

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

FRIENDS OF DAVIE BAY

PETITIONER

AND:

HER MAJESTY IN RIGHT OF THE PROVINCE OF BRITISH  
COLUMBIA, AND LEHIGH HANSON MATERIALS LTD.

RESPONDENTS

**Petitioner's Reply Submissions**

**I. Standard of Review**

1. *Nolan v. Kerry (Canada) Inc.* (“*Nolan*”) is distinguishable on its facts and cannot be relied on to establish that the appropriate standard of review in the case at hand is reasonableness.
2. In *Nolan*, a decision of the Financial Services Tribunal (the “Tribunal”) was being reviewed. The Supreme Court of Canada found that the issue before the Tribunal was largely a question of law with respect to the interpretation of language contained in pension plans and related texts.

*Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 at paras 29-30.

3. The Tribunal, as an administrative body with expertise in interpreting such texts, was given deference and the standard of review applied was reasonableness. Given that the nature of the question involved applying the expertise of the Tribunal, such deference is appropriate.
4. *Nolan*, however, is distinct from the case at hand as the question before the court in this matter is the correct interpretation of the term “production capacity”. This is a pure question of law that does not involve the expertise of the Environmental Assessment Office (the “EAO”).
5. The Petitioner says that the case at hand is analogous to *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (“*Monsanto*”), where the court applied

the standard of correctness to a ruling by the Tribunal in which they interpreted the *Pensions Benefit Act*.

*Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54.

6. In *Monsanto*, when determining the standard of review to be correctness, the court described the nature of the problem as:

“the issue or appeal is a pure question of law, related to the interpretation of a section that has no specialized technical meaning. Statutory interpretation is an exercise in which courts are well equipped to engage. The question concerns the establishment of statutory rights by construing the legislature’s intention from the text of s. 70(6), the legislative purpose, and the statutory context it is situated. Generally speaking, such legal questions will attract more searching standard of review as being clearly within the expertise of the judiciary unless the legal question is “at the core” of the tribunal’s expertise.

*Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54 at para 8.

7. The question before the court in this matter is analogous to that in *Monsanto*.
8. The expertise of the EAO, has been described by the court as “in a field which engages many disciplines, in a position which calls for the assessment and mitigation of the social impacts of works and activities.”

*Do Rav Right Coalition v. Hagen*, 2005 BCSC 991 at para 93; affirmed 2006 BCCA 571.

9. The issue before the court does not engage this expertise. Rather, as recognized in *Monsanto*, it falls squarely in the expertise of the court. Relying on the above and the Petitioner’s Submissions of January 18, 2011 the Petitioner says that standard of review is correctness.

## **II. Interpretation of Production Capacity**

### Proponent’s Intention Is Not Relevant

10. The Petitioners agree with the Respondent, Lehigh Materials Limited (“Lehigh”) submissions that the assessment of a project’s production capacity requires a consideration of the project’s operation plan, equipment, infrastructure and schedule.

Lehigh’s Submissions at para 7, and 62.

11. Lehigh is mistaken, however, in its statement that the EAO adopted a definition of “production capacity” that took into consideration the project’s actual capacity to extract and produce aggregate during its operations.

Lehigh’s Submissions at para 67.

12. The evidence is clear that the EAO relied on Lehigh’s stated estimated extraction rate in its Notice of Work and nothing more to determine whether the “production capacity” exceeded 250,000 tonnes per year.

Affidavit #1 of K. J. Dove, Petition Record Tab 4,  
Exhibit B, tab 26 at p 138.

13. While Lehigh agrees that many of the factors suggested by the Petitioner should be considered when determining “production capacity”, their argument, at its essence means that it is the proponent itself who makes the determination of a project’s capacity.
14. The Petitioner strongly disagrees with interpreting of the *Environmental Assessment Act* (the “*Act*”) as a voluntary process that proponents can opt out of by interpreting their “production capacity” as being less than the requisite trigger amount.
15. Section 5 of the *Act* makes it evident that Lehigh’s interpretation is not consistent with the intention of the *Act*. Section 5 provides the Lieutenant Governor in Council with the ability to make regulations prescribing what constitutes a reviewable project for the purposes of the *Act*. In describing how projects can be categorized the *Act* sets out objective methods of identifying projects as reviewable. There is no indication that the subjective intentions of a project’s proponent are to be considered, let alone be determinative, in whether a project is reviewable.

*Environmental Assessment Act*, S.B.C. c. 43, s. 5,  
Petitioner’s Book of Authorities Tab 10.

#### Relevance of the *Mines Act*

16. Similarly, the legislative scheme in the *Mines Act* does not inform the interpretation of “production capacity” in the *Regulation*. The purpose and intent of the *Mines Act* is distinct from that of the *Act*.
17. As recognized by the Supreme Court of Canada the purpose of environmental assessments is to provide for early identification and evaluation of all environmental consequences of a proposed undertaking and to arrive at a decision that reconciles development desires with environmental protection.

*Friends of the Oldman River Society v. Canada*  
(*Minister of Transport*), [1992] 1 S.C.R. 3 (QL),  
Petitioner’s Book of Authorities Tab 5, at para 95.

18. The Petitioner says the purpose of the *Mines Act* is to regulate the mining industry in British Columbia. As such, it would be appropriate that they are concerned with the intention of the mining proponents.

Relevance of Section 6 of the Act

19. The Petitioner strongly disagrees with Lehigh's statement that the Minister's decision under s. 6 of the Act has any relevance in whether Table 6 of Part 3 of the *Reviewable Project Regulation* (the "*Regulation*") has been interpreted correctly.
20. The *Regulation* is a mandatory provision. If the trigger capacity of a project is met or exceeded then the project is reviewable. The Minister's opinion with respect to the project is not relevant and has no affect on the operation of the *Regulation*.

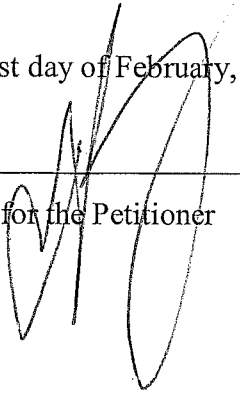
**III. Canadian Environmental Assessment**

21. The Respondents have raised the federal environmental assessment that was completed by Transport Canada in their submissions and relied on this assessment as a reason why the Petitioner should not be successful in this petition.
22. The federal environmental process is irrelevant to the legislative interpretation question at issue in this judicial review. If the Petitioner's argument is correct a provincial assessment is mandatory regardless of what federal process has taken place.
23. However, in response to the issues raised by the Respondents, the Petitioner also says:
  - (a) A provincial assessment would not be duplicative of the federal assessment. The federal environmental process focuses on federal authorizations while the provincial process would cover issues within the provincial mandate.
  - (b) The Petitioner raised the same issue with the federal authorities as is before the court in this action, the interpretation of the term "capacity". Had Transport Canada interpreted capacity in the manner suggested by the Petitioner, the project would have been tracked in the federal assessment process as a comprehensive study, rather than as a screening report. A comprehensive study is a significantly more rigorous assessment process. The Petitioner had to choose a venue for challenging the interpretation of "capacity" and elected to proceed in the British Columbia Supreme Court.

Affidavit #1 of K. J. Dove, Petition Record Tab 4,  
Exhibit B, tab 17 at p 108.

24. As such, the submission that the federal environmental assessment is adequate should not be prejudicial to the Petitioner's case before this court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of February, 2011.



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Counsel for the Petitioner