Federal Court Cour fédérale

Date: 20250218

Docket: T-1765-23

Citation: 2025 FC 311

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 18, 2025

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

RIO TINTO IRON AND TITANIUM INC., JEAN-FRANÇOIS GAUTHIER, ANNIE BOURQUE, FRÉDÉRIC PINARD, JONATHAN FAUCHER and MAXIME DUFOUR

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

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I. Background

[1] On July 24, 2023, an inspector and officer [Officer] of the Department of the Environment and Climate Change [Department] issued a direction [Direction] under subsection 38(7.1) of the *Fisheries Act*, RSC 1985, c F-14 [Act], regarding a metallurgical complex operated by Rio Tinto Iron and Titanium Inc. [RTIT] and some of its officers [collectively, the "Applicants"].

[2] Under the Act, no person may deposit a deleterious substance of any type in water frequented by fish, except for classes of deleterious substances that may be deposited in accordance with the *Metal and Diamond Mining Effluent Regulations*, SOR/2002-222 [MDMER].

[3] Among other things, the Direction orders the Applicants to provide by October 31, 2023, a detailed action plan with specific timelines to [TRANSLATION] "permanently end" all deposits of deleterious substances that would be in contravention of the Act and the MDMER from the metallurgical complex into the St. Lawrence River, by December 31, 2024.

[4] The Applicants are asking this Court to intervene on the grounds that the Direction is unreasonable and fails to adhere to the framework of the Act. They submit, *inter alia*, that the Direction should not have been issued since there was no "emergency" in the circumstances. Moreover, they claim that the "necessary measures" directed to permanently end the deposit of deleterious substances in the St. Lawrence River impose an obligation of result that contravenes the Act by depriving them, from the outset, of the due diligence defence provided for in the Act.

[5] For the reasons that follow, the application for judicial review is dismissed. The existing context, including collaboration between the Department and the Applicants in a highly regulated activity and numerous compliance failures documented in recent years, led the Officer to conclude that, in the circumstances, an "emergency" as understood under the Act existed and that therefore she had the power to issue the Direction. Moreover, the Direction does not amount to a change in the Department's longstanding practice, nor does it deprive the Applicants of any possible due diligence defence.

II. Facts

[6] RTIT has operated a metallurgical complex on the edge of the St. Lawrence River for over fifty years. The complex is an industrial site where coal (anthracite) and ore (ilmenite) are treated and processed to produce titanium dioxide, iron products and critical minerals, among other things.

[7] RTIT's operations use large quantities of water from the St. Lawrence River for production and cooling purposes. The water becomes contaminated as it is used and must be treated before it is discharged back into the river.

[8] The size of the metallurgical complex makes it necessary for RTIT to manage the quality of the runoff as well, which is mainly rainwater falling on and around the complex. Deleterious substances may accumulate in the runoff as it flows naturally to the St. Lawrence River.

[9] All the water used for production and some of the runoff are routed to a water treatment plant [WTP] at the metallurgical complex. Once treated, the water is discharged into the St. Lawrence River.

[10] Another portion of the runoff is routed to a "Stormceptor" type stormwater treatment systems throughout the metallurgical complex.

[11] Lastly, part of the metallurgical complex is served by a pond named "TK-0100," which collects water that has been used for production purposes and runoff from the western part of the complex. This pond forms a junction with part of the wastewater system, and the water is pumped from there to the WTP, where it is treated before flowing into the St. Lawrence River.

[12] Under subsection 36(3) of the Act, no person may deposit or permit the deposit of a deleterious substance of any type in water frequented by fish. However, deleterious substances may be deposited under the terms set out in the MDMER.

[13] For the sake of terminological clarity, it is worth noting that the waters carrying these deleterious substances are defined by the term "effluent" under the MDMER. Pursuant to subsection 1(1) of the MDMER, an "effluent" is understood as including "any seepage or surface

runoff containing any deleterious substance that flows over, through or out of the site of a mine." The same subsection defines a "final discharge point," in respect of an effluent, as "an identifiable discharge point of a mine beyond which the operator of the mine no longer exercises control over the quality of the effluent." A "deposit" under the MDMER is defined pursuant to subsection 34(1) of the Act as meaning "any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing." Together, these provisions require that any water containing a deleterious substance flowing onto the site (the effluent) that is then discharged (the deposit) in waters frequented by fish, must come from a "final discharge point" in order to comply with the Act and the MDMER.

[14] Section 9 of the MDMER requires the owner or operator of a mine to identify each "final discharge point" in respect of an effluent (those waters containing any deleterious substance that flows through the site of a mine) and submit a set of information to the Minister to this effect, notably as to their maintenance and design. Pursuant to section 10 of the MDMER, if the owner or operator of a mine fails to identify a "final discharge point" under section 9, an inspector may identify it, and that "final discharge point" will also be subject to the MDMER. All effluents must be associated with an identified "final discharge point" (whether determined by an inspector or an agent or operator) if they are flowing in waters frequented by fish, and must conform with the provisions contained in the MDMER, for the deposits to be permissible.

[15] Pursuant to the MDMER, once the "effluents" and "final discharge points" have been identified, the deposits in waters frequented by fish originating from these "final discharge points" must comply with certain maximum concentrations and not be acutely lethal to fish. Each "final

discharge point" must also be inspected regularly in accordance with the MDMER. However, a deposit that does not originate from a "final discharge point" under the MDMER cannot be exempted from the prohibition under subsection 36(3) of the Act. In this case, only the source of the water treated by the WTP is a "final discharge point" identified by RTIT as an effluent under the MDMER.

[16] In her inspections in 2022 and 2023, the Officer noted that deleterious substances from the metallurgical complex were being deposited in a manner contrary to the MDMER and that some sources of deposits of deleterious substances were not identified as "final discharge points" under the MDMER.

[17] RTIT states that, despite its best efforts, its water treatment systems (in particular the WTP) sometimes reach their maximum retention capacity as a result of hydraulic overloads in the system, power shortages, operational problems or torrential rain. When such events occur, RTIT must channel excess, untreated water into the St. Lawrence River to avoid serious technical consequences. These discharges of untreated wastewater into the St. Lawrence River are referred to as "overflows." To the extent that an overflow, from a "final discharge point" under the MDMER, contains concentrations of deleterious substances above the maximum authorized concentrations, affects the pH of the water in a manner contrary to the MDMER or is acutely lethal to prescribed species, that overflow constitutes a violation of the Act and the MDMER.

[18] RTIT has admitted to having regularly contravened the Act and the MDMER since it became subject to the MDMER in 2008. Warning letters have been issued, as well as two directions

(in 2010 and 2013). That said, RTIT has always cooperated and worked to continually improve the metallurgical complex. Consequently, except for the 2010 and 2013 directions, the Department has always preferred to provide support for compliance rather than impose coercive measures.

[19] For example, on August 25, 2008, September 20, 2011, and July 18, 2013, officers sent RTIT warning letters regarding multiple contraventions of subsection 36(3) of the Act because deleterious substances, including suspended solids, above the limits authorized under the MDMER, had been deposited as a result of overflows or other events (Warning Letter dated August 25, 2008, Certified Tribunal Record [CTR] Tab 13, Applicants' Record [AR] Vol 1 at 266; Warning Letter dated September 20, 2011, CTR Tab 15, AR Vol 1 at 281; Warning Letter dated July 18, 2013, CTR Tab 16, AR Vol 1 at 302).

[20] On February 5, 2010, an officer issued a direction because she had reasonable grounds to believe that there had been contraventions between July 2009 and January 2010, on the basis of the following observations:

(a) A deleterious substance had been deposited, and the pH of the WTP effluent was either less than 6.0 or greater than 9.5, contrary to the MDMER.

(b) Acute lethality tests on rainbow trout showed that the effluent had been harmful to fish in December 2009.

(c) Not all necessary measures required to prevent the deposit of deleterious substances had been taken.

[21] The officer concluded that [TRANSLATION] "all necessary measures should be taken immediately . . . to prevent such an event from occurring or to mitigate or remedy any adverse effects . . ." The officer directed RTIT to provide [TRANSLATION] "a detailed action plan and a

specific timeline for all measures that ha[d] been or w[ould] be implemented to prevent irregular deposits of deleterious substances" and a written report [TRANSLATION] "showing that permanent measures h[ad] been completed . . . so that, if a spill [were to] occur, the substance w[ould] be contained in the outdoor retention pond" [emphasis added] (Direction dated February 5, 2010, CTR Tab 14, AR Vol 1 at 278).

[22] On September 16, 2013, an officer issued a direction to RTIT under subsection 38(7.1) of the Act. The officer noted that deleterious substances, in particular suspended solids, above the limits authorized under the MDMER had been deposited in the St. Lawrence River. The deposits originated from the "final discharge point" of the WTP and from storm sewers and other effluent sources at the metallurgical complex. The officer noted that [TRANSLATION] "since it became subject to the [MDMER], [RTIT] ha[d] had a recurring issue of exceeding the regulatory limits for total suspended solids" (Direction dated September 16, 2013, CTR Tab 17, AR Vol 1 at 316).

[23] The officer reported that, between January 2012 and March 2013, she had reasonable grounds to believe that contraventions of section 36(3) of the Act had occurred and that [TRANSLATION] "not all necessary measures . . . ha[d] been taken as required by subsection 38(6) of the *Fisheries Act*" (Direction of September 16, 2013, CTR Tab 17, AR Vol 1 at 316). She concluded that it was necessary to [TRANSLATION] "immediately take all necessary measures to prevent the occurrence . . . or to counteract, mitigate or remedy any adverse effects," [TRANSLATION] "[t]ake all necessary measures to comply with the [MDMER]," provide an [TRANSLATION] "action plan detailing each key activity and a specific timeline indicating all the measures that w[ould] be implemented to prevent any deposit that does not comply with the

[MDMER]" and provide a final report [TRANSLATION] "demonstrating that measures ha[d] been taken to prevent any deposit contrary to the [MDMER] and the [Act]" [emphasis added] (Direction dated September 16, 2013, CTR Tab 17, AR Vol 1 at 318–19).

[24] It is worth noting that when warnings or directions are issued, it is specified that the grounds on which they are issued will be part of the entity's record and will be taken into account in the event of repeat offences or other contraventions, and in internal decision making, particularly with regard to the frequency of inspections. In addition, the Department may take further action if the entity fails to take [TRANSLATION] "all necessary measures to comply with the Act" (see, for example, Warning Letter dated August 25, 2008, CTR Tab 13, AR Vol 1 at 274–75; Direction dated February 5, 2010, CTR Tab 14, AR Vol 1 at 279–80; Warning Letter dated September 20, 2011, CTR Tab 15, AR Vol 1 at 297; Warning Letter dated July 18, 2013, CTR Tab 16, AR Vol 1 at 313; Direction dated September 16, 2013, CTR Tab 17, AR Vol 1 at 321).

[25] A number of other failures to comply with the MDMER and the Act were noted between 2016 and 2023 (Internal Excel Files Summary of Exceedances Unauthorized Deposit RTIT 2016 to Present, CTR Tab 107, AR Vol 4 at 83).

[26] In February 2022, the Officer who issued the Direction that is the subject of this application for judicial review became responsible for monitoring compliance with the Act and Regulations at the RTIT metallurgical complex.

[27] Between May 2022 and May 2023, the Officer inspected the metallurgical complex four times, on May 9 and 10, September 27, and November 16, 2022, and on May 8, 2023.

[28] Between April 2022 and June 2023, the Officer sent four warning letters, on April 25, May 16 and July 14, 2022, and June 14, 2023. The letters set out reasonable grounds for believing that deleterious substances, in some cases acutely lethal to rainbow trout and *Daphnia magna*, had been deposited in the St. Lawrence River in violation of the Act and the MDMER, notably as a result of overflows (Warning Letter dated April 25, 2022, CTR Tab 19.1, AR Vol 1 at 330; Warning Letter dated May 16, 2022, CTR Tab 31.1, AR Vol 1 at 353; Warning Letter dated July 14, 2022, CTR Tab 33.1, AR Vol 1 at 373; Warning Letter dated June 14, 2023, CTR Tab 97.1, AR Vol 3 at 76).

[29] For example, on September 27, 2022, the Officer conducted an inspection of the effluent from the metallurgical complex to verify the identified "final discharge points" and the discharge points not identified under the MDMER, including the Stormceptors, and to collect effluent samples to assess whether any deleterious substances had been deposited in the St. Lawrence River. The inspection found that the effluents discharged into the river from the Stormceptors contained a high concentration of deleterious substances (note that the Stormceptors have not been identified as "final discharge points," such that no deleterious substances were allowed to be deposited from them) (CTR Tab 80, AR Vol 2 at 313).

[30] Between the first warning letter in April 2022 and the Direction, RTIT and its officers attended four follow-up meetings with the Officer, on November 16, 2022, and January 27, April 13 and June 21, 2023, and gave their full cooperation in all the inspections.

[31] At the meeting on January 27, 2023, the Officer told the Applicants that she intended to issue a direction because of the compliance failures noted in her inspections and in the warnings. She explained that a direction would [TRANSLATION] "enable her to monitor the implementation of the measures set out in the action plan . . . through inspections and achieve compliance as quickly as possible by means of the enforcement measures available" (Teams Meeting Report 2023-01-27, CTR Tab 84, AR Vol 2 at 352). At the meeting, RTIT admitted that [TRANSLATION] "the number of compliance failures in the [previous] year was unacceptable" (Teams Meeting Report 2023-01-27, CTR Tab 84, AR Vol 2 at 353).

[32] After further discussion between the Officer and RTIT on March 24, April 13 and June 12, 2023, the Officer sent the Applicants a notice of intention to issue a direction together with a draft version of the Direction.

[33] RTIT provided its comments on the draft Direction at an oral meeting through Microsoft Teams on June 21, 2023. At the meeting, RTIT said that the deadlines in the draft Direction were too tight and that RTIT preferred not to have strict deadlines but rather to present quarterly progress reports. The Officer asked RTIT to propose a timeline for addressing the compliance failures, which RTIT was unable to do, although it did say [TRANSLATION] "that it [was] a matter of months, not years." The Officer stated that the issue [TRANSLATION] "[had to] be resolved as soon as

feasible because, in the meantime, [RTIT] continue[d] to be non-compliant," and that, with regard to the timeline, [TRANSLATION] "a direction c[ould] always be amended" (Gavia Report, CTR Tab 87, AR Vol 2 at 379).

[34] RTIT also filed written submissions on July 7, 2023, stating that the [TRANSLATION] "necessary effluent […] compliance measures ha[d] been taken." The Applicants further stated that, since the items subject to the proposed direction were already being assessed and studied as part of their ongoing efforts to improve their environmental management, [TRANSLATION] "a direction [was] unnecessary, let alone an emergency" (Written Representations of RTIT dated July 7, 2023, CTR Tab 100.1, AR Vol 3 at 117). In addition, the Applicants requested that the deadlines for achieving compliance with the Act be dropped and that the allegations made to justify issuing the Direction be withdrawn.

A. *The July 24, 2023, Direction*

[35] On July 24, 2023, the Officer issued the Direction under subsection 38(7.1) of the Act. The Officer stated that she had reasonable grounds to believe that violations of subsections 36(3) and 38(6) of the Act had occurred, leading her to conclude that an emergency existed and that corrective measures were necessary. In particular, the Officer noted that there were overflows and deposits of deleterious substances into the St. Lawrence River from the WTP in 2022 and 2023, which contravened the MDMER. In addition, water had been discharged from other effluents, including the Stormceptors, which are not identified under the MDMER, and RTIT's loading and unloading dock.

[36] Based on this finding, the Officer concluded that she could issue a direction for certain corrective measures to permanently end the deposit of deleterious substances in the St. Lawrence River, including the following:

> [TRANSLATION]
>
> i. Provide, by October 31, 2023, a detailed action plan and a specific timeline to permanently end the discharge of effluent from Stormceptors or any storm pipe or to ensure their ongoing monitoring in accordance with the MDMER as soon as feasible but no later than December 31, 2023.
>
> ii. Provide, by October 31, 2023, a detailed action plan and a specific timeline to end the deposit of ilmenite, coal or any other substance in the St. Lawrence River or in any place under any conditions where the substance may enter the river during loading or unloading at the dock, no later than December 31, 2024. Make deposits of suspended solids or other deleterious substances from the dock into the river at a "final discharge point" that meets the requirements of the MDMER.
>
> iii. Provide, by October 31, 2023, a detailed action plan and a specific timeline to permanently end the discharge of runoff containing deleterious substances into the St. Lawrence River other than from an identified "final discharge point" and in accordance with the MDMER.
>
> iv. Provide the Officer, by October 31, 2023, with an analysis of overflows in the previous four years and a detailed action plan with a specific timeline to permanently end overflows of untreated effluent into the river no later than December 31, 2024.
>
> v. Provide the Officer with written progress reports on the implementation of the measures, signed by the managing director of RTIT.
>
> (Direction dated July 24, 2023, CTR Tab 2, AR Vol 1 at 26.)

[37] In response to the Applicants' oral and written submissions, the Officer amended the draft Direction, granting the Applicants additional time. The deadline for providing action plans was extended to October 31, 2023 (from August 15, 2023), and the deadline to permanently end the deposit of deleterious substances was extended by one year, from December 31, 2023, to December 31, 2024.

III. Issue and standard of review

[38] The only issue is whether the Officer's Direction is reasonable. The Applicants propose that the following sub-issues be analyzed in determining the reasonableness of the Direction:

i. Was there an "emergency" allowing the Officer to issue the Direction, and did the Officer give sufficient reasons for deciding to do so?

ii. Are the measures ordered in the Direction "reasonable measures" under subsection 38(7.1) of the Act?

iii. Did the Officer depart from the longstanding practices of the Department?

[39] The parties agree that reasonableness is the applicable standard of review in this case (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 7 [*Mason*]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 115 [*Vavilov*]).

[40] *Mason*, relying on *Vavilov*, instructs that, under this standard, the reviewing court must take a "reasons first" approach that evaluates the administrative decision maker's justification for its decision (*Mason* at paras 8, 58–60, 63; *Vavilov* at paras 14, 81, 84–86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 41 [*Canada Post Corp*]).

[41] In *Mason*, the Supreme Court of Canada [SCC] explains how a reviewing court should conduct reasonableness review. A decision may be unreasonable if the reviewing court identifies a fundamental flaw, either a failure of rationality internal to the reasoning process or a failure of justification given the legal and factual constraints bearing on the decision (*Mason* at para 64; *Vavilov* at para 100).

[42] The SCC identified a series of legal and factual constraints that decision makers must examine and explain in light of the applicable context in order for their decisions to be appropriately *justified* in accordance with *Vavilov*. The burden of justification varies, but the decision maker must demonstrate that it was "alive" to the essential elements and "sensitive to the matter before it," and "meaningfully grapple with key issues or central arguments raised by the parties" (*Mason* at paras 69, 74; *Vavilov* at paras 79, 120, 128). Decision makers must consider the parties' central arguments and evidence and give reasons for how they bear on their decision (*Mason* at paras 73–74; *Vavilov* at paras 126–28).

[43] In particular, the decision maker must ensure that it considers the principles of statutory interpretation, the governing statutory scheme, rules of common law or international law, the evidence and central arguments of the parties, the past practices and decisions of the administrative tribunal and the potential and possibly harsh consequences of the decision on the affected party or a broad category of individuals, as well as overarching issues. Failure to properly consider one of these elements or explain why it was not considered could be a serious shortcoming that leads a reviewing court to "lose confidence" in the decision under review (*Mason* at paras 64, 66–76).

[44] When the decision maker communicates the rationale for its decision, it is not enough for the outcome of the decision to be *justifiable*; it must also be *justified* by way of reasons that demonstrate transparency and intelligibility (*Mason* at paras 59–60; *Vavilov* at paras 81, 84, 86). In examining the rationale for the decision and the outcome to which it led, the Court must determine whether the decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker (*Mason* at paras 8,

58–61; *Vavilov* at paras 12, 15, 24, 85–86). A decision is not reasonable when there is a failure of rationality in the reasoning process or the reviewing court is unable to trace the decision maker's reasoning without encountering "any fatal flaws in its overarching logic" (*Mason* at para 65, citing *Vavilov* at paras 102–103).

[45] However, the reviewing court should not create its own yardstick and then use it to measure what the administrator did (*Mason* at para 62; *Vavilov* at para 83). The Court's assessment is sensitive and respectful, but not a "rubber-stamping" process: judicial review is a robust exercise (*Mason* at paras 8, 63; *Vavilov* at para 12).

[46] Consequently, when performing a reasonableness review, the reviewing court must assess the reasons for the decision "holistically and contextually" in light of the history of the proceedings, the evidence submitted and the parties' central arguments (*Mason* at para 61; *Vavilov* at paras 91, 94, 97). The Court's role is not to reweigh the evidence presented to the Department, question the exercise of the Department's discretion or offer its own interpretation of the legislation. These are the decision maker's roles. As long as the decision maker's interpretation of the legislation is reasonable and the reasons for its decision are justifiable, precise and intelligible, the decision maker is owed deference by the Court (*Vavilov* at paras 75, 83, 85–86, 115–24).

[47] Regardless of the approach used by the decision maker, the reviewing court's task is to ensure that the interpretation of the legislative provision complies with the "modern principle" of statutory interpretation, which focuses on the overall context of the legislation, assessing the words chosen by the legislature in their grammatical and ordinary sense harmoniously with the scheme

of the act, its object and the legislature's intent (*Mason* at paras 67, 69–70, 83; *Vavilov* at paras 110, 115–24; *Canada Post Corp* at para 42; *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at paras 20, 36 [*Alexion*]; *Le-Vel Brands, LLC v Canada (Attorney General)*, 2023 FCA 66 at para 16 [*Le-Vel*]; *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 at para 26; Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87). Similarly, an interpretation involving a "result-oriented analysis" that is expedient or tendentious is unreasonable (*Alexion* at para 37, citing *Vavilov* at paras 120–21; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para 42). The text of the statute "remains the anchor of the interpretive exercise," as it reveals "among other things, the means chosen by the legislature to achieve its purposes" (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at para 24, citing Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59 Alta L Rev 919 at 927, 930–31).

[48] The standard of review therefore takes into account the context of the decision rendered, and the decision maker's interpretation may be based on its specialized institutional expertise (*Vavilov* at paras 92–93, 119; *Mason* at para 70). Moreover, the use of "broad, open-ended or highly qualitative language" in the enabling statute may afford the decision maker greater flexibility (*Mason* at para 67).

[49] As well, the reasons on key points do not always need to be explicit. They can be implicit or implied. Therefore, the decision maker does not have an absolute obligation to respond to every

argument made by the parties (*Vavilov* at para 128). As recognized by the Federal Court of Appeal in *Zeifmans LLP v Canada*, 2022 FCA 160, at paragraph 10 [*Zeifmans*], "[l]ooking at the entire record, the reviewing court must be sure, from explicit words in reasons or from implicit or implied things in the record or both, that the administrator was alive to the key issues, including issues of legislative interpretation, and reached a decision on them" (see also *Vavilov* at paras 94, 128).

[50] Moreover, as the Federal Court of Appeal stated in *Rameau v Canada (Attorney General)*, 2024 FCA 40 [*Rameau*]:

> [TRANSLATION]
>
> [101] The Supreme Court cautions that the failure of an administrator's reasons to mention something explicitly does not necessarily make the reasons insufficient or the decision, unreasonable. A reviewing court must read the reasons holistically and contextually, in light of the record and with due sensitivity to the administrative regime in which they were given: *Alexion* at para. 15, citing *Vavilov* at paras. 97, 103. Thus, silence in the express reasons on a particular point is not necessarily a "fundamental flaw" that warrants intervention by the reviewing court:
>
> The administrator's reasons, read alone or in light of the record in a holistic and sensitive way, might legitimately lead the reviewing court to find that the administrator must have made an implicit finding. The evidentiary record, the submissions made, the understandings of the administrator as seen from previous decisions cited or that it must have been aware of, the nature of the issue before the administrator and other matters known to the administrator may also supply the basis for a conclusion that the administrator made implicit findings.
>
> [*Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at para 16 [*Alexion*], Heckman JA, citations omitted]
>
> . . .
>
> [158] As our colleague states at paragraph 101 of his reasons, a reviewing court must read an administrative decision maker's reasons holistically and contextually, in light of the record and

> with due sensitivity to the administrative regime in which they are given: *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157 at para. 15 [*Alexion*], citing *Vavilov* at paras. 97, 103. It must also ensure that the administrative decision maker has provided enough to ensure that concerns about critical points have been heard: *Alexion*, at paras. 13, 19–20. In this case, the alleged breach of the memorandum [of understanding] was one of the central concerns in the complaint. We are of the opinion that a review of the record shows that this concern was heard by the Commission. . . .
>
> [de Montigny CJ and Goyette JA, concurring]

[51] However, although the reviewing court may examine "the entire record" in the absence of specific reasons on a significant issue, it can only "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn" (*Vavilov* at para 97). The reviewing court should not deduce from the record or read into the decision maker's reasons an "implicit" justification in the abstract to justify an outcome the decision maker itself did not reach (*Mason* at paras 96–97, 101).

[52] Here, it is for the Officer, and not the Federal Court, to interpret the scope of the discretion conferred by a governing statute, in this case, subsection 38(7.1) of the Act (*Safe Food Matters Inc v Canada (Attorney General)*, 2022 FCA 19 at para 37 [*Safe Food*]). There was no need for the Officer to mimic how courts go about it—the standard of perfection does not apply. There was also no need for the Officer to formulate reasons on all the arguments, statutory provisions or details raised by the parties (*Mason* at paras 61, 69–70; *Vavilov* at paras 119, 120).

[53] Ultimately, when read in the full context of the record, the reasons must be sufficient for the Applicants to understand why the Officer did not accept their submissions and explain the

factual and legal basis justifying why the Officer made the decision under review (*Vavilov* at paras 79, 81, 128; *Mason* at para 74).

A. *Statutory scheme*

[54] The purposes of the Act and the MDMER include providing a framework for the management of fisheries and the conservation and protection of fish and fish habitat, including by preventing pollution (s 2.1 of the Act).

[55] Subsection 36(3) of the Act prohibits the deposit of a deleterious substance of any type in water frequented by fish.

[56] If there occurs a deposit of a deleterious substance, under subsection 38(6) of the Act, any person described in subsection 38(5) shall, as soon as feasible, take all "reasonable measures" ["mesures nécessaires" in the French version of the provision] to prevent the occurrence or to counteract, mitigate or remedy any adverse effects that result from or might reasonably be expected to result from the deposit of the deleterious substance.

[57] Paragraph 36(4)(b) and subsection 36(5) of the Act give the Governor in Council the power to make regulations allowing exceptions to the general prohibition under subsection 36(3) of the Act against depositing a deleterious substance of any type in water frequented by fish. The MDMER therefore authorize the deposit of some classes of deleterious substances under certain specific terms and conditions set out in the MDMER.

[58] Specifically, any deposit of an effluent must come from an identified "final discharge point" under the MDMER, and deposits must respect the concentration limits for arsenic, copper, cyanide, lead, nickel, zinc, suspended solids, radium 226 and un-ionized ammonia. In addition, the pH of any effluents must fall between a minimum and a maximum level and not be acutely lethal to rainbow trout and *Daphnia magna*.

[59] The authorization to deposit an effluent containing a deleterious substance under the terms set out in the MDMER is conditional on the owner or operator complying with sections 6 to 27 of the MDMER.

[60] Consequently, when an owner or operator deposits or permits the deposit of a deleterious substance of any type, they are violating subsection 36(3) of the Act, unless the deposit complies with the MDMER (and, therefore, the deposit comes from a "final discharge point" identified under the MDMER and respects the other associated conditions) (*ArcelorMittal Canada inc c R*, 2023 QCCA 1564 at para 79 [*ArcelorMittal (CA)*], leave to appeal refused, see *ArcelorMittal Canada inc, et al v His Majesty the King*, 2024 CanLII 88319 (SCC) [*ArcelorMittal (SCC)*]).

[61] The inspectors and fishery officers appointed by the Minister of the Environment are tasked with ensuring compliance with the provisions of the Act and the MDMER using various measures. The Act's enforcement measures are directed towards ensuring compliance with the Act within the shortest possible time and that violations are not repeated (*Compliance and Enforcement Policy*, CTR Tab 106, AR Vol 4 at 42, 56–58 [*Policy*]). The Act is enforced by carrying out

inspections to monitor or verify compliance, investigating alleged violations, sending warnings, issuing directions by inspectors and/or officers and instituting legal proceedings.

[62] As one of the means available to inspectors and officers to enforce the Act and the MDMER, directions under subsection 38(7.1) of the Act are issued to ensure that persons respect their obligations under subsection 38(6) if they have not done so of their own accord. Under subsection 38(7.1) of the Act, fishery officers have the discretion to take or direct a person to take any measures referred to in subsection 38(6), that is, all "reasonable measures" ["mesures nécessaires" in the French version of the provision] to prevent an occurrence described in subsection 38(5) (in this case, the unauthorized deposit of a deleterious substance) or to counteract, mitigate or remedy any adverse effects that result from the occurrence or might reasonably be expected to result from it. However, officers may only exercise this discretion and impose measures if they are satisfied on reasonable grounds that "immediate action is necessary" ["l'urgence de ces mesures" in the French version of the provision] to take those corrective measures.

B. *Officer's conclusion that an "emergency" exists requiring that corrective measures be taken is reasonable*

(1) Applicants' position

[63] The Applicants submit that the Officer's interpretation of her discretion to issue a direction is unreasonable since it is contingent on a situation being an "emergency" [the term *"urgence"* is used in the French version of the provision, while the expression "immediate action is necessary"

is used in the English version of the provision], an "emergency" that is imminent. They claim that no such situation arose here. Subsection 38(7.1) provides as follows:

38 (7.1) Corrective measures **(7.1)** If an inspector or fishery officer, whether or not they have been notified under subsection (4), (4.1) or (5) or provided with a report under subsection (7), is satisfied on reasonable grounds that immediate action is necessary in order to take any measures referred to in subsection (6), the inspector or officer may, subject to subsection (7.2), take any of those measures at the expense of any person described in paragraph (4)(a) or (b), (4.1)(a) or (b) or (5)(a) or (b) or direct that person to take the measures at their expense.	**38(7.1) Mesures correctives** **(7.1)** Même en l'absence de l'avis exigé par les paragraphes (4), (4.1) ou (5) ou du rapport mentionné au paragraphe (7), l'inspecteur ou l'agent des pêches peut, sous réserve du paragraphe (7.2), prendre ou faire prendre, aux frais de la personne visée aux alinéas (4)a) ou b), (4.1)a) ou b) ou (5)a) ou b), les mesures mentionnées au paragraphe (6), ou ordonner à cette personne de le faire à ses frais lorsqu'il est convaincu, pour des motifs raisonnables, de l'urgence de ces mesures.

[64] The Applicants argue that given the nuance between the English and French versions of subsection 38(7.1) of the Act, in interpreting the provision, the meaning that is common to both versions should be preferred. According to the Applicants, the concept of *"urgence"* in French must therefore be understood here as the need to take immediate action ["immediate action is necessary"] as provided under the English version of the provision.

[65] Relying on *St Brieux (Town) v Canada (Fisheries and Oceans)*, 2010 FC 427 at paragraph 55 [*St Brieux*], the Applicants submit that inspectors or fishery officers have the discretion to decide whether they will exercise this power, but it "is not an absolute discretion for it is very clearly limited to the specific situations described in subs[ection] 38(4) of the Act and when immediate action is necessary." The Applicants allege that this interpretation is consistent with the manner in which the courts have interpreted similar emergency powers, including for interlocutory injunctions.

[66] According to the Applicants, this interpretation of the power to issue a direction under subsection 38(6) when an emergency is imminent is the interpretation preferred by the Department. In its *Policy*, the Department writes as follows:

> Where there is a deposit of a deleterious substance out of the normal course of events to waters frequented by fish, or where there is serious and imminent danger of such an incident and immediate action is necessary, enforcement personnel who are appointed as Fishery Inspectors under the Fisheries Act may issue directions regarding remedial or preventative action to be taken by the alleged offender[.]
>
> (*Compliance and Enforcement Policy*, CTR Tab 106, AR Vol 4 at 58.)

[67] Hence, they submit that the vague, general and unwarranted allegation that the Officer [TRANSLATION] "believe[d] on reasonable grounds . . . that all necessary measures should be taken immediately" is not sufficient on its own to meet the requirements of justification, intelligibility and transparency for an administrative decision. The use of "boilerplate language" cannot by itself ensure the reasonableness of an administrative decision.

[68] The Applicants state in particular that, in her reasons, the Officer failed to explain why she was rejecting their argument that there was no emergency within the meaning of subsection 38(7.1), given RTIT's many efforts to comply with the Act:

> [TRANSLATION]
> All the elements raised in the draft direction are already being assessed and studied as part of our ongoing efforts to improve the environmental management of our site and operations. This is why, in our opinion, a direction is unnecessary, let alone an emergency that would justify a direction being issued under subsection 38(7.1) of the Act.
>
> (Written Submissions of RTIT dated July 7, 2023, CTR Tab 100.1, AR Vol 3 at 117.)

[69] According to the Applicants, the facts in this case do not justify a conclusion that there is an “urgency” to order any corrective measures and do not allow the Officer to exercise her discretion to issue such measures. Rather, the issues targeted have occurred only occasionally over many years and have been the subject of discussion and cooperation with the Department as well as an ongoing process entailing several improvement projects, some of which have already been completed while others are still under way. Finally, overflows occur almost exclusively as a result of exceptional events such as heavy rainfall, power outages and mechanical failures.

[70] To illustrate that there was no emergency in this case, the Applicants note that the Officer has been responsible for their file since February 2022 and has been familiar with the underlying facts since at least then. Nevertheless, she only gave notice that she would be issuing a Direction in June 2023 and issued the Direction in July 2023. The Applicants note that, if there had been an emergency, the Officer would have acted earlier.

[71] Finally, the Applicants argue that, in her reasons for issuing the Direction, the Officer erred in stating that the 2013 direction had not been implemented. On the contrary, the Applicants carried out the requested work, and the Department never replied to their last update.

(2) Respondent’s position

[72] The Respondent submits that, as soon as an officer believes on reasonable grounds that subsections 36(3) and 38(6) of the Act have been contravened, they can issue a direction ordering any corrective measures they deem necessary to enforce compliance with the Act.

[73] In this case, the Officer concluded that she believed on reasonable grounds that the Applicants had not [TRANSLATION] “as soon as feasible, taken all the necessary measures” [the requirement under the French version of subsection 38(6)] to prevent the deposit of a deleterious substance of any type. In the light of historical failures to comply and her inspection results, it was open to her to conclude that it was urgent that corrective measures be taken since the conditions for exercising her discretion to issue a direction had been fulfilled. After making this finding, she exercised her discretion to issue the Direction, which imposes measures to take to comply with subsection 38(6) of the Act (*St Brieux* at para 66). According to the Respondent, this interpretation is justified in light of the law and the facts of this case.

[74] The Respondent states that the reviewing court must keep in mind (i) that a range of interpretations may be open to the administrative decision maker; (ii) that, because of their expertise, the administrative decision maker may be in a better position to interpret their home statute or regulations than the court; and (iii) that Parliament has conferred the task of interpreting the legislation to that decision maker, not the reviewing court (*Vavilov* at paras 83, 116, 119, 124; *Mason* at paras 62, 70–71, 78).

[75] According to the Respondent, the context and the facts also justify the Direction. It is not disputed that the Officer’s conclusion that there were reasonable grounds to believe that offences under subsection 36(3) had been committed was well founded. The evidence on the record also establishes that, since 2008, RTIT has regularly contravened subsection 38(6) of the Act. During this time, RTIT has received seven warning letters and two directions. The warning letters and the directions clearly state that they are part of RTIT’s record and that the Department would take

them into account in the future in both enforcing the Act and determining future measures. The RTIT representatives themselves recognized that, in the time before the Direction was issued, a number of deposits of deleterious substances exceeded the standards established in the MDMER (Teams Meeting Report 2023-01-27, CTR Tab 84, AR Vol 2 at 352–353; Teams Meeting Report 2023-04-13, CTR Tab 88, AR Vol 2 at 391).

[76] The Respondent also argues that the Direction highlights the seriousness of the situation, noting that several effluents originating from the metallurgical complex are not identified as "final discharge points" under the MDMER. Since these are not subject to the rules of the MDMER, no deposit of a deleterious substance of any type is authorized from these effluents (Direction dated July 24, 2023, CTR Tab 2, AR Vol 1 at paras 14–16; Inspection Report of September 27, 2022, CTR Tab 70, AR Vol 2 at 243; Email – Inspection Analysis Results of September 27, 2022, CTR Tab 78, AR Vol 2 at 304; Inspection Report dated November 16, 2022, CTR Tab 80, AR Vol 2 at 314; *R c ArcelorMittal Canada Inc*, 2021 QCCQ 10578 at paras 75–76 [*ArcelorMittal (CQ)*]).

[77] Regarding the interpretation of the term *"urgence"* ["immediate action is necessary" in the English version of the provision], the Respondent submits that what constitutes an "emergency" must be interpreted in light of the context. The term is broad, open-ended and qualitative and affords the decision maker flexibility in interpreting the enabling statute when making a decision (*Mason* at para 67; *Vavilov* at paras 68, 110; *Mikisew Cree First Nation v Canadian Environmental Assessment Agency*, 2023 FCA 191 at paras 112–17 [*Mikisew Cree First Nation*]). The term *"urgence"* [in the French version of the provision] should not be interpreted in isolation, but in connection with the fact that there were reasonable grounds to believe that subsection 38(6) of the

Act had been contravened. The term *"urgence"* should also be interpreted in light (a) of the complete prohibition against depositing or permitting the deposit of a deleterious substance of any type (subsection 36(3) of the Act); (b) of the duty, if a deposit occurs or if there is a serious and imminent danger of such an occurrence, to notify without delay an inspector (subsection 38(5)); (c) of the duty to take measures as soon as feasible to prevent the deposit of deleterious substances (subsection 38(6)); (d) but also taking into consideration of the Act's broader purpose of conserving and protecting fish and fish habitat, including by preventing pollution (paragraph 2.1(b) of the Act).

(3) Analysis

[78] The Applicants essentially submit that since the Department was aware of the work planned by RTIT; since RTIT has always cooperated with the Department, has made enormous investments over the last few years and has carried out several projects; and since the number of overflows has dropped substantially, there was no *"urgence"* [in the French version of the provision] to issue a direction imposing that corrective measures to be taken, including a strict timeline for preventing future deposits. Since there was no *"urgence"* that corrective measures be taken, the Officer lacked the power to issue a direction under subsection 38(7.1) of the Act. The Applicants also state that the Officer did not justify her decision in respect of how she interpreted the term *"urgence"* [term used in the French version of the provision, "immediate action is necessary" is the expression used in the English version of the provision], nor considered RTIT's many efforts over the years to comply with the Act and the MDMER.

[79] At issue is therefore whether the Officer's interpretation of the scope of the term *"urgence"* [in the French version of the provision] is reasonable.

[80] As discussed earlier, it was for the Officer to interpret the scope of her discretion and, in this case, the scope of the term *"urgence"* [in the French version of the provision] under subsection 38(7.1) of the Act (*Safe Food* at para 37). Her reasons on this subject do not necessarily need to be explicit, but together with the entire record, they must allow the Court to determine whether the Officer was alive to the key issues and made a decision in their regard (*Vavilov* at paras 94, 119, 128; *Zeifmans*, at para 10).

[81] It is important to note that, in this case, in contrast to an adjudicative context in a proceeding where the decision maker is independent and with no opportunity to communicate otherwise with the parties, the context here is a regulatory one in which the Officer and RTIT are working closely together to ensure the metallurgical complex's compliance with the Act and the MDMER. The communications between the parties leading to the issuance of the Direction are therefore relevant in interpreting the Officer's reasons in light of the context and the record as a whole (*Vavilov* at paras 94, 119, 128).

[82] As the SCC explained in *Vavilov* at paragraph 90, the standard of review must account "for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt." In

paragraph 91, the SCC continues by holding that "[a] reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do 'not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred' is not on its own a basis to set the decision aside."

[83] The reviewing court is tasked with ensuring that the interpretation is consistent with the "modern principle" of statutory interpretation, which focuses on the entire context of the Act and the grammatical and ordinary sense of the language chosen by Parliament harmoniously with the scheme of the Act, the object of the Act, the context and the intention of Parliament (*Mason* at paras 67, 69–70, 83; *Vavilov* at paras 110, 115–24; *Canada Post Corp* at para 42; *Alexion* at paras 20, 36; *Le-Vel* at para 16).

[84] It is true that, in her reasons, the Officer does not specifically deal with the issue of the interpretation of the term *"urgence"* [in the French version of the provision], nor does she discuss RTIT's past compliance efforts.

[85] However, as discussed earlier, when read holistically in the context of the record, the reasons can reveal implicit or implied findings on key points (*Vavilov* at para 128; *Alexion* at para 16; *Zeifmans* at para 10; *Rameau* at paras 101, 158). I conclude that, when read in the context of the entire record, the Officer's reasons are sufficient to establish a reasonable interpretation of the term *"urgence"* [in the French version of the provision] within the meaning of subsection 38(7.1) of the Act.

[86] In the light of the Officer's reasons, it is clear that the Officer considered RTIT's entire record and its history of non-compliance since at least 2013. The Officer also took into account her own inspections and drew the conclusion that she had reasonable grounds to believe that RTIT was not in compliance in a number of areas. For example, overflows originating from the WTP, an identified "final discharge point" under the MDMER, occurred in 2022 and 2023, as well as repeatedly in the years before that. In many cases, these overflows resulted in the deposit of deleterious substances contrary to the MDMER. Moreover, deleterious substances were deposited through Stormceptors and runoff, which are not identified as "final discharge points" under the MDMER. No such deposits of deleterious substances are authorized in such circumstances. Finally, further deposits of deleterious substances originated from the loading and unloading dock.

[87] On the basis of evidence of repeated compliance failures over several years and in light of a regulatory context involving many interactions between the parties since 2008, the Officer found that she had reasonable grounds to believe that the situation required an "urgent" intervention to ensure RTIT's compliance with the Act and the MDMER. In particular, in June 2023, when the Applicants made their oral submissions in response to their receipt of the notice of intention and the draft Direction, the Officer clearly explained that the situation [TRANSLATION] "[had to] be resolved as soon as feasible because, in the meantime, [RTIT] continue[d] to be non-compliant" (Gavia Report, CTR Tab 87, AR Vol 2 at 379). Beforehand, at a meeting on January 27, 2023, during which she expressed her intention to issue a direction, the Officer explained that a direction would [TRANSLATION] "enable her to monitor the implementation of the measures set out in the action plan . . . through inspections and achieve compliance as quickly as possible by means of the enforcement measures available" (Teams Meeting Report 2023-01-27, CTR Tab 84, AR Vol 2 at

352). The fact that RTIT is non-compliant is not disputed. On January 27, 2023, RTIT admitted that [TRANSLATION] "the number of compliance failures in the [previous] year was unacceptable" (Teams Meeting Report 2023-01-27, CTR Tab 84, AR Vol 2 at 353).

[88] The Officer's reasons therefore describe the factual and legal basis on which her decision to issue a direction relied. She explained that in 2013 a direction had been issued under subsection 38(7.1) on the basis of reasonable grounds to believe that deleterious substances had been deposited contrary to the MDMER. Issued under subsection 38(7.1) of the Act, that is, the same provision as in the Direction at issue, the 2013 direction was therefore also based on reasonable grounds to believe that there existed an *"urgence"* [the term used in the French version of the provision] to order that corrective measures be taken, and no application for judicial review was filed to dispute this decision, including the Department's interpretation of the term *"urgence"* [as interpreted under the French version of the provision] within the decision (Direction dated September 16, 2013, CTR Tab 17, AR Vol 1 at 319). This factual and legal basis is not in dispute and, as explained by the Federal Court of Appeal in *Alexion*, at paragraph 16 (see also *Rameau* at para 101), a reviewing court may find that the administrative decision maker made an implicit finding "as seen from previous decisions cited or that it must have been aware of . . . and other matters known to the [administrative decision maker]." The Officer found that the 2013 offences were similar to the compliance failures she had noted in her 2022 and 2023 inspections. It is apparent from the reasons, read holistically, and from the record, that the Officer concluded that there was still an "emergency" requiring that corrective measures be taken (as it was in 2013, which has never been disputed) since RTIT continued to be non-compliant, despite its many efforts

and the improvements it had made over the years to limit the number of deposits, including overflows.

[89] The Officer's reasons and the record as a whole make it easy to understand the basis for her conclusion that it was "urgent" that corrective measures be taken, and to issue the Direction. Even though the reasons for the Direction do not contain a full analysis of the issue of the interpretation of the term *"urgence"* [in the French version of the provision], as a court of justice would provide, it is easy to discern the Officer's conclusions with the help of the record as a whole, and particularly the Officer's own oral comments to the Applicants (*Vavilov* at para 98). In my opinion, these comments are in themselves partial, oral "reasons" that may be considered on judicial review, similar to the Global Case Management System notes utilized by immigration officers (*Ezou v Canada (Citizenship and Immigration)*, 2021 FC 251 at para 17) or Canada Revenue Agency review reports or internal assessment observations in judicial reviews of Canada Recovery Benefit applications under the *Canada Recovery Benefits Act*, SC 2020, c 12 (*Kleiman v Canada (Attorney General)*, 2022 FC 762 at para 9; *Vavilov* at paras 94–98). As the SCC explained in *Vavilov* at paragraph 119, "formal reasons for a decision will not always be necessary and may, where required, take different forms" [emphasis added].

[90] Consequently, this is not a case where a reviewing court "fashion[s] its own reasons in order to buttress the administrative decision" (*Vavilov* at para 96). To the contrary, in this case, the Officer's reasons can be found in her written reasons, in her feedback to the Applicants' oral submissions at the June 21, 2023, meeting and, as early as January 2023, in her comments when she first indicated her intention to issue a direction. Ultimately, by the reasons offered, but also

with the other interactions with the Officer, the Applicants are informed about the Officer's apprehensions, her understanding of the facts and of her powers, and what motivated her intervention at this point.

[91] According to the Officer's written reasons and her oral explanations, any failure to comply with the Act and the MDMER is problematic and must be rectified immediately. The Act does not permit even a temporary deviation (though a due diligence defence may be raised following an offence). In fact, according to the Officer, compliance with the Act and the MDMER is always "urgent" (Teams Meeting Report 2023-01-27, CTR Tab 84, AR Vol 2 at 352; Gavia Report, CTR Tab 87, AR Vol 2 at 379; Teams Meeting Report 2023-04-13, CTR Tab 88, AR Vol 2 at 391). Subsection 38(7.1) therefore allows officers to order corrective measures in cases of violation but does not oblige them to do so. Even though, historically, the Department had decided to impose only two directions, this did not prevent the Officer from issuing warnings, as she also did, or from issuing a direction.

[92] This interpretation is not unreasonable. It is consistent with the Department's interpretation of the term *"urgence"* [under the French version of the provision], as shown by the 2010 and 2013 directions imposed on RTIT, which have not previously been challenged. The Officer's interpretation is therefore consistent with the Department's previous dealings with RTIT. The metallurgical complex became subject to the MDMER in April 2008. A warning was issued as soon as August 2008, followed by a direction in February 2010, less than two years later. Even though the 2010 direction relied on subsection 38(6) as it was then, that provision also required an *"urgence"* [in the French version of the provision] in order for an officer to be able to issue a

direction (Direction dated February 5, 2010, CTR Tab 14, AR Vol 1 at 279). After the enactment of subsection 38(7.1) of the Act in 2012, the same provision as in this case, an officer issued a second direction in September 2013 because there was an *"urgence"* to impose corrective measures (Direction dated September 16, 2013, CTR Tab 17, AR Vol 1 at 319). The previous directions therefore show the importance of entities complying with the Act and the MDMER at all times, and of the *"urgence"* ["immediate action is necessary" in the English version of the provision] to take corrective measures if they are failing to comply. RTIT did not apply for judicial review to challenge these two directions or the fact that an *"urgence"* existed to impose the taking of corrective measures to address those compliance failures.

[93] The Officer's interpretation, and those of her predecessors in 2010 and 2013, is also consistent with the case law that has subsequently evolved on this subject. In *Conesa v Canada (Attorney General)*, 2021 FC 632 [*Conesa*], a direction was issued under subsection 38(7.1) of the Act ordering the applicant to correct authorized dykes and islands built to protect fish habitat in connection with the Highway 30 extension along Montreal's south shore. A Department officer had issued a direction ordering that these works be corrected given the evidence of erosion and premature degradation, which caused a risk of harmful alteration, disruption or destruction of fish habitat. Despite the direction having been issued preventatively (since the harmful alteration, disruption or destruction was hypothetical at that point), Justice Shore confirmed its validity. Straightaway, at paragraph 1 of his reasons, he asks:

> [1] Is it necessary to demonstrate that a latent threat is turning into a significant environmentally destructive situation before urgent action is taken? When the variables are highly volatile and the consequences serious, is there an obligation to prevent the threat or should it be ignored knowing that it could happen today, just as well as yesterday or even tomorrow?

(*Conesa* at para 1)

[94] Justice Shore then rejected an argument similar to that of the Applicants in this case, namely, that instead of issuing a direction because of the "urgency" of the situation, the Department should have continued working in collaboration with the Applicants. Justice Shore rejected this argument in the following words, which also apply in this proceeding given the history of non-compliance observed by the Officer:

> [14] Even in the absence of prior information and notwithstanding any conditions of the authorization, an officer may order corrective measures to prevent, counteract, mitigate or remedy any adverse effects that result from the unauthorized harmful alteration, disruption or destruction of fish habitat, or a serious and imminent danger of such an occurrence. The officer must be satisfied on reasonable grounds that immediate action is necessary.
>
> [15] In this case, the order was issued after a warning, investigation reports and nearly two and a half years of discussions concerning the extensive scouring of the structures, their instability and the current and projected consequences thereof, contrary to the authorization. The process appears highly discretionary.
>
> . . .
>
> [18] There is a legitimate expectation that [the Department of Fisheries and Oceans] will be able to exercise its emergency discretion independently when circumstances require, as supported by guidance regarding the urgency of the measures ordered. Otherwise, the Act is devoid of content. The applicant, for its part, was expecting to continue with the pattern of the previous interactions, i.e., to extend the discussions over time.
>
> [19] That said, the officer chose to issue the order for corrective measures, which requires that the officer be satisfied on reasonable grounds that immediate action is necessary.
>
> . . .
>
> [22] Moreover, the order follows a warning that has not been judicially reviewed, several informal reminders—the most recent in July 2020—and numerous exchanges of documents, case studies

and respective submissions focusing on scouring and the increasing instability of structures that do not comply with the documentation as per the authorization, requiring remedial work as soon as possible to ensure compliance.

[23] The accounts of the interactions between the parties cannot be taken in isolation in this respect, as they all relate to the same issue identified in 2017, with the same solution identified in 2018—this solution becoming larger in scope, owing to the passage of time and the severity of the situation—with which any non-compliance carries consequences under the [*Fisheries Act*].

. . .

[25] [The Department of Fisheries and Oceans] was not compelled to further delay carrying out its duty of care subject to further feedback from the claimant, given the previous exchanges, the history of non-compliance, the harm to fish habitat and the fact that the required remedial work in this regard is to be done without delay, since the warning pursuant to the [*Fisheries Act*]in 2018 (*British Columbia Hydro and Power Authority v Canada (Attorney General)* (1998), 149 FTR 161 at para 74 . . .).

. . .

[28] In the words of the Act as they relate to this case, the officer must be satisfied on reasonable grounds that immediate action is necessary to take the ordered corrective measures to prevent the occurrence or to counteract, mitigate or remedy any adverse effects that result or might reasonably be expected to result from the unauthorized disruption of fish habitat. Therefore, "not only is the appreciation of the circumstances left to the inspector, but he also has to decide which of the measures . . . he will take . . . . It is not [however] an absolute discretion for it is very clearly limited to the specific situations described in subs. 38(4) of the Act and when immediate action is necessary" (*St Brieux (Town) v Canada (Fisheries and Oceans)*, 2010 FC 427 at paras 54–55 . . .).

. . .

[31] The officer was fully entitled to intervene to prevent adverse effects that might reasonably be expected to result from the unauthorized disruption of fish habitat, as established by the evidence of the risks involved. Moreover, based on the record before it, it was reasonable to believe that the time element of this intervention required immediate action, in accordance with the reasons set out above and its duty of care.

> (*Conesa* at paras 14–15, 18–19, 22–23, 25, 28, 31 [emphasis in original])

[95] The Applicants submit that in subsection 38(7.1), the term *"urgence"* [in the French version of the provision] must be interpreted as meaning an emergency that is imminent since the English version of this provision uses the words "immediate action is necessary." The Applicants state that the case law supports this interpretation since in the French version of *St Brieux* at paragraph 55, Justice Gauthier held that *"l'inspecteur est libre de décider s'il exercera les pouvoirs que lui donne le paragraphe 38(4). Il ne s'agit pas d'une liberté absolue, car elle se limite très clairement aux cas précis décrits dans le paragraphe 38(4) de la Loi et aux cas où une mesure immédiate est requise"* [in the English version of the decision: "the inspector [has] the discretion to decide whether he will exercise the powers described [in subsection 38(4)]. It is not an absolute discretion for it is very clearly limited to the specific situations described in subs[ection] 38(4) of the Act and when immediate action is necessary"; emphasis added by the Applicants]. The Applicants note that a narrow interpretation requiring both an [TRANSLATION] "emergency" and a need for [TRANSLATION] "immediate action" is consistent with how the courts exercise similar powers, such as issuing interlocutory injunctions. In their opinion, this interpretation is also compatible with the Department's own *Policy*.

[96] I reject these arguments. First, there was no discussion in *St Brieux* of a potential distinction between the English and French versions of the provision. Justice Gauthier's reasons were written in English, which is why she used the words "and when immediate action is necessary" at paragraph 55 of her reasons, this being the legal test required by the English version of the provision. The literal translation of these words as *"et aux cas où une mesure immédiate est*

requise" instead of *"et de l'urgence de ces mesures"* [which is the equivalent legal criterion in the French version of the provision], when the French translation of those reasons was not revised, cannot in itself be conclusive as to the scope of the provision.

[97] *R v Daoust*, 2004 SCC 6 at paragraphs 26–31 [*Daoust*], sets out the rules to apply in cases where there is a discrepancy between the two versions of the same text. The first step it to determine whether there is discordance, and if so, the texts must be reconciled. If there is an ambiguity in one version while the other is clear and unequivocal, the common meaning would favour the version that is clear, and where one of the two versions is broader than the other, the common meaning of both would favour the more restricted or limited meaning (see also *Schreiber v Canada (Attorney General),* 2002 SCC 62 at para 56; Michel Bastarache et al, *The Law of Bilingual Interpretation*, Markham, Ontario, LexisNexis, 2008 at 43–48 [Bastarache et al]; Pierre-André Côté and Mathieu Devinat, *Interprétation des lois*, 5th ed, Montreal, Éditions Thémis, 2021, Nos 1123, 1125–28, 1135–37, 1141 [Côté and Devinat]).

[98] In this case, despite a distinction between the chosen terms, the scope of the term "l'urgence de ces mesures" [in the French version of the provision] and "immediate action is necessary" [in the English version of the provision] is equivalent in the context of the purpose of the Act: a direction cannot be issued unless the officer is "satisfied on reasonable grounds" that "immediate action is necessary" in the English version (in order to take any measures that the officer will direct), which is consistent with the French version, which provides that the officer must be "convaincu, pour des motifs raisonnables," of the "urgence de ces mesures"(which the officer will direct). In both cases, the provision is about imposing immediate measures where they are

necessary to remedy or prevent a contravention of the Act or the MDMER. The fact that these measures must be taken "immediately" [as in the English version] is of the same scope as the *"urgence"* ["urgency"] of taking these measures [as in the French version]. In fact, in the dictionary of Quebec and Canadian law, *"urgence"* is defined as [TRANSLATION] "the need to act without delay" (Hubert Reid and Simon Reid, eds, *Dictionnaire de droit québécois et canadien*, 6th ed, Chambly, Wilson & Lafleur, 2023, *sub verbo "urgence"*). The French term *"urgence"* therefore has the same scope as the English term "immediate."

[99] Next, in my opinion, decisions in matters of injunctive relief are not persuasive. The context is quite different in such cases, where, for example, applicants must establish, on a balance of probabilities and on the basis of clear and non-speculative or hypothetical evidence, that serious or irreparable harm will occur (see, for example, *R v Canadian Broadcasting Corporation*, 2018 SCC 5 at para 12; *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7; *Canada (Attorney General) v Oshkosh Defense Canada Inc*, 2018 FCA 102 at para 25). In contrast, the purpose of the Act is the conservation and protection of fishing resources, including by preventing pollution (paragraph 2.1(b) of the Act; *St Brieux* at para 43). To do so, the Act confers discretion on officers, leaving it up to them to assess the circumstances of each case and decide which measures, if any, should be taken (*St Brieux* at paras 54–55). In this case, this wide discretion is described in broad, open-ended and highly qualitative language, affording the decision maker greater flexibility in interpreting the meaning of such discretion (*Mason* at para 67, *Vavilov* at paras 108, 110, *Mikisew Cree First Nation* at para 116).

[100] Moreover, the Officer need only be "satisfied, on reasonable grounds" ["*convaincu, pour des motifs raisonnables*" in the French version of the provision] that "immediate action is necessary" [*"urgence"* in the French version of the provision] to take corrective measures, without needing to establish on a balance of probabilities that the event will occur if corrective measures are not implemented, which is a lesser burden than the standard regularly applicable in civil matters and for injunctive relief (which requires for example preponderant evidence that the irreparable harm will occur) (*Mugesera v Canada (Minister of Citizenship and Immigration*), 2005 SCC 40 at paras 114–16; see also *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at paras 34–41, *Gordillo v Canada (Attorney General)*, 2022 FCA 23 at para 112; *Lapaix v Canada (Citizenship and Immigration)*, 2025 FC 111 at paras 42–44); especially since, in this case, the evidence shows that there have been failures to comply with the Act and the MDMER for several years and it is not being denied that contraventions will occur in the future. The expression *"urgence"* ["immediate action is necessary"] should therefore not be interpreted in isolation, but in connection with the fact that there are reasonable grounds to believe that the Act or the MDMER have been contravened, or that such a contravention could occur in the future. The concept of *"urgence"* in the context of an injunctive relief is therefore too restrictive and does not conform with the purpose of the Act.

[101] The Applicants then submit in paragraph 46 of their memorandum that the *Policy* supports their claim that the term *"urgence"* [in the French version of the provision] requires an "emergency" that is imminent. To the contrary, the Respondent replies that the *Policy* clearly states that "[c]ompliance with the habitat protection and pollution prevention provisions and their accompanying regulations is mandatory," such that conformity with the Act and the MDMER is

required at all times (*Compliance and Enforcement Policy*, CTR Tab 106, AR Vol 4 at 42). I agree with the Respondent. The passage the Applicants cite in paragraph 46 of their memorandum states that a direction may be issued "[where] immediate action is necessary […] regarding remedial or preventative action," which seems to add weight to their claim, but the statement is in fact a qualifier of the sentence that precedes it in the *Policy*, which specifies in turn that this is "[w]here there is a deposit of a deleterious substance out of the normal course of events to waters frequented by fish, or where there is serious and imminent danger of such an incident" (*Compliance and Enforcement Policy*, CTR Tab 106, AR Vol 4 at 58). As a result, "immediate action" may be necessary to remedy "a deposit of a deleterious substance . . . or [a] serious and imminent danger of such an incident." There can therefore be an "urgent" need to act, even preventatively, and even if the deposit of deleterious substances is minimal or only slightly above the degrees of concentration set out in the MDMER. In this case, not only does the evidence show that deleterious substances are indeed being deposited (from sources yet to be identified as "final discharge points" or which represent too high a concentration under the MDMER), but it also shows that if no action is taken, further deposits will occur. The conclusion that the situation requires "immediate action […] regarding remedial or preventative action," or that there is an *"urgence"* given the context, is therefore not unreasonable.

[102] The Applicants then argue that the evidence that there was not an "emergency" in this case is demonstrated by the fact that the Officer had been familiar with the facts since May 2022 but did not issue the Direction until July 2023. Waiting 14 months between the first inspection and the Direction in itself demonstrates that there was no "emergency." The Applicants cite *Piatka-Wasty v Canada (Attorney General)*, 2023 FC 1042, [*Piatka-Wasty*] where, in their opinion, Justice

Heneghan found that there was no "urgency" when an officer was notified of a complaint in May 2020, but did not issue a direction until October 2021, 17 months later. However, the *Piatka-Wasty* decision is not persuasive on this point, since the direction was invalidated on grounds of breach of procedural fairness. Although Justice Heneghan mentioned, at paragraph 145, that the applicants could, "with reason, question the [officer's conclusion of] urgency," she specifically declined to discuss whether the direction itself was reasonable since it had been invalidated on other grounds. In *Conesa*, the direction was not invalidated despite the fact that in that case the Department had been aware of the risks since November 2017, but a direction was not issued until July 2020 (after a warning).

[103] Finally, on the subject of the 2013 direction, while it is true that RTIT sent a letter to the Department stating that it had completed the necessary actions mentioned and the Department did not dispute this statement, that direction was aimed at the deposit of deleterious substances contrary to the MDMER and the Act, originating from identified discharge points within the meaning of the MDMER and also from storm sewers. However, the Officer notes that the deposits mentioned in the 2013 direction are similar to compliance failures she identified in her 2022 inspections, including the overflows. Therefore, it was not unreasonable for the Officer to conclude that she had reasonable grounds to believe that RTIT had failed to implement sufficient measures following the 2013 direction to stop any non-compliant deposits, since her inspections show that deposits continue to occur. It should be noted that at no time did the Officer determine that RTIT and its officers had breached their obligations under the 2013 direction.

[104] In conclusion, in my view, although the Officer did not explicitly repudiate the Applicants' arguments on the issue of the necessity of an "emergency" to order the taking of corrective measures, and on their efforts and the progress made since 2008, the reasons provided are, contrary to the Applicants' arguments, not "boilerplate" (*Yu v Canada (Citizenship and Immigration)*, 2021 FC 1236 at para 29; *Khosravi v Canada (Citizenship and Immigration)*, 2023 FC 805 at para 7). The Officer did not have to respond to all the arguments presented and her reasons on these arguments, although implicit or implied in some cases, are in my view adequate for the Applicants to understand why, in the Officer's view, a direction had to be issued because of the "urgency" of the situation (*Vavilov* at para 94, 128; *Zeifmans* at para 10). The oral communications of June 21, 2023, concerning the draft Direction, as well as those of January 2023 announcing her intention to issue a Direction, must be considered. In these communications, not only did the Officer say that the situation [TRANSLATION] "[had to] be resolved as soon as feasible because, in the meantime, [RTIT] continue[d] to be non-compliant" (Gavia Report, CTR Tab 87, AR Vol 2 at 379), but before that, she specified that the reason for her intention was that a direction would [TRANSLATION] "enable her to monitor the implementation of the measures set out in the action plan . . . through inspections and achieve compliance as quickly as possible by means of the enforcement measures available" (Teams Meeting Report 2023-01-27, CTR Tab 84, AR Vol 2 at 352). Added to this is the fact that the Officer's conclusions that she had reasonable grounds to believe that subsection 36(3) had been contravened are not disputed; the Applicants admit that [TRANSLATION] "the number of compliance failures in the [previous] year was unacceptable" (Teams Meeting Report 2023-01-27, CTR Tab 84, AR Vol 2 at 352).

[105] The Officer's interpretation of the term *"urgence"* [in the French version of the provision] to take corrective measures was therefore one of several possible interpretations, and her reasons, read in context, are reasonable. As the SCC explains in *Vavilov* at paragraph 123: "There may be other cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable."

[106] That is the case here. The Officer's reasons, combined with the submissions of RTIT to the Officer and the other communications between RTIT and the Officer, enable the Court to assess the adopted interpretation and determine that, in the highly regulated context of industrial operations and environmental protection, this interpretation is reasonable. The Court cannot identify any sufficiently central or significant shortcomings that would cause it to lose confidence in the outcome reached since it is able to discern the interpretation adopted by the decision maker from the record (*Vavilov* at paras 100, 106, 122–23; *Mason* at paras 64, 69). In my opinion, the reasoning process in question is not opaque; an examination of the entire record uncovers a clear rationale for the Officer's interpretation of the term *"urgence"* [in the French version of the provision] to take corrective measures (*Vavilov* at para 137).

[107] The facts noted in the reasons, which demonstrate that RTIT has been in a situation of non-compliance for several years, as well as the mandatory statutory and regulatory obligations, amply demonstrate the urgency that corrective measures be taken so that the Act and the MDMER can be complied with as soon as feasible. The reasons included in the Direction, in addition to the

explanations given during the meetings between the Applicants and the Officer, and in a context where similar directions were issued in 2010 and 2013 which also required *"urgence"* [in the French version of the provision] before being issued, make it easy for the Applicants, and the Court, to understand why the Officer found that it was "urgent" that corrective measures be taken in this case [or "immediate action is necessary" in the English version of the provision] and why the Officer rejected the Applicants' arguments about actions taken in the past, which proved insufficient. Her reasons are therefore coherent, transparent, intelligible and justified (*Vavilov*, at paras 15, 95–98).

[108] The Applicants are effectively asking that the Court re-weigh the evidence and substitute its opinion. Accepting the Applicants' arguments would amount to the Court establishing its own yardstick and then using that yardstick to measure what the Officer did (*Vavilov* at para 83). This is not the role of the Court on judicial review on a standard of reasonableness.

C. *The measures ordered are "reasonable measures" under subsection 38(6) of the Act*

(1) Applicants' position

[109] The Applicants argue that the interpretation of the French term "mesures nécessaires" at subsection 38(6) means the imposition of [TRANSLATION] "reasonable measures" in the circumstances, because the term "reasonable measures" is used in the English version of the provision. Since the measures ordered by the Officer are impossible to implement and impose an obligation of result that will deprive the Applicants of their potential due diligence defence under the Act, the Direction is unreasonable.

[110] Subsection 38(7.1) of the Act allows an officer to direct any person to take the measures referred to in subsection 38(6) of the Act, which provides as follows:

38(6) Any person described in paragraph (4)(a) or (b), (4.1)(a) or (b) or (5)(a) or (b) shall, as soon as feasible, take all reasonable measures consistent with public safety and with the conservation and protection of fish and fish habitat to prevent the occurrence or to counteract, mitigate or remedy any adverse effects that result from the occurrence or might reasonably be expected to result from it. [emphasis added]	**38(6)** La personne visée aux alinéas (4)a) ou b), (4.1)a) ou b) ou (5)a) ou b) est tenue de prendre, le plus tôt possible dans les circonstances, toutes les mesures nécessaires qui sont compatibles avec la sécurité publique et la conservation et la préservation du poisson et de son habitat pour prévenir l'événement mentionné aux paragraphes (4), (4.1) ou (5) ou pour neutraliser, atténuer ou réparer les dommages qui en résultent ou pourraient normalement en résulter. [Je souligne]

[111] According to the Applicants, the language used in the English and French versions of the text highlight a discordance because the expression "all reasonable measures" in the English version of the provision is different from the French expression "*toutes les mesures nécessaires*." Thus, since the expression "all reasonable measures" has a more restricted or more limited scope than the expression "*toutes les mesures nécessaires*," the common meaning, which should be expressed in French as "*toutes mesures raisonnables*" should be preferred.

[112] The Applicants thus submit that a fishery officer can only direct "reasonable measures" to ensure the conservation of fish habitat. They state that the Department itself has adopted this interpretation in its communications (see *Compliance and Enforcement Policy*, CTR Tab 106, AR Vol 4 at 58), which is the only interpretation consistent with the due diligence defence (s 78.6 of the Act; *R v Sault Ste-Marie*, 1978 CanLII 11 (SCC), [1978] 2 SCR 1299).

[113] According to the Applicants, by directing the implementation of measures to [TRANSLATION] "permanently end" unauthorized deposits, including any overflows and runoff, the Direction imposes measures that for all practical purposes are impossible to carry out and creates an obligation of result, thereby transforming compliance failures into so-called [TRANSLATION] "absolute liability" offences, for which the due diligence defence provided for in section 78.6 of the Act is not possible.

[114] For example, despite all of RTIT's diligence, the metallurgical complex sometimes reaches its maximum water retention capacity because of hydraulic overloads in the system or operational problems, or runoff water making its way into the St. Lawrence River. However, because of the nature and complexity of the metallurgical complex's operations, there are no "reasonable measures" that exist to permanently end all deposits or runoff of deleterious substances into the St. Lawrence River by December 31, 2024 (Applicants' Memorandum at para 94).

[115] Finally, according to the Applicants, the Direction has the practical effect of transforming RTIT's violation of the Act into a criminal offence by its officers for their failure to comply with a direction of a fishery officer under paragraph 40(3)(g) of the Act, which is punishable by summary conviction or indictment. In the event of a criminal prosecution, it would no longer be necessary to prove that the Applicants' actions contravened section 36 of the Act; the prosecution's reduced burden would be limited to proving that the Applicants failed to comply with the Direction. For the officers, RTIT's failure to comply with the Direction would have a significant impact in that they would be personally subject to criminal prosecution, which could result in a

fine of up to $200,000 for a first offence, or, for a second or subsequent offence, a fine of up to $200,000 and imprisonment for a term not exceeding six months.

(2) Respondent's position

[116] The Respondent maintains that the Officer merely directed that RTIT take the measures already required under subsection 38(6) of the Act, which requires the taking of "necessary measures" [in the French version, "reasonable measures" in the English version of the provision] at all times to prevent deposits. In her Direction, the Officer could not direct otherwise and consent to measures less onerous than those required by the Act: compliance with the Act is not optional. The operational challenges faced by the Applicants in complying with the Act and the MDMER do not allow the Officer to demand less than compliance with the obligations set out in subsection 38(6) of the Act.

[117] In requesting that the Applicants [TRANSLATION] "permanently end" the deposit of deleterious substance outside the MDMER framework, the Officer is essentially asking the Applicants to comply with the Act, and the Direction is not unreasonable simply because it is impossible for the Applicants to do that.

[118] Furthermore, according to the Respondent, there is no contradiction between the English and French versions of subsection 38(6) of the Act. In French, subsection 38(6) states that "*le plus tôt possible dans les circonstances, toutes les mesures nécessaires*" must be taken. In English, it provides that "as soon as feasible . . . all reasonable measures" must be taken. According to the Respondent, "reasonable measures" are those that are "necessary" to ensure compliance with the

Act and to prevent contraventions of subsection 36(3) of the Act. These measures are "necessary" because if they are not taken, the activity will be in contravention of the Act. Adopting an interpretation of "reasonable measures" or "necessary measures" that requires less than what is required to comply with the Act would defeat the Act's purpose.

[119] In this case, according to the Respondent, the Direction to permanently cease unauthorized deposits under the MDMER is reasonable, because a Direction cannot be used to allow contraventions of the Act to continue. The Respondent states that the Direction in this case is no more onerous than the directions issued in 2010 and 2013, which directed the production of [TRANSLATION] "a detailed action plan and a specific timeline for all measures that ha[d] been or w[ould] be implemented to prevent irregular deposits of deleterious substances" (Direction dated February 5, 2010, CTR Tab 14, AR Vol 1 at 278) and [TRANSLATION] "an action plan . . . as well as a precise schedule indicating all the measures that w[ould] be implemented to prevent any deposit that does not comply with the [MDMER]" (Direction dated September 16, 2013, CTR Tab 17, AR Vol 1 at 318–19). In all cases, the directions called for measures to be taken in order to comply fully with the Act and the MDMER.

[120] In response to the argument that the Direction transforms any non-compliance into an absolute liability offence for which the due diligence defence is not available, the Respondent states that this is not the case. The due diligence defence may be raised in any prosecution of offences under subsections 36(3), 38(6) and 38 (7.1) of the Act. Also, even in the absence of a direction under subsection 38(7.1) of the Act, under section 78.2 of the Act, officers remain liable to criminal prosecution if they fail, as soon as feasible, to take all "reasonable measures" [*"mesures*

nécessaires" in the French version of the provision] to prevent the deposit of deleterious substances. The Direction therefore does not impose an additional risk of criminal proceedings against officers. Finally, since the Direction cannot impose obligations that go beyond what is already required by subsection 38(6) of the Act, it does not limit the Applicants' due diligence defence under section 78.6 of the Act.

(3) Analysis

[121] There is no doubt that the English and French versions of federal statutes have the same authority. The Court must therefore make an attempt to find a common meaning from the two versions that falls within the purpose of the Act, as discussed above (*Daoust* at paras 26–31; Bastarache et al at 46–52; Côté and Devinat at Nos 1123, 1125–28, 1135–37, 1141).

[122] In this case, the interpretations proposed by the parties can be reconciled. In my opinion, "mesures nécessaires" in French and "reasonable measures" in English are equivalent. I agree with the Applicants that the term "reasonable" [*"raisonnable"* in French] is appropriate and has a common meaning, and that the Department itself uses this term in its French-language communications to the public (*Compliance and Enforcement Policy*, CTR Tab 106, AR Vol 4 at 58). On the other hand, as proposed by the Respondent, any "reasonable" measures that persons subject to the Act may take in order to comply with their obligations must enable them to do so. This interpretation is supported by the definition of "reasonable" which is defined in its legal sense as "fair and proper under the circumstances; rational, sound, and sensible" (Bryan A Garner, ed, *Black's Law Dictionary*, 12th ed, Toronto, Thomson Reuters, 2024, *sub verbo* "reasonable"). In this case, "reasonable measures" are those that allow persons to comply with the Act.

[123] Consequently, when more than one measure is possible to comply with the purpose of the Act, one measure may be preferred over another because it is more "reasonable" [the term used in the English version of the provision] in terms of cost or feasibility, for example. However, the measure chosen must enable compliance with the Act and is therefore also "necessary" ["*nécessaire*" in the French version of the provision] within the meaning of the Act. The terms are thus equivalent.

[124] Taking "reasonable measures" in English or "*mesures nécessaires*" in French enables persons to defend themselves of any offence by establishing that they exercised all due diligence. Consequently, paragraph 78.6(a) of the Act, which gives rise to the due diligence defence, uses "*mesures nécessaires*" in French, a term that one finds in subsection 38(6) of the Act, which is then translated to "reasonable measures" in English. That said, the term *"mesures nécessaires"* appears only twice in the French version of the Act: subsection 38(6) and paragraph 78.6(a), which are linked together. In turn, the notion of "reasonable measures" appears three times in the English version of the Act: subsection 38(6), subsection 38(8) and paragraph 40(3)(e). With respect to paragraph 40(3)(e), the French version of the Act speaks to the *"mesures auxquelles l'oblige le paragraphe 38(6),"* which is a reference to the *"mesures nécessaires"* in question; that is why the term is absent in the French version, while it is included in the English version of paragraph 40(3)(e). There is accordingly no incompatibility between the terms in their French and English versions at this juncture. As for subsection 38(8), where the English version also uses the term "reasonable measures," the French version speaks of "*mesures utiles*," but in a completely different context, namely that of *"accès"* ["access" in the English version of the provision] to property in the application of subsections 38(4) to 38(7.1) of the Act. The *"mesures"* referenced here are not

understood as *"mesures correctives"* ["corrective measures" in the English version of the provision's marginal note] as provided under subsection 38(6), and the use of the qualifier *"utile"* in French does not affect the scope of the term "reasonable" in English for the purposes of subsections 38(6) and paragraph 40(3)(e) of the Act. This only reinforces the sense in which Parliament understands "reasonable measures" and *"mesures nécessaires"* as equivalent. Therefore, I see no reason to depart from the presumption of consistent expression, according to which the legislator is presumed within a statute to use language such that the same words have the same meaning (*R v Basque*, 2023 SCC 18 at para 59; *Vavilov* at paras 44, 117–118; Côté and Devinat at Nos 1142–1143).

[125] Regarding the "reasonableness" of the measures imposed by the Officer, the Applicants argue that [TRANSLATION] "permanently end[ing]" deposits is impossible to achieve, thereby creating an obligation of result eliminating any possibility of a due diligence defence under section 78.6 of the Act. The directed measures are therefore unreasonable.

[126] In my view, the Applicants' proposed interpretation of the scope of the Direction, and of the imposed measures, is too broad. The Officer's use of the words [TRANSLATION] "permanently end" does not entail a higher standard than was imposed in the 2010 and 2013 directions. The events noted by the Officer in her reasons clearly demonstrate, and this is not disputed, that RTIT has been non-compliant for several years. Although the operation of the metallurgical complex is complicated, this does not exempt RTIT from its obligation to comply with the provisions of the Act and the MDMER.

[127] The Applicants have chosen to engage in a highly regulated economic activity and are strictly held to comply with a strict legal framework or be liable to penalties. It is up to them to demonstrate the level of diligence expected of persons subject to the Act and the MDMER (*R v Wholesale Travel Group Inc*, 1991 CanLII 39 (SCC), [1991] 3 SCR 154 at 239–40; *R v Fitzpatrick*, [1995] 4 SCR 154 at paras 29–30; *La Souveraine, Compagnie d'assurance générale v Autorité des marchés financiers*, 2013 SCC 63 at para 49; *ArcelorMittal (CQ)* at para 74 aff'd *ArcelorMittal (CA)* at para 28; *ArcelorMittal (SCC)*).

[128] Consequently, as the Respondent maintains, in her direction and by using the words [TRANSLATION] "permanently end," the Officer simply directed that the Appellants take the measures required under subsection 38(6) of the Act, which was already mandatory, in order to comply with subsection 36(3) of the Act, among other things. In this regard, it should be noted that the *Policy* is clear that "[c]ompliance with . . . provisions and their accompanying regulations is mandatory," that "[e]nforcement measures [including specifically warnings and directions] are directed towards ensuring that violators comply with the Fisheries Act within the shortest possible time and that violations are not repeated" and that "[t]he desired result is compliance with the Act in the shortest possible time and with no further occurrence of violations" [emphasis added] (*Compliance and Enforcement Policy*, CTR Tab 106, AR Vol 4 at 42, 56–58). The words [TRANSLATION] "permanently end" used by the Officer are, in my opinion, consistent with the clearly expressed purpose of the Act (as explained in the *Policy*), which aims not only at compliance but also at the absence of additional offences (which can be defended by raising a due diligence defence, as discussed below).

[129] Although the terms used in the Direction are different from those used in the 2010 and 2013 directions, their scope is the same and is consistent with the Act and the *Policy*, which both aim to achieve compliance as quickly as feasible, with no repeat offences. The 2010 direction directed RTIT to provide [TRANSLATION] "a detailed action plan and a specific timeline for all measures that ha[d] been or w[ould] be implemented to prevent irregular deposits of deleterious substances [and to provide a written report] showing that permanent measures h[ad] been completed . . . so that, if a spill [were to] occur, the substance w[ould] be contained in the outdoor retention pond" [emphasis added] (Direction dated February 5, 2010, CTR Tab 14, AR Vol 1 at 278). For its part, the 2013 direction required that RTIT [TRANSLATION] "[t]ake all necessary measures to comply with the [MDMER]; [. . . and provide] an action plan . . . and a specific timeline indicating all the measures that w[ould] be implemented to prevent any deposit that does not comply with the [MDMER] [and to provide a written report] demonstrating that measures ha[d] been taken to prevent any deposit contrary to the [MDMER]" [emphasis added] (Direction dated September 16, 2013, CTR Tab 17, AR Vol 1 at 318–19).

[130] The Direction in this case required no more or no less of the Applicants. By ordering that it [TRANSLATION] "permanently end" deposits, the Officer is imposing measures that will allow RTIT to comply with the Act and, to the extent that "final discharge points" are identified under the MDMER, allow deposits that comply with the concentrations and other conditions imposed by the MDMER. The Direction therefore targets the prevention of [TRANSLATION] "irregular deposits" and [TRANSLATION] "any deposit that does not comply," just like the 2010 and 2013 directions. The scope of the Direction is therefore just as mandatory as the 2010 and 2013 directions, and no more coercive.

[131] Although it imposes a deadline of December 31, 2024, it must be noted that the Officer's direction merely reflects the obligations set out in subsections 36(3) and 38(6) of the Act, which provide that "no person shall deposit or permit the deposit of a deleterious substance of any type" (pursuant to subsection 36(3), other than in accordance with the MDMER regime, as authorized under subsection 36(4)) and that, if a deposit occurs, any person responsible "shall, as soon as feasible, take all reasonable measures" *["mesures nécessaires"* in the French version of the provision] to prevent the occurrence or to counteract, mitigate or remedy any adverse effects. The Direction therefore merely requires RTIT to do what it is already required to do under subsection 38(6) of the Act at all times. Having deposited deleterious substances into the St. Lawrence River, the Applicants must take measures to prevent any future non-compliance. The Direction does not impose any specific measures. It simply imposes compliance with the Act and the MDMER.

[132] As for the overflows, which appear to be particularly problematic for the Applicants, the Direction requires the submissions of an analysis of all overflows over the past four years, as well as a [TRANSLATION] "detailed action plan and a timeline to permanently end overflows [from the WTP and the TK-0100]."

[133] Here again, the Direction merely requires RTIT to comply with the Act and the MDMER, without imposing any particular means of doing so.

[134] While it is open to the Officer to exercise her discretion under subsection 38(7.1) as she sees fit, and she may proceed by warning rather than Direction, the fact that it is difficult, if not impossible, for the Applicants to operate the metallurgical complex in a manner consistent with

the Act and the MDMER is not a relevant criterion in the Act or the MDMER that limits the scope of the Officer's discretion. After finding multiple deposits of deleterious substances contrary to the Act and the MDMER, it was open to the Officer to impose the taking of corrective measures to bring RTIT into compliance, including a specific timeline. Accordingly, I reject the Applicants' argument that by adopting the Direction, the Officer assumed a power that the Act does not authorize.

[135] In doing as she did, the Officer behaved in a manner consistent with her predecessors. Although she used the words [TRANSLATION] "permanently end" in her reasons for the Direction, these words are equivalent to [TRANSLATION] "prevent irregular deposits" in the 2010 direction and [TRANSLATION] "comply with [and] prevent any deposit that does not comply with the [MDMER]" in the 2013 direction [emphasis added]. As with the Direction in this case, those words were also directed at [TRANSLATION] "permanently end[ing]" all deposits of deleterious substances contrary to the Act and the MDMER.

[136] Accordingly, I reject the Applicants' argument that the 2010 and 2013 directions provided flexibility by favouring a framework for ongoing improvement rather than a deadline. While it is true that the 2010 and 2013 directions did not set any specific deadlines, they were nonetheless binding and required the communication of timelines. Given her observation that the RTIT was still not in compliance with the Act and the MDMER more than 10 years later, it was open to the Officer, in exercising her discretion, to direct a stricter framework.

[137] However, as the communications between the parties demonstrate, the Officer was nonetheless receptive to the Applicants' submissions that the proposed timeline ending December 31, 2023, was too short, and she granted an additional year to allow RTIT to comply with the Act and the MDMER. As the Applicants themselves stated in their oral submissions that they were unable to propose a timeline, but that [TRANSLATION] "it [was] a matter of months, not years," it was not unreasonable for the Officer to extend her original proposed deadline from December 31, 2023, to December 31, 2024, especially because the Officer herself stated that the Direction could be amended in the future (Gavia Report, CTR Tab 87, AR Vol 2 at 379).

[138] It is also important to note that the Applicants do not only seem to be challenging the December 31, 2024, date itself as being unreasonable, but more generally, seem to be stating that it is impossible for them to guarantee to [TRANSLATION] "permanently end" deposits, and forever, since non-compliant deposits are inevitable. They are therefore contesting the imposition of a strict deadline (Affidavit of Annie Bourque at paras 40–42, 91, AR Vol 1 at 55; Gavia Report, CTR Tab 87, AR Vol 2 at 379; Written Submissions of RTIT dated July 7, 2023, CTR Tab 100.1, AR Vol 3 at 117–18; Applicants' Memorandum at paras 16–18, 90–92, 94). In any event, despite the imposition of a date, the compliance standard is not imposed solely by the Direction, but by the Act. The Act and the MDMER prohibit any deposit of deleterious substances that does not comply with the prescribed conditions. The Department may initiate criminal proceedings at any time, without first issuing a direction or imposing a timeline for achieving compliance (see subsections 40(2) and 40(3), and section 78; *Compliance and Enforcement Policy*, CTR Tab 106, AR Vol 4 at 60; in *ArcelorMittal (CQ)* at para 309, the judge writes that a warning was issued but there is no mention of a direction having been issued under subsection 38(7.1) of the Act).

[139] Finally, the Act specifically recognizes that non-compliant deposits (including overflows) will occur and allows a due diligence defence to justify them. The Officer's imposition of a timeline cannot, therefore, in itself, be unreasonable in the context of the Act, since a timeline implicitly protects RTIT from criminal prosecution during its duration and effectively grants a time limit to achieve compliance when RTIT could otherwise be subject to criminal prosecution immediately.

[140] With respect to the due diligence defence, the Applicants argue that the Direction violates their rights and transforms any non-compliance into an absolute liability offence for which the due diligence defence under section 78.6 of the Act is not available. In addition, they argue that in the event of a criminal prosecution, the Respondent's burden of proof would be lightened since the prosecutor would only have to prove a contravention of the Direction, and not of subsection 36(3) of the Act. Lastly, they argue that, insofar as the Direction requires RTIT officials to take the "*mesures nécessaires*" [in the French version, "reasonable measures" in the English version of the provision] and to [TRANSLATION] "permanently end" non-compliant deposits, should a deposit occur in the future, those officials could be guilty of a criminal offence under paragraph 40(3)(g) of the Act punishable by summary conviction or indictment. Moreover, to the extent that RTIT could not establish its due diligence defence in a criminal proceeding under subsection 36(3), its officers, in turn, could not establish it either since the Direction requires that "*mesures nécessaires*" [in the French version of the provision] be taken, which would not have been considered sufficient to exonerate RTIT. As a result, the officials would be deprived of their due diligence defence.

[141] With respect, these arguments must also be rejected. The Applicants give too limited a scope to the defence codified in section 78.6 of the Act. First, in the event of a deposit of deleterious substances contrary to the Act or the MDMER, both RTIT and its officers (if prosecuted under section 78.2 or paragraph 40(3)(g) of the Act) may, if prosecuted for an offence under subsection 36(3) of the Act, plead due diligence in defence. To the extent that RTIT succeeds in establishing its defence, the offence is no longer applicable, and its officers cannot be convicted of it either. This principle also applies to offences under paragraph 40(3)(g). To the extent that the Direction requires RTIT and its officials to take "reasonable measures" [in the English version, *"mesures nécessaires"* in French version of the provision] to comply with the Act, and a subsequent deposit occurs, the Applicants could attempt to establish due diligence. For example, RTIT and its officials could argue that the overflow was the result of the heaviest rains in 50 years or an unforeseen mechanical breakdown that could not be repaired before a deposit became necessary. If due diligence is established with respect to the deposit, neither RTIT nor its officials can have committed an offence since the defence will have been established, thereby exonerating RTIT and its officials.

[142] In short, contrary to the Applicants' arguments, the due diligence defence applies at all times, and both RTIT and its officers can attempt to establish it in defence of any future deposits. To the extent that due diligence is not established and RTFT and/or its officers are convicted of offences, for example, under subsections 36(3), 36(4), 38(6) and 38(7.1) of the Act and under sections 78 and 78.2, and paragraph 40(3)(g), cumulative offences are simply an effect of enforcing the Act. Paragraph 40(3)(g) specifically provides for an offence for failing to comply with a direction made under subsection 38(7.1). But that provision is not the only one. Paragraph

40(3)(e) also provides that the failure to take "reasonable measures" ["*mesures nécessaires*" in the French version of the provision] to prevent a deposit under subsection 38(6) is also guilty of an offence. Moreover, section 78.2 of the Act provides that the officers of a corporation that has committed an offence under the Act, such as RTIT, may, as discussed above, be considered in certain cases as party to and guilty of the offence. The decision in *St Brieux*, at paragraph 51, speaks eloquently about there being multiple offences in the Act, with Justice Gauthier noting that:

> [51] All the other provisions in this section provide for various ways to police and enforce the principles set out above. These include such things as:
>
> 1. the power to take samples and to search, including the right to obtain warrants;
>
> 2. the power to directly take measures to prevent or remedy harm or pollution in certain specific circumstances and to recuperate the reasonable expenses incurred;
>
> 3. the power to issue directions in certain specific cases.
>
> Whether or not these powers, which are conferred upon the [Department of Fisheries and Oceans], are used, persons that contravene ss. 35, 36 or 38 of the *Act* can be prosecuted under s. 40 of the *Act* and those who have failed in their duty to take measures in accordance with subs. 38(5) of the *Act* are liable to pay the costs and expenses reasonably incurred in the circumstances by Her Majesty pursuant to subs. 42(1) and (2) of the *Act*.

[143] Accordingly, the Direction does not ease the burden of proof the Crown must meet to prove the elements of an offence under subsection 36(3) by allowing the Crown to confine itself to proving a breach of the Direction and does not strip RTIT or its officers of their due diligence defence for any type of offence under the Act. If a due diligence defence justifies a deposit, the defender is completely exonerated with respect to the events leading to the deposit. Thus, despite the fact that the Direction seeks to [TRANSLATION] "permanently end" the deposit of deleterious

substances that do not comply with the Act and the MDMER, the Act recognizes that deposits remain possible, even likely, and allows the Applicants to discharge their burden and establish their due diligence by demonstrating, for example and without limiting any possible defence, that RTIT complies with industry standards, has taken all reasonable measures and precautions, and that the deposit is the result of an unexpected event that is exceptional, unforeseeable, unavoidable or beyond its control.

[144] The *"mesures nécessaires"* [in the French version, "reasonable measures" in the English version] imposed by the Officer are therefore reasonable in the circumstances and consistent with the purpose of the Act to provide for corrective measures to prevent the deposit of deleterious substances that would contravene the Act and the MDMER into the St. Lawrence River. These measures do not deprive RTIT and its officers of the due diligence defence.

D. *The Direction does not constitute a change in the Department's position with respect to longstanding practices*

(1) Applicants' position

[145] The Applicants submit that the Direction is a departure from the Department's longstanding practices. In their view, the various warnings and directions received in the past were aimed at ensuring timely monitoring, the implementation of measures to prevent the identified incident from recurring, and the constant improvement of the equipment and processes at the metallurgical complex.

[146] However, in addition to requesting detailed action plans and following up on those action plans through timelines, the Direction now directs the development and implementation of measures to [TRANSLATION] "permanently end" non-compliant deposits, including any overflows and runoff deposits, which may occur during exceptional events or events beyond RTIT's control.

[147] According to the Applicants, the directions issued in 2010 and 2013 recognize the operational reality of an industrial facility such as the metallurgical complex. Rather than ordering the permanent end to a problem, these directions prioritize a framework for ongoing improvement by directing [TRANSLATION] "a detailed action plan and a specific timeline for all measures that ha[d] been or w[ould] be implemented to prevent irregular deposits of deleterious substances" and [TRANSLATION] "an action plan detailing each key activity and a specific timeline indicating all the measures that w[ould] be implemented to prevent any deposit that does not comply" (Direction dated February 5, 2010, CTR Tab 14, AR Vol 1 at 276; Direction dated September 16, 2013, CTR Tab 17, AR Vol 1 at 315).

[148] The previous directions therefore aimed for collaboration between RTIT and the Department over several decades. These directions took into account that overflows and runoff are not new and are well known to the Department. This is why, according to the Applicants, despite the fact that the number of overflows had been much higher in the past, the Department never issued a direction similar to the one imposed by the Officer.

[149] Lastly, the Applicants argue that by departing from the Department's longstanding collaborative practices, the Officer had an obligation to justify why she did so. However, the facts

in this case did not permit this and the Officer did not attempt to demonstrate it in her reasons (*Vavilov* at para 131; *Canada (Attorney General) v Honey Fashions Ltd*, 2020 FCA 64 at para 40).

(2) Respondent's position

[150] According to the Respondent, no existing practice tolerates non-compliance with the Act or provides for the issuance of directions that require less than compliance with obligations under the Act. Failure to send a warning letter or direction for similar situations in the past cannot be a precedent that limits an officer's discretion to do what is necessary to enforce the Act. Not only would such a conclusion defeat the purpose of the Act, but it would also be an undue restriction of an officer's discretion to issue a direction under subsection 38(7.1) of the Act.

[151] Furthermore, the few previous decisions limited to the Applicants' record cannot be characterized as "longstanding practices" or "established internal authority" (*Vavilov* at para 131).

(3) Analysis

[152] The evidence in this case establishes that the Applicants and the Department had been cooperating since 2008, which is something that should be encouraged. However, as discussed above, the evidence does not support the Applicants' contention that the Direction departs from the Department's longstanding practices. On the contrary, the metallurgical complex has been subject to the MDMER since 2008 and a direction was issued as early as 2010. There is therefore no longstanding practice that demonstrates that, before a direction is issued, lengthy and close cooperation is required. In addition, a second direction was issued in 2013, and both directions

were issued after warnings were sent. Further warnings followed subsequent to that. It is important to note that these directions were issued after an officer had concluded that there was an "emergency" to impose corrective measures to ensure a return to compliance, and that these directions were not the subject of applications for judicial review.

[153] The cooperation noted by the Applicants had been taking place in a regulatory context in which the Department wished to lead RTIT towards compliance with the Act. Throughout this period, the warnings and directions specified in this regard that the grounds on which they were issued would be noted in RTIT's record and would be taken into account by the Department in internal decisions regarding future steps that might be necessary to ensure RTIT's compliance with the Act.

[154] The approach taken by the Officer was therefore not a departure from previous practices, and if it was the case, the departure is not sufficiently significant to warrant the Court's intervention. The evidence shows that, as with the 2010 and 2013 directions, as well as issuing warnings, the Officer met with RTIT several times before issuing the Direction. In oral argument, the Applicants stated that for three of the four aspects of the Direction, namely the Stormceptors, the management of the loading and unloading dock, and runoff, the Officer issued the Direction without ever issuing any advance warning, which was also a departure from the Department's previous practices. While it is true that the earlier warnings did not address the Stormceptors, the dock or the runoff directly, the oral communications between the Officer and RTIT did address these issues in RTIT's practices, and in January 2023, the Officer notified RTIT that she intended to issue a direction on RTIT's general lack of compliance (see Inspection Report dated

November 16, 2022, CTR Tab 80, AR Vol 2 at 312; Teams Meeting Report 2023-01-27, CTR Tab 84, AR Vol 2 at 351; Gavia Report, CTR Tab 87, AR Vol 2 at 373–75; Teams Meeting Report 2023-04-13, CTR Tab 88, AR Vol 2 at 391–92). In my view, therefore, and despite the fact that there was no specific warning about the Stormceptors, dock and runoff, the Direction properly continued the existing practice of inspections and meetings with the Applicants about numerous compliance failures, and, where appropriate, subsequent warnings and/or directions.

[155] Furthermore, neither the Act nor the *Policy* requires the issuance of a warning before a direction is issued or legal proceedings are instituted: each of these measures is independent of each other (*Compliance and Enforcement Policy*, CTR Tab 106, AR Vol 4 at 56–61). Given the historical context of the metallurgical complex and the compliance failures noted over several years, it was therefore open and reasonable for the Officer to proceed by direction with respect to these failures as a whole, rather than continuing to wait.

[156] Moreover, as discussed above, despite the use of the wording [TRANSLATION] "permanently end," the scope of the Direction is equivalent to the 2010 and 2013 directions. The Officer did not, therefore, depart from longstanding practices by directing more coercive measures or requiring the implementation of more robust measures. In all three cases, the directions were aimed at [TRANSLATION] "permanently end[ing]" (i.e., no repeat offences) any deposit of deleterious substances contrary to the Act and the MDMER and were consistent with the *Policy*, which states that "[e]nforcement measures [including specifically warnings and directions] are directed towards ensuring that violators comply with the Fisheries Act within the shortest possible time and that violations are not repeated" and that "[t]he desired result is compliance with the Act in the shortest

possible time and with no further occurrence of violations" [emphasis added] (*Compliance and Enforcement Policy*, CTR Tab 106, AR Vol 4 at 42, 56–58).

[157] Lastly, in their oral and written submissions to the Officer, the Applicants did not raise the argument that the Direction represented a departure from the Department's longstanding practices. The fact that they did not raise this issue in their submissions in response to the draft Direction explains why the Officer's reasons justifying the Direction did not address this aspect, which was raised for the first time on judicial review. What appears to be a potential shortcoming in the reasons is therefore not a lack of justification, intelligibility or transparency in this case, given that the issue was never submitted to the Officer for consideration and is thus an issue raised for the first time on judicial review (*Vavilov* at paras 94, 128; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 22).

IV. Conclusion

[158] In the factual context assessed by the Officer, the issuance of the Direction and its contents were reasonable. The Officer's reasons explain the basis of her decision in a coherent, transparent and intelligible manner. In her view, RTIT's historical and recent record contained numerous failures to comply with the Act and the MDMER and, therefore, there was an urgent need to act and issue a direction in order to monitor the implementation of the corrective measures and resolve the issue as soon as feasible. The measures imposed are also reasonable because the Direction gives RTIT time to comply with the Act. Lastly, contrary to the Applicants' arguments, the Direction is not a departure from the Department's longstanding practices, nor does it deprive the Applicants of their due diligence defence or any other right.

[159] The application for judicial review is therefore dismissed with costs, in the amount of $6,000 in favour of the Respondent, according to the agreement reached between the parties.

[160] To conclude, I wish to thank counsel on both sides for their detailed and able submissions.

JUDGMENT in T-1765-23

THIS COURT ORDERS as follows:

1. The application for judicial review is dismissed.

2. Costs in the amount of $6,000 are awarded in favour of the Respondent, according to the agreement between the parties.

"Guy Régimbald"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1765-23
STYLE OF CAUSE:	RIO TINTO IRON AND TITANIUM INC, ET AL v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	OCTOBER 29, 2024
JUDGMENT AND REASONS BY:	RÉGIMBALD J.
DATED:	FEBRUARY 18, 2025

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