt of this Order;

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

(iv) the interveners shall have the right to participate in cross examination of the deponents for the Applicant and the Respondent;

(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;

f. the timeliness of the application;

(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.

(xii) The interveners shall take all measures necessary to avoid overlapping arguments or duplicating the material filed.

"Johanne Trudel"
J.A.

"I agree
John M. Evans J.A."

"I agree
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-93-11
(AN APPEAL FROM THE ORDER OF THE HONOURABLE MADAM JUSTICE HENEGHAN OF THE FEDERAL COURT DATED FEBRUARY 10, 2011, DOCKET NO. T-888-10).	
STYLE OF CAUSE:	VALE CANADA LIMITED v. SANDY POND ALLIANCE TO PROTECT CANADIAN WATERS INC. and HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL v. MINING ASSOCIATION OF CANADA and MINING ASSOCIATION OF BRITISH COLUMBIA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 31, 2011
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	EVANS J.A. DAWSON J.A.
DATED:	APRIL 8, 2011

APPEARANCES:

Douglas Hamilton Christopher A. Wayland	FOR THE APPELLANT
Owen Myers	FOR THE RESPONDENT (Sandy Pond Alliance)
James L. Thistle, Q.C.	FOR THE INTERVENERS

SOLICITORS OF RECORD:

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OWEN MYERS, Barrister & Solicitor St. John's, Nfld.	FOR THE RESPONDENT (Sandy Pond Alliance)
McINNES COOPER St. John's, Nfld.	FOR THE INTERVENERS

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